

1997

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Plaintiff,

Defendant

UTAH STATE
PUBLIC SAFETY
agency; (C)
BODRERO;
ARTHUR HUDAK

AS

Defendant

BRIEF OF APPEAL

Salt Lake County, State of
Judge Stephen L. Henriod presiding

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IN THE UTAH COURT OF APPEALS

MICHAEL W. HOM,

Plaintiff and Appellant,

v.

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

Defendants and Appellees.

Case No. 970592-CA

Priority 15

BRIEF OF APPELLEES

Appeal from a Final Judgment of the Third Judicial
District Court, Salt Lake County, State of Utah,
the Honorable Stephen L. Henriod presiding

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Defendants and Appellees.

Case No. 970592-CA

Priority 15

BRIEF OF APPELLEES

The Defendants-Appellees Utah Department of Public Safety (the "Department"), Cherie Ertel, Douglas Bodrero, A. Roland Squire, Arthur Hudachko, and Bart Blackstock (the "Defendants") submit this brief in response to the opening brief of Plaintiff-Appellant Michael W. Hom ("Hom").

STATEMENT OF JURISDICTION

This Court has jurisdiction over this case, which was transferred to this Court by the Utah Supreme Court on October 15, 1997. See Utah Code Ann. § 78-2a-3(2)(j) (1996).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

1. Did the trial court correctly hold that Hom failed to state a claim against the Department for breach of an alleged written employment contract because Hom's former employment relationship with the state was governed solely by statute?

2. Did the trial court correctly grant summary judgment, dismissing Hom's federal disability discrimination claim against the Defendants because it was barred by the four-year residual statute of limitations and because the discovery rule did not toll the limitations period?

Standard of Review: All of the above issues are questions of law, reviewable de novo. See Berenda v. Langford, 914 P.2d 45, 47 (Utah 1996) (reviewing summary judgment dismissing claims based on statute of limitations).

DETERMINATIVE PROVISIONS

The following provisions set forth in Addendum A to this brief are determinative of, or of central importance to, this appeal.

Utah Code Ann. § 67-19-2 (1986)
Utah Code Ann. § 67-19-15 (1986)
Utah Code Ann. § 67-19-18 (1986)
Utah Code Ann. § 78-12-25(3) (1996)
Utah Code Ann. § 78-12-26(4) (1996)

STATEMENT OF THE CASE

Nature of the Case

This case arose over seven years ago when Hom was fired from his career service position as a computer programmer with the Department. Hom brought suit for breach of an alleged written employment contract and for disability discrimination under the federal Rehabilitation Act. The trial court granted summary judgment dismissing Hom's claims because the applicable limitations periods had expired. More specifically, the court held that: (1) Hom's employment relationship with the state was governed by statute, rather than by a written contract, and the three-year limitations period for claims of statutory entitlement had expired; and (2) Hom's federal disability discrimination claim was barred by the four-year residual limitations period, and the discovery rule was inapplicable.

Course of the Proceedings and Disposition Below

On March 21, 1994, Hom commenced this action by filing a complaint in the Third Judicial District Court, Salt Lake County. Hom's original state court complaint was brought only against the State of Utah, and purported to assert two claims: breach of employment contract and blacklisting. Approximately one year later, on March 6, 1995, Hom amended his complaint to add the individual defendants, and three new claims: disability

discrimination under § 504 of the federal Rehabilitation Act against all of the Defendants, breach of the covenant of good faith and fair dealing against the Department only, and tortious interference with a contractual relationship against the individual defendants. Hom continued to assert his breach of employment contract claim against the Department only, but amended his blacklisting claim to include the individual defendants Bodrero and Squire. In March 1995, Defendants answered the amended complaint, denying all allegations material to this appeal.

In December 1996, the Defendants filed a motion for summary judgment seeking dismissal of all of Hom's claims. In opposing the motion for summary judgment, Hom filed a motion to use the discovery materials from the federal case, which the court granted. On March 5, 1997, after full briefing and oral argument, the court granted the motion for summary judgment and issued a statement of grounds for its decision. The court dismissed Hom's breach of employment contract claims, including the claim for breach of the covenant of good faith and fair dealing, because the four-year limitations period for actions upon oral contracts had expired and the employment relationship between Hom and the state was governed exclusively by statute, rather than written contract. The court dismissed Hom's federal disability discrimination claim because the applicable four-year

limitations period had expired. Finally, the court dismissed Hom's tortious interference and blacklisting claims because Hom had failed to provide notice of those claims in accordance with the Utah Governmental Immunity Act, because the Act retained immunity for those claims, and because the applicable limitations periods had expired. Hom filed his notice of appeal on April 3, 1997. In his opening brief, Hom challenges only the rulings dismissing his claims for breach of an alleged written employment contract and disability discrimination.

Statement of Facts

Administrative Proceeding

Hom was involuntarily terminated from employment with the Department effective March 2, 1990. In about March 1990, Hom appealed the Department's decision to terminate his employment to the Career Service Review Board ("CSRB"). R. 350-51 (excerpt from Hom v. Squire, Civil No. 91-C-1016W, Memorandum Decision and Order at 13-14 (D. Utah December 1, 1994)).¹ An evidentiary hearing was scheduled for April 1990, but upon Hom's motion was continued without date. Id. In about October 1990, Hom requested a stay of the CSRB proceedings pending the outcome of his prospective federal suit. Id. In December 1992, the CSRB issued an Order to Show Cause Why Appeal Should not be Dismissed.

¹A complete copy of the Memorandum Decision and Order is attached as Addendum B.

Id. In January 1993, the CSRB issued an Order and Notice Setting Forth Deadline for Dismissal if Case not Timely Prosecuted, directing Hom to schedule an evidentiary hearing on or before March 31, 1993, or Hom's appeal would be dismissed. Id. Hom apparently failed to do so, and his appeal was dismissed for failure to prosecute in April 1993. Id. This Court affirmed the dismissal. Id.

Federal action

Hom also brought suit against the Defendants by filing a complaint under 42 U.S.C. § 1983 in federal district court in September 1991. R. 413. In July and August 1994, Hom took the depositions of several Department employees, who testified that before his termination Hom had been "acting nutty," R. 975, doing "bizarre things," id., and that his behavior had become threatening, abusive and intimidating. R. 1038-39.

In October 1994, nearly two years after the deadline for amending pleadings, when the lawsuit was over four years old, and on its fourth trial setting, which was only two months away, Hom moved for leave to file an amended complaint to add a disability discrimination claim under § 504 of the federal Rehabilitation Act. R. 414. Hom claimed that before taking the employees' depositions, he had been unaware of any factual basis for the claim. Id. The district court denied the motion on the ground that it was untimely and would unduly prejudice the Defendants.

Id. Ultimately, the federal district court granted summary judgment against Hom on his § 1983 claim, R. 391-410, and that decision was affirmed by the federal court of appeals in April 1996. R. 411-416.

State court action

On March 21, 1994, Hom brought this action. In his amended complaint, Hom alleged that the Department terminated his employment without just cause, and in doing so violated "an express contract of employment [between Mr. Hom and the Department], based upon Utah statutes and administrative rules." R. 232. He further alleged that the Defendants had discriminated against him based upon a perceived handicap in violation of § 504 of the federal Rehabilitation Act. R. 232-34.

SUMMARY OF THE ARGUMENT

Hom failed to bring suit against the Defendants within the limitation periods applicable to his claims. Hom's wrongful termination claim against the Department is properly characterized as statutory, rather than contractual, and the three-year limitations period for an action for a liability created by statute had expired when Hom brought suit. In addition, Hom allowed the four-year limitations period applicable to his federal disability discrimination claim to expire before bringing suit. The discovery rule does not toll the time for filing Hom's discrimination claim because at the time of his termination, Hom had good reason to suspect that Department employees perceived his behavior to be abnormal and possibly mentally disturbed. Accordingly, the trial court properly granted summary judgment dismissing Hom's claims, and this Court should affirm the judgment of dismissal in its entirety.

ARGUMENT

Point I

THE TRIAL COURT CORRECTLY DISMISSED HOM'S BREACH OF CONTRACT CLAIM BECAUSE HOM'S RELATIONSHIP WITH THE DEPARTMENT WAS STATUTORY RATHER THAN CONTRACTUAL

A. Hom's Wrongful Termination Claim is Statutory, Not Contractual

This Court should affirm the dismissal of Hom's breach of contract claim against the Department because, as a career service employee, Hom's relationship with the Department was governed by statute, and no written employment contract existed between Hom and the Department. Hom's claim was commenced on March 21, 1994 over four years after he was involuntarily terminated from his employment with the Department on March 2, 1990, and is therefore barred by the three-year limitation period for "an action for a liability created by the statutes of this state." See Utah Code Ann. § 78-12-26(4) (1996) (1996 amendment made stylistic changes).

The Utah State Personnel Management Act, Utah Code Ann. §§ 67-19-1 to 29 (1986) ("the Personnel Act")², governs the employment of most state career service employees, including Hom.

²This brief cites to the version of the Personnel Act in effect at the time Hom's employment was terminated in March 1990, unless otherwise stated. The Personnel Act has been amended since then and now extends to section 67-19-40. This brief will note amendments to the relevant provisions when the provisions are first cited.

In asserting a breach of contract claim against the Department, Hom relies exclusively on the Personnel Act and the administrative rules promulgated under the Personnel Act. Specifically, Hom relies on section 67-19-18 of the Personnel Act, which states:

Dismissals or demotions of career service employees shall only be to advance the good of the public interest, or for such just causes 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. There shall be no dismissals for reasons of race, sex, age, physical handicap, national origin, religion, political affiliation, or other non-merit factor including the exercise of rights under this chapter.

Utah Code Ann. § 67-19-18(1) (1986) (1991 & 1995 amendments made stylistic changes and substituted "service" for "interest").

Hom's reliance on the Personnel Act, and the corresponding administrative rules, to define his rights as a state employee establishes the fundamentally statutory nature of his claim against the Department. Indeed, Hom's contractual theory is inconsistent with the well-established principle that "the performance of a duty imposed by law is insufficient consideration to support a contract." Prows v. State, 822 P.2d 764, 768 (Utah 1991) (holding buyers of savings and loan corporation failed to state a claim for breach of contract as a matter of law in alleging that state breached its promise to guarantee deposits in accordance with existing statutory

obligation).

In a case similar to this one, the Kansas Supreme Court recognized the essentially statutory nature of a civil servant's claim for wrongful termination.³ In Wright v. Kansas Water Office, 881 P.2d 567 (Kan. 1994), a former state hydrologist alleged that the state water department had breached a written employment contract in terminating his employment. Despite its acknowledgment that the hydrologist had been wrongfully terminated, the Wright court reversed the trial court's decision granting back pay, reinstatement and other remedies. The court determined that the hydrologist's claim was barred because the claim was subject to the three-year statute of limitations for statutory claims, rather than the five-year period for claims for breach of a written contract. Id. at 573. The court held:

We hold that the employment relationship between the State and Wright did not arise out of a written contract. Rather, the relationship is fixed by statute. The [Kansas Civil Service Act] controls a classified civil service employee's employment status.

³Hom correctly notes that this is a case of first impression in Utah. Indeed, few cases directly on point exist in any jurisdiction. One reason for this dearth is the exhaustion of remedies requirement applicable to most wrongful termination cases by civil servants. Indeed, Hom's failure to pursue his administrative remedies in this case is an alternative ground for affirmance of the trial court's order dismissing Hom's state law claims. See Utah Code Ann. §§ 67-19a-101 to -408 (1996) (enacted by L. 1989, ch. 191, §§ 6-21 and establishing Career Service Review Board), and Dep't of Social Servs. v. Higgs, 656 P.2d 998, 1001 (Utah 1982) (upholding dismissal of state's appeal from administrative order sustaining employee grievances because state had failed to exhaust administrative procedures).

The KCSA affords the right of continued employment in the absence of a legitimate cause for termination. The employment relationship of a classified employee to the State is one of statutory status.

Id. at 571.

In analyzing whether the hydrologist's claim was contractual or statutory, the Wright court reviewed the state civil service act, which created a department of personnel management and authorized the director to make rules and regulations governing all aspects of state employment. Id. at 572. The court noted that although the hydrologist had identified a few personnel records as the alleged contract, "the focus of his claim is that as a classified civil service employee, he held a right not to be terminated without a hearing and without good cause." Id. at 573. Because the hydrologist "would not have had these rights but for the [civil service act]," the court held that his claim was statutory, rather than contractual.

Like the civil service statute in Wright, the Personnel Act establishes a department of personnel management (the Utah State Division of Personnel Management, now the Department of Human Resource Management), and creates a comprehensive personnel management system that governs virtually every aspect of employment for most state employees. Like the hydrologist in Wright, Hom posits only the existence of a written, rather than an oral contract, and the focus of his wrongful termination claim is the just cause provision of the civil service statute.

Indeed, Hom is unable to identify any writing other than the Personnel Act and the corresponding administrative rules to support his contract theory.⁴ Accordingly, like the hydrologist's claim in Wright, Hom's wrongful termination claim is statutory, rather than contractual.

Moreover, wrongful termination actions under the Personnel Act involve issues of fundamental legislative concern. Like other civil service systems, the Personnel Act advances the important public policy that "comparative merit or achievement govern the selection and advancement of employees in Utah state government and that employees be rewarded for performance in a manner that will encourage excellence and strengthen the system" and of providing

for equal employment opportunity by ensuring that all personnel actions including hire, tenure or term, and condition or privilege of employment be based on the ability to perform the duties and responsibilities assigned to a particular position without regard to age, race, creed or religion, color, handicap, sex, national origin, ancestry or political affiliation.

Utah Code Ann. § 67-19-2 (3) & (4) (1986) (repealed effective May 1, 1995). See also 15A Am. Jur. 2d Civil Service § 1 (1976)

⁴Although one might argue that an agency employing a career service employee may enter into a contract with the employee that imposes obligations in addition to those imposed by Personnel Act and corresponding administrative rules (so long as the contractual obligations are consistent with the statutory duties), that is not the case here. In advancing his breach of contract claim against the Department, Hom relies solely on the theory that the Personnel Act and the corresponding administrative rules themselves formed a written contract.

(discussing legislative purpose of civil service systems and stating that a primary goal is to enable governments "to render more efficient services to the public by enabling them to obtain efficient public servants"). The Personnel Act also charges the director to:

develop and administer a program of personnel management which will: (a) aid in the efficient execution of public policy; (b) foster careers in public service for qualified employees; and (c) render assistance to state agencies in performing their missions

Utah Code Ann. § 67-19-6(1) (1986).

Rather than merely "flesh[ing] out" or "adding a layer of protection" to a fundamentally contractual relationship, the Personnel Act comprehensively defines the basic nature, terms and conditions of career service employment with the state. In so doing, it advances important public policy as determined by the legislature. Therefore, issues concerning the employment rights of a career service employee such as Hom are properly resolved under the principles of statutory interpretation, rather than contract law.⁵

Furthermore, as noted by the Wright court, the conclusion that a civil servant's wrongful termination claim is statutory

⁵Hom incorrectly asserts that before the enactment of the Personnel Act, the relationship between the state and its employees was contractual. The Personnel Act was preceded by the Merit Systems Act, Utah Code Ann. § 67-13-1 to -15, which was repealed in 1979 when the Personnel Act was enacted.

rather than contractual is consistent with the holdings of courts in other jurisdictions, which "have reasoned that the terms and conditions of employment in the civil service are not determined by a written contract between the State and the employee. Rather the statutes and regulations of the appropriate agency or agencies control the relationship." Id. at 571.⁶ For example, in Personnel Division of the Executive Department v. St. Clair, 498 P.2d 809 (Ore. Ct. App. 1972), the court rejected the claim of several state employees that a statutory amendment that lengthened the time before a required salary review violated the state constitutional provision against impairment of contracts. The court stated,

Respondents' arguments concerning 'vested contractual rights' and 'impairment of the obligation of contracts,' in which they endeavor to apply the general law of contracts to the present case, are based on the erroneous assumption that the employment relationship between the state of Oregon and its civil service employees [sic] arises out of, or results in, a contract between the parties. The terms and conditions of civil service employment are fixed by statute and the regulations of the state personnel agency, and not by "contract" between the public employer and the individual employee.

Id. at 811. See also Miller v. State of California, 557 P.2d

⁶As the Wright court noted, the issue of whether a state employee's wrongful termination claim is statutory or contractual does not often arise in the context of a statute of limitations question because such claims are ordinarily subject to an exhaustion of remedies requirement. 881 P.2d at 573. As previously noted, Hom's failure to exhaust his administrative remedies with the CSRB is an alternative ground for affirming the decision below. See note 3 above.

970, 973-76 (Cal. 1977) (holding reduction of mandatory retirement age for state employees did not impair vested contractual rights, stating, "it is well settled in California that public employment is not held by contract but by statute"); Bowman v. Maine State Employees Appeals Board, 408 A.2d 688, 689-92 (Me. 1979) (rejecting claim of former state hospital doctor that statutory declassification of his civil service position violated contract clause of state and federal constitutions); Wage Appeal of Montana State Highway Patrol Officers v. Board of Personnel, 676 P.2d 194, 199 (Mont. 1984) (rejecting claim that new state pay plan decreasing salaries for highway patrol officers impaired the officers' contractual rights, recognizing that "when the Legislature enacts a statute fixing certain terms and conditions of public employment, such as salaries and compensation, it is presumed that the statute does not create contractual rights, but is intended merely to declare a policy to be pursued until the Legislature declares otherwise"); Smith v. City of Newark, 320 A.2d 212, 219 (N.J. Sup. Ct. Law Div. 1974), reversed on other grounds 344 A.2d 782, 784 (N.J. Sup. Ct. App. Div. 1975) (rejecting impairment of contracts claim on ground that "the terms and conditions of public service in office or employment rest in legislative policy rather than contractual obligation, and hence may be changed except of course insofar as the State Constitution specifically provides otherwise

(citations omitted)''"); Washington Federation of State Employees v. State of Washington, 682 P.2d 869, 872 (Wash. 1984) (rejecting impairment of contracts claim, holding terms and conditions of public employment are basically controlled by statute, not by contract). As the above courts recognize, claims of wrongful treatment of government employees subject to civil service statutes invoke strong public policy considerations and are fundamentally statutory, rather than contractual.

The conclusion that such claims are properly characterized as statutory is further bolstered by the case law interpreting the statute of limitations for statutory claims. Utah Code section 78-12-26(4) establishes a three-year limitations period for "an action for a liability created by the statutes of this state." See Utah Code Ann. § 78-12-26(4) (1996) (1996 amendment made stylistic changes). Interpreting similar provisions, courts have generally held that limitations periods for statutory claims apply where the statute creates new substantive rights that would not have existed without the enactment of the statute. See Wright v. Kansas Water Office, 881 P.2d 567, 572 (Kan. 1994); see also Kelly v. Primeline Advisory, Inc., 889 P.2d 130, 135 (Kan. 1995) (holding state securities fraud statute created new substantive rights and liabilities that did not exist under a common law fraud action and was therefore subject to the

limitations period for liabilities created by statute, rather than the limitations period for common law fraud).

Without the provisions of the Personnel Act, career service employees would be considered common law "at-will" employees, who generally may be fired for any reason, or for no reason at all. See Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044 (Utah 1989) (recognizing rebuttable presumption that employment having no specified duration may be terminated without just cause). Accordingly, the Personnel Act is the source of the substantive right on which Hom sues, and that right would not exist but for the Personnel Act. The just cause requirement which Hom seeks to enforce was created solely by statute and would not exist at all absent the statute. Therefore, Hom's claim is statutory, rather than contractual in nature.

B. Cases Involving Governmental Employees Who Are Exempt from the Civil Service Statutes, or Vested Rights Are Inapposite to Hom's Wrongful Termination Claim

None of the cases cited by Hom support the application of contract law to his wrongful termination claim. The Utah Supreme Court's decision in Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981) is inapplicable because it addressed the wrongful termination claim of an exempt college employee rather than a state career service employee such as Hom. In Piacitelli, the court upheld the trial court's determination that a college had substantially complied with the procedures required

by its personnel manual in declining to renew the contract of a non-tenure track counselor. The court noted the trial court's decision that the personnel manual governing the counselor's employment "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. Therefore, the court stated that in addressing whether the college had substantially complied with the manual, "we are construing a contract, not declaring statutory or constitutional rights." Id.

The application of contract principles in Piacitelli fails to support Hom's contract theory because all state college employees are expressly exempt from the provisions of the Personnel Act. Section 67-19-15 of the Personnel Act states: "[T]he following positions shall be exempt from the career service provisions of this chapter: . . . officers, faculty, and other employees of state universities and other state institutions of higher education." Utah Code Ann. § 67-19-15(g) (1986). Accordingly, the counselor in Piacitelli relied on the college's personnel manual, rather than the provisions of the Personnel Act on which Hom relies, to define his employment rights.

Nor does the decision in Thurston v. Box Elder County, 892

P.2d 1034 (Utah 1995) ("Thurston II"), support Hom's cause against the Department. In Thurston II, the court followed law of the case principles in upholding a trial court ruling that a county had terminated a county road worker in violation of the County Personnel Management Act, Utah Code Ann. §§ 17-33-1 to -15 (1987). Acknowledging that its decision in Thurston v. Box Elder County, 835 P.2d 165 (1992) ("Thurston I"), an earlier appeal in the same case, had "overstated the applicability of the [County Personnel Management] Act to the County's personnel policies and procedures," the court declined to remand the case for a consideration of the evidence showing that the statute did not apply to the county because it had too few employees. Instead, the court determined that the county personnel manual should be interpreted to comport with the court's interpretation of the statute from which the manual's language had been borrowed. Id. at 1039. Accordingly, the trial court's determination that the county worker had been wrongfully terminated was correct, under either the statute or the manual.

Hom inaccurately characterizes the Thurston II decision as recognizing that the "nature of the relationship between a public employee and his employer is contractual; not statutory." Opening Brief of Appellant Hom, at 29. More accurately, the court in Thurston II determined that it was unnecessary to decide whether the statute applied because the terms of the statute and

the personnel manual were the same, and the result would be the same under either theory.

Indeed, the court's analysis in Thurston I soundly refutes Hom's theory that a wrongful termination claim by a career service employee is contractual rather than statutory. Based on the assumption (cast in doubt on the second appeal), that the County Personnel Management Act governed the county worker's employment, the court stated that the parties "have inaccurately formulated the issues" in casting the case as a breach of contract action based on the county's personnel manual. 835 P.2d at 168. Although the parties had not addressed the County Personnel Management Act, the court felt compelled to consider the effect of the statute sua sponte "because it is controlling and it would be contrary to public policy to decline to do so." Id. at 168 n.3. The court went on to reject the county's argument that it properly terminated the worker because the personnel manual required consideration of only two of the three factors enumerated in the statute, stating, "Clearly the County was not authorized to adopt a standard different from that found in the statute." Id. at 168. The court further held that in terminating the worker the county had improperly considered additional factors not enumerated in the statute, stating that the purpose of the statute "is to set a standard which county employers must follow and upon which employees can rely

Given this purpose, we hold that the statute precluded consideration of factors not enumerated." Id.

Assuming that the County Personnel Management Act was applicable, the Thurston I court plainly viewed the county worker's wrongful termination claim as statutory, rather than contractual. In this case, no doubt exists that the Personnel Act governs Hom's claim. Indeed, Hom expressly relies on the Personnel Act and the administrative rules promulgated under the Act as the basis of his claim. As Thurston I demonstrates, a wrongful termination claim under a civil service statute requires consideration of the strong public policies advanced by the statute. Accordingly, such a claim is fundamentally statutory, rather than contractual in nature.

Hom correctly points out that Utah courts, like many other jurisdictions, treat vested public retirement benefits as contractual obligations, but that narrow proposition fails to support his assertion that the entire employment relationship is contractual. See, e.g., Ellis v. Utah State Retirement Board, 757 P.2d 882, 886 (Utah Ct. App. 1988) (holding city attorney was not deprived of vested contractual benefits when he failed to satisfy conditions precedent to disability retirement benefits because he did not become disabled or retired before the legislature modified Disability Act). Vested retirement and similar employment benefits represent deferred compensation for

services that have already been provided, and are therefore deemed contractual. Unlike an employee who has satisfied all the requirements for the payment of a retirement benefit by providing the required years of service and making the required contributions, Hom has no vested right in continued civil service employment.

Several courts have explained the distinction. For example, in Miller v. State, 557 P.2d 970 (Cal. 1977), the California Supreme Court reasoned:

Plaintiff's reliance upon decisions concerning the pension rights of public employees is misplaced Pension rights, unlike tenure of civil service employment, are deferred compensation earned immediately upon the performance of services for a public employer "and cannot be destroyed . . . without impairing a contractual obligation. Thus the courts of this state have refused to hold, in the absence of special provision, that public employment establishes tenure rights, but have uniformly held that pension laws . . . establish contractual rights."

Id. at 973 (rejecting state employee's claim that legislation reducing the age of mandatory retirement impaired his contractual rights). Similarly, agreeing that state civil service laws do not create a contract between the state and its employees, the Washington Supreme Court stated:

We adopt the [state's] position as the correct statement of the law. The rights challenged here are neither deferred benefits nor do they give rise to contractual expectancies. Rather, the affected provisions (certification, increment salary increases, layoffs, and reemployment from layoffs) are best categorized as terms of public employment (tenure) and part of a system of personnel administration. Tenure

is regulated by legislative policy.

Washington Federation of State Employees v. State of Washington, 682 P.2d 869, 872 (Wash. 1984) (holding amendments to civil service statute did not impair state employees contractual rights).

In the same vein, the Maine Supreme Court rejected the claim of a state hospital doctor that the statutory declassification of his position impairs his contractual rights, stating, "It must be remembered that we are not concerned with Dr. Bowman's right to whatever emoluments he may be entitled to as a result of his years of service. We are concerned only with his right to continue in his position as Superintendent of Pineland." Bowman v. Maine State Employees Appeal Bd., 408 A.2d 688, 691 (Me. 1979). Similarly, the trial court was concerned only with Hom's right to continued employment with the Department, not with his retirement or other state benefits, and therefore correctly held that Hom failed to state a claim for breach of contract.⁷

⁷Hom points to occasional references in the administrative rules of the Department of Human Resource Management to "agreements" or "contracts" with employees concerning matters such as telecommuting and overtime payment options to support his contention that his relationship with the defendant Department was contractual. Opening Brf. of Hom at 27, referring to R. at 620. This analysis has several flaws. First, the rules to which Hom points were not adopted in 1992, well after Hom's employment was terminated in March 1990. Second, none of the identified rules concern grounds for termination of employment. Third, some of the rules apply to exempt employees, rather than career service employees.

C. No Covenant of Good Faith and Fair Dealing Existed Between Hom and the Department

Hom's allegation of breach of an implied covenant of good faith and fair dealing adds nothing to his wrongful termination claim against the Department. As discussed above, Hom had no employment contract with the Department, and therefore no contract into which such a covenant may be implied. In addition, the alleged obligation of good faith and fair dealing simply restates the obligation already imposed on the Department by the Personnel Act and corresponding administrative rules. Moreover, like his contract claim, Hom's breach of the covenant of good faith and fair dealing is barred for failure to exhaust administrative remedies. See note 3 above. As stated by the court in Valenzuela v. State, 240 Cal. Rptr. 45, 48 (Cal. Ct. App. 1987), "We hold Valenzuela's claim for a breach of the implied covenant of good faith and fair dealing simply restates the obligation of the State to deal fairly and in good faith with its employees as required by statute and administrative rules, and remedies for breach of that obligation are in the administrative procedures provided by the State civil service system, [the employee plaintiff's] exclusive remedy as a State civil service employee."⁸

⁸Because Hom asserts only the existence of an express written contract, his citation of a series of Michigan cases grappling inconclusively with the issue of whether a public employer may create an implied-in-fact contract is inapposite.

D. Conclusion

In sum, Hom relies exclusively on the Personnel Act and its corresponding administrative rules in advancing his claim that the Department wrongfully terminated his employment. His claim necessarily involves the interpretation and application of statutory law. The cases on which Hom relies are inapposite because they involve vested rights or governmental employees who are exempt or otherwise not covered by civil service statutes. Hom failed to commence his wrongful termination claim within the three-year period allowed for statutory claims. Accordingly, the trial court correctly held that Hom failed to state a claim for breach of a written contract against the Department, and this Court should affirm the trial court's dismissal of Hom's breach of contract claim.⁹

See Bennett v. Marshall Public Library, 746 F. Supp. 671 (W.D. Mich. 1990); Merrell v. Bay County Metropolitan Trans. Auth., 707 F. Supp. 289 (E.D. Mich. 1989); Thorin 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).

⁹The dismissal of Hom's claim may also be affirmed on the alternative ground that it is barred by the Utah Governmental Immunity Act. Utah Code Ann. §§ 63-30-1 to -38 (1993 & Supp. 1997). First, Hom never filed a notice of claim describing the nature of his claims as statutory as required by section 63-30-11(3)(a)(ii). R. 1087-90. See Yearsley v. Jensen, 798 P.2d 1127 (Utah 1990) (notice of claim for physical and emotional distress from alleged assault and battery insufficient to preserve claim for malicious prosecution). Second, although the Utah Governmental Immunity Act waives immunity for contractual obligations, no such waiver applies to Hom's statutory claim. See Utah Code Ann. § 63-30-3(1) (1993) (retaining immunity except as expressly provided in statute).

Point II

THE TRIAL COURT CORRECTLY DISMISSED HOM'S
FEDERAL DISABILITY DISCRIMINATION CLAIM AS
BARRED BY THE FOUR-YEAR STATUTE OF
LIMITATIONS

This Court should affirm the dismissal of Hom's federal disability discrimination claim against the Defendants because the applicable four-year limitations period had expired when Hom filed his initial complaint in this case, and because no circumstances exist to warrant application of the discovery rule. Disability discrimination claims under section 504 of the Rehabilitation Act are subject to the limitations period for personal injury claims under state law. See Baker v. Board of Regents of State of Kansas, 991 F.2d 628, 631-32 (10th Cir. 1993). Accordingly, the four-year limitations period for personal injury claims in Utah applies to Hom's disability discrimination claim under section 504. See Utah Code Ann. § 78-12-25(3) (1996) (1996 amendment made stylistic changes).

Under the ordinary rule that a personal injury action accrues when the injury occurs, Hom's disability discrimination claim accrued, at the very latest, on the date his employment was terminated on March 1, 1990. See Jepson v. State, 846 P.2d 485, 488 (Utah Ct. App. 1993). Hom's amended complaint in which he

first asserted his disability discrimination claim in this case and which was filed on March 6, 1995, was filed too late. Even assuming, however, that Hom's amended complaint related-back to March 24, 1994, when he filed his original complaint in this case, Hom's disability discrimination claim was untimely and is therefore barred.¹⁰

Hom's alleged unawareness until August 1994 that several Department employees believed that he was emotionally or mentally unstable does not support the application of the discovery rule to toll the limitations period for his disability discrimination claim. Generally, "simple ignorance or obliviousness to the existence of a cause of action will not prevent the running of the statute of limitations." Anderson v. Dean Witter Reynolds, Inc., 920 P.2d 575, 578 (Utah Ct. App. 1996). Rather, the discovery rule applies in three situations:

(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

¹⁰The federal court denied Hom leave to file an amended complaint to allege a disability discrimination claim because the proposed amendment was untimely and prejudicial, and because the statute of limitations had expired and the claim did not relate-back to the filing of his original federal complaint. R. 418. That decision was affirmed by the Tenth Circuit Court of Appeals on the ground of untimeliness alone, without reaching the relation-back issue. See Hom v. Squire, 81 F.3d 969 (10th Cir. 1996). Accordingly, Hom's relation-back argument is precluded under the doctrine of collateral estoppel. Because Hom's claim is barred by the statute of limitations in any event, however, this Court need not reach the collateral estoppel or relation-back issue.

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.

Id.

Contrary to Hom's contention, neither the fraudulent concealment nor the exceptional circumstances versions of the discovery rule applies here because Hom has failed to make the required threshold showing that he did not know and could not reasonably have discovered the facts underlying his disability discrimination claim in time to bring an action. See Walker Drug Co. v. La Sal Oil Co., 902 P.2d 1229, 1231-32 (Utah 1995).

Ordinarily, "[a]ll that is required [to trigger the statute of limitations] is . . . sufficient information to apprise [the plaintiffs of the underlying cause of action] so as to put them on notice to make further inquiry if they harbor doubts or questions" about the defendant's actions.'" Berenda v. Langford, 914 P.2d 45, 51 (Utah 1996) (quoting United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 889 (Utah 1993)) (modifications in original).

Hom has failed to show that he had insufficient information to put him on notice to make further inquiry about the perceptions of his behavior. Hom's disability discrimination claim is based on the allegation that in terminating his employment, the Defendants discriminated against him because they

perceived that he was mentally unstable. Hom contends that he was unaware of the Defendants' alleged perception until August 1994 when he deposed several Department employees in his federal action and, in response to questioning, they revealed their perceptions of Hom's emotional state and behavior.

Even under Hom's version of the facts, the events leading up to Hom's involuntary termination and the stated reasons for that termination gave Hom ample notice of the possibility that the Defendants regarded him as mentally unstable. For example, Hom reports experiencing deteriorating relationships with his co-workers, Opening Brief of Appellant Hom at 11, being the subject of an internal affairs investigation, id. at 12, experiencing extreme stress and pressure from being overworked, id. at 13, being banned from the third floor of his building where the Driver's License Division was located, id. at 14, having his supervisor tape record his conversations with Hom, id. at 19, having his security clearance revoked, id. at 20, and breaking down and crying uncontrollably during a meeting with the chief of the Bureau of Criminal Investigations. Id. These circumstances strongly suggest that Department employees believed Hom was unstable. Indeed, awareness of these facts probably prompted Hom's attorney to probe the topic of the employees' perceptions of Hom's emotional and mental state at their depositions.

Moreover, the stated reasons for Hom's involuntary

termination--that Hom was perceived to be a security threat, that he had committed perjury, and that he had been insubordinate--also strongly suggest that the Defendants believed Hom to be mentally disturbed or unstable, and placed Hom on notice to inquire further. Thus, Hom failed to show that he had insufficient information to put him on notice to make further inquiry.

In addition, Hom failed to establish a prima facie case that the Defendants fraudulently concealed Hom's claim. When a plaintiff alleges that a defendant "took affirmative steps to conceal" the cause of action, the "plaintiff can avoid the full operation of the discovery rule by making a prima facie showing of fraudulent concealment and then demonstrating that given the defendant's actions, a reasonable plaintiff would not have discovered the claim earlier." Berenda v. Langford, 914 P.2d 45, 51 (Utah 1996). The fact that the Defendants may have believed that Hom was mentally unstable does not, as Hom suggests, automatically establish that the Defendants involuntarily terminated Hom's employment because of his mental instability.¹¹

¹¹Under the American With Disabilities Act, the successor statute to the Rehabilitation Act, an employer "must tolerate eccentric or unusual conduct caused by an employee's disability so long as the employee can satisfactorily perform the essential functions of his job." Hartog v. Wasatch Academy, 1997 LEXIS 29792 *39 (10th Cir. as corrected December 15, 1997). However, "an employer may take action against an employee who poses a 'direct threat' to the health or safety of other individuals in the workplace." Id. at *35. Thus, an employer may be required

Thus, contrary to Hom's suggestion, the Defendants' consistent position in their discovery responses that they terminated Hom because of insubordination, perjury, and threats to state security, does not constitute fraudulent concealment of the factual basis for Hom's disability discrimination claim.

Moreover, even if Hom had established a prima facie case of fraudulent concealment, it is apparent that Hom could easily have discovered earlier the Defendants' perception of his mental state simply by diligently pursuing his claims, either before the CSRB or the federal district court. To take advantage of the discovery rule, a plaintiff who has established a prima facie case of fraudulent concealment must still demonstrate that "given the defendant's actions, a reasonable plaintiff would not have discovered the claim earlier." Berenda, 914 P.2d at 51.

Although such an inquiry is normally a question of fact, summary judgment is proper "when the facts are so clear that reasonable persons could not disagree about the underlying facts or about the application of the governing legal standard to the facts." Id. at 54.

As both the federal district court and court of appeals made clear, Hom was far from diligent in pursuing his claims either in

to relax workplace rules concerning neatness or courtesy where a mentally disabled employee's job does not involve interaction with others, but may uniformly enforce rules prohibiting violence or the threat of violence in the workplace, regardless of whether such behavior is caused by a mental disability.

the CSRB or in federal court. R. 403-05 (Addendum B) and Hom v. Squire, 81 F.3d 969, 973 (10th Cir. 1996). Moreover, when Hom finally deposed several Department employees in August 1994--over four years after Hom was terminated and nearly three years after he commenced his federal action--they freely revealed their perceptions of Hom's mental instability, despite the continued threat of liability from Hom's claims. Contrary to Hom's suggestion, witnesses who testify truthfully under the threat of litigation are not necessarily "foolish," and fraudulent concealment may not reasonably be inferred from the existence of such a threat alone. Accordingly, the trial court properly granted summary judgment against Hom on the ground that reasonable persons could not disagree that given the Defendants' conduct, Hom's alleged failure to discover his cause of action was unreasonable.


Finally, Hom's allegation that the concealment exception applies here should also be rejected on the ground that "'the facts underlying the allegation of fraudulent concealment are so tenuous, vague, or insufficiently established that they fail to raise a genuine issue of material fact as to concealment.'" Id.; see also Anderson, 920 P.2d at 580. Hom has failed to set forth anything more than vague innuendo in support of his allegations of fraudulent concealment. Accordingly, the trial court properly granted summary judgment to the Defendants on the ground that the

limitations period had run on Hom's disability discrimination claim.¹²

CONCLUSION

Hom failed to commence his suit against the Defendants within the limitation periods applicable to his claims. Hom had no written employment contract with the Department, and his claim is properly characterized as statutory, rather than contractual. The discovery rule does not apply to his federal disability discrimination claim. The trial court properly granted summary judgment against Hom, and this Court should affirm the judgment of dismissal in its entirety.

RESPECTFULLY SUBMITTED this 16th day of January, 1998.



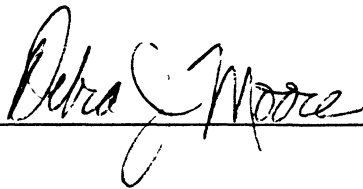
DEBRA J. MOORE
Attorney for Appellees

¹²Because the limitations period clearly barred Hom's claim, this Court need not address Hom's arguments that the decision in his federal case did not collaterally estop him from claiming that his amended complaint in this case related-back to his original complaint, and that he stated a proper disability discrimination claim.

CERTIFICATE OF SERVICE

I certify that I mailed two true and correct copies of the foregoing BRIEF OF APPELLEES this 16th of January, 1998, to:

L. Zane Gill
LAW OFFICE OF L. ZANE GILL, P.C.
1926 East 3900 South
Salt Lake City, Utah 84124



ADDENDUM A

UTAH CODE ANN. § 67-19-2 (1986)

67-19-2. Policy of state.

(1) It is the policy of this state that the governor be responsible for the administration of the personnel system and that the governor direct the system in a manner that will provide for the effective implementation of the policies and programs under the governor's direction.

(2) It is the policy of this state that the Utah state personnel system be administered on behalf of the governor by a strong central personnel agency. Any delegation of personnel functions should be according to standards and guidelines determined by the central personnel agency and should be carefully monitored by it.

(3) It is the policy of this state that comparative merit or achievement govern the selection and advancement of employees in Utah state government and that employees be rewarded for performance in a manner that will encourage excellence and strengthen the system.

(4) It is the policy of this state to provide for equal employment opportunity by ensuring that all personnel actions including hire, tenure or term, and condition or privilege of employment be based on the ability to perform the duties and responsibilities assigned to a particular position without regard to age, race, creed or religion, color, handicap, sex, national origin, ancestry or political affiliation.

(5) It is the policy of this state, if there are substantial disparities between the proportions of members of racial, ethnic, gender or handicap groups in state employment and the proportions of such groups in the labor force in this state, to take affirmative action to ensure that members of the groups have the opportunity to apply and be considered for available positions in state government.

(6) It is the policy of this state to ensure its employees opportunities for satisfying careers and fair treatment based on the value of each employee's services.

(7) It is the policy of this state to provide a formal procedure for processing the appeals and grievances of state employees without discrimination, coercion, restraint or reprisal.

History: C. 1953, 67-19-2, enacted by L. 1979, ch. 139, § 8.

UTAH CODE ANN. § 67-19-15 (1986)

67-19-15. Coverage of career service provisions.

(1) Except as otherwise provided by law or by rules and regulations promulgated for federally aided programs, the following positions shall be exempt from the career service provisions of this chapter:

(a) the governor, members of the Legislature, and all other elected state officers;

(b) persons appointed to fill vacancies in elective positions, employees of the state Legislature, employees of the state judiciary, members of boards and commissions, and heads of departments appointed by the governor, state and local officials serving ex officio, and members of state and local boards and councils appointed by the governing bodies of the departments;

(c) all employees and officers in the office and at the residence of the governor;

(d) those employees who make final policy decisions, including all heads of departments, agencies, and major offices; those heads of subordinate units whose duties have a direct and substantial effect on the public relations of state administration generally; those employees whose regular duties include public advocacy and defense of administration policy; and those in a personal and confidential relationship to elected officials and to heads of departments, agencies, and other major offices. All positions designated as being exempt under this subsection shall be listed in the rules promulgated under this act by the job title and department or agency and any change in exempt status shall constitute an amendment to the rules;

(e) unskilled employees in positions requiring little or no specialized skill or training. A roster of all such positions showing job title, number of positions, and department or agency shall be maintained by the director of personnel management on a current basis and the roster shall be available for public review;

(f) part-time professional noncareer persons, who are paid for any form of medical and other professional service, and who are not engaged in the performance of administrative duties;

(g) officers, faculty, and other employees of state universities and other state institutions of higher education;

(h) teaching staff of all state institutions, and patients and inmates employed in state institutions;

(i) persons employed in a professional or scientific capacity to make or conduct a temporary and special inquiry, investigation, or examination on behalf of the Legislature or a legislative committee or by authority of the governor;

(j) noncareer employees compensated for their services on a seasonal or contractual basis who are hired for limited periods of less than nine consecutive months, or who are employed on less than one-half time basis; and

(k) all employees of the Utah Housing Finance Agency.

UTAH CODE ANN. § 67-19-15 (1986)
(Continued)

(2) The civil service shall consist of two schedules, as follows:

(a) schedule A — The exempted schedule made under Subsection (1). Removal from any appointive position under schedule A, unless otherwise regulated by law, shall be at the pleasure of the appointing officers without regard to tenure; and

(b) schedule B — The competitive career service schedule, consisting of all positions filled through competitive selection procedures as defined by the director.

(3) The director, after consultation with the heads of concerned departments and agencies, and with the approval of the governor, shall allocate positions to the appropriate schedules under this section.

(4) Requests to change the schedule assignment and tenure rights of any position shall be made by an agency head to the director, whose decision shall be final, subject only to the governor's review in cases of denial of an agency's request by the director.

(5) All employees of the office of lieutenant governor, the office of state auditor, the office of state treasurer, the attorney general's office, excluding attorneys who are under their own career service system, and employees who are not exempt under this section shall be covered by the career service provisions of this chapter.

History: C. 1953, 67-19-15, enacted by L. 1979, ch. 139, § 21; L. 1983, ch. 332, § 7; 1985, ch. 203, § 11; 1985 (1st S.S.), ch. 4, § 18.

Amendment Notes. — The 1983 amendment reduced the number of schedules from three to two in Subsection (2); substituted "selection procedures as defined by the director" for "examination, written or unwritten, and to which tenure shall apply following a probationary period, subject to the availability of funds and continued need for the position" in Subsection (2)(b); deleted Subsection (2)(c) concerning the noncompetitive schedule; deleted "of personnel management" after "director" in Subsection (3); substituted "lieutenant governor" for "secretary of state" in Subsection (5); and made minor changes in phraseology and punctuation.

The 1985 amendment by ch. 203 deleted "and regulations" after "rules" in two places in the last sentence of Subsection (1)(d); inserted "who are under their own career service system" in Subsection (5); and made minor changes in phraseology.

The 1985 (1st S.S.) amendment substituted "chapter" for "act" in Subsection (1); inserted Subsection (1)(k); substituted "chapter" for "act" in Subsection (5); and made minor changes in phraseology and punctuation.

Meaning of "this act". — See note under same catchline following § 67-19-11.

UTAH CODE ANN. § 67-19-18 (1986)

67-19-18. Dismissals and demotions — Grounds — Disciplinary action — Procedure — Reductions in force.

(1) Dismissals or demotions of career service employees shall only be to advance the good of the public interest, and for such just causes 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. There shall be no dismissal for reasons of race, sex, age, physical handicap, national origin, religion, political affiliation, or other non-merit factor including the exercise of rights under this chapter. The director shall promulgate rules governing the procedural and documentary requirements of disciplinary dismissals and demotions.

(2) If an agency head finds that a career service employee is charged with aggravated misconduct or that retention of a career service employee would endanger the peace and safety of others or pose a grave threat to the public interest, the employee may be suspended pending the administrative appeal to the department head as provided in Subsection (3).

(3) No person shall be demoted or dismissed from a career service position unless the department head or designated representative has observed the following procedures:

(a) The department head or designated representative notifies the employee in writing of the reasons for the dismissal or demotion;

(b) The employee has no less than five working days to reply and have the reply considered by the department head;

(c) The employee has an opportunity to be heard by the department head or designated representative; and

(d) Following the hearing an employee may be dismissed or demoted if the department head finds adequate cause or reason.

(4) Reductions in force required by inadequate funds, change of workload, or lack of work shall be governed by retention rosters established by the director. Under such circumstances:

(a) The agency head shall designate the category of work to be eliminated, subject to review by the director;

(b) Temporary and probationary workers shall be separated before any tenured employee;

(c) Retention points for each tenured employee shall be computed according to rules promulgated by the director allowing appropriate consideration for proficiency and for seniority in state government, including any active duty military service fulfilled subsequent to original state appointment. Tenured employees shall be separated in the order of their retention points, the employee with the lowest points to be discharged first; and

(d) A career service employee who is separated in a reduction in force shall be placed on the reappointment roster provided for in Subsection 67-19-17(2), and shall be reappointed without examination to any va-

UTAH CODE ANN. § 67-19-18 (1986)
(Continued)

cancy for which the employee is qualified which occurs within one year of the date of the separation.

(e) An employee separated due to a reduction in force may appeal to the department head for an administrative review. The notice of appeal must be submitted within 20 working days after the employee's receipt of written notification of separation. The employee may appeal the decision of the department head according to the grievance and appeals procedure of this act.

History: C. 1953, 67-19-18, enacted by L. 1979, ch. 139, § 24; L. 1983, ch. 332, § 9.

Amendment Notes. — The 1983 amendment deleted "where funds have expired or work no longer exists" in the first sentence of Subsection (1); deleted "of personnel" after "director" in the last sentence of Subsection (1); deleted "of personnel management" after "director" in Subsection (4); added Subsection (4)(e); and made minor changes in phraseology and punctuation.

Meaning of "this act". — The term "this

act," referred to in the last sentence in Subsection (4)(e), literally means Laws 1983, ch. 332, §§ 1 to 9, which appear as various sections throughout this chapter (see Table of Session Laws in Parallel Tables volume). However, given the context in which it is used, it seems that the term is meant to refer to Laws 1979, ch. 139, §§ 1 to 35. See note under same catchline following § 67-19-11.

UTAH CODE ANN. § 78-12-25(3) (1996)

78-12-25. 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 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;

(2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1);

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

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-25; L. 1988, ch. 59, § 14; 1996, ch. 79, § 110.

Amendment Notes. — The 1996 amendment, effective April 29, 1996, in the introductory paragraph, substituted "An action may be brought within" for "Within"; deleted "An ac-

tion" at the beginning of Subsections (1) and (3); and made stylistic changes.

UTAH CODE ANN. § 78-12-26(4) (1996)

78-12-26. Within three years.

An action may be brought within three years:

(1) for waste, or trespass upon or injury to real property; except that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting such waste or trespass;

(2) for taking, detaining, or injuring personal property, including actions for specific recovery thereof; except that in all cases where the subject of the action is a domestic animal usually included in the term "livestock," which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant;

(3) for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake;

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

(5) to enforce liability imposed by Section 78-17-3, except that the cause of action does not accrue until the aggrieved party knows or reasonably should know of the harm suffered.

History: L. 1951, ch. 58, § 1; c. 1943, Supp., 104-12-26; L. 1986, ch. 143, § 1; 1996, ch. 79, § 111.

Amendment Notes. — The 1996 amendment, effective April 29, 1996, in the introductory paragraph, substituted "An action may be brought within" for "Within"; deleted "An action" at the beginning of Subsections (1) to (5); and made stylistic changes.

ADDENDUM B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Michael Hom,	:	
	:	
Plaintiff,	:	MEMORANDUM DECISION
	:	AND ORDER
-vs-	:	
	:	
A. Roland Squire, Arthur J.	:	Case No. 91-C-1016W
Hudachko, Douglas Bodrero, and	:	
John Does 1-10.	:	
	:	
Defendants.	:	

This matter is before the court on Defendants A. Roland Squire ("Squire"), Arthur J. Hudachko, and Douglas Bodrero's ("Bodrero") (collectively "defendants") Motion for Summary Judgment.¹ A hearing on the motion was held on November 22, 1994. The defendants were represented by J. Mark Ward. Plaintiff Michael Hom ("Hom") was represented by L. Zane Gill ("Gill"). Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to the Motion for Summary

¹ Defendants were employees of the Utah Department of Public Safety at times relevant to the facts alleged in the complaint.

Judgment. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. BACKGROUND

This action arose out of the termination of Hom's employment with the Utah Department of Public Safety ("DPS"), where he worked as a computer programmer/analyst. DPS terminated Hom for three enumerated reasons: (1) insubordination; (2) perjury; and (3) making threats against, and thus becoming a perceived security risk to, DPS's law enforcement related computer files. In his complaint, Hom alleges these are not the true reasons he was fired. Instead, he asserts he was terminated in retaliation for speaking out on certain matters. Specifically, he alleges this occurred "because of his vocalized and written concerns about the [DPS computer vendor] selection committee practices, compensation time violations and his grieving . . . letters of reprimand issued to him." (Am. Compl. ¶ 82.) Hom also alleges the defendants deprived him of a liberty interest without due process of law. Specifically, he alleges DPS employees informed personnel at two other government agencies of the problems they perceived with Hom without affording him a constitutionally adequate opportunity to clear his name.

The defendants have moved for summary judgment, arguing that Hom was not terminated for speaking out on the above matters, and that in any event such speech is not protected under the First Amendment. The defendants also argue that Hom had a constitutionally sufficient opportunity to clear his name. In response, Hom maintains that there are disputed issues of material fact that preclude this court from granting the defendants' motion on both issues.

II. STANDARD OF REVIEW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court must construe all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Wright v. Southwestern Bell Tel. Co., 925 F.2d 1288, 1292 (10th Cir. 1991).

Once the moving party has carried its burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to

interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Gonzales v. Millers Casualty Ins. Co., 923 F.2d 1417, 1419 (10th Cir. 1991).² The nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322.

In considering whether there exist genuine issues of material fact, the court does not weigh the evidence but instead inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Clifton v. Craig, 924 F.2d 182, 183 (10th Cir.), cert. denied, 112 S. Ct. 97 (1991).³ Finally, all material facts asserted by the moving party shall be deemed admitted unless specifically controverted by the opposing party. D. Utah R. 202(b)(4).

² The summary judgment motion may be "opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves." Celotex Corp., 477 U.S. at 324.

³ "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient." Liberty Lobby, 477 U.S. at 252.

III. DISCUSSION

"[I]t has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." Connick v. Myers, 461 U.S. 138, 142 (1983). In vindicating public employees' free speech rights, the Supreme Court has sought to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Id. (quoting Pickering v. Board of Education, 391 U.S. 563, 568 (1968)). Absent unusual circumstances, the Court has indicated that when employee expression is not on a matter of public concern, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Id. at 147.

The parties dispute whether Hom's speech involved matters of public concern. Employee expression involves a matter of public concern if it can "be fairly considered as relating to any matter of political, social, or other concern to the community." Id. at 146. Hom asserts he was terminated in retaliation for written and oral statements concerning his

compensation time, his grievances, and the DPS computer vendor selection committee practices.

The first two items do not involve matters of public concern, but rather involve matters of personal interest and the internal affairs of DPS. Thus, they are not protected by the First Amendment. See, e.g., Saye v. St. Vrain Valley School Dist. RE-1J, 785 F.2d 862, 866 (10th Cir. 1986) (teacher's complaint that school district cut back on aide time did not go to aide time allocated generally, but only that allocated to her and thus did not address a matter of public concern); Sipes v. United States, 744 F.2d 1418, 1423 (10th Cir. 1984) (Air Force employee's statement that he was cited for infractions, while others committing the same infractions were not cited, involved personnel actions affecting only his own employment and therefore did not touch on matters of public concern); Schmidt v. Fremont County Sch. Dist. No. 25, 558 F.2d 982, 984-85 (10th Cir. 1977) (high school principal's statements concerning career education and football seating practices were part of his official functions and were related to internal affairs of school system and thus not subject to First Amendment protection).

His statements alleging inappropriate and illegal conduct on the part of DPS employees involved with the computer

selection committee, however, arguably touch on a matter of public concern because the committee is involved in government procurement. On the other hand, the committee's discussions as to what type of computer vendor can best serve DPS's needs may properly be considered part of the internal affairs of DPS and thus not implicate the First Amendment.

Yet even if Hom's speech concerning the selection committee practices is considered to involve matters of public concern, Hom must demonstrate a causal connection between such speech and his termination. Saye, 785 F.2d at 866. After reviewing all of the evidence in the record, it is the opinion of this court that Hom has made an insufficient showing that he was terminated for the speech in question.

Essentially, the remainder of Hom's retaliation claim consists of a recitation of his protestations of alleged illegal and improper actions of DPS employees during the selection process. He then lists several subsequent incidents, including disciplinary actions initiated against him, and summarily states that the described incidents occurred because he spoke out against the handling of the selection process. Hom has done little more than make bald assertions of belief regarding the requisite nexus in his memorandum and his affidavit, both of

which are filled with what amounts to largely unsubstantiated speculation as to the reasons for his termination.

The timing of Hom's termination also casts doubt on whether Hom could carry his burden of proof on the causation issue. The computer vendor selection process occurred in 1987-88. It was not until November of 1989, however, that the DPS sent Hom a letter notifying him of its intent to terminate his employment. This action was prompted by a memo drafted by Squire on October 31, 1989 in which he requested that Hom be terminated because he was a security risk, insubordinate, and had committed perjury. Not only was the alleged retaliation for his speech delayed for at least a year, but Squire, the person who initially requested Hom's termination, was not a DPS employee during the time of the selection process.

As indicated above, to demonstrate that there is a genuine issue of material fact, the evidence must be such that a reasonable fact finder could find for Hom. See Liberty Lobby, 477 U.S. at 249; Clifton, 924 F.2d at 183. The causal connection here is simply too tenuous to pass that test. Therefore, the defendants' motion for summary judgment on this issue is

granted.⁴

The liberty interest Hom claims the defendants infringed is that in his reputation and also in his ability to secure employment in his chosen occupation.⁵ Because the claim is for a constitutional deprivation made against state actors,⁶ Hom must show more than simple defamation to prevail at trial. Paul v. Davis, 424 U.S. 693, 701-10 (1976). He must show "stigma plus." Neu v. Corcoran, 869 F.2d 662, 667 (2d Cir.), cert. denied, 493 U.S. 816 (1989). Courts have defined the elements of such a claim as follows: (1) the defamation must occur in the course of the termination of employment; (2) the government officials' statements must be stigmatizing or attach a badge of shame to the employee being terminated, thereby impairing the employee's ability to pursue future employment; (3) the statements must be false; (4) the statements must have been made

⁴ Because Hom has failed to carry his burden on the causation issue, the defendants' burden to show they would have reached the same decision in the absence of Hom's speaking out is not triggered. See Saye, 785 F.2d at 866.

⁵ Hom concedes that he has not raised a claim based on the taking of a property interest without due process of law. (Pl.'s Supp. Mem. Opp. at 3.).

⁶ Actually, although Hom apparently seeks to implicate all of the defendants in this claim, the record only supports an arguable claim against Squire. (See, e.g., Hom Aff. ¶¶ 61-63.)

granted.⁴

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⁶ Actually, although Hom apparently seeks to implicate all of the defendants in this claim, the record only supports an arguable claim against Squire. (See, e.g., Hom Aff. ¶¶ 61-63.)

public; and, if the first three elements are met, (4) the employee did not have a meaningful opportunity to clear the employee's name. Paul, 424 U.S. at 710; Board of Regents v. Roth, 408 U.S. 564, 573 (1971); Wisconsin v. Constantineau, 400 U.S. 433, 437-39 (1971); Neu, 869 F.2d at 667-69; Asbill v. Housing Auth., 726 F.2d 1499, 1503-04 (10th Cir. 1984). Even assuming Hom could make out the first three elements, the evidence in the record currently before the court clearly establishes that he cannot satisfy the fourth element. The record amply reflects that Hom had a constitutionally sufficient opportunity to clear his name through the administrative process in his agency and through appellate procedures available in the Utah courts.

The procedures available to Hom are summarized as follows. On October 31, 1989, Squire wrote a detailed memo to Brant Johnson ("Johnson"), a Deputy Commissioner of DPS. Squire requested that Hom be terminated because Squire perceived him to be a security risk. Squire also stated in the memo that he had evidence that Hom had lied under oath in an administrative proceeding, and that he judged Hom's conduct to be insubordinate. On November 13, 1989, Johnson sent Hom a letter stating it was the intent of the DPS to sever its employment relationship with

Hom. The letter described the reasons for this action and also stated Hom would be contacted by an administrative law judge to set a time, date, and place for a pre-termination hearing.

On December 7, 1989, Gill, who was then representing Hom, wrote to an employee of DPS that the first days he would be available for the hearing would be December 13, 14, or 15. Gill specifically waived the apparent administrative rule that such hearings be held within ten days. He made a request for administrative discovery and also acknowledged that the hearing would be a de novo review of the decision to terminate Hom's employment. If the administrative law judge ruled adverse to Hom, his next recourse would be to Bodrero, who was the Commissioner of DPS.

Subsequently, Gill met with Bodrero, and indicated he wanted to bypass the de novo evidentiary hearing and instead preferred to submit written argument directly to Bodrero. On December 14, Bodrero wrote Gill to confirm what they discussed at the meeting.⁷ Bodrero ordered a DPS employee to provide Gill

⁷ Bodrero also wrote:

As I said in our meeting, I am disappointed that you have chosen not to avail yourself of the opportunity to participate in the evidentiary hearing

with the specific information supporting the intent to dismiss letter, per Gill's request. Gill then had five days to respond in writing to this information. Bodrero would then conduct his own investigation into the matter. On December 21, Johnson sent Gill a detailed letter describing the reasons supporting the intent to terminate letter. On January 8, 1990, Gill responded to the allegations contained in Johnson's December 21 correspondence with a nineteen page letter, not including exhibits. On January 18, 1990, Bodrero informed Gill of his decision to terminate Hom, effective that day.

On January 19, Gill wrote to Bodrero that he was interested in working out an agreement whereby Hom could return to his job with DPS. Ten days later, Hom himself sent notice to the Utah State Career Service Review Board ("CSRB") that he was appealing Bodrero's termination decision. Applicable procedures

process that usually takes place prior to the time I am asked to make a decision on an employee dismissal case. The purpose of the evidentiary hearing would have been to provide me with a more complete picture of this matter prior to my having to decide it. Since you have chosen to bypass the evidentiary hearing, I consider the process described above as the next best way to proceed.

The "process" referred to is described below.

provided that the CSRB would hear this appeal and conduct a de novo evidentiary review on matters relating to Hom's termination. However, the decision to terminate Hom had apparently been revoked pending settlement discussions, but the discussions were not fruitful and on March 8, 1990, Bodrero sent Hom a final termination letter, noting that Gill had refused an offer of settlement. Bodrero advised in his letter that Hom had the right to appeal his decision to the CSRB.

Gill sent a notice of appeal to the CSRB and requested the de novo evidentiary hearing at the earliest opportunity. The hearing was scheduled for April 23-24, 1990. However, a few days before the hearing, Gill moved for a continuance. The hearing was continued without a date. Hom v. Administrative Servs. Div., No. 8 CSRB/H.O. 106 (Utah C.S.R.B. Apr. 18, 1990) (notice of continuance). On October 30, 1990, the CSRB wrote Gill, believing that Hom had filed suit and asked Gill what his intentions were vis-a-vis continuing the grievance procedure. Gill responded that Hom had not yet filed suit, but requested an indefinite stay of the grievance proceedings pending the outcome of the litigation he implied he would file.

Approximately two and one-half years later, the CSRB entered an order dismissing Hom's appeal of Bodrero's decision.

The basis for the dismissal was Hom's failure to prosecute. Hom v. Administrative Servs. Div., No. 8 CSRB/H.O. 106 (Utah C.S.R.B. Apr. 8, 1993) (order and final agency action dismissing appeal). The order was issued after the CSRB had entered an Order to Show Cause Why Appeal Should not be Dismissed, issued December 8, 1992 and the CSRB's subsequent Order and Notice Setting Forth Deadline for Dismissal if Case not Timely Prosecuted, issued January 28, 1993. Id. The CSRB's January 28 Order directed Hom to request the CSRB to schedule an evidentiary hearing on or before March 31, 1993, or Hom's appeal would be dismissed. Hom apparently failed to do so, and thus his appeal was dismissed. The Utah Court of Appeals subsequently upheld the CSRB's action. Hom v. Administrative Servs. Div., No. 930307-CA (Utah Ct. App. Aug. 19, 1993) (per curiam).

As the above reference to procedures available to Hom amply demonstrates, Hom was afforded substantial pre- and post-termination procedural safeguards. Before he was officially terminated he was given notice of the allegations against him and chose to challenge them in the form of a letter to Bodrero. Such constitutes adequate pre-termination due process. See, e.g., West v. Grand County, 967 F.2d 362, 367 (10th Cir. 1992) (pre-termination hearing need not be elaborate, employee must only be

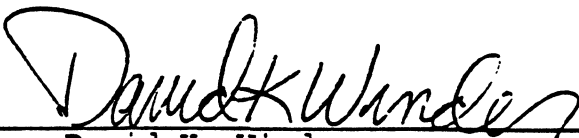
afforded notice and opportunity to be heard). Hom eschewed the other pre-termination procedures as well as the post-termination procedures. He cannot claim that because he failed to take advantage of these opportunities he was not afforded due process. Had he taken advantage of these procedures he would have been afforded ample opportunity to disprove the allegations alleged as the basis for his termination and ample opportunity to clear any stigma attached to his name by the defendants' alleged actions. Hom's claim that he was deprived of a liberty interest without due process thus must fail. Therefore, defendants' motion for summary judgment on this issue is granted.

Accordingly, based on the foregoing, and good cause appearing,

IT IS HEREBY ORDERED that defendants' Motion for Summary Judgment is granted.

Dated this 1st day of December, 1994.

BY THE COURT:



David K. Winder
Chief Judge

Copies of the foregoing Order were mailed, postage prepaid, this 14th day of December, 1994, addressed as follows:

J. Mark Ward, Esq.
Assistant Attorney General
330 South 300 East
Salt Lake City, UT 84111

L. Zane Gill, Esq.
215 South State St., Suite 545
Salt Lake City, UT 84111

Narrine Hardiner
Secretary

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Michael Hom,

Plaintiff,

-vs-

A. Roland Squire, Arthur J.
Hudachko, Douglas Bodrero, and
John Does 1-10.

Defendants.

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JUDGMENT

Case No. 91-C-1016W

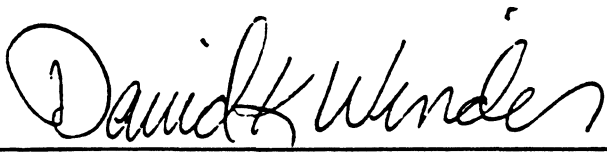
In accordance with the Memorandum Decision and Order entered this date which grants summary judgment to the defendants and against the plaintiffs, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, and good cause appearing, IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. Judgment is entered in favor of the defendants and against the plaintiff of dismissal with prejudice of plaintiff's Amended Verified Complaint.

2. All of the parties are to bear their own attorney fees and costs.

Dated this 1st day of December, 1994.

BY THE COURT:

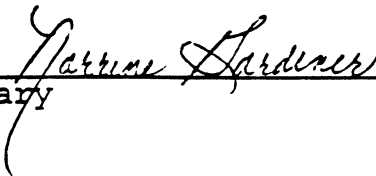


David K. Winder
Chief Judge

Copies of the foregoing Judgment were mailed, postage prepaid, this 1st day of December, 1994, addressed as follows:

J. Mark Ward, Esq.
Assistant Attorney General
330 South 300 East
Salt Lake City, UT 84111

L. Zane Gill, Esq.
215 South State St., Suite 545
Salt Lake City, UT 84111



Secretary

ADDENDUM C

RECEIVED

FILED
CLERK U.S. DISTRICT COURT

DEC 10 1994

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

DISTRICT OF UTAH

CENTRAL DIVISION

DEPUTY CLERK

MICHAEL HOM,

Plaintiff(s),

v.

A. ROLAND SQUIRE, et al.,

Defendant(s).

Case No. 91-C-1016 W

O R D E R

Plaintiff's October 11, 1994 motion to amend complaint was briefed by the parties and argued at a hearing held October 31, 1994, at which the Honorable Judge Ronald N. Boyce presided. Plaintiff was represented at the October 31st hearing by his attorney of record L. Zane Gill, and defendants were represented by their attorney of record, Assistant Attorney General J. Mark Ward.

At the October 31, 1994 hearing, the magistrate judge requested supplemental briefing by the parties, and the magistrate judge took the motion to amend under advisement pending submission and review of those supplemental briefs. The parties did submit supplemental briefs subsequent to the October 31st hearing, as requested.

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On Friday November 18, 1994, at the end of the hearing in this case but on another issue, the magistrate judge announced to the parties' counsel a decision to deny the motion to amend. The basis of the ruling is as follows:

1. Plaintiff's motion for leave to amend and bring a cause of action for handicap discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and/or 42 U.S.C. § 1983, is denied for two reasons:

A. In the interest of just and orderly judicial administration, and under Rule 15(b) Fed. R. of Civ. P., such an amendment is untimely in that it would unduly prejudice defendants in maintaining their defense of the present action upon the merits.

B. Utah's 4-year personal injury statute of limitations (Utah Code § 78-12-25 (1994)) governs plaintiff's proposed Section 504 claim.

The original complaint herein was filed within four years after plaintiff's employment was terminated, but the present motion to amend was not filed within four years of that employment termination. Plaintiff's proposed amended claim under Section 504 does not properly relate back to the date of the original pleading herein, for purposes of Rule 15(c)(2) Federal Rules of Civil Procedure.

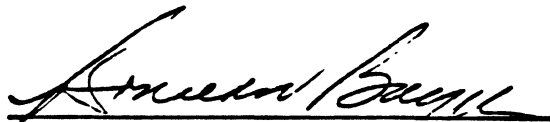
Therefore, there is a significant issue of the application of the statute of limitations.

2. 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.

3. The court also denies plaintiff's motion to amend to further state a cause of action for liberty interest violations without due process under 42 U.S.C. § 1983 (hereinafter "liberty interest claim"). This amendment is unnecessary, because the liberty interest claim was already effectively plead and preserved and is being litigated before the court in the present action.

DATED this 8th day of December 1994.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Ronald N. Boyce", written over a horizontal line.

Ronald N. Boyce
United States Magistrate Judge

United States District Court
for the
District of Utah
December 9, 1994

* * MAILING CERTIFICATE OF CLERK * *

Re: 2:91-cv-01016

True and correct copies of the attached were mailed by the clerk to the following:

Mr. Mark Ward, Esq.
UTAH ATTORNEY GENERAL
330 S 300 E
Salt Lake City, UT 84111

Mr. James R Soper, Esq.
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215 S State Street, #545
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