

2008

Kipp Cabaness, an individual, and Does 1-20 v.
Brent Thomas, an individual; Clifford C. Michaelis,
an individual; Bountiful City, a Municipal
Corporation, Bountiful City Power, and Does
1-100 : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KIPP CABANESS, an individual,
and Does 1-20,

Plaintiffs and Appellants,

v.

BRENT THOMAS, an individual;
CLIFFORD C. MICHAELIS, an
individual; BOUNTIFUL CITY, a
Municipal Corporation,
BOUNTIFUL CITY POWER, and
Does 1-100,

Defendants and Appellees.

Case No: 20080446-SC

Appeal From The Second Judicial District Court, Davis County, State of Utah

The Honorable Glen R. Dawson, District Judge

Civil No: 040700494

PLAINTIFF/APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURTS

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LIST OF PARTIES

Plaintiffs/Appellants:

KIPP CABANESS, an individual; and

JOHN DOES 1-100, unidentified persons.

Defendants/Appellees:

BRENT THOMAS, an individual;

CLIFFORD C. MICHAELIS, an individual;

BOUNTIFUL CITY, a Utah municipal corporation;

BOUNTIFUL CITY POWER, a subdivision of a Utah municipal corporation; and

JOHN DOES 1-100, unidentified persons.

JURISDICTIONAL STATEMENT

This is an appeal from orders and judgment of the Second District Court, which is a court of record, and the Court of Appeals does not have original appellate jurisdiction, so this Court has jurisdiction over this matter under Utah Code Ann. § 78A-3-102(3)(j).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

I. Did the district court err in ruling that Defendant Thomas' actions were not sufficiently extreme and outrageous to support a claim of intentional infliction of emotional distress, where, as Plaintiff Kipp Cabaness' ("Kipp") supervisor at Bountiful Power, Thomas (a) ridiculed and demeaned him, (b) intentionally pressured him and his crew to shortcut safety procedures, (c) threatened to terminate them for his own enjoyment, (d) required them unnecessarily to perform dangerous work in hazardous conditions, (e) required one of Kipp's crew to risk his life by using a jackhammer to remove concrete from a conduit of energized primary electrical distributor lines, (f) kneed an employee in the groin in Kipp's presence, (g) publicly disparaged Kipp and others frequently about their personal and confidential issues to break them down mentally, (h) specifically targeted Kipp at an employee meeting following his return from 6 weeks of medical absence, knowing of his fragile emotional health, and (i) 13 of 15 Bountiful employees quit between summer 2003 and spring 2004, citing Thomas' abuse as the sole reason?

This issue was preserved in the trial court. Pl.’s Mem. Opp. Defs.’ Mot. Summ. J. at Pl.’s Statement of Facts Nos. 13-28, 31-36, 41-46, 54-55, 63, (R. at 2346-50, 2352-81, 2420-22, 3641-46, 3657-59, 4006).

Standard of Review: Correctness. *Salt Lake City Mission v. Salt Lake City*, 2008 UT 31, ¶ 5; *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 19.

II. Did the district court err in ruling that sections 406, 408, and 508 of the City’s Employee Manual failed to create an implied contract between Kipp and the City, where (a) Kipp knew of those provisions prohibiting hostile working conditions and expected the City to comply with them, (b) Kipp considered those sections to be a contract or agreement, (c) the City used and followed the Manual’s provisions for terminating and disciplining employees, (d) Defendants produced no evidence of the City’s argument made for the first time at oral argument that those provisions merely stated policies, goals, and warnings, and (e) the Manual’s limited disclaimer stated only that “[n]o contract exists between Bountiful City and its employees *with respect to salary, salary ranges, movement with[in] salary ranges, or employee benefits,*” without disclaiming or limiting its provisions or promises related to working conditions?

This issue was preserved in the trial court. (R. at 1380-81, 2382-88, 3654-55, 4000-05, 4096-4104, 4145-46, 4149-51, 4385-93).

Standard of Review: Correctness. *Salt Lake City Mission*, 2008 UT 31 at ¶ 5.

III. Did the trial court err in excluding the affidavits of Kenneth Mears and Bonnie Quinn as untimely, where (a) the City asserted for the first time at oral argument that it intended the Manual only as a statement of policies, goals, and warnings, (b) the

City had not argued the issue of intent in any of its memoranda nor submitted any supporting evidence, but had argued in its memoranda only (i) governmental immunity and (ii) that the Manual's limited disclaimer prevented formation of a contract, and (c) Kipp did not produce the affidavits earlier because the issue had not been raised?

This issue was preserved in the trial court. (R. at 4564-65).

Standard of Review: Abuse of discretion. *Daines v. Vincent*, 2008 UT 51, ¶ 21.

IV. Did the trial court err in holding that Utah Code Ann. § 63-30-10(2) bars Kipp's claim for breach of implied contract and the covenant of good faith and fair dealing because "the alleged injury arose out of the alleged infliction of mental anguish"?

This issue was preserved in the trial court. (R. at 2388-90, 3578, 3622-24, 3630, 3638-39, 3655, 4380-85).

Standard of Review: Correctness. *Salt Lake City Mission*, 2008 UT 31 at ¶5.

V. Did the trial court err when it determined that, since there was no implied contract, there could be no covenant of good faith and fair dealing and, therefore, refused to address whether emotional distress damages were recoverable under claims for breach of implied contract and the covenant of good faith and fair dealing?

This issue was preserved below. (R. at 2382-88, 2409-14, 3638, 3655, 4000-05).

Standard of Review: Correctness. *Salt Lake City Mission*, 2008 UT 31 at ¶ 5.

VI. Did the district court err when it ruled that Kipp's wrongful termination claim was a tort barred by the Governmental Immunity Act rather than a contract action?

This issue was preserved below. (R. at 2388-97, 3638-40, 3655-56, 4380-85).

Standard of Review: Correctness. *Salt Lake City Mission*, 2008 UT 31 at ¶ 5.

VII. Did the district court err when it held that Kipp’s wrongful termination claim was duplicative of his claims for breaches of implied contract and the covenant of good faith and fair dealing where, in addition to sections 406, 408, and 508, the City failed to comply with sections 101, 105, 601-04, and 701 of its Manual?

This issue was preserved in the trial court. (R. at 3402-08, 3640, 3656, 3742).

Standard of Review: Correctness. *Salt Lake City Mission*, 2008 UT 31 at ¶ 5.

CONSTITUTIONAL OR STATUTORY PROVISIONS

Utah Code Ann. § 63-30-3 (2003): *See Addendum..*

Utah Code Ann. § 63-30-5 (2003): *See Addendum.*

Utah Code Ann. § 63-30-10 (2003): *See Addendum.*

Bountiful City Personnel

Policies & Procedures Manual

§§ 101, 105, 406, 408, 508, 601-604, 701: *See Addendum.*

STATEMENT OF THE CASE

Plaintiff Kipp Cabaness (“Kipp”) appeals the trial court’s (i) summary judgment ruling for Bountiful City and its employees, (ii) denial of Kipp’s Cross Motion for Summary Judgment, and (iii) denial of Kipp’s motion under Utah R.Civ.P. 59 and 60(b).

This action arises from Bountiful Power Superintendent Brent Thomas’ extended and pervasive abuse of Kipp. Thomas created a hostile work environment by intimidating and bullying Bountiful Power employees into shortcutting safety procedures and performing unsafe acts. Bountiful Power Director Clifford Michaelis condoned Thomas’ abusive conduct, and, when Kipp and others complained, he threatened to terminate them. Thomas’ abusive conduct, in combination with the stressful nature of Kipp’s work

on potentially lethal high-voltage lines, severely damaged Kipp's mental health and caused him severe and undisputed mental and physical injuries.

Kipp commenced this action seeking economic and non-economic damages for (i) Defendants' breaches of the City Employee Manual's implied contract mandating working conditions that are free of hostility, intimidation, and abuse, (ii) breach of the covenant of good faith and fair dealing inherent in those provisions, (iii) constructive and wrongful termination, and (iv) intentional infliction of emotional distress.

The City moved for summary judgment, arguing that a limited disclaimer in the Manual prevented formation of an implied contract, and that Utah's Governmental Immunity Act barred an action seeking damages for mental anguish.

Kipp filed a cross-motion for summary judgment, arguing that: (i) the Manual created an implied contract between the City and its employees, (ii) the City owed him a contractual duty to prevent harassment and abuse by his supervisor, (iii) consequential damages for that breach of contract included emotional distress damages, (iv) Kipp either complied with the City's internal grievance and appeals procedures or was excused from doing so, and (v) Kipp's intentional infliction of emotional distress claim was an ongoing injury resulting from a continuing and unfolding pattern of abusive conduct.

Following briefing on these motions, the City argued for the first time at oral argument that it did not intend the Manual to be a contract. However, the City produced no evidence to support that argument.

The trial court erroneously reasoned that, in filing cross motions for summary judgment, the parties had stipulated that all the necessary facts to rule on the existence of

an implied contract were before it—despite Defendants’ concession at oral argument that the existence of an implied contract is an issue of fact for the jury. The trial court granted summary judgment, holding that the Manual created neither an implied contract nor a covenant of good faith and fair dealing, the Governmental Immunity Act barred Kipp’s wrongful termination and intentional infliction of emotional distress claims, and Thomas’ actions did not rise to the level of extreme and outrageous conduct sufficient to support a claim of intentional infliction of emotional distress. The trial court discounted evidence of (i) Thomas’ abusive disregard of human life when on July 30, 2003 he ordered one of Kipp’s crew members to perform a life-threatening act and (ii) another incident on September 9, 2003, when Kipp returned to work from a medical absence for work-induced depression and Thomas, knowing his mental vulnerability, publicly singled him out, threatened to fire him, and ridiculed him about personal and confidential issues in front of all employees. Rather than construing the evidence of these incidents in a light most favorable to Kipp, the trial court improperly dismissed them.

Kipp filed a Rule 59 and 60(b) motion for relief from the trial court’s ruling, with affidavits from former City employees Bonnie Quinn and Kenneth Mears, who were involved in creating and enforcing the Manual, testifying that the City Manager and City Attorney had said that the City intended it to be a binding agreement, and that the City had treated it as such, and an affidavit from psychologist Rick Hawks analyzing the damaging effect of the September 9, 2003. The court struck the Quinn and Mears affidavits and denied that motion. This appeal ensued.

STATEMENT OF FACTS

1. Beginning March 29, 1978, Defendant Bountiful City (“the City”), specifically, Bountiful Light & Power Company (“Bountiful Power”), employed Kipp Cabaness (“Kipp”), who became a foreman for one of the City’s three power line crews from August 1, 1984, through January 2, 2004. Aff. K. Cabaness at ¶ 4 (R. at 1381).

2. For at least the last 15 years of Kipp’s employment, Defendant Clifford Michaelis was Director of Bountiful Power, and Defendant Brent Thomas was Superintendent of Operations. *Id.* at ¶ 11 (R. at 1382).

3. Thomas never has been a certified journeyman line worker, in contrast to the foremen, including Kipp, who is certified as such. Dep. Thomas at 45:8-46:15, 52:17-53:4 (R. at 1419-20); Dep. Michaelis at 21:12-22 (R. at 1842).

4. The City’s Personnel Policies & Procedures Manual (“the Manual”) promises and represents in §§ 406, 408, and 508 that harassment, threats, and intimidation will not be tolerated, nor will a hostile work environment. *See* Addendum, Manual at §§ 406 (R. at 1590), 408 (R. at 1592-93), 508 (R. at 1604-07).

5. The Manual expressly disclaims creating any type of contract “with respect to salary, salary ranges, movement with[in] salary ranges, or employee benefits,” but it makes no such disclaimer regarding the mandate in §§ 406, 408, and 508’s of a work environment free of hostility, intimidation, and abuse. Manual at §101 (R. at 1565).

6. Kipp believed the City had an obligation to comply with those provisions, Aff. K. Cabaness at ¶ 10, (R. at 1381), §§ 406, 408, and 508 (R. at 1590-93, 1604-07), and, as Director, Michaelis was responsible to implement the Manual, including its

promises that the City would not tolerate harassment, intimidation and ridicule of employees by supervisors or others. Dep. Michaelis (R. at 1861).

7. In violation of those Manual provisions, Thomas created a hostile work environment through harassment, demeaning comments, and other abuse of the workers he supervised, including Kipp, and Michaelis knowingly tolerated and condoned that abuse. Aff. K. Cabaness (R. at 1382-83), Aff. Hatch (R. at 1947), Aff. Hutchings (R. at 1952-53), Aff. Tuttle at 10-15 (R. at 1939-41), Dep. D. Farnes (R. at 1508-12, 1514-22, 1528); Dep. Gines (R. at 2172, 2175-78); Dep. A. Farnes (R. at 1546-47, 1550, 1554); Dep. Bellon (R. at 1752-60, 1782-83); Aff. Knighton at ¶¶ 7-9, 15, 18, 23 (R. at 2211).

8. Former City employee Kenneth Mears, who was involved in creating and enforcing the manual, testified:

Both the City Manager and the City Attorney advised me and the other members of [the committee that wrote and edited provisions of the Manual] that all of the provisions of the Manual including ... those provisions for Work Environment, Work Place Violence, for Sexual and Other Harassment, Employee Safety, ... Standards of Conduct, Disciplinary Action, and termination would be implemented and enforced by City management personnel, for the protection and benefit of City employees, and that a City employee could be terminated for a violation of those provisions as provided in Sections 500 (Standards of Conduct) *et seq.* and Section 600 *et seq.* (disciplinary action) of the Manual. I was also advised by the City Manager and the City Attorney that management personnel were obligated to implement and enforce all of the provisions of the Manual, for the protection and benefit of all of the City employees, and that a failure of management personnel to comply with this obligation would be grounds for termination of that individual.

Aff. Mears at ¶ 14 (R. at 4144) (offered at 4140, stricken at 4564-65).

9. Kipp daily worked with hazardous and potentially lethal power lines, under Thomas' pressure to perform quickly and shortcut safety measures, which exacerbated

the hostile and abusive work environment Thomas created. Aff. Hawks at ¶¶ 8-19 (R. at 3906-10); Report Hawks at ¶¶ II.A.6., 7., and Observations 3-5 (R. at 3895-96, 3901).

10. “The danger associated with the unsafe work environment substantially influenced [Kipp’s] depression and related emotional concerns to worsen during the last few years of his employment.” Report Hawks at Observation 4 (R. at 3901).

11. Thomas’ abuse took multiple forms, all of which were intended to manipulate and control Kipp psychologically, often at the expense of his safety:

12. Thomas constantly used verbal harassment, abuse, intimidation, ridicule and gross profanity to manipulate and control power company employees through their emotions and break them down mentally. Aff. Knighton at ¶¶ 10, 15 (R. at 2213-14); Dep. D. Farnes 69:4-14, 72:10-73:13 (R. at 1519).

13. Using profanity and cutting sarcasm, Thomas insulted and demeaned Kipp throughout his entire career, calling him “dumbass,” “jackass,” and “shit for brains.” (R. at 2120, 2128); Report Hawks at ¶¶ II.A.6 (page 5) (R. at 3893).

14. Thomas even verbally abused Kipp and other linemen over the radio, to the point where, sometime in the late 1990s, a dispatcher, Richard Pierce, asked Thomas why he treated them so badly. Thomas responded with more profanity, and an unusually graphic obscene gesture. Dep. Cabaness at 72:9-73:16 (R. at 2129).

15. To belittle Kipp and his crew, Thomas repeatedly ordered them to perform unnecessary, laborious, and even hazardous tasks, solely to exercise power over them, threatening to fire them if they did not obey. *Id.* at 36:1-38:22 (R. at 2120-21); Aff. Knighton at ¶ 10 (R. at 2213); Aff. Hatch at ¶ 19 (R. at 1948).

16. For example, sometime during the 1990s, after a car hit a power pole, all three crews responded, and, under the direction of the three foremen, were safely setting a new pole into the ground and restoring power while managing traffic. However, when Thomas arrived, he intentionally created unnecessary and dangerous tension by screaming at everyone to stop working and senselessly ordered them to re-arrange the trucks, pounding on his chest and saying "I'm the captain," after which the foremen had to settle everybody down so they could safely finish the dangerous task of getting the power lines restored. Dep. Cabaness at 36:1-38:22. (R. at 2120 [reverse side]).

17. On another occasion in the late 1990s or 2000, Kipp's and foreman Steve Knighton's crews were installing underground electrical lines at Bountiful High School. The foremen were supervising the job and had positioned the trucks and equipment correctly when Thomas arrived and ordered Kipp to needlessly switch the locations of the two trucks and pull the wire from the reverse side, just to make the crews obey him and do additional work. When Knighton asked Thomas why he was making them move the trucks and equipment that already had been positioned properly, Thomas told him and Kipp that he was their boss, and if they didn't do it his way, he would create a paper trail and fire them. *Id.* at 43:2-45:17 (R. at 2122); Dep. Bellon at 33:25-36:12 (R. at 1758-61).

18. Also in 2000 or 2001, Kipp and his crew were building a new mile-long transmission line, which involved first putting each pole on a stand and "framing" it by installing the insulators before setting it into the ground. Kipp and his crew had a pole framed and were about to set it into the ground, when Thomas needlessly ordered them to disassemble it and then frame another, identical pole to set in its place, just to make Kipp

and his crew do additional work. Dep. Cabaness at 53:14-55:4 (R. at 2125).

19. As another example of intentionally belittling employees, Thomas dumped out a bin of tools from Brent Tuttle's work truck, scattered them onto the floor, and ordered Tuttle to pick them up. *Id.* at 85:5-19. (R. at 2133).

20. Thomas also tried to create tension and animosity by turning the crews against each other. For example, in fall of 2003, after a crew had replaced an underground electrical conduit that had been located incorrectly, when the crews returned to the warehouse, Thomas blamed Tuttle for making a mistake and asked Kipp if he liked having to redo Tuttle's work; when Tuttle apologized, Thomas angrily told him he had a bad attitude and threatened to write him up for it. *Id.* at 39:11 to 41:1. (R. at 2121-22).

21. Thomas, for his own amusement, frequently threatened to fire employees to intimidate them, remind them that he could control them, and create fear and tension. Aff. Tuttle at ¶¶11-12, 16 (R. at 1941-42); Aff. Knighton at ¶¶ 10-11 (R. at 2213); Dep. D. Farnes at 32:13-18, 79:3-80:15 (R. at 1509, 1521).

22. On one occasion in the latter part of 1996 or early 1997, Thomas walked up to a new employee, Don Hatfield, and said, "You're fired!" just to scare him and watch his reaction. Dep. Cabaness at 77:16-78:2 (R. at 2131); Aff. Hatch at ¶ 19 (R. at 1948); Dep. D. Farnes at 29:20-31:19 (R. at 1521).

23. Thomas regularly told Kipp, "You are lucky to have this job. If you don't do what you are told, we can fire you," (R. at 2118-19), and criticized him publicly about personal and confidential issues to humiliate and belittle him. Aff. Knighton at ¶10 (R. at 2213); Dep. D. Farnes at 41:8-42:21; 81:10-82:8 (R. at 1512, 1522).

24. In 2003, Thomas told Kipp, “You know what your problem is? It’s your wife. You need to get rid of your wife.” Kipp tried to change the subject, but Thomas kept repeating that statement. Dep. Cabaness at 67:18-69:9 (R. at 2128).

25. Thomas also abused employees physically in front of Kipp and others, including in 1999 when he kneed Steve Hutchings in the groin with such force that he dropped to the floor, reeling in pain, after which Thomas said, “I guess I showed you who is boss.” *Id.* at 84:5-85:2 (R. at 2132-33); Aff. Hutchings at ¶ 7 (R. at 1952); Aff. Tuttle at ¶ 14 (R. at 1941); Dep. D. Farnes at 28:11-29:19 (R. at 1508).

26. Thomas intentionally and cavalierly ordered Kipp and other employees to perform unsafe acts. For example, in 1983, when Kipp was working on a pole with a primary line of 7,200 volts, Kipp wanted to ground it before going up the pole to work, which is the safe procedure. However, Thomas told Kipp there was not time and made him go up the pole and work on it anyway. Kipp received a painful and anxiety-producing shock that scared him badly because he knew he could have been killed. Dep. Cabaness at 81:11-82:3 (R. at 2132); Report Hawks at ¶¶ II.A.7 (R. at 3895-96).

27. When a transformer caught fire at the hospital and was still smoking when the crews arrived, Thomas just tapped it with his knuckle and told Kipp and his crew, “All right, it’s not hot, you guys are all right. Open the door and start doing your work in there,” when he knew it unsafe to do so. Dep. Cabaness at 78:9-79:6 (R. at 2131).

28. During the late 1990s, when Kipp and the crews were working at 500 West and 2600 South, they had to kill the power, “breaking the load” by removing three old fuses, but lacked the right safety equipment. Nonetheless, Thomas ordered Gary Hatch to

pull first one fuse and then another. Hatch knew the last fuse would have a heavy load and did not want to pull it. Thomas, who is not a certified lineman, said there was no load and pulled the fuse. It exploded. To a crew routinely working with high-voltage lines, that explosion was extremely anxiety-producing. *Id.* at 79:19-81:7 (R. at 2131).

29. Thomas also forced Kipp and his crew unnecessarily to do dangerous work in rain, snow, and wind hundreds of times in Kipp's 25-year career, when it easily could have been postponed and completed more safely. Thomas lightly dismissed their concerns, saying "I bought you rain gear. Use it." *Id.* at 82:10-83:17 (R. at 2132).

30. Each month when Kipp, as the Safety Director, held the required safety briefings, Thomas sat in the back, pointing to his watch and saying "Let's go, let's go, let's go," and then cut the meetings short of the time planned, saying "Let's go, we're done, we need to go to work." *Id.* at 136:12-137:5 (R. at 2145).

31. On July 30, 2003, as a show of power, intimidation, and control, Thomas ordered Brent Tuttle, a member of Kipp's close-knit crew, to use a jackhammer to remove concrete from a conduit of live primary electrical distributors. Thomas knew the act posed a serious, life-threatening risk. Although Tuttle also knew the risk, he obeyed out of fear he would be fired. *Id.* at 56:1-60:21 (R. at 2125-26); Aff. Tuttle at ¶15 (R. at 1941-42); Aff. K. Cabaness at ¶31 (R. at 1392).

32. Tuttle broke through the conduit multiple times, narrowly missing the live wires inside it; had he hit them, he likely would have been killed. Dep. Thomas at 170:12-18 (R. at 1450); Aff. Tuttle at ¶15 (R. at 1942); Aff. K. Cabaness at ¶31 (R. at 1392).

33. Kipp was not present for the jackhammer incident but found out about it

from Gary Hatch, and it upset him greatly. Plaintiff described:

I was shocked and appalled. I started crying I was really worried because they were my crew that actually did it It made me feel bad inside because I didn't want nothing to happen to them I was wishing I was there We were all in a brotherhood together. We were just all close. They were like my family. Because of the situations with Cliff and Brent we had to stick together. I wasn't surprised because Brent made us do that before.

Report Hawks at ¶¶ II.A.7. (R. at 3894-95).

34. After Kipp learned about the jackhammer incident and returned to work, his mental health worsened significantly. Aff. VanderMerwe at ¶¶ 7-9 (R. at 2052-54).

35. As Safety Director, Kipp served with Greg Bellon, Jay Christensen, Kent Servoss, Brian Smart and Brent Tuttle on the Safety Committee, which investigated the jackhammer incident and issued reports on September 10 and 22, 2003. Aff. Kipp Cabaness at ¶¶ 9, 14 (R. at 1381, 1383); Dep. Bellon (R. at 1767-69).

36. The Safety Committee concluded that Thomas was the site supervisor and knew the concrete encased energized primary distribution conductors but ordered Tuttle to jackhammer it anyway, and that Tuttle was extremely scared because of the danger and should have stopped but, feeling intimidated, obeyed Thomas. Reports of September 10 and 22, 2003 (R. at 2012, 2016).

37. The Safety Committee cited Thomas with a "serious safety violation" for ordering Tuttle to jackhammer over live primary distributors. *Id.* (R. at 2012, 2016).

38. Michaelis told the committee he was "currently investigating the accusations of intimidation" about Thomas, "according to Bountiful City policies and procedures and ha[d] conducted interviews with affected Bountiful Power employees."

Id. (R. at 2016).

39. OSHA and the Utah Labor Commission also investigated the jackhammer incident and found a “serious violation,” concluding that “management directed a work crew to use a jackhammer to break the concrete from around a buried conduit line which was known to have live electrical conductors running through the conduit” and that it was Thomas who had ordered Tuttle to do so. September 19, 2003, Report (R. at 2019, 2023).

40. Due to medically-diagnosed work-related major depression, Kipp was off work from July 23 to September 8, 2003. *Aff. VandeMerwe* at ¶¶ 7-10 (R. at 2051).

41. Michaelis and Thomas knew why Kipp missed work, and that he had fragile mental health and was on antidepressants. *Dep. Michaelis* (R. at 1855).

42. When Kipp returned from his medical absence, Thomas singled him out and publicly humiliated him at an employee meeting on September 9, 2003, by threatening to fire him and criticizing him about his personal issues in front of all the employees. *Id.* (R. at 1867); *Aff. Knighton* at ¶¶ 7, 19 (R. at 2211, 2215); *Dep. D. Farnes* (R. at 1513-14); *Aff. McComas* at ¶ 9 (R. at 2031).

43. Later in September 2003, as a result of the jackhammer incident investigations, Michaelis formed an “executive committee” of himself, David Farnes, Alan Johnson, and Jay Christensen, to investigate the employees’ complaints of harassment and intimidation by Thomas. The committee interviewed 15 Bountiful Power employees. *Dep. D. Farnes* (R. at 1511); *Dep. Michaelis* (R. at 1849-52); Michaelis Outline for Exec. Comm., (R. at 2191); *Aff. Knighton* at ¶¶ 22-23 (R. at 2215-16).

44. From those interviews, the committee learned that, for over a decade,

Thomas regularly abused, intimidated, and harassed employees, creating a hostile and intolerable working environment. He frequently threatened to terminate them, and they felt their jobs were on the line every day. Dep. D. Farnes (R. at 1511-12, 1517-24); Dep. Michaelis (R. at 1852-59); Aff. Knighton (R. at 2216).

45. That committee also learned that Michaelis knew of Thomas' abuse for over a decade without taking any action to correct it. Michaelis' only response had been to threaten to terminate any employees who complained again. Dep. D. Farnes (R. at 1511-12, 1517-24); Dep. Michaelis (R. at 1852-59, 1880); Aff. Knighton (R. at 2216).

46. That committee learned that Thomas practiced "breaking people down mentally" and that he had specifically targeted Kipp, Dep. Michaelis (R. at 1881-83); Aff. Knighton at ¶ 23 (R. at 2216), and that Thomas had threatened to fire any employees who took complaints over his head. Dep. Michaelis (R. at 1889).

47. On September 15, 2003, Michaelis wrote a letter to Thomas stating that he, the OSHA inspector, and the Safety Committee "agree on the seriousness of the factor of intimidation and, no matter how great a safety program we have, it failed us in this [the jackhammer] incident," because Thomas intimidated the employees. Letter, (R. at 2038).

48. In that letter, Michaelis told Thomas, "Your intimidation needs to stop," and said he had interviewed each employee who Thomas supervised, and they each begged him to make Thomas change. *Id.* (R. at 2038).

49. Michaelis also told Thomas that he would be forced into retirement if he did not make a "life change," within 90 days, including eliminating employee intimidation. *Id.* (R. at 2038); Dep. Michaelis (R. at 1866, 1877-80).

50. The Safety Committee recommended that Thomas be given two days off without pay, held in abeyance if he would write a letter acknowledging the seriousness of the safety violation and set out what he would do to prevent similar problems. Report dated September 10, 2003, (R. at 1826), Dep. Thomas (R. at 1496-98).

51. However, those sanctions were not enforced. Thomas' response stated that he "strongly disagrees with most of [the committee's] findings," and that he "ha[s] to accept [his] part of the *misconstrued* facts that led to [the jackhammer] incident," Mem. Sept. 17, 2003 (emphasis added) (R. at 1496-98), and he told the employees that he had changed as much as he was going to change, and that he would change no further, stating, "You can't change the spots on a dog." Dep. D. Farnes at 68:11-69:4 (R. at 1518-19).

52. As Director of Bountiful Power, Michaelis was responsible to implement the Manual, and, where City employees besides Thomas were concerned, the City followed its provisions for discipline and termination. Dep. Michaelis (R. at 1861); Aff. Mears (R. at 4144-46); Aff. Quinn (R. at 4149-51) (both stricken at 4564-65).

53. However, despite that responsibility, Michaelis did nothing to correct Thomas' abusive conduct, but in fact tolerated and condoned it:

54. As early as 1986, Cabaness informed City Councilman Harold Shafter about Thomas' abusive conduct, and Shafter told him he would discuss Thomas' behavior with Michaelis, but no action was taken. Aff. K. Cabaness at ¶ 21 (R. at 1386).

55. Michaelis acknowledged first receiving complaints about Thomas' abusive treatment of employees as early as the late 1980s or early 1990s and that he received similar complaints through 2003. Dep. Michaelis at 59:2-13, 69:5-22 (R. at 1851, 1854).

56. Prior to 1991, Bountiful Power employees began reporting to Michaelis that Thomas was creating a hostile working environment through abuse, intimidation, and harassment. Aff. Cabaness at ¶ 16 (R. at 1384-85); Aff. Tuttle at ¶¶ 12-13 (R. at 1941); Aff. Hatch at ¶ 12 (R. at 1946-49); Aff. Hutchings at ¶¶ 10-11 (R. at 1951-53); Dep. D. Farnes (R. at 1510-11, 1514-15, 1528); Dep. A. Farnes, (R. at 1551).

57. On January 17, 1994, twelve Bountiful employees reported Thomas' abusive behavior to Michaelis. They reminded him of his obligation to provide a non-hostile work environment and told him he was failing to do so. After that meeting, Thomas' abusive behavior and the hostile work environment persisted. Aff. K. Cabaness at ¶ 23 (R. at 1387); Aff. Knighton at ¶ 13 (R. at 2214).

58. Also in the early 1990s, the three line foremen (Kipp, Knighton, and David Farnes) met with Michaelis and complained that Thomas created a hostile work environment by abusing, intimidating, and demeaning employees. Aff. K. Cabaness at ¶¶ 13, 16 (R. at 1382-85); Dep. D. Farnes (R. at 1510-12, 1514-15, 1528); Dep. A. Farnes (R. at 1551); Dep. Michaelis (R. at 1352-56); Aff. Knighton at ¶ 10 (R. at 2213).

59. Following that meeting with Michaelis, Thomas' abusive conduct worsened. Dep. D. Farnes (R. at 1513-15); Aff. Knighton at ¶¶ 10-15 (R. at 2213-14).

60. The three foremen continued to complain to Michaelis about Thomas' worsening conduct, and, in apparent retaliation for a complaint Kipp made in 1997, Thomas wrote a letter to Kipp on or about July 14, 1997, unjustly threatening to terminate him. Aff. K. Cabaness, at ¶ 19 (R. at 1385).

61. On July 21, 1997, Kipp and his wife, Holly, met with Michaelis and told

him about Thomas and the hostile work environment he created daily through profanity, rage, intimidation, harassment, threats of termination, interference with safety, and similar abuse. *Id.* (R. at 1380, 1386); Aff. H. Cabaness at ¶ 10 (R. at 2003).

62. On or about August 1, 1997, Kipp again told City Councilman Harold Shafter about the abusive work environment Thomas continued to create, and Shafter again told Kipp he would discuss that matter with Michaelis. However, Shafter did not communicate any further with Kipp. Aff. K. Cabaness at ¶ 21 (R. at 1386-87).

63. On August 4, 1997, David Warden, M.D., diagnosed Kipp with depression caused by an abusive boss and a hostile working environment, and he treated him with antidepressants through June 1999. Notes of Dr. Warden (R. at 2041).

64. Sometime between July 1997 and February 1998, the three foremen, including Kipp, again met with Michaelis to complain about the hostile work environment Thomas created through intimidation, harassment, verbal abuse, profanity, and threats of termination. Aff. K. Cabaness at ¶ 25 (R. at 1388); Dep. D. Farnes (R. at 1515-16, 1521); Dep. A. Farnes (R. at 1551); Dep. Bellon (R. at 1754-56, 1782-83); Dep. Michaelis (R. at 1852-57); Aff. Knighton at ¶¶ 16-17 (R. at 2214).

65. During that meeting, Michaelis told the foremen to stop complaining about Thomas and that he did not want to hear any more complaints. He threatened that if they complained any more about Thomas, he would fire them and their linemen. Aff. K. Cabaness at ¶ 25 (R. at 1387); Dep. D. Farnes (R. at 1515-17); Dep. A. Farnes (R. at 1552); Aff. Hatch at ¶ 20 (R. at 1949); Aff. Tuttle at ¶¶ 12-13 (R. at 1941); Dep. Michaelis (R. at 1852-55); and Aff. Knighton at ¶¶ 16-17 (R. at 2214).

66. The foremen told the others about Michaelis' threats, and Michaelis told Thomas that he warned the foremen not to complain about him again and had threatened to terminate them. Aff. K. Cabaness at ¶ 13 (R. at 1382-83); Dep. Michaelis (R. at 1855).

67. After Michaelis told Thomas about the complaints, his abusive behavior and the hostile work environment worsened. Dep. D. Farnes (R. at 1516-17); Dep. Bellon (R. at 1784-92); Aff. K. Cabaness at ¶ 26 (R. at 1389); Aff. Hatch at ¶¶ 9-10, 15, 18, 19 (R. at 1946-49); Aff. Knighton at ¶ 17 (R. at 2214).

68. Thomas repeatedly threatened to terminate employees, and they did not learn that he lacked authority to fire them until September 11, 2003. On the contrary, they believed that Michaelis agreed with Thomas' management decisions and anyone who complained would be terminated. Aff. K. Cabaness at ¶ 13 (R. at 1383); Aff. Tuttle at ¶ 11 (R. at 1941); Aff. Hatch at ¶¶ 10, 15, 19 (R. at 1946-49); Dep. D. Farnes (R. at 1509-10); Dep. Michaelis (R. at 1855, 1895-96); Aff. Knighton at ¶¶ 20-21 (R. at 2215).

69. In August 1999, Bountiful Power employees met with an attorney from the Utah Public Employees Association about Thomas' abuse, the hostile work environment, and Michaelis' threat to fire them if anyone complained again. The attorney told them that the City was an "old boys' network" and that the grievance and appeals process was useless. Aff. K. Cabaness at ¶ 28 (R. at 1390); Dep. K. Cabaness (R. at 2113-14).

70. On June 24, 2003, David A. VandeMerwe, M.D., diagnosed Kipp with major depression/chronic dysthymia with insomnia caused by an abusive boss and a hostile work environment. As a result, he treated Kipp with antidepressants. Aff. VandeMerwe at ¶¶ 5-10 (R. at 2051).

71. At Dr. VandeMerwe's direction, Kipp was off work from July 23 to September 8, 2003, due to work-related major depression. Although Kipp's depression improved while he was off work, upon his return to work, it recurred. When Kipp saw Dr. VandeMerwe on January 27, 2004, his diagnosis was major depression with a question of bipolar condition, and Dr. VandeMerwe continued antidepressants and referred him to Jerry Sandberg, Ph.D., for psychotherapy. *Id.* at ¶¶ 7-10 (R. at 2051).

72. Thomas knew of Kipp's fragile mental condition and that his medical absence from July to September 2003 was for work-related major depression. Dep. Michaelis at 73:6-74:5 (R. at 1855).

73. On September 9, 2003, when Kipp returned to work from his medical absence for work-related major depression, Thomas publicly humiliated him by criticizing him about personal and family issues and threatened to fire him in front of a meeting of all Bountiful Power Employees. Aff. Knighton at ¶¶ 19 (R. at 2215).

74. Kipp's examining psychologist described the effect of that public humiliation on him as follows:

When Brent Thomas, in the presence of the co-workers of Mr. Cabaness, belittled and ridiculed him, threatened him with job termination (authority he did not have), and included in his statements personal and family matters relating to Mr. Cabaness, it was a substantial factor and further aggravated the fragile mental condition of Mr. Cabaness and made his mental disorders and conditions more severe. It was my opinion that his mental disorders and conditions, and particularly his conditioned helplessness, worsened, substantially, due to the conduct of Brent Thomas during the course of that meeting. The fact that Mr. Cabaness cannot recall these events at the present time is irrelevant to the diagnosis and its cause. Rather, the fact of his involuntary forgetfulness is a reflection of the severity [of Kipp's] mental suffering and the severity of the abuse which occurred on September 9, 2003.

Aff. Hawks at ¶ 18 (R. at 3909).

75. On October 2, 2003, Kipp's wife met with City Mayor Joseph Johnson and told him about Thomas' abusive conduct. She explained the effect that the abuse had on Kipp, his diagnosed depression, treatment with antidepressants, and his numerous complaints to Michaelis over the years, as well as Michaelis' threats to terminate him. She explained that she had not spoken to City Manager Tom Hardy because of his prior demeaning comments to her and other female City employees from 1977-1980, when Hardy said he would not listen to any female employees until they "learned how to pee standing up" and said they could be replaced by "any monkey on the street." The Mayor told her that Hardy knew of their meeting and that it was not necessary for either her or Kipp to meet with Hardy. The Mayor also said he would interview Tuttle about the abuse. However, neither the Mayor nor Hardy communicated further with Kipp or his wife. Aff. H. Cabaness at ¶¶ 1-21 (R. at 1959-2008 [sic] [numbers skip]).

76. In October 2003, Tuttle told Mayor Johnson about the abusive and hostile environment Thomas created, the many reports to Michaelis about it, and that Michaelis had done nothing about them. The Mayor said that Hardy knew all that was going on. Aff. Tuttle at ¶¶ 18-21 (R. at 1943-44).

77. Kipp's employment with the City terminated in January 2004, when Kipp became completely unable to continue working in the hostile work environment there. Aff. K. Cabaness at ¶ 38 (R. at 1395).

78. On February 5, 2004, from Dr. VandeMerwe's referral, Jerry L. Sandberg,

Ph.D., began treating Kipp and diagnosed him as suffering major depression (DSM IV § 296.33) and a panic disorder (DSM IV § 300.01) of longstanding duration caused by an abusive boss and a hostile work environment. Aff. Sandberg at ¶¶ 1-8 (R. at 2058).

79. Between summer 2003 and spring 2004, all but two Bountiful Power employees quit due to the hostile work environment Thomas created. The employees who quit due to Thomas' abuse include: Brent Tuttle, Steve Knighton, Steve Hutchings, Gary Hatch, Bret Thomas, and Justin Halloran, who all quit because they were tired of "fighting it" and "didn't want to deal with it anymore"; the only two employees who stayed were David Farnes and Kent Gines. Michaelis knew why those individuals were leaving Bountiful Power but let them go in order to protect Thomas. Dep. D. Farnes (R. at 1526-27); Dep. A. Farnes (R. at 1553-54); Dep. Michaelis (R. at 1877); Aff. Hutchings at ¶¶ 5-6 (R. at 1951); Aff. Hatch at ¶ 13 (R. at 1946-47); Aff. Tuttle at ¶ 10 (R. at 1941); Aff. Knighton at ¶ 26 (R. at 2216).

80. In April 2005, board-certified psychiatrist Dennis H. Smith, M.D., began treating Cabaness, and diagnosed him as follows:

Axis I:

1. Major depression, first episode, in partial remission, 296.25
2. Dysthymia, 300.4
3. Note: Anxiety disorder, symptoms with the depression
4. Panic disorder without agoraphobia, 300.01

Axis II:

1. Deferred, none really apparent during this interview

Axis III

1. No significant medical problems known.

Axis IV

1. Still struggling with some PTSD-type (Post Traumatic Stress Disorder) issues related to employment.

Aff. Smith at ¶ 6 (R. at 2066).

81. In Dr. Smith's professional opinion, Kipp's abusive boss and hostile working environment were substantial causes of his diagnosis. *Id.* at ¶¶ 6-8 (R. at 2066).

82. Plaintiff sustained both economic and non-economic damages from Defendants' conduct. *Id.* (R. at 2066, 2085); Aff. K. Cabaness (R. at 1397-1401); Aff. H. Cabaness (R. at 1959); Aff. Hawks (R. at 3904); Rep. Hawks at (R. at 3889-3901); Aff. Warden (R. at 2041); Aff. Sandberg (R. at 2058); Aff. VandeMerwe (R. at 2051).

83. Kipp was not mentally or emotionally able to pursue any administrative remedies due to his major depression, major panic disorder, and elements of post-traumatic stress disorder, from at least June 2003 through January 2004 and beyond. Aff. Smith at ¶¶ 13-19 (R. at 2004-07); Aff. Hawks at ¶¶ 7-10, 19 (R. at 3904).

84. Kipp did make a workers' compensation claim in early 2004, to which the City responded, stating, "In our opinion, the claim is nonsense," and the claim was denied. Letter from City, May 25, 2004 (R. at 2109).

85. The Manual provides that Kipp, as a regular employee, could not be fired or even disciplined unless the City (i) conducts a disciplinary investigation, giving him a written notice of the claims against him, an opportunity to respond, and advising him in writing of the discipline and findings of the investigation, Manual at § 603 (R. at 1658-59), (ii) informs him of his right to appeal the discipline, *id.* at § 602(e) (R. at 1658), and (iii) allows him to appeal the discipline to the City Manager, City Council, or Board of Appeals, including the opportunity to present evidence and confront witnesses at a public hearing, *id.* at § 604(c)(3)(iii) (R. at 1660-61).

86. Thomas' intimidation of City employees continued even during this litigation, as he insisted upon being present for the depositions of all City employees deposed. Each City employee stated that Thomas' presence was intimidating to them and made them feel uncomfortable and fear reprisals if they said something untoward about him, even though it was the truth, and his presence likely affected their deposition testimony. Dep. A. Farnes at 4:20-6:13; Dep. V. Gines at 4:25-8:16, 49:25-53:12; Dep. Bellon at 8:19-12:4, 85:18-86:24; Dep. Thomas at 187:21-188:10.

SUMMARY OF ARGUMENT

The trial court erred in ruling that Thomas' continuing pattern of abuse of Kipp over more than ten years was not extreme and outrageous, considering the dangerous and stressful nature of Kipp's work and Thomas' knowledge of Kipp's particular mental vulnerability. The court erred by refusing to consider an incident where Thomas ordered a member of Kipp's crew to jackhammer into a live electrical conduit because, although Kipp was not present, Thomas intended the order to upset him, and it did. The trial court improperly discounted an employee meeting where Thomas publicly humiliated Kipp on the day Kipp returned from a medical absence for work-induced major depression.

The trial court also erred when it held that the Manual on its face did not create an implied contract as to abuse-free work conditions and failed to consider extrinsic evidence that the parties intended the Manual to form a binding contract and treated it as such. Inherent in that contract was a covenant of good faith and fair dealing. Although Defendants and Plaintiff both moved for summary judgment, the trial court erred in assuming that they had agreed the court had before it all evidence necessary to determine

whether the Manual created an implied contract. Defendants asserted for the first time at oral argument that the City intended the Manual to be only a statement of policies, goals, and warnings to employees, and the trial court erred by striking the subsequently submitted affidavits of Bonnie Quinn and Kenneth Mears testifying that City management had told them the Manual was a binding agreement.

Damages for Kipp's emotional distress are available as consequential damages for the City's breach of its implied contract with him. Furthermore, Kipp's claims are not barred by governmental immunity because his emotional distress injuries were intentional and result from a breach of contract. Finally, his wrongful constructive termination claim also is a breach contract action distinct from his other contractual claims.

ARGUMENT

I. DEFENDANT THOMAS' ABUSIVE CONDUCT WAS SUFFICIENTLY EXTREME AND OUTRAGEOUS TO ALLOW A JURY TO DECIDE KIPP'S INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS CLAIM.

The trial court dismissed Kipp's claim for intentional infliction of emotional distress, holding that Thomas' actions did not meet the threshold level of extreme and outrageous conduct. In reaching that conclusion, the trial court refused to consider the July 30, 2003 jackhammer incident because Kipp was not immediately present. It also disregarded the evidence of Thomas' deliberate public humiliation of Kipp on September 9, 2003, upon his return from a medical absence caused by work-induced major depression because that evidence was "conclusory." (R. at 3657-59).

As demonstrated below, the trial court's refusal to consider those extreme instances of abuse and intimidation is reversible error. However, even if disregarding those incidents were proper, the court erred in dismissing the intentional infliction of emotional distress claim because Kipp's cumulative evidence of Thomas' unchecked abuse and mistreatment spanning well over a decade was sufficient to satisfy the extreme and outrageous threshold.

The Court should consider the jackhammer because, although Kipp was not immediately present, Thomas' deliberate disregard of human life on that occasion is consistent with evidence of other efforts by Thomas to break down Kipp and his crew through verbal abuse, fear, and intimidation. On that occasion Thomas required Brent Tuttle use a jackhammer to remove concrete from a conduit with energized primary distributor lines, knowing that the lines carried lethal amounts of electricity, and the jackhammer broke through the conduit in multiple places, narrowly failing to penetrate the insulation to the energized lines inside. Had the jackhammer penetrated into the lines, Tuttle likely would have been killed. *Aff. Cabaness* at ¶¶ 30-31 (R. at 1392); *Aff. Tuttle* at ¶ 15 (R. at 1941-42); *Dep. Thomas* at 170:12-18 (R. at 1450).

One could reasonably conclude that Thomas' shocking disregard of human life in that instance was intended to have precisely the severe impact on Kipp that it in fact had according his psychological expert, Dr. Hawks. Thomas clearly intended a more pervasive and far-reaching impact, in terms of fear and intimidation, than merely upon the crew members present. Indeed, the evidence of its impact bears that out.

The trial court also erred in disregarding as conclusory Knighton's affidavit regarding the September 9, 2003, personnel meeting following Kipp's return from a medical absence caused by work-induced major depression. In that meeting, Thomas singled Kipp out and deliberately humiliated him publicly by threatening to fire him and criticizing him about private personal matters.

In sum, the trial court committed reversible error by (i) concluding as a matter of law that Thomas' abusive treatment of Kipp was not extreme and outrageous, (ii) disregarding the jackhammer incident, (iii) disregarding Thomas' public humiliation of Kipp following his return from medical leave for severe, work-induced depression, and (iv) failing to draw reasonable inferences from the evidence in Kipp's favor.

A. Even Without Considering the July 30 and September 9, 2003 Incidents, Defendants' Actions, In The Aggregate, Were Sufficiently Extreme And Outrageous To Support A Claim For Intentional Infliction Of Emotional Distress.

To state a claim for intentional infliction of emotional distress, Kipp must plead facts that demonstrate that Thomas:

intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or (b) where any reasonable person would have known that such would result; *and* his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.

Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, ¶ 58 (internal quotation marks omitted). "Emotional distress does not so much occur as *unfold* ... where a defendant subjects a plaintiff ... to a pattern or practice of acts tolerable by themselves

though clearly intolerable in the aggregate. *Retherford v. AT&T Commc'ns of the Mountain States, Inc.*, 844 P.2d 949, 975 (Utah 1992).

Consequently, the Court must consider Thomas' pattern of mistreatment, intimidation, and verbal abuse *cumulatively*, in light of all the facts and circumstances of the case, rather than construing each incident separately. *Ellison v. Stam*, 2006 UT App 150, ¶ 38. The extreme and outrageous character of Thomas' conduct:

may arise from [Thomas'] knowledge that [Kipp] is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, or outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know.

Id. at ¶ 31 (quoting Rest., 2d, Torts § 46 cmt. F (1965)).

During Kipp's more than twenty years at Bountiful Power, his work was inherently highly stressful, characterized by daily work on potentially lethal power lines and heightened by the added responsibility for his crew members' safety. Consequently, Thomas' abusive treatment of Kipp, spanning well over a decade, was not merely rude or unpleasant, but rather a willful and deliberate disregard of human life and dignity.

Thomas routinely required Kipp to compromise his own safety and that of his crew members by shortcutting important safety measures and unnecessarily rushing through dangerous procedures, all the while subject to Thomas' verbal abuse and threats of termination. Thomas cut short Kipp's safety meetings and pressured him to skip standard safety procedures. As an example, on one occasion, Thomas required Kipp to forego grounding a 7,200-volt line before climbing up to work on it, resulting in an extremely painful and anxiety-producing shock. Thomas repeatedly required Kipp and

his crew to unnecessarily work in dangerous conditions such as rain, snow, and wind, when that work could have been done safely at a later time. Aff. K. Cabaness at ¶¶ 14-15, 22 (R. at 1383-84, 1387); Dep. Cabaness at 81:11-83:17 (R. at 2132), 136:12-137:5 (R. at 2145); Report Hawks at ¶¶ II.A.7 (R. at 3895-96).

Throughout Kipp's career, Thomas sought to break him down by demeaning him with verbal abuse and profanity, calling him "dumbass," "jackass," and "shit for brains." (R. at 2120, 2128); Report Hawks at ¶¶ II.A.6 (page 5) (R. at 3893). For his own amusement, Thomas often threatened to fire Kipp and regularly told him, "You are lucky to have this job. If you don't do what you are told, we can fire you." (R. at 2118-19). Thomas also frequently criticized Kipp publicly about his personal, private matters to humiliate him. Aff. Knighton (R. at 2213); Dep. D. Farnes at 41:8-42:21; 81:10-82:8 (R. at 1512, 1522). In 2003, Thomas told Kipp, "You know what your problem is? It's your wife. You need to get rid of your wife." Dep. Cabaness at 67:18-69:9 (R. at 2128). Thomas also physically abused employees to instill fear, such as when he kneed Steve Hutchings in the groin and told him, "I guess I showed you who is boss." Dep. K. Cabaness at 84:5-85:2 (R. at 2132-33); Aff. Hutchings (R. at 1952).

Thomas also senselessly created tasks for Kipp and his crew to perform, such as when he scattered a lineman's tools across the floor and ordered him to pick them up, Dep. Cabaness at 85:5-19. (R. at 2133), or when he ordered them to needlessly reposition equipment, Dep. Cabaness at 43:2-45:17 (R. at 2122), and unnecessarily repeat properly completed tasks such as disassembling a framed pole only to frame an identical pole in its place, Dep. Cabaness at 53:14-55:4 (R. at 2125). Indeed, even if Thomas' inappropriate

conduct might have been more tolerable in other employment circumstances, here, the life-threatening nature of Kipp's work and his known fragile mental health makes the aggregate of Thomas' abusive behavior over a decade extreme and outrageous.

Kipp's resulting emotional distress was exacerbated by Michaelis' patent support of Thomas. Although the foremen frequently informed Michaelis over the years of Thomas' mistreatment and abuse, and Michaelis knew the mental and emotional suffering it caused Kipp and others, Dep. Michaelis at 73:6-74:5 (R. at 1855), he did nothing to stop it, and actually threatened to terminate any employees who complained to him again about Thomas' abusive conduct. Aff. Kipp Cabaness at ¶¶ 13, 19, 22, 27 (R. at 1382, 1385-87, 1389-90); Aff. Hatch at ¶ 10 (R. at 1947); Aff. Hutchings at ¶ 9 (R. at 1952); Aff. Knighton at ¶ 19 (R. at 2215).

Even without considering the outrageous July 30 and September 9, 2003 incidents, one could reasonably conclude that Thomas' actions, which Michaelis tolerated and condoned, were extreme and outrageous, offending accepted standards of decency and morality, particularly in the aggregate, where Defendants knew of Kipp's emotionally susceptible state. Dep. Michaelis at 73:6-74:5 (R. at 1855). That these intolerable actions caused Kipp extreme emotional and psychological harm is well documented by his professional care providers and must be accepted as undisputed. Aff. VandeMerwe at ¶¶ 5-10 (R. at 2051); Aff. Sandberg at ¶¶ 1-8 (R. at 2058); Aff. Smith at ¶¶ 3-10 (R. at 2066); Aff. Hawks at ¶¶ 8-19 (R. at 3906-10); Report of Hawks at ¶¶ II.A.6., 7., and Observations 3-5 (R. at 3895-96, 3901). At a minimum, a reasonable person could

sensibly conclude that Thomas' pervasive pattern of abusive treatment of Kipp was extreme and outrageous, and that issue should have been presented to a jury:

Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

Gygi v. Storch, 503 P.2d 449, 450 (Utah 1972) (quoting Restatement (Second) of Torts § 46 cmt. h (1965)). Consequently, the trial court erred in not allowing the issue of whether Thomas' conduct, in the aggregate, was extreme and outrageous to go the jury.

B. Although Kipp Was Not Present For The Jackhammer Incident, Whether Thomas Intended It To Instill Fear In Kipp As Well As His Crew Members Present Is A Jury Issue, And The Trial Court Erred By Refusing To Consider That Incident.

The trial court erred by refusing to consider the July 30, 2003, jackhammer incident where Thomas ordered Brent Tuttle, a member of Kipp's crew, to risk his life by using a jackhammer to remove the concrete around a conduit containing live primary distributor lines with lethal amounts of electricity. The trial court erroneously refused to consider that incident because Kipp was not immediately present. (R. at 3658-59).

While, as a general rule, conduct outside a plaintiff's presence cannot give rise to an intentional infliction of emotional distress claim, an important exception to that rule:

reflects the law's recognition that certain conduct not committed in one's presence can nevertheless be so injurious to an individual, despite the fact that he is not present to witness it, that our societal values would be offended were we not to provide a remedy at law. Unusually offensive behavior can and should trigger the exception.

Hatch v. Davis, 2000 UT 44, ¶ 29.

Whether the jackhammer incident should have been considered, where Kipp was not present, requires the Court to consider: (1) Tuttle's relationship to Kipp; (2) Thomas' relationship with Kipp; and (3) the egregiousness of Thomas' conduct. *Id.* at ¶ 27.

Thomas must also have undertaken the conduct, in whole or in part, with the intent to inflict injury upon Kipp, even though he was not present. *Id.*

This incident must be viewed properly as part of an ongoing course of conduct characterized by Thomas' intimidation and control of Kipp and his crew through manipulation, ridicule, and fear. Examples include Thomas forcing Kipp or his crew members to: (i) perform unreasonably dangerous acts, while skipping safety procedures, Dep. Cabaness at 81:11-82:3 (R. at 2132); Report Hawks at ¶¶ II.A.7 (R. at 3895-96), (ii) unnecessarily reposition equipment and vehicles already properly set up to run lines and perform the task in the opposite direction, Dep. Cabaness at 43:2-45:17 (R. at 2122); Dep. Bellon at 33:25-36:12 (R. at 2122), (iii) needlessly repeat properly completed tasks, such as disassembling a framed pole only to identically frame an indistinguishable pole in its place, Dep. Cabaness at 53:14-55:4 (R. at 2125), and (iv) pick up a lineman's tools from the garage floor after Thomas purposely dumped and scattered them with no apparent purpose other than to manipulate him. Dep. Cabaness at 85:5-19. (R. at 2133).

Such evidence creates, at the very least, a reasonable inference that when Thomas ordered Tuttle to jackhammer the conduit, he intended to create a factor of fear and intimidation extending not only to those linemen immediately present, but also the entire crew, including Kipp. A jury could infer reasonably that Thomas knew or expected that those present would tell absent crew members such as Kipp, who, as their foreman and

safety director, was responsible for their safety. In fact, Kipp learned about this life-threatening incident soon after it occurred, and his psychologist determined that the incident exacerbated his fear and depression, even though Kipp did not witness it first hand. Report Hawks at ¶ II.A.7. (R. at 3894-95).

Under the *Hatch* factors, the trial court should have considered the jackhammer incident when assessing Kipp's claim for intentional infliction of emotional distress. First, Tuttle was a member of Kipp's close-knit crew with whom he had worked for years and had developed a close bond through the shared adversity of Thomas' emotional abuse. Second, Thomas was Kipp's supervisor, and Kipp was a member of the crew that Thomas' order was meant to scare and intimidate. Moreover, Thomas routinely singled Kipp out for ridicule and verbal abuse on many other occasions, both before and after the jackhammer incident. Third, Thomas' order was particularly egregious because it seriously endangered Tuttle's life. Finally, in light of Thomas' pervasive pattern of intimidating, manipulating, and controlling Kipp and his crew through emotionally abusive conduct, there is at least an issue of fact as to whether Thomas intended his conduct to intimidate and control the entire crew, including Kipp, although not present. Thus, the trial court should have considered the jackhammer incident, and its decision to disregard that incident must be reversed.

C. Steve Knighton's Affidavit Is Not Conclusory And Creates A Genuine Issue Of Fact As To Whether Thomas's Conduct Was Extreme And Outrageous.

The trial court held that Steve Knighton's affidavit testimony was conclusory regarding a Power Company employee meeting held on September 9, 2003. Knighton

testified that upon Kipp's return from a medical absence for work-induced major depression, Thomas, knowing of the reason for that absence, singled Kipp out at that meeting, threatened to fire him, and publicly belittled him by criticizing him about personal and confidential matters in front of all the employees. (R. at 3659).

However, the trial court erred because Knighton's affidavit did state specific and material facts. While Knighton did not identify what Thomas said about Kipp's personal matters, Knighton's affidavit establishes certain essential facts demonstrating that Thomas' conduct on that occasion was outrageous: (i) the meeting occurred the day after Kipp returned from a six-week medical absence for work-induced depression (ii), all Bountiful Power employees were present, (iii) Thomas singled out Kipp in front of them, and (iv) Thomas threatened to fire him. *Aff. Knighton* (R. at 2215). Where Thomas knew of Kipp's vulnerability to depression and the reason for his medical absence, *Dep. Michaelis* at 73:6-74:5 (R. at 1855), the facts alleged were sufficiently specific to consider the instance as a part of Thomas' continuing and unfolding pattern of extreme and outrageous conduct. *See Ellison v. Stam*, 2006 UT App 150, ¶ 31 (extreme and outrageous nature of conduct may arise from actor's knowledge that victim is particularly vulnerable to emotional distress due to mental condition); *Retherford*, 844 P.2d at 975 (emotional distress an unfolding injury). Moreover, Knighton's affidavit was sufficiently specific to allow Kipp's psychologist to form an opinion that Thomas' public humiliation of Kipp adversely affected his mental health. *See Aff. Hawks* at ¶¶ 11-18 (R. 3907-3910); *Aff. Knighton* at ¶¶ 19, 24 (R. at 2215-16).

Rather than disregarding Knighton's affidavit, the trial court should have construed it in a light most favorable to Kipp. *See Webster v. Sill*, 675 P.2d 1170, 1172 (Utah 1983) ("Doubts or uncertainties concerning issues of fact properly presented, or the nature of inferences to be drawn from the facts, are to be construed in a light favorable to the party opposing summary judgment."). Its failure to do so constitutes reversible error.

II. THE TRIAL COURT ERRED WHEN IT HELD, AS A MATTER OF LAW, THAT THE MANUAL CREATED NEITHER A CONTRACT NOR A COVENANT OF GOOD FAITH AND FAIR DEALING.

In granting Defendants summary judgment as to Kipp's claim for breach of implied contract, the trial court erroneously held, as a matter of law, that the Manual did not create any contract between Kipp and the City. (R. at 3654).

A. The Existence Of An Implied Contract Is A Question Of Fact That The Trial Court Wrongly Decided As A Matter Of Law.

Whether an employee manual creates an implied contract is a question of fact, particularly where, as here, the Manual purports to limit an employer's power to discharge an employee. *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 56 (Utah 1991). "[E]mployee manuals and bulletins containing policies for employee termination are legitimate sources for determining the apparent intentions of the parties and for fixing the terms of the employment relationship." *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1002 (Utah 1991). To determine whether the Manual created an implied contract, the Court should consider not only the language of the Manual itself, but also the employer's course of conduct and pertinent oral representations. *Brehany*, 812 P.2d at 56.

If the parties intended to form an implied agreement, the Court should give effect to the parties' intentions by enforcing that agreement, and determining the parties' intentions is a question of fact. *Johnson*, 818 P.2d at 1003. Without a conspicuous and unambiguous disclaimer, the determination that an employee manual is not an implied-in-fact contract cannot be made as a matter of law. *Id.*

B. The Manual Created An Implied Contract Between The City And Its Employees, Including Kipp, And The Court Erred In Disregarding Evidence of Contractual Intent.

The trial court ruled that there was no implied contract between Kipp and the City because “the language of the City Manual on which plaintiff relies is not ambiguous and does not create a contract between plaintiff and the city as to the issues raised in this lawsuit” and “the disclaimer in the City Manual, at Section 101(b), is clear and conspicuous and precludes the existence of a contract as to any items or rights identified in said disclaimer.” (R. at 3654).

However, that ruling is erroneous because the disclaimer is limited to salary and benefit issues: “No contract exists between Bountiful City and its employees *with respect to salary, salary ranges, movement within salary ranges, or employee benefits.*” (R. at 1570) (emphasis added). The disclaimer neither extends nor applies to employee discipline and termination policies and procedures or the Manual's promise of a workplace free of harassment or abuse. Where the City followed the Manual's binding provisions for disciplinary action, disciplinary measures, disciplinary investigations, disciplinary appeals, and termination of employment, (R. at 1608-13), the Manual was a legitimate source for Kipp to rely upon for the terms of his employment. *Brehany*, 812

P.2d at 56 (employee manuals and bulletins containing personnel policies are legitimate sources for determining parties' intentions and fixing terms of employment relationship)

The Manual states the City policy that all employees are expected:

to comply with the City's standards of conduct and performance, ***including all matters set forth in this manual*** and that any noncompliance with these standards may be remedied by appropriate disciplinary action.

(R. at 1608) (emphasis added).

The City both intended and treated the Manual as an implied contract for the protection and benefit of City employees, and any failure by management to implement or enforce its provisions was grounds for termination. Aff. Mears at ¶¶ 10, 14 (R. at 4142-43); Aff. Quinn at ¶¶ 10-11 (R. 4149-50). The Manual manifested the City's intent concerning work environment, safety, disciplinary action, termination, standards of conduct and other benefits and protections, upon which City employees could rely. Manual at §§ 406 (Work Environment), 409 (Sexual And Other Harassment); Aff. Mears at ¶ 12 (R. at 4143); Aff. Quinn at ¶ 10 (R. 4149-50) (both stricken at 4564-65). Those provisions were sufficiently definite to act as unilateral contract terms and communicated to Kipp. Consequently, his retention of employment constituted acceptance of, and consideration for, those contract terms. *See Johnson*, 818 P.2d at 1000-02.

When disciplining employees for failure to comply with the Manual, the City followed the Manual's procedures. Aff. Mears at ¶ 17 (R. at 4145); Aff. Quinn at ¶¶ 7-13 (R. 4149-51) (both stricken at 4564-65). Moreover, Michaelis acknowledged that he was responsible to enforce the Manual's policies for the City. Dep. Michaelis (R. at 1856-61).

The parties' oral representations also show that Kipp and the City both considered the Manual to be a contract, and Kipp testified that he intended and understood it to govern his terms of employment. Aff. Mears at ¶¶ 10, 14 (R. at 4142-43); Aff. Quinn at ¶¶ 10-11 (R. 4149-50) (both stricken at 4564-65); Aff. Cabaness at ¶ 10 (R. at 1381). The City has produced no evidence to the contrary.

An implied employment contract can be established from "a variety of sources, including the conduct of the parties, announced *personnel policies*, practices of that particular trade or industry, or other circumstances." *Canfield v. Layton City*, 2005 UT 60, ¶ 17 (quoting *Berube, v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1044 (Utah 1989) (at-will presumption may be overcome by evidence of contractual intent in employee manual, and conclusion that promise exists may arise from announced personnel policies)). *See also Canfield*, 2005 UT 60 at ¶ 24 (municipal employer may create implied employment contract through personnel policies); *Brehany*, 812 P.2d at 56 (plaintiffs could recover if they prove that terms in manual were implied terms of contract and were breached); *Johnson*, 818 P.2d at 1002 (Utah 1991) (employee manuals legitimate sources for determining parties' intent and fixing terms of employment). Hence, the trial court erred when it ruled that the Manual did not form an implied contract concerning the provisions Kipp relied upon.

C. The Trial Court Erred By Concluding That The Parties Agreed All Necessary Facts To Determine The Implied Contract Issue Were Before The Court.

With cross-motions for summary judgment pending, the trial court incorrectly assumed that the parties agreed the court had before it all necessary facts to determine

whether there was an implied contract and then decided as a matter of law that there was no contract. (R. at 4600). However, the mere fact that opposing parties file cross motions for summary judgment does not mean that a case may be decided as a matter of law.

DeStefano v. Oregon Mut. Ins. Co., 762 P.2d 1123, 1124 (Utah Ct. App. 1988). This is so because, by filing a motion, a party concedes only that no issue of fact exists under the theory he is advancing, but he does not thereby so concede that no issues remain in the event his adversary's theory is adopted. *Id.* When considering cross-motions for summary judgment, a court should weigh each motion *separately*, viewing the facts and inferences favorably to the non-moving party. *Prince, Yeats & Geldzahler v. Young*, 2005 UT 26, ¶ 10. The court below failed to apply these principles.

Kipp did not stipulate that all of the necessary facts were before the trial court. Indeed, Defendants did not raise the issue of the parties' intent regarding the Manual prior to their oral argument. Defendants' summary judgment memoranda argued only that the Manual's disclaimer in section 101 prevented it from creating an implied contract, so Kipp did not address the issue of the parties' intent in his briefing, and the trial court had not received any evidence of intent regarding the Manual. (R. at 1254-59). Ironically, Defendants even conceded at oral argument that the issue of whether an implied contract exists is a question of fact for the jury:

MR. PRESTON: The Court could decide all sorts of fact issues, but whether there's an implied contract is typically an issue, under the Dan's Foods case, that is reserved to a jury. Because the jury needs to hear the entire evidence and conclude, well, is there an implied contract, and, if so, what are the terms of that contract.

Partial Transcript of July 26, 2006, Hearing at 4:7-12 (transcript begins at R. at 4599).

At oral argument, for the first time, the City claimed that it intended the Manual merely to create non-binding goals, while producing no evidence to support that claim. (R. at 4600). In response to that bald assertion at oral argument, Kipp insisted that the parties' intent was vital to the analysis and that, without evidence to determine the parties' intent, the trial court could not grant Defendants' motion. (R. at 4601). At the conclusion of oral argument, the trial court incorrectly assumed, *sua sponte* and without justification, that the parties had agreed that all of the necessary facts on the implied contract issue were before the court and granted summary judgment. (R. at 4600).

Having had no chance to address adequately Defendant's newly-raised argument, following summary judgment, Kipp subsequently produced affidavits from Kenneth Mears and Bonnie Quinn, two City employees involved in creating, implementing, and enforcing the Manual. They testified that the City intended the Manual to be binding upon both the City and its employees, that the City followed its procedures for employee discipline and termination, and that both the City Attorney and City Manager had made statements consistent with that intent. (R. at 4160, 4168.) Without any evidence from the City regarding intent,¹ the trial court struck the Mears and Quinn affidavits.

D. The Trial Court Erred By Striking The Affidavits Of Kenneth Mears And Bonnie Quinn.

The trial court erroneously struck the Mears and Quinn affidavits, which Kipp submitted with his Rule 59 and 60(b) motion, and which evidence that the City intended the Manual to be contractually binding upon both the City and its employees.

¹Defendants neither briefed nor submitted or proffered any evidence of intent.

Defendants' oral argument raised issues not included in their briefing, and the affidavits of Mears and Quinn were necessary for Kipp to respond to those new arguments. Had Defendants raised the issue of intent in their supporting brief, Kipp would have discovered and produced those affidavits of intent prior to oral argument. However, Kipp did not do so because the only evidence before the court for summary judgment was Kipp's testimony that he intended the Manual to govern the terms of his employment and that the parties acted in accordance with their understanding that the Manual was binding.² Aff. K. Cabaness at ¶ 10 (R. at 1381). Where Defendants omitted from their memoranda any claim that the City never intended the Manual to form a binding agreement (and therefore Kipp did not address it in his opposition memorandum), then Defendants raised that claim for the first time at oral argument, and that claim later became important to the trial court's summary judgment ruling, the trial court unfairly denied Kipp the opportunity to respond to that argument and abused its discretion by refusing to consider the Mears and Quinn affidavits.

E. The City's Implied Contract With Kipp Included An Implied Covenant Of Good Faith And Fair Dealing.

Under Utah law, the Manual created an implied contract, which includes an implied covenant of good faith and fair dealing. *Wood v. Farm Bureau Ins. Co.*, 2001 UT App 35, ¶¶ 23-24 (implied covenant of good faith and fair dealing inherent in implied employment contract). At the very least, the Manual created a triable issue of fact of the

² Even if the trial court's ruling striking the Mears and Quinn Affidavits stands, Plaintiff's testimony that he understood the Manual to be a binding contract and that the parties acted in accordance with that understanding stands as the only evidence of either side's intent regarding the Manual. Aff. K. Cabaness at ¶ 10 (R. at 1381).

existence of such an implied contract. Indeed, Defendants conceded that determining whether there is a contract is a question of fact. (R. at 4599). Thus, the trial court erred in dismissing Kipp's claim of breach of the implied covenant of good faith and fair dealing.

III. UNDER KIPP'S CONTRACT CLAIMS, HE MAY RECOVER CONSEQUENTIAL DAMAGES FOR HIS EMOTIONAL INJURIES, AND THE TRIAL COURT ERRED BY FAILING TO SO HOLD.

Having held that the Manual did not create an implied contract or a covenant of good faith and fair dealing, the trial court did not decide whether Kipp could recover emotional distress damages under his claim for breach of implied contract. (R. at 3655).

For breach of contract, Utah law allows recovery of consequential damages, that is, "those [damages] reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." *Beck v. Farmers Ins. Exch.*, 701 P.2d 794, 801 (Utah 1985). In an unusual case such as the one at bar, damages for mental anguish may be provable as consequential damages for breach of contract. *See id.* at 802. The foreseeability of any damages depends upon the nature and language of the contract and the parties' reasonable expectations. *Id.* at 801.

The Manual provides that the City will not tolerate conduct that creates an intimidating, offensive, or hostile work environment, § 406 (R. at 1590-91), that the City will provide a work environment free of violent behavior and threatening conditions, § 408 (R. at 1592), that oral and written threats, physical assault, harassment, intentional damage, and every other act or threat of violence is strictly prohibited, § 408 (R. at 1592), that employees should refrain from offensive or undesirable conduct, § 508(b) (R. at

1604-05), and that profanity and abusive language, threatening or intimidating co-workers, and conduct endangering employee safety are all prohibited, § 508(c) (R. at 1605-07). Given the hazardous nature of Kipp's work, dealing daily with potentially lethal electrical lines, it was reasonably foreseeable at the time of contracting that, if those Manual provisions were breached, an individual with Kipp's fragile emotional health could suffer emotional distress damages of the type and extent that he did in fact suffer. Similarly, given Thomas' willful and deliberate mistreatment of Kipp, knowing of his fragile mental and emotional health, and the effects of that abuse upon him, consequential damages here should include damages for Kipp's emotional distress. *See Townsend v. Daniel, Mann, Johnson Mendenhall*, 196 F.3d 1140, 1150 (10th Cir. 1999) (consequential emotional distress damages allowed for breach of contract with willful or wanton conduct).

IV. UTAH'S GOVERNMENTAL IMMUNITY ACT WAIVES IMMUNITY FOR BREACHES OF THE CITY'S CONTRACTUAL OBLIGATIONS.

The trial court held that the Governmental Immunity Act, Utah Code Ann. §§ 63-3-1 to 63-30-38 (Supp. 1997),³ bars Kipp's claims for breaches of implied contract and of the covenant of good faith and fair dealing and for wrongful termination. The trial court reasoned that, under *Ledfors v. Emery County School Dist.*, 849 P.2d 1162, 1164 (Utah 1993), and *Butler, Crocket & Walsh Dev. Corp. v. Salt Lake County*, 2005 UT App 402 (unpublished), § 63-30-10(2) barred Kipp's breach of implied contract claim because his

³Although the Governmental Immunity Act relied upon was repealed, it still controls this matter. *See* Utah Code Ann. §§ 63-30d-101 to 63-30d-904 (2004).

injury arose out of an infliction of mental anguish. The trial court further ruled that, under *Broadbent v. Bd. of Educ. of Cache County School Dist.*, 910 P.2d 1274, 1276 (Utah Ct. App. 1996), the Act bars Kipp's wrongful termination claim. (R. at 3655-56). However, the trial court misinterpreted § 63-30-10, *Ledfors*, and *Butler*, because that section is inapposite to Kipp's claims that City employees *intentionally* caused him emotional distress, and § 63-30-5 has waived governmental immunity for breach of contract claims.

**A. The Governmental Immunity Act Does Not Bar Kipp's
Claims For Breach Of Implied Contract.**

In Utah, "[i]mmunity from suit of all governmental entities is waived as to any contractual obligation." Utah Code Ann. § 63-30-5(1) (Supp. 1997). Despite that waiver, the trial court held that, under *Ledfors*, 849 P.2d 1162, and *Butler, Crocket & Walsh Dev. Corp.*, 2005 UT App 402, § 63-30-10(2) creates an exception for breach of contract claims seeking damages for infliction of emotional distress. (R. at 3655).

The trial court's interpretation of *Ledfors* and *Butler* is erroneous. First, § 63-30-10 addresses only "injuries proximately caused by a *negligent* act or omission" of a government employee and is inapplicable here, where Kipp's injuries were caused by Thomas' *intentional* and deliberate acts.⁴ Utah Code Ann. § 63-30-10. The Supreme Court has held that § 63-30-10(2) is inapposite to injuries caused by a municipal actor's *intentional* infliction of emotional distress. *Atiya v. Salt Lake County*, 852 P.2d 1007, 1011 (Utah 1993) (finding § 63-30-10 inapposite where plaintiff did not "allege injury

⁴Although Plaintiff initially pleaded a cause of action for negligence, the sole claim based on negligence was withdrawn. (R. at 2330).

caused by negligent act of the County or its employee” but specifically alleged “that the County’s *intentional* acts caused her emotional distress”) (emphasis in original).

Neither *Ledfors* nor *Butler* addressed claims arising from intentional, deliberate, and wrongful acts of a government employee; *Ledfors* alleged a negligent failure to supervise, resulting in the assault and battery of one high school student by others, 849 P.2d at 1165-66, while *Butler* claimed a negligent failure to grant a conditional use permit, disguised as a contract-based declaratory action, 2005 UT App 402 at *1.

Second, § 63-30-10 does not apply to claims for injuries arising from a government entity’s breach of contractual obligations. In *Ledfors*, the Court held that the “Governmental Immunity Act, especially section 63-30-10, focuses on the conduct or situation out of which the injury arose, not on the theory of liability crafted by the plaintiff or *the type of negligence* alleged.” 849 P.2d 1166 (emphasis added). In *Butler*, the Court of Appeals expanded upon that holding to affirm the dismissal of the developer’s claims for a negligent failure to grant a conditional use permit, where the developer had re-packaged those claims as a contract-based declaratory action, trying to avoid the immunity provision of § 63-30-10. 2005 UT App 402 at *1. In contrast, here, Kipp does not allege or rely upon any type of negligence, only an intentional breach of contract. Complaint at ¶¶ 22-35 (R. at 2-9).

The present case is further distinguishable from *Butler* in that Kipp’s claim legitimately sounds in contract and is not an attempt to disguise a negligence claim as a breach of contract to evade immunity. Here Kipp seeks only damages available for the City’s breaches of contract, which include consequential damages for foreseeable injuries

to his mental health, *see* Complaint at ¶¶ 27-29 and page 12 (R. at 1-13), whereas in *Butler*, the developer's contract-based declaratory judgment action sought affirmative relief far beyond what was available in a declaratory action, 2005 UT App 402 at *1.

Simply put, Kipp's breach of contract claim does not arise from any infliction of emotional distress, much less an infliction of emotional distress caused by *negligence*. Instead, Kipp's injuries arose from Defendants' breach of the Manual's implied contract where the City, having promised not to tolerate an abusive and hostile work environment created, allowed and condoned exactly that. Kipp's injuries also arose from his wrongful constructive termination by the City, which, as set forth below, also is a contract claim. These breaches of contract exist independently of Kipp's emotional distress injuries.

The fact that Defendants' breaches of contract caused Kipp emotional distress does not transform his contract claims into barred claims for *negligent* infliction of emotional distress.

B. Governmental Immunity Is Waived For Kipp's Wrongful Termination Claim Because It Is A Breach Of Contract Rather Than A Tort.

A wrongful termination claim may have both tort and contract aspects, depending on which exception to the at-will employment presumption applies. If the claim alleges that the termination violates a clear and substantial public policy, it is a tort. *Berube*, 771 P.2d at 1042. However, if it alleges that the termination violates an implied contract, it is a contract action. *Id.* at 1044; *see also Johnson*, 818 P.2d at 997 (examining involuntary termination action under contract theory); *Canfield*, 2005 UT 60 at ¶¶ 13-15 (treating wrongful termination action against city as contract action).

Here, the abusive working conditions became so intolerable that 13 of 15 Bountiful Power crew members quit between summer of 2003 and spring 2004. Dep. D. Farnes (R. at 1526-27); Dep. A. Farnes (R. at 1553-54); Dep. Michaelis (R. at 1877); Aff. Hutchings at ¶¶ 5-6 (R. at 1951); Aff. Hatch at ¶ 13 (R. at 1946-47); Aff. Tuttle at ¶ 10 (R. at 1941); Aff. Knighton at ¶ 26 (R. at 2216). Kipp claims that, under the authority of *Touchard v. La-Z-Boy, Inc.*, 2006 UT 71, ¶ 27 (“...a resignation under working conditions that a reasonable employee would consider intolerable is equivalent to termination.”), his constructive termination by the City violated the City’s own policies and procedures as set forth in the Manual.

Kipp was a regular employee, not an at-will employee. *See* Manual at § 105(c) (R. at 1571). Consequently, his constructive termination by the City violated § 701(a), which provides only that non-regular employees may be terminated at the will of the Department Head. (R. at 1613). The Manual also provides that, in order to terminate or even discipline Kipp, the City was required to (i) conduct a disciplinary investigation, giving him a written notice of the claims against him, an opportunity to respond, and advising him in writing of investigation’s findings and the discipline, Manual at § 603 (R. at 1658-59), (ii) inform him of his right to appeal the discipline, *id.* at § 602(e) (R. at 1658), and (iii) allow him to appeal the discipline to the City Manager, the City Council, or the Board of Appeals, including the opportunity to present evidence and confront witnesses at a public hearing, *id.* at § 604(c)(3)(iii) (R. at 1660-61). Because Kipp’s constructive termination by the City deprived him of the rights those sections guarantee him, the City breached its implied contract with Kipp.

Kipp does not claim that his termination violated public policy and even stipulated in the trial court that his wrongful termination claim is not brought under a tort theory.⁵ Thus, Kipp's wrongful termination action seeks damages for the breach of a contractual obligation, and sovereign immunity has been waived under Utah Code Ann. §63-30-5-1.

**VI. KIPP'S WRONGFUL TERMINATION CLAIM IS NOT
DUPLICATIVE OF HIS OTHER CONTRACT CLAIMS.**

The District Court held that, to the extent that Kipp's second cause of action, for wrongful termination, was a contract claim, it was duplicative of his other contract claim. (R. at 3656). On the contrary, Kipp's wrongful termination claim is not duplicative, because it alleges that Kipp's wrongful termination violated separate provisions of Manual and the implied contract those provisions created.

Kipp's claim for breach of implied contract and the duty of good faith and fair dealing alleges that the City breached the Manual's provisions regarding working conditions and the covenant of good faith and fair dealing by subjecting Kipp to harassment, intimidation, and abuse. Complaint at ¶¶ 27-28 (R. at 7). Kipp's wrongful termination claim also includes those allegations, but it goes beyond them, additionally alleging that the City breached the Manual's implied contract by constructively terminating him, under the precedent of *Touchard*, 2006 UT 71, ¶ 27. By subjecting Kipp to abusive, harassing, and hostile working conditions that a reasonable employee would

⁵ Although the Complaint uses the words "wrongful" and "tortious," those terms merely indicate Plaintiff's recognition that a wrongful termination may have both tortious and contractual aspects. The factual allegations underlying the Complaint control its interpretation. *See Sill v. Hart*, 2005 UT App 537, ¶ 13 (court determines the character of a pleading by the facts set out in the pleading), *rev'd on other grounds*, 2007 UT 45.

have considered intolerable, and by ignoring his complaints and requests that the City take remedial action to improve those conditions, the City forced him to resign. *Id.*

The essence of Kipp's wrongful termination claim is that the City constructively terminated him and, by so doing, wrongfully deprived him of the procedures that the Manual requires the City to follow when terminating an employee, amounting to a separate breach of contract from the City's breach of §§ 406, 408, and 508. Complaint (R. at 7-8). *Compare* §§ 406, 408, and 508 (R. at 1590, 1592-93, and 1604-07, respectively) *with* § 603 (R. at 1609) (procedure for disciplinary investigation); § 602(d) and (e) (R. at 1609) (right to be informed of right to appeal discipline), § 604(c) (R. at 1611-12) (right to appeal to City Manager, City Council, or Board of Appeals), and § 701(a) (R. at 1613) (allowing termination at-will only of *non*-regular employees).

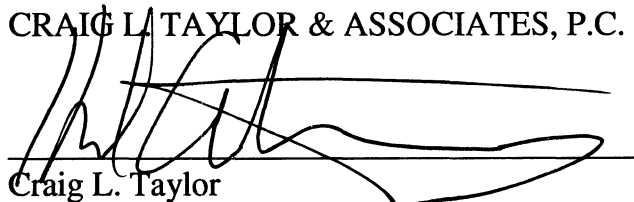
Due to these distinctions, Kipp's wrongful termination claim is not duplicative of his other contractual claims and was erroneously dismissed by the trial court.

CONCLUSION

For the reasons set forth above, the Supreme Court should reverse the trial court's ruling granting Defendants summary judgment and remand this case to the trial court.

Dated this 17th day of November, 2008.

CRAIG L. TAYLOR & ASSOCIATES, P.C.



Craig L. Taylor

Willis F. McComas

Hal Armstrong

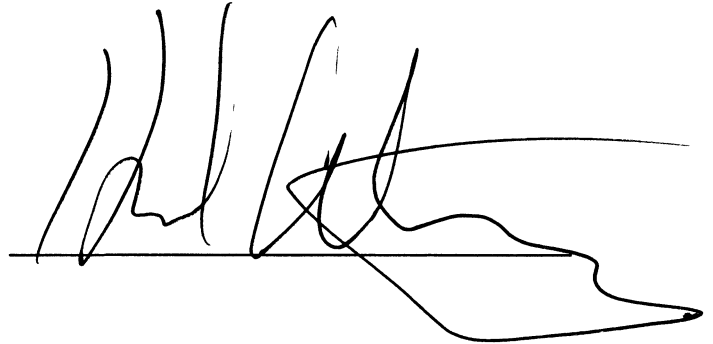
Bryan D. Nielsen

Attorneys for Plaintiff/Appellant

CERTIFICATE OF MAILING

I, hereby certify that I sent the attached **PLAINTIFF/APPELLANT'S OPENING BRIEF** upon the following parties by first class U.S. mail, postage prepaid, this ¹⁷20th day of ~~November~~ May, 2008.

Stanley J. Preston Esq.
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Salt Lake City, Utah 84145

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

Utah Code Ann. § 63-30-3 (2003)

Immunity of governmental entities from suit.

(1) Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

(2) Subsections (2)(a) through (c) are unique or essential core governmental functions and, notwithstanding the waiver of immunity provisions of Section 63- 30-10, governmental entities, political subdivisions, and their officers and employees are immune from suit for any injury or damage resulting from the implementation of or the failure to:

(a) implement measures to control the causes of epidemic and communicable diseases and other conditions significantly affecting the public health or necessary to protect the public health as set out in Title 26A, Chapter 1, Local Health Departments;

(b) investigate and control suspected bioterrorism and disease as set out in Title 26, Chapter 23b, Detection of Public Health Emergencies Act; and

(c) respond to a national, state, or local emergency, a public health emergency as defined in Section 26-23b-102, or a declaration by the President of the United States or other federal official requesting public health-related activities.

(3) (a) For the purposes of this chapter only, the following state medical programs and services performed at a state-owned university hospital are unique or essential to the core of governmental activity in this state and are considered to be governmental functions:

(i) care of a patient referred by another hospital or physician because of the high risk nature of the patient's medical condition;

(ii) high risk care or procedures available in Utah only at a state-owned university hospital or provided in Utah only by physicians employed at a state-owned university acting in the scope of their employment;

(iii) care of patients who cannot receive appropriate medical care or treatment at another medical facility in Utah; and

(iv) any other service or procedure performed at a state-owned university hospital or by physicians employed at a state-owned university acting in the scope of their employment that a court finds is unique or essential to the core of governmental activity in this state.

(b) If any claim under this Subsection (3) exceeds the limits established in Section 63-30-34, the claimant may submit the excess claim to the Board of Examiners and the Legislature under Title 63, Chapter 6.

(4) The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

(5) Officers and employees of a Children's Justice Center are immune from suit for any injury which results from their joint intergovernmental functions at a center created in Title 62A, Chapter 4a, Child and Family Services.

Utah Code Ann. § 63-30-5 (2003)

Waiver of immunity as to contractual obligations.

(1) Immunity from suit of all governmental entities is waived as to any contractual obligation. Actions arising out of contractual rights or obligations shall not be subject to the requirements of Sections 63-30-11, 63- 30-12, 63-30-13, 63-30-14, 63-30-15, or 63-30-19.

(2) Notwithstanding Subsection (1), the Division of Water Resources is not liable for failure to deliver water from a reservoir or associated facility authorized by Title 73, Chapter 26, Bear River Development Act, if the failure to deliver the contractual amount of water is due to drought, other natural condition, or safety condition that causes a deficiency in the amount of available water.

Utah Code Ann. § 63-30-10 (2003)

**Waiver of immunity for injury caused by negligent act or omission of employee --
Exceptions.**

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of, in connection with, or results from:

- (1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
- (2) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;
- (3) the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;
- (4) a failure to make an inspection or by making an inadequate or negligent inspection;
- (5) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;
- (6) a misrepresentation by an employee whether or not it is negligent or intentional;
- (7) riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;
- (8) the collection of and assessment of taxes;
- (9) the activities of the Utah National Guard;
- (10) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;
- (11) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire and State Lands;
- (12) research or implementation of cloud management or seeding for the clearing of fog;
- (13) the management of flood waters, earthquakes, or natural disasters;
- (14) the construction, repair, or operation of flood or storm systems;

(15) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6-14;

(16) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them;

(17) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement;

(18) the activities of:

(a) providing emergency medical assistance;

(b) fighting fire;

(c) regulating, mitigating, or handling hazardous materials or hazardous wastes;

(d) emergency evacuations;

(e) transporting or removing injured persons to a place where emergency medical assistance can be rendered or where the person can be transported by a licensed ambulance service; or

(f) intervening during dam emergencies; or

(19) the exercise or performance or the failure to exercise or perform any function pursuant to Title 73, Chapter 5a, Dam Safety, or Title 73, Chapter 10, Board of Water Resources --Division of Water Resources, which immunity is in addition to all other immunities granted by law.

Personnel Policies & Procedures Manual of the City of Bountiful

101. PURPOSE OF THIS MANUAL

(a) This Personnel Policies & Procedures Manual provides information concerning the practices, standards of conduct, disciplinary measures and other policies and procedures of the City. Because of the changing nature of Federal and State laws, as well as the changing needs of the City and its residents and employees, the policies and procedures in this manual may be unilaterally added to, rescinded, or modified from time to time as may be decided by the Bountiful City Council.

(b) No contract exists between Bountiful City and its employees with respect to salary, salary ranges, movement within salary ranges, or employee benefits. These may change as a result of salary surveys, job analysis, appropriations of the City Council, or changes in City policies and procedures.

(c) This manual supersedes all prior policies and procedures of the City of Bountiful which are inconsistent with the matters stated therein.

Personnel Policies & Procedures Manual of the City of Bountiful

105. APPLICATION OF THIS MANUAL

(a) These policies and procedures do not apply to the City Manager. The City Manager's status, compensation, benefits and responsibilities are determined by State law and as negotiated between the City Manager and the City Council.

(b) Department heads are the City Recorder, City Treasurer, City Engineer, Police Chief, Fire Chief, Water and Sewer Manager, Parks and Recreation Director, Light and Power Director, Streets and Sanitation Superintendent, Planning Director, Information Systems Manager, Administrative Services Director and the City Attorney. This manual applies to department heads, except for those provisions relating to disciplinary actions. Department heads may be terminated with or without cause, without appeal, as provided by State law. In the event of involuntary termination for reasons other than dishonesty, department heads shall be compensated with a lump sum severance pay of thirteen weeks' salary and 20% of accrued sick leave up to a maximum of 288 hours, plus accrued vacation up to a maximum of 240 hours.

(c) Regular employees are those individuals filling Council-authorized positions who have successfully completed a probation period of one year, and who are expected to work 32 or more hours per week on a year-round basis. This manual has been specifically intended to apply to regular employees.

(d) Probationary employees are those individuals hired to fill Council-authorized positions who have yet to complete a probationary period of one year, and who are expected to work 32 or more hours per week. This manual has been specifically intended to apply to probationary employees, except for those provisions relating to disciplinary actions. Probationary employees are strictly at-will employees and may be terminated with or without cause, without appeal or procedure.

(e) Non-regular employees are those individuals hired on a part-time, seasonal, temporary or other basis. These policies and procedures apply to non-regular employees as to hiring practices, employment policies and standards of conduct, but not otherwise. Benefits will be paid only if required by law or by express provision of the position with the approval of the City Manager. Non-regular employees are strictly at-will employees and may be terminated with or without cause, without appeal or procedure.

Personnel Policies & Procedures Manual of the City of Bountiful

406. WORK ENVIRONMENT

It is the policy of the City to promote a productive work environment that is a clean, safe and hospitable place to which employees may fulfill their responsibilities. Accordingly, City policy will not tolerate verbal or physical conduct by any employee which harasses, disrupts, or interferes with another's work performance or which creates an intimidating, offensive, or hostile environment, nor will the City tolerate any such behavior toward, or from, members of the general public. Employees are expected to act in a positive manner and contribute to a productive environment.

Personnel Policies & Procedures Manual of the City of Bountiful

408. WORK PLACE VIOLENCE

It is the policy of the City to provide, as far as possible based on the nature of our duties, a work environment that is free of threatening conditions, violent behavior and criminal activity. Oral or written threats, physical assault, harassment, intentional damage, and every other act or threat of violence by City employees is strictly prohibited.

It is the responsibility of all employees to notify the Department Head when there has been an act or threat of violence, whether actual, express, or implied. In a situation of immediate danger, the Police Department should be immediately notified.

All incidents of work place violence are to be reported immediately to the Department Head, who shall in turn notify the City Attorney. It is the responsibility of all employees to fully cooperate with any City investigation into an incident of work place violence.

Work place violence is grounds for termination of employment from the City.

Personnel Policies & Procedures Manual of the City of Bountiful

508. STANDARDS OF CONDUCT

(a) Employment is subject to meeting the performance and conduct requirements of the employee's job to the satisfaction of the City. Employees who fail to satisfy these requirements may be subject to disciplinary action from warnings to termination. The standards set out below are as complete as can reasonably be made, but are not necessarily all-inclusive.

(b) Employees are expected at all times to conduct themselves in a positive manner so as to promote the best interests of the City and the public. Such conduct includes:

- (1) Applying one's self fully to assigned duties during work hours.
- (2) Reporting to work punctually as scheduled and being at the proper work station, ready for work, at the assigned starting time.
- (3) Giving proper advance notice whenever unable to work or report on time.
- (4) When away from work for any reason, keeping supervisors informed as to the reason, expected duration, the date and/or time of anticipated return, and, when required, furnishing medical or other documentation justifying the absence.
- (5) Prudent and frugal use of City funds, equipment, vehicles, and supplies.
- (6) Complying with all safety and security regulations.
- (7) Wearing clothing appropriate for the work being performed.
- (8) Maintaining work place and work area cleanliness and orderliness.
- (9) Treating the public, visitors and co-workers in a courteous manner.
- (10) Refraining from conduct that is offensive or undesirable, or which is contrary to the City's best interests.
- (11) Performing assigned tasks efficiently and in accord with established quality standards.
- (12) Reporting to management suspicious, unethical or illegal conduct by the public, visitors or co-workers.
- (13) Co-operating with City investigations.

(c) The following conduct is prohibited and may subject the individual involved to disciplinary action up to and including termination:

- (1) Violation of City or departmental policies and procedures.

(2) The use of alcoholic beverages or illegal drugs during working hours, reporting to work under the influence of alcohol or drugs, or the use, sale, dispensing or possessing of alcohol and/or illegal drugs or narcotics on City premises.

(3) The use of profanity or abusive language.

(4) Chronic tardiness.

(5) The possession of firearms or other weapons on City property, unless connected with the City work assignment of the employee.

(6) Insubordination, or the refusal by an employee to follow management's instructions concerning a job-related matter, or the refusal to perform a function of the job when capable of doing so.

(7) Violence, fighting, or assault on a co-worker or member of the public.

(8) Unauthorized possession or use, theft, destruction, defacement or misuse of City property, or that of another employee or member of the public.

(9) Recording conversations with other employees or supervisors without the knowledge of all the parties involved.

(10) Gambling on City property.

(11) Falsifying or altering any City record or report.

(12) Threatening or intimidating co-workers or members of the public.

(13) Absence from work or work station without authorization or excuse.

(14) Smoking where prohibited.

(15) Sleeping while on duty.

(16) Failure to wear assigned safety equipment or failure to abide by safety rules and policies.

(17) Conduct endangering the safety of employees or the public.

(18) Improper attire or inappropriate personal appearance, or failure to wear required uniforms.

(19) Inducing or attempting to induce any City employee to violate any City policy.

(20) Engaging in any form of sexual or other harassment.

- (21) Incompetency, inefficiency, poor workmanship, misfeasance, malfeasance or nonfeasance in the performance of job duties, or neglect of job duties.
- (22) Dishonesty in word or conduct.
- (23) Failure to be courteous or cooperative with the public, co-workers or supervisors.
- (24) Falsification of City records or reports.
- (25) Failure to conduct one's self in a professional and competent manner appropriate to the position.
- (26) Unauthorized use, or abuse, of City vehicles or equipment.
- (27) Unauthorized performance of City services.
- (28) Failure to maintain eligibility for a driving license, when driving is necessary to the discharge of City duties.
- (29) Failure to maintain skills and professional licensing, when such skills or licensing are necessary to the discharge of City duties.
- (30) Violation of the criminal laws, whether Federal, State or local.
- (31) Unlawful discrimination of any nature.
- (32) Failure to keep confidential City matters which are of a delicate, sensitive, or private nature by law, custom, policy or instruction of supervisor.
- (33) Abuse of sick leave, bereavement leave, jury duty or other paid or unpaid leave.
- (34) Unauthorized possession of a firearm or other deadly weapon.
- (35) Conduct off the job which discredits the City or affects the employee's ability to perform his/her duties effectively.
- (36) Failure to cooperate with an investigation.
- (37) Unjustified interference with the work of other City Employees.
- (38) Failure to comply with any policy or agreement with the City concerning the use of equipment, including personal cellular telephone agreements.

Personnel Policies & Procedures Manual of the City of Bountiful

601. GROUNDS FOR DISCIPLINARY ACTION

It is the policy of the City that all employees are expected to comply with the City's standards of conduct and performance, including all matters set forth in this manual, City policies as may be elsewhere expressed, and any applicable departmental policies and procedures, and that any non-compliance with these standards may be remedied by appropriate disciplinary action.

Personnel Policies & Procedures Manual of the City of Bountiful

602. DISCIPLINARY MEASURES

(a) Under normal circumstances, the City endorses a policy of progressive discipline in which it attempts to provide employees with notice of deficiencies and an opportunity to improve. However, where the non-compliance is grave, more serious discipline may be applied, up to and including termination, even when there is no prior disciplinary history.

(b) An employee whose conduct violates these policies and procedures may be subject to one or more of the following actions, depending upon the judgment of the supervisor and/or Department Head of the severity of the offense and the employee's previous performance record:

(1) An oral warning, to be documented and placed in the employee's personnel file. The fact that the oral warning is documented does not convert it into a written reprimand. An immediate supervisor, a Department Head or the City Manager may issue an oral warning.

(2) A written reprimand, with a copy to be placed in the employee's personnel file. A Department Head or the City Manager may issue a written reprimand.

(3) Suspension or other time off without pay, or forfeiture of accrued leave of up to 30 days. A Department Head or the City Manager may issue an order of suspension. An employee on suspension shall be responsible for the continuation of his/her employment benefits.

(4) Demotion by either moving an employee to a position of lesser responsibility and compensation, or by keeping the employee in the current position but at a lesser compensation. A Department Head or City Manager may demote an employee.

(5) Termination from employment with the City. A Department Head or the City Manager may terminate an employee.

(c) Pending a full investigation into the alleged violations, the City may, when it deems it to be in the best interests of the City and/or the employee, (1) suspend an employee and relieve him/her of all City duties, with pay, or (2) temporarily reassign an employee to another position or work location at the same rate of pay. In such case, if the employee is found to be innocent, he/she shall be reinstated without loss of seniority or credits of any kind.

(d) An employee will be informed of the alleged violation and given an opportunity to present his/her explanation of the event or conduct in question prior to any disciplinary action being taken. Discipline shall not be imposed upon there is a determination that facts sufficient for discipline exist.

(e) Except for oral warnings, an employee will be given a notice, in writing, of the disciplinary action and of his/her right to appeal the same.

Personnel Policies & Procedures Manual of the City of Bountiful

603. DISCIPLINARY INVESTIGATIONS

(a) Before any disciplinary action (except for oral reprimands) may be taken against an employee, the following steps shall be taken:

(1) The employee should be given written notice of the claims against him/her.

(2) Prior to a determination of what discipline is to be imposed, if any, the employee shall be given the opportunity to respond verbally and/or in writing to the claims alleged. A record of the response shall be made. No disciplinary decision shall be made at the time of the employee's explanation.

(3) If, after due deliberation, it is determined by the Department Head that discipline is appropriate, the employee shall be advised in writing of the findings and discipline.

Personnel Policies & Procedures Manual of the City of Bountiful

604. DISCIPLINARY APPEALS

Once the Department Head has determined upon a disciplinary action, it shall be implemented immediately. A regular employee has the right of appeal, but, except in the case of suspensions, during the pendency of the appeal the action taken shall be in effect. In the event that the action taken is overturned on appeal, the employee shall be reinstated without loss of pay, seniority or credits of any kind. Suspensions shall not be implemented until after all appeals have been concluded.

There shall be a right of appeal of discipline in regular employees, as follows:

(a) Oral Warnings.

(1) If given by a supervisor, an oral warning may be appealed to the Department Head. If an oral warning is given by the Department Head or the City Manager, there is no right of appeal.

(2) The appeal shall be made by the aggrieved employee by filing with the Department Head, within ten days of the issuance of the oral warning, a written statement of the appeal. The statement shall set forth the nature of the oral warning, the circumstances in which it arose, and the reasons why the employee is appealing its issuance.

(3) The Department Head shall immediately notify the supervisor of the appeal. Unless extenuating circumstances are present, the supervisor shall file a written response to the appeal within ten days from the date of the filing of the appeal. The employee shall be furnished a copy of the response.

(4) Within ten days, or as soon thereafter as is practical, of the filing of the appeal, the Department Head shall review the appeal and the response. The employee shall be given the opportunity in person to informally review the appeal with the Department Head. At the request of the Department Head, the supervisor shall also be present. Within fifteen days, or as soon thereafter as is practical, of the filing of the appeal, the Department Head shall determine whether to uphold, modify or disallow the oral warning. The Department Head may not increase the severity of the discipline, such as by increasing an oral warning to a written reprimand. The employee shall be notified in writing of the decision of the Department Head.

(b) Written Reprimands and Suspensions.

(1) A written reprimand or a suspension may be appealed from the Department Head to the City Manager, but there is no further right of appeal. A written reprimand or suspension from the City Manager may not be appealed.

(2) The appeal shall be made by the aggrieved employee by filing with the Department Head, within ten days of the issuance of the written reprimand, a written statement of the appeal. The statement shall set forth the nature of the written reprimand or suspension, the circumstances in which it arose, and the reasons why the employee is appealing its issuance.

(3) The Department Head shall immediately notify the City Manager of the appeal. Unless extenuating circumstances are present, the Department Head shall file a written response to the appeal within ten days from the date of the filing of the appeal. The employee shall be furnished a copy of the response.

(4) Within ten days of the filing of the appeal, or as soon thereafter as is practical, the City Manager shall review the appeal and the response. The employee shall be given the opportunity in person to informally review the appeal with the City Manager. At the request of the filing of the appeal, or as soon thereafter as is practical, the City Manager shall determine whether to uphold, modify or disallow the written reprimand or suspension. The City Manager may not increase the severity of the discipline, such as by increasing a written reprimand to a suspension, or a suspension to a demotion. The employee shall be notified in writing of the decision of the City Manager.

(c) Demotions and Terminations.

(1) Demotions and terminations may be appealed to the City Manager, the Board of Appeals and the City Council.

(2) City Manager: The appeal to the City Manager shall be made in the same manner as described in the preceding section for Written Reprimands and Suspensions.

(3) Board of Appeals.

(i) If the aggrieved employee wishes to appeal further, the appeal shall be made by the aggrieved employee by filing with the City Recorder, within ten days of the issuance of the decision of the City Manager, a written request that the appeal be heard by the Board of Appeals.

(ii) The City Recorder shall immediately notify the Board of Appeals of the appeal. The Board shall be furnished with the written appeal documents of the aggrieved employee, the response of the supervisor and/or Department Head, and the written decision of the City Manager.

(iii) The Board of Appeals shall take and receive evidence and fully hear and determine the appeal. The aggrieved employee shall be entitled to appear in person, be represented by counsel, have a public hearing, confront the witnesses whose testimony is to be considered, examine the evidence to be considered by the Board, and call such witnesses and submit such relevant evidence as he/she deems desirable. The City Attorney or his/her designee shall present the case in support of the disciplinary action, may present such witnesses

and relevant evidence as he/she deems desirable, and may cross-examine the witnesses presented by the appellant.

(iv) Within fifteen days of the filing of the appeal, the Board of Appeals shall hold a hearing and determine whether to uphold, modify or disallow the disciplinary decision of the City Manager. The Board of Appeals, after concluding the hearing, may deliberate in private. Its decision shall be made by secret ballot. A majority vote of the Board is required to sustain a disciplinary action. The Board may not increase the severity of the discipline originally imposed by the Department Head, such as by increasing a demotion to a termination. However, if the City Manager lessened the original discipline, the Board may in its discretion increase the severity of the discipline back to that originally imposed by the Department Head. The employee shall be notified in writing of the decision of the Board of Appeals.

(4) The City Council:

(i) If the aggrieved employee wishes to appeal further, the appeal shall be made by the aggrieved employee by filing with the City Recorder, within fourteen days of the issuance of the decision of the Board of Appeals, a written request that the appeal be heard by the City Council.

(ii) The City Recorder shall at the next City Council meeting notify the appeal. The City Council shall be furnished with the written appeal documents of the aggrieved employee, the response of the supervisor and/or Department Head, the transcript or tape recording of the proceedings before the Board of Appeals, and the written decisions of the City Manager and the Board of Appeals.

(iii) The City Council shall hear the appeal in the nature of an appellate court. No new evidence may be submitted, and no witnesses may be called. The aggrieved employee shall be entitled to appear in person, be represented by counsel, have a public hearing, submit written argument based on the existing record at least five days prior to the hearing, and make oral arguments before the Council either himself/herself or through counsel at the hearing, or both. The City Attorney or his/her designee shall present the case in support of disciplinary action, may submit written argument based on the existing record at least two days prior to the hearing, and may make oral arguments before the Council at the hearing.

(iv) Within fifteen days of the notification of the appeal by the City Recorder, or as soon thereafter as is practical, the City Council shall hold a hearing and determine whether to uphold, modify or disallow the disciplinary decision of the Board of Appeals. The City Council, after concluding the hearing, may deliberate in executive session. Its decision shall be made in open session. A majority vote of the Council is required to sustain the disciplinary action. The Council may not increase the severity of the discipline originally imposed by the Department Head, as by increasing a demotion to a termination. However, if the

City Manager or Board of Appeals lessened the original discipline, the Council may in its discretion increase the severity of the discipline back to that originally imposed by the Department Head. The employee shall be notified in writing of the decision of the City Council.

- (v) The decision of the City Council is final.

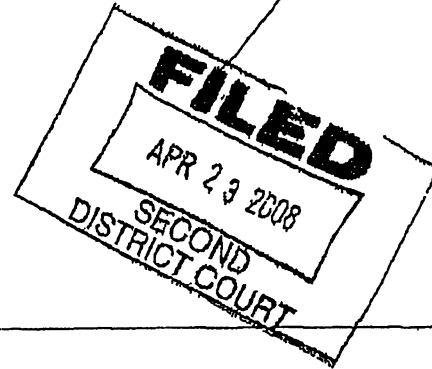
Personnel Policies & Procedures Manual of the City of Bountiful

701. TERMINATION OF EMPLOYMENT

(a) Department Heads are authorized to terminate at their discretion the employment of any employee filling a non-regular employment position.

(b) Non-regular employees are free to resign from employment at any time. The City requests, however, that such employees provide their supervisor or Department Head with as much prior notice as possible. This will enable the City to find an adequate replacement in a timely manner.

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Bountiful, Utah 84010

Order denying plaintiffs rule 59 and 60b motion to alte



VD24265173

pages:

Attorneys for Defendants

040700494 THOMAS,BRENT

IN THE SECOND DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

KIPP CABANESS and DOES 1-20,

Plaintiffs,

vs.

BRENT THOMAS, CLIFFORD C.
MICHAELIS and BOUNTIFUL CITY,

Defendants.

ORDER:

(1) DENYING PLAINTIFF'S RULE 59
AND 60(b) MOTION TO ALTER OR
AMEND COURT'S FINAL ORDER;

(2) GRANTING DEFENDANTS'
MOTION TO STRIKE; AND

(3) DENYING PLAINTIFF'S MOTION
TO STRIKE

Civil No. 040700494

Judge Glen R. Dawson

The Rule 59 and Rule 60(b) Motion to Alter or Amend Court's Final Order and Incorporated Memoranda filed by plaintiff Kip Cabaness ("plaintiff"), together with Plaintiff's Motion to Strike and Overrule Defendants' Objection to the Consideration by the Court of the Affidavit and Psychological Report of Dr. Rick D. Hawks Ed.D., as well as the Motion to Strike the Affidavits of Matthew Hilton, Bonnie Quinn and Kenneth E. Mears, filed by defendants Brent Thomas, Clifford C. Michaelis and Bountiful City (collectively "defendants"), all came on regularly for hearing before the above-referenced Court, the Honorable Judge Glen R. Dawson presiding, on March 24, 2008. Plaintiff was represented by Willis F. McComas of Craig L. Taylor & Associates and Matthew Hilton of Matthew Hilton P.C. Defendants were represented by Stanley J. Preston and Bryan M. Scott of Snow, Christensen & Martineau and Russell L. Mahan, the Bountiful City Attorney.

The Court, having fully reviewed the motions, memoranda, exhibits and affidavits filed by the parties regarding the referenced motions, having heard oral argument by the parties' respective counsel, and being fully advised in the premises,

HEREBY ORDERS, ADJUDGES AND DECREES AS FOLLOWS:

1. Plaintiff's Rule 59 and Rule 60(b) Motion to Alter or Amend Court's Final Order is denied for the reasons set forth in defendants' memoranda, and the reasons articulated by the Court at hearing in this matter, including the following:

(a) The Court is comfortable with the grounds upon which it made its decision herein, as articulated in the Court's Final Order and its Memorandum

Decision, and does not believe that its decision was made in error.

(b) The Court has considered the cases which plaintiff claims constitute "new law" and has determined that, even if new case law constitutes a proper basis for granting a Rule 59 and/or Rule 60(b) motion, these cases do not constitute new law, nor do they alter the Court's decision.

(c) In addition, none of the evidence upon which plaintiff's motion relies constitutes "newly discovered evidence" which satisfies the applicable due diligence requirement under the Utah Rules of Civil Procedure, such that it could not have been previously discovered and timely submitted prior to or during the summary judgment stage of these proceedings. Even if the Court were to consider this evidence, however, the Court determines that it is cumulative and incidental, and would not change the Court's decision.

2. Defendants' Motion to Strike the Affidavits of Matthew Hilton, Bonnie Quinn and Kenneth Mears is granted to the extent set forth below, for the reasons set forth in defendants' memoranda, and the reasons articulated by the Court at hearing in this matter, including the following:

(a) With Regards to Mr. Hilton's Affidavit the Court strikes paragraphs 1-9 and 18-26, as well as all of the footnotes in this Affidavit on the grounds that they are irrelevant and/or contain legal argument. Paragraphs 10-17 of Mr. Hilton's Affidavit are relevant to, and were considered by the Court only as

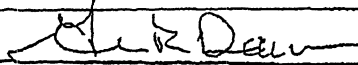
they relate to, the issue of whether plaintiff was surprised by defendants' arguments during the summary judgment stage of this case. The Court, however, determines that there has not been a sufficient showing of surprise by plaintiff pursuant to Rule 60 of the Utah Rules of Civil Procedure to receive Mr. Hilton's Affidavit.

(b) In addition, the Affidavits of Mr. Mears and Ms. Quinn are stricken on the grounds that plaintiff has failed to establish the necessary showing of surprise. In addition, plaintiff has failed to satisfy the applicable due diligence requirement with respect to these two Affidavits, *i.e.*, that the information contained therein could not have been previously discovered and timely submitted prior to or during the summary judgment stage of these proceedings. Regardless, even if the Court were to consider these two Affidavits, the evidence therein is cumulative and incidental, and it would not change the Court's decision.

3. Finally, Plaintiff's Motion to Strike and Overrule Defendants' Objection to the Consideration by the Court of the Affidavit and Psychological Report of Dr. Rick D. Hawks Ed.D., is denied. It is the best view of the Court that defendants' arguments as they relate to the Affidavit of Dr. Hawks should not be disregarded. Dr. Hawk's Affidavit does not constitute new evidence that satisfies the above-referenced due diligence standard. Moreover, *Ellison v. Stam*, 2006 Ut App 150, 136 P.3d 1242, does not create new law, and even if considered does not change the Court's decision.

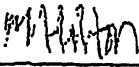
DATED this 23rd day of April, 2008.

BY THE COURT:


Judge Glen R. Dawson
District Court Judge

APPROVED AS TO FORM:

CRAIG L. TAYLOR & ASSOCIATES
MATTHEW HILTON, P.C.

By: 
Craig L. Taylor
Willis F. McComas
Matthew Hilton
Attorneys for Plaintiff Kip Cabaness

Date: 4/9/08

2008 APR 15 A 10:47

CERTIFICATE OF SERVICE SECOND DISTRICT COURT

I hereby certify that I am employed by the law offices of Snow, Christensen & Martineau,
attorneys for defendants, and that I caused to be served **ORDER: (1) DENYING**

~~PLAINTIFF'S RULE 59 AND 60(b) MOTION TO ALTER OR AMEND COURT'S~~

FINAL ORDER; (2) GRANTING DEFENDANTS' MOTION TO STRIKE; AND (3)

DENYING PLAINTIFF'S MOTION TO STRIKE (Case Number 040700494) upon the

following parties this 14th day of April, 2008, by facsimile and first class mail, postage prepaid,

addressed as follows:

Craig L. Taylor, Esq.
Willis F. McComas, Esq.
472 North Main Street
Kaysville, UT 84037

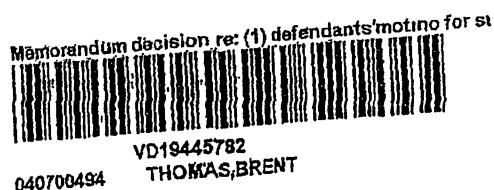
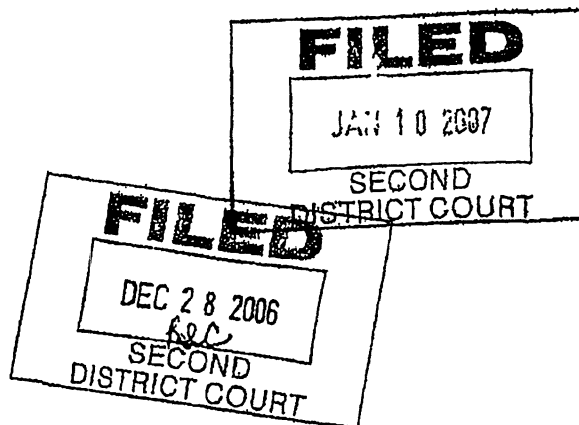
Matthew Hilton, Esq.
P.O. Box 1004
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Attorneys for Defendants



IN THE SECOND DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

KIPP CABANESS and DOES 1-20,

Plaintiffs,

vs.

BRENT THOMAS, CLIFFORD C.
MICHAELIS and BOUNTIFUL CITY,

Defendants.

MEMORANDUM DECISION RE: (1)
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT; AND (2)
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

Civil No. 040700494

Judge Glen R. Dawson

This matter came for a hearing before this Court, the Honorable Glen R. Dawson presiding on July 26, 2006, August 10, 2006, and August 17, 2006. The Court having reviewed the pleadings and record in this matter, heard the parties' arguments, and considered the

applicable legal authority, the Court hereby enters this Memorandum Decision on Defendants' Motion for Summary Judgment, dated October 17, 2005, ("Defendants' Summary Judgment Motion" or "Defs.' SJ Mem."), and on Plaintiff's Motion for Partial Summary Judgment, dated November 11, 2005, ("Plaintiff's Summary Judgment Motion" or "Pl.'s SJ Mem."). In so doing, the Court has viewed the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.

I. Claim for Breach of Contract Against the City.

A. The Manual. The City is entitled to summary judgment on the Breach of Contract claim. Plaintiff's breach of contract claim is based on the allegation that certain provisions in the City's Personnel Policies and Procedures Manual (the "Manual") created an implied contract between the City and plaintiff. *See* Compl. ¶¶ 23-24. For example, plaintiff asserts that the following sections of the Manual created an implied contract between plaintiff and the City:

406. WORK ENVIRONMENT

It is the policy of the City to promote a productive work environment that is a clean, safe, and hospitable place in which employees may fulfill their responsibilities. Accordingly, City policy will not tolerate verbal or physical conduct by any employee which harasses, disrupts, or interferes with another's work performance or which creates an intimidating, offensive, or hostile environment, nor will the City tolerate any such behavior toward, or from, members of the general public. Employees are expected to act in a positive manner and contribute to a productive environment.

* * *

408. WORK PLACE VIOLENCE

It is the policy of the City to provide a work environment that is free of threatening conditions, violent behavior, and criminal activity. Oral or written threats, physical assault, harassment, intentional damage, and every other act or threat of violence is strictly prohibited.

* * *

409. SEXUAL AND OTHER HARASSMENT

- b. Any behavior or conduct of a harassing or discriminating nature, including that of a sexual nature, which is pervasive, unwelcome, demeaning, ridiculing, derisive or coercive, or results in a hostile, abusive or intimidating work environment, constitutes harassment and shall not be tolerated by the City.

* * *

- e. Any employee who believes that the actions or words of a supervisor or fellow employee constitute unwelcome harassment or discrimination has a responsibility to report or complain as soon as possible to his/her Department Head. If the complaint involves a Department Head, it should be directed to the City Manager. All complaints of this nature should be in writing and should document specific information regarding the harassment. This information should include dates, times, places, witnesses, and specific types of harassment. Malicious or frivolous complaints of harassment or discrimination may result in disciplinary action against the accuser.

* * *

- g. If an employee is not satisfied with either the handling of a complaint or the action taken by the Department Head, he or she shall bring the complaint to the attention of the City Manager. The City Manager shall then investigate the charges and respond in writing to the employee as quickly as possible.

The Manual also contains the following disclaimer:

101. PURPOSE OF THIS MANUAL

- b. No contract exists between Bountiful City and its employees with respect to salary, salary ranges, movement with salary ranges, or employee benefits. These may change as a result of salary surveys, job analysis, appropriations by the City Council, or changes in City policies and procedures.

Defs.' SJ Mem. Ex. E. It is undisputed that plaintiff received copies of the Manual from time to time as a City employee and that he was generally familiar with the Manual's contents. *See* Cabaness Depo. at 98.

Both plaintiff and defendants have requested and agreed that the Court has before it all of the facts necessary to determine whether a contract exists between plaintiff and the City based on the above-referenced provisions in the Manual and, indeed, both plaintiff and defendants have moved for summary judgment on this issue, indicating that the parties do not believe there are material issues of disputed fact which would preclude the Court from ruling on whether the Manual did create a contract between the City and plaintiff.

The Court, having reviewed the provisions of the Manual cited by plaintiff, has determined that those provisions are not ambiguous. Based upon the undisputed facts and evidence before the Court, as a matter of law, Section 101.b of the Manual, as set forth above, constitutes a clear and conspicuous disclaimer that there is no contract between the City and plaintiff with respect to salary, salary ranges, movement with salary ranges, or employee benefits.

The undisputed facts and evidence before the Court also establish that Sections 406, 408 and 409 of the Manual, as set forth above, state certain policies and goals of the City, and serve as a warning to City employees not to engage in the misconduct discussed in these policies. By setting forth these policies in its Manual, however, the City is not promising its employees, either expressly or impliedly, that the misconduct prohibited by these policies will not occur in the work place, nor is it undertaking an express or implied contractual obligation with its employees to protect them from such misconduct. Based on the undisputed facts and evidence before the Court, no reasonable jury could find that there is an issue of fact regarding whether a contract exists between the plaintiff and the City with respect to the provisions of the Manual plaintiff has relied upon in this case. Because there is no contract, there is no implied covenant of good faith and fair dealing, and defendants are entitled to judgment on any such claim as a matter of law.

In sum, as a matter of law, the provisions of the Manual cited by plaintiff do not create a contract between plaintiff and the City as to the issues raised in this lawsuit. The language in the Manual is not ambiguous and there is no triable issue of fact as it relates to this claim.

Defendants are entitled to summary judgment on the Breach of Contract claim.

B. Governmental Immunity. In addition, defendants are entitled to summary judgment on the breach of contract claim because the claim is based on the same conduct that plaintiff alleges inflicted mental anguish and the damages plaintiff alleges to have suffered as a result of the City's alleged breach of contract all arise from the alleged infliction of mental anguish. *See* Compl. ¶¶ 14-29. Pursuant to applicable case law, the Court is required to look to

the underlying injury to determine whether immunity is waived under the Utah Governmental Immunity Act (the "Act")¹, regardless of how plaintiff has styled or pled the claim. Accordingly, plaintiff's breach of contract claim is barred under the Act pursuant to Utah Code Ann. § 63-30-10(2), for the reasons set forth in defendants' supporting memoranda, and pursuant to *Leidfors v. Emery County School District*, 849 P.2d 1162, 1166 (Utah 1993) and *Butler, Crockett & Walsh Development Corp. v. Salt Lake County*, 2005 UT App 402 (per curiam mem. decision), because plaintiff's alleged injury arose out of the alleged infliction of mental anguish, which is conduct specifically described in § 63-30-10(2). As a result, governmental immunity is preserved and the City is entitled to judgment as a matter of law on the breach of contract claim.²

II. Claim for Wrongful Constructive Termination Against the City.

Plaintiff's wrongful constructive termination claim is pled as a tort claim, not a contract claim. This claim is based on defendants' alleged "wrongful and tortious conduct" and plaintiff seeks punitive damages under this claim. Compl. ¶¶ 31-35. The only tort claim for wrongful constructive termination recognized by Utah case law is where a termination "contravenes a clear and substantial public policy." *Hansen v. America Online*, 2004 UT 62, ¶ 7, 96 P.3d 950 (citing

¹Following plaintiff's resignation, the Act has been amended and renumbered. See Utah Code Ann. § 63-30d-301(5)(b). In revising the Act, however, the Legislature indicated its intent that the previous version govern an allegation of injury that occurred before July 1, 2004. See *Canfield v. Layton City*, 2005 UT 60, ¶ 7 n.2, 122 P.3d 622.

²Based on its ruling herein, the Court does not find it necessary to rule on the issue of whether, if there had been a contract and the claim was not barred by the Act, plaintiff would have been able to recover emotional distress damages under his breach of contract claim.

Peterson v. Browning, 832 P.2d 1280, 1284 (Utah 1992)). However, plaintiff has failed to allege anywhere in his Complaint that defendants violated a "clear and substantial public policy." Cf. Compl. ¶¶ 30-35. Indeed, no public policy is identified in plaintiff's allegations by name or description. *See id.* In addition, the undisputed facts and evidence before the Court establish that plaintiff has failed to show that he was terminated in violation of a "clear and substantial public policy," as defined by applicable Utah case law. The alleged harassing conduct of Mr. Thomas (and the City's and Mr. Michaelis' alleged failure to stop that alleged conduct) does not contravene a clear public policy that is "plainly defined by legislative enactments, constitutional standards, or judicial decisions." *Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 165-66 (Utah 1991).

In addition, plaintiff's tort claim for wrongful termination against the City is barred by the Act pursuant to *Broudbent v. Board of Education of Cache County School District*, 910 P.2d 1274, 1276 (Utah Ct. App. 1996). Also, to the extent plaintiff is claiming that his wrongful constructive termination claim is a contract claim, as opposed to a tort claim, it is duplicative of his breach of contract claim, and fails for the same reasons that his breach of contract claim fails, as set forth above.

In sum, plaintiff has failed to state a wrongful termination claim under Utah law, and based on the undisputed facts, the City is entitled to judgment as a matter of law on this claim.

III. Claim for Negligent Infliction of Emotional Distress Against Defendants.

This claim is barred by the Act pursuant to Utah Code Ann. § 63-30-10(2). Plaintiff has not opposed summary judgment on this claim and has requested to withdraw this claim.

IV. Claim for Punitive Damages Against the City.

Plaintiff's alleged claim for punitive damages against the City is barred by the Act pursuant to Utah Code Ann. § 63-30-22(1)(a). Plaintiff has not opposed summary judgment on this claim and concedes he is not seeking punitive damages against the City.

V. Claim for Intentional Infliction of Emotional Distress Against Mr. Thomas and Mr. Michaelis.

It is undisputed that, on August 4, 1997, plaintiff's medical records state plaintiff was diagnosed as suffering from depression and anxiety as a result of stress from his supervisor at work and from the fact that he was supervising a work crew. *See* Medical Records Bates No. B000760 attached to Affidavit of Sandra Smith in Pl.'s SJ Mem. Ex. V. The Court has reviewed plaintiff's Complaint, his entire deposition and his affidavit, as well as all other admissible evidence that is properly in the record before the Court. Among other things, plaintiff has alleged that Mr. Thomas engaged in the following conduct towards plaintiff:

- (i) asked plaintiff how he liked doing Mr. Tuttle's work;
- (ii) told plaintiff to change the way plaintiff and his crew were pulling wire and threatened to fire plaintiff for being insubordinate;
- (iii) reprimanded plaintiff for turning off electrical circuits during a snow storm;

- (iv) told plaintiff that two of his crew members were cutting a telephone pole incorrectly and then stomped away;
- (v) told plaintiff that he did not want plaintiff and his crew to work on the pole that they were working on but he wanted them to work on a different pole first; .
- (vi) was reluctant to let plaintiff and other employees look at new trucks and finally threw the truck keys on the ground and said, "go ahead, fine, ^{if} look at the truck";
- (vii) in a sarcastic manner told employees to get their jobs done;
- (viii) for five or six months ignored plaintiff's comments regarding blown fuses on a power line by an elementary school that plaintiff felt was potentially hazardous for school children;
- (ix) on one occasion would not let one of the employees replace the workers' rubber gloves but rather made him help clean the warehouse;
- (x) slammed a pager on the table and told plaintiff he was going to have to do Steve Knighton's job;
- (xi) made the employees work in the rain;
- (xii) made the employees certify themselves with the power department safety manual on their own time; and
- (xiii) threatened to fire plaintiff.

Plaintiff's intentional infliction of emotional distress claim against Mr. Michaelis is based on the allegation that Mr. Michaelis allowed Mr. Thomas to engage in the conduct described above, and failed to stop or prevent Mr. Thomas from engaging in such conduct.

Plaintiff has focused on two events as the primary evidence to support his claim for intentional infliction of emotional distress. First is an incident occurring on July 30, 2003 (the "OSHA Incident") and second is an employee meeting held on September 9, 2003.

With respect to the OSHA Incident, plaintiff alleges that, on July 30, 2003, Mr. Thomas ordered Bountiful Power employees to jack-hammer a concrete block that encased plastic conduit containing "live" electrical conductors. *See* Pl.'s SJ Mem. Ex. S. It is undisputed, however, that plaintiff was not present during the OSHA Incident because he was on a leave of absence from July 23, 2003, until September 8, 2003, based on his doctor's order. *See* Affidavit of Dr. David Vande Merwe ¶ 7, attached as Ex. W. to Pl.'s SJ Mem. Plaintiff has argued at length and relied heavily on the OSHA Incident as a primary basis for his intentional infliction of emotional distress claim based on the fact that, even though he was not present, it was his crew that was ordered to perform the unsafe work.

With respect to the second incident, on September 9, 2003, the day after plaintiff returned to work from his leave of absence, he attended an employee meeting wherein Mr. Knighton alleged that Mr. Thomas "belittled and berated [plaintiff] and told him, in the presence of all of the employees, that he was considering firing him. He also brought up some personal matters involving [plaintiff] and ridiculed him in the presence of the other employees." Steve Knighton

Affidavit ¶ 19, attached as Ex. II to Pl.'s SJ Mem. Mr. Knighton went on to say that he found Mr. Thomas' behavior to be "unforgivable." *Id.*

Among other legal authority, the Court has reviewed *Sorensen v. Barbuto*, 2006 UT APP 40 ¶ 21; *Retherford v. AT & T Communications of Mountain States, Inc.*, 844 P.2d 949, 970 (Utah 1992); and *Restatement (Second) of Torts*, § 46, comment d (1965), regarding the standard Utah courts have adopted to determine whether the conduct in question meets the threshold level of extreme and outrageous conduct necessary to constitute a claim for intentional infliction of emotional distress.

Plaintiff has argued that although he was not present during the OSHA Incident, pursuant to *Hatch v. Davis*, 2006 UT 44, he nonetheless should be allowed to recover for intentional infliction of emotional distress because of the exception to the "presence" rule as set forth in *Hatch*. In *Hatch*, the Court identified the following four factors which should be considered in determining whether an exception to the presence rule should be allowed:

In considering whether conduct triggers the exception, a finder of fact may consider (1) the relationship of the target of the conduct to the plaintiff, (2) the relationship between the person committing the conduct and the plaintiff, and (3) the egregiousness of the conduct. Finally, (4) a plaintiff must establish that the conduct was undertaken, in whole or in part, with the intention of inflicting injury to the absent plaintiff.

Id. at ¶ 27. Plaintiff has failed to come forward with any evidence to satisfy the fourth factor identified in *Hatch*. In addition, the fact that the OSHA Incident involved plaintiff's crew is insufficient to warrant an exception to the "presence" rule. Accordingly, the Court concludes

that the OSHA Incident should not be considered in determining whether Mr. Thomas' conduct constituted extreme and outrageous conduct towards plaintiff.

With respect to the employee meeting on September 9, 2003, the Court concludes that the majority of the allegations made by Mr. Knighton are conclusory and insufficient to support a finding that Mr. Thomas engaged in the requisite extreme and outrageous conduct necessary to constitute a claim for intentional infliction of emotional distress. Moreover, even taking all reasonable inferences in favor of plaintiff, the evidence does not show that Mr. Thomas or Mr. Michaelis engaged in conduct that meets the threshold level of extreme and outrageous conduct necessary to constitute a claim for intentional infliction of emotional distress. Indeed, threats to terminate an employee, insults, and indignities are not enough to trigger a claim for intentional infliction of emotional distress. See *Boisjoly v. Morton Thokol, Inc.*, 712 F. Supp. 1514, 1522 (D. Utah 1989); see also *Restatement (Second) of Torts*, § 46, comment d (1965).

Accordingly, based on the undisputed and admissible evidence before the Court, the Court concludes that Mr. Thomas' alleged conduct does not meet the threshold level of extreme and outrageous conduct necessary to constitute a claim for intentional infliction of emotional distress, as a matter of law. Further, a reasonable jury could not find that the alleged conduct of Mr. Thomas constitutes extreme and outrageous conduct sufficient to constitute a claim for intentional infliction of emotional distress against Mr. Thomas. Likewise, based on the undisputed and admissible evidence before the Court, the Court concludes that Mr. Michaelis' alleged conduct does not meet the threshold level of extreme and outrageous conduct necessary

to constitute a claim for intentional infliction of emotional distress, as a matter of law. Further, a reasonable jury could not find that Mr. Michaelis' alleged conduct and failure to act constitutes extreme and outrageous conduct sufficient to constitute a claim for intentional infliction of emotional distress against Mr. Michaelis.

Therefore, the Court holds that plaintiff's claim for intentional infliction of emotional distress against Mr. Thomas and Mr. Michaelis fails as a matter of law. Plaintiff's claim for punitive damages against Mr. Thomas and/or Mr. Michaelis is denied as a matter of course because the Court finds that there is no cause of action based in tort that would support the awarding of punitive damages.

VI. Notice of Claim

It is undisputed that plaintiff served his notice of claim on Kim Coleman, the Bountiful City Recorder, on March 31, 2004. *See* Pl.'s SJ Mem. Ex. AA. Based on the undisputed facts, plaintiff properly served his Notice of Claim on defendants pursuant to Utah Code Ann. § 63-30-11. Although the terms "fraud" and "malice" are not specifically used in plaintiff's Notice of Claim in regards to the allegations against Mr. Thomas and Mr. Michaelis, the allegations in the Notice of Claim are sufficient to conclude that malice has been alleged against Mr. Thomas and Mr. Michaelis. In asserting a claim against Mr. Thomas and Mr. Michaelis for individual liability, plaintiff is not required to use the specific terms "fraud" and "malice" in his Notice of Claim against the individual defendants. *See P.J. ex rel. Jensen v. Utah*, 2006 WL 1702585, 13 (D. Utah 2006). There is sufficient detail in the Notice of Claim to put all of the defendants on

notice of the claims against them, including a claim for punitive damages against the individual defendants, pursuant to Utah Code Ann. § 63-30-11.

VII. Plaintiff's Motion for Partial Summary Judgment.

The Court concludes that Plaintiff's Motion for Partial Summary Judgment should be denied in its entirety for the following reasons:

(a) Based on the Court's ruling granting Defendants' Summary Judgment Motion, it would be inconsistent to grant Plaintiff's Summary Judgment Motion on certain issues raised by plaintiff in Plaintiff's Summary Judgment Motion.

(b) Based on the Court's ruling granting Defendants' Summary Judgment Motion, various issues raised in Plaintiff's Summary Judgment Motion have been rendered moot and the Court need not decide said issues raised by Plaintiff's Summary Judgment Motion.

(c) Both parties have agreed that all of the facts and evidence necessary to determine whether there was a contract between plaintiff and the City are before the Court. The Court has concluded that, based on the undisputed evidence and taking all reasonable inferences from the evidence in favor of plaintiff, there was no contract between the plaintiff and the City as to the issues raised by plaintiff in this case.

(d) Plaintiff's breach of contract claim is also barred by the Immunity Act, inasmuch as it is based on an injury that "arises out of, [is] in connection with, or results from . . . infliction of mental anguish." Utah Code Ann. § 63-30-10(2);

(e) There is no contract, and thus, no covenant of good faith and fair dealing that applies to the issues raised by plaintiff in this case. Therefore, plaintiff is not entitled to summary judgment in his favor with respect to a claim for breach of the implied covenant of good faith and fair dealing.

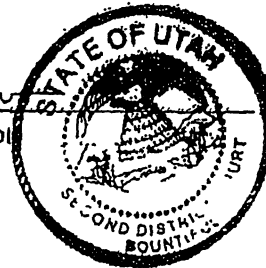
(f) Plaintiff did not allege in his Complaint that the City breached a covenant of good faith and fair dealing by failing to notify him of any health and disability benefits or his options under the Family Medical Leave Act. *See* Compl. ¶ 28. Moreover, the Complaint never mentions or references any such health and disability benefits or the Family Medical Leave Act and the deadlines for amending pleadings and conducting discovery have passed. Therefore, to the extent plaintiff is attempting to assert any such claim, it is unfairly prejudicial to defendants and is barred as a matter of law.

(g) For the reasons set forth in defendants' memorandum opposing plaintiff's summary judgment motion.

DATED this 10th day of January, 2007.

THE COURT

By: Glen R. Dawson
The Honorable Glen R. Dawson
District Judge



2/5/2007 12:21:20 PM 007094

APPROVED AS TO FORM:
CRAIG L. TAYLOR & ASSOCIATES, P.C.

By _____
Craig L. Taylor
Willis F. McComas
Attorneys for Plaintiff
N:\130875\Orders\Memo Docketed SJ 10-01-06.wpd

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law offices of Snow, Christensen & Martineau, attorneys for defendants, and that I caused to be served MEMORANDUM DECISION RE: (1) DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; and (2) PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Case Number 040700494) upon the following parties this 27th day of December, 2006, by first class mail, postage prepaid, addressed as follows:

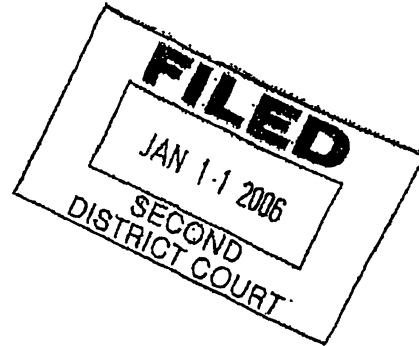
Craig L. Taylor, Esq.
Willis F. McComas, Esq.
CRAIG L. TAYLOR & ASSOCIATES, P.C.
472 North Main Street
Kaysville, UT 84037

A handwritten signature in cursive script, appearing to read "K. Taylor", is written over a horizontal line.

STANLEY J. PRESTON (4119)
MARALYN M. REGER (8468)
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Bountiful, Utah 84010

Attorneys for Defendants



IN THE SECOND DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

KIPP CABANESS and DOES 1-20,

Plaintiffs,

vs.

BRENT THOMAS, CLIFFORD C.
MICHAELIS and BOUNTIFUL CITY,

Defendants.

ORDER:

(1) DENYING DEFENDANTS' MOTION
TO STRIKE;

(2) GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT;
AND

(3) DENYING PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT

Civil No. 040700494

Judge Glen R. Dawson

Order: 1 denying defendants motion to strike; 2 granting



VD19407856
040700494 THOMAS,BRENT

Defendants' Motion for Summary Judgment, dated October 17, 2005. ("Defendants' Summary Judgment Motion"), Plaintiff's Motion for Partial Summary Judgment, dated November 11, 2005, ("Plaintiff's Summary Judgment Motion"), and Defendants' Motion to Strike Plaintiff's Memorandum in Opposition to the City's Motion for Summary Judgment and in Support of Plaintiff's Motion for Partial Summary Judgment and Supporting Affidavits, dated January 26, 2006, ("Defendants' Motion to Strike"), all came on regularly for hearing before this Court, the Honorable Glen R. Dawson presiding, on July 26, 2006, August 10, 2006, and August 17, 2006. Defendants Brent Thomas ("Mr. Thomas"), Clifford C. Michaelis ("Mr. Michaelis") and Bountiful City (the "City") (collectively "defendants") were represented by Stanley J. Preston and Bryan M. Scott of Snow, Christensen & Martineau, and by Russell L. Mahan, the City Attorney. Plaintiff Kipp Cabaness ("plaintiff") was represented by Craig L. Taylor, Willis F. McComas, and Matthew Hilton of Craig L. Taylor & Associates, P.C.

The Court, having fully reviewed the motions, memoranda, exhibits and affidavits filed by the parties regarding the referenced motions, having heard oral argument by the parties' respective counsel, having issued its Memorandum Decision Re: (1) Defendants' Motion for Summary Judgment; and (2) Plaintiff's Motion for Partial Summary Judgment (the "Memorandum Decision"), and being fully advised in the premises,

HEREBY ORDERS, ADJUDGES AND DECREES AS FOLLOWS:

DEFENDANTS' MOTION TO STRIKE:

The Court denies Defendants' Motion to Strike based on the following grounds and reasoning:

1. There were numerous problems and failures to comply with Rule 7 of the Utah Rules of Civil Procedure in Plaintiff's Memorandum in Opposition to The City's Motion for Summary Judgment and in Support of Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Opposing Memorandum").

2. There were numerous instances where evidence cited by plaintiff, in the form of exhibits and affidavits, lacked authentication or admissibility for various reasons under the Utah Rules of Evidence. Some of these procedural and evidentiary problems are set forth in the supporting memoranda to Defendants' Motion to Strike. Based on its own review of Plaintiff's Opposing Memorandum and its supporting affidavits and exhibits, the Court has also found other problems and failures which were not specifically identified by defendants.

3. The Court, however, denies Defendants' Motion to Strike and, in making its rulings set forth herein, has relied on evidence that is properly before the Court and that meets the standards of authentication and admissibility under the Utah Rules of Evidence.

DEFENDANTS' SUMMARY JUDGMENT MOTION:

The Court grants Defendants' Summary Judgment Motion in its entirety as to all plaintiff's claims herein, enters judgment in favor of defendants on plaintiff's Complaint as a

matter of law, and dismisses plaintiff's Complaint, and all claims therein, with prejudice and on the merits. In so doing, the Court has viewed the facts and all reasonable inferences drawn therefrom in the light most favorable to plaintiff. The grounds on which the Court relies in granting this motion, as well as the bases for dismissing each of the claims in plaintiff's Complaint and entering judgment in favor of defendants on plaintiff's Complaint, are set forth herein, as well as in the Memorandum Decision.

1. The Court grants Defendants' Summary Judgment Motion on the First Claim for Relief for breach of contract and for breach of an implied covenant of good faith and fair dealing, as alleged in Plaintiff's Complaint, enters judgment in favor of defendants on said claim, and dismisses said claim in its entirety on the merits and with prejudice, based on the following grounds:

(a) The language of the City Manual on which plaintiff relies is not ambiguous and does not create a contract between plaintiff and the City as to the issues raised in this lawsuit;

(b) The disclaimer in the City Manual, at Section 101.b, is clear and conspicuous and precludes the existence of a contract as to any items or rights identified in said disclaimer;

(c) This claim is barred under the Utah Governmental Immunity Act (the "Act")¹, pursuant to Utah Code Ann. § 63-30-10(2), for the reasons set forth in defendants' supporting memoranda, and pursuant to *Ledfors v. Emery County School District*, 849 P.2d 1162, 1166 (Utah 1993) and *Butler, Crockett & Walsh Development Corporation v. Salt Lake County*, 2005 UT App 402 (per curiam mem. decision), including the fact that, because plaintiff's alleged injury arose out of the alleged infliction of mental anguish, which is conduct specifically described in § 63-30-10(2), governmental immunity is preserved;

(d) Since the Court has determined there is no contract as to the issues raised in the lawsuit, there is no implied covenant of good faith and fair dealing, and defendants are entitled to judgment on any such claim as a matter of law; and

(e) Based on its ruling herein, the Court does not find it necessary to rule on the issue of whether plaintiff would have been able to recover emotional distress damages under his First Claim for Relief if there had been a contract and the claim was not barred by the Act.

2. The Court grants Defendants' Summary Judgment Motion on the Second Claim for Relief for wrongful termination, as alleged in Plaintiff's Complaint, enters judgment in favor

¹Following plaintiff's resignation, the Act has been amended and renumbered. *See* Utah Code Ann. § 63-30d-301(5)(b). In revising the Act, however, the Legislature indicated its intent that the previous version govern an allegation of injury that occurred before July 1, 2004. *See Canfield v. Layton City*, 2005 UT 60, ¶ 7 n.2, 122 P.3d 622.

of defendants on said claim, and dismisses said claim in its entirety on the merits and with prejudice, based on the following grounds:

(a) This claim is asserted as a tort claim and it does not allege by name or description that defendants have violated a "clear and substantial public policy" as defined by applicable Utah case law, nor is any such public policy implicated in this claim as asserted by plaintiff, based on the record before the Court, and, as a result, plaintiff fails to state a wrongful termination claim under Utah law;

(b) Plaintiff's tort claim for wrongful termination against the City is barred by the Act pursuant to *Broadbent v. Board of Education of Cache County School District*, 910 P.2d 1274, 1276 (Utah Ct. App. 1996); and

(c) To the extent plaintiff is now claiming that his Second Claim for Relief is a contract claim, as opposed to a tort claim, it is duplicative of his First Claim for Relief, and fails for the same reasons that his First Claim for Relief fails, as set forth in paragraph 1, above.

3. The Court grants Defendants' Summary Judgment Motion on the First and Second Claims for Relief in Plaintiff's Complaint to the extent plaintiff is asserting said claims against the individual defendants, Mr. Thomas and Mr. Michaelis, enters judgment in favor of defendants on said claims, and dismisses any such claims on the merits and with prejudice, based on the following grounds:

(a) plaintiff's alleged employment relationship is with the City, not with Mr. Thomas or Mr. Michaelis; and

(b) plaintiff concedes that these two claims are not asserted against Mr. Thomas or Mr. Michaelis.

4. The Court grants Defendants' Summary Judgment Motion on Plaintiff's Third Claim for Relief for negligent infliction of emotional distress, enters judgment in favor of defendants on said claim, as asserted in Plaintiff's Complaint, and dismisses this claim on the merits and with prejudice, based on the following grounds:

(a) this claim is barred by the Act pursuant to Utah Code Ann. § 63-30-10(2); and

(b) plaintiff has not opposed summary judgment on this claim and has requested to withdraw the claim.

5. The Court grants Defendants' Summary Judgment Motion on the Fourth Claim for Relief for intentional infliction of emotional distress, as alleged in Plaintiff's Complaint, enters judgment in favor of defendants on said claim, and dismisses said claim in its entirety on the merits and with prejudice, based on the following grounds:

(a) Based on the undisputed admissible evidence before the Court, Mr. Thomas' alleged conduct does not meet the threshold level of extreme and outrageous conduct necessary to constitute a claim for intentional infliction of emotional distress, as a matter of law. Further, a reasonable jury could not find

that the alleged conduct of Mr. Thomas constitutes extreme and outrageous conduct sufficient to constitute a claim for intentional infliction of emotional distress against Mr. Thomas;

(b) Based on the undisputed admissible evidence before the Court, Mr. Michaelis' alleged conduct does not meet the threshold level of extreme and outrageous conduct necessary to constitute a claim for intentional infliction of emotional distress, as a matter of law. Further, a reasonable jury could not find that Mr. Michaelis' alleged conduct and failure to act constitutes extreme and outrageous conduct sufficient to constitute a claim for intentional infliction of emotional distress against Mr. Michaelis; and

(c) Plaintiff has argued that, pursuant to *Hatch v. Davis*, 2006 UT 44, although he was not present during the July 30, 2003 incident (the "OSHA Incident"), he nonetheless should be allowed to recover for intentional infliction of emotional distress because of the exception to the "presence" rule as set forth in *Hatch*. Plaintiff, however, has failed to come forward with any evidence to satisfy the fourth factor identified in *Hatch*, i.e., "that a plaintiff must establish that the conduct was undertaken, in whole or in part, with the intention of inflicting injury to the absent plaintiff." *Id.* at ¶ 27. In addition, the fact that the OSHA incident involved plaintiff's crew is insufficient to warrant an exception to the "presence" rule. Accordingly, the OSHA Incident should not be considered in determining

whether Mr. Thomas' conduct constituted extreme and outrageous conduct towards plaintiff;

(d) With respect to the employee meeting on September 9, 2003, the the majority of the allegations regarding this incident are conclusory and insufficient to support a finding that Mr. Thomas engaged in extreme and outrageous conduct sufficient to support a claim of intentional infliction of emotional distress. Moreover, the facts related to this meeting that are not conclusory do not reach the necessary threshold level of a showing of outrageous conduct. Indeed, threats to terminate an employee, insults, and indignities are not enough to trigger a claim for intentional infliction of emotional distress; and

(e) Plaintiff's claim for punitive damages against Mr. Thomas and Mr. Michaelis is denied as a matter of course, because the Court finds that there is no cause of action based in tort that would support an award of punitive damages against the individual defendants.

6. In dismissing plaintiff's intentional infliction of emotional distress claim, the Court does not rely on certain arguments advanced by defendants, and concludes as follows:

(a) Plaintiff properly served his Notice of Claim on defendants pursuant to Utah Code Ann. § 63-30-11;

(b) In asserting a claim against Mr. Thomas and Mr. Michaelis for individual liability, plaintiff is not required to use the specific terms "fraud" and

“malice” in his Notice of Claim and that, although the terms “fraud” and “malice” are not specifically used in the Notice of Claim in regards to the allegations against Mr. Thomas and Mr. Michaelis, the allegations in the Notice of Claim are sufficient to conclude that malice has been alleged against Mr. Thomas and Mr. Michaelis; and

(c) The allegations in the Notice of Claim are sufficient put all of the defendants on notice of the claims against them, including a claim for punitive damages against the individual defendants, pursuant to Utah Code Ann. § 63-30-11.

7. The Court grants Defendants’ Summary Judgment Motion on any alleged claim by plaintiff for punitive damages against the City, enters judgment in favor of defendants on said claim, and dismisses any such claim on the merits and with prejudice, based on the following grounds:

(a) Any punitive damage claim asserted against the City is barred by the Act pursuant to Utah Code Ann. § 63-30-22(1)(a); and

(b) plaintiff has not opposed summary judgment on this claim and concedes it is not seeking punitive damages against the City.

8. The Court grants Defendants’ Summary Judgment Motion on any alleged claim asserted by the unidentified John Does in Plaintiff’s Complaint and against the unidentified John

Roes in Plaintiff's Complaint, and dismisses any such claim on the merits and with prejudice, based on the following grounds:

- (a) no such John Does/Roes have been identified or added to Plaintiff's Complaint;
- (b) the time for amending Plaintiff's Complaint has expired pursuant to the terms of the Scheduling Order in this case; and
- (c) plaintiff has not opposed the dismissal of any claims on behalf of, or against, the unidentified John Does/Roes.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT:

The Court denies Plaintiff's Partial Summary Judgment Motion in its entirety. In so doing, the Court has viewed the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving parties. The grounds on which the Court relies in denying this motion are as follows:

1. Based on the Court's ruling granting Defendants' Summary Judgment Motion, it would be inconsistent to grant Plaintiff's Summary Judgment Motion on certain issues raised by plaintiff in Plaintiff's Summary Judgment Motion.
2. Based on the Court's ruling granting Defendants' Summary Judgment Motion, various issues raised in Plaintiff's Summary Judgment Motion have been rendered moot and the Court need not decide said issues raised by Plaintiff's Summary Judgment Motion.

3. Both parties have agreed that all of the facts needed to determine whether there was a contract between plaintiff and the City are before the Court and, based on the undisputed evidence and taking all reasonable inferences from the evidence in favor of plaintiff, the Court has concluded that there is no triable issue of fact as to whether there was a contract between the plaintiff and the City as to the issues raised by plaintiff in this case.

4. Plaintiff's breach of contract claim is also barred by the Immunity Act, inasmuch as it is based on an injury that "arises out of, [is] in connection with, or results from . . . infliction of mental anguish." Utah Code Ann. § 63-30-10(2).

5. There is no contract, and thus, no covenant of good faith and fair dealing that applies to the issues raised by plaintiff in this case, and plaintiff is not entitled to judgment on any such claim as a matter of law.

6. Plaintiff did not allege in his Complaint that the City breached a covenant of good faith and fair dealing by failing to notify him of any health and disability benefits or his options under the Family Medical Leave Act. *See* Compl. ¶¶ 28. Moreover, the Complaint never mentions or references any such health and disability benefits or the Family Medical Leave Act and the deadlines for amending pleadings and conducting discovery have passed. Therefore, to the extent plaintiff is attempting to assert any such claim, it is unfairly prejudicial to defendants and is barred as a matter of law.

7. For the reasons set forth in defendants' memorandum opposing plaintiff's summary judgment motion,

DATED this 10th day of Jan 2008?

THE COURT

By: Glen R. Dawson

Glen R. Dawson



APPROVED AS TO FORM:
CRAIG L. TAYLOR & ASSOCIATES, P.

By _____
Craig L. Taylor
Willis F. McComas
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law offices of Snow, Christensen & Martineau, attorneys for defendants, and that I caused to be served ORDER: (1) DENYING DEFENDANTS' MOTION TO STRIKE; (2) GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; AND (3) DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Case Number 040700494) upon the following parties this 27th day of December, 2006, by first class mail, postage prepaid, addressed as follows:

Craig L. Taylor, Esq.
Willis F. McComas, Esq.
Matthew Hilton
CRAIG L. TAYLOR & ASSOCIATES, P.C.
472 North Main Street
Kaysville, UT 84037

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

**Personnel
Policies & Procedures
Manual
of the
City of Bountiful**

January 1, 2004

**Personnel Policies & Procedures Manual
of the City of Bountiful**

B001279

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PURPOSE OF POLICIES AND PROCEDURES

101. PURPOSE OF THIS MANUAL

(a) This Personnel Policies & Procedures Manual provides information concerning the practices, standards of conduct, disciplinary measures, and other policies and procedures of the City. Because of the changing nature of Federal and State laws, as well as the changing needs of the City and its residents and employees, the policies and procedures in this manual may be unilaterally added to, rescinded, or modified from time to time as may be decided by the Bountiful City Council.

(b) No contract exists between Bountiful City and its employees with respect to salary, salary ranges, movement within salary ranges, or employee benefits. These may change as a result of salary surveys, job analysis, appropriations by the City Council, or changes in City policies and procedures.

(c) This manual supersedes all prior policies and procedures of the City of Bountiful which are inconsistent with the matters stated herein.

102. INTERPRETATION OF POLICIES AND PROCEDURES

The City Manager functions as the Personnel Officer for the City and shall provide the official interpretation of this manual. Under his/her direction, department heads and supervisors shall be responsible for implementing these Policies and Procedures within their departments. Employees are encouraged to consult with their supervisor or department head concerning the interpretation of these personnel policies and, when necessary, may consult the City Manager.

103. DEPARTMENTAL POLICIES AND PROCEDURES

Department heads may adopt departmental policies and procedures applicable within their individual departments. Minor variances with these City policies and procedures may be made to fit departmental needs, but all departmental policies shall be consistent with applicable law, and must be approved by the City Manager.

104. COMPLIANCE WITH APPLICABLE LAW

It is the intent of the City to comply with all Federal and State laws and regulations applicable to the City and/or its employees, whether mentioned herein or not.

105. APPLICATION OF THIS MANUAL

(a) These policies and procedures do not apply to the City Manager. The City Manager's status, compensation, benefits and responsibilities are determined by State law and as negotiated between the City Manager and the City Council.

(b) Department heads are the City Recorder, City Treasurer, City Engineer, Police Chief, Fire Chief, Water and Sewer Manager, Parks and Recreation Director, Light and Power Director,

Streets and Sanitation Superintendent, Planning Director, Information Systems Manager, Administrative Services Director and the City Attorney. This manual applies to department heads, except for those provisions relating to disciplinary actions. Department heads may be terminated with or without cause, without appeal, as provided by State law. In the event of involuntary termination for reasons other than dishonesty, department heads shall be compensated with a lump sum severance pay of thirteen weeks' salary and 20% of accrued sick leave up to a maximum of 288 hours, plus accrued vacation up to a maximum of 240 hours.

(c) Regular employees are those individuals filling Council-authorized positions who have successfully completed a probation period of one year, and who are expected to work 32 or more hours per week on a year-round basis. This manual has been specifically intended to apply to regular employees.

(d) Probationary employees are those individuals hired to fill Council-authorized positions who have yet to complete a probationary period of one year, and who are expected to work 32 or more hours per week. This manual has been specifically intended to apply to probationary employees, except for those provisions relating to disciplinary actions. Probationary employees are strictly at-will employees and may be terminated with or without cause, without appeal or procedure.

(e) Non-regular employees are those individuals hired on a part-time, seasonal, temporary or other basis. These policies and procedures apply to non-regular employees as to hiring practices, employment policies and standards of conduct, but not otherwise. Benefits will be paid only if required by law or by express provision of the position with the approval of the City Manager. Non-regular employees are strictly at-will employees and may be terminated with or without cause, without appeal or procedure.

SECTION 200

HIRING PRACTICES

201. EMPLOYMENT PHILOSOPHY

(a) The City of Bountiful seeks to attract and retain for employment the most competent persons available on the basis of ability, qualifications, experience and potential.

(b) Successful employees are self-motivated problem-solvers, who seek to provide service in a professional manner. These employees are perceptive, have an eye for detail, and follow a job through to its completion. They are loyal to the City, and are expected to support and follow supervisory direction.

(c) Bountiful City encourages and conducts most of its work on a team basis. Because of this, employees are expected to cooperate and work together in carrying out their responsibilities. As clear communication is the key to successful team efforts, any pertinent information related to

City projects should be shared with other employees. This type of free exchange of information will enable the City to achieve its goals in an efficient manner while improving the quality of life within the work place.

202. EQUAL EMPLOYMENT OPPORTUNITY

(a) It is the policy of the City of Bountiful to comply with Federal and State Equal Employment Opportunity laws and guidelines. All employment decisions will be made without regard to, and the City will not engage in any unlawful discrimination based upon, race, color, religion, sex, national origin, pregnancy, age, marital status, political belief, or disability (except where physical or mental abilities are a bona fide occupational qualification).

(b) It is the obligation of each officer, manager and supervisor of the City to conduct himself/herself in conformity with the principle of Equal Employment Opportunity at all times. All employment activities, including but not limited to hiring, promotion, demotion, transfer, recruitment, advertising, discipline, layoff, termination, compensation and training, shall be conducted without unlawful regard to race, color, religion, sex, national origin, age, marital status, political belief, or disability (except where physical or mental abilities are a bona fide occupational qualification).

(c) It is the responsibility of every employee who believes that he/she has been unlawfully discriminated against to inform his/her Department Head, who shall immediately report the complaint to the City Manager and the City Attorney. If it is believed that the Department Head is the source of the unlawful discrimination, the employee may report the complaint directly to the City Manager.

203. CREATION OF JOB POSITIONS

(a) All full-time, regular positions must be created by authorization of the City Council. The Council shall establish the classification and grade of the new positions; and may unilaterally re-classify and re-grade existing positions. All department heads wishing to create new, full-time regular positions within their respective departments shall submit a request to the City Manager, who shall review the position requested, its classification, job description, and proposed pay range. Upon approval of the City Manager, the proposed position shall be submitted to the City Council for its consideration.

(b) All job openings for part-time regular, part-time temporary or full-time temporary employees may be filled by the department head, provided that sufficient funds are budgeted. Each department head is responsible for developing and implementing recruitment and selection procedures for these positions in the department. Upon filling the position, however, the appropriate payroll forms must be completed and approved by the City Manager.

204. RECRUITMENT AND SELECTION

Recruiting, selecting and hiring of all applicants for job positions within the City shall be

conducted in a manner consistent with this policy.

(a) When a full-time, regular job position needs to be filled, an up-to-date job description for that position will be prepared and approved by the department head and City Manager.

(b) Recruitment for the position shall be made as follows:

(1) Departmental Recruitment. The department head shall post an announcement on the departmental information board. ~~Any applications from within the department shall be made within three working days of the posting of the announcement.~~ If it is known that no employee within the department is qualified for the position, this step may be omitted. If no applications are received, then recruitment shall proceed to the next step.

If applications are received from within the department from employees of suitable qualifications, the department head shall consider whether any such applicant is the appropriate person for the position on the basis of ability, qualifications, experience and potential, and loyalty to the applicant's supervisor, to management of the department, and to management of the City. If the department head determines that it would be in the best interests to hire an applicant from within the department, he/she may do so.

If the department head determines that it is in the best interests of the City to consider further applications, then recruitment shall proceed to the next step. However, applications from within the department shall remain pending, and shall be considered until a final selection is made.

(2) City Recruitment. The department head shall announce the position by posting an announcement at the Payroll office, and by distributing announcements to all other Department Heads, who shall post it at their respective departmental information boards. Any applications from within the City must be made within five working days of the posting of the announcement. If it is known that no employee within the City is qualified for the position, this step may be omitted. If no applications are received, then recruitment shall proceed to the next step.

If applications are received from within the City from employees of suitable qualifications, the Department Head shall consider whether any such applicant is the appropriate person for the position on the basis of ability, qualifications, experience and potential, and loyalty to the applicant's supervisor, to management of the department, and to management of the City. If the department head determines that it would be in the best interests to hire an applicant from within the City, he/she may do so.

If the Department Head determines that it is in the best interests of the City to consider further applications, then recruitment shall proceed to the next step. However, applications from within the City shall remain pending, and shall be considered until a final selection is made.

(3) Outside Recruitment. The Department Head shall announce the position by publishing it in the appropriate media, as approved by the City Manager. Applications must be made

within ten working days of the publishing of the announcement, unless in the reasonable discretion of the Department Head the period need be lengthened or shortened.

(c) Each applicant shall submit all necessary application forms and supply such other pertinent information regarding their training and experience as may be required. The applicant should be advised that such information will be verified. Each applicant shall be requested to sign a consent to inquire into his job performance in prior jobs, the refusal of which shall be grounds for not hiring that applicant.

(d) The Department Head or his/her designee shall make appropriate inquiries to verify experience, character, education and history of any applicant.

(e) The Department Head shall select for interview such applicants as are reasonably considered to be candidates for the position on the basis of ability, qualifications, experience and potential.

(f) The interview shall be conducted by the Department Head or by such persons as he/she may designate. Only job-related questions or ones which assess the candidate's experience, skill and training will be asked.

If appropriate, interviewers may request applicants to demonstrate job-related skills by completing a test or exercise that measures knowledge or skills for the particular job and which are a valid prediction of job performance. All interviewed applicants must be given the same exercise.

(g) Selection of an applicant for the position shall be made by the Department Head on the basis of ability, qualifications, experience and potential to perform the duties set forth in the job description.

205. CONDITIONAL OFFER OF EMPLOYMENT

Any applicant who is selected for a job position with the City shall be given a Conditional Offer of Employment, which shall set forth the requirements which must be met prior to the actual hiring of the applicant. Such conditions shall require that each such applicant shall submit to the City a certified copy of the applicant's criminal record from the Utah Bureau of Criminal Identification.

206. PRE-EMPLOYMENT EXAMINATIONS

(a) All applicants must take and pass a drug test as a condition of employment.

(b) It is the policy of the City that applicants to whom a conditional offer of employment has been extended may be required as a condition of employment to pass a medical, psychological or other tests or examinations to establish both their fitness to perform the jobs for which they have applied and their fitness to do so without endangering the health and safety of themselves or others. If the City determines that an examination is appropriate to a particular position, all applicants for

the job to whom a conditional offer of employment has been made are to be examined.

(c) Once the City has extended a conditional job offer to the applicant, a medical interview or examination may be conducted by a health professional chosen by the City to determine an applicant's ability to fulfill essential job functions, with or without an accommodation. All costs for required interviews or examinations shall be paid by the City. The applicant must sign a written release of this information to the City.

(d) Medical examinations paid for by the City are property of the City and will be treated as confidential. However, records of such examinations, if required by law or regulation, will be made available to the applicant, persons designated and authorized by the applicant, public agencies, relevant insurance companies, or the applicant's doctor.

207. EMPLOYMENT OF RELATIVES

As used in this section, the term "immediate family" means the spouse, mother, father, stepmother, stepfather, foster-mother, foster-father, mother-in-law, father-in-law, sister, brother, child, brother-in-law, sister-in-law, son-in-law, daughter-in-law, uncle, aunt, nephew, niece, first cousin, grandparent, grandparent-in-law, and any other relative by blood or law residing within the employee's household.

A member of an employee's immediate family will be considered for employment by the City, provided the applicant meets the requirements for employment. An immediate family member may not be hired, however, if such employment would:

(a) create either a direct or indirect supervisor/subordinate relationship with a family member, or

(b) create either an actual conflict of interest or the appearance of a conflict of interest.

Non-regular employment positions are exempt from this provision. These criteria will also be considered when assigning, transferring or promoting an employee. No relatives will be hired or assigned in violation of State law.

208. PROBATION

(a) New Employees.

(1) All regular City employees hired from outside of the current City employees shall be subject to a probationary period of one year. This probationary period is considered part of the selection process. Its purpose is to allow City management sufficient time to evaluate an employee's ability to perform the duties and responsibilities of the assigned position.

(2) It is the policy of the City that all new employees are to be carefully monitored and evaluated during their probationary period. Supervisors are to observe carefully the performance of

each probationary employee. Where appropriate, weaknesses in performance, conduct, or attitude are to be brought to the employee's attention for correction. Employees who successfully complete their probationary period shall, with the approval of the Department Head and the City Manager, become permanent regular employees of the City.

(3) At the conclusion of the probationary period, a department head may, with the consent of the City Manager, extend probation for a period of six additional months. In such case the employee shall be so advised in writing and the employee must consent in writing to the extension of time, acknowledging that during such time the employee shall remain strictly probationary and will not have the rights of regular employees.

(b) Promoted or Transferred Employees. Current City employees who are promoted to a position of greater salary or responsibility, or who are transferred to another position within the City that is of equal or lesser salary, shall serve a one year probation. In the event that the promoted or transferred employee does not perform the new job satisfactorily, that employee may be returned to that employee's previous position prior to the promotion or transfer.

209. FALSE STATEMENTS IN JOB APPLICATIONS

It is the policy of the City that false statements given in the job application process, whether in writing or verbal, are not tolerated. If a false statement is discovered during the hiring process, the applicant will no longer be considered for employment. If a false statement is discovered after an employee has been hired, the employee may be terminated, depending upon the severity of the statement.

SECTION 300 COMPENSATION

301. POSITION CLASSIFICATION

(a) Every full-time permanent position in the City shall be assigned a classification and a grade. Each position shall have a job description which sets forth the abilities necessary to perform the job, the job duties and responsibilities, the reporting relationship of the position to management, minimum qualifications and other pertinent job information.

(b) The City Council may, from time to time, re-classify a position in order to stay within the employment marketplace for that position. In such event, any employee whose position is re-classified from one class to another shall continue to receive the same salary, unless it falls below the minimum salary of the new range, or unless, in the opinion of the City Manager, an immediate salary adjustment within the range is needed. Such changes will not alter an employee's scheduled anniversary date insofar as advancement to the next step of the salary range is concerned.

302. ANNIVERSARY DATES

The date the employee begins his/her full-time employment with the City shall be that employee's anniversary date. If an employee is promoted, the effective date of the promotion shall be the new anniversary date for that employee. Each employee shall be given a performance evaluation on or shortly after each anniversary date and, if eligible and approved by the Department Head and the City Manager, may receive a step increase in accordance with the salary schedule and plan of the City.

303. TRANSFERS, PROMOTIONS, AND DEMOTIONS

(a) In the event that an employee is promoted to a position of greater responsibility within his/her career field, the employee shall be moved to the first salary step in the new range or receive a five per cent promotional increase, whichever is greater. Persons promoted to a higher classification in a different career field shall start at the first step of the applicable salary range and will be eligible for a step increase after one year of satisfactory service in the new career field. In each case, the employee's anniversary date shall be the first full day of work in the higher classification (in the case of a promotion), or the first full day in the new career field. Any exceptions to this policy must be specifically approved by the City Manager.

(b) An employee who, for disciplinary reasons, is demoted to a position assigned a lower salary range, shall receive the salary in the new range, at the same step he/she was at before the demotion. Persons demoted to a classification in a different career field shall start at the first step of the applicable salary range and will be eligible for a step increase after one year of satisfactory service in the new field. The employee's anniversary date shall be the first full day of work in the position to which he/she was demoted. Any exception to this policy must be specifically approved by the City Manager.

(c) Employees filling non-regular employment positions may be transferred, promoted, or demoted at the discretion of the Department Head. The hourly wage of a non-regular employee may also be adjusted at the discretion of the department head as part of any of these actions.

304. HOURS OF WORK AND WORK WEEK

It is the policy of the City that the normal work week shall be 40 hours, except in the case of firefighters. Exceptions to this must be approved by the Department Head and the City Manager.

Employee work schedules will be made by each Department Head in order to best meet the operational needs of the City. Each pay period will begin on Sunday at 12:00 midnight and end 14 days later on Saturday at 12:00 midnight. Each work period will be 28 days and will consist of two pay periods as described above. Employees engaged in fire protection or law enforcement activities qualify for the Fair Labor Standards Act (FLSA) 207(k) exemption.

305. SALARY

(a) An employee's wage or salary shall be based on the wage and salary schedules approved by the City Council. The employee's actual salary within the authorized range shall be dependent upon performance evaluations. Employees shall be eligible for increases as set forth in the salary schedule applicable to their position.

(b) Those positions designated as "management" positions within the City shall have an open salary range -- that is, there will be no steps and the range will simply consist of a beginning salary and a top salary. Employees may be assigned by the City Manager to a position anywhere within the salary range, and may receive annual increases of up to 5% depending on their performance and evaluation.

306. SALARY ADJUSTMENTS

(a) Step increases based on employee evaluations and time in service shall be made consistent with the salary range and steps established for that position. Employees shall be eligible for a step increase upon their anniversary date and shall receive an evaluation and recommendation from their supervisor and department head, which shall be forwarded to the City Manager for his approval, with copies placed in the employee's personnel file and in the payroll department.

(b) The salary schedule may be adjusted annually by the cost of living increase approved by the City Council. Cost of living increases shall be effective at the beginning of the first pay period of the new fiscal year, unless the City Council shall direct otherwise.

307. OVERTIME

Supervisory personnel should organize their department workloads to avoid overtime payments. Scheduled overtime will be approved only on an emergency or special need basis. Overtime work must have the prior approval of the supervisor. Overtime work will be compensated as required under the Fair Labor Standards Act (FLSA) unless departmental policy exceeds these standards. Part-time employees shall not accumulate compensation time.

308. ON CALL DUTY

Subject to approval of the City Manager, each department may adopt on call duty policies appropriate to the particular circumstances of the department.

309. SALARY ADVANCES

It is the general policy of the City that payroll advances are not made. However, if approved by the City Manager due to unusual circumstances, advances can be made not to exceed the amount due for the next pay period.

310. PAYROLL DEDUCTIONS

(a) The City is required by law to deduct Social Security, Medicare, retirement and federal and state income tax withholding in accordance with the employee's salary and number of dependents. In addition, the City will deduct those items specifically authorized by the City and approved in writing by the employee, including but not limited to deductions for insurance, and voluntary retirement plans. These elective deductions shall be made as set forth by the payroll department.

(b) If an employee is indebted to the City for any reason, the City may deduct such debt from the net pay of the employee (i) if the employee has been given notice of the debt and has failed to pay it, or (ii) if the employee's employment with the City is terminating.

311. BENEFITS

(a) **Social Security.** Bountiful City participates in the Social Security and Medicare program established by the federal government. In accordance with this program, the City pays the employer's share to the federal government and withholds the employee's share from the employee's pay.

(b) **Workers Compensation.**

(1) Employees of Bountiful City are covered by Workers Compensation as required by State law. State law shall determine the eligibility for, the amount of, and the period of, compensation granted to injured employees.

(2) Any injury occurring on the job must be reported immediately to the employee's supervisor no matter how slight the injury may seem. Failure to report may result in benefits being lost or reduced. Supervisors must notify the City Benefits Administrator immediately (as soon as it is possible), so that the Employer's First Report of Injury form may be completed and submitted to the Industrial Commission of Utah. Departments must also notify the Benefits Administrator when an employee is placed on, or returns to work from, Workers Compensation leave.

(3) Employees injured while on the job shall visit a physician designated by the City when medical attention is necessary. After the initial visit, the employee may switch to a physician of his choice, but only as permitted by State Workers' Compensation rules. Employees failing to use an approved physician or medical provider may be responsible for payment of medical bills.

(4) Employees injured on the job who receive a medicine prescription in connection with the injury shall have that prescription filled only at City-designated pharmacies. If prescriptions are filled elsewhere, the City shall pay only the cost that the City negotiated with the City-designated pharmacy, and the employee shall be responsible to pay any difference.

(5) Employees who are injured while on the job shall comply with all regulations of the Workers' Compensation Act as provided in the Utah State Code.

(6) Utah State law requires that no compensation from the Workers' Compensation Fund shall be paid for the first three days following the day of the injury. However, employees injured while on the job may use sick leave, vacation leave or compensatory time, if available, for the remaining work hours of the day of the injury and the first three calendar days following the day of the injury. Beginning the fourth day, Workers' Compensation benefits shall be utilized.

(7) Workers' Compensation benefits shall be those set by State law. These benefits may be supplemented by the employee's accrued sick, vacation or other leave up to the employee's fully salary. Initially the employee must use sick or vacation leave to compensate for the hours on industrial leave. However, once the City's workers' compensation administrator issues a check for lost work time, the employee will be recited back the number of hours that the reimbursement check represents.

(8) Employees who have been on Workers' Compensation shall resume the same or comparable position of the same grade and classification. If the employee, in the opinion of a treating doctor, cannot perform the duties of the position from which leave was taken, the City is not required to accept the employee for work. The City may at its discretion request a second opinion to verify the physician's findings. A list of duties should be sent to the verifying physician. If the employee does not return to work when released to do so by the treating physician, the Benefits Administrator shall notify the employee that he/she is on unapproved leave and expected to return to work immediately. An employee who does not report as directed and makes no contact with the Benefits Administrator within three (3) days following notice shall be considered to have resigned from City employment.

(9) The City may require an employee to present medical certification from his doctor of fitness to continue or resume work, or of physical inability to continue or resume work. It is the duty of every employee to immediately disclose to his/her department head any doctor's release to return partly or fully to work, and any doctor's certification of inability to work.

(10) All medical expenses including prescription drugs incurred while treating on-the-job injuries shall be submitted by the employee to the Workers' Compensation Fund and not through City health insurance programs.

(11) When a doctor certifies that an employee can do "light duty work" only, whether from a job-related injury or an off-duty injury, the injured party may be returned to work only if the department head determines that light duty work is available and appropriate. If the department head determines that light duty work is not available or not appropriate, the injured employee shall remain on temporary total disability until fully released to return to work by the physician.

(12) Employees must direct their medical care providers to communicate directly to the Benefits Administrator as to work restrictions, work releases, billings, and medical examinations and records. Failure to do so may result in termination of workers compensation benefits.

(c) Uniform Allowance. The City is proud of the image its employees maintain before

area residents. Accordingly, each City employee should make every effort to maintain a clean, well-groomed appearance. Some employees may be required to wear identifying uniforms and will be, at the City's option, either furnished their uniforms or compensated with a uniform allowance. This allowance will be in addition to the employee's regular compensation. If the City is required by Federal or State law to subject this allowance to taxes, the City will deduct them from the employee's paycheck in accordance with the law.

(d) **Retirement Systems.**

(1) Bountiful City is a member of the Utah State Retirement System. Eligible City employees participate in the Public Safety Retirement System, the Fireman's Retirement System and the Public Employees Retirement System, as appropriate, subject to the rules and regulations of the respective systems.

(2) The City also has established 401(k) and 457 plans which shall consist of such programs, contributions and eligibility as may be established by the City Council and the respective plans.

(e) **Medical Insurance.**

(1) All regular employees, and such other employees whose positions are designated by the City Manager, are eligible to participate in the City's health, dental, and life insurance programs. Enrollment cards and a detailed schedule of benefits will be provided to eligible employees. The City's contributions to health, dental and life insurance programs shall be set by the City Council.

(2) Regular employees, appointive officers and elected officials who retire or terminate while participating in the current group insurance program of the City, are eligible for further group insurance coverage as indicated if they qualify upon the following grounds:

(i) If an individual leaves the City with 30 years of cumulative service and is 55 years of age or older, the City will pay the cost of single coverage under the current group insurance program until the individual is eligible for Medicare coverage. (If the individual leaves with 30 years of service but is under age 55, the individual may stay with the group insurance by personally paying the applicable premium until reaching the age of 55, at which time the City will pay the premium until eligible for Medicare.)

(ii) If an individual leaves the City with 25 years of cumulative service and is 60 years of age or older, the City will pay the cost of single coverage under the current group insurance program until the individual is eligible for Medicare coverage. (If the individual leaves with 25 years of service but is under age 60, the individual may stay with the group insurance by personally paying the applicable premium until reaching the age of 60, at which time the City will pay the premium until eligible for Medicare.)

(iii) If an individual leaves the City with 20 years of cumulative service, the individual may

stay with the City's group insurance until the individual is eligible for Medicare coverage by personally paying the applicable premium.

(iv) Under sections (2)(i), (ii) and (iii), the spouse of such an employee may also stay with the City's group insurance until the spouse is eligible for Medicare coverage by personally paying the applicable premium. In the event the employee dies, the surviving spouse will then be eligible only for such further group insurance as COBRA may provide.

(f) **Education Allowance.**

(1) The City has a policy of encouraging its employees to continually update and increase their level of education. To further this policy, the City will give financial assistance to employees enrolled in City-approved educational programs of direct benefit in aiding the employee to improve performance and skills in his/her position with the City. To this end, 50% of tuition and book fees will be paid for classes or coursework of direct benefit after proof of registration. Approval of eligibility of the course shall be obtained from the employee's department head prior to taking the course if reimbursement is going to be requested. At the end of the class, the employee must provide evidence of satisfactory completion of the course. If the employee does not complete or satisfactorily pass the class, the employee must reimburse the City for the tuition and books paid by the City for that class.

(2) Employees must agree in writing to remain with the City following completion of the course for at least one year, or to re-pay the City for the tuition and books fees paid by the City.

(3) The City will pay fees for approved conferences, seminars and courses approved by the department head.

312. LEAVES OF ABSENCE

(a) **Holidays.**

(1) The City observes the following paid holidays each year: New Year's Day, President's Day, Memorial Day, Independence Day, Pioneer Day, Labor Day, Veteran's Day, Thanksgiving Day, the day after Thanksgiving, and Christmas Day.

(2) In addition to the above holidays, the City grants two "floating" holidays, which employees may take at any time with the approval of the department head. Eight hours of vacation time shall be accrued to employees twice per year as directed by the City Manager

(3) Holidays falling on Sunday will be observed on the following Monday. Holidays falling on Saturday will be observed the preceding Friday. Department heads will schedule work assignments so that whenever possible employees may observe the holiday schedule.

(4) FLSA-eligible employees who are required to work on a holiday shall be paid straight

time pay, and shall be credited with eight hours of vacation time. FLSA-exempt employees who are required to work on a holiday shall be allowed to take another day off in lieu of the holiday worked. Temporary employees and part-time employees working less than 20 hours per week shall not receive holiday pay but will be paid straight time for all hours worked on a holiday.

(b) Vacation Leave.

(1) Vacation leave is provided for the purpose of rest and relaxation and also for attending to personal business.

(2) Except for firefighters who shall accrue and accumulate vacation leave at a rate established by the City, vacation leave for full-time regular employees shall accrue at the following rate:

0 - 5 years of service: 3.692 hours per pay period (12 days per year)
6-10 years of service: 4.615 hours per pay period (15 days per year)
11-15 years of service: 5.538 hours per pay period (18 days per year)
15+ years of service: 6.461 hours per pay period (21 days per year)

(3) Employees may accumulate up to 240 hours of vacation time which can be carried forward to a new calendar year. Unused vacation in excess of this amount will be forfeited without compensation each December 31st. Employees are encouraged to take their vacation leave annually. However, an extension of the December 31st forfeiture date may be approved in writing by the City Manager.

(4) Accrued vacation leave will be credited to an employee's account each pay period. Vacation leave is to be scheduled at the mutual convenience of the City and the employee, and must be scheduled by the employee with the approval of the department head. Paid holidays occurring during vacation leave will not be charged as vacation time.

(5) Once each fiscal year, an employee may elect to convert up to 40 hours of vacation leave to cash at the current rate of pay. Department Heads may elect to convert up to 80 hours of vacation leave to cash at the current rate of pay. Employees wishing to do this should notify the payroll department on an approved form. In the alternative to cash, employees may have these funds deposited into their City 401(k) or 457 plan to which they belong, if permitted under applicable plan regulations.

(6) Terminating employees are entitled to payment at their current rate of compensation for all unused vacation leave which has been accrued, up to 240 hours.

(7) Ongoing part-time employees working 32 or more but less than 40 hours per week, whose positions are expressly approved by the City Manager for compensation with vacation leave, shall accrue vacation on a prorated basis. Employees working less than 32 hours per week, and temporary employees, shall accrue no vacation leave.

(8) Employees may not take vacation leave in advance of its actual accrual.

(c) Sick leave.

(1) Except for firefighters who shall accrue and accumulate sick leave at a rate established by the City, all regular employees will be credited with 3.692 hours of sick leave for each full pay period of service with the City.

(2) Ongoing part-time employees working 32 or more but less than 40 hours per week, whose positions are expressly approved by the City Manager for compensation with sick leave, shall accrue sick leave on a prorated basis. Employees working less than 32 hours, and temporary employees, shall accrue no sick leave. Accrued sick leave will be credited to the employee's account each pay period.

(3) Employees may accrue sick leave without limitation. Unused sick leave should be valued as an insurance against protracted illness. Sick leave may be used for (i) employee illness or injury, (ii) illness or injury in the employee's immediate family, and (iii) medical and dental appointments. The term "illness" includes illness from a pregnancy. In this section the term "immediate family" means the employee's spouse or child residing within the employee's household.

(4) An employee shall notify his/her supervisor prior to or at the beginning of scheduled work that he/she will be absent from work because of sick leave circumstances. In the event of an extended absence, the employee shall keep his/her supervisor informed of his/her condition. In the event that the absence from work exceeds three working days, the City may require the employee to present a medical statement justifying the absence from work and containing a clearance to return to work, or stating a physical inability to resume work.

(5) Any absence or sick leave that extends beyond accrued sick leave will result in the employee being carried on vacation leave status until all accrued vacation and compensatory time balances have been used, and then the employee shall be carried on a leave-without-pay status. This provision does not give a right to an employee to be carried on any such status.

(6) Employees may convert a maximum of 32 hours of sick leave each calendar year to cash at their current rate of pay, provided that any sick leave used during the year will be deducted from the 32 hours. Department Heads may convert a maximum of 80 hours of sick leave each calendar year to cash at their current rate of pay, provided that any sick leave used during the year will be deducted from the 80 hours. In order to participate in this conversion, employees must have a minimum of 120 hours of sick leave remaining after the conversion permitted in this section. In the alternative to cash, employees may have these funds deposited into their City 401(k) or 457 plan to which they belong, if permitted under applicable plan regulations. Employees desiring to convert sick leave to cash shall notify the payroll department prior to November 30th. Sick leave conversion shall be reflected in a December payroll designated by the City Manager.

(7) Employees retiring from the City under the City's retirement program may convert

20% of their accrued but unused sick leave, up to a maximum of 288 hours, to cash at their current rate of pay.

(d) **Parental leave.** If accrued sick leave is available, employees who are the mother or father of a child being born may take up to forty hours for parental leave at the time of birth, which shall be counted against the sick leave of the employee. Any additional leave taken in connection with this birth under the Family Medical Leave Act shall be unpaid leave unless taken from accrued paid vacation leave.

(e) **Military leave.**

(1) Employees who are drafted or called into active military duty will be granted leaves of absence without pay for the duration of military service.

(2) Regular employees who serve as reserve members of the armed forces shall be granted military leave of up to 15 working days per year for attendance at annual training programs. Where the military pay is less, the City shall pay the employee's regular salary and the employee will, within one week of receipt from the military, reimburse the City the compensation received during such periods.

(3) An employee on military leave for a period exceeding three months will be returned to his/her former position, or to one of like status and pay.

(f) **Bereavement leave.**

(1) Regular employees, after notifying their supervisor, shall be granted actual time off up to three days with pay in the case of the death of a member of the immediate family. Immediate family means spouse, children, step-children, mother, father, stepmother, stepfather, mother-in-law, father-in-law, grandfather, grandmother, sister, sister-in-law, brother, brother-in-law, daughter-in-law, son-in-law, grandparent-in-law, or other relative by blood or law living in the home of the employee.

(2) Regular employees, after notifying their supervisor, shall be granted actual time off or one day with pay in the case of the death of a nephew, niece, aunt or uncle.

(g) **Jury duty.**

(1) Employees who have been summoned to jury duty, or who have been subpoenaed (as opposed to being retained) to appear as a witness, will be allowed full pay during the time of their absence. Payment does not apply to court appearances falling on the employee's personal time, or to court appearances when an individual is appearing in court on his/her own behalf.

(2) Any compensation received by employees for jury or witness duty while he/she is being paid by the City, shall be turned into the City, with the exception of any reimbursement for

travel to and from the courtroom.

(3) It is the employee's responsibility to notify his/her department head as soon as formal notice regarding jury duty is received. The department head shall make arrangements for coverage during this time period.

(4) If the employee is excused from jury duty or otherwise released during the employee's scheduled work, the employee shall report to work for the balance of the day.

(h) **Subpoenas.**

(1) If lawfully subpoenaed to appear in court, it is the employee's responsibility to notify his/her department head as soon as formal notice is received. The department head shall make arrangements for coverage during this time.

(2) Appearances in court under subpoena are normally considered as excused time with pay. However, individual circumstances may vary. Any compensation for such appearances shall be turned into the City, except for travel.

(3) Time for appearance in court on personal matters will be the employee's responsibility. Vacation leave can be used for this purpose.

(i) **Leaves without Pay.** Leaves of absence without pay may be granted in writing by the City Manager, if the City's services and needs will not be adversely affected. This provision does not give an employee a right to leave without pay.

(j) **Family Medical Leave.** It is the policy of the City to fully comply with the Federal Family and Medical Leave Act of 1993, and to grant employees leaves of absence in accordance with its provisions.

(1) **Eligibility.** An employee who has both (1) been employed by the City for at least 12 months, and (2) has worked for the City for at least 1,250 hours during the 12 months immediately prior to the intended leave to be taken, is eligible for family and medical leave.

(2) **Leave.** An eligible employee is entitled to a total of 12 work weeks of family and medical leave during any one year, which year shall commence on the day the employee first takes family medical leave.

(3) **Reasons for Leave.** Eligible employees may take family or medical leave (1) to take care of a child upon birth, or upon placement for adoption or foster care; (2) to care for a parent, spouse, or child with a serious health condition; or (3) when an employee is unable to work because of the employee's own serious health condition. FMLA leave will not be granted for reasons not specified in the FMLA.

A "serious health condition" means an illness, injury, impairment, or physical or mental

condition that involves: (1) any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility; (2) any period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or (3) continuing treatment (by or under the supervision of) a health care provider for prenatal care or a chronic or long-term health condition that is so incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days.

"Health care provider" means: (1) doctors of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctor practices; (2) podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice, and performing within the scope of their practice, under state law; (3) nurse practitioners and nurse midwives authorized to practice, and performing within the scope of their practice, as defined under state law; or (4) Christian Science practitioners listed with the First Church of Christ Scientist in Boston, Massachusetts.

Leave for birth, or placement for adoption or foster care, must conclude within 12 weeks of the birth or placement. Spouses who are both employed by the City are jointly entitled to a combined total leave of 12 weeks of family care for (1) the birth of a child, or placement for adoption or foster care, or (2) care of a parent who has a serious health condition.

Eligible employees may take family and medical leave intermittently (for example, in blocks of time or by reducing a work schedule) in certain circumstances. If leave is taken to care for a child after the birth or placement for adoption or foster care, employees may take such leave intermittently only with the permission of the City Manager. If leave is taken because of the employee's own serious illness or to take care of a seriously ill family member, the employee may take the leave intermittently if it is medically necessary.

(4) **Notice and Certification.** Employees who want to take FMLA leave ordinarily must provide the City at least 30 days notice of the need for leave, if the need for leave is foreseeable. If the employee's need is not foreseeable, the employee should give as much notice as is practicable. When leave is needed to care for an immediate family member or for the employee's own illness and is for planned medical treatment, the employee must try to schedule treatment so as not to disrupt the City's operations unduly.

In addition, employees who need leave for their own or a family member's serious health condition must provide medical certification of the serious health condition. The City also may require a second or third opinion (at the City's expense), periodic recertification of the serious health condition, and, when the leave is a result of the employee's own serious health condition, a fitness for duty examination prior to returning to work. The City may deny leave to employees who do not provide proper advance leave notice and will deny leave for failure to provide the required medical certification.

(5) **Accrued Paid Leave.** Employees may, but need not, first use any accrued paid vacation, and sick leave as paid FMLA leave prior to unpaid FMLA leave.

(6) **Benefits During Leave.** Employees taking leave under the FMLA are entitled to receive health and City-paid life insurance benefits during the leave at the same level and terms of coverage as if they had been working throughout the leave. If applicable, arrangements will be made for employees to pay their share of health insurance and life insurance premiums while on leave. As provided by federal law, the City may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave.

The employee's use of FMLA leave will not result in the loss of any employment benefit that accrued prior to the start of the employee's leave. However, other than the continuation of health benefits, no other employment benefits shall accrue during the period of unpaid leave.

(7) **Job Restoration After Leave.** The City will reinstate an employee returning from FMLA leave to the same or equivalent position with equivalent pay, benefits, and other employment terms and conditions. However, an employee on an FMLA leave does not have any greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employee on FMLA leave must file every fourth week a written and signed statement that the employee intends to return to work at the conclusion of FMLA leave. Failure to do so may result in the termination of FMLA leave.

(8) **Management Officers.** Salaried executive, administrative, and professional employees of the City who meet the Fair Labor Standards Act ("FLSA") criteria for exemption from minimum wage and overtime do not lose their FLSA-exempt status by using any unpaid FMLA leave. This special exception to the "salary basis" requirements for the FLSA's exemptions extends only to eligible employees' use of leave required by the FMLA.

Section 400

EMPLOYMENT POLICIES

401. CERTIFICATION AND LICENSING

Where certification or licensing is essential to the performance of one's job, employees are required to provide evidence of such certification or licensing (or recertification or relicensing) as a continuing condition of employment.

402. FITNESS FOR DUTY

It is the continuing responsibility of each employee to maintain the standards of physical and mental health fitness required for performing the duties of his or her position. If an employee is not able to safely and properly perform his or her duties for any reason, it is the responsibility of the

employee to report this fact to the supervisor. The employee should then take sick leave or other appropriate leave until he or she is fit to perform the duties of the position.

If a superior reasonably believes that an employee is for any reason not fit to perform duties, it shall be brought to the attention of the department head. If the Department Head reasonably believes that an employee is not fit to perform duties, the employee may be asked for an explanation, sent home, relieved of certain duties, assigned to different duties or assigned to light duty, or require the employee to undergo a fitness for duty examination by the appropriate person selected by the City. The employee must cooperate with the decision of the Department Head.

If an employee is unable to perform his or her duties, he/she shall be relieved of those duties until such time as the employee is certified by a physician or health care provider acceptable to the City that the employee is physically and/or mentally able to return to full or light duty.

This policy will be interpreted and applied so as to conform with applicable law.

403. PERSONNEL RECORDS

It is the policy of the City to maintain personnel records concerning its employees. It is the City's policy to allow access to personnel records in accordance with applicable law.

Employees may have reasonable access to their own personnel files during regular business hours. Copies from the file may be made at employee expense. Privileged information, as defined by law, is not to be accessed or copied by the employee.

If the City receives a subpoena for personnel records, it is the policy of the City to comply with the requirements of the law. The City will notify the employee whose records have been subpoenaed, and will furnish to the employee a copy of the subpoena and of the records provided in response to it.

404. EMPLOYEE EVALUATIONS

(a) Employee evaluations shall be used to assess employee performance, review employee strengths and weaknesses, improve employee effectiveness, set goals and objectives, and, as appropriate, to evaluate salary advancements. The format of the evaluation shall be determined by the department head and approved by the City Manager. Performance review factors which ought to be considered include work productivity, work quality, attendance, cooperation, job knowledge, initiative, and attitude.

Each regular employee shall receive at least one annual evaluation of their performance at or near their anniversary date. Evaluations will be made by an employee's immediate supervisor and/or Department Head, as directed by the Department Head. The evaluation shall be reviewed with the employee. Employees may respond in writing to any performance evaluation. A copy of each employee evaluation will be provided to the employee, and a copy the evaluation and any response shall be transmitted to the City Manager, who shall place them in the employee's personnel

file.

(b) Employees have a right to appeal all or part of their evaluation to the City Manager.

(1) Employees desiring to appeal their evaluation should do so by filing with the Department Head, within ten days of the delivery of the evaluation, a written statement of the appeal. The supervisor and/or Department Head shall file a written response to the appeal within five days from the date of filing, a copy of which shall be furnished to the employee. Within five days of the filing of the appeal, the Department Head shall deliver to the City Manager copies of the evaluation, the statement of the aggrieved employee, and the response of the supervisor and/or Department Head.

(2) The City Manager shall meet informally with the aggrieved employee and, at the option of the City Manager, the supervisor and/or Department Head. The City Manager shall, within fifteen days of receipt of the appeal, make a decision to affirm or modify the evaluation.

(3) The decision of the City Manager is final.

405. EMPLOYMENT REFERENCES

Only the City Manager and Department Heads are authorized to answer on behalf of the City inquiries about employment references, termination or retirement concerning present or former employees. However, the Payroll Administrator may give information confirming employment and giving the dates of such employment.

406. WORK ENVIRONMENT

It is the policy of the City to promote a productive work environment that is a clean, safe, and hospitable place in which employees may fulfill their responsibilities. Accordingly, City policy will not tolerate verbal or physical conduct by any employee which harasses, disrupts, or interferes with another's work performance or which creates an intimidating, offensive, or hostile environment, nor will the City tolerate any such behavior toward, or from, members of the general public. Employees are expected to act in a positive manner and contribute to a productive environment.

407. DRUG-FREE WORKPLACE

(a) It is the policy of the City to maintain a workplace that is free from the effects of drug and alcohol abuse. An employee must notify his/her Department Head of any criminal drug conviction for a violation occurring in the workplace within five days after such conviction.

(b) Employees are prohibited from the use, sale, dispensing, distribution, possession, or manufacture of alcoholic beverages or illegal drugs and narcotics on City premises or work sites. In addition, employees are prohibited from the off-premises use of alcohol and possession, use, or sale of drugs if such activities are illegal or adversely affect job performance, job safety, or the City's

reputation in the community.

(c) Employees working the golf course snack bar are exempt from the provisions of this policy addressing the sale, dispensing, and distribution of alcohol. Employees serving alcohol at the golf course facilities are, however, subject to all applicable State law and licensing requirements.

(d) Employees and supervisors should report immediately to their Department Head any action by an employee who demonstrates an unusual behavior pattern. Employees reasonably believed to be under the influence of drugs, narcotics, or alcohol will be required to leave the work site and may be required to immediately submit to drug and/or alcohol testing. The City Manager shall be informed of each incident of this nature.

(e) Employees who need to use prescribed drugs while at work, and where such use may impair their ability to perform their job safely and effectively, must report this to their Department Head and, if requested, provide acceptable medical documentation. Depending on the circumstances, employees may be reassigned, forbidden to perform certain tasks, or even not allowed to work if they are judged not to be able to perform their jobs safely and properly while taking their prescribed medication. In the latter situation, the employee will be placed on sick leave.

(f) The City shall require employees to submit to drug testing in the following circumstances: pre-employment hiring, following on-the-job injuries or accidents, reasonable suspicion situations, pre-announced periodic testing, rehabilitation programs, and random testing in safety-sensitive positions.

(1) The collection of drug testing samples shall be performed under reasonable and sanitary conditions.

(2) Samples shall be collected and tested in such a manner as to ensure the privacy of the individual being tested and in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples.

(3) Samples shall be labeled and sealed so as to reasonably preclude the probability of erroneous identification of test results.

(4) People being tested will have the opportunity to provide notification to the City of any information they consider relevant to the test, including identification of currently or recently used prescription or non-prescription drugs, or other relevant medical information.

(5) Sample collection, storage and transportation to the place of testing shall be performed in a manner that reasonably precludes the probability of sample misidentification, contamination or adulteration.

(6) Sample testing shall conform to scientifically accepted analytical methods and procedures.

(7) Before the result of any test may be used in a disciplinary action, any positive initial screening shall be verified by gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical methods. The person tested shall be notified as soon as possible by telephone and in writing of the initial test result, if it is positive, and where a new test may be obtained if the employee wants a second test taken. In addition to the initial test results, these new test results shall be considered in any disciplinary action.

(8) Testing shall occur during or immediately after work, and shall be considered as work time for purposes of compensation.

(9) All costs of testing shall be paid by the City.

(10) If an applicant for employment refuses a test, that applicant will not be hired. If an employee refuses to provide a sample for testing, that refusal may be considered in a disciplinary action.

(11) If verified positive test results indicate a violation of City policy, the City may as a part of any disciplinary action require the employee to enroll in a rehabilitation, treatment, counseling or education program approved by the City, suspend the employee without pay, terminate the employee from employment, refuse to hire a prospective employee, or impose other disciplinary measures.

(12) This drug testing policy shall be administered in a discrete manner in order to protect employee embarrassment or public notice as much as reasonably possible.

(g) In the event of violation of the drug-free workplace policy, the City may require employees to submit to reasonable monitoring by periodic blood or other testing for compliance.

(h) It is the policy of the City that no employee shall be in the workplace with any measurable amount of alcohol or any illegal drug in the employee's blood. If such an event occurs, the employee shall be sent home without pay for the remainder of that day's scheduled work, and shall be subject to further disciplinary action.

408. WORK PLACE VIOLENCE

It is the policy of the City to provide, as far as possible based on the nature of our duties, a work environment that is free of threatening conditions, violent behavior and criminal activity. Oral or written threats, physical assault, harassment, intentional damage, and every other act or threat of violence by City employees is strictly prohibited.

It is the responsibility of all employees to notify the Department Head when there has been an act or threat of violence, whether actual, express, or implied. In a situation of immediate danger, the Police Department should be immediately notified.

All incidents of work place violence are to be reported immediately to the Department Head, who shall in turn notify the City Attorney. It is the responsibility of all employees to fully cooperate with any City investigation into an incident of work place violence.

Work place violence is grounds for termination of employment from the City.

409. SEXUAL AND OTHER HARASSMENT

(a) It is the policy of the City that the working environment of City employees be free from harassment and discrimination based on race, color, religion, sex, age, national origin, or disability.

(b) Any behavior or conduct of a harassing or discriminating nature, including that of a sexual nature, which is pervasive, unwelcome, demeaning, ridiculing, derisive or coercive, or results in a hostile, abusive or intimidating work environment, constitutes harassment and shall not be tolerated by the City.

(c) It is the responsibility of each supervisor and Department Head to maintain a work place free of any form of sexual or other harassment and discrimination. No supervisor is to threaten or insinuate, either explicitly or implicitly, that an employee's refusal to submit to sexual advances will adversely affect the employee's employment, evaluation, wages, advancement, assigned duties, shifts, or any other condition of employment or career development. In addition, no supervisor is to favor in any way any applicant or employee because that person has performed or shown a willingness to perform sexual favors for the supervisor.

(d) All sexually harassing conduct in the work place, whether committed by supervisors or non-supervisory personnel, is prohibited. Such prohibited conduct includes, but is not limited to:

- (1) Sexual flirtations, touching, advances, or propositions;
- (2) Verbal abuse of a sexual nature;
- (3) Graphic or suggestive comments about an individual's dress or body;
- (4) Sexually degrading words to describe an individual; and
- (5) The display in the work place of sexually suggestive objects or pictures, including nude photographs.

(e) Any employee who believes that the actions or words of a supervisor or fellow employee constitute unwelcome harassment or discrimination has a responsibility to report or complain as soon as possible to his/her Department Head. If the complaint involves a Department Head, it should be directed to the City Manager. All complaints of this nature should be in writing and should document specific information regarding the harassment. This information should include dates, times, places, witnesses, and specific types of harassment. Malicious or frivolous

complaints of harassment or discrimination may result in disciplinary action against the accuser.

(f) Upon receiving a complaint of harassment, Department Heads (or the City Manager, when appropriate) shall investigate the complaint in a prompt, impartial, and confidential manner. The City Manager and the City Attorney shall be immediately notified upon the receipt of a complaint. The Department Head shall notify the employee in writing of his findings and conclusions as quickly as possible.

(g) If an employee is not satisfied with either the handling of a complaint or the action taken by the Department Head, he or she shall bring the complaint to the attention of the City Manager. The City Manager shall then investigate the charges and respond in writing to the employee as quickly as possible.

(h) Any employee, supervisor, or Department Head who is found to have engaged in harassment of another employee will be subject to appropriate disciplinary action, up to and including termination. The severity of the discipline depends upon the circumstances of the harassment, and the prior disciplinary history of the person involved.

(i) No City official or employee shall harass, coerce, intimidate, threaten or discipline employees who exercise their rights under this procedure in good faith. Any such form of reprisal will render the official or employee subject to disciplinary action.

410. WORK AREAS

(a) It is the policy of the City that work areas must be kept safe, clean, and orderly at all times, and in such a manner as to promote an efficient work environment. All employees are responsible for carrying out this policy in their own work areas. They should refrain from bringing unnecessary or inappropriate personal property to work.

(b) Employees should conduct their work sites in such a manner as to avoid adversely impacting the work areas of others.

(c) Employees should not bring personal items to work which they wish to remain private. There is no expectation of privacy for employees as to their desks, filing cabinets, equipment, lockers, containers, or City-issued vehicles under their control, while on City premises or while conducting City business. Prescription drugs properly prescribed on City premises shall not be subject to search and seizure without reasonable suspicion.

411. EMPLOYEE SAFETY

(a) It is City policy to comply, and for all employees to comply, with all applicable Federal, State and local health and safety regulations and to provide a work environment as free as possible from hazards.

(b) It is the responsibility of all employees to ensure that working conditions are safe,

healthful, and in compliance with all Federal and State safety regulations. Although the following list is not all-inclusive, employees are therefore responsible to:

- (1) Familiarize themselves with all safety and health procedures relevant to the operations in their departments and work with their supervisors to identify, reduce, and eliminate unsafe working conditions or potential hazards;
- (2) Make regular safety inspections of all work areas, machinery, equipment, lift trucks, grounds, and any other potentially hazardous areas;
- (3) Report all accidents and injuries to the City Risk Manager and the Benefits Administrator as quickly as possible, although never later than the end of the work day;
- (4) Never operate any machine or equipment unless specifically authorized to do so by the supervisor;
- (5) Never operate defective equipment, or use broken hand tools, and to report defective or hazardous equipment to the supervisor;
- (6) Obtain full instructions from the supervisor before operating a machine with which the employee is not familiar;
- (7) Never start on any hazardous job without being completely familiar with the safety techniques which apply to it, and to check with the supervisor if in doubt;
- (8) Make sure all safety attachments are in place and properly adjusted before operating any machine;
- (9) Never operate any machine or equipment at unsafe speeds;
- (10) Shut off equipment which is not in use;
- (11) Wear all protective garments and equipment necessary to be safe on the job, including proper shoes;
- (12) Not wear loose, flowing clothing or long hair while operating moving machinery;
- (13) Never repair or adjust any machine or equipment unless specifically authorized to do so by the supervisor;
- (14) Never oil, clean, repair, or adjust any machine while it is in motion;
- (15) Never repair or adjust any electrically-driven machine without opening and properly tagging the main switch;

- (16) Put tools and equipment away when not in use;
 - (17) Not lift items alone which are too bulky or too heavy to be handled by one person;
 - (18) Keep all aisles, stairways, and exits clear of skids, boxes, air hoses, equipment, and spillage;
 - (19) Not place equipment and materials so as to block emergency exit routes, fire boxes, sprinkler shutoffs, machine or electrical control panels, or fire extinguishers;
 - (20) Stack all materials neatly and make sure piles are stable;
 - (21) Not participate in horseplay, or tease or otherwise distract fellow workers; and
 - (22) Never take chances, and be governed by common sense.
- (c) Employees are encouraged to submit suggestions to their supervisor concerning safety and health matters.

412. COMMERCIAL DRIVER LICENSES

(a) Employees operating a commercial vehicle (as defined by applicable State and/or Federal law) must comply with all of the requirements of the Commercial Motor Vehicle Safety Act and all other applicable Federal and State laws and regulations.

(b) Employees operating a commercial vehicle shall:

(1) Notify their immediate supervisor within 30 days of a conviction for any traffic violation except parking citations.

(2) Notify the Drivers License Division within 30 days if they are convicted in any other state of any traffic violation except parking citations.

(3) Notify their immediate supervisor if their license is suspended, revoked, or canceled, or if they are disqualified from driving.

(4) Not drive without a valid Commercial Driver's License (CDL).

(5) Not be allowed to drive if they possess more than one license or if their CDL is suspended or revoked.

(c) When it is necessary for employees to renew their CDL, the City shall pay the cost for the written test, the cost for the skills test, and the total amount for all endorsements required by the City. Employees shall pay any remaining costs of the written and skills tests and for all endorsements not required by the City. The City shall also pay the entire cost for required physical

examinations. The employee shall undergo the exam at a medical facility determined by the City. In specifying a medical facility, insurance coverage may be taken into consideration.

(d) New employees may be expected to have a valid CDL upon hire and bear the entire cost of obtaining a CDL including medical examination costs. At its discretion, the City may bear the cost of licensing for new employees and employees promoted or placed in positions requiring a CDL.

413. MEAL BREAKS

It is the policy of the City to provide meal breaks during the course of each workday. The duration and timing of these breaks will depend upon the needs of the respective departments. Supervisors are responsible for scheduling meal breaks. Meal breaks are not considered as time worked, except in the case of certain police officer and firefighter positions. In the event that an employee for any reason works through the meal break, the employee will still have to work eight full hours to receive credit for eight hours of work.

414. REST BREAKS

(a) During normal working hours, employees may take two (2) rest breaks, not to exceed fifteen (15) minutes each. These break times will be scheduled by department supervisors and will be compensated as working time.

(b) Employees who choose to remain at work during rest breaks are not entitled to leave before the normal quitting time and will not receive extra pay for the time worked. Employees may not accumulate rest breaks for the purpose of off-setting other time off work, such as doctor appointments, extended meal breaks, or other personal errands requiring more than the allowed 15 minute break, unless pre-approved by the Department Head and, even then, only on an occasional basis.

(c) During rest breaks, employees shall not interfere with fellow employees who are continuing to work.

415. TELEPHONE USE

Office telephone facilities are provided for City business purposes. However, personal telephone call by employees are permitted if they are very short and infrequent. Employees may not make personal long-distance calls at City expense. Work telephone numbers are not to be given as business numbers for the conducting of a commercial business by any employee.

If the telephone is equipped with voice mail, answering machine or other recording device, there is no employee right of privacy with respect to messages left on these devices.

416. COMPUTER USE

- (a) Office computers are provided for City business purposes.
- (b) Employees have no right to privacy with respect to City computers, software, disks, electronic mail, or other computer-related items. They are subject to supervision, review, reading, inventorying, copying, and other examination by supervisors at any time and without notice. Employees must inform their supervisors of any and all passwords on their computers unless excused in writing by their Department Head.
- (c) Employees shall use computer software only in accordance with the license agreement applicable to that software.
- (d) Employees must honor any City policy or agreement relevant to the use of computers they may enter into.

417. PERSONAL MAIL

Employees shall not use their work address for personal mail unless approved by the Department Head under individual circumstances. City stationery and letterhead shall not be used for personal or unauthorized correspondence, and the City postage meter shall not be used for the mailing of personal correspondence.

Facsimile transmission machines are for City business purposes. Any private use by employees must be approved by the department head and payment made to the City for the cost of the use. There is no employee right of privacy with respect to facsimile transmissions.

418. TOBACCO

It is the policy of the City to follow the Utah Indoor Clean Air Act. Smoking and chewing tobacco are prohibited within any City buildings, and within any City vehicles that are or may be used for the transportation of any member of the public or of any other City employee.

419. AUTOMOBILE USAGE

- (a) Employees may not drive City vehicles on City business without the prior approval of their supervisor. These employees must be licensed to drive by the State and be able to meet their department's driver approval standards at all times.
- (b) It is the responsibility of all employees to immediately notify their supervisor of any suspension, revocation, or other limitation upon their driver license and of any offense which may affect their ability or right to drive. Failure to do so will subject the employee to disciplinary action.
- (c) Employees who need transportation in the course of their work may be assigned a City vehicle for their use. Such vehicles are to be used for City business and only a de minimus

personal use. All other employees needing transportation for City business may use vehicles assigned to their department, provided the employee meets his department's driver standards and has received his supervisor's prior approval. If no City vehicles are available, employees may use their own cars for business purposes, but only with the prior approval of their supervisor.

(d) Employees who drive a vehicle on City business must exercise due caution and drive safely. Accordingly, employees must wear seat belts at all times while driving on City business. As part of their precautionary efforts, employees should ensure that the vehicle they are driving meets any City or legal standards for insurance, driveability, safety, and mechanical fitness.

(e) Employees are not permitted, under any circumstances, to operate a City vehicle, or a personal vehicle for City business, when any physical or mental impairment causes the employee to drive unsafely. This prohibition includes, but is not limited to, circumstances in which the employee is temporarily unable to operate a vehicle safely or legally because of illness, medication, or intoxication.

(f) Employees are solely responsible for any willful or negligent driving violations or fines as a result of their driving.

(g) In order to assess the safe driving behavior of City employees who are required to drive in the performance of their job duties, it is the policy of the City to conduct periodic reviews of the State Division of Motor Vehicle's records. Any pattern of traffic violations suggesting that an employee is an unsafe driver may be cause for disciplinary action against the employee, and/or for revoking the authority of the employee to drive a City vehicle or his own vehicle upon City business.

(h) Employees who use their personal car for approved City business will receive a mileage allowance based on the Internal Revenue Service mileage allowance for business use. This allowance is to compensate for the cost of gasoline, oil, depreciation, and insurance.

(i) An employee must report any accident involving a City vehicle or a private vehicle being used to conduct City business to both their Department Head and the City Attorney. There is no exception to this policy, regardless of the extent of damage or lack of injuries. Such reports must be made as soon as possible and no later than 24 hours after the accident. Employees are expected to cooperate fully with authorities in the event of an accident.

(j) Employees may have family members or other non-employees in City vehicles only when authorized by their supervisor.

420. TRAVEL AND TRAINING

It is sometimes necessary for employees to travel or receive training in order to fulfill their work responsibilities. All business travel and training must be approved in advance by the Department Head. Whenever travel or training is required, the City will pay for reasonable expenses incurred. The City will pay costs actually incurred up to the standard room rate associated with the

conference hotels.

Employees should provide their Department Head with a copy of their itinerary before leaving on business travel. Employee expenses will be advanced, paid, or reimbursed when properly documented. Meal expenses will be paid by an allowance of \$25.00 per day, and no receipts are required. However, should the economy in the area of the meeting dictate more than the \$25.00, the full cost of meals may be allowed providing receipts submitted verify the greater amount. Automobile usage will be compensated as provided in these policies.

421. POLITICAL ACTIVITY

(a) City employees shall not engage in the distribution or publication of materials approving or favoring a candidate for nomination or election to public office during working or office hours or in any City building, except as a public information service approved by the City Manager. An employee may not engage in political activity during working or office hours. Employees shall not use their office or position with the City for the political enhancement of any individual or group.

(b) (1) An employee may not be a candidate for public office in the general election of Bountiful City unless the employee takes a leave of absence or submits a resignation from City employment beginning the day after the primary election.

(2) An employee elected to either the Bountiful City Council or to any full time elective position shall resign his or her employment with the City prior to beginning the duties of such office.

(3) An employee elected to a part-time elective position (other than Bountiful City Council) shall be granted a leave of absence without pay while being monetarily compensated for service in such position. Employees shall not receive annual leave while serving in political office.

(c) Nothing contained herein shall be construed to interfere with the right of an employee to become a member of a political club or organization, to attend political meetings, to express an opinion on all political subjects and to enjoy freedom from interference in voting or to contribute freely to political causes.

422. CONFIDENTIALITY

Information obtained by employees in the course of their job duties is confidential. An employee shall not disclose to any unauthorized person any information acquired in the course of employment other than public information as defined by applicable law.

423. INCENTIVE AWARDS

Employees who make proposals that result in substantial savings of tax dollars may be

rewarded if the savings achieved are documented and result directly from the proposal. An employee who makes a cost-saving proposal should first present and explain the proposal to the Department Head.

An employee who develops a successful cost-saving proposal may be granted a bonus payment equal to five percent of the saving achieved, up to a maximum of \$500. If two or more employees collaborate in developing a successful proposal, each shall share equally in the award.

All employees below the level of Department Head are eligible for incentive awards. A recommendation for an award must be submitted in writing by the Department Head. All incentive awards must be approved by the City Council.

424. GRIEVANCE PROCEDURES

It is the policy of the City to provide a method for employees to register complaints or problems concerning working conditions or other matters related to employment.

If an employee has a complaint, problem or misunderstanding concerning employment, it should be taken up with the employee's immediate supervisor as soon as possible. The supervisor will discuss the problem fully with the employee at a mutually convenient time. The supervisor may investigate the matter as appropriate, and reply to the employee within five working days.

In the event the employee feels the problem remains unresolved, or if the problem concerns the supervisor, the employee should take it up with the Department Head. The Department Head may investigate the matter as appropriate, and reply to the employee within ten working days.

In the event the employee feels the problem remains unresolved, or if the problem concerns the Department Head, the employee should take it up with the City Manager. The City Manager may investigate the matter as appropriate, and reply to the employee within fifteen working days.

425. CITY RECREATIONAL FACILITIES

Full time regular employees may utilize the City's recreational facilities as established by the City Council. These recreational privileges shall not extend to family members or non-regular employees.

Section 500

STANDARDS OF CONDUCT

501. ATTENDANCE

(a) Regular and consistent attendance at scheduled work is an essential job function of every City position.

(b) Employees shall be in attendance at their work in accordance with these policies and with department regulations. Any employee unable to report for duty on a work day shall notify the supervisor of that fact no later than the beginning of work, unless department rules require an earlier reporting time. Failure to do so may result in disciplinary action.

(c) The normal work day for full-time employees shall be eight (8) hours and the normal work week shall be forty (40) hours, except in certain circumstances when it is considered to be in the best interest of the public and of the City to work shifts of extended hours. Work shall generally begin at 8:00 a.m. and end at 5:00 p.m., with one hour for lunch. Employees should report to work fully dressed/uniformed, equipped and ready to begin work at the scheduled time.

(d) Failure to report to work, or to notify of non-attendance as provided in (b), for three consecutive days shall constitute resignation from employment with the City.

502. PUNCTUALITY

It is the policy of the City to require good attendance and punctuality on the part of its employees. The City recognizes, however, that circumstances are occasionally such that an employee cannot arrive to work on time, if at all. In the event this occurs, an employee should contact his supervisor as quickly as possible but no later than fifteen minutes of the beginning of the scheduled start of work. This will enable the supervisor to make any necessary adjustments in the allocation of the department's work.

503. EMPLOYEE APPEARANCE

Because employees represent the City before its citizens, it is City policy that employee's dress and grooming should be appropriate to the work situation and to community standards. Radical departures from conventional dress or personal grooming standards shall not be permitted, regardless of the nature of the job performed. Employees are expected to dress in a manner that is normally acceptable in their line of work. All employees shall wear shirts, pants or dresses and shoes, except for swimming pool personnel as permitted by the Department Head. The wearing of earrings by males is prohibited. Office employees, particularly those who interact or meet with the public, are expected to wear businesslike attire. The wearing of suggestive attire or of shorts, T-shirts, tank tops, and similar items of casual attire is not permitted. Casual attire may be permitted in those departments where such apparel is deemed appropriate by the Department Head. Employees who are uncertain about the appropriateness of their work attire or hair styles, should address their questions to their supervisors or Department Head.

504. CONFLICTS OF INTEREST

(a) City policy prohibits employees from engaging in any activity, practice, or act which

conflicts with, or appears to conflict with, the interests of the City, its citizens, or the employee's job duties. Employees are expected to represent the City in a positive and ethical manner, and to avoid conflicts of interest and the appearance of a conflict of interest.

(b) Employees are not to engage in, directly or indirectly, any conduct which is disloyal, disruptive, competitive or damaging to the City or its interests.

(c) Employees are not to give, offer, or promise, directly or indirectly, anything of value to any individual, firm, or organization with whom the City conducts business either currently or potentially.

505. OUTSIDE EMPLOYMENT

(a) It is the policy of Bountiful City that employees who wish to have employment outside of their duties with the City may do so subject to the condition that the outside employment must not interfere with efficient performance of the employee's position with the City, conflict with the interests of the City, or be of a type that would reasonably give rise to criticism or suspicion of conflicting interests or duties. Furthermore, the outside employment must not be directly connected with nor contingent upon a representation that the employee is in any way representing the City of Bountiful, either directly or indirectly.

(b) Prior to accepting or engaging in outside employment, all regular employees shall submit a request in writing to their Department Head. Approval by the Department Head shall be given if the outside work meets the requirements of this policy.

(c) Promoting or conducting outside employment on City premises with other City employees, suppliers to the City, or any member of the public is prohibited. "Promoting outside employment" means selling items, giving sales pitches, asking people to buy or attend sales pitches outside of work, discussions of any kind relating to the outside employment, and any other act which is calculated in any way to promote the outside employment of the employee. Such actions may make other employees, suppliers or citizens uncomfortable with being at work or with coming to the City. It has an appearance of impropriety and in some cases of unfair advantage, even when all connection to the City is expressly disclaimed. This prohibition holds true so long as the employee is on City premises, whether "on" or "off" the City clock. It applies to all City employees, whether full-time or part-time.

(d) Should outside employment become an impairment to an employee's work performance with the City, the employee may be requested to discontinue one of the jobs.

(e) Department heads may determine whether any particular situation violates these policies on a case by case basis.

507. OFF-DUTY CONDUCT

In general, the City applies its policies and procedures and its disciplinary actions to on-duty

conduct. However, off-duty conduct may be an appropriate concern of the City under certain circumstances.

It is impossible to list all potential off-duty conduct that may affect the City's interest, but the following conduct is prohibited off-duty:

- (a) Conduct, while wearing or using City-identified uniforms, equipment or other items, which is either illegal or which tends to bring discredit to the City of Bountiful;
- (b) Conduct, while identifying one's self as a City employee, which is either illegal or which tends to bring discredit to the City of Bountiful;
- (c) Harassment of any kind of other employees or of the public;
- (d) Conduct that causes the employee to not be able to perform his/her job duties;
- (e) Disclosure of confidential information;
- (f) Unauthorized use of City property.

508. STANDARDS OF CONDUCT

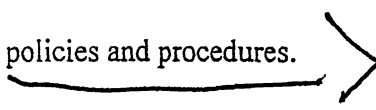
(a) Employment is subject to meeting the performance and conduct requirements of the employee's job to the satisfaction of the City. Employees who fail to satisfy these requirements may be subject to disciplinary action from warnings to termination. The standards set out below are as complete as can reasonably be made, but are not necessarily all-inclusive.

(b) Employees are expected at all times to conduct themselves in a positive manner so as to promote the best interests of the City and the public. Such conduct includes:

- (1) Applying one's self fully to assigned duties during work hours.
- (2) Reporting to work punctually as scheduled and being at the proper work station, ready for work, at the assigned starting time.
- (3) Giving proper advance notice whenever unable to work or report on time.
- (4) When away from work for any reason, keeping supervisors informed as to the reason, expected duration, and date and/or time of anticipated return, and, when required, furnishing medical or other documentation justifying the absence.
- (5) Prudent and frugal use of City funds, equipment, vehicles, and supplies.
- (6) Complying with all safety and security regulations.

- (7) Wearing clothing appropriate for the work being performed.
- (8) Maintaining work place and work area cleanliness and orderliness.
- (9) Treating the public, visitors and co-workers in a courteous manner.
- (10) Refraining from conduct that is offensive or undesirable, or which is contrary to the City's best interests.
- (11) Performing assigned tasks efficiently and in accord with established quality standards.
- (12) Reporting to management suspicious, unethical or illegal conduct by the public, visitors or co-workers.
- (13) Co-operating with City investigations.

(c) The following conduct is prohibited and may subject the individual involved to disciplinary action, up to and including termination:

- (1) Violation of City or departmental policies and procedures. 
- (2) The use of alcoholic beverages or illegal drugs during working hours, reporting to work under the influence of alcohol or drugs. or the use, sale, dispensing or possessing of alcohol and/or illegal drugs or narcotics on City premises.
- (3) The use of profanity or abusive language.
- (4) Chronic tardiness.
- (5) The possession of firearms or other weapons on City property, unless connected with the City work assignment of the employee.
- (6) Insubordination, or the refusal by an employee to follow management's instructions concerning a job-related matter, or the refusal to perform a function of the job when capable of doing so.
- (7) Violence, fighting, or assault on a co-worker or member of the public.
- (8) Unauthorized possession or use, theft, destruction, defacement or misuse of City property, or that of another employee or member of the public.
- (9) Recording conversations with other employees or supervisors without the knowledge of all the parties involved.

- (10) Gambling on City property.
- (11) Falsifying or altering any City record or report.
- (12) Threatening or intimidating co-workers or members of the public.
- (13) Absence from work or work station without authorization or excuse.
- (14) Smoking where prohibited.
- (15) Sleeping while on duty.
- (16) Failure to wear assigned safety equipment or failure to abide by safety rules and policies.
- (17) Conduct endangering the safety of employees or the public.
- (18) Improper attire or inappropriate personal appearance, or failure to wear required uniforms.
- (19) Inducing or attempting to induce any City employee to violate any City policy.
- (20) Engaging in any form of sexual or other harassment.
- (21) Incompetency, inefficiency, poor workmanship, misfeasance, malfeasance or nonfeasance in the performance of job duties, or neglect of job duties.
- (22) Dishonesty in word or conduct.
- (23) Failure to be courteous or cooperative with the public, co-workers or supervisors.
- (24) Falsification of City records or reports.
- (25) Failure to conduct one's self in a professional and competent manner appropriate to the position.
- (26) Unauthorized use, or abuse, of City vehicles or equipment.
- (27) Unauthorized performance of City services.
- (28) Failure to maintain eligibility for a driving license, when driving is necessary to the discharge of City duties.
- (29) Failure to maintain skills and professional licensing, when such skills or licensing are necessary to the discharge of City duties.

- (30) Violation of the criminal laws, whether Federal, State or local.
- (31) Unlawful discrimination of any nature.
- (32) Failure to keep confidential City matters which are of a delicate, sensitive, or private nature by law, custom, policy or instruction of supervisors.
- (33) Abuse of sick leave, bereavement leave, jury duty or other paid or unpaid leave.
- (34) Unauthorized possession of a firearm or other deadly weapon.
- (35) Conduct off the job which discredits the City or affects the employee's ability to perform his/her duties effectively.
- (36) Failure to cooperate with an investigation.
- (37) Unjustified interference with the work of other City employees.
- (38) Failure to comply with any policy or agreement with the City concerning the use of equipment, including personal cellular telephone agreements.

Section 600

DISCIPLINARY ACTION

601. GROUNDS FOR DISCIPLINARY ACTION

It is the policy of the City that all employees are expected to comply with the City's standards of conduct and performance, including all matters set forth in this manual, City policies as may be elsewhere expressed, and any applicable departmental policies and procedures, and that any non-compliance with these standards may be remedied by appropriate disciplinary action.

602. DISCIPLINARY MEASURES

(a) Under normal circumstances, the City endorses a policy of progressive discipline in which it attempts to provide employees with notice of deficiencies and an opportunity to improve. However, where the non-compliance is grave, more serious discipline may be applied, up to and including termination, even when there is no prior disciplinary history.

(b) An employee whose conduct violates these policies and procedures may be subject to one or more of the following actions, depending upon the judgment of the supervisor and/or

Department Head of the severity of the offense and the employee's previous performance record:

(1) An oral warning, to be documented and placed in the employee's personnel file. The fact that the oral warning is documented does not convert it into a written reprimand. An immediate supervisor, a Department Head or the City Manager, may issue an oral warning

(2) A written reprimand, with a copy to be placed in the employee's personnel file. A Department Head or the City Manager may issue a written reprimand.

(3) Suspension or other time off without pay, or forfeiture of accrued leave, of up to 30 days. A Department Head or the City Manager may issue an order of suspension. An employee on suspension shall be responsible for the continuation of his/her employment benefits.

(4) Demotion by either moving an employee to a position of lesser responsibility and compensation, or by keeping the employee in the current position but at a lesser compensation. A Department Head or the City Manager may demote an employee.

(5) Termination from employment with the City. A Department Head or the City Manager may terminate an employee.

(c) Pending a full investigation into the alleged violations, the City may, when it deems it to be in the best interests of the City and/or the employee, (1) suspend an employee and relieve him/her of all City duties, with pay, or (2) temporarily reassign an employee to another position or work location at the same rate of pay. In such a case, if the employee is found to be innocent, he/she shall be reinstated without loss of seniority or credits of any kind.

(d) An employee will be informed of the alleged violation and given an opportunity to present his/her explanation of the event or conduct in question prior to any disciplinary action being taken. Discipline shall not be imposed until there is a determination that facts sufficient for discipline exist.

(e) Except for oral warnings, an employee will be given a notice, in writing, of the disciplinary action and of his/her right to appeal the same.

603. DISCIPLINARY INVESTIGATIONS

(a) Before any disciplinary action (except for oral reprimands) may be taken against an employee, the following steps shall be taken:

(1) The employee should be given written notice of the claims against him/her.

(2) Prior to a determination of what discipline is to be imposed, if any, the employee shall be given the opportunity to respond verbally and/or in writing to the claims alleged. A record of the response shall be made. No disciplinary decision shall be made at the time of the employee's explanation.

(3) If, after due deliberation, it is determined by the Department Head that discipline is appropriate, the employee shall be advised in writing of the findings and discipline.

604. DISCIPLINARY APPEALS

Once the Department Head has determined upon a disciplinary action, it shall be implemented immediately. A regular employee has the right of appeal, but, except in the case of suspensions, during the pendency of the appeal the action taken shall be in effect. In the event that the action taken is overturned on appeal, the employee shall be reinstated without loss of pay, seniority or credits of any kind. Suspensions shall not be implemented until after all appeals have been concluded.

There shall be a right of appeal of discipline in regular employees, as follows:

(a) Oral Warnings.

(1) If given by a supervisor, an oral warning may be appealed to the Department Head. If an oral warning is given by the Department Head or the City Manager, there is no right of appeal.

(2) The appeal shall be made by the aggrieved employee by filing with the Department Head, within ten days of the issuance of the oral warning, a written statement of the appeal. The statement shall set forth the nature of the oral warning, the circumstances in which it arose, and the reasons why the employee is appealing its issuance.

(3) The Department Head shall immediately notify the supervisor of the appeal. Unless extenuating circumstances are present, the supervisor shall file a written response to the appeal within ten days from the date of the filing of the appeal. The employee shall be furnished a copy of the response.

(4) Within ten days, or as soon thereafter as is practical, of the filing of the appeal, the Department Head shall review the appeal and the response. The employee shall be given the opportunity in person to informally review the appeal with the Department Head. At the request of the Department Head, the supervisor shall also be present. Within fifteen days, or as soon thereafter as is practical, of the filing of the appeal, the Department Head shall determine whether to uphold, modify or disallow the oral warning. The Department Head may not increase the severity of the discipline, such as by increasing an oral warning to a written reprimand. The employee shall be notified in writing of the decision of the Department Head.

(b) Written Reprimands and Suspensions.

(1) A written reprimand or a suspension may be appealed from the Department Head to the City Manager, but there is no further right of appeal. A written reprimand or suspension from the City Manager may not be appealed.

(2) The appeal shall be made by the aggrieved employee by filing with the Department Head, within ten days of the issuance of the written reprimand, a written statement of the appeal. The statement shall set forth the nature of the written reprimand or suspension, the circumstances in which it arose, and the reasons why the employee is appealing its issuance.

(3) The Department Head shall immediately notify the City Manager of the appeal. Unless extenuating circumstances are present, the Department Head shall file a written response to the appeal within ten days from the date of the filing of the appeal. The employee shall be furnished a copy of the response.

(4) Within ten days of the filing of the appeal, or as soon thereafter as is practical, the City Manager shall review the appeal and the response. The employee shall be given the opportunity in person to informally review the appeal with the City Manager. At the request of the City Manager, the supervisor and/or Department Head shall also be present. Within fifteen days of the filing of the appeal, or as soon thereafter as is practical, the City Manager shall determine whether to uphold, modify or disallow the written reprimand or suspension. The City Manager may not increase the severity of the discipline, such as by increasing a written reprimand to a suspension, or a suspension to a demotion. The employee shall be notified in writing of the decision of the City Manager.

(c) Demotions and Terminations.

(1) Demotions and terminations may be appealed to the City Manager, the Board of Appeals, and the City Council.

(2) City Manager. The appeal to the City Manager shall be made in the same manner as described in the preceding section for Written Reprimands and Suspensions.

(3) Board of Appeals.

(i) If the aggrieved employee wishes to appeal further, the appeal shall be made by the aggrieved employee by filing with the City Recorder, within ten days of the issuance of the decision of the City Manager, a written request that the appeal be heard by the Board of Appeals.

(ii) The City Recorder shall immediately notify the Board of Appeals of the appeal. The Board shall be furnished with the written appeal documents of the aggrieved employee, the response of the supervisor and/or Department Head, and the written decision of the City Manager.

(iii) The Board of Appeals shall take and receive evidence and fully hear and determine the appeal. The aggrieved employee shall be entitled to appear in person, be represented by counsel, have a public hearing, confront the witnesses whose testimony is to be considered, examine the evidence to be considered by the Board, and call such witnesses and submit such relevant evidence as he/she deems desirable. The City Attorney or his/her designee shall present the case in support of the disciplinary action, may present such witnesses and relevant evidence as he/she deems

desirable, and may cross-examine the witnesses presented by the appellant.

(iv) Within fifteen days of the filing of the appeal, the Board of Appeals shall hold a hearing and determine whether to uphold, modify or disallow the disciplinary decision of the City Manager. The Board of Appeals, after concluding the hearing, may deliberate in private. Its decision shall be made by secret ballot. A majority vote of the Board is required to sustain the disciplinary action. The Board may not increase the severity of the discipline originally imposed by the Department Head, such as by increasing a demotion to a termination. However, if the City Manager lessened the original discipline, the Board may in its discretion increase the severity of discipline back to that originally imposed by the Department Head. The employee shall be notified in writing of the decision of the Board of Appeals.

(4) The City Council.

(i) If the aggrieved employee wishes to appeal further, the appeal shall be made by the aggrieved employee by filing with the City Recorder, within fourteen days of the issuance of the decision of the Board of Appeals, a written request that the appeal be heard by the City Council.

(ii) The City Recorder shall at the next City Council meeting notify the Council of the appeal. The City Council shall be furnished with the written appeal documents of the aggrieved employee, the response of the supervisor and/or Department Head, the transcript or tape recording of the proceedings before the Board of Appeals, and the written decisions of the City Manager and the Board of Appeals.

(iii) The City Council shall hear the appeal in the nature of an appellate court. No new evidence may be submitted, and no witnesses may be called. The aggrieved employee shall be entitled to appear in person, be represented by counsel, have a public hearing, submit written argument based on the existing record at least five days prior to the hearing, and make oral arguments before the Council either himself/herself or through counsel at the hearing, or both. The City Attorney or his/her designee shall present the case in support of the disciplinary action, may submit written argument based on the existing record at least two days prior to the hearing, and may make oral arguments before the Council at the hearing.

(iv) Within fifteen days of the notification of the appeal by the City Recorder, or as soon thereafter as is practical, the City Council shall hold a hearing and determine whether to uphold, modify or disallow the disciplinary decision of the Board of Appeals. The City Council, after concluding the hearing, may deliberate in executive session. Its decision shall be made in open session. A majority vote of the Council is required to sustain the disciplinary action. The Council may not increase the severity of the discipline originally imposed by the Department Head, as by increasing a demotion to a termination. However, if the City Manager or Board of Appeals lessened the original discipline, the Council may in its discretion increase the severity of discipline back to that originally imposed by the Department Head. The employee shall be notified in writing of the decision of the City Council.

- (v) The decision of the City Council is final.

Section 700

TERMINATION OF EMPLOYMENT

701. TERMINATION OF EMPLOYMENT

- (a) Department Heads are authorized to terminate at their discretion the employment of any employee filling a non-regular employment position.
- (b) Non-regular employees are free to resign from employment at any time. The City requests, however, that such employees provide their supervisor or Department Head with as much prior notice as possible. This will enable the City to find an adequate replacement in a timely manner.

702. REDUCTION IN FORCE

Reductions in force may be required by changes in funding by the City Council, change of work load, or lack of work. Cost saving mechanisms, hiring freezes or temporary furloughs shall be considered prior to implementing permanent reductions. Reductions in force shall be made by each Department Head after conferring with the City Manager. Each Department Head shall be responsible for determining which positions and employees should be retained in order to best serve the interests of the City; provided, however, that where performance and ability are judged to be equal, employees shall be retained on the basis of seniority. Regular employees will be retained before probationary employees.

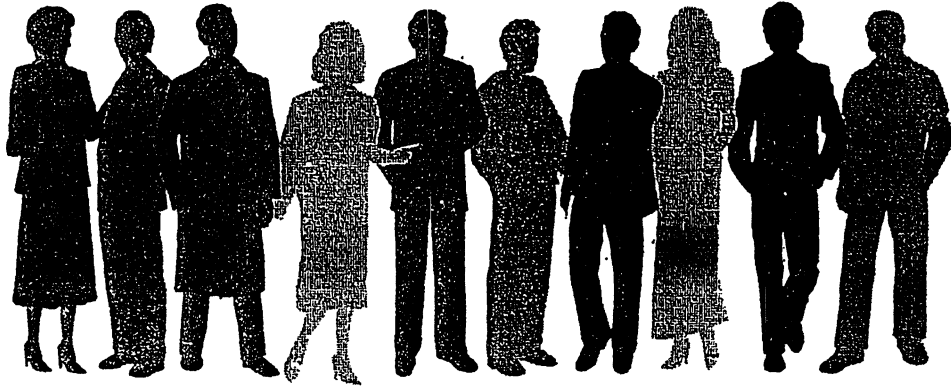
703. RE-EMPLOYMENT

The following policy shall apply to re-employment of former City employees:

- (a) **Military re-employment.** Former employees returning from mandatory (as opposed to voluntary) military service, will be re-hired in their former, or comparable, positions, even though this may result in the lay-off of more recently hired employees. Such employee shall be reinstated with his/her accrued sick leave and credited with his/her former full-time period with the City for purposes of determining vacation leave and other benefits.
- (b) **Voluntary termination.** Any employee hired to a Council-authorized and budgeted position who voluntarily terminates employment with the City must compete with other individuals interested in filling vacancies within the City. In the event that such an employee is re-hired, he/she shall receive no consideration for past time with the City.
- (c) **Involuntary termination due to reduction in force.** Employees who have been

involuntarily terminated due to lay-off or reduction in force shall be eligible for reinstatement for up to twelve months after their termination date, provided that they left City employment in good standing with satisfactory performance evaluations. In the event that such an employee is re-hired, his/her accrued sick leave shall be credited and his/her time with the City shall be credited for purposes of determining vacation leave or other benefits.

(d) **Employees who have been terminated from employment due to a disciplinary firing shall not be re-hired to any position with the City.**



CODE OF ETHICS

CODE OF ETHICS
FOR
BOUNTIFUL CITY LIGHT & POWER EMPLOYEES

1. Demonstrate the highest standards of personal integrity, truthfulness, honesty and fortitude in all our public activities in order to inspire public confidence and trust in public institutions.

Perceptions of others are critical to the reputation of an individual or a public agency. Nothing is more important to public administrators than the public's opinion about their honesty, truthfulness, and personal integrity. It overshadows competence as the premier value sought by citizens in public officials and employees.

Any individual or collective compromise with respect to these character traits can damage the ability of an agency to perform its tasks or accomplish its mission. The reputation of the administrator may be tarnished. Effectiveness may be destroyed. A career or careers may be destroyed. The best insurance against loss of public confidence is adherence to the highest standards of honesty, truthfulness and fortitude.

Public administrators are obliged to develop civic virtues because of the public responsibilities they have sought and obtained. Respect for the truth, for fairly dealing with others, for sensitivity to rights and responsibilities of citizens, and for the public good must be generated, carefully nurtured and matured.

If you are responsible for the performance of others, share with them the reasons for the importance of integrity. Hold them to high ethical standards and teach them the moral as well as the financial responsibility for any public funds under their care.

If you are responsible only for your own performance, do not compromise your honesty and integrity for advancement, honors or personal gain. Be discreet, respectful of proper authority and your appointed or elected superiors. Be sensitive to the expectations and the values of the public you serve.

Whether you are an official or an employee, your example will give testimony of your regard for the rights of others.

2. Serve in such a way that we do not realize undue personal gain from the performance of our official duties.

The only gains you should seek from public employment are salaries, respect and recognition for your work. No elected or appointed public servant should borrow or accept gifts from staff or any corporation which buys services from you, or sells to, or is regulated by, his or her governmental agency.

Public property, funds and power should never be directed toward personal or political gain. Make it clear by your own actions that you will not tolerate any use of public funds to benefit yourself, your family or your friends.

3. Avoid any interest or activity which is in conflict with the conduct of our official duties.

Public employees should not undertake any task which is in conflict or could be viewed as in conflict with his or her job responsibilities.

This general statement addresses a fundamental principle that public employees are trustees for all the people. This means that the people have a right to expect public employees to act as surrogates for the entire populace with fairness toward all the people and not a few or a limited group.

Actions or inactions which conflict with, injure or destroy this foundation of trust between the people and their surrogates must be avoided.

Public employees should remember that despite whatever preventive steps they might take, situations which hold the possibility for conflict of interest will always emerge. Consequently, the awareness of the potentiality of conflict of interest is important.

4. Support, implement, and promote merit employment and programs of affirmative action to assure equal employment opportunity by our recruitment, selection and advancement of qualified persons from all elements of society.

Oppose any discrimination because of race, color, religion, sex, national origin, political affiliation, physical handicaps, age or marital status in all aspects of personnel policy. Likewise, a person's lifestyle should not be the occasion for discrimination if it bears no reasonable relation to his or her ability to perform required tasks.

Any kind of sexual, racial or religious harassment should not be allowed. Appropriate channels should be provided for harassed persons to state their problems to objective officials. In the event of a proven offense, appropriate action should be taken immediately.

5. Eliminate all forms of illegal discrimination, fraud and mismanagement of public funds, and support colleagues if they are in difficulty because of responsible efforts to correct such discrimination, fraud, mismanagement or abuse.

If you are a supervisor, you should not only be alert that no illegal action issues from or is sponsored by your immediate office. Public employees who have good reason to suspect illegal

action in any public agency should seek assistance in how to channel information regarding the matter to appropriate authorities.

Managers have an ethical obligation to seek adequate equipment, software, procedures and controls to reduce the agency's vulnerability to misconduct.

Supervisors should inform their staff that constructive criticism may be brought to them without reprisal, or may be carried to an ombudsman or other designated official. As a last resort, public employees have a right to make public their criticism, but it is the personal and professional responsibility of the critic to advance only well-founded criticism.

6. Serve the public with respect, concern, courtesy and responsiveness, recognizing that service to the public is beyond service to oneself.

Make sure your answers to questions on public policy are complete, understandable and true. Try to develop a goal of courteous conduct with citizens.

Each citizen's questions should be answered as thoughtfully and as fully as possible. If you do not know the answer to a question, an effort should be made to get an answer or to help the citizen make direct contact with the appropriate office.

Respect the right of the public (through the media) to know what is going on in your agency even though you know queries may be raised for partisan or other non-public purposes.

7. Strive for personal professional excellence and encourage the professional development of our associates and those who are seeking to enter the field of public administration.

Staff members should be reminded of the importance of doing a good job and their responsibility to improve the public service.

Administrators should lend their support to well-planned internship programs.

8. Approach organization and operational duties with a positive attitude; constructively support open communication, creativity, dedication and compassion.

Americans expect government to be compassionate, well-organized and operating within the law. Public employees should understand the purpose of their agency and the role they play in achieving that purpose. Dedication and creativity of staff members will flow from a sense of purpose.

Administrators should strive to create a work environment that supports positive and constructive attitudes among workers at all

levels. This environment should permit employees to comment on work activities without fear of reprisal.

9. Respect and protect the privileged information to which we have access in the course of official duties.

Much information in public offices is privileged for reasons of national security, or because of laws or ordinances. If you talk with colleagues about privileged matters, be sure they need the information and you enjoin them to secrecy. If the work is important enough to be classified, learn and follow the rules set by the security agency.

10. Exercise whatever discretionary authority we have under law to promote public interest.

Tell yourself and your staff quite frequently that every decision creates a precedent, so the first decisions on a point should be ethically sound; this is the best protection for staff as well as for the public.

11. Accept as a personal duty responsibility to keep-up-to-date on emerging issues and to administer public business with professional competence, fairness, impartiality, efficiency and effectiveness.

All employees goals should be to keep informed about the present and future issues and problems of their professional field and organization in order to take advantage of opportunities and avoid problems.

12. Respect, support, study and, when necessary, work to improve federal and state constitutions and laws that define relationships among public agencies, employees, clients and all citizens.

Familiarize yourself with principles of American constitutional government. As a citizen, work for legislation that is in the public interest.