

2004

Machelle Canfield v. Layton City : Brief of Appellee

Utah Supreme Court

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STATE OF UTAH SUPREME COURT

MACHELLE CANFIELD,

Plaintiff/Appellant,

vs.

LAYTON CITY, a Utah municipality,

Defendant/Appellee.

Supreme Court No. 20040681-SC

Court of Appeals No. 20030212-CA

**UTAH SUPREME COURT
BRIEF**

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**FILED
UTAH APPELLATE COURTS**

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I. STATEMENT OF JURISDICTION

On July 9, 2004, the Court of Appeals filed an unpublished memorandum decision, 2004 UT App 228 (2004 WL 1534204), affirming dismissal of plaintiff/appellant Machelie Canfield's ("Ms. Canfield") appeal from the trial court's ruling granting appellee/defendant Layton City's (the "City") Rule 26(b)(1) Motion to Dismiss for lack of subject matter jurisdiction. Ms. Canfield petitioned this Court for a writ of certiorari, and her petition was granted as to one issue only. Jurisdiction in this Court is pursuant to Utah Code Ann. § 78-2-2(3)(a).

II. ISSUES PRESENTED FOR REVIEW

1. **Issue:** Does Ms. Canfield's Complaint state a sufficient claim for the existence of, and violation of, a contract with the City that is not subject to the immunity and notice and claim provisions of the Utah Governmental Immunity Act, Utah Code Ann. § 63-30-1, *et. seq* (the "Act")?

Standard of Review: "Compliance with the [Governmental] Immunity Act is a prerequisite to vesting a district court with subject matter jurisdiction over claims against governmental entities." *Wheeler v. McPherson*, 2002 UT 16, ¶ 9, 40 P.3d 632 (citations omitted). Whether subject matter jurisdiction exists is a question of law reviewed for correctness. *Beaver County v. Qwest, Inc.*, 2001 UT 81, ¶ 8, 31 P.3d 1147; *Housing Auth. of County of Salt Lake v. Snyder*, 2002 UT 28, ¶ 10, 44 P.3d 724. On certiorari, this Court gives no deference to the Court of Appeals' conclusions of law. *See, e.g., Carrier v. Pro-Tech Restoration*, 944 P.2d 346, 350 (Utah 1997).

Preservation of Issue: Challenges to subject matter jurisdiction may be raised at any time, including on or after appeal. *Hom v. Utah Dep't of Pub. Safety*, 962 P.2d 95, 99 (Utah 1998); *Snyder*, 2002 UT 28, ¶ 11, 44 P.3d 724; *Nielsen v. Gurley*, 888 P.2d 130, 134 (Utah Ct. App. 1994). This issue was preserved in the City's motion to dismiss and supporting memorandum, in Ms. Canfield's opposition to that motion, and in the trial court's Order granting the City's motion. *See* R. 6-8, 9-24, 25-27, 28-52, 53-54.

2. Issue: Do Utah courts lack subject matter jurisdiction over Ms. Canfield's claims due to her failure to exhaust administrative remedies as set forth in applicable City policies and procedures and based on Utah Code Ann. § 10-3-1106?

Standard of Review: Whether a court has subject matter jurisdiction is a question of law. *Beaver County*, 2001 UT 81, ¶ 8, 31 P.3d 1147; *Snyder*, 2002 UT 28, ¶ 10, 44 P.3d 724.

Preservation of Issue: Challenges to subject matter jurisdiction can be raised at any time, including on or after appeal. *Hom*, 962 P.2d at 99; *Snyder*, 2002 UT 28, ¶ 11, 44 P.3d 724; *Nielsen*, 888 P.2d at 134.

3. Issue: Is any appeal in this case rendered futile because this lawsuit is subject to dismissal on grounds of res judicata, inasmuch as substantially the same complaint was previously dismissed by the federal court in *Canfield v. Layton City*, Case No. 1:02CV41 (N.D. Utah), based on Ms. Canfield's failure to comply with the court's order to amend her complaint, which dismissal is an adjudication on the merits pursuant to Fed.R.Civ.P. 41(2)(b)?

Standard of Review: Whether claims are barred by res judicata is a question of law. *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶ 20, 70 P.3d 1.

Preservation of Issue: Ms. Canfield raised the issue of res judicata in her memorandum in opposition to the City's motion to dismiss, by referring to the federal court's dismissal of the same Complaint that was subsequently filed in this lawsuit. *See* R. 28-35, at R. 30-31. Before the City could file a reply, the trial court granted the City's motion. The City also would have raised res judicata as an affirmative defense in its Answer. Regardless, an appellate court can affirm on any grounds, even one not relied upon by the trial court. *Hall v. Utah State Dep't of Corrections*, 2001 UT 34, ¶ 21, 24 P.3d 958 (citations omitted). Documents relied on by the City for its res judicata defense are part of the public record and subject to judicial notice.¹ These public records are included for the Court's convenience in the Addendum to this brief.

III. DETERMINATIVE STATUTES AND RULES

The following rules and statutes are determinative:

Any person having a claim for injury against a governmental entity, or against its employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under the color of authority shall file a written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental.

Utah Code Ann. § 63-30-11(2). (Governmental Immunity Act).

¹A court may take judicial notice of public records and court filings in other cases. Moore's Federal Practice ¶12.34[2]. Such records "[are] not viewed as scrutiny of evidence . . . since facts capable of judicial notice are recorded in sources whose accuracy is not subject to reasonable question." *Id.* ¶56.30[3][c]. Thus, even in Rule 12(b)(6) motions to dismiss, a court may take judicial notice of matters of public records outside the pleadings without converting the 12(b)(6) motion to one for summary judgment. *Id.* ¶ 56.30[4]. *Accord, GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

The governing body of each municipality shall prescribe rules and regulations which are not inconsistent with the laws of this state, as it deems best for the efficient administration, organization, operation, conduct and business of the municipality.

Utah Code Ann. § 10-3-815. (Utah Municipal Code; Rules and Regulations for Administration of Municipality).

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits.

Fed.R.Civ.P. 41(2)(b).

Utah Code Ann. § 10-3-1106 Appeals of Terminations (copy of relevant statute attached in Addendum to this brief as Ex. 14)

IV. STATEMENT OF THE CASE

Ms. Canfield's appeal arises from a lawsuit that she filed in state court on or about November 25, 2002, Case No. 020700620. The history of Ms. Canfield's claims is more extensive, however, and includes a November 18, 2002 dismissal by the United States District Court for the Northern District of Utah, of essentially the same Complaint that she subsequently filed in state court.

A. STATEMENT OF FACTS

The following allegations are taken from Ms. Canfield's Complaint:

Ms. Canfield was employed by Layton City as a police dispatcher for approximately fourteen years prior to her resignation in 2002. R. 1-5. She contends that she resigned her employment on June 2, 2001 because "officers, employees, agents or

servants of [Layton City] confronted [her] with the allegation that [she] had misused sick leave.” R. 9; *see also* R. 21 (Ms. Canfield’s resignation letter). Her Complaint alleges that a new supervisor in the dispatch area where she worked “unfairly and unjustly scrutinized [her] work performance” and her use of sick leave, and that she felt the supervisor’s request that she provide medical documentation of the need for sick leave was “an improper deviation from existing City policy.” R. 2-3. She contends that she resigned because she was confronted with the “ultimatum” of either resigning or facing termination, and because she feared that “a termination would preclude her from gaining future gainful employment.” R. 4.

Ms. Canfield alleges that: (1) other employees “have not been punished as severely as she has, have not been terminated, or not given an ultimatum, but instead, were given employee warnings, probation, and other punishment,” (2) that her alleged punishment, including her alleged termination, “was disproportionate to the acts alleged,” and (3) that she “has been treated differently from and more severely than other employees of Defendant, all in contravention of Defendant’s specific written policy.” R. 4-5. She also alleges that “Defendant’s personnel policy specifically requires that plaintiff be treated fairly and that any punishments or discipline given to her be proportionate to the offense alleged.” Her Complaint asks for “damages in an amount to be proven at trial.” R. 5.

B. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND PRIOR DISPOSITION

1. Federal Lawsuit

On or about March 18, 2002, Ms. Canfield filed an Amended Complaint in the Second Judicial District Court for Davis County. *See Canfield v. Layton City* (Case No.

020800412), attached in Aplee Add., as Ex. 1. The Amended Complaint is word for word identical to the Complaint filed herein, except that the Complaint here has added ¶ 12.² *Compare id. with Aplt Add., Ex. B.*

Layton City removed this initial state lawsuit to federal court and filed an Answer. *See Answer, Case No. 1:02CV00041 (N.D. Utah), attached in Aplee Add., as Ex. 2.* The basis for removal was the City's belief that the Amended Complaint asserted an equal protection claim under 42 U.S.C. § 1983, over which the federal court would have jurisdiction pursuant to 28 U.S.C. § 1331. *See Notice of Removal, Aplee Add., Ex. 3.* Ms. Canfield did not object to removal.

At a subsequent scheduling conference, United States Magistrate Judge Ronald N. Boyce commented that it was unclear what claim Ms. Canfield was asserting. Ms. Canfield's attorney then stated that there was no equal protection claim, and that Ms. Canfield was asserting a "disparate treatment" claim under City policies. *See Def's Mem. Supp. Mot. Req. Am. Compl. (Aug. 26, 2002), Aplee Add., Ex. 4.*

Based on Magistrate Judge Boyce's comment, on August 22, 2002, District Judge Dale Kimball, who was presiding over the federal lawsuit, issued an Order to Show Cause which stated:

²This added ¶ 12 states as follows: "Prior to these incidents, in December, 2000, after being Plaintiff's supervisor for only a few weeks, Lisa Murdock demanded that Plaintiff provide medical documentation of sick leave used at that time. Plaintiff did not provide said documentation, although she had it, because she felt that it was an improper deviation from existing City policy." The City submits that this additional allegation does not materially alter the substance or gravamen of her Complaint here from Ms. Canfield's Amended Complaint in the federal lawsuit.

The above-entitled matter was removed from state court on defendant's contention that plaintiff was asserting a claim under 42 U.S.C. § 1983. The plaintiff did not allege such a claim and at pretrial before the magistrate judge plaintiff's counsel asserted there was no equal protection claim being pursued. Therefore, the case involves only state issues of violation of plaintiff's rights under Layton City's civil service standards.

See Order to Show Cause, Aplee Add., Ex. 5. Judge Kimball ordered the parties to show cause on or before September 28, 2002, why the lawsuit should not be remanded to state court. *See id.*

On August 26, 2002, the City filed a motion to require Ms. Canfield to file an amended complaint that specifically identified any cause of action which she was asserting. *See* Defs' Mot. Req. Am. Compl. (Aug. 26, 2002), Aplee Add., Ex. 6. Ms. Canfield never responded to the City's motion and she did not file any amended complaint clarifying the nature of her claims against the City. Instead, on September 20, 2002, her attorney sent a letter to the City's attorneys providing them with a "more definitive statement as to what my client's claims are." *See* Letter from Brad Smith to Camille N. Johnson, attached as Ex. B to Defs' Resp. to Order to Show Cause, Aplee Add., Ex. 7. Ms. Canfield's counsel's letter states that she is not asserting an equal protection claim, and that her claim "is one for constructive termination on the basis that Layton City failed to follow its own termination policy and deprived Ms. Canfield of her job without due process of law," and states this would "implicate Federal Fourteenth Amendment case law." *Id.*

On September 25, 2002, the City filed a response to the Order to Show Cause, and attached a copy of Mr. Smith's September 20, 2002 letter. *See* Defs' Resp. to Order

to Show Cause, Aplee Add., Ex. 7. The City's response cited to Mr. Smith's attached letter and notified the court that "plaintiff's attorney has identified his client's claim as one for deprivation of due process under the Fourteenth Amendment to the United States Constitution." *See id.*, p. 4. Based on this letter, the City asked the federal court to retain jurisdiction of the lawsuit and to grant the City's motion requiring Ms. Canfield to amend her complaint. *Id.*

Ms. Canfield never filed a response to the federal court's Order to Show Cause, and never responded or objected to the City's statement to the court that Ms. Canfield had informed the City that her claim was a due process claim under the Fourteenth Amendment. Ms. Canfield also failed to respond to the City's motion that she amend her complaint. On October 1, 2002, the federal court granted the City's motion requiring Ms. Canfield to amend her complaint, and ordered her to do so within 30 days. *See Order*, Aplee Add., Ex. 8.

Ms. Canfield did not file a second amended complaint as required by the federal court's October 1, 2002 Order. Accordingly, on November 15, 2003, the City filed a motion to dismiss based on Ms. Canfield's failure to comply with the court's Order. *See Motion to Dismiss & Supp. Mem*, Aplee Add., Ex. 9. On November 18, 2002, Judge Kimball dismissed Ms. Canfield's lawsuit due to her failure to comply with the court's Order. *Order*, Aplee Add., Ex. 10.

2. Subsequent State Lawsuit

On November 25, 2002, one week after Judge Kimball dismissed her federal court lawsuit, Ms. Canfield filed her Complaint in this lawsuit. As discussed above, her

Complaint here was virtually identical to the Amended Complaint that had been dismissed by Judge Kimball.

The City did not answer the Complaint and, on December 23, 2002, filed a Motion to Dismiss under Utah Rule of Civil Procedure 12(b)(1), based on lack of subject matter jurisdiction and grounded in Ms. Canfield's failure to file a Notice of Claim. R. 6-7, 9-24. On January 17, 2003, Ms. Canfield filed a response to the Motion to Dismiss, where she admitted that she had not filed a Notice of Claim ®. 30), and contended that her "complaint alleges a constructive termination and violation of Layton City's written employment rules including rules regarding the proportionality of employee discipline, rules relating to consistency among termination, and related matters" ®. 31). She argued that her Complaint "sounds in contract."³ R. 31. She further contended that her employment with the City had "a reasonable expectation of its continuance" and that "[t]here were various policies and procedures in place for termination and discipline."⁴ R. 32. She cited to the federal lawsuit and incorrectly asserted that the federal lawsuit was dismissed "on the basis that there was no federal jurisdiction." R. 30-31.

When responding to the City's challenge to subject matter jurisdiction, Ms. Canfield did not provide the trial court with a copy of any policies and procedures on

³This assertion is, of course, contrary to Ms. Canfield's attorney's prior representation that his client's complaint claim asserted a Fourteenth Amendment due process claim. *See* Ex. B to Aplee Add., Ex. 7.

⁴Ms. Canfield stated in her response that her "prayer for relief includes a prayer for contract damages with no reference to tort type damages whatsoever." R. 33. In reality, Ms. Canfield's signed and notarized response to the City's interrogatories in the federal lawsuit state that she is seeking "general damages for suffering and humiliation," which are tort damages, not contract damages. *See* Pl.'s Resp. to Def's Interrog. No. 3, attached as Ex. 11 in Aplee Add.

which she relied for her assertion that her claims sounded in “contract,” nor did she cite to specific City policies or procedures which she claims were breached.⁵

The City had no opportunity to file a reply memorandum in support of its Motion to Dismiss because, prior to the due date, the state trial court contacted the City’s attorneys and informed them that the court would grant the City’s Motion. On February 19, 2003, the state trial court filed its Order granting the City’s Motion to Dismiss. R. 53-54. On March 12, 2003, Ms. Canfield filed a notice of appeal ®. 56).

On July 9, 2004, the Court of Appeals filed an unpublished memorandum decision, 2004 UT App 228 (2004 WL 1534204), affirming dismissal of Ms. Canfield’s appeal from the trial court’s ruling granting the City’s Motion to Dismiss for lack of subject matter jurisdiction. She subsequently petitioned this Court for a writ of certiorari. Her petition was granted as to one issue.

V. SUMMARY OF ARGUMENT

This Court should affirm the Court of Appeals’ denial of Ms. Canfield’s appeal for the following reasons.

First, Ms. Canfield’s Complaint fails on its face to identify any contract or contractual obligation with the City, and it also fails to allege a breach of any contract by the City. At best, the Complaint alleges only that Ms. Canfield believes that she was treated unfairly and differently from other employees, in contravention of the City’s policy. R. 2-5. The words “contract” and “breach” never even appear in Ms. Canfield’s

⁵Attaching evidence to a Rule 12(b)(1) motion does not convert the motion into one for summary judgment. *Spoons v. Lewis*, 1999 UT 82, ¶ 5, 987 P.2d 36.

Complaint. The elements of such a claim are simply not pled. There are no allegations in the Complaint regarding (1) the fact that the parties entered into a contract; (2) the terms and conditions of any contract; (3) Ms. Canfield's performance under the any contract; or (4) the City's breach of any contract. Moreover, Ms. Canfield also failed to meet her burden in the trial court to establish facts sufficient to show subject matter jurisdiction, because she failed to provide the trial court with any evidence whatsoever of a contract or any contractual obligation. In light of Ms. Canfield's failure to meet her burden, it was appropriate for the trial court to rule on the City's Motion to Dismiss prior to the City's filing a reply brief.

Second, Ms. Canfield's claims cannot be contractual because they are grounded in statute since they arise out of the Legislature's mandate that municipalities enact rules and regulations as they "deem best" to govern their operations. The City's internal discipline and/or termination grievance procedures fall within this statutory grant. The Utah Court of Appeals also has recognized that public employers promulgate rules and regulations pursuant to statute and not from contract. Moreover, Utah Code Ann. § 10-3-1106 (2002) is the basis for the City's termination appeals procedure.

Third, this Court also lacks subject matter jurisdiction due to Ms. Canfield's failure to exhaust administrative remedies by pursuing a grievance or appeal with the City.

Fourth, this lawsuit is properly dismissed on grounds of res judicata or claim preclusion because not only are the parties and Complaint the same as those in the previous federal lawsuit, but the federal court's dismissal of Ms. Canfield's lawsuit, based

on her failure to comply with the court's order, constitutes a dismissal on the merits under Federal Rule of Civil Procedure 41(b).

VI. ARGUMENT

A. MS. CANFIELD'S COMPLAINT FAILS TO PLEAD A CONTRACT CLAIM.

1. The Complaint Fails On Its Face To State A Sufficient Claim For The Existence Of A Contract With The City, Or The Breach Of A Contract.

Ms. Canfield contends that the trial court erred in dismissing her lawsuit for lack of subject matter jurisdiction because her Complaint "sounds in contract" and she therefore was not subject to the notice requirements of the Governmental Immunity Act ("Act"). This argument is without merit.

"Compliance with the [Governmental] Immunity Act is a prerequisite to vesting a district court with subject matter jurisdiction over claims against governmental entities." *Wheeler*, 2002 UT 16, ¶ 9, 40 P.3d 632 (citations omitted). Since "[s]ubject matter jurisdiction [implicates] the authority of the court to adjudicate the type of controversy presented by the action before it," "[t]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." *Fort Trumbull Conservancy v. City of New London*, 829 A.2d 801, 806 & 806 n.12 (Conn. 2003) (internal citation omitted).

Utah law mandates strict compliance with the requirements of the Act. Utah Code Ann. §§ 63-30-1 to -38. Under the Act, a claim against a political subdivision is barred unless a notice of claim is filed with the governing body of the political subdivision within one year after the claim arises. *Id.* § 63-30-11 and -13; *Stahl v. Utah Transit Auth.*, 618 P.2d 480, 481 (Utah 1980). Compliance with the notice provisions of the Act is a

condition precedent to maintaining suit (*Hall v. Utah State Dep't of Corrections*, 2001 UT, ¶ 23, 24 P.2d 958), and the burden of filing a notice of claim rests entirely with the plaintiff (*Shunk v. State*, 924 P.2d 879, 882 (Utah 1996)). The requirements of the Act must be strictly complied with or dismissal of the action is mandated (*Hall*, 2001 UT 34, ¶ 23, 24 P.3d 958), and failure to comply precisely with notice requirements deprives a court of subject matter jurisdiction (*Greene v. Utah Transit Auth.*, 2001 UT 109, ¶ 16, 24 P.3d 1156).

The purpose of a notice of claim “is to require every claimant to clearly state all of the elements of his claim to the city council” and to “afford the political subdivision an opportunity to investigate the claim while the matter is of recent memory, witnesses are yet available, conditions have not materially changed and to determine if there is liability, and if there is, the extent of it.” *Hall*, 2001 UT 34, ¶ 23, 24 P.3d 958 (citation omitted); *see also Larson v. Park City Mun. Corp.*, 955 P.2d 343, 345-46 (Utah 1998).

Based on these standards, Ms. Canfield's Complaint was properly dismissed for lack of subject matter jurisdiction. First, the Complaint on its face fails to assert a contract. The word “contract” never appears in the Complaint, and the Complaint fails to identify any specific contract or contractual provision. The basis of Ms. Canfield's claim is that she was treated “unfairly” and/or differently from other employees and, at most, the Complaint generally alludes to “City policy” ®. 12), “Defendant's specific written policy” ®. 4), and “personnel policy” ®. 4), but she fails to identify, quote from, or attach the specific policy in question. These general references do not show a contract between Ms. Canfield and the City. This is particularly true since the City's Policy Manual states

that “[t]he policies and statements contained in this manual and in other statements that may be issued from time to time, do not create a contract or agreement of any kind between the City and its employees.” See Layton City Policy Manual, Ex. 12 in Aplee Add.

Second, Ms. Canfield’s Complaint fails to plead the elements of a contract claim. As support for her argument that she has pleaded a contract claim, Ms. Canfield cites *Bair v. Axiom Design*, 2001 UT 20, ¶ 4, 20 P.3d 388, for the following elements of a breach of contract claim: “(1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages.” However, comparison to *Bair* only underscores the deficiencies in Ms. Canfield’s Complaint, since in *Bair* there were **express** written contracts that were executed by the two parties (*Bair*, 2001 UT 20, ¶¶ 2,3,6), and in this case there was no express, written contract that was executed by Ms. Canfield and the City. In addition, since Ms. Canfield admits that she resigned⁶ and does not allege in the Complaint that she was denied access to any grievance procedure, she has not performed under the so-called contract. Furthermore, since she resigned her employment, it is difficult to see how the City could have breached any contract. Finally, regarding alleged damages, Ms. Canfield’s Complaint in this lawsuit is virtually identical to the Complaint removed to the federal court (*compare* Am. Compl., Case No. 020800412 (Ex. 1 to Add. to Aplee. Brf.) to Complaint, Case No. 020700620 (Ex. B to

⁶Based on the allegations in her Complaint, Ms. Canfield was not constructively terminated. “If an employee resigns of her own free will, even as a result of the employer’s actions, the employee will not be held to have been constructively discharged.” *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 858 (10th Cir. 2000) (citation omitted).

Aplt. Brf.), and she admitted to the Court of Appeals that, in response to interrogatories in the federal lawsuit, she requested damages based on tort. *See* Aplt. Reply Brf., p. 3 n.2.

Third, Ms. Canfield's Complaint fails to show any breach or violation of a contract by the City. Ms. Canfield contends that: (1) she resigned because "officers, employees, agents or servants of [Layton City] confronted [her] with the allegation that [she] had misused sick leave" ®. 9), and (2) she resigned when faced with either resigning or termination because she feared that "a termination would preclude her from gaining future gainful employment" ®. 4). These allegations fall far short of the requisite pleadings for alleging a breach of any contractual obligation by the City.

Fourth, in opposing the City's Motion to Dismiss, Ms. Canfield failed to provide the trial court with a copy of (or citation of language from) a "contract," or a personnel policy, and relied solely on argument. This is significant, since it was Ms. Canfield's burden to establish subject matter jurisdiction and she failed to provide evidence to meet that burden. A plaintiff that fails to meet this burden should not be allowed on appeal to complain of the trial court's alleged error.

2. Any Employment Rights Of Ms. Canfield Were Grounded In Statute.

Although Ms. Canfield's explanations of the nature of her claim have varied, her claims could not be contractual because they are grounded in statute. Under Utah law, it is mandatory that municipalities prescribe rules and regulations as they "deem best" to efficiently administer the municipality and its operations:

The governing body of each municipality shall prescribe rules and regulations which are not inconsistent with the laws of this state, as it deems

best for the efficient administration, organization, operation, conduct and business of the municipality.

Utah Code Ann. § 10-3-815. The City has adopted such operational policies, including procedures related to termination and/or discipline of its employees which are consistent with Utah Code Ann. § 10-3-1106. These operational policies accordingly are grounded in statute.

For example, in *Knight v. Salt Lake County*, 2002 UT App. 100, 46 P.3d 247, the trial court ruled there was no contract in a situation where public employees were employed pursuant to the County Personnel Management Act, Utah Code Ann. §§ 17-33-1 to -15. *Id.* at ¶ 4. The Court of Appeals affirmed, finding that any alleged rights were statutory, not contractual. *Id.* at ¶¶ 7-9. In making this ruling, the court in *Knight* commented that “public employees’ employment rights generally spring not from contract, but from legislative policy,” (*Id.* at ¶ 8), and cited as persuasive the following statement by the Kansas Supreme Court which notes the lack of analogy between public and private employees:

“There neither is, nor can be, an analogy of statuses between public employees and private employees, in fact or law, because of the inherent differences in the employment relationship arising out of the unique fact that the public employer was established by and is run for the benefit of all the people and **its authority derives not from contract** nor the profit motive inherent in the principle of free private enterprise, **but from the constitution, statutes, civil service rules, regulations and resolutions.**”

Id. at ¶ 8 n.7 (quoting *Wright v. Kansas Water Office*, 881 P.2d 567, 571 (Kan. 1994)) (emphasis in original).

As additional support for the contract/statute distinction, *Knight* cited *Weese v. Davis County Commission*, 834 P.2d 1, 3 (Utah 1992), as stating that “[t]he county only

has those rights and powers granted it by the Utah Constitution and statutes or those implied as a necessary means to accomplish them.” *Id.* at ¶ 8 n.7.

Ms. Canfield disputes *Knight*’s relevance in this case and, quoting *Knight*, contends that rights can be contractual and not statutory where there is “evidence of an agreement that ‘altered or added to the terms and conditions of public employment.’” *See* Aptl’s Opening Brf., p. 11 (citations omitted). This argument does not assist Ms. Canfield’s contract argument here, however, because she has failed to plead or show an agreement in her case that altered or added to the terms of her employment.

Ms. Canfield also contends that the Court of Appeals in *Knight* improperly relied on *Hom v. Utah Department of Public Safety*, 962 P.2d 95 (Utah 1998), in finding that any alleged rights were statutory. *See* Aptl’s Opening Brf., p. 11. However, Ms. Canfield fails to show how *Hom* is distinguishable from her own situation and, in fact, she concedes that there was nothing to create an implied contract in *Hom* so as to alter the statutory nature of the claim. Ms. Canfield likewise has failed to cite to anything that would alter the statutory nature of her claims.

Moreover, Ms. Canfield’s reliance on *Piacitelli v. Southern Utah State College*, 636 P.2d 1063 (1981), as being “comparable to her case” is misplaced. *See* Aptl’s Opening Brf., p. 13. In *Piacitelli*, there was no contention that the plaintiff’s alleged rights were statutory and not contractual,⁷ and in fact there is no discussion whatsoever of

⁷*Piacitelli* is also distinguishable because the plaintiff was told by the college that he would not receive a contract for the upcoming year, and his objection was that he was not allowed to avail himself of the due process procedures provided in the personnel policy. By contrast, Ms. Canfield admits she resigned, and contends she is not required to exhaust the administrative (due process) procedures provided in the City’s Handbook.

a statutory basis for plaintiff's alleged rights. *Id.* at 1064-65.

In sum, based on these standards and on the grant of authority to municipalities in Utah Code Ann. § 10-3-815, any alleged rights of the City's employees are statutory and not contractual.

3. The Implied Contract Exception To At-Will Employment Is Irrelevant Here.

As support for her contention that her Complaint establishes a contract on its face, Ms. Canfield cites Utah case law addressing the implied contract exception to the general rule of "at-will" employment. *See* Aptl's Opening Brf., pp. 7-8 (citing *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033 (Utah 1989); *Caldwell v. Ford, Bacon & Davis, Utah, Inc.*, 777 P.2d 483, 485 (Utah 1989); *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 56 (Utah 1991)). These cases stand for the proposition that an implied contract may create an exception to the "at-will" rule, thereby requiring that any termination be "for cause."

This argument and the cited case law are inapplicable here. First, all of these cases involve private employees, not public employees. Second, Ms. Canfield does not appear to claim that she was an "at-will" employee. Third, unlike the employees in the cited cases, Ms. Canfield was never terminated; rather, she resigned her employment.

Moreover, Ms. Canfield cannot argue that the City's Policy Manual created some type of implied contract, because the City's Policy Manual expressly states that "[t]he policies and statements contained in this manual and in other statements that may be issued from time to time, do not create a contract or agreement of any kind between the City and its employees." *See* Layton City Policy Manual, Ex. 12 in Aplee Add.

4. An Implied Covenant Of Good Faith And Fair Dealing Is Not Itself A Contract.

There is no merit to Ms. Canfield's contention that her Complaint establishes on its face a breach of the covenant of good faith and fair dealing, and that this is sufficient to show a contract claim. *See* Aptl's Opening Brf., pp. 8-10 (citing as support *Beck v. Farmers Ins. Exch.*, 701 P.2d 795 (Utah 1985); *Dubois v. Grand Central*, 872 P.2d 1073 (Utah Ct. App. 1994); *Cooks v. Zions First Nat'l Bank*, 919 P.2d 56 (Utah Ct. App. 1996)). First, the Complaint does not state on its face the existence of a covenant of good faith and fair dealing. In fact, there is no reference to any such covenant in the Complaint. Moreover, a good faith and fair dealing covenant cannot exist alone, and only exists where there is a contract in which it is grounded. *See Dubois*, 872 P.2d at 1078-79. Inasmuch as Ms. Canfield has failed to allege the existence of any contract, she cannot assert that her Complaint includes a claim for breach of an implied covenant of good faith and fair dealing.

5. No Utah Case Law Supports Ms. Canfield's Position, And The Case Law She Cites From Other Jurisdictions Is Inapplicable.

Ms. Canfield's appeal fails to cite any Utah case law dealing with the Governmental Immunity Act that supports her position because there is no such law. Furthermore, the cases from other jurisdictions cited by Ms. Canfield do not apply here. For example, *Garcia v. Middle Rio Grande Conservancy District*, 918 P.2d 7 (N.M. 1996), involved an employee who was demoted with a reduction in pay, whose lawsuit alleged that he was not provided with notice of the basis for his demotion or given a chance to improve. *Id.* at 730. That is not the situation here. There also is nothing in

Garcia to show whether a notice of claim was required prior to bringing the lawsuit.

Most important, unlike here, *Garcia* was not a case where the plaintiff was required to show that a contract and breach were pled on the face of the complaint.

The second case cited by Ms. Canfield, *Harris v. State Personnel Board.*, 216 Cal. Rptr. 274 (Ct. App. 1985), is also inapplicable. In that case, the employee's claim was a mandamus claim for unpaid back wages. *Id.* at 276. The court noted that the notice of claim requirement did not apply because this was a **mandamus** claim, and like claims for injunctive or declaratory relief, was not subject to that requirement. By contrast, in this case Ms. Canfield has not pled a mandamus or other equitable claim.

C. THE TRIAL AND APPELLATE COURTS LACK SUBJECT MATTER JURISDICTION BECAUSE MS. CANFIELD FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

Ms. Canfield contends in her appellate brief and Complaint that she was constructively terminated. Taking Ms. Canfield's Complaint at face value, this lawsuit should be dismissed for lack of subject matter jurisdiction due to her failure to exhaust administrative remedies.

Utah law makes clear that courts lack subject matter jurisdiction when a plaintiff fails to exhaust administrative procedures or remedies. For example, in *Patterson v. American Fork City*, 2003 UT 7, 67 P.3d. 466, the Court dismissed claims brought by a real estate developer because the developer failed to exhaust administrative remedies under Utah Code Ann. § 10-9-1001(1). *Id.* ¶¶ 14-16. *Patterson* recognized that § 10-9-1001 authorizes municipalities to adopt administrative procedures to govern land use decisions, and that American Fork City had done so in its Development Code. *Id.* ¶ 16.

This Court found that the developer's failure to exhaust these procedures resulted in a lack of subject matter jurisdiction. *Id.* ¶ 17; *see also id.* ¶¶ 18-19 (discussing failure to exhaust remedies).

Likewise, Ms. Canfield has also failed to exhaust administrative remedies. Utah statutory law gives municipalities the authority to prescribe policies and procedures to govern their efficient operation as the municipalities "deem best," so long as the policies and procedures do not conflict with laws of the state. Utah Code Ann. § 10-3-815. The City has done so by establishing procedures for employees to present grievances and object to disciplinary actions, performance evaluations, and termination, including an appeals process. *See Layton City Policies and Procedures*, attached as Ex. 13 to Aplee App. These policies and procedures regarding termination comport with and are based on the procedures and rights set forth in Utah Code Ann. § 10-3-1106, including giving the employee the opportunity to call witnesses and present evidence.

Although Ms. Canfield contends she was constructively terminated and treated differently with regard to the City's policies and procedures, she fails to allege that she has been denied access to a grievance/appeals procedure, and indeed she has not. There is nothing in the record to indicate that Ms. Canfield ever attempted to avail herself of the City's available grievance/appeals procedure and, in fact, it is undisputed that she did not do so. In light of the Legislature's broad grant of authority to municipalities to regulate "operations" as the municipality "deems best," Ms. Canfield was bound to pursue these internal remedies before bringing a lawsuit.

The fact that the exhaustion requirement applies to internal grievance and termination procedures of governmental entities is illustrated in numerous cases. For example, in *Long v. Samson*, 568 N.W.2d 602 (N.D. 1997), the North Dakota Supreme Court affirmed the trial court's dismissal for lack of subject matter jurisdiction of contract and tort claims by a professor who was formerly employed by the University of North Dakota. *Id.* at 606. In affirming, the court agreed with the trial court that the professor had failed to exhaust internal administrative remedies set forth in a Faculty Handbook. *Id.* at 603-604. As justification for the exhaustion requirement, the court pointed to the following language in a prior decision involving a doctor who failed to exhaust administrative remedies at the hospital where she was employed:

“ . . . an exhaustion of remedies requirement serves the salutary function of eliminating or mitigating damages. If an organization is given the opportunity quickly to determine through the operation of its internal procedures that it has committed error, it may be able to minimize, and sometimes eliminate, any monetary injury to the plaintiff by immediately reversing its initial decision and affording the aggrieved party all membership rights; an individual should not be permitted to increase damages by foregoing available internal remedies. . . . Moreover, by insisting upon exhaustion even in these circumstances, courts accord recognition to the ‘expertise’ of the organization’s quasi-judicial tribunal, permitting it to adjudicate the merits of plaintiff’s claim in the first instance. . . . Finally, even if the absence of an internal damage remedy makes ultimate resort to the courts inevitable . . . the prior judicial efficiency will still promote judicial efficiency by unearthing the relevant evidence and by providing a record which the court may review.”

Id. at 605 (citation omitted). This is consistent with other courts which have held that an employee must exhaust internal grievance procedures.⁸

⁸*See, e.g., Bockover v. Perko*, 34 Cal. Rptr.2d 423 (Cal. Ct. App. 1994) (fired employee of public university laboratory must exhaust internal grievance procedure before filing lawsuit); *Aranoff v. Bryan*, 569 A.2d 466, 469-470 (Vt. 1989) (law clerk for

In this case, Ms. Canfield grounds her claims in the City's policies and procedures, but she has failed to allege that she has exhausted the grievance and/or appeals procedures applicable to those policies and procedures. If Ms. Canfield or other Utah public employees are permitted to file lawsuits without first exhausting internal remedies, the judicial system risks inundation with employment-related claims by public employees, which are more properly dealt with in the first instance through internal grievance procedures. In light of this failure by Ms. Canfield to avail herself of the remedies included in the very policies which she now contends amount to a contract, this Court should find that there is a lack of subject matter jurisdiction.

D. MS. CANFIELD'S LAWSUIT IS BARRED ON GROUNDS OF RES JUDICATA.

In *Madsen v. Borthick*, 769 P.2d 245 (Utah 1988), the Utah Supreme Court stated that claim preclusion bars a lawsuit if: (1) the prior and present lawsuit involve the same parties or their privies, (2) the claim alleged to be barred was presented in the first lawsuit or could and should have been raised, and (3) the first lawsuit resulted in a final judgment on the merits. *Id.* at 247; *see also Macris & Assoc., Inc. v. Neways, Inc.*, 2000 UT 93, ¶ 20, 16 P.3d 1214.

In this case, each of the three elements of claim preclusion are satisfied. First, the parties in the prior federal lawsuit are identical to the parties in this lawsuit. Second, it is obvious that the claim presented in the prior federal lawsuit is the same claim presented in

state court must exhaust grievance procedure in judicial branch Personnel Policy before filing lawsuit); *Edgren v. Regents of Univ. of Cal.*, 205 Cal. Rptr. 6 (Cal. Ct. App. 1984) (dismissal of lawsuit appropriate because architect employed by state university failed to exhaust internal grievance policies).

this lawsuit because the underlying complaints in the two lawsuits are virtually identical. Third, the dismissal of the prior federal lawsuit constitutes a final judgment on the merits. Specifically, there was an adjudication on the merits because the federal lawsuit was dismissed based on Ms. Canfield's failure to comply with the federal court's Order. *See, e.g., Henderson v. Consolidated Merch. Corp.*, 286 F. Supp. 697, 698 (N.D. Ga. 1968) (dismissal due to failure to comply with court's order is adjudication on the merits under Fed.R.Civ.P. 41).

The record shows that the federal court dismissed Ms. Canfield's lawsuit because she failed to comply with the court's direct order that she file a second amended complaint to state her claim(s) specifically. Under Federal Rule of Civil Procedure 41, dismissal for failure to comply with a court order operates as an adjudication on the merits.⁹

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits.

Fed.R.Civ.P. 41(2)(b).

Filings in the federal district court show that, after the court issued an Order to Show Cause why the lawsuit should not be dismissed on jurisdictional grounds, Ms.

⁹This Court has noted that Utah Rule of Civil Procedure Rule 41, which is substantially the same as the federal rule, definitively operates as an adjudication on the merits unless a dismissal was for lack of jurisdiction, improper venue, or lack of an indispensable party. *Madsen*, 769 P.2d at 248.

Canfield informed the City's attorneys that her claim was one for due process and implicated the Fourteenth Amendment. *See* IV.B.1, *supra* (discussing federal lawsuit). Ms. Canfield never filed a response to the federal court's Order to Show Cause, never responded or objected when the City submitted to the federal court the letter in which she admitted that her claim was one for due process implicating the Fourteenth Amendment, and never responded or objected when the City informed the federal court that Ms. Canfield had stated that her claim was a due process claim under the Fourteenth Amendment. *See id.*

Significantly, the federal court did not follow through on its Order to Show Cause by dismissing the lawsuit at that time. Instead, the Federal court retained jurisdiction of the lawsuit and, on October 1, 2002, it granted the City's motion requesting that Ms. Canfield be ordered to amend her Complaint, and gave Ms. Canfield thirty days in which to do so.¹⁰ *See* Order, Aplee Add., Ex. 8.

Ms. Canfield did not amend her complaint as required by the federal court's October 1, 2002 Order and, on November 15, 2003, the City filed a motion to dismiss based on her failure to comply with this court order. *See* Aplee Add., Ex. 9. On November 18, 2002, Judge Kimball dismissed Ms. Canfield's lawsuit due to her failure to comply with the court's October 1, 2002 Order. *See* Order, Aplee Add., Ex. 10.

Based on the foregoing, it is clear that Ms. Canfield's lawsuit was dismissed due to her failure to comply with the court's order to file a second amended complaint, and not

¹⁰The federal court's Order was clearly based on the City's response to the Order to Show Cause wherein it had notified the court of Ms. Canfield's admission that she was asserting a claim that implicated the Fourteenth Amendment.

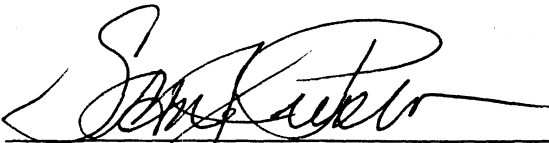
because of lack of subject matter jurisdiction. The federal court's dismissal of Ms. Canfield's prior lawsuit therefore was a dismissal on the merits and, as a result, this lawsuit is barred by claim preclusion under the doctrine of res judicata.

VII. CONCLUSION

For the reasons set forth above, the City respectfully submits that the trial court's dismissal of Ms Canfield's lawsuit should be affirmed.

DATED this 16th day of February, 2005.

SNOW, CHRISTENSEN & MARTINEAU

By: 

Stanley J. Preston
Camille N. Johnson
Judith D. Wolferts
Maralyn M. Reger

Attorneys for Appellee/Defendant Layton City

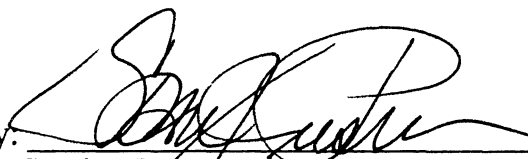
CERTIFICATE OF MAILING

I certify that on this 16th day of February, 2005, I caused two true and correct copies of the **BRIEF OF APPELLEE LAYTON CITY** to be mailed by first class

United States mail, postage pre-paid, to:

Brad C. Smith, Esq.
Stevenson & Smith, P.C.
3986 Washington Boulevard
Ogden, UT 84403

Attorneys for Plaintiff/Appellant

By: 
Stanley J. Preston
Camille N. Johnson
Judith D. Wolferts
Maralyn M. Reger
Attorneys for Appellee/Defendant Layton City

ADDENDUM

ADDENDUM

EXHIBIT 1

Brad C. Smith, NO. 6656
 STEVENSON & SMITH, P.C.
 2605 Washington Blvd., Suite 300
 Ogden, Utah 84401
 Telephone: (801) 394-4573

Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT FOR DAVIS COUNTY
 STATE OF UTAH

MACHELLE CANFIELD,	:	
	:	
Plaintiff,	:	AMENDED COMPLAINT
	:	
vs.	:	Civil No. 020800412
	:	Judge: Glen R. Dawson
LAYTON CITY, a Utah	:	
municipality,	:	
	:	
Defendant.	:	

Comes now Plaintiff, by and through counsel, and complains
 and alleges of Defendant as follows:

PARTIES, JURISDICTION & VENUE

1. Machelles Canfield is a resident of Weber County, State of Utah.
2. Defendant Layton City, is a Utah municipality, located in Davis County, State of Utah.
3. Venue and jurisdiction are proper in the above-entitled court.

2605 Washington Blvd.
 Ogden, Utah 84403
 Telephone (801) 394-4573
 or (801) 394-9910

FACTUAL ALLEGATIONS

4. Plaintiff was employed as a police department dispatcher for Defendant, Layton City. Prior to July 2001, Plaintiff had been employed by Defendant for in excess of thirteen (13) years. During that period of time she was a police dispatcher. Approximately six months prior to the termination of her employment, Plaintiff was placed under the charge of a new supervisor, Lisa Murdock.
5. Ms. Murdock unfairly and unjustly scrutinized the work performance of Plaintiff and created a hostile, tense and stressful environment, in an area that is already stress ridden.
6. On 12 June 2001, Plaintiff left work due to stress and informed Lisa Murdock that she was going to take her daughter to the doctor's office. Plaintiff reported said hours on her time sheet.
7. Due to the stress situation, Plaintiff decided it was best not to go back to work until Lt. Moyes had returned and we could resolve the situation. Plaintiff spoke with Lt. Moyes on Monday morning, June 11th, and he had asked if Plaintiff should be alright until he got back. Plaintiff thought she would.
8. On Tuesday, the 12th, Plaintiff left 4.5 hours early, and that evening she called dispatch to have her shift filled for the next day.

7015 Washington Blvd.
Ogden, Utah 84403
Telephone (801) 394-4573
or (801) 394-9818

9. Lisa called Plaintiff back and said that Plaintiff needed to be at work. Plaintiff went to work at 7:00 a.m. When Plaintiff came in to work later in the morning, Lisa asked if she needed to leave. Plaintiff said if she could skip lunch and go home early it would be better. Lisa said she would see what she could do since she is the lunch relief. Lisa came up several hours later and told Plaintiff to go to lunch. Plaintiff assumed that meant she was not going home early.
10. In the meantime Plaintiff's daughter called on her cell phone and said that her knee and ankle were hurting from the basketball camp that morning. (She has had other ankle injuries).
11. At 2:00 p.m. Lisa came back to dispatch and told Plaintiff she could leave. Plaintiff was surprised. Plaintiff was walking out the door and Lisa said she would need a doctor's excuse for the one hour she was leaving early.
12. Plaintiff is informed and believes, and thereupon alleges, that numerous employees of City have used sick leave in the same manner as Plaintiff but have not been subject to any disciplinary proceeding whatsoever. Accordingly, Plaintiff has been treated differently from and more severely than other employees of Defendant, all in contravention of Defendant's specific written policy.
13. Officers, employees, agents or servants of Defendant

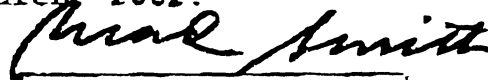
confronted Plaintiff with the allegation that Plaintiff had misused sick leave and gave her an ultimatum that she resign from the City or face termination. Because of her fear that a termination would preclude her from obtaining future gainful employment, Plaintiff and reluctantly and against her will accepted termination.

14. Plaintiff is informed and believes and thereupon alleges that other employees of City have been subject to allegations regarding misuse of sick leave and/or other instances in which they have been accused, rightly or wrongly, of stealing city property, misusing city time or similar allegations.
15. Plaintiff is informed and believes and there upon alleges that said individuals have not been punished as severely as she has, have not been terminated, or not given an ultimatum, but instead, were given employee warnings, probation, and other punishment.
16. Defendant's personnel policy specifically require that Plaintiff be treated fairly and that any punishments or discipline given to her be proportionate to the offense alleged. Defendant's punishment of Plaintiff, including its termination of her, was disproportionate to the acts alleged, even if the acts were taken as true.

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. For damages in an amount to be proven at trial.
2. For reinstatement or other appropriate remedy.
3. For costs of court and attorney's fees as the same may be allowed by law.
4. For such other and further relief as the court deems just and proper.

DATED this 12th day of March, 2002.



Brad C. Smith
Attorney for Plaintiff

Plaintiff's Address:
3552 W. 5000 S.
Roy, Utah 84067

ADDENDUM

EXHIBIT 2

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Telephone: (801) 521-9000

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

MACHELLE CANFIELD,

Plaintiff,

vs.

LAYTON CITY, a Utah municipality,

Defendant.

DEFENDANT LAYTON CITY'S
ANSWER TO AMENDED
COMPLAINT

Case No. _____

Judge _____

Defendant Layton City hereby answers plaintiff's Amended Complaint as follows:

PARTIES, JURISDICTION AND VENUE

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 of the Amended Complaint, and on that basis denies the allegations of paragraph 1 of the Amended Complaint.

2. Defendant admits the allegations of paragraph 2 of the Amended Complaint.

3. The allegations contained in paragraph 3 of the Amended Complaint are legal conclusions consisting of allegations regarding jurisdiction and venue, and require no answer. To the extent paragraph 3 requires an answer, defendant denies each and every allegation.

FACTUAL ALLEGATIONS

4. Defendant admits that plaintiff was employed as a police department dispatcher for Layton City and had held that position for more than 13 years at the time of her resignation. Defendant admits and affirmatively asserts that approximately six months prior to her resignation, plaintiff was placed under the charge of a new supervisor, Lisa Murdock. Defendant denies the remaining allegations of paragraph 4 of the Amended Complaint.

5. Defendant denies the allegations of paragraph 5 of the Amended Complaint.

6. In response to the allegations of paragraph 6 of the Amended Complaint, defendant admits that on June 12, 2001, plaintiff left work early informing her supervisor Lisa Murdock that she was going to take her daughter to the doctor's office. Defendant admits that plaintiff reported 4.5 hours sick leave for June 12, 2001. Defendant denies the remaining allegations of paragraph 6 of the Amended Complaint.

7. In response to the allegations of paragraph 7 of the Amended Complaint, defendant admits that plaintiff spoke with Lt. Moyes on June 11, 2001. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7 of the Amended Complaint concerning plaintiff's thoughts and decision and on that basis denies those allegations. Defendant denies the remaining allegations of paragraph 7 of the Amended Complaint.

8. In response to the allegations of paragraph 8 of the Amended Complaint, defendant admits that plaintiff left her shift early on June 12, 2001 and that she called in sick to

dispatch for the next day. Defendant denies the remaining allegations in paragraph 8 of the Amended Complaint.

9. In response to the allegations of paragraph 9 of the Amended Complaint, defendant admits that Lisa Murdock told plaintiff that she needed to come to work on June 13, 2001. Defendant admits that plaintiff's time sheet reflects that she reported to work at 7:00 a.m. on June 13, 2001. The remaining allegations of paragraph 9 of the Amended Complaint are vague and ambiguous and on that basis defendant denies them.

10. Defendant is without knowledge or information sufficient to form a belief as to plaintiff's cell phone calls, and on that basis denies the allegations of paragraph 10 of the Amended Complaint.

11. In response to the allegations of paragraph 11 of the Amended Complaint, defendant is without knowledge or information sufficient to form a belief as to plaintiff's thoughts and the other allegations are vague and ambiguous, and on that basis defendant denies the allegations of paragraph 11 of the Amended Complaint.

12. As to the allegations of paragraph 12 of the Amended Complaint, defendant admits that employees of Layton City have used sick leave. Defendant denies the remaining allegations of paragraph 12 of the Amended Complaint.

13. In response to the allegations of paragraph 13 of the Amended Complaint, defendant admits that it confronted plaintiff with her violation of Layton City and Police Department Policies and that plaintiff resigned her employment. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning plaintiff's

“fear” and on that basis denies those allegations. Defendant denies the remaining allegations of paragraph 13 of the Amended Complaint.

14. In response to the allegations of paragraph 14 of the Amended Complaint, defendant admits that other City employees have been accused of violating City policy. Defendant denies the remaining allegations of paragraph 14 of the Amended Complaint.

15. Defendant denies the allegations of paragraph 15 of the Amended Complaint.

16. In response to the allegations of paragraph 16 of the Amended Complaint, defendant asserts that its personnel policy speaks for itself and any attempt to characterize it is denied. Defendant denies the remaining allegations of paragraph 16 of the Amended Complaint.

Defendant denies the allegations of that paragraph of the Amended Complaint which begins “WHEREFORE.”

Defendant denies all allegations in the Amended Complaint that relate or are directed to defendant unless those allegations are expressly admitted in the Answer.

AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses to plaintiff's causes of action against defendant in the Amended Complaint, defendant alleges as follows:

First Affirmative Defense

Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

Plaintiff's claims as asserted in the Amended Complaint are barred by the applicable statutes of limitations, including, without limitation, §§ 78-12-23(2), 78-12-25(1) and (3), 78-12-28, 78-12-29 and 78-12-30, *Utah Code Ann.* (1953, as amended).

Third Affirmative Defense

Defendant is immune and/or this action is barred, in whole or in part, by virtue of the Utah Governmental Immunity Act, § 63-30-1 *et seq.*, *Utah Code Ann.* (1953, as amended), including, without limitation, §§ 63-30-3, -4, -5, -10, -11, -13, -15, and -19, and by plaintiff's failure to comply with the provisions of said Act. In any event, defendant's liability is limited by said Act, as provided by, *inter alia*, § 63-30-34, *Utah Code Ann.* (1953, as amended).

Fourth Affirmative Defense

Plaintiff's claims are not actionable as pled.

Fifth Affirmative Defense

Defendant specifically denies violating any federal or state constitutional, statutory, or common law right of the plaintiff.

Sixth Affirmative Defense

Plaintiff's Amended Complaint is unconstitutionally vague, and constitutes a denial of due process.

Seventh Affirmative Defense

Plaintiff has failed to mitigate her damages, if any. Plaintiff is thereby barred in whole or in part from recovering monetary damages from defendant. In addition, or alternatively, any compensation or benefits received by plaintiff after her resignation, including unemployment compensation, must be applied to reduce any damages claimed by plaintiff.

Eighth Affirmative Defense

Plaintiff voluntarily terminated her employment, and is, therefore, estopped and has *waived any right to bring claims or seek damages or other relief from any defendant, including but not limited to reinstatement, back pay, or future pay.*

Ninth Affirmative Defense

Plaintiff waived her rights, if any, to seek damages or other relief from defendant.

Tenth Affirmative Defense

Plaintiff is estopped from asserting any and all causes of action against defendant.

Eleventh Affirmative Defense

Plaintiff is barred under the doctrine of unclean hands from all forms of equitable relief sought in her Amended Complaint.

Twelfth Affirmative Defense

Plaintiff is barred under the doctrine of laches from all forms of relief sought in her Amended Complaint.

Thirteenth Affirmative Defense

Plaintiff has failed to exhaust applicable procedural, administrative, statutory or judicial *remedies otherwise available to her, and this action is therefore barred, in whole or in part.*

Fourteenth Affirmative Defense

All acts or omissions of defendant were undertaken in good faith, without malice, with probable cause, and were fully justified and reasonable under the circumstances.

Fifteenth Affirmative Defense

Plaintiff's actions violated applicable rules, regulations, policies, procedures, and/or standards of behavior. Any actions of defendant were in response to plaintiff's actions and were reasonable and justified under the circumstances.

Sixteenth Affirmative Defense

Plaintiff's punitive damages claim, if any, must be established in accordance with Utah Code Ann. § 78-18-1.

Seventeenth Affirmative Defense

As a matter of law, plaintiff is not entitled to recover punitive or exemplary damages from defendant.

Eighteenth Affirmative Defense

Plaintiff must prove her claim for punitive damages by a unanimous verdict, and the burden of proof is beyond a reasonable doubt.

Nineteenth Affirmative Defense

Plaintiff's punitive damage claims are barred by the prohibition of *ex post facto* laws in Article I, Section 18 of the Utah Constitution, and the Open Courts provision, Article I, Section II of the Utah Constitution.

Twentieth Affirmative Defense

Defendant did not act with actual malice or reckless indifference, and any award of punitive damages is barred.

Twenty-First Affirmative Defense

The punitive damages claims are barred by the United States Constitution and amendments thereto, including: Article I, Section 10[1] (Contracts Clause); Fifth Amendment (Due Process); Eighth Amendment (Cruel and Unusual Punishment; Excessive Fines); and Fourteenth Amendment (Due Process and Equal Protection).

Twenty-Second Affirmative Defense

The punitive damages claims are barred by the Constitution of Utah, including Article I, Section 7 (Due Process), Section 9 (Excessive Fines; Cruel and Unusual Punishment), and Section 12 (Self-Incrimination).

Twenty-Third Affirmative Defense

Pursuant to Utah Code Ann. § 78-27-56, defendant is entitled to recover reasonable attorneys' fees against plaintiff on the grounds that this action, in whole or in part, is brought without merit and has not been brought or asserted in good faith.

Twenty-Fourth Affirmative Defense

Defendant is protected by the doctrines of qualified and good faith immunity both at common and under statutory law.

Twenty-Fifth Affirmative Defense

Plaintiff's recovery, if any, is limited by *Utah Code Ann.*, §§ 63-30-22 and -34.

Twenty-Sixth Affirmative Defense

Plaintiff's damages, if any, were not caused by an official policy or custom of defendant.

Twenty-Seventh Affirmative Defense

Defendant cannot be liable under the doctrine of *respondeat superior*.

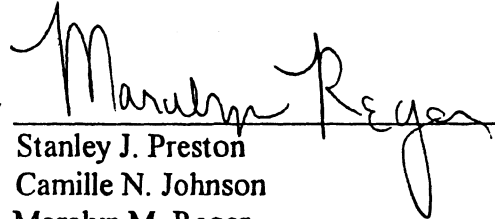
WHEREFORE, defendant prays judgment as follows:

1. That plaintiff take nothing from defendant by way of her Amended Complaint, and that the Amended Complaint against defendant be dismissed, with prejudice;
2. That defendant be awarded its costs of suit, including reasonable attorneys' fees incurred herein; and
3. That this Court award such other and further relief as it may deem just.

DATED this 8th day of April, 2002.

SNOW, CHRISTENSEN & MARTINEAU

By



Stanley J. Preston

Camille N. Johnson

Maralyn M. Reger

Attorneys for Defendant Layton City

ADDENDUM

EXHIBIT 3

STANLEY J. PRESTON (A4119)
CAMILLE N. JOHNSON (A5494)
MARALYN M. REGER (A8468)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant Layton City
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

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

MACHELLE CANFIELD,

Plaintiff,

vs.

LAYTON CITY, a Utah municipality,

Defendant.

**NOTICE OF REMOVAL OF A CIVIL
ACTION FROM STATE COURT TO
FEDERAL COURT**

Case No. _____

Judge _____

Under 28 U.S.C. §§ 1441, 1443 and 1446, defendant Layton City, through its attorneys, hereby gives NOTICE OF REMOVAL of the civil action pending against it in the Second District Court of the County of Davis, State of Utah, to this Court. Layton City alleges as grounds for removal the following:

1. On March 19, 2002, Layton City was served with a Summons and Amended Complaint in the civil action titled Machelle Canfield v. Layton City, a Utah municipality, Civil No. 020800412, which commenced in the Second Judicial District Court in and for the County of Davis, State of Utah.

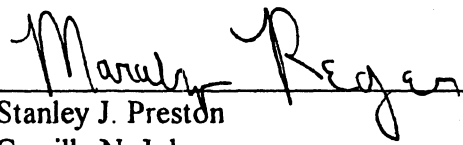
2. The Amended Complaint alleges an equal protection claim under a federal statute, 42 U.S.C. § 1983.

3. This Court has original jurisdiction of the above-entitled action, pursuant to 28 U.S.C. § 1331, and hence, this action may be removed to this Court pursuant to 28 U.S.C. §§ 1441, 1443. Copies of the Summons and Amended Complaint are attached hereto.

WHEREFORE, defendant Layton City hereby submits notice that the above-entitled matter is removed from the Second Judicial District Court in and for the County of Davis, State of Utah, to this Court, in accordance with the provisions of 28 U.S.C. § 1446.

DATED this 8th day of April, 2002.

SNOW, CHRISTENSEN & MARTINEAU

By 
Stanley J. Preston
Camille N. Johnson
Maralyn M. Reger
Attorneys for Defendant Layton City

ADDENDUM

EXHIBIT 4

STANLEY J. PRESTON (A4119)
CAMILLE N. JOHNSON (A5494)
MARALYN M. REGER (A8468)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant Layton City
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Fax No.: (801) 363-0400

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

MACHELLE CANFIELD,

Plaintiff,

vs.

LAYTON CITY, a Utah municipality,

Defendant.

**DEFENDANT'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR AN
ORDER REQUIRING PLAINTIFF TO
FILE A SECOND AMENDED
COMPLAINT THAT STATES
CLEARLY ANY CAUSE OF ACTION
ASSERTED AGAINST LAYTON CITY**

Case No. 1:02-CV-00041 K

Judge Dale A. Kimball

Magistrate Judge Ronald Boyce

Pursuant to the Court's inherent authority, defendant Layton City ("the City") respectfully submits this memorandum in support of its motion for an order requiring plaintiff to file a Second Amended Complaint that states clearly any cause of action asserted against the City.

RELEVANT FACTS

1. On March 18, 2002, plaintiff filed an Amended Complaint in the Second Judicial District Court for Davis County, Bountiful Department, State of Utah.

2. The City received a copy of the Amended Complaint and Summons on March 29, 2002.

3. Based upon the Amended Complaint, the City believed that plaintiff was attempting to assert an Equal Protection claim, pursuant to 42 U.S.C. § 1983. On April 8, 2002, the City removed the action on that basis.

4. On April 12, 2002, plaintiff filed a pleading in this Court, in which plaintiff demanded a trial by jury and acknowledged notice of the case's removal from state court to federal court. Plaintiff did not file an objection to the removal.

5. On May 9, 2002, plaintiff's attorney and the City's attorney met telephonically, pursuant to Federal Rule of Civil Procedure 26(f). Plaintiff's attorney did not object to the removal or assert that there was no basis for removal. An Attorneys' Planning Meeting Report, signed by plaintiff's attorney, was submitted to the Court on May 22, 2002.

6. On July 8, 2002, plaintiff served her initial disclosures. The City served its initial disclosures on July 12, 2002.

7. On July 16, 2002, the City served its first set of interrogatories and document requests on plaintiff. Plaintiff did not file any objections to the City's discovery requests.

8. An initial pretrial conference was held in this matter on August 22, 2002. During the initial pretrial conference, Magistrate Boyce stated that it was unclear from the Amended

Complaint whether plaintiff was asserting an Equal Protection claim. Plaintiff's attorney, in open court, responded that the plaintiff was asserting a "disparate treatment" claim under Layton City policies, not an Equal Protection claim.

9. On August 22, 2002, the parties were ordered to show cause why this case should not be remanded to state court.

ARGUMENT

Federal courts are courts of limited jurisdiction and must, as a threshold matter, determine questions of jurisdiction. *See Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002). Based upon the Amended Complaint plaintiff filed in state court, the City believed that plaintiff was attempting to assert an Equal Protection claim, pursuant to 42 U.S.C. § 1983. The City removed the action on that basis. Months later, after an attorneys' planning report was filed, initial disclosures were made, and discovery requests were served, plaintiff's attorney, in response to a question by Magistrate Boyce at the initial pretrial hearing, stated for the first time that the plaintiff was asserting a "disparate treatment" claim under the City's policies, not an Equal Protection claim. No such actionable claim exists, and use of the phrase "disparate treatment" gives rise to equal protection issues.¹

The Court has now ordered the parties to show cause why the case should not be remanded to state court. However, based on the vagueness of the Amended Complaint, it is unclear what cause of action plaintiff is attempting to assert, and whether she has attempted to

¹The Court's Order to Show Cause references civil service standards; however, Layton City does not have a civil service commission.

state a claim under the United States Constitution or a federal statute. Thus, it cannot be determined, based upon the current state of the pleadings, whether this Court has subject matter jurisdiction over this action.

Accordingly, the City respectfully moves the Court for an order requiring plaintiff to file a Second Amended Complaint that states clearly any cause of action asserted against the City.

DATED this 20th day of August, 2002.

SNOW, CHRISTENSEN & MARTINEAU

By

A handwritten signature in black ink, appearing to be "Stanley J. Preston", written over a horizontal line.

Stanley J. Preston

Camille N. Johnson

Maralyn M. Reger

Attorneys for Defendant

ADDENDUM

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

FILED

22 AUG 02 PM 3:31

DISTRICT OF UTAH

MACHELLE CANFIELD,

Plaintiff(s),

v.

LAYTON CITY,

Defendant(s).

BY: _____
DEPUTY CLERK

Case No. 02-NC-41 DK


ORDER TO SHOW CAUSE

The above entitled matter was removed from state court on defendant's contention that plaintiff was asserting a claim under 42 USC § 1983. The plaintiff did not allege such a claim and at pretrial before the magistrate judge plaintiff's counsel asserted there was no federal equal protection claim being pursued. Therefore, the case involves only state issues of violation of plaintiff's rights under Layton City's civil service standards. Therefore,

IT IS HEREBY ORDERED the parties shall, on or before September 28, 2002 show cause why this case should not be remanded to state court under 28 USC § 1441(c) and § 1447(c).

DATED this 22^d day of August, 2002.

BY THE COURT:


Dale Kimball, Judge
United States District Court

Docketed for: SJP/CNO/MMF
Attorneys
Docketed by: CA
Secretary

8-26-02

ce

United States District Court
for the
District of Utah
August 23, 2002

* * CERTIFICATE OF SERVICE OF CLERK * *

1:02-cv-00041

le and correct copies of the attached were either mailed or faxed by the
rk to the following:

Brad C. Smith, Esq.
STEVENSON & SMITH
3986 WASHINGTON BLVD
OGDEN, UT 84403

Stanley J. Preston, Esq.
SNOW CHRISTENSEN & MARTINEAU
10 EXCHANGE PLACE
PO BOX 45000
SALT LAKE CITY, UT 84145-5000
JFAX 9,3630400

ADDENDUM

EXHIBIT 6

STANLEY J. PRESTON (A4119)
CAMILLE N. JOHNSON (A5494)
MARALYN M. REGER (A8468)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant Layton City
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Fax No.: (801) 363-0400

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

MACHELLE CANFIELD,

Plaintiff,

vs.

LAYTON CITY, a Utah municipality,

Defendant.

**DEFENDANT'S MOTION FOR AN
ORDER REQUIRING PLAINTIFF TO
FILE A SECOND AMENDED
COMPLAINT THAT STATES
CLEARLY ANY CAUSE OF ACTION
ASSERTED AGAINST LAYTON CITY**

Case No. 1:02-CV-00041 K

Judge Dale A. Kimball

Magistrate Judge Ronald Boyce

Pursuant to the Court's inherent authority, defendant Layton City ("the City") respectfully moves the Court for an order requiring plaintiff to file a Second Amended Complaint that states clearly any cause of action asserted against the City.

Based upon the Amended Complaint plaintiff filed in state court, the City believed that plaintiff was attempting to assert an Equal Protection claim, pursuant to 42 U.S.C. § 1983. The

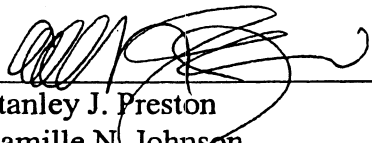
City removed the action on that basis. Months later, after an attorneys' planning report was filed, initial disclosures were made, and discovery requests were served, plaintiff's attorney, in response to a question by Magistrate Boyce at the initial pretrial hearing, stated for the first time that the plaintiff was not asserting an Equal Protection claim. The Court has now ordered the parties to show cause why the case should not be remanded to state court. However, based on the vagueness of the Complaint, it is now unclear what claim plaintiff is asserting and whether this Court has jurisdiction over this matter.

Accordingly, the City respectfully moves the Court for an order requiring the plaintiff to file a Second Amended Complaint that states clearly any cause of action asserted against the City.

DATED this 26th day of August, 2002.

SNOW, CHRISTENSEN & MARTINEAU

By



Stanley J. Preston
Camille N. Johnson
Maralyn M. Reger

Attorneys for Defendant

ADDENDUM

EXHIBIT 7

STANLEY J. PRESTON (A4119)
CAMILLE N. JOHNSON (A5494)
MARALYN M. REGER (A8468)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant Layton City
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Fax No.: (801) 363-0400

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

MACHELLE CANFIELD,

Plaintiff,

vs.

LAYTON CITY, a Utah municipality,

Defendant.

**DEFENDANT'S RESPONSE TO
ORDER TO SHOW CAUSE**

Case No. 1:02-CV-00041 K

Judge Dale A. Kimball

Magistrate Judge Samuel Alba

Defendant Layton City ("the City") respectfully submits this response to the Court's Order to Show Cause why this case should not be remanded to state court.

RELEVANT FACTS

1. On March 18, 2002, plaintiff filed an Amended Complaint in the Second Judicial District Court for Davis County, Bountiful Department, State of Utah. A copy of the Amended

Complaint is attached hereto as Exhibit A. The Amended Complaint does not identify a “cause of action” or “claim for relief.”

2. The City received a copy of the Amended Complaint and Summons on March 29, 2002.

3. Based upon the allegations of the Amended Complaint, the City believed that plaintiff was attempting to assert an Equal Protection claim, pursuant to 42 U.S.C. § 1983. On April 8, 2002, the City removed the action on the grounds that this Court had original jurisdiction pursuant to 28 U.S.C. § 1331.

4. On April 12, 2002, plaintiff filed a pleading in this Court, in which plaintiff demanded a trial by jury and acknowledged notice of the case’s removal from state court to federal court. Plaintiff did not file an objection to the removal.

5. On May 9, 2002, plaintiff’s attorney and the City’s attorney met telephonically, pursuant to Federal Rule of Civil Procedure 26(f). Plaintiff’s attorney did not object to the removal or assert that there was no basis for removal. An Attorneys’ Planning Meeting Report, signed by plaintiff’s attorney, was submitted to the Court on May 22, 2002.

6. On July 8, 2002, plaintiff served her initial disclosures. The City served its initial disclosures on July 12, 2002.

7. On July 16, 2002, the City served its first set of interrogatories and document requests on plaintiff. Plaintiff did not file any objections to the City’s discovery requests.

8. An initial pretrial conference was held in this matter on August 22, 2002. During the initial pretrial conference, Magistrate Boyce stated that it was unclear from the Amended Complaint whether plaintiff was asserting an Equal Protection claim. Plaintiff's attorney, in open court, responded that the plaintiff was asserting a "disparate treatment" claim under Layton City policies, not an Equal Protection claim.

9. In light of plaintiff's attorney's comments, counsel for the City asked, in writing, that plaintiff's attorney identify with specificity the plaintiff's claim.

10. On August 26, 2002, the City filed a Motion for an Order Requiring Plaintiff to File a Second Amended Complaint that States Clearly any Cause of Action Asserted Against Layton City.

11. Plaintiff's attorney has not yet responded to the City's Motion, however he did respond in writing to the City's request that he identify with specificity his client's claim. Mr. Smith's September 20, 2002 letter to counsel for the City provides:

Ms. Canfield's claim is one for constructive termination on the basis that Layton City failed to follow its own termination policy and deprived Ms. Canfield of her job without due process of law.

I suppose as to the deprivation [sic] of due process Federal Fourteenth Amendment case law would be implicated.

See September 20, 2002 letter attached hereto as Exhibit B.

ARGUMENT

Based upon the Amended Complaint plaintiff filed in state court, the City believed that plaintiff was attempting to assert an Equal Protection claim, pursuant to 42 U.S.C. § 1983. The City removed the action on that basis pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). Months later, after an attorneys' planning report was filed, initial disclosures were made, and discovery requests were served, plaintiff's attorney, in response to a question by Magistrate Boyce at the initial pretrial hearing, stated for the first time that the plaintiff was asserting a "disparate treatment" claim under the City's policies, not an Equal Protection claim. No such actionable claim exists, and use of the phrase "disparate treatment" gives rise to equal protection issues.¹ Now, plaintiff's attorney has identified his client's claim as one for deprivation of due process under the Fourteenth Amendment to the United States Constitution. *See* Exhibit B. That being the case, this Court has original jurisdiction of the case under 28 U.S.C. § 1331,² and the case should not be remanded to state court.

The City asks not only that this Court retain jurisdiction of this case, but that it grant the City's Motion for an Order Requiring Plaintiff to File a Second Amended Complaint that States Clearly any Cause of Action Asserted Against Layton City. The vagueness of the Amended

¹The Court's Order to Show Cause references civil service standards; however, Layton City does not have a civil service commission.

²28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Complaint can only be remedied with an amendment which pleads the cause of action plaintiff now purports to assert.

DATED this 25th day of September, 2002.

SNOW, CHRISTENSEN & MARTINEAU

By 

Stanley J. Preston
Camille N. Johnson
Maralyn M. Reger
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT'S RESPONSE TO ORDER TO SHOW CAUSE** (Case No. 1:02CV00041, United States District Court, District of Utah) was served on the parties listed below by first class mail, postage prepaid, this 25th day of September, 2002.

Brad C. Smith
STEVENSON & SMITH
3986 Washington Boulevard
Ogden, Utah 84403
Attorneys for Plaintiff


Cheryl Hunter

EXHIBIT A

Brad C. Smith, NO. 6656
STEVENSON & SMITH, P.C.
2605 Washington Blvd., Suite 300
Ogden, Utah 84401
Telephone: (801) 394-4573

Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT FOR DAVIS COUNTY
STATE OF UTAH

MACHELLE CANFIELD,	:	
Plaintiff,	:	AMENDED COMPLAINT
vs.	:	Civil No. 020800412
LAYTON CITY, a Utah	:	Judge: Glen R. Dawson
municipality,	:	
Defendant.	:	

Comes now Plaintiff, by and through counsel, and complains
and alleges of Defendant as follows:

PARTIES, JURISDICTION & VENUE

1. Machelles Canfield is a resident of Weber County, State of Utah.
2. Defendant Layton City, is a Utah municipality, located in Davis County, State of Utah.
3. Venue and jurisdiction are proper in the above-entitled court.

FACTUAL ALLEGATIONS

4. Plaintiff was employed as a police department dispatcher for Defendant, Layton City. Prior to July 2001, Plaintiff had been employed by Defendant for in excess of thirteen (13) years. During that period of time she was a police dispatcher. Approximately six months prior to the termination of her employment, Plaintiff was placed under the charge of a new supervisor, Lisa Murdock.
5. Ms. Murdock unfairly and unjustly scrutinized the work performance of Plaintiff and created a hostile, tense and stressful environment, in an area that is already stress ridden.
6. On 12 June 2001, Plaintiff left work due to stress and informed Lisa Murdock that she was going to take her daughter to the doctor's office. Plaintiff reported said hours on her time sheet.
7. Due to the stress situation, Plaintiff decided it was best not to go back to work until Lt. Moyes had returned and we could resolve the situation. Plaintiff spoke with Lt. Moyes on Monday morning, June 11th, and he had asked if Plaintiff should be alright until he got back. Plaintiff thought she would.
8. On Tuesday, the 12th, Plaintiff left 4.5 hours early, and that evening she called dispatch to have her shift filled for the next day.

9. Lisa called Plaintiff back and said that Plaintiff needed to be at work. Plaintiff went to work at 7:00 a.m. When Plaintiff came in to work later in the morning, Lisa asked if she needed to leave. Plaintiff said if she could skip lunch and go home early it would be better. Lisa said she would see what she could do since she is the lunch relief. Lisa came up several hours later and told Plaintiff to go to lunch. Plaintiff assumed that meant she was not going home early.
10. In the meantime Plaintiff's daughter called on her cell phone and said that her knee and ankle were hurting from the basketball camp that morning. (She has had other ankle injuries).
11. At 2:00 p.m. Lisa came back to dispatch and told Plaintiff she could leave. Plaintiff was surprised. Plaintiff was walking out the door and Lisa said she would need a doctor's excuse for the one hour she was leaving early.
12. Plaintiff is informed and believes, and thereupon alleges, that numerous employees of City have used sick leave in the same manner as Plaintiff but have not been subject to any disciplinary proceeding whatsoever. Accordingly, Plaintiff has been treated differently from and more severely than other employees of Defendant, all in contravention of Defendant's specific written policy.
13. Officers, employees, agents or servants of Defendant

2000 WASHINGTON BLVD.
DURHAM, N.C. 27603
Telephone: (919) 391-4373
Fax: (919) 391-4310


confronted Plaintiff with the allegation that Plaintiff had misused sick leave and gave her an ultimatum that she resign from the City or face termination. Because of her fear that a termination would preclude her from obtaining future gainful employment, Plaintiff and reluctantly and against her will accepted termination.

14. Plaintiff is informed and believes and thereupon alleges that other employees of City have been subject to allegations regarding misuse of sick leave and/or other instances in which they have been accused, rightly or wrongly, of stealing city property, misusing city time or similar allegations.
15. Plaintiff is informed and believes and there upon alleges that said individuals have not been punished as severely as she has, have not been terminated, or not given an ultimatum, but instead, were given employee warnings, probation, and other punishment.
16. Defendant's personnel policy specifically require that Plaintiff be treated fairly and that any punishments or discipline given to her be proportionate to the offense alleged. Defendant's punishment of Plaintiff, including its termination of her, was disproportionate to the acts alleged, even if the acts were taken as true.

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. For damages in an amount to be proven at trial.
2. For reinstatement or other appropriate remedy.
3. For costs of court and attorney's fees as the same may be allowed by law.
4. For such other and further relief as the court deems just and proper.

DATED this 12th day of March, 2002.



Brad C. Smith
Attorney for Plaintiff

Plaintiff's Address:
3552 W. 5000 S.
Roy, Utah 84067

EXHIBIT B

STEVENSON & SMITH

A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS AT LAW

3986 WASHINGTON BOULEVARD

OGDEN, UTAH 84403

TELEPHONE (801) 399-9910 OR (801) 394-4573

FACSIMILE (801) 399-9954

H. THOMAS STEVENSON*

BRAD C. SMITH

*ADMITTED IN UTAH AND IDAHO

OF COUNSEL:
DAVID S. KUNZ

September 20, 2002

Camille N. Johnson
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145-5000

Re: Machele Canfield v. Layton City

Dear Camille,

You have requested that I provide you with some sort of more definitive statement as to what my client's claims are. I thought this was covered while we were in court. However, I will oblige your request.

Ms. Canfield's claim is one for constructive termination on the basis that Layton City failed to follow its own termination policy and deprived Ms. Canfield of her job without due process of law.

I suppose as to the deprivation of due process Federal Fourteenth Amendment case law would be implicated. However, contrary to the representation you made in your removal notification I have not and have not intended to assert an equal protection claim arising under 42 U.S.C. §1983. At present I am unaware of any facts which would suggest that Ms. Canfield was denied equal protection of the law based on any invidious or forbidden group membership. I am unaware of any evidence that would show that Ms. Canfield was terminated or subjected to a subjective termination as a result of her gender, age, race, religion, handicap, or national origin. Accordingly, I do not believe there is any equal protection claim to be made here and have not intended to make one.

If you have any other questions on this matter please feel free to contact me.

Respectfully,



Brad C. Smith

ADDENDUM

EXHIBIT 8

FILED
CLERK, U.S. DISTRICT COURT

-1 OCT 02 PM 1:56

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION BY: DEPUTY CLERK

MACHIELLE CANFIELD,

Plaintiff,

vs.

LAYTON CITY, a Utah municipality,

Defendant.

Case No. 1:02-CV-41-K

ORDER

This matter is before the Court on Defendant's Motion for An Order Requiring Plaintiff to File a Second Amended Complaint that States Clearly any Cause of Action Asserted Against Layton City. No response having been filed, the motion is **GRANTED**. Plaintiff has thirty days to comply and file an Amended Complaint.

DATED this 1st day of October, 2002.

BY THE COURT:



SAMUEL ALBA
United States Magistrate Judge

asp

United States District Court
for the
District of Utah
October 2, 2002

* * CERTIFICATE OF SERVICE OF CLERK * *

: 1:02-cv-00041

ue and correct copies of the attached were either mailed, faxed or e-mailed
the clerk to the following:

Brad C. Smith, Esq.
STEVENSON & SMITH
3986 WASHINGTON BLVD
OGDEN, UT 84403

Stanley J. Preston, Esq.
SNOW CHRISTENSEN & MARTINEAU
10 EXCHANGE PLACE
PO BOX 45000
SALT LAKE CITY, UT 84145-5000
EFAX 9,3630400

ADDENDUM

EXHIBIT 9

STANLEY J. PRESTON (A4119)
CAMILLE N. JOHNSON (A5494)
MARALYN M. REGER (A8468)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant Layton City
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Fax No.: (801) 363-0400

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

MACHELLE CANFIELD,

Plaintiff,

vs.

LAYTON CITY, a Utah municipality,

Defendant.

MOTION TO DISMISS

Case No. 1:02-CV-00041

Judge Dale A. Kimball

Magistrate Judge Samuel Alba


Defendant Layton City moves to dismiss the captioned case for plaintiff's failure to comply with the Court's October 1, 2002 Order which requires plaintiff to file a Second

Amended Complaint on or before October 31, 2002. The basis for this Motion is set forth with more particularity in the accompanying Memorandum.

DATED this 15th day of November, 2002.

SNOW, CHRISTENSEN & MARTINEAU

By


Stanley J. Preston

Camille N. Johnson

Maralyn M. Reger

Attorneys for Defendant

N:\13607520\Pleadings\Motion to Dismiss.wpd

STANLEY J. PRESTON (A4119)
CAMILLE N. JOHNSON (A5494)
MARALYN M. REGER (A8468)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant Layton City
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Fax No.: (801) 363-0400

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

MACHELLE CANFIELD,

Plaintiff,

vs.

LAYTON CITY, a Utah municipality,

Defendant.

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS**

Case No. 1:02-CV-00041

Judge Dale A. Kimball

Magistrate Judge Samuel Alba

Defendant Layton City submits this memorandum in support of its motion to dismiss the captioned case for plaintiff's failure to comply with this Court's Order.


On October 1, 2002, this Court signed an Order granting Layton City's Motion to Compel and ordering plaintiff to file a Second Amended Complaint that states clearly any cause of action asserted against defendant Layton City. The Court gave plaintiff 30 days in which to comply and file the Second Amended Complaint. See Order attached as Exhibit "A." Plaintiff has failed to

comply with the Court's Order in that she has not filed a Second Amended Complaint. For her failure to comply, this case should be dismissed.

DATED this 15th day of November, 2002.

SNOW, CHRISTENSEN & MARTINEAU

By


Stanley J. Preston

Camille N. Johnson

Maralyn M. Reger

Attorneys for Defendant

NA13607520Pleadings\Memo in Support of Motion to Dismiss.wpd

EXHIBIT A

FILED
CLERK, U.S. DISTRICT COURT

-1 OCT 02 PM 1:56

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION BY: DEPUTY CLERK

MACHIELLE CANFIELD,

Plaintiff,

vs.

LAYTON CITY, a Utah municipality,

Defendant.

Case No. 1:02-CV-41-K

ORDER

This matter is before the Court on Defendant's Motion for An Order Requiring Plaintiff to File a Second Amended Complaint that States Clearly any Cause of Action Asserted Against Layton City. No response having been filed, the motion is **GRANTED**. Plaintiff has thirty days to comply and file an Amended Complaint.

DATED this 1st day of October, 2002.

BY THE COURT:



SAMUEL ALBA

United States Magistrate Judge

asp

United States District Court
for the
District of Utah
October 2, 2002

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 1:02-cv-00041

True and correct copies of the attached were either mailed, faxed or e-mail
by the clerk to the following:

Brad C. Smith, Esq.
STEVENSON & SMITH
3986 WASHINGTON BLVD
OGDEN, UT 84403

Stanley J. Preston, Esq.
SNOW CHRISTENSEN & MARTINEAU
10 EXCHANGE PLACE
PO BOX 45000
SALT LAKE CITY, UT 84145-5000
EFAX 9,3630400

ADDENDUM

EXHIBIT 10

FILED
CLERK OF DISTRICT COURT

18 NOV 02 PM 2:45

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION
BY: _____
DEPUTY CLERK

MACHELLE CANFIELD,

Plaintiff,

vs.

LAYTON CITY,

Defendant.

ORDER

Case No. 1:02CV41K

On October 1, 2002, this court issued an Order requiring Plaintiff, within thirty days, to file a Second Amended Complaint that states clearly any cause of action asserted against Layton City. As of the date of this Order, Plaintiff has not complied with the court's Order.

Based upon Plaintiff's failure to comply, IT IS HEREBY ORDERED that Plaintiff's case is DISMISSED.

DATED this 18th day of November, 2002.

BY THE COURT:


DALE A. KIMBALL

United States District Judge

asp

United States District Court
for the
District of Utah
November 19, 2002

* * CERTIFICATE OF SERVICE OF CLERK * *

1:02-cv-00041

True and correct copies of the attached were either mailed, faxed or e-mailed
the clerk to the following:

Brad C. Smith, Esq.
STEVENSON & SMITH
3986 WASHINGTON BLVD
OGDEN, UT 84403

Stanley J. Preston, Esq.
SNOW CHRISTENSEN & MARTINEAU
10 EXCHANGE PLACE
PO BOX 45000
SALT LAKE CITY, UT 84145-5000
EFAX 9,3630400

ADDENDUM

EXHIBIT 11

Brad C. Smith, NO. 6656
STEVENSON & SMITH, P.C.
3986 Washington Boulevard
Ogden, Utah 84403
Telephone: (801) 394-4573

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
NORTHERN DIVISION, STATE OF UTAH

MACHELLE CANFIELD,	:	
Plaintiff,	:	PLAINTIFF'S ANSWER TO
	:	DEFENDANT'S FIRST SET OF
	:	INTERROGATORIES
vs.	:	
	:	Civil No. 1:02-CV-00041 K
LAYTON CITY, a Utah	:	
municipality,	:	Judge: Dale A. Kimball
	:	
Defendant.	:	

Comes now Plaintiff, by and through counsel, and answers
Plaintiff's First Set of Interrogatories as follows:

Interrogatory No. 1: Identify each person whom you
anticipate that you will call or may call as a witness at the
time of trial of this matter and state the topic or subject
matter upon which each such witnesses will testify, the substance
of the testimony of each witness with respect to each topic or
subject matter, and the identity of all documents which relate to
or concern any such testimony.

Answer to Interrogatory No. 1: Plaintiff has not yet
determined who she will call as witnesses at the time of trial,

3988 WASHINGTON BLVD.
ODEN, UTAH 84403
TELEPHONE (801) 394-4573
or (801) 395-9910

when this determination is made, Plaintiff will supplement this interrogatory. Plaintiff anticipates that her witnesses may include: Debbie Pettijohn, Layton Police Dispatch; Laree Hopkins, Layton Police Dispatch; Debbie Joubert, Layton Police Dispatch; Blake Haycock, Layton Police Officer; Lt. Quinn Moyes, Layton Police; and Lisa Murdock, Layton Police Dispatch. The above named individuals have knowledge of the circumstances of my separation with Layton City, my "Garritty" hearing, my use of sick leave, and my job performance.

Interrogatory No. 2: Identify all documents that you anticipate presenting to a witness or the trier of the fact at the trial of this matter, whether as an exhibit or otherwise.

Answer to Interrogatory No. 2: Machelles Canfield's Leave Time Sheet, Memorandum to Lt. Quinn Moyes from Plaintiff Machelles Canfield, Certificate to return to work or school from IHC Health Center. Plaintiff has not yet determined who she will call as witnesses at the time of trial, when this determination is made, Plaintiff will supplement this interrogatory.

Interrogatory No. 3: Describe with specificity all damages Ms. Canfield claims she has suffered as a result of the actions of the City complained of in her Amended Complaint, and all information concerning any such damages, including, without limitation: the precise nature of the damages suffered, the amount of any such damages, how each damages amount was

calculated or estimated, and identify each person involved in calculating such damages or who otherwise has knowledge of the basis for and method of calculation for such damages and summarize each such person's involvement and/or knowledge.

Answer to Interrogatory No. 3:

Past Wages

2 July 2001 - 9 January 2002
unemployed:

at Layton:

$$17.26/\text{hr.} \times 40 \times (211 \text{ days} / 7) \\ = \$20,810.63$$

15 January 2002 - 5 July 2002
IRS

$$(17.26 - 11.50) \times 40 \times (171 / 7) \\ = \$5,628.34$$

Future Wages

5 July 2002 - 2022

$$(17.26 - 11.50) \times 40 \times 52 \times 20 = \$239,616.00$$

Plaintiff is also entitled to general damages for suffering and humiliation. Plaintiff anticipates claiming an amount equal to front and back pay for general damages.

The following individuals would have knowledge of the basis for and method of calculation for economic damages as they were her superiors and they participated in her performance reviews and have knowledge of her hourly wage, etc.:

Lt. Quinn Moyes, Layton Police Dept., 429 N. Wasatch Dr, Layton
801-546-8300

Chief Terry Keefe, Layton Police Dept., 429 N. Wasatch Dr, Layton
801-546-8300

3986 WASHINGTON BLVD.
OGDEN, UTAH 84403
TELEPHONE (801) 394-4573
OR (801) 399-9910

the nature of the employment sought, identify each person you communicated with, identify all documents that refer or relate to contact with that person or entity, and describe the outcome of your contact with that individual or entity.

Answer to Interrogatory No. 10: See response to Request for Production of Documents No. 13.

Interrogatory No. 11: If you are aware of the existence of any written or recorded statement made by any party or potential witness, identify the person making the statement, the date of the statement, a summary of the contents of the statement, the name, address, telephone number and occupation of the person or persons taking the statement, and the name, address and telephone number of the person now in possession of the original statement.

Answer to Interrogatory No. 11: Plaintiff is aware that her "Garrity" hearing was partially recorded.

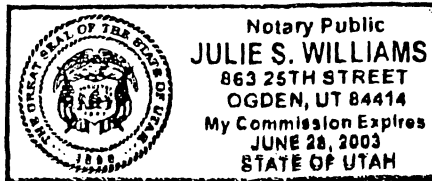
DATED this 5 day of Sept, 2002.

Machelle Canfield
Machelle Canfield
Plaintiff

Plaintiff's Address:
3552 W. 5000 S.
Roy, Utah 84067

STATE OF UTAH)
)
:SS.
COUNTY OF WEBER)

On the 3 day of Sept, 2002, at Ogden, Utah, personally appeared before me Machelie Canfield, the signer of the within instrument, who duly acknowledged to me that she executed the same.



Julie S. Williams
NOTARY PUBLIC
Residing at Ogden, Utah

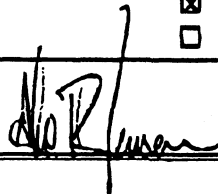
My Commission Expires:

6-28-03

ADDENDUM

EXHIBIT 12

Layton City Policy Manual

[Policy] PERSONNEL POLICY			
[Subject Area]	Personnel	[Effective Date] February 12, 1996	[No.] 3001
[Action] New	<input type="checkbox"/>	[Distribution] City-Wide	<input checked="" type="checkbox"/>
Revision of #	3001	Dept Heads	<input type="checkbox"/>
Previously Effective	6-10-95, 10-24-95	Department	<input type="checkbox"/>
[Type] Administrative Policy	<input type="checkbox"/>	Risk Management	<input type="checkbox"/>
Personnel Policy	<input checked="" type="checkbox"/>	Form	<input type="checkbox"/>
Finance Policy	<input type="checkbox"/>		
[Approval Signature & Title] <div style="text-align: center;">  City Manager </div>			[Pages] 2

Introduction

The following personnel policies (3000 and 4000 series) set forth City policies and procedures for personnel administration, risk management and safety, as well as the conditions of employment with the City and the basis for compensation and benefits.

The information contained in these policies shall be considered official policy of the Layton City Corporation and may be revised from time to time by the City Manager or City Council with or without notice to the employee. The official interpretation of all matters dealt with in this manual shall be the responsibility of the City Manager.

The policies and statements contained in this manual and in other statements that may be issued from time to time, do not create a contract or agreement of any kind between the City and its employees. Although they reflect current policy, they may, at any time and for any reason, with or without notice to employees, be changed or rescinded.

Department Directors may, with the approval of the City Manager, establish additional policies and procedures as they deem necessary for the efficient and orderly administration and supervision of their departments, provided that they do not conflict with policies and procedures established in this manual.

Philosophy of Service

The purpose of the City is to provide those services which the City Council deems necessary and desirable for the general health, safety, and welfare of the citizens of Layton. Essentially, all that each City employee does should be for the public benefit and advantage of the people residing within the corporate limits of Layton City, thus promoting their greater prosperity and general welfare.

Specifically, the purpose of each department of the City is to provide the highest possible level of service at the most reasonable cost to the citizens.

Employment Philosophy

The quality of the services provided by the City is dependent upon the individual initiative and responsibility of its employees. Successful employees are self-motivated, perceptive, problem-solvers, service-oriented, have an eye for detail, and follow a job through to its completion in a professional manner.

Most work in the City is accomplished on a team basis. A productive and successful employee is expected to be able to work with others in a cooperative manner to accomplish the purpose of the City. The unifying force of team action is communication. To this end, pertinent job-related information must be shared and communicated with all others in the City who have an interest or concern in the outcome of any job or endeavor.

The City, therefore, seeks to attract and retain the most highly qualified and competent employees who exhibit the qualities and characteristics consistent with the job to be performed.

Enforcement of Policies and Procedures

The Department Director should enforce the City's Personnel Policies and Procedures and implement all procedures necessary to carry out the responsibilities of their respective departments consistent with these policies. The Department Director should notify all departmental employees of these policies and any amendments.

Personnel Administration

The administration of all personnel matters, except those specifically reserved by the City Council, are the responsibility of the City Manager. The City Manager may delegate these responsibilities to the Assistant City Manager. The City Manager or Assistant City Manager, as authorized, shall administer the personnel system provided by this personnel policy pursuant to approved rules and regulations and applicable law.

ADDENDUM

EXHIBIT 13

Layton City Policy Manual

[Policy] APPEALS/GRIEVANCE PROCEDURES			
[Subject Area] Personnel		[Effective Date] February 12, 1996	[No.] 3802
[Action] New Revision of # P-90-2, 3401, 3802 Previously Effective 3-19-90, 9-1-93, 4-5-94, 12-05-95		[Distribution] City-Wide <input checked="" type="checkbox"/> Dept Heads <input type="checkbox"/> Department <input type="checkbox"/>	
[Type] Administrative Policy <input type="checkbox"/> Personnel Policy <input checked="" type="checkbox"/> Finance Policy <input type="checkbox"/>		Risk Management <input type="checkbox"/> Form <input type="checkbox"/>	
[Approval Signature & Title] City Manager			[Pages] 5

Appeals/Greivances Not Involving Termination or Transfer Discipline

If a Layton City employee wishes to appeal a performance evaluation, disciplinary action, or register a grievance, the supervisor should instruct the employee in the following procedures:

1. A written notification of appeal must be filed with the Department Director within 5 working days of the interview for the performance evaluation, disciplinary action or grievance, except as described in Paragraph 7.

In cases involving the appeal of a performance evaluation, this notification should state the specific reason(s) why the appraisal is being appealed.

2. The Department Director will meet with the supervisor and with the employee separately to discuss the appeal and obtain relevant information.
3. The Department Director will then determine if the appeal has merit.
4. If the Department Director determines that the appeal does have merit, a meeting will be held with the employee, the supervisor, the Department Director, and the Personnel Department to discuss an appropriate resolution to the situation.
5. If the Department Director determines that the appeal does not have merit, the employee will be informed, in writing, of the Department Director's decision. Written notification of denial of an appeal will be made within fifteen working days from the time the original written appeal was filed.

6. If the employee wishes to pursue the appeal further, the employee may file a written notice of appeal with the City Manager within five working days from the time he received notice that the original appeal was officially denied. The City Manager will then review the facts of the situation, interview the involved parties, and make a written determination regarding the appeal within fifteen working days.
7. If an employee's supervisor is a Department Director, the written appeal may be filed directly with the City Manager within five working days of the interview for the performance evaluation, disciplinary action or grievance. The Department Director will then be notified of the appeal and the City Manager will handle the appeal process in place of the Department Director, as outlined in Numbers 2 through 5 above. The City Manager's decision on an appeal will be final.

Appeals of Termination or Transfer to a Position of Less Remuneration

(See chapter 2.55 of the Layton City Municipal Code)

Right of Appeal

No appointive officer or employee covered by Section 10-3-1105 U.C.A. shall be discharged or transferred to a position with less remuneration because of his or her politics or religious beliefs, or incident to, or through changes, either in the elective officers, governing body or heads of departments. In all cases where an appointive officer or regular full time employee, other than the City Manager and heads of departments, is discharged or transferred to a position with less remuneration for any reason, the officer or regular full time employee shall have the right to appeal such discharge or transfer in accordance with this chapter.

Appeal Procedure

All administrative appeals shall be processed according to the following procedure:

- (1) The appeal shall be taken by filing a written notice of such appeal with the personnel director within ten days after discharge or transfer. Upon filing of such appeal, the personnel director shall forthwith refer a copy of the same to said appeal board. Upon receipt of the referral from the personnel director, 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 such discharge or transfer.
- (2) The officer or employee shall be entitled to appear in person and to be represented by counsel, to have a public hearing, to confront any witness whose testimony is to be considered, to call witnesses, and to examine the evidence to be considered by the appeal board.

- (3) In the event the appeal board upholds the discharge or transfer, the officer or employee may have fourteen days thereafter to appeal to the City Manager whose decision shall be final.
- (4) In the event the appeal board does not uphold the discharge or transfer, then the supervisor or department head may have fourteen days thereafter to appeal to the governing body of the city whose decision shall be final after hearing the evidence in the same manner as provided for in the appeal to the appeal board.

Appeal Board

There is hereby created an appeal board to consist of five members, two of whom shall be members of the governing body and three of whom shall be chosen by and from the appointive officers and employees of the city.

Selection of Board Members

The city recorder will give notice that applications and nominations are being accepted for the appeal board. Any officer or employee may apply or may nominate another officer or employee. The city recorder shall establish a reasonable notice procedure and time period for this process. All people nominated will be notified and given an opportunity to accept the nomination or withdraw their name from consideration. At the end of the application/nomination period the city recorder shall forward all remaining names to the City Manager. The members of the appeal board shall be selected through an election which shall be conducted by the city recorder and which allows all appointive officers and regular full time employees of the city an opportunity to cast a vote. In addition to the three appointive officers and regular full time employees elected to the board, alternate members shall also be elected to serve on the board in the event of an absence or if a conflict of interest should arise involving another board member.

Election of Board Members

The City Manager shall present the names of five officers or employees to be considered by the general body of employees of Layton City to sit on the appeal board. These names shall be given to the city recorder. After receiving the names, the city recorder shall then prepare a ballot for the election of said appeal board members. Votes shall be cast, either yes or no, in favor of each individual nominee by the city employees. If all are affirmed the City Manager will determine which members are to be the alternates. If any are not affirmed, by receiving yes votes totaling less than 50% of the votes cast, the City Manager shall present an additional name or names, in a number equivalent to those not affirmed, for a second election process. The two board members to be chosen from the governing body shall be appointed by the mayor.

Conflict of Interest

No member of the appeal board shall hear an appeal from the department in which the member is employed or administers. Nor shall a member hear an appeal in which the member is related to the appealing employee through blood or marriage. For purposes of this section, related persons shall include and be limited to: father, mother, husband, wife, son, daughter, sister, brother, uncle, aunt, nephew, niece, first cousin, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law.

Vacancy on the Board

If a vacancy occurs on the board the member shall be replaced by the first alternate board member in the case of an appointed officer or employee. The City Manager shall then present a name for the election process. This newest member then becomes the second alternate.

In the case of a vacancy by a member of the governing body, the mayor shall appoint a replacement for the remainder of the term.

No Compensation for Board Members

Members of the appeal board shall receive no compensation for services.

Quorum

Three or more members of the appeals board shall constitute a quorum sufficient to hear appeals.

Board Decisions

The decision of the appeal board shall be by secret ballot, and shall be certified to the personnel director within fifteen days from the date the matter is referred to it. The board may, in its decision, provide that an employee shall receive his/her salary for the period of time during which he is discharged, or any deficiency in salary for the period he was transferred to a position of less remuneration but not to exceed a fifteen day period. In no case shall the appointive officer or employee be discharged or transferred, where an appeal is taken, except upon a concurrence of the City Manager.

Counting Board Ballots

After balloting, the decision shall be counted, and revealed in the presence of the same members that voted. A simple majority of quorum voting will determine the decision. A member may not abstain from voting. The voting shall be limited to upholding or reversing the decision before the board on appeal.

Board Reverses Decision and Employee Salary

In the event that the appeal board does not uphold the discharge or transfer to a position of less remuneration, the recorder shall certify the decision to the employee affected, and also to the head of the department from whose order the appeal was taken. The employee shall be paid his salary, commencing with the next working day following the certification by the recorder of the appeal boards decision, provided that the employee, or officer concerned, reports for his assigned duties during that next working day.

ADDENDUM

EXHIBIT 14

10-3-1105. Appointive officers and employees — Duration and termination of term of office.

All appointive officers and employees of municipalities, other than members of the police departments, fire departments, heads of departments, and superintendents, shall hold their employment without limitation of time, being subject to discharge or dismissal only as hereinafter provided.

History: C. 1953, 10-3-1105, enacted by L. 1977, ch. 48, § 3.

NOTES TO DECISIONS

ANALYSIS

Construction.

De facto officer.

Duration of term.

Removal.

— Council to concur.

— Right to appeal.

— Who holds power.

— Without cause.

Construction.

The language "as hereinafter provided" in this section specifically refers to the sections that follow. Therefore, "any officer" in § 10-3-1106 must mean any officer not excluded in this section. *Ward v. Richfield City*, 776 P.2d 93 (Utah Ct. App. 1989), *aff'd*, 798 P.2d 757 (Utah 1990).

De facto officer.

Where the person in possession of a city office is at most only a de facto officer, he is subject to removal at any time and is not in a position to complain of the city council's action abolishing office. *McAllister v. Swan*, 16 Utah 1, 50 P. 812 (1897).

Duration of term.

City marshal's term will not in any event last beyond the next municipal election even though no successor be appointed. *Taylor v. Gunderson*, 107 Utah 437, 154 P.2d 653 (1944).

Removal.

— Council to concur.

The consent of a majority of the council is necessary for removal of officer. *State ex rel. Breeden v. Sheets*, 26 Utah 105, 72 P. 334 (1903).

Assuming that the city marshal was rightfully holding office, the attempt by the mayor to remove him without the concurrence of the council was wholly ineffectual. *Henriod v. Church*, 52 Utah 134, 172 P. 701 (1918).

— Right to appeal.

The legislature intended specifically to exclude a chief of police, and hence "head" of a police "department," from the appeal provisions of § 10-3-1106. *Ward v. Richfield City*, 798 P.2d 757 (Utah 1990).

— Who holds power.

When this section is read in connection with former § 10-6-30 (see present § 10-3-916), it will be seen that the same authorities who have the power of appointment, the mayor and city council, have the power of removal. *Taylor v. Gunderson*, 107 Utah 437, 154 P.2d 653 (1944).

— Without cause.

It is the legislative intent that a city marshal in cities of the third class may be removed without cause. *Taylor v. Gunderson*, 107 Utah 437, 154 P.2d 653 (1944).

COLLATERAL REFERENCES

C.J.S. — 62 C.J.S. Municipal Corporations §§ 496 to 501, 552, 719.

A.L.R. — Pre-employment conduct as ground for discharge of civil service employee having

permanent status, 4 A.L.R.3d 488.

Determination as to good faith in abolition of public service or employment subject to civil service or merit system, 87 A.L.R.3d 1165.

10-3-1106. Discharge or transfer — Appeals — Board — Procedure.

(1) No officer or employee covered by Section 10-3-1105 shall be discharged or transferred to a position with less remuneration because of his politics or

religious belief, or incident to, or through changes, either in the elective officers, governing body, or heads of departments. In all cases where any officer or employee is discharged or transferred from one position to another for any reason, he shall have the right to appeal the discharge or transfer to a board to be known as the appeal board which shall consist of five members, three of whom shall be chosen by and from the appointive officers and employees, and two of whom shall be members of the governing body.

(2) The appeal shall be taken by filing written notice of the appeal with the recorder within ten days after the discharge or transfer. Upon the filing of the appeal, the city recorder shall forthwith refer a copy of the same to the appeal board. 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 or transfer.

(3) The employee shall be entitled to appear in person and to be represented by counsel, to have a public hearing, to confront the witness whose testimony is to be considered, and to examine the evidence to be considered by the appeal board.

(4) In the event the appeal board upholds the discharge or transfer, the officer or employee may have 14 days thereafter to appeal to the governing body whose decision shall be final. In the event the appeal board does not uphold the discharge or transfer the case shall be closed and no further proceedings shall be had.

(5) The decision of the appeal board shall be by secret ballot, and shall be certified to the recorder with 15 days from the date the matter is referred to it. The board may, in its decision, provide that an employee shall receive his salary for the period of time during which he is discharged, or any deficiency in salary for the period he was transferred to a position of less remuneration but not to exceed a 15 day period. In no case shall the appointive officer or employee be discharged or transferred, where an appeal is taken, except upon a concurrence of at least a majority of the membership of the governing body of the municipality.

(6) In the event that the appeal board does not uphold the discharge, or transfer, the recorder shall certify the decision to the employee affected, and also to the head of the department from whose order the appeal was taken. The employee shall be paid his salary, commencing with the next working day following the certification by the recorder of the appeal board's decision, provided that the employee, or officer, concerned reports for his assigned duties during that next working day.

(7) The method and manner of choosing the members of the appeal board, and the designation of their terms of office shall be prescribed by the governing body of each municipality by ordinance, but the provisions for choosing the three members from the appointed officers and employees shall in no way restrict a free selection of members by the appointive officers and employees of the municipality.

History: C. 1953, 10-3-1106, enacted by L. 1977, ch. 48, § 3.