

2009

John Daniel Thorpe v. Washington City : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN DANIEL THORPE, aka
DANNY THORPE,

Plaintiff/Appellant,

v.

Case No. 20090798-CA

WASHINGTON CITY, a municipal
corporation; and UNKNOWN
PERSONS 1-10 individually,

Defendant/Appellee.

On appeal from a judgment of the Fifth District Court for Washington County
The Honorable Eric A. Ludlow

BRIEF FOR APPELLEE WASHINGTON CITY

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code section 78A-4-103(j).

ISSUES AND STANDARDS OF REVIEW

1.

An employee claiming a violation of the Whistleblower Act must “bring a civil action . . . within 180 days after the occurrence of the alleged violation” Utah Code Ann. § 67-21-4(2). Does the filing of a notice of claim under the Governmental Immunity Act within the 180-day period constitute the filing of a “civil action” sufficient to meet the Whistleblower Act’s statute of limitations?

Standard of Review. “An appellate court reviews a trial court’s legal conclusions and ultimate grant or denial of summary judgment for correctness.” Orvis v. Johnson, 2008 UT 2, ¶6, 177 P.3d 600 (citation omitted).

Preservation. This issue was preserved below at R. 210-211, 302-303.

2.

Utah Code section 10-3-1106 provides that a decision of a municipal employee appeals board “may be appealed to the Court of Appeals . . .” within thirty days of the date of the decision. Utah Code Ann. § 10-3-1106(6)(a). After receiving a decision from Washington City’s employee appeals board, Plaintiff did not appeal the decision to the Utah Court of Appeals within thirty days. Instead he filed action in district court disputing the Board’s decision. Did the trial court correctly dismiss this claim for lack of jurisdiction?

Standard of Review. “An appellate court reviews a trial court’s legal conclusions and ultimate grant or denial of summary judgment for correctness.” Orvis, 2008 UT 2 at ¶6 (citation omitted).

Preservation. This issue was preserved below at R. 203-208, 298-301.

3.

To pursue an unjust enrichment claim, a plaintiff must prove the lack of adequate legal remedies. Plaintiff sued the City for non-payment of wages under an unjust enrichment theory. Did the trial court correctly dismiss the unjust enrichment claim where Plaintiff failed to prove (or even argue) that he had no adequate legal remedies?

Standard of Review. “An appellate court reviews a trial court’s legal conclusions and ultimate grant or denial of summary judgment for correctness.” Orvis, 2008 UT 2 at ¶6 (citation omitted).

Preservation. This issue was preserved below at R. 209-210, 301-302.

DETERMINATIVE STATUTES

Central to the outcome of this appeal are the following statutes: Utah Code § 67-21-4(2) (2008) and Utah Code § 10-3-1106 (2008), which are reproduced at Addendum 1.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case arises from a decision of the Washington City Employee Appeals Board (“Board”) unanimously affirming the City’s decision to terminate Plaintiff’s employment. The Board’s decision, on April 6, 2005, came after a six hour public hearing. Plaintiff did not appeal that decision to the Utah Court of Appeals. In August 2006, Plaintiff filed suit in district court. His action challenged the Board’s decision, and also claimed that he did not receive due process in his hearing before the Board. He also claimed the City violated the Whistleblower Act and that he was owed wages, which he claimed under an unjust enrichment theory. The trial court granted summary judgment for the City. Plaintiff appeals.

II. STATEMENT OF FACTS¹

Plaintiff/Appellant John Daniel Thorpe is a former Washington City employee. [R. 295.] He was employed in the City’s public works department. [R. 295.] The City terminated Thorpe’s employment, effective March 15, 2004, for failing a breath alcohol test that was administered to him. [R. 295-296; Admin. R. Ex. 3.]² It was the second

¹ The following are the undisputed facts before the trial court on summary judgment. They are presented in a light most favorable to the non-moving party, Thorpe.

² The administrative record before the Board is contained in the Record beginning at R. 104. However, the Clerk did not separately paginate the administrative record. As such, references to the administrative record are indicated by the designation “Admin. R. Tr. ____” for references to the transcript portion and “Admin. R. at Ex. ____” for references to documents and exhibits before the Board.

time Thorpe had failed such a test while employed by the City. [R. 296; Admin. R. Exs. 1, 3.] Pursuant to Utah Code section 10-3-1106, Thorpe was given the right to appeal his termination to the Washington City Employee Board of Appeals (“Board”) and chose to exercise that right of appeal. [R. 296; Admin. R. Exs. 3, 4.]

On April 6, 2005, the City held an administrative hearing before the Board. [R. 296; Admin. R. Tr. *passim*.] At the hearing, which lasted over six hours, Thorpe appeared with his attorney, confronted the evidence against him, and gave testimony concerning his version of events. [R. 296; Admin. R. Tr. *passim*.] Ultimately the Board, by a 5-0 vote, affirmed the decision to terminate Thorpe’s employment. [R. 296; Admin. R. Tr. 184:14-16.] In its decision the Board made detailed findings of fact and conclusions of law. [R. 296-297; Admin R. Tr. 181:12-25, 182-183, 184:1-16.]

Specifically, the Board found that City policy created a drug free work place policy and that any level of alcohol on the breath or in the blood violated that policy and is grounds for termination. [R. 296-297.] The Board found that Thorpe received, accepted, and understood this drug free work place policy. [R. 296-297.] Based on the testimony of the individuals who administered the drug testing process to Thorpe, the Board found that the test was reliable and performed in accordance with required procedure and confirmed the positive result that was a violation of the City’s drug free work place policy. [R. 296-297.]

The Board found that Thorpe failed to produce any competent evidence or testimony challenging the drug testing procedure or the result and, in fact, found that

Thorpe's own test, administered on the date the City administered the drug alcohol test was also positive and indicated a violation of the City's drug free work place policy. [R. 297.] Finally, the Board found that based upon Thorpe's prior alcohol violation of the City's drug free work place policy in 2002 and "multiple positive blood and breath alcohol tests on March 9, 2004, that Washington City's decision to terminate Mr. Thorpe was reasonable under the circumstances and supported by reliable evidence." [R. 297.] As a result, the Board unanimously affirmed the City's decision in terminating Thorpe's employment. [R. 297.]

Thorpe did not appeal the Board's decision to this Court. [R. 297.] Instead, he waited until 148 days after his hearing and filed a notice of claim with the City. [R. 38.] In his notice of claim, he asserted, among other things, that the City violated the Whistleblower Act on April 6, 2005 when the Board denied his appeal. [R. 38-40.]

On August 1, 2006—482 days after his hearing—he filed his complaint in district court. [R. 1.] In his complaint, Thorpe asserted the following claims, as he labeled them: (1) unjust enrichment; (2) wrongful discharge; (3) due process violations; (4) breach of contract; and (6) violations of the Utah Protection of Public Employees Act. [R. 1-22.]³

³ Plaintiff also asserted claims under the Americans with Disabilities Act ("ADA") and for attorney fees under the "private attorney general" doctrine. On the ADA claim, he acknowledged his failure to file a mandatory pre-suit charge with the EEOC as required by 42 U.S.C. § 2000e-5(b), and therefore stipulated to dismissal of the ADA claim in the face of the City's motion for summary judgment. [R. 301.] The private attorney general claim is irrelevant because to get fees under that doctrine Thorpe must have successfully vindicated public policy in an "extraordinary" case. Faust v. KAI Tech., Inc., 2000 UT 82, ¶18, 15 P.3d 1266. Not only is there nothing extraordinary about this case, Thorpe was not successful in vindicating anything.

The City moved for summary judgment on the following grounds: (i) the district court lacked jurisdiction to review the Board’s decision and, regardless of the pleading labels, Thorpe’s wrongful discharge, due process, and breach of contract claims all arose out of his hearing before the Board or otherwise related to the Board’s decision; (ii) that Thorpe could not recover for unjust enrichment because he did not attempt to show that his existing legal remedies were inadequate; and (iii) that his whistleblower claims were untimely and otherwise meritless because he admitted he was not discharged for blowing the whistle on the City. [R. 196-212.] The trial court held a hearing on the motion and thereafter granted summary judgment in the City’s favor. [R. 295.]

Thorpe appeals.

SUMMARY OF ARGUMENT

1. A public employee claiming a violation of the Whistleblower Act must file a “civil action” within 180 days from the date of the alleged violation in order for his claim to be timely. Here, it is undisputed that Thorpe did not file a civil action—*i.e.*, a complaint in district court—within 180 days from the date of the alleged violation. As a result, the trial court dismissed the claim as untimely.

Thorpe claims the trial court erred because, even though he did not file a civil action within 180 days, he did file a notice of claim with the City in that time period and that, he argues, met the “civil action” filing requirement. Against a straightforward application of basic rules construction, his argument is without merit. First, we must presume the Legislature used the term “civil action” advisedly, and apply its plain and

ordinary meaning. The plain and ordinary meaning of the term connotes one thing: filing a complaint in district court.

Second, under the applicable statutory scheme, a notice of claim and a civil action are two different events that serve different purposes. The notice of claim is a prerequisite to filing a civil action. As such, to accept Thorpe's construction of the term "civil action" would not only require this Court to ignore the plain and ordinary meaning of the term, it would require the Court to hold that the Legislature meant what it said in the Immunity Act—wherein a notice of claim precedes a civil action—but something entirely different in the Whistleblower Act (that "civil action" actually means notice of claim). Had the Legislature intended to mark the limitations period in the Whistleblower Act with the filing of a notice of claim, it would have said "notice of claim," not "civil action." It did not. And under settled rules of statutory construction, we presume that the Legislature means what it says. And when settled rules of construction are applied, the trial court's reasoned analysis is confirmed—the whistleblower claim was not timely filed.

Furthermore, not only is the whistleblower claim untimely and therefore procedurally barred, it is also substantively without merit. Specifically, in his deposition, Thorpe testified that he was not terminated for blowing the whistle on the City. That fact was undisputed. As a result, the trial court correctly dismissed his whistleblower claim as both untimely and meritless. The trial court was plainly correct in entering summary judgment for the City on the whistleblower claim. This Court should affirm.

2. Utah Code section 10-3-1106 provides that “[a] final action or order of the appeal board may be reviewed by the Court of Appeals by filing with that court a petition for review.” Utah Code Ann. § 10-3-1106(6)(a). To obtain this review, the employee must file a petition for review with this Court within thirty days of the date of the board’s final action. See id. § 10-3-1106(6)(b).

After the City terminated Thorpe’s employment, Thorpe invoked the procedures in section 10-3-1106 and obtained a review hearing before the City’s municipal employee appeals board. The Board affirmed Thorpe’s termination. It is undisputed that Thorpe did not appeal to this Court as required by section 10-3-1106. Instead, he filed a complaint in district court asking the district court to review both the merits of the Board’s decision and whether the hearing violated his right to due process. The trial court dismissed these claims for lack of jurisdiction. Thorpe claims error by offering a range of excuses, none of which has merit. This issue, like the previous issue, is resolved by straightforward application of rules of statutory construction.

The plain language of section 10-3-1106, as well as every relevant canon of statutory construction, lead to the inescapable conclusion that when the Legislature establishes an appellate procedure, the procedure must be followed. The statute does not offer a choice of forums. It required Thorpe to take his appeal to this Court within thirty days. His failure to do so deprived him of any review of the Board’s decision.

Additionally, pleading labels may not be utilized to sneak through the back door to the courthouse. It is the nature of the action that is determinative. As such, Thorpe can’t

simply attach the labels “breach of contract,” “wrongful discharge,” and “due process” as his ticket to a jury trial—while ignoring that all of the claims arose out of the hearing before the Board. Here, the nature of Thorpe’s action was what the trial court said it was: an appeal of the Board’s decision. By statute, he was required to pursue those claims in this Court; not in district court. The trial court was therefore correct in refusing to entertain claims that were not properly before it. This Court should affirm.

3. Finally, Thorpe assigns error to the trial court’s grant of summary judgment on his unjust enrichment claim. Because unjust enrichment is an equitable remedy, it is not available where there exists an adequate remedy of law. It is Thorpe’s burden to show that he has no adequate remedy at law. But he made no effort at all to explain, either to the trial court below, or to this Court on appeal that he has no available legal remedies. Indeed, there are a myriad of state and federal statutes governing the payment of wages. These are legal remedies, which, if applicable would bar recovery under the equitable unjust enrichment theory. Thorpe’s failure to make any effort to show that he is without adequate legal remedies warranted dismissal of his unjust enrichment claim. As a result, the trial court should be affirmed.

ARGUMENT

I. THORPE’S WHISTLEBLOWER CLAIMS ARE TIME BARRED AND WITHOUT MERIT.

A. Thorpe Failed to Timely File a Civil Action.

The Utah Protection of Public Employees, commonly known as the “Whistleblower Act” (“WBA”), Utah Code Ann. §§ 67-21-1 to -9 (2008), prohibits public employers from taking adverse action against employees who “blow the whistle” on government by exposing, among other things, “any waste of public funds, property, or manpower, or a violation or suspected violation of a law, rule, or regulation” Utah Code Ann. § 67-21-3(1)(a). An employee claiming a violation of the WBA must “bring a civil action for appropriate injunctive relief or actual damages, or both, within 180 days after the occurrence of the alleged violation of [the WBA].” *Id.* § 67-21-4(2).

Thorpe sued the City for allegedly violating the WBA, claiming that the violation occurred on April 6, 2005. *See* R. 19; Thorpe Br. at 15. It is undisputed that Thorpe did not file his complaint in district court within 180 days from this date. *See* R. 1; Thorpe Br. at 15. Instead, he filed a notice of claim with the City within the 180-day period. The trial court reasoned that filing a notice of claim is not the equivalent to filing an actual “civil action” as required by section 67-21-4(2). [R. 302-303.] Accordingly, it granted the City’s motion for summary judgment, dismissing Thorpe’s whistleblower claim as untimely. [R. 302-303.]

Thorpe asserts this was erroneous because, his argument goes, when the Legislature used the term “civil action” in the WBA it really meant “notice of claim,” and

therefore his filing of a notice of claim satisfies the civil action filing requirement. See Thorpe Br. at 15-16. The trial court rejected this argument; so should this Court, for several reasons.

1. A plain language analysis precludes any conclusion that “civil action” actually means “notice of claim.”

The starting point is the plain language of the statute. See Lyon v. Burton, 2000 UT 19, ¶17, 5 P.3d 616 (“The plain language of a statute is generally the best indication of [legislative] intent.”). The statute provides that a “civil action” must be filed within 180 days from the date of the alleged violation. Utah Code Ann. § 67-21-4(2).

We must presume that the Legislature chose the term “civil action” advisedly, and give effect to the ordinary and accepted meaning of the term. See Nelson v. Salt Lake County, 905 P.2d 872, 875 (Utah 1995) (“We presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning.”). The term “civil action” connotes one thing: the filing of a complaint in district court to commence a civil judicial proceeding. See e.g., Utah R. Civ. P. 3(a) (“A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons together with a copy of the complaint in accordance with Rule 4.”); Black’s Law Dictionary 31 (8th ed. 2004) (defining “action” as a “civil or criminal judicial proceeding”); <http://legal-dictionary.thefreedictionary.com/civil+action> (last visited February 11, 2010) (defining “civil action” as “any lawsuit relating to civil matters and not criminal prosecution”); Bryan A. Garner, Dictionary of Modern Legal Usage 20 (2d

ed. 1995) (defining “action” as “a mode of proceeding in court to enforce a private right . . .” and indicating that it is used interchangeably with the term “suit”).

The WBA does not offer or even imply a contrary meaning. Rather, it expressly contemplates that a civil action is an action actually filed in district court because it specifies in which district court a complainant must file the civil action. See Utah Code Ann. § 67-21-4(3). Notices of claim, by contrast, are not filed in district court. They are filed with the governmental entities against whom the action will be brought and merely give notice that the claimant intends to file a civil action. See Utah Code Ann. §§ 63-30d-401, -402 (Supp. 2004).⁴

Indeed, the Immunity Act clearly differentiates between a notice of claim and a civil action. It provides that “[i]f the claim is denied, a claimant may institute an action in the district court against the governmental entity or an employee of the entity.” Utah Code Ann. § 63-30d-403(2)(a) (emphasis added). It goes on to specify that the “claimant shall begin the action within one year after denial of the claim” Id. § 63-30d-403(2)(b) (emphasis added). By design, filing a notice of claim with a government entity and filing an “action” in district court are two different events.

For this Court to conclude otherwise and accept Thorpe’s argument, it would have to make the illogical assumption that the Legislature really meant “notice of claim” when

⁴ We cite the Immunity Act as contained in Title 63, Chapter 30d of the Utah Code, because that was the codification in effect at the time Thorpe’s claim arose. See S.B. 55, 55th Leg., Gen. Sess. (Utah 2004); Hoyer v. State, 2009 UT 38, ¶4 n.1, 212 P.3d 547. The Legislature has since re-numbered Title 63 and the Immunity Act is now contained in Title 63G, Chapter 7. See H.B. 68, 57th Leg., Gen. Sess. (Utah 2008) (re-codification of Title 63, Chapter 30d).

it used the term “civil action” in the WBA but actually meant what it said in using the terms in the Immunity Act. The rules of statutory construction do not permit this leap. Had the Legislature intended that a notice of claim mark the limitations period in the WBA, it would have said so. It did not. And “[w]hen language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction.”’ Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick, 890 P.2d 1017, 1020 (Utah 1995) (quoting Hanchett v. Burbidge, 202 P. 377, 379-80 (Utah 1921)).

2. Statutes must be read in harmony and effect must be given to all terms, rendering none superfluous.

Instead of addressing these basic rules of statutory construction, Thorpe flings several cases at the issue in the hopes of convincing the Court that at least one of them stands for the proposition that the Legislature did not actually mean what it said. But none of these cases hits center—or is even close. For example, Thorpe relies on Hall v. Dep’t of Corrections, 2001 UT 34, 24 P.3d 958, but Hall simply addressed what is now codified in the Immunity Act—that immunity is waived for whistleblower claims. See id. at ¶¶19-20. And while the Supreme Court acknowledged that a plaintiff must file a notice of claim as a prerequisite to suit, it did not hold or suggest that the 180-day limitations period in the WBA was tolled or otherwise satisfied by the filing of a notice of claim. See id. at ¶22.

Thorpe similarly errs in relying on Youren v. Tintic School District, 343 F.3d 1296 (10th Cir. 2003). There (we are told), the federal district court held that a notice of claim was sufficient to meet the 180-day limitations period. See id. at 1302. On appeal,

the Tenth Circuit did not review that aspect of the lower court's ruling because it determined that the defendant waived the statute of limitations defense. See id. at 1303-04. Youren, therefore, stands for nothing relevant to the question before this Court.

And in any event, whatever the federal district court's rationale for deciding in Youren that a notice of claim was a "civil action" under the WBA, it cannot be squared with the rules of statutory construction. Nor is it precedent that this Court is obligated to follow, as state courts never yield to federal court interpretations of state law. See First Nat'l Bank v. Rostek, 514 P.2d 314, 442 n.1 (Colo. 1973) (en banc) (recognizing that it is "well settled that a state court is not bound by federal court interpretation of state law"); Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers v. Blount Int'l, Ltd., 519 So. 2d 1009, 1012 (Fla. Dist. Ct. App. 1988) ("[S]tate courts, in construing and interpreting state law, are not bound by the decisions of federal courts."). Certainly this Court should not follow a federal district court's erroneous interpretation of state law.

Thorpe also relies on Fannen v. Lehi City, 2005 UT App 301U, No. 20040723-CA (Utah Ct. App. June 30, 2009) (mem.), which is curious for the simple reason that it rejected the argument Thorpe advances here. In Fannen, the plaintiff appealed the trial court's entry of summary judgment against him, arguing that "the 180-day statute of limitations in Utah Code section 67-21-4(2) (Whistle Blower Act) is superseded by the Notice of Claim provision found in Utah Code sections 63-30d-402, -403 (Government Immunity Act)[.]" Fannen, 2005 UT App 301U at para. 1. This Court affirmed summary judgment, reasoning that the notice of claim requirements in the Immunity Act do not

constitute the filing of a civil action for purposes of the 180-day limitations period in the WBA. See id. at para. 4. The Court reasoned that the Immunity Act “merely gives a deadline for which notice must be given that there is a claim against the State; it does not prohibit the legislature from imposing a shorter statutory filing date on a cause of action.” Id.

Because of Fannen’s memorandum decision status, the reasoning behind the Court’s result was abbreviated. Nevertheless, the result merely followed established rules of statutory construction: read all provisions of a statute in harmony with related statutes in order to give effect and meaning to all of their terms, rendering none superfluous. See Lyon, 2000 UT 19 at ¶¶17-18; Hoyer v. State, 2009 UT 38, ¶22, 212 P.3d 547; Due South, Inc. v. Dep’t of Alcoholic Beverage Control, 2008 UT 71, ¶33, 197 P.3d 82.

The trial court’s decision here was faithful to these rules. Harmonizing the WBA’s 180-day civil action filing requirement with the Immunity Act’s notice of claim requirement demonstrates a legislative intent to put a short fuse on the filing of whistleblower claims. To comply with the necessary notice and limitations requirements, a notice of claim must be filed within 120 days of the date the violation occurred to ensure that the underlying civil action may be timely filed within the 180-day period. See Utah Code Ann §§ 63-30d-403(1), (2) (requiring claimant to wait 60 days after

submitting notice of claim before filing a civil action).⁵ To read it any other way would render superfluous the requirement to file a “civil action” within 180 days “after the occurrence of the alleged violation” Utah Code Ann. § 67-21-4(2). And while Thorpe complains about the supposed unfairness of these requirements; one need only read the Utah Code to determine what action to take and when to take it.

In the final analysis, there is logic in the Legislature’s decision to impose a short statutory filing date on whistleblower claims. It precludes employees from raising spurious claims in response to disciplinary action taken against them later in their employment, when the lapse in time makes the claims inherently suspect and often nothing more than a retaliatory response to warranted discipline. It also reflects the reality in which our Legislature operates—that government officials often change as a result of elections and the political appointment process. Thus, it requires timely claims to ensure that public officials are held accountable to the people—as well as the whistleblower.

* * *

In sum, it is undisputed that Thorpe failed to file a civil action within 180 days of the date his alleged whistleblower claim arose. Accordingly, the trial court correctly held

⁵ The purpose of notice is to allow the government time to investigate the claim to determine whether it has merit, and if so, to resolve it prior to litigation. See Hall, 2001 UT 34 at ¶23 (reasoning that the purpose of the notice of claim ““is to prevent spurious claims from being paid . . . [and to] give the city officials ample opportunity to examine into both the cause and extent of the injury and also to test the good faith of the claimant in presenting the claim””) (quoting Sweet v. Salt Lake City, 134 P. 1167, 1171 (Utah 1913)).

that his filing of a notice of claim did not toll the 180-day limitations period, nor did it constitute the filing of a “civil action” as required by the WBA. Thorpe’s whistleblower claim was time barred. This Court should affirm.

B. It is Undisputed That Thorpe was Not Terminated for “Blowing the Whistle” on the City.

The trial court did not stop its analysis at the procedural gates. It went further, determining that even if timely, Thorpe’s whistleblower claim was substantively without merit. [R. 303.] We know this because Thorpe told us in his deposition:

Q. Did your termination – did it have anything to do with testimony that you’d given against Mr. Shaw in any proceeding, to your knowledge?

A. No.

[R. 303; see also R. 235 (deposition excerpt).]

Thorpe now contends that the trial court simply misread his complaint and therefore did not quite fully understand the nature of his claim. But the sum total of his argument to the trial court below was a single paragraph confirming that the question he was posed in his deposition was precisely his claim:

As to Defendant’s claim that Plaintiff admitted he was not terminated for “blowing the whistle”, Plaintiff’s Verified Complaint clearly states, at ¶¶ 152-157, that he was terminated in connection with his reports that Mike Shaw had wasted public funds, property, or manpower belonging to Defendant Washington City and had used them for personal gain. A material issue of fact remains in dispute as to the extent and scope of the reasons behind Defendant’s termination of Plaintiff’s employment.

[R. 246] (Emphasis added.)

In light of Thorpe's argument it is difficult to see how the trial court could misunderstand his claim. And if the trial court did misunderstand it, it is because he caused that misunderstanding, thereby inviting the error he now claims. He cannot use this as a basis for reversal. See Cheves v. Williams, 1999 UT 86, ¶20, 993 P.2d 191 (party cannot on appeal take advantage of error committed below where party "led the trial court into committing the error") (quoting State v. Dunn, 850 P.2d 1201, 1220 (Utah 1993)).

Moreover, once the City met its burden by placing the undisputed fact before the trial court, the burden shifted to Thorpe to do something more than rest on the allegations of his complaint. See Orvis v. Johnson, 2008 UT 2, ¶18, 177 P.3d 600; Utah R. Civ. P. 56(e). But, as demonstrated by his single paragraph opposition, all he did was rest on the allegations of his complaint. Citing a complaint and saying a material issue of fact still remains is not enough to avoid summary judgment. See Stevens v. LaVerkin City, 2008 UT App 129, ¶18, 183 P.3d 1059 ("Failure to produce acceptable evidence demonstrating a genuine issue of material fact will result in a grant of summary judgment.") (quotation omitted).

Thorpe's failure to produce acceptable evidence was not surprising. In light of his unequivocal deposition testimony, there was no competent evidence that he could have produced to create a disputed issue of material fact, *i.e.*, changing his unequivocal "no" to a "yes." See Brinton v. IHC Hosps, Inc., 973 P.2d 956, 973 (Utah 1998) (where a witness takes a clear position in a deposition, he is not permitted to thereafter raise an

issue of fact by his own affidavit which contradicts the deposition); Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983) (stating that “[a]s a matter of general evidence law, a deposition is generally a more reliable means of ascertaining the truth than an affidavit, since a deponent is subject to cross-examination and an affiant is not”).

In sum, Thorpe claimed he was terminated for blowing the whistle on Mr. Shaw’s alleged misuse of public resources. But under oath, he unequivocally admitted that this was not the case. Accordingly, the trial court was correct in ruling that his whistleblower claim was substantively without merit. This provides another basis for affirming summary judgment on Thorpe’s whistleblower claim.

II. THE DISTRICT COURT LACKED JURISDICTION TO REVIEW THE BOARD’S DECISION OR THE CONDUCT OF THE HEARING.

Outside of Thorpe’s whistleblower and unjust enrichment claims (addressed in Points I and III, respectively, of this brief) the remainder of Thorpe’s claims—which he labels “wrongful discharge,” “due process,” and “breach of contract”—arise out of or relate to his hearing before the Board. [R. 1-22.] Because section 10-3-1106 vests this Court with exclusive jurisdiction over such matters, the trial court dismissed the claims for lack of jurisdiction.

Thorpe assigns error (at Br. 21-26) to this decision on two fronts: (i) that section 10-3-1106 did not require him to appeal to this Court and, therefore, he had the right to bring his claims at a time and place of his own choosing; and (ii) that, even if he was required to appeal the Board’s decision to this Court, he was not required to appeal his

cleverly labeled “breach of contract” and “due process” claims to this Court because they were not before the Board in the first instance.

These arguments are without merit. As set forth in further detail below, they wholly ignore the plain language of section 10-3-1106 as well as every relevant canon of statutory construction, which, if followed, lead to the inescapable conclusion that when the Legislature establishes an appellate procedure, the procedure must be followed. A party is not entitled to make it up as he goes and determine, on his own, in which forum he will lodge his claims.

Additionally, in determining jurisdiction, it is the nature of the action that is determinative, not the pleading labels chosen by the plaintiff. In this case the nature of Thorpe’s action was what the trial court said it was: an appeal of the Board’s decision. By statute, he was required to pursue those claims in this Court; not in district court. The trial court was therefore correct in refusing to entertain claims for which it did not have jurisdiction. This Court should affirm.

A. The Utah Court of Appeals has Exclusive Jurisdiction to Review the Board’s Decision.

1. The statute: Utah Code § 10-3-1106.

Municipal employees, upon being terminated by their employer, have the right to a public hearing in which they may “appear in person and be represented by counsel,” “confront the witness whose testimony is to be considered,” and “examine the evidence

to be considered by the appeal board.” Utah Code Ann. § 10-3-1106(4) (Supp. 2006).⁶

In this regard, the statute authorizes municipalities to establish employee appeals boards, see id. §§ 10-3-1106(2)(a), (7)(a), and pursuant to this authorization, Washington City established the Washington City Employee Appeals Board (the “Board”) to “take and receive evidence and fully hear and determine the matter which relates to the action from which the appeal is taken.” [R. 104 Admin R. at Ex. D, p. 58 (Washington City Personnel Rules & Regulations, Section XIX.C.1 (2000) (providing that the Board shall “take and receive evidence and fully hear and determine the matter which relates to the action from which the appeal is taken”))).]

Section 10-3-1106 specifies this Court—the Utah Court of Appeals—as the court with jurisdiction to review any action or order of a municipal appeal board. See Utah Code Ann. § 10-3-1106(6)(a) (“A final action or order of the appeal board may be reviewed by the Court of Appeals by filing with that court a petition for review.”). To obtain this review, the employee must file a petition for review with this Court within thirty days of the date of the board’s final action. See id. § 10-3-1106(6)(b); Utah R. App. P. 14(a) (requiring that petition for judicial review of an administrative order in the court of appeals “shall be filed with the clerk of the appellate court within the time prescribed by statute”) (emphasis added). This Court’s review is “on the record of the

⁶ There are municipal employees who are not entitled to an appeal procedure. See id. § 10-3-1105(2) (excepting from appeals process officers appointed by the mayor, police chiefs, part-time employees, and probationary employees, among others). But those exceptions are not applicable here.

appeal board and for the purpose of determining if the appeal board abused its discretion or exceeded its authority.” Id. § 10-3-1106(6)(c).

In this case, after terminating Thorpe’s employment, the City gave Thorpe the right to a hearing and Thorpe exercised that right. The Board held a lengthy public hearing and, based upon the evidence presented, unanimously upheld the termination. Thorpe never appealed the Board’s decision to this Court. Instead, he waited over a year and filed an action in district court disputing the reason for his termination and the Board’s decision, as well as complaining about the fairness of the hearing. [R. 1-22.] The trial court correctly dismissed those claims for lack of jurisdiction, reasoning that the Court of Appeals had exclusive jurisdiction to review these claims. [R. 298-301.]

2. Section 10-3-1106 does not offer a choice of venues.

Thorpe raises various objections to the trial court’s ruling, insisting that he had the right to pursue his claims in district court. But his objections cannot withstand scrutiny. As set forth in detail below, they impermissibly: (i) ignore the statute’s plain language; (ii) ignore the constitutional limitations on district court jurisdiction; (iii) ignore the structure and purpose of the statute; (iv) favor application of a general statute over a more specific one; and (v) render the statute superfluous and inoperative.

i. Thorpe’s construction ignores the statute’s plain language.

First, Thorpe’s arguments are untethered from the text of the statute. Indeed, he fails to confront the simple and straightforward fact that the only court mentioned in section 10-3-1106 with any authority over municipal employee appeals boards is the Utah

Court of Appeals. See Utah Code Ann. § 10-3-1106(6). The Legislature’s sole reference to this Court evinces a plain and unmistakable intent to exclude other courts. See Biddle v. Washington Terrace City, 1999 UT 110, ¶14, 993 P.2d 875 (expression of one thing in a statute creates a presumption that the legislature meant to exclude something else).

Moreover, and contrary to Thorpe’s arguments, when the Legislature intends to provide litigants with options as it relates to filing in the district or appellate courts, it knows how to do so—by expressly saying so. For example, in providing a procedure to review tax commission decisions, the Legislature evinced a plain and unmistakable intent to grant concurrent jurisdiction in both district and appellate courts by expressly providing for review of tax commission decisions in the district court, the Utah Supreme Court, or the Utah Court of Appeals. See Utah Code Ann. § 59-1-602(1)(a) (2008) (“Any aggrieved party appearing before the commission or county whose tax revenues are affected by the decision may at that party’s option petition for judicial review in the district court pursuant to this section, or in the Supreme Court or the Court of Appeals”). Section 10-3-1106 does not offer a similar choice.

ii. Thorpe’s construction impermissibly ignores the constitutional limitations on district court jurisdiction.

Thorpe also fails to seriously confront the constitutional limitations on the jurisdiction of our district courts. As recognized by the trial court, its jurisdiction is not limitless. It is circumscribed by the Utah Constitution, which requires an express statutory basis for a district court to exercise appellate review over any lower tribunal. See Utah Const. art. VIII, § 5 (“The district court shall have appellate jurisdiction as

provided by statute.”). There is no statute that authorized the trial court to review any aspect of the Board’s decision. Additionally, a district court’s grant of “original jurisdiction in all matters” is limited by statute. *Id.* (“The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute . . .”). As stated above, the express reference to only the Utah Court of Appeals in section 10-3-1106 is necessarily an exclusion of other courts and, by extension, a statutory limitation on the district court’s jurisdiction to review matters arising from municipal employee appeal boards.

As aptly reasoned by the trial court in recognizing the limitations on its own jurisdiction: “In enacting Utah Code Ann. § 10-3-1106, the Legislature deliberately granted jurisdictional authority to review decisions of municipal boards of appeal to the Utah Court of Appeals.” [R. 298.] And, observing the lack of a comparable section granting jurisdiction to district courts: “[i]t is not this Court’s province to frustrate the statutory scheme by allowing Plaintiff an extra avenue of review of the Board’s decision.” [R. 300.]

iii. Thorpe’s construction impermissibly ignores the structure and purpose of the statute.

Thorpe simply shrugs off the trial court’s reasoned (and correct) analysis and cobbles together a series of arguments that trivialize section 10-3-1106, ignore settled canons of statutory construction, and proceed as though this Court is receiving this case on a blank slate, devoid of any procedural history or facts. First, he argues that he was never required to pursue an appeal to the Board because (the argument goes) there is no

language in section 10-3-1106 that expressly states he must follow the procedures in the statute. See Thorpe Br. at 23. This argument makes no sense. Thorpe did appeal his termination to the Board. The Board did hold a hearing. Thorpe then sued the City for claims that arose out of that hearing and related to the Board's decision. But for his hearing, Thorpe would have no claims against the City which relate to the hearing.

His argument is a variation of the argument he made below.⁷ There (at R. 242-244) he argued, not that he was not required to go before the Board, but that he was not required to appeal the Board's decision to this Court. This was based on the fact that the statute provides that "a final action or order of the appeal board may be appealed to the Court of Appeals[.]" Utah Code Ann. § 10-3-1106(6)(a) (emphasis added). Though he deviates from this argument on appeal, he still clings to its basic premise by emphasizing, in several places in his brief that appeal to the Board and thereafter to this Court was "permissive" because the Legislature used the term "may" section 10-3-1106. See Thorpe Br. at 24 (emphasizing the term "may" three times). Thorpe argues this can only mean that the procedures in section 10-3-116 are not exclusive of other remedies. He is wrong.

The term "may" is not always permissive. It must be construed in context, and context often dictates that the term be construed as mandatory. See e.g., Carter v.

⁷ His failure to present it below, of course, means that he cannot advance it for the first time on appeal. See Dansie v. City of Herriman, 2006 UT 23, ¶30, 134 P.3d 1139 (a party must first present his entire case, including all theories, to the trial court in order to preserve them for appeal). He is not entitled to test different theories of his case before different judges at various stages hoping that at some point one of his arguments will eventually stick.

University of Utah Med. Ctr., 2006 UT 78, ¶¶13-14, 150 P.3d 467 (“We think construing ‘may’ as mandatory is harmonious with the legislative intent underlying the Act, namely, to provide a protocol that must be followed by those seeking to file a claim against the government.”). That is particularly true where to construe it otherwise would lead to absurd results. See Savage v. Utah Youth Vill., 2004 UT 102, ¶18, 104 P.3d 1242 (stating that a court must interpret statutes to avoid absurd results). Thorpe’s construction would lead to absurd results.

If section 10-3-1106 stated “shall” as opposed to “may,”—as Thorpe suggests it must in order to be mandatory—it would require terminated employees to appeal to municipal employee appeal boards and thereafter to this Court regardless of whether they desired to dispute their termination in the first instance or the outcome of the board’s decision thereafter. The Legislature’s use of the term “may” simply, and wisely, recognizes that the State will not compel or force people into administrative hearings or into court against their will. Thus, if a terminated employee desires to appeal his termination to the Board or the Board’s decision to this Court, he or she “may” do so. But if they make that choice, the statute is clear that their only option is to do so before the Board in the first instance, and to this Court thereafter.

Indeed, after giving an employee the right to appeal, section 10-3-1106 goes on to impose mandatory filing deadlines to appeal to the Board and thereafter to this Court:

- “Each appeal [to the appeal board] shall be taken by filing written notice of the appeal with the municipal recorder within 10 days” Utah Code Ann. § 10-3-1106(3)(a) (emphasis added);
- “Each petition [to the Court of Appeals] shall be filed within 30 days after the issuance of the final action or order of the appeal board.” Id. § 10-3-1106(6)(b) (emphasis added).

The statute is clear: there is one method to dispute a discharge—to the Board, within ten days. And there is one method to appeal the Board’s decision—to this Court, within thirty days.

It is not surprising that Thorpe has been unable to produce a single authority addressing a similar statute and interpreting it the way Thorpe urges this Court must. Indeed, the opposite is true. For example, when confronted with a similar argument, the Washington Supreme Court quickly rejected it, reasoning: “[i]n our view the use of the word ‘may’ in this statute operates to grant permission to bring the pertinent petition in a certain form” but if a party chooses to do so “the statute provides only one place in which to file it” Sim v. Washington State Parks & Rec. Comm’n, 583 P.2d 1193, 1195 (Wash. 1978). See also Northwest Ecosystem Alliance v. Forest Practices Board, 66 P.3d 614, 618 (Wash. 2003) (interpreting “may” as permissive only insofar as “there is no mandatory duty to pursue an administrative remedy—a party can simply give up”;

however, if a party desires to pursue the remedy, the term “‘may’ is used to convey that a procedure must be followed if a person wants to achieve what is permitted”).⁸

In its summary judgment ruling (at R. 300-301), the trial court drew an apt comparison between section 10-3-1106 and our rules of appellate procedure, noting that Rule 3(a), like section 10-3-1106, states that if a party desires to appeal a ruling of a district court that they “may” do so. Utah R. App. P. 3(a). It reasoned that the “use of the term ‘may’ certainly does not mean that a litigant can choose some other method of appeal. Rather, it merely indicates that should a litigant desire to appeal, this is the only way in which he or she can do so.” [R. 301.] There is no plausible justification for this Court to read section 10-3-1106 in a different fashion.

iv. Thorpe’s construction impermissibly favors a general statute over a more specific one.

Thorpe next argues that the trial court’s interpretation of section 10-3-1106 conflicts with the Immunity Act, which Thorpe asserts gives him no choice but to file his action in district court. See Thorpe Br. at 23-25 (citing Utah Code § 63-30d-101 (governing the general scope of the Immunity Act)). He tries to get there by asserting

⁸ Similarly, in response to an argument that the term “may appeal” was not mandatory, another court reasoned: “We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealed order. To conclude otherwise, would postpone indefinitely the vitality of administrative orders and frustrate the orderly operations of administrative law.” Pennsylvania Dep’t of Natural Resources v. Wheeling-Pittsburgh Steel Corp., 348 A.2d 765, 767 (Pa. Commw. Ct. 1975).

that when comparing the Immunity Act and section 10-3-1106 the more specific provision should govern.

He is correct that when two statutes appear to cover the same subject matter, the more specific statute governs. See Jensen v. IHC Hosps., Inc., 944 P.2d 327, 336 (Utah 1997) (“A settled rule of statutory construction, which helps us determine legislative intent, provides that ‘a more specific statute governs instead of a more general statute.’”) (quoting De Baritault v. Salt Lake City Corp., 913 P.2d 743, 747 (Utah 1996)). But he is flat wrong in arguing that the more specific statute is the statute setting forth the general scope of the Immunity Act. It is not. The more specific statute is section 10-3-1106 because it squarely addresses what occurred in this case—the termination of a municipal employee. See Utah Code Ann. § 10-3-1106(2)(a) (“If an employee is discharged . . .”). As such, it is the statute that governs. See Taghipour v. Jerez, 2002 UT 74, ¶14, 52 P.3d 1252 (reasoning that the more specific statute is the one “tailored precisely to address” the situation at hand).

Moreover, Thorpe’s argument that the Immunity Act forces him to bring his “wrongful discharge” claim in district court avails him nothing because the City is immune from suit for wrongful discharge. See Broadbent v. Bd. of Educ., 910 P.2d 1274, 1277 (Utah Ct. App. 1996). Thus, his only valid remedy to challenge the grounds for his termination is section 10-3-1106. Of course, Thorpe knows this because section 10-3-1106 is the statute he invoked when he sought and obtained his appeal before the Board. He cannot invoke the protections of section 10-3-1106 to force the City to hold a

hearing on his termination and then claim, after an adverse result, that it has no application. Thorpe cites no authority for the proposition that the administrative appeal in section 10-3-1106 is nothing more than a trial balloon.

v. Thorpe's construction impermissibly renders the statute superfluous.

Finally, Thorpe fails to address a more fundamental problem with his argument: when would section 10-3-1106 ever apply if does not apply in this case? Stripped bare, his argument is nonsensical because to accept it would require acceptance of the proposition that section 10-3-1106 is simply a superfluous and inoperative piece of legislation because a municipal employee can either ignore it altogether or invoke its protections but then ignore it when he loses at the administrative level. That runs afoul of yet another cardinal rule of statutory construction—to avoid interpretations that “render portions of a statute superfluous or inoperative.” Hoyer, 2009 UT 38 at ¶22 (quoting Grappendorf v. Pleasant Grove City, 2007 UT 84, ¶ 9, 173 P.3d 166). See also Taghipour, 2002 UT 74 at ¶16 (in determining which statute to apply the court must consider whether application of the more general would render the other statute superfluous and inoperative).

In sum, Thorpe has offered no justification, grounded in accepted rules of statutory construction (or simple logic), for his contention that he had the right to attack the Board's decision in district court.

3. The trial court's reasoning is consistent with public policy.

There is an additional reason to affirm the district court's interpretation of section 10-3-1106—it is consistent with the policy underlying the statute. As indicated above, by designating only the Court of Appeals as the court with review authority over municipal employee appeal boards, the Legislature deliberately left out our district courts. By leaving out our district courts the Legislature necessarily intended to provide for expeditious review of appeals board decisions without the expense that accompanies time-consuming litigation in district courts. See, e.g., Note, The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes, 63 B.U. L. REV. 765, 795 (1983) (stating that both courts and commentators recognize that review in the court of appeals in the first instance expedites final resolution of a dispute and eliminates needless delay and expense associated with trials at the district court level).⁹

This case underscores the wisdom and policy behind that choice. If Thorpe had his way, instead of defending the Board's decision in this Court on the record made before the Board, with a deferential standard of review, the taxpayers of Washington City would have to incur the expense of fending off a lawsuit from an employee who was

⁹ See also generally Harrison v. PPG Indus., 446 U.S. 578, 593 (1980) ("The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal."); Ruud v. U.S. Dep't of Labor, 347 F.3d 1086, 1090 (9th Cir. 2003) ("[A] district court offers no advantages over a court of appeals with respect to on-the-record review of completed administrative proceedings."); Investment Co. Inst. v. Board of Governors, 551 F.2d 1270, 1276 (D.C. Cir. 1976) (reasoning where administrative record forms the basis for review, review in district court results in "unnecessary delay and expense and undesirable bifurcation of the reviewing function between the district courts and the courts of appeals") (citations omitted).

terminated because he violated the City's drug and alcohol policy, not once, but twice. The taxpayers would have their City officials diverted from handling the City's business and instead bogged down in necessary participation in discovery, depositions, hearings, a jury trial and all the other trappings of litigation in our district courts. And all of this coming on the heels of a six-plus hour public hearing funded by the taxpayers. The law was never designed to require municipalities to deplete the public treasury in order to discharge problem employees.

To the contrary: "[t]he government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." Connick v. Myers, 461 U.S. 138, 151 (1983). The streamlined appeal process in section 10-3-1106 embodies these principles. Public employees receive a public hearing in which they can be represented by counsel and confront the evidence against them. If they don't like the result, they have the right to ask this Court to review and reverse it. And even then, the Legislature created a standard of review deliberately slanted towards the Board's decision, see Utah Code Ann. § 10-3-1106(6)(c) (creating abuse of discretion standard of review), which is yet another recognition that municipalities must have the discretion to make employment decisions. See, e.g., Guenon v. Midvale City, 2010 UT App 51, ¶4 (recognizing that city officials are in the best position to determine appropriateness of disciplinary action and therefore deference must be given to their decisions).

Here, Thorpe disagreed with the result, but in failing to timely file a petition for review of the Board's decision in this Court, he deprived himself of any right to have this Court review and reverse it if the circumstances warranted a reversal.¹⁰

B. Thorpe Cannot Recharacterize his Claims to Circumvent the Constitutional and Statutory Limitation on this Court's Jurisdiction.

Once it is accepted (as it must be) that this Court has exclusive jurisdiction to review decisions of municipal employee appeal boards, it must also be accepted that the trial court was correct in dismissing Thorpe's self-styled "due process" and "breach of contract" claims for lack of jurisdiction because, as the trial court determined after its "examin[ation] of the allegations related to [Thorpe's] wrongful discharge, due process, and breach of contract claims . . . they are all claims that arise out of or relate to the hearing [he] received before the Board." [R. 299.]

Both before the trial court and now on appeal, Thorpe trumpets the labels he has given to his claims, as if the labels control, but never seriously confronts (or attempts to confront) the substance behind the labels. But the pleading labels chosen for a cause of action are not determinative of the jurisdictional question. Rather, a court's obligation is to determine the nature of the action, not the pleading labels chosen. See Jensen v.

¹⁰ We note that Thorpe's view of the evidence before the Board—as outlined in his brief—is different than the City's, and different than the Board's actual factual findings. This is to be expected. Yet, for purposes of summary judgment below and this appeal, those differences are immaterial. The time to argue evidence was on a petition for review of the Board's decision in this Court. For whatever reason, Thorpe chose not to take that route. That choice ended the matter. Indeed, in light of the Board's detailed factual findings, Thorpe would be required to marshal the evidence in order to attack those findings. See Guenon, 2010 UT App 51 at ¶¶4-6.

Sawyers, 2005 UT 81, ¶34, 130 P.3d 325 (“In assessing which of these two statutory provisions applies . . . we pay little heed to the labels placed on a particular claim, favoring instead an evaluation based on the essence and substance of the claim.”); Failor v. Megadyne Med. Products, Inc., 2009 UT App 179, ¶13, 213 P.3d 899 (affirming trial court’s determination of nature of cause of action reasoning that “[a]lthough [p]laintiffs use pleading labels for legal causes of action, the substance of each of these so-called legal claims . . .” was what the trial court said it was). And a litigant may not re-characterize his claims to avoid jurisdictional limitations imposed by statute. See Schwenke v. Smith, 942 P.2d 335, 336-37 (Utah 1997) (rejecting effort to file action in district court by recharacterizing the nature of complaint “in an attempt to avoid” jurisdiction of Utah Supreme Court). As the trial court determined after careful examination of the complaint, the nature of this action is an appeal of the Board’s decision. These are claims that could have (and should have) been brought to this Court on a petition for review of the Board’s decision.

1. “Due process.”

First is Thorpe’s “due process” claim. Here, he alleges a grab bag of complaints about the hearing and the process, including that he was “terminated without regard to proper due process,” that he was denied an “impartial hearing,” that the City did not follow “proper administrative proceedings regarding employment decisions,” that the grounds for his termination were “flawed and inappropriate,” and that his rights to due

process were violated when his supervisor, Mike Shaw, was allowed to testify.¹¹ [R. 13-15.] In other words, the hearing violated his rights to due process.

It is unexceptional in our case law that this Court has jurisdiction to review, on direct appeal, whether an administrative hearing comported with due process. This is illustrated by Becker v. Sunset City, 2009 UT App 197, 216 P.3d 367. There, like here, the city terminated the plaintiff's employment and, pursuant to section 10-3-1106, the plaintiff appealed to the city's employee appeals board. See id. at ¶¶2-3. A hearing before the board was convened at which time the plaintiff advised the board that he had barely received notice of the hearing and did not have time to obtain counsel and prepare his case. See id. at ¶4. The appeal proceeded anyway, and the board affirmed the termination. See id.

Following the requirements of section 10-3-1106, the plaintiff appealed directly to this Court and argued that he was deprived of due process because he was not given adequate notice and opportunity to be heard. See id. at ¶5. In a decision solely devoted to whether the plaintiff received due process, this Court reversed the board's decision and remanded for another hearing, holding that "[b]ecause the hearing proceeded in violation of [the employee's] due process rights, the Board's decision affirming [the employee's] termination is set aside." Id. at ¶11.

¹¹ This last allegation is an odd one. It was Thorpe's supervisor, Mike Shaw, who was involved in the termination decision. The purpose of the hearing is to confront the evidence against him, including cross-examining those individuals who made the termination decision. There is no plausible basis for Thorpe to argue that it was a violation of due process to confront an accuser. This allegation simply underscores the haphazard and disjointed nature of Thorpe's complaint.

Other cases that have gone to this Court on direct review under similar statutes reinforce the scope of this Court’s jurisdiction to review employee appeal board decisions, including whether the hearing violated due process. For example, in Lucas v. Murray City Civil Service Commission, 949 P.2d 746 (Utah Ct. App. 1997), this Court undertook direct review of a city civil service commission decision upholding the termination of a police officer’s employment. See id. at 750. The basis for the Court’s jurisdiction was Utah Code section 10-3-1012.5, see id., which is nearly identical to the statute at issue here—Utah Code section 10-3-1106(6)(c). Compare Utah Code Ann. § 10-3-1012.5 (“The review by Court of Appeals shall be on the record of the commission and shall be for the purpose of determining if the commission has abused its discretion or exceeded its authority.”), with Utah Code Ann. § 10-3-1106(6)(c) (“The Court of Appeals’ review shall be on the record of the appeal board and for the purpose of determining if the appeal board abused its discretion or exceeded its authority.”).¹²

On appeal, this Court addressed, among other things, the city’s alleged failure to comply with its rules and regulations in the course of disciplinary action; evidentiary decisions made at the hearing as impacting the petitioner’s due process rights; and the

¹² The appeal procedure in the civil service commission statute provides:

Any final action or order of the commission may be appealed to the Court of Appeals for review. The notice of appeal must be filed within 30 days of the issuance of the final action or order of the commission. The review by Court of Appeals shall be on the record of the commission and shall be for the purpose of determining if the commission has abused its discretion or exceeded its authority.

proper role of the commission's legal advisor during the course of the proceedings. See id. at 745-758. This Court reversed the commission's decision and ordered reinstatement of the officer, determining, inter alia, that the exclusion of evidence at the hearing violated his right to due process. See id. at 763.

Sorge v. Office of the Attorney General, 2006 UT App 2, 128 P.3d 566, cert. denied, 138 P.3d 589 (Utah 2006) provides yet another example. There, this Court considered due process claims arising from the direct appeal of a decision of the Utah Career Service Review Board. And there, like here, the petitioner claimed the board violated his right to due process because the hearing was not fair; arguing that he was not allowed to call witnesses or present certain evidence at his hearing. See id. at ¶18. This Court reviewed that claim, ultimately holding that the petitioner “has not demonstrated that he was denied a fair hearing before an impartial tribunal.” Id. at ¶21. See also Harmon v. Ogden City Civil Serv. Comm’n, 2007 UT App 336, 171 P.2d 474 (affirming civil service commission's decision on termination of firefighter and considering, as appellate issues, the severity of the sanction and constitutional claims).

Against the weight of this authority, Thorpe offers few arguments—none of which have merit. His principal argument is that the Board “is not equipped to determine issues of constitutional . . . law.” Thorpe Br. at 26. That makes no sense. There was no

constitutional claim until the Board actually held the hearing because the constitutional claims arise out the hearing.¹³

The same goes for Thorpe's feature case, Hatton-Ward v. Salt Lake City, 828 P.2d 1071 (Utah Ct. App. 1992). In that case this Court held that the civil service commission was not empowered to hear whistleblower claims under the WBA. See id. at 1074. That is irrelevant to the question here. Thorpe's self-styled "due process" claims do not arise from nor are they created by a wholly separate statute, as was the case in Hatton-Ward. Rather, Thorpe's claims spring from the very statute—section 10-3-1106—under which the Board and this Court derive their jurisdiction. Hatton-Ward is simply irrelevant to this Court's analysis.

In short, the fact remains that just as this Court reviewed the due process claims in Becker, Lucas, and Sorge, it could have reviewed Thorpe's due process claims here if he had only bothered to petition for that review. It could have reviewed his claim that he was denied an impartial hearing. It could have reviewed his evidentiary claims. It could have reviewed his complaints that the City did not follow proper procedure in terminating his employment. But for whatever reason, Thorpe did not timely petition this Court for review. And this Court cannot save him from his failure to follow the statutory requirements by letting him pursue those claims before the district court. He does not get

¹³ It would be different if Thorpe was actually advancing a constitutional claim in the first instance, such as, for example, the constitutionality of section 10-3-1106. See, e.g., Nebeker v. Utah State Tax Comm'n, 2001 UT 74, ¶¶15-16, 34 P.3d 180 (questions concerning the constitutionality or legality of legislative enactment may be raised by independent action in district court). But that is not Thorpe's claim. His constitutional claim is a challenge to the conduct of the hearing itself.

a mulligan. The trial court was correct in dismissing Thorpe's "due process" claims for lack of jurisdiction. This Court should affirm.

2. "Breach of contract."

For the same reasons, this Court should also affirm the trial court's dismissal of Thorpe's self-styled "breach of contract" claims. Again, we look to the nature of the claims, not the label Thorpe attaches to those claims. His "breach of contract" claim asserts that the City failed to follow procedure outlined in its personnel handbook as it relates to alcohol testing and review. [R. 15-17.] In Thorpe's view, the City should have submitted his positive alcohol test to a medical review officer, which he claims was required by City policy. [R. 16.]

While Thorpe now argues that the Board did not have jurisdiction over this claim, he fails to mention that this was, in fact, one of his primary arguments to the Board for reversing his termination. See R. 104 Admin. R. Tr. 140-151. And, of course, the Board addressed this in its decision, determining that the handbook only required such a review on drug testing, not testing for alcohol, which occurred in Thorpe's case. [R. 297; Admin R. Tr. 183.] In other words, this so-called breach of contract claim is merely a claim that the City failed to follow procedure.

It is the Board's expertise to consider whether the City followed its own policies and procedures in terminating an employee. Thorpe readily agrees with this point, stating in his brief that: "The Appeals Board's expertise is in interpreting policy and in assessing

whether an adverse employment action was warranted.” Thorpe Br. at 26. On this score, he is correct.

As illustrated by this Court’s recent decision in Guenon v. Midvale City, 2010 UT App 51, determining whether termination was an appropriate sanction for the violation of city policy is just the type of matter that municipal appeal boards were established to review and consider under section 10-3-1106. See id. at ¶¶2, 17 (reviewing board’s decision to affirm termination based on employee’s violation of department policy, and affirming on grounds that “[g]iven the serious nature of [petitioner’s] violations of Department policies, termination was an appropriate sanction”).

Here, the City terminated Thorpe’s employment because he showed up to work impaired by alcohol. This violated the City’s zero tolerance drug and alcohol policy. It was his second offense. It was the reason for his discharge. The Board was set up to review and examine the evidence against the employee, *i.e.*, to consider the reasons for discharge. See Utah Code Ann. § 10-3-1106(4). The City’s own procedures, which set up the Board, do nothing to narrow the reach of the Board’s jurisdiction, but confirm that the Board shall “take and receive evidence and fully hear and determine the matter which relates to the action from which the appeal is taken.” Washington City Personnel Rules & Regulations, Section XIX.C.1 (2000). Once again, Thorpe cannot avail himself of this review procedure and then, after getting a bad result, fix a new label to it in an effort to try the case again in district court. Utah law is clear: a litigant may not recharacterize the nature of a complaint to defeat jurisdiction. See Schwenke, 942 P.2d at 336-37.

There are, to be sure, circumstances that could give rise to a claim for breach of an implied employment contract, which would be properly asserted in district court. This fact was not lost on the trial court, as it reasoned: “Plaintiff’s contract arguments, for which he invokes the procedures set forth in the Employee Handbook, really go to the fairness and conduct of the termination hearing process, they are not separate claims arising from other aspects of his employment as in, for instance, Canfield v. Layton City, 2005 UT 60 (Utah 2005).” [R. 299-300.]

The trial court was simply recognizing that in Canfield, the court held that in certain instances an implied employment contract can arise in a municipal setting where “the government voluntarily undertakes an additional duty” beyond its normal obligation to the employee. Canfield v. Layton City, 2005 UT 60, ¶16, 122 P.3d 622. This can include announced personnel policies. See id. at ¶17. However, the Utah Supreme Court more recently clarified that there must, at the very least, be evidence of intent to create an implied employment contract. See Cabaness v. Thomas, 2010 UT 2, ¶57, 647 Utah Adv. Rep. 7. This would include “the language of the manual itself, the employer’s course of conduct, and pertinent oral representations.” Id. (quoting Brehany v. Nordstrom, Inc., 812 P.2d 49, 56 (Utah 1991)).

Here, Thorpe’s complaint is devoid of any allegations that would support an implied employment contract. Rather, it is a series of disjointed and conclusory statements mainly about the fairness of his hearing and the Board’s decision. And, more important to the procedural posture of this case, on summary judgment he was required to

do something more than ask the trial court to take his word for it. Indeed, the City submitted evidence in the form of the administrative record (transcript and documentary evidence), to show that there was no implied employment contract. The burden thus shifted to Thorpe to produce evidence of this alleged contract. See Orvis, 2008 UT 2 at ¶18; Stevens, 2008 UT App 129 at ¶18. He produced nothing.

The bottom line is that—as set forth in detail above—the Board was empowered to consider the merits of his termination. As a result, this Court was empowered to review that decision on a petition for review. Were this Court to hold otherwise it would circumvent the intent of section 10-3-1106 and open the door to creative pleading labels as a way to evade statutory and constitutional limitations on a district court’s jurisdiction. It would allow terminated employees to get two trials—one before the appeals board and another in district court if they do not like the appeal board decision. And all they would have to do is make a bare and conclusory allegation that they have a contract with the municipality. And then, when challenged on summary judgment, they could simply retreat to a conclusion without evidence—“it really is a contract, take our word for it.” The law was never meant to work in such a fashion.

3. “Wrongful discharge.”

In his brief, Thorpe does not argue that the Board did not have jurisdiction over his wrongful discharge claim. Instead, he concedes that if section 10-3-1106 is the exclusive remedy to challenge his termination, then his wrongful discharge claim must be dismissed. See Thorpe. Br. at 25 (“Even if 1106 precludes the district court from hearing

Appellant's wrongful discharge claim, he is entitled to sue in district court on his due process and breach of contract claims."'). Because (as set forth in detail above) it is, we do not address it separately here. But we do note that, as the trial court determined, the "wrongful discharge" claim—however labeled—was nothing more than a challenge to the grounds for his termination and the Board's decision affirming that termination. As such, it founders for the same reasons as the other claims.

4. Thorpe had his day in court.

Thorpe finally argues (at Br. 26) that he is entitled to his day in court. But he has had his day in court. When an administrative hearing is conducted in a trial-type fashion, complete with findings, legal reasoning, evidence, and the opportunity to cross-examine witnesses, it is on level with an actual judicial proceeding. See Kirk v. Div. of Occupational & Prof'l Licensing, 815 P.2d 242, 243-44 (Utah Ct. App. 1991).

In this case, Thorpe received a lengthy public hearing. He was represented by an attorney. His attorney cross-examined and confronted witnesses and the evidence against him. He testified in his own defense. An administrative law judge was employed to advise the Board and rule on evidence. The Board made specific findings of fact and conclusions of law. A lengthy record was made of the proceeding complete with a transcript of the hearing. Thorpe had his day in court. He is not entitled to a do over. See, e.g., Buckner v. Kennard, 2004 UT 78, ¶12, 99 P.3d 842 ("[O]nce a party has had his or her day in court and lost, he or she does not get a second chance to prevail on the same issues.'). This Court should affirm.

III. THORPE HAS MADE NO SHOWING (OR EFFORT TO SHOW) THAT EXISTING LEGAL REMEDIES ARE INADEQUATE.

Lastly, Thorpe appeals the trial court's grant of summary judgment dismissing his unjust enrichment claim. With this claim he asserts that he performed work for the City in March 2004, that the City never paid him for it, and therefore he is owed \$522.56 in wages. [R. 10.]

Unjust enrichment is an equitable remedy. See Knight v. Post, 748 P.2d 1097, 1099 (Utah Ct. App. 1988). As such, recovery for unjust enrichment is not available where there exists an adequate remedy at law. See id. at 1099-1100; Buckner v. Kennard, 2004 UT 78, ¶56, 99 P.3d 842 (stating that "equitable jurisdiction is precluded if the plaintiff has an adequate remedy at law"). See also Lysenko v. Sawaya, 1999 UT App 31, ¶13, 973 P.2d 445 ("The unjust enrichment 'doctrine is designed to provide an equitable remedy [only] where one does not exist at law. In other words, if a legal remedy is available . . . the law will not imply the equitable remedy of unjust enrichment'" (second and third alterations in original) (citation omitted))).

Thus, a plaintiff seeking such a remedy "must affirmatively show a lack of adequate remedy at law on the face of the pleading and from the evidence." See Ockey v. Lehmer, 2008 UT 37, ¶61, n.42, 189 P.3d 51 (citation omitted) (stating that "if a complaint on its face shows that adequate legal remedies exist, equitable remedies are not available"). See also, e.g., Walton v. City of Berkeley, 158 S.W.3d 260, 264 n.3 (Mo. Ct. App. 2005) ("party seeking equitable relief must plead and prove there is no adequate

remedy at law”); Ferguson v. DRG/Colony North, Ltd., 764 S.W.2d 874, 886-87 (Tex. App. 1989) (same).

Thorpe made no effort at all to explain to either the trial court below or this Court on appeal that he has no available legal remedies. There are a myriad of state and federal statutes governing the payment of wages. These are legal remedies, which, if applicable, would bar recovery under the equitable unjust enrichment theory. Indeed, with respect to statutory remedies, in a recent case, the Utah Supreme Court denied an equitable claim for back pay, stating that the County Personnel Management Act provided the plaintiffs with an adequate remedy at law—a grievance process with judicial review. Buckner, 2004 UT 78 at ¶¶56-57 (stating that “[e]quitable jurisdiction is not justifiable simply because a party’s remedy at law failed”). It is Thorpe’s burden to show that these statutes are not applicable.

But Thorpe makes no effort at all to show that these statutory legal remedies are inadequate. Without such a showing, his unjust enrichment claim fails as a matter of law. See, e.g., Cichon v. Exelon Generation Co., No. 02 C 3441, 2002 U.S. Dist. LEXIS 21228, at *8 (N.D. Ill. Nov. 1, 2002) (“Illinois common law does not provide for a retaliatory discharge cause of action where an alternative remedy (specifically that under the FLSA) provides effective deterrence to the complained-of conduct.”); Tombrello v. USX Corp., 763 F. Supp. 541, 544 (N.D. Ala. 1991) (stating that common law claims for “wrongful refusal to pay” were “nothing more than claims for wages [which] must be brought under the Fair Labor Standards Act . . . the exclusive remedy for enforcing these

rights”); Nettles v. Techplan Corp., 704 F. Supp. 95, 100 (D.S.C. 1988) (stating that claims for unpaid overtime and negligent failure to pay overtime were governed by the FLSA).

Instead, Thorpe simply argues about notice pleading standards. But those standards have nothing to do with a summary judgment motion. “A major purpose of summary judgment is to avoid unnecessary trial by allowing the parties to pierce the pleadings to determine whether there is a genuine issue to present to the fact finder.” Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776, 779 (Utah 1984). That purpose was served here because Thorpe made no effort to show that this claim was valid in light of existing law.


Therefore, the trial court correctly dismissed his unjust enrichment claim. This Court should affirm.

CONCLUSION

The trial court should be affirmed.

DATED THIS 19 day of March 2010.

DURHAM JONES & PINEGAR, P.C.

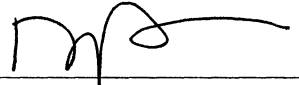


BRYAN V. PATTISON
Attorneys for Washington City

CERTIFICATE OF SERVICE

In accordance with Utah R. App. P. 26(b), I, Bryan J. Pattison, certify that on March 19, 2010, I caused two (2) copies of Appellant's **BRIEF FOR APPELLEE WASHINGTON CITY**, to be served upon counsel for Appellant in this matter, via first class mail with sufficient postage prepaid, to the following address:

Justin D. Heideman
Heideman McKay Hugely & Olson, LLC
2696 North University Avenue, Suite 180
Provo, Utah 84604
Attorneys for Appellant



BRYAN J. PATTISON

Tab 1

DETERMINATIVE STATUTES

67-21-4. Remedies for employee bringing action -- Proof required.

(1) As used in this section, “damages” means damages for injury or loss caused by each violation of this chapter.

(2) An employee who alleges a violation of this chapter may bring a civil action for appropriate injunctive relief or actual damages, or both, within 180 days after the occurrence of the alleged violation of this chapter.

(3) An action begun under this section may be brought in the district court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides or has his principal place of business.

(4) To prevail in an action brought under the authority of this section, the employee shall establish, by a preponderance of the evidence, that the employee has suffered an adverse action because the employee, or a person acting on his behalf engaged or intended to engage in an activity protected under Section 67-21-3.

* * *

10-3-1106. Discharge, suspension without pay, or involuntary transfer -- Appeals -- Board -- Procedure.

(1) An employee to which Section 10-3-1105 applies may not be discharged, suspended without pay, or involuntarily transferred to a position with less remuneration:

(a) because of the employee’s politics or religious belief; or

(b) incident to, or through changes, either in the elective officers, governing body, or heads of departments.

(2) (a) If an employee is discharged, suspended for more than two days without pay, or involuntarily transferred from one position to another with less remuneration for any reason, the employee may, subject to Subsection (2)(b), appeal the discharge, suspension without pay, or involuntary transfer to a board to be known as the appeal board, established under Subsection (7).

(b) If the municipality provides an internal grievance procedure, the employee shall exhaust the employee’s rights under that grievance procedure before appealing to the board.

(3) (a) Each appeal under Subsection (2) shall be taken by filing written notice of the appeal with the municipal recorder within 10 days after:

(i) if the municipality provides an internal grievance procedure, the employee receives notice of the final disposition of the municipality’s internal grievance procedure; or

(ii) if the municipality does not provide an internal grievance procedure, the discharge, suspension, or involuntary transfer.

(b) (i) Upon the filing of an appeal under Subsection (3)(a), the municipal recorder shall forthwith refer a copy of the appeal to the appeal board.

(ii) Upon receipt of the referral from the municipal recorder, the appeal board shall forthwith commence its investigation, take and receive evidence, and fully hear and determine the matter which relates to the cause for the discharge, suspension, or transfer.

(4) An employee who is the subject of the discharge, suspension, or transfer may:

- (a) appear in person and be represented by counsel;
- (b) have a public hearing;
- (c) confront the witness whose testimony is to be considered; and
- (d) examine the evidence to be considered by the appeal board.

(5) (a) (i) Each decision of the appeal board shall be by secret ballot, and shall be certified to the recorder within 15 days from the date the matter is referred to it, except as provided in Subsection (5)(a)(ii).

(ii) For good cause, the board may extend the 15-day period under Subsection (5)(a)(i) to a maximum of 60 days, if the employee and municipality both consent.

(b) If it finds in favor of the employee, the board shall provide that the employee shall receive:

- (i) the employee's salary for the period of time during which the employee is discharged or suspended without pay; or
- (ii) any deficiency in salary for the period during which the employee was transferred to a position of less remuneration.

(6) (a) A final action or order of the appeal board may be reviewed by the Court of Appeals by filing with that court a petition for review.

(b) Each petition under Subsection (6)(a) shall be filed within 30 days after the issuance of the final action or order of the appeal board.

(c) The Court of Appeals' review shall be on the record of the appeal board and for the purpose of determining if the appeal board abused its discretion or exceeded its authority.

(7) (a) The method and manner of choosing the members of the appeal board, the number of members, the designation of their terms of office, and the procedure for conducting an appeal and the standard of review shall be prescribed by the governing body of each municipality by ordinance.

(b) For a municipality operating under a form of government other than a council-mayor form under Chapter 3b, Part 2, Council-Mayor Form of Municipal Government, an ordinance adopted under Subsection (7)(a) may provide that the governing body of the municipality shall serve as the appeal board.

Tab 2

FILED
FIFTH DISTRICT COURT
2009 AUG 19 PM 1:57
WASHINGTON COUNTY

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

JOHN DANIEL THORPE, aka DANNY
THORPE,

Plaintiff,

vs.

WASHINGTON CITY, a municipal
corporation; and UNKNOWN PERSONS 1-
10 individually,

Defendants.

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Case No. 060501436

Judge Eric A. Ludlow

Before the Court is Defendant Washington City's motion for summary judgment. The Court held a hearing on the motion on June 23, 2009. Having reviewed and considered the parties' memoranda and argument, the Court finds and rules as follows:

UNDISPUTED MATERIAL FACTS

Summary judgment is appropriate only when papers on file "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." Utah R. Civ. P. 56(c). For purposes of summary judgment and in accordance with Rule 7, the following facts, as stated in Defendant's initial memorandum, are undisputed:

1. Plaintiff Danny Thorpe is a former Washington City employee, having been employed in the City's Public Works Department.

2. The City terminated Plaintiff's employment, effective March 15, 2004, because he

failed a breath alcohol test that was administered to him.

3. It was the second time Plaintiff had failed such a test while employed by the City.

4. Pursuant to Utah Code section 10-3-1106, Plaintiff was given the right to appeal his termination to the Washington City Employee Board of Appeals (“Board”) and chose to exercise that right of appeal.

5. On April 6, 2005, the City held an administrative hearing before the Board.

6. At the hearing, which lasted over six hours, Plaintiff appeared with his attorney, confronted the evidence against him, and gave testimony concerning his version of events.

7. Ultimately, by a 5-0 vote, the Board affirmed the decision to terminate Plaintiff’s employment.

8. The decision included the following findings of fact and conclusions of law (which were made orally at the conclusion of the hearing by the Board’s legal counsel):

(A) [T]he Washington City policy embodied in the Employee’s Exhibit D in the Personnel Rules & Regulations creates a drug-free policy, meaning that any level of alcohol in breath or blood violates that policy and is grounds for termination.

(B) The board finds that Exhibit 5 clearly establishes that John D. Thorpe received and accepted the Washington City drug-free policy, and that he also agreed that the policy was a condition of his continued employment.

(C) The board finds that based on the testimony of Jody Westover and Chris Bandle¹ that the drug testing process employed by Ms. Westover on March 9, 2004, was reasonable and reliable and showed a breath alcohol level of044 in the first breath test and .036 in the second, or what was referred to as the confirming breath test. The board finds that both these results establish a violation of the Washington City drug-free policy.

¹ Westover performed the drug test on Plaintiff for the City. Bandle is Westover’s supervisor and provided testimony that the manner in which Westover performed the test was correct. (Admin R. Tr. 53-125.)

(D) The board finds that the urinalysis process employed by Ms. Westover was also reasonable and reliable, and the result of .086 established a blood -- .086 blood alcohol established by the urinalysis was also a violation of the Washington City drug-free policy.

(E) The board finds that it is significant that there was no competent evidence or testimony presented that challenged either the urinalysis procedure or the result.

(F) The board further finds . . . significant that the test arranged for by Mr. Thorpe himself later in the morning March 9, 2004, also showed a . . . breath alcohol result of .004, which by itself violates the Washington drug-free policy which is established in Exhibit . . . C.

(G) The board finds based on Exhibit 1 that the evidence clearly establishes that Mr. Thorpe has tested positive for alcohol on the job in 2002.

(H) The board also finds that the policy and procedures manual in Exhibit D clearly distinguishes between drug and alcohol testing procedures and find that there are multiple references to separate drug and alcohol or drug or alcohol and find that the drug and alcohol are separately defined and separate testing procedures clearly are established for both.

(I) They find that the alcohol testing procedure as provided in the policy does not require a referral to a multiple review officer or what was referred to as an MRO. And they – the board specifically finds, based on the evidence, that the Washington City's human resources director decision not to refer the alcohol testing results to an MRO was reasonable under the policy.

(J) The board further finds that the letter of [Mr. Thorpe's] – Employee's Exhibit A that is on letterhead from Judd LaRowe, M.D., was signed by a physician's assistant not the doctor, and that there is nothing in the exhibit nor anything in the competent evidence that connects the liver condition that Mr. Thorpe seems to have and its effect on the accuracy of the alcohol tests.

(K) Finally, the board finds that based on the prior alcohol incident in 2002 and the multiple positive blood and breath alcohol tests on March 9th, 2004, that Washington City's decision to terminate Mr. Thorpe was reasonable under the circumstances and supported by reliable evidence.

(L) Therefore, they affirm unanimously the City's decision and action terminating Mr. John Daniel Thorpe.

9. Plaintiff never appealed the Board's decision to the Utah Court of Appeals.

10. Rather, Plaintiff waited almost a year and a half after the Board's decision and then filed this action in district court.

11. In his complaint, Plaintiff asserts seven causes of action for, as he labels them: (1) unjust enrichment; (2) wrongful discharge; (3) due process violations; (4) breach of contract; (5) violations of the Americans with Disabilities Act; (6) violations of the Utah Protection of Public Employees Act; and (7) for attorney fees under the "Private Attorney General" doctrine.

12. Plaintiff has never filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Indeed, he does not even allege that he has filed a charge with the EEOC.

ANALYSIS

I. THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE BOARD'S DECISION.

Article VIII, section 5 of the Utah Constitution delineates a district court's authority to review directly the decisions of lower tribunals, stating, "The district court shall have appellate jurisdiction as provided by statute." There is no statute that authorizes this Court to review the Board's decision; in fact, Utah Code Ann. § 10-3-1106 specifically lodges jurisdiction over such review elsewhere. It therefore follows that this Court is without jurisdiction to review any claim, however characterized, which arises out of the Board's decision or the hearing before the Board.

In enacting Utah Code Ann. § 10-3-1106, the Legislature deliberately granted jurisdictional authority to review decisions of municipal boards of appeal to the Utah Court of Appeals. *See* Utah Code Ann. § 10-3-1106(6)(a) ("A final action or order of the appeal board may be reviewed by the Court of Appeals by filing with that court a petition for review."). To

obtain review, the employee must file a petition for review in the Utah Court of Appeals within thirty days of the date of the board's final action. *See id.* at (b). There is no comparable section giving jurisdiction to the district court.

In this case, after terminating Plaintiff's employment, the City—at Plaintiff's request—held a lengthy public hearing before the Board pursuant to section 10-3-1106. The Board upheld his termination. Despite the requirements of section 10-3-1106, Plaintiff never appealed the Board's decision to the Court of Appeals. Having thus failed to timely file a petition for review of the Board's decision in the Court of Appeals, Plaintiff has deprived himself of any right to have the Board's decision directly reviewed.

While Plaintiff has not technically characterized his complaint as one seeking review of the Board's decision, labels are not ultimately determinative of the jurisdictional question. "In characterizing a cause of action, Utah courts look to the nature of the action and not the pleading labels chosen." *Failor v. MegaDyne Med. Prods.*, 2009 UT App 179, ¶ 13, quoting *Records v. Briggs*, 887 P.2d 864, 868 (Utah Ct. App. 1994). *See also Jensen v. Sawyers*, 2005 UT 81, ¶ 34, 130 P.3d 325 ("[W]e pay little heed to the labels placed on a particular claim, favoring instead an evaluation based on the essence and substance of the claim").

The Court has examined the allegations related to Plaintiff's wrongful discharge, due process, and breach of contract claims and finds they are all obligations that arise out of or relate to the hearing Plaintiff received before the Board. The wrongful discharge and due process claims amount to an allegation that the Board's decision was incorrect and proper procedures were not followed, in substance this an argument that the "appeal board abused its discretion or exceeded its authority," a claim that should be addressed to the Court of Appeals under § 10-3-

1106(6)(c). Plaintiff's contract arguments, for which he invokes the procedures set forth in the Employee Handbook, really go to the fairness and conduct of the termination hearing process; they are not separate claims arising from other aspects of his employment as in, for instance, *Canfield v. Layton City*, 2005 UT 60 (Utah 2005). It is not this Court's province to frustrate the statutory scheme by allowing Plaintiff an extra avenue of review of the Board's decision.

Plaintiff asserts that an appeal to the Utah Court of Appeals is discretionary because the statute provides that "a final action or order of the appeal board *may* be appealed to the Court of Appeals[.]" Utah Code Ann. § 10-3-1106(6)(a) (emphasis added). Plaintiff interprets the statute to offer an employee who is dissatisfied with a municipal appeal board decision a choice of whether to appeal to the Court of Appeals or to bring an action in district court. The Court does not find this a plausible reading of the statute. The "may" in the statute is permissive only in that it gives a discharged employee the option of appealing the Board's decision— or not. As with other litigants, the employee will not have an appeal forced on him or her.

While the employee may choose whether or not to pursue the appeal, however, he or she cannot choose the court. The statute makes clear that the only place to appeal is in the Utah Court of Appeals. *See* Utah Code Ann. § 10-3-1106(6)(c); *see also Sim v. Washington State Parks & Rec. Comm'n*, 583 P.2d 1193, 1195 (Wash. 1978) (reasoning that "[i]n our view the use of the word 'may' in this statute operates to grant permission to bring the pertinent petition in a certain form" and if a party chooses to do so "the statute provides only one place in which to file it"). Indeed, the rules of appellate procedure themselves are similarly phrased and state that if a litigant desires to appeal a ruling of this Court that he or she "may" do so. Utah Rule of Appellate Procedure 3(a), for instance, provides that: "An appeal *may* be taken from a district or

juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4 ” Utah R. App. P. 3(a) (emphasis added) The use of the term “may” certainly does not mean that a litigant can choose some other method of appeal Rather, it merely indicates that should a litigant desire to appeal, this is the only way in which he or she can do so The Court therefore concludes that there is no genuine issue as to any material fact to preclude entry of summary judgment and Defendant is entitled to judgment as a matter of law on the wrongful discharge, due process, and breach of contract claims

II. PLAINTIFF CONCEDES HIS ADA CLAIM SHOULD BE DISMISSED.

The City argues that this Court lacks jurisdiction over Plaintiff’s discrimination claim under the Americans with Disabilities Act (“ADA”) because Plaintiff failed to timely file a verified charge of discrimination with the EEOC, a jurisdictional prerequisite to court action *See Sizova v Nat’l Inst. of Standards & Tech.*, 282 F.3d 1320, 1325 (10th Cir. 2002) (failure to file an administrative charge with the EEOC is a jurisdictional bar), *Simms v Oklahoma ex rel Dep’t of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999) (a plaintiff may not bring an ADA action based on claims that were not part of a timely filed EEOC charge) Plaintiff did not contest this in his opposition memorandum and, in fact, conceded the point at oral argument Therefore, the Court dismisses Plaintiff’s ADA claim

III. PLAINTIFF’S UNJUST ENRICHMENT CLAIM FAILS TO SHOW THE LACK OF AN ADEQUATE REMEDY AT LAW.

Plaintiff alleges that the City owes him wages for work performed Unjust enrichment is an equitable remedy and, generally speaking, there can be no recovery under such a theory where

there exists an adequate remedy at law. “In general, the law will not imply an equitable remedy when there is an adequate remedy at law.” *UTC O Assocs., Ltd. v. Zimmerman*, 2001 UT App 117, ¶ 19 (Utah Ct. App. 2001), citing *American Towers Owners Ass’n Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1193 (Utah 1996). *See also Lysenko v. Sawaya*, 1999 UT App 31, ¶13, 973 P.2d 445 (“The unjust enrichment ‘doctrine is designed to provide an equitable remedy [only] where one does not exist at law. In other words, if a legal remedy is available ... the law will not imply the equitable remedy of unjust enrichment’” (citation omitted)).

A plaintiff seeking an equitable remedy “must affirmatively show a lack of adequate remedy at law on the face of the pleading and from the evidence, and if a complaint on its face shows that adequate legal remedies exist, equitable remedies are not available,” *Ockey v. Lehmer*, 2008 UT 37 ¶ 44, n.42, quoting 27A Am. Jur. 2d Equity § 21 (2008). Plaintiff’s complaint contains no allegation that his legal remedies are inadequate, nor has he presented an argument demonstrating that the many state and federal statutes regulating wages provide an inadequate remedy. The Court therefore dismisses his unjust enrichment claim.

IV. PLAINTIFF’S WHISTLEBLOWER CLAIMS ARE TIME-BARRED.

Plaintiff’s final cause of action is for violation of the Utah Protection of Public Employees (“Whistleblower”) Act, Utah Code Ann. §§ 67-21-1 to -9. Here, Plaintiff alleges that during a hearing before the Board concerning the termination of a different City employee, Ritch Johnson, Plaintiff provided testimony that certain City officials, including his supervisor, Mike Shaw, were “wasting public funds, property or manpower.” He alleges that the City took adverse employment action against him because of his testimony in violation of the Whistleblower Act.

An employee who alleges a violation under the Whistleblower Act “may bring *a civil*

action for appropriate injunctive relief or actual damages, or both, within 180 days after the occurrence of the alleged violation,” Utah Code Ann § 67-21-4(2)(emphasis added) According to Plaintiff, the alleged violation occurred on the date his appeal was denied by the Board, April 6, 2005 The complaint, however, was not filed until August 1, 2006, more than 180 days after the alleged violation Plaintiff argues that he submitted a notice of claim under the Governmental Immunity Act and that the filing of his notice of claim tolled the statute of limitations in the Whistleblower Act A notice of claim, however, is not *a civil action* The plain language of the Whistleblower Act is not that “a notice of claim” must be filed within 180 day, but that a “civil action” must be brought within 180 days Accordingly, Plaintiff’s whistleblower claims are untimely

Finally, even assuming the claim was timely, Plaintiff admits that he was not terminated for “blowing the whistle” on the City In a deposition, he was directly asked the question by his own attorney and answered in the negative

Q Did your termination – did it have anything to do with testimony that you’d given against Mr Shaw in any proceeding, to your knowledge?

A No

(Plaintiff Dep 89 3-10)

Accordingly, the Court dismisses Plaintiff’s whistleblower claim

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's Motion for Summary Judgment and dismisses Plaintiff's claims.

DATED this 18th day of August, 2009.

A handwritten signature in black ink, appearing to read "Eric A. Ludlow". The signature is fluid and cursive, with the first name "Eric" being more prominent.

JUDGE ERIC A. LUDLOW
FIFTH DISTRICT COURT

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on this 19 day of Aug., 2009, I provided a true and correct copy of the foregoing ORDER to each of the parties/attorneys named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows

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