

2015

Lori Ramsay and Dan Smalling, Appellants, vs. Utah State Retirement Board, and Kane County Human Resource Special Service District, Appellees

Utah Court of Appeals

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LORI RAMSAY and DAN SMALLING.

VS.

Appellees.

OPENING BRIEF OF APPELLANTS LORI RAMSAY and DAN SMALLING

20150574-CA

Appeal No. 15 0574

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UTAH APPELLATE COURTS

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UTAH COURT OF APPEALS

LORI RAMSAY and DAN SMALLING,	:	
	:	
Appellants,	:	OPENING BRIEF OF
	:	APPELLANTS LORI
vs.	:	RAMSAY and DAN
	:	SMALLING
	:	
UTAH STATE RETIREMENT BOARD,	:	
and KANE COUNTY HUMAN	:	
RESOURCE SPECIAL SERVICE	:	Appeal No. 15 0574
DISTRICT,	:	
	:	
Appellees.	:	

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PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. Lori Ramsay and Dan Smalling;
2. Utah State Retirement Board; and
3. Kane County Human Resource Special Service District.

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STATEMENT OF JURISDICTION

This Court has jurisdiction under Utah Code Ann §78A-4-103(2)(a).

Administrative Hearing Officer Dennis Frederick entered a Final Order on June 4, 2015.

The Utah State Retirement Board ("USRB") entered its Final Order, based on the June 4, 2015 Final Order, on June 18, 2015. Appellants filed their Petition for Review on July 20, 2015.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Statement of the Issues

Issue number 1: Did the creation of a defined contribution plan by the Kane County Human Resource Special Service District ("KCH") in the form of 401(k) accounts for its employees in 1993 trigger a requirement that KCH provide the full level of defined benefits as required under the Utah State Retirement Act, U.C.A. § 49-11-101 et. seq. ("the Act")?

Issue number 2: If KCH is subject to the full funding requirements of the Act for its employees, is the three year limitation of action in place for Lori Ramsay ("Ramsay") and Dan Smalling ("Smalling") to bring a claim for unpaid retirement fund contributions from KCH tolled in light of their lack of knowledge of the obligation KCH had to provide them the full retirement benefits package under the Act?

Standard of Review

Whether KCH was required to provide to its employees the defined benefits required under the Act, in addition to the defined contribution 401(k) payments, is a question of law involving statutory interpretation and is subject to a de novo standard of

review providing no deference to the original decision-maker's legal conclusions. *Salt Lake City Corp. v. Restoration Network*, 2012 UT 84, ¶ 32, 299 P.3d 990, 1001 (UT 2012).

As to the second issue, "the applicability of a statute of limitations and the applicability of the discovery rule are questions of law, which we review for correctness." *Spears v. Warr*, 2002 UT 24, ¶32.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE OF THE APPEAL OR OF CENTRAL IMPORTANCE TO THE APPEAL

The following are central to the Appellants' appeal:

- U.C.A. § 49-13-202
- U.C.A. § 78B-2-305(4)
- U.C.A. § 63G-7-401

STATEMENT OF THE CASE

KCH operates the Kane County Hospital in Kanab, Utah. KCH is a governmental entity, a special service district, which acts as a subdivision of the State of Utah. In 1993, it decided, for the first time, to offer retirement benefits to its employees. It established a defined contribution retirement program where it allowed employees to set up 401(k) retirement accounts and agreed to provide matching contributions up to certain percentages to employees who wanted to set money aside for their retirement. Apparently KCH did not consult with or coordinate its decision to set up the 401(k) defined contribution plan with the Utah State Retirement Office or any other individual charged with administering or monitoring the activities of the State of Utah or its political

subdivisions to ensure they comply with the requirements of the Act. In fact, the Act required that once a political subdivision of the state of Utah, such as KCH, sets up any retirement program for its employees, it is obligated to comply completely with the Act in providing the full range of defined retirement benefits to employees. That range of defined benefits was significantly more extensive and beneficial to the employees than simply providing 401(k) accounts as KCH did in 1993.

The difference between defined contribution retirement plans, such as KCH set up in 1993, and defined benefit retirement plans, such as required by the Act, is described by the U.S. Department of Labor, <http://www.dol.gov/dol/topic/retirement/typesofplans.htm> (last accessed 11/30/15). A defined benefit plan specifies how much money an employee will receive at retirement. *Id.* During the employee's working career, the risk of loss in the portfolio of assets necessary for the employer to fund those retirement benefits stays with the employer or its agents. Conversely, a defined contribution retirement plan does not promise a specific amount to the employee at retirement. *Id.* Rather, the employer makes contributions on a regular basis over the employee's working career to a retirement account set up for each specific employee. Consequently, once the employer makes its contribution to the employee, whether those funds gain or lose value during after that is controlled by the investments the employee chooses. The risk of loss (or gain) is with the employee, not the employer.

It was not until 2007 that the Utah State Retirement Office became aware that KCH was providing defined contribution retirement benefits in the form of 401(k) retirement accounts to its employees. The Utah State Retirement Board ("USRB"), acting

to enforce the Act, filed a Notice of Board Action against KCH on August 11, 2009. The Notice of Board Action alleged that the establishment of the 401(k) required KCH to participate fully in the Utah Retirement Systems ("the System") and make retirement contributions to fund the service credits accumulated by KCH employees for the full package of defined benefits, not just the defined contribution 401(k) benefit package KCH had created. USRB alleged this was required by the Act. Ramsay and Smalling, employees of KCH and participants in the KCH retirement plan, subsequently filed a Motion to Intervene in the Board Action, which was granted.

USRB alleged that KCH was responsible to make contributions for KCH's eligible employees from 1993 through April of 2009, when KCH opted out of participating in the System. However, the Administrative Hearing Officer ruled that the applicable statute of limitations for USRB to bring a claim against KCH for funding of the service credits accumulated by employees was three years before the filing of the Board action in 2009. Consequently, the hearing officer ruled that USRB had no claims for funding of service credits for the time frame before 2006.

Following the decision on the statute of limitations question against USRB, KCH and USRB worked to provide information to all eligible KCH employees about what defined benefits the employees were entitled to under USRB's argument, including, but not limited to, service credits for the complete package of defined benefit retirement money in the System for the three year period from 2006 to 2009. Eventually, all but six of the KCH employees agreed to sign an Affidavit Relinquishing Service Credit ("Affidavit") in return for a lump sum payment to each signing employee that represented

a settlement of the claims the KCH employees could have had to the full package of defined benefits USRB asserted KCH was obligated to provide to KCH employees for the 2006-2009 time frame. As to the remaining six KCH employees, including Ramsay and Smalling, KCH made all required payments to USRB, including interest, for the period between 2006 and 2009 to fund the employees' service credits for the defined benefits. USRB moved for dismissal of the Board Action on May 16, 2014, in light of the resolution of its complaint against KCH. The hearing officer granted USRB's Motion on June 17, 2014.

KCH then filed a separate Motion for Summary Judgment against Ramsay and Smalling on the basis of the limitation of action defense. Ramsay and Smalling argued they were entitled to tolling of the three year limitation of action on the basis of the discovery rule and that they are entitled to contributions from KCH to the System for service credits for the entire period of their eligibility from the dates each began working at KCH through 2009, and not just for the three-year period from 2006 through 2009. After receiving briefing on the issue and entertaining oral argument, the hearing officer ruled in favor of KCH and ruled that Ramsay and Smalling's claim for payment of service credits against KCH was limited to the time from from 2006-2009.

STATEMENT OF FACTS

1. Ramsay was hired at KCH in March of 1988 and was employed there in 1993 when the 401(k) plan was created. Ramsay participated in the 401(k) plan from its inception. Ramsay is still actively employed at KCH. Record, 000397, ¶2; 000572, ¶8.

2. Smalling was hired at KCH in June of 1995 and began participating in the 401(k) plan as soon as he was eligible to do so. Smalling continues to be actively employed at KCH. Record, 000395, ¶2; 000593-594, ¶¶2 and 3.
3. In 1993, KCH decided to provide retirement benefits for its employees. It opted to do so by setting up a 401(k) program. Record, 000050.
4. In setting up its 401(k) program, KCH retained the services of Dean Johnson, an insurance agent, and John Hancock Life Insurance Company, to assist KCH in ensuring the legal requirements of setting up the program were satisfied. Record 000048, ¶s 4-5, 000050, ¶s 16-17.
5. Ramsay and Smalling relied on KCH to act in their interest and for their benefit in establishing and maintaining the 401(k) retirement plan. Ramsay and Smalling reasonably expected KCH to set up a retirement plan that complied with all requirements of state and federal statutes. Record, 000594, ¶4.
6. Between 1993 and 2007, KCH consistently and repeatedly communicated with participants in the 401(k) program in a manner that constituted explicit or implicit representations that the retirement plan complied with state and federal statutory requirements and constituted the full and complete amount of retirement benefits to which Ramsay and Smalling were entitled under both the terms of the retirement plan and the applicable statutes. Record, 000594, ¶5.
7. Nothing KCH did between 1993 and January, 2007, gave Ramsay and Smalling any reason to believe that KCH was not providing retirement benefits to them in a manner that complied with all state and federal statutes or that KCH had

violated its fiduciary duties or any other standards of care associated with the establishment or maintenance of a lawful governmental retirement plan for Ramsay and Smalling and other KCH employees. *Id.*

8. Ramsay and Smalling had no knowledge before January of 2007 of any facts that led them to believe there was any noncompliance by KCH with federal or state statutory requirements, applicable fiduciary standards, or relevant standards of care for the establishment or maintenance of defined benefit or defined contribution retirement plans or accounts. Record, 000594, ¶¶4 through 7.

9. Ramsay and Smalling were, and continue to be, employees of KCH. As such, they allege entitlement to funding of their retirement benefits pursuant to U.C.A. §49-11. Record, 000043-44.

10. The Act establishes a statutory level of funding for any deferred retirement benefits established by a governmental entity such as KCH. Record, 000049.

11. The 401(k) program established by KCH in 1993 did not provide funding at the level required by the Act. Record, 000051.

12. Sometime in 2006 or 2007, KCH employees were notified by the Internal Revenue Service that their 401(k) accounts had been frozen. The 401(k) program established by KCH not only violated the Act, but was contrary to the Internal Revenue Code. Record, 000387-388.

13. On January 5, 2007, Ramsay contacted the Utah State Retirement Office to inquire about state retirement benefits. Record, 000273.

14. Ramsay received a Retirement New Group Questionnaire from USB and

Ramsay provided that document to KCH. Record, 000273, ¶5.

15. KCH completed and returned the questionnaire to USRB. Record, 000273, ¶6.

16. On February 12, 2007, USRB informed KCH that it was eligible for membership in the System. Record, 000273, ¶8.

17. KCH declined to make any retrospective or prospective contributions into the System. *Id.*

18. During the 2009 General Legislative Session, legislation was passed to allow state employers to opt out of the System. Based on this change to the Act, in April of 2009, KCH elected not to participate in the System. Record, 000274, ¶9.

19. Ramsay and Smalling were not aware of any obligation on the part of KCH to fund service credits for them through the Act or the System until 2009, when legislation was passed allowing KCH to opt out of the System. Record, 000594, ¶6 and 7.

20. On June 24, 2009, Ramsay and Smalling, through their counsel, sent notice of their claim for funding of unpaid retirement benefits to USRB and to KCH. Record, 000374, ¶¶4 and 5.

21. The USRB filed its Notice of Board Action against KCH in which USRB alleged violations of the Act, on August 11, 2009. Record, 00002-10.

22. On December 16, 2009, Ramsay and Smalling filed a Complaint in Third District Court for Salt Lake County, State of Utah (“the State Court Lawsuit”), in which they alleged that KCH had violated the requirements of the Act in failing to

fully fund the retirement benefits to which Ramsay and Smalling were entitled. Record, 000047-000059.

23. On March 31, 2010, Ramsay and Smalling filed their Motion to Intervene with USRB. Ramsay and Smalling were pursuing their claims before the USRB contemporaneously with the State Court Lawsuit. Record, 000043-44.

24. Attached to the Motion to Intervene was a copy of the Complaint filed in the State Court Lawsuit. Record, 000047-59.

25. The State Court Lawsuit was dismissed by the Third District Court judge, Ramsay and Smalling appealed, and the Court of Appeals affirmed in part and reversed in part. *Ramsay v. Kane County Human Resources Special Services District*, 2012 UT App 97. KCH filed a Petition for Writ of Certiorari with the Supreme Court which was granted.

26. The Supreme Court affirmed the district court's dismissal of the State Court Lawsuit for lack of jurisdiction. *Ramsay v. Kane County Human Resources Special Services District*, 2014 UT 5, ¶18, 322 P.3d 1163. The Court ruled that Ramsay and Smalling's claims fell within the scope of the Act and that they were required to exhaust all administrative remedies before filing suit in district court.

27. In 2012, the Utah Legislature passed HB 512 which created a grant program for rural county health care special service districts like KCH to help them meet state retirement liability. Record, 000333, ¶21.

28. Following disposition of other issues in the matter, KCH filed a Motion for Partial Summary Judgment and Memorandum in Support on March 1, 2013.

KCH's Motion specifically addressed the issue of whether the applicable statute of limitations limited the USRB's action to collect funding for the KCH employee service credits to the three-year period preceding the Notice of Board Action filed against KCH. Record, 000266-267; 000269-280.

29. Ramsay and Smalling submitted their Memorandum in Opposition to KCH's Motion for Partial Summary Judgment on May 3, 2013. Record, 000371-381.

30. The USRB Hearing Officer entered his Findings of Undisputed Fact, Conclusions of Law, and Partial Summary Judgment on August 26, 2013 ("2013 Decision"). Record, 000422-431.

31. The 2013 Decision did not address whether or not KCH was, in fact, subject to the Act but, rather, referred to the parties' agreement to assume that KCH was required to fund retirement benefits in the System for purposes of KCH's Motion. Record, 000425.

32. The 2013 Decision granted KCH's Motion for Partial Summary Judgment and held that the applicable statute of limitations limited contribution claims by USRB against KCH to the period between 2006 and 2009. Record, 000427.

33. KCH applied for, and received, a grant from the State Department of Health to fund the retirement liability owed to the USR for KCH employees. Record, 000333, ¶23.

34. KCH used the grant from taxpayers to pay a lump sum settlement to all eligible employees, with the exception of six individuals including Ramsay and

Smalling, to relinquish any claim for Service Credits from the System. Record, 000535.

35. Only then did KCH file a second Motion for Summary Judgment against Ramsay and Smalling on the limitation of action grounds. It submitted a Memorandum in Support of its Motion for Summary Judgment specifically relating to Ramsay and Smalling's claims on August 18, 2014. Record, 000534-000544.

36. Ramsay and Smalling filed their Memorandum in Opposition to KHC's Motion on December 3, 2014. Ramsay and Smalling maintained that they were entitled to funding of their benefits for their entire period of eligibility. Record, 000569-583.

37. If KCH was not required to provide funding for Ramsay and Smalling to receive service credits toward their retirement through the System for their years of eligible employment, Ramsay would lose her service credits toward retirement for the period between 1993 and 2006 and Smalling would lose any and all retirement benefits to which he would be entitled as an employee at KCH between 1995 and 2006. Record, 000595, ¶13.

38. The information necessary for KCH to calculate and provide funding for Ramsay and Smalling's service credits from 1993 and 1995 through the dates of their retirements is currently in the possession of KCH and/or USRB. Record, 000595, ¶14.

39. A final Findings of Undisputed Fact, Conclusions of Law, and Summary

Judgment was entered on May 18, 2015. The hearing officer ruled that the applicable statute of limitations restricted the time frame for which Ramsay and Smallings' retirement benefits should be funded to the period between 2006 and 2009. Record, 000658-666.

SUMMARY OF ARGUMENT

As for the first issue, once KCH established a defined contribution plan for its employees in the form of setting up 401(k) accounts in 1993, it was required to provide its employees funding for the full level of defined benefits under the Act. U.C.A. § 49-13-202. The actions of KCH in negotiating with, and settling, claims or potential claims from USRB and the employees of KCH for the time frame from 2006 to 2009 make it clear that KCH recognizes and acknowledges this obligation. It is necessary for this Court to establish explicitly this obligation of KCH in connection with the claims Ramsay and Smalling are asserting against KCH.

With regard to the second issue, Ramsay and Smalling are entitled to funding of their defined benefit retirement accounts by KCH from the time they first became employed at KCH to the date KCH withdrew from the System in 2009 rather than for only the three year period from 2009 to 2006. Because they did not have, and could not reasonably have gained, knowledge before 2009 that KCH was obligated to fund service credits to allow them to receive the complete defined retirement benefits provided for under the Act for the entire time they were employed at KCH, the limitation of action that otherwise would have accrued and required them to bring a claim should be tolled to allow them three years from 2009 to assert their claims. Because they filed their claims in

a timely manner, they should be allowed to assert claims to payment of the full package of retirement benefits under the Act for the entire time they were employed at KCH through the date KCH withdrew from the System.

ARGUMENT

I. KCH WAS SUBJECT TO THE REQUIREMENTS OF THE ACT

A critical threshold issue to final resolution of this matter is a question that was raised and thoroughly discussed in the parties' briefing but was never specifically ruled on by the USRB Hearing Officer. Did the creation of the 401(k) retirement plan by KCH for its employees in 1993 constitute "opting in" to the Act in a manner that required KCH to fully fund the defined benefit retirement money under the Act?

USRB has maintained throughout the case that KCH *did* opt in to the Act and was bound by its requirements in 1993. Ramsay and Smalling agree. KCH, on the other hand, has not conceded this point and the USRB Hearing Officer did not specifically address that question. Ramsay and Smalling are entitled to a ruling on this issue.

KCH's actions since the Notice of Board Action was filed by USRB and Ramsay and Smalling were allowed to intervene indicate that KCH recognized it had an obligation to fully fund defined benefit retirement funds for its employees. Faced with the difficult prospect of having to fund service credits through the System for all eligible employees at KCH from 1993 through 2009, KCH asked the Utah Legislature to amend the Act to allow political subdivisions to opt out of participation in the System. Legislation was enacted in 2009 and KCH opted out. U.C.A. §§ 49-12-202, 49-12-203, 49-13-202, and 49-13-203. However, KCH recognized its ongoing

responsibility to eligible employees during the three-year period preceding the legislation and KCH's opt out. For the three-year period, KCH accessed funding made available through U.C.A. § 26-9-5, enacted in 2012, to purchase service credits for eligible employees who wanted them or, in the alternative, to provide a lump sum payment for those eligible employees who waived their right to service credits. The need for legislative action in 2009 to provide an "out" for governmental employers who had not been, for whatever reason, meeting their obligations under the Act, reinforces the arguments of both USRB and Ramsay and Smalling.

After opting out of the Act in April of 2009, KCH recognized its obligations to fund at least the three years of service credits from 2006 to 2009 for those employees who wanted service credits for retirement. However, KCH has never expressly admitted in this matter that it became a participating employer in the System when it set up the 401(k) plan in 1993. The Hearing Officer also did not issue a holding on the question, in spite of Ramsay and Smalling's explicit request that he do so. Record 000573-575.

Ramsay and Smalling also argued in the Interveners' Memorandum in Opposition to Kane County Hospital Motion for Partial Summary Judgment involving the claims asserted against KCH by the USRB that the hearing officer needed to rule on this specific issue:

This tribunal has not yet determined whether or not KCH's action in setting up a 401(k) program for its employees obligated KCH to provide a full level of funding of defined benefits to each qualified employee under the Act. As a result, KCH's motion asks the [Board] hearing officer to rule without necessary factual and legal information relating to KCH's obligations under the Act.

Record, 000378. KCH's actions in seeking legislation to allow it to opt out of the Act, seeking taxpayer funding for payment of three years of service credits for its employees, and negotiating a lump sum settlement with most of the eligible employees in 2014, make clear KCH knows it was a participating, if unwilling, employer in the System before April 30, 2009. Ramsay and Smalling are entitled to a ruling from this Court that specifically establishes their rights to funding from KCH for their retirement benefits under the Act.

II. RAMSAY AND SMALLING ARE ENTITLED TO FUNDING FOR FULL BENEFITS UNDER THE ACT FROM THE TIME THEIR RESPECTIVE EMPLOYMENTS BEGAN UNTIL KCH'S OPT OUT OF THE ACT IN 2009

Ramsay and Smalling were not aware of the fact that KCH was subject to the requirements of the Act in fully funding Ramsay and Smalling the full defined benefit retirement values for Ramsay and Smalling rather than just the smaller values for funding defined contribution retirement accounts under the 401(k)s set up by KCH. KCH never informed them of the fact that they had the legal right to the Act's defined benefit retirement money. Nor did USRB inform Ramsay and Smalling of that fact.

Indeed, as part of the claims brought in State Court Lawsuit, Ramsay and Smalling alleged that both KCH and USRB were negligent and breached their fiduciary duties to Ramsay and Smalling by not informing them of their right to defined benefit retirement money in addition to the defined contribution retirement money. Record 000055-000057. Despite the fact that both KCH and USRB had fiduciary obligations to act in the interests of Ramsay, Smalling, and the other employees of KCH when it came to dealing with

their retirement benefits, both KCH and USRB failed to either recognize the need for KCH to fully fund the employees' retirement benefits, or monitor KCH's activities in a way that would uncover KCH's noncompliance with the Act in a timely way.

Even if the Court is not satisfied that Ramsay and Smalling's interests were protected and their claims raised by the August, 2009, USRB Notice of Board Action, Ramsay and Smalling sent Notices of Claim to KCH, in June of 2009, and USRB, in August, 2009, putting those entities on notice of their claims. They did this to preserve their rights to bring claims under U.C.A. § 63G-7-401 et. seq. ("the GIA"). They followed up with the filing of the State Court Lawsuit on December 16, 2009, in the time frame required under the GIA, U.C.A. § 63G-7-402. Thus, the very latest date that KCH can argue Ramsay and Smalling took action to establish their claim was December 16, 2009.

A. The Discovery Rule Tolls the Three Year Limitation of Action that Applies to This Case.

KCH has consistently argued that the limitation of action period that applies to this case is U.C.A. §78B-2-305(4), which establishes a three-year limitation period for "liability created by the statutes of this state." The GIA states that the statute of limitations for claims against governmental entities does not begin to run until "a claimant knew, or with the exercise of reasonable diligence should have known: (i) that the claimant had a claim against the governmental entity or its employee" U.C.A. § 63G-7-401(1)(b)(i). This is the same standard utilized under the discovery rule argued before the USRB. *Berneau v. Martino*, 2009 UT 82, ¶ 22 citing *In Re Hoopiiana Trust*,

2006 UT 53, ¶ 35.

The discovery rule “balances the equitable interests of the potential plaintiff and defendant where the potential plaintiff has discovered [new] facts forming the basis for the cause of action.” *Berneau*, at ¶22. Before the hearing officer, Ramsay and Smalling argued they satisfied the discovery rule because KCH engaged in concealing or misleading conduct and also because the case represented exceptional circumstances that would make strict application of the three year limitation of action “irrational or unjust, regardless of any showing that the defendant has prevent the discovery of the cause of action.” *Russell Packard Development Inc. v. Carson*, 2005 UT 14, ¶25.

The Supreme Court differentiated between a discovery rule that depends on the application of language in a statute of limitations that, by its own terms, “mandates application of the discovery rule” and a discovery rule based on equitable considerations. *Russell Packard* at ¶21-25. The terms of U.C.A. § 78B-2-305(4), the limitation of action that identifies the three-year period applicable in this case, does not contain any discovery rule. However, the GIA does contain a statutory discovery provision within its terms.

Before the hearing officer the parties did not specifically discuss the statutory discovery rule in U.C.A. § 63G-7-401. That statute involving claims against state entities or their subdivisions states that the cause of action that applies is the same one that would be in place if the claim were brought between private parties, U.C.A. § 63G-7-401(1)(a), and that it does not begin to run until “a claimant knew, or with the exercise of reasonable diligence should have known: . . . that the claimant had a claim against the governmental entity or its employee . . .” U.C.A. § 63G-7-401(1)(b)(i). Given the close

and overlapping relationship between the discovery rule briefed and decided by the USRB hearing officer and the statutory discovery rule outlined in U.C.A. § 63G-7-401(1)(b)(i), it is proper for this Court to evaluate whether Ramsay and Smalling knew, or in the exercise of reasonable diligence, should have known of the existence of facts to justify a claim against KCH under the GIA and to have the results of that evaluation guide the application of the discovery rule in this matter.

Before determining whether equitable tolling shall be applied, “the plaintiff must make an initial showing that he did not know nor should have reasonably known the facts underlying the cause of action in time to reasonably comply with the limitations period.” *Highland at Jordanelle, LLC v. Wasatch County*, 2015 UT App 173, ¶42, citing *Berneau*, ¶23. Utah case law also makes clear that the applicable statute of limitations begins to run for a claim only after the occurrence of the last fact that allows for the bringing of the action. *Colosimo v. Roman Catholic Bishop of Salt Lake City*, 2004 UT App 436, ¶ 18, citing *Myers v. McDonald*, 635 P.2d 84,86 (Utah 1981).

Ramsay and Smalling are still actively employed with KCH, have not retired, and do not intend to retire in the near future. It could be argued that the statute of limitations for them has not yet begun to run. Claimants in similar situations have asserted that claims in connection with retirement benefits cannot be brought prior to the actual retirement of the claimant. *See e.g., Bailey v. Shelby County*, 2013 Tenn. App. LEXIS 333, *22. However, Ramsay and Smalling brought their claim for funding of their retirement benefits prior to retiring and KCH has not objected to the claim being raised prior to their retirement. KCH never asserted that Ramsay or Smalling lacked standing or

that their ability to make a claim had yet to be realized.

B. **The Failure of KCH to Disclose to Ramsay and Smalling its Status as a Participating Employer in the System Prevented Ramsay and Smalling from Knowing of the Existence of their Cause of Action and Tolls the Statute of Limitations**

This Court has stated:

Statutes of limitations "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."

Anderson v. Dean Witter Reynolds, 920 P.2d 575, 578 (Utah App. 1996), citing *Becton Dickinson & Co. v. Reese*, 668 P.2d 1254, 1257 (Utah 1983). However, the running of a limitation of action may be tolled based on a claimant's lack of knowledge of facts sufficient to allow him to recognize or bring a claim that would otherwise exist. *Colosimo*, ¶20. The language of the GIA echoes the general equitable tolling concept when it references when a claimant knew, or with the exercise of reasonable diligence, should have known that the claimant had a claim against a governmental entity or its employee.

KCH engaged in conduct that constituted concealment or otherwise violated their fiduciary obligations to its employees. KCH knew, or should have known, that its actions in setting up the 401(k) defined contribution plan for its eligible employees in 1993 constituted an opt in to the System and carried with it the obligation to fund at the full amount the defined benefits required by the Act. KCH failed to report to the USRB that it had set up a retirement plan for its employees. This was a violation of the Act. U.C.A. § 49-11-603(1). In spite of the fact that KCH knew, or should have known, of its

obligations under the Act, KCH's actions communicated to its employees, including Ramsay and Smalling, from 1993 through, at the earliest, 2007, that the 401(k) plan was proper, legitimate, and constituted all retirement benefits to which the employees were entitled under state or federal statute.

In addition to failing to carry out its obligations to its employees, KCH failed to report to USRB the necessary information about eligible employees. U.C.A. § 49-11-603 states that participating employers must report to USRB, "the eligibility for service credit accrual of: (i) all current members; (ii) each new member as they begin employment; and (iii) any changes to eligibility to service credit accrual of each member." Funding or reporting requirements under the Act were in place from the time KCH created the 401(k) plan in 1993 until 2009 when KCH opted out of the Act. If the funding and reporting requirements were in place, there can likewise be no question that KCH's failure to provide the funding and the information required under the Act constitutes a concealment, whether intentional or inadvertent, of relevant information. Had KCH provided the funding and reporting as required, it would have led to discovery by Ramsay and Smalling of their entitlement to their full package of defined benefit money under the Act. KCH's concealing, misleading, or otherwise culpable conduct prevented Ramsay and Smalling from knowing or having any reason to know of their right to defined benefit retirement funds.

Through no fault of their own, Ramsay and Smalling knew nothing about the Act or its requirements and knew nothing about their entitlement to service credits through the System until, at the earliest, 2007, when Ramsay contacted USRB. There was no

inaction or negligence on Ramsay and Smalling's parts in not pursuing the matter sooner. And it is appropriate, given the equitable balancing of interests between the parties referenced in *Berneau*, ¶ 22, that as between Ramsay and Smalling and KCH, the relative lack of sophistication of these two employees weigh in their favor regarding tolling when compared with the relative experience and statutory duties KCH owed to its employees regarding their employment benefits.

Before 2009, Ramsay and Smalling lacked the knowledge of the necessary facts which, once obtained, triggered their inquiries, their filing of their civil Lawsuit and, ultimately, their intervention in the matter before USRB. *Colosimo*, 2004 UT App. at ¶ 20. At the earliest, Ramsay and Smalling learned of facts to trigger their inquiry into both the legitimacy of the 410(k) plan and the possibility of obtaining service credits through the System no sooner than January of 2007. Eventually the information they obtained led them to understand that they had claims. They diligently pursued that information and perfected those claims in a timely way. That is all that is required under *Colosimo* and under the GIA.

In *Colosimo* the Supreme Court ruled that because the plaintiffs were aware of the facts underlying the conduct that gave rise to a cause of action at the time the wrongful conduct occurred, there would be no tolling of the limitation of action based on the discovery rule. But this case is different. Ramsay and Smalling knew that KCH was providing 401(k) benefits. But they did not know that doing so triggered a legal requirement under the Act for KCH to provide the full package of retirement benefits above and beyond the 401(k) plans. The lack of knowledge of this fact tolls the running

of the limitation of action under *Colosimo* and under U.C.A. § 63G-7-401(1)(b)(i).

KCH argues that lack of knowledge of the existence of a cause of action is not a basis for tolling a limitation of action. Record, 000542. But it was not a lack of knowledge of a cause of action that existed for Ramsay and Smalling. They lacked knowledge of essential facts that were necessary before they could reasonably be expected to take action to bring a course of action to protect their rights to retirement benefits. These facts included that when KCH established its 401(k) program in 1993, the action obligated KCH to provide full retirement benefits to its employees under the Act, that Ramsay and Smalling were eligible to obtain service credits in the System for their years of employment at KCH from 1993 onward, that KCH had an obligation to fund retirement benefits for Ramsay and Smalling based on those service credits, and that, once they retired, Ramsay and Smalling were entitled to retirement benefits above and beyond the 410(k) benefits they had been promised. These facts were all unknown to Ramsay and Smalling until, at earliest, 2007. And the primary reason Ramsay and Smalling were unaware of those facts was because KCH, in violation of the Act, failed to report to USRB that it had established a retirement plan for its employees, failed to fund the full package of benefits for the employees, and failed to inform the employees that they were entitled to the defined benefit retirement monies under the Act.

Ramsay and Smalling believed that the retirement plan established for them as employees of KCH, the 401(k) plan, was a proper and legitimate plan and provided all benefits available to them. In light of the requirements of the Act, they were mistaken. Until they became aware of facts informing them of their right to full retirement benefits,

they were not in a position to take any action to preserve their rights. Whether tolling of the limitation of action is reviewed under the GIA language or under the equitable discovery rule, the absence of any reason for Ramsay and Smalling to know of their right to retirement benefits above and beyond their 401(k) plans constitutes a circumstance that makes application of the three year limitation of action irrational and unjust.

In *Helfrich v. Adams*, 2013 UT App. 37, 299 P.3d 2, the Utah Court of Appeals noted:

"The ultimate determination of whether a case presents exceptional circumstances is a question of law and turns on a balancing test" that "examines [t]he hardship the statute of limitations would impose on the plaintiff . . . [against] a prejudice to the defendant from difficulties of proof caused by the passage of time."

Id., at 18, quoting *Berneau v. Martino*, 2009 UT 87, ¶ 23, 223 P.3d 1128. The balancing test led the Utah Court of Appeals to determine that exceptional circumstances did not exist in *Helfrich*. However, in this case, the test produces a different result. In *Helfrich*, the claimants failed to demonstrate that they had been misled or that facts had been concealed from them to the satisfaction of either the trial court or the Utah Court of Appeals. The appellate court went further and explained that:

Failure to disclose is not fraudulent unless a fiduciary relationship exists, which requires "not only confidence of the one in the other, but . . . [also] a certain inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the facts involved, or other conditions, giving to one advantage over the other."

Id. at 15, citing *First Sec. Bank of Utah NA v. Banberry Dev. Corp.*, 786 P.2d 1326, 1333 (Utah 1990). Such a fiduciary relationship did not exist for the claimant in *Helfrich*.

In this case, there was a fiduciary relationship between KCH and Ramsay and

Smalling. In establishing the 401(k) plan for its employees, KCH had all the information regarding what needed to be done or should have been done to comply with the requirements of the Act. It retained Dean Johnson and John Hancock Life Insurance Company to assist KCH in setting up the 401(k) program in a way that complied with all legal requirements. The only information the employees had about the program was what KCH chose to provide to them. As a governmental employer, KCH knew, or should have known, what its obligations to its employees were under relevant state and federal statutes. The employees, to the extent they were aware of being governmental employees at all, were in a much inferior position to know of KCH's statutory obligations in connection with the employer-employee relationship.

KCH argues that the knowledge of the existence of the 401(k) plan was the only fact necessary to begin the running of the three-year limitation of action in this case. Record 000542-000543. KCH asserts that it is of no consequence that Ramsay and Smalling were ignorant of the effect of the law given these facts. However, this is inconsistent with the argument KCH presents that it should be shielded from the effects of the law in terms of its own failure to comply with the requirements of the Act when it set up the 401(k) program in 1993.

In *Highlands at Jordanelle, LLC v. Wasatch County*, 2015 UT App 173, this Court rejected a very similar argument presented by a governmental employer in the context of an equitable tolling analysis. In *Highlands* a governmental subdivision, a fire district, argued for an earlier date than the claimants for commencing the limitation of action. The claimant asserted that it was not aware of the legal effect of certain facts that the fire

district argued commenced the running of the limitation of actions. According to the fire department, “all men . . . [are presumed to] know the law” in connection with when a limitation of action will begin running. *Highlands*, ¶44, quoting *Board of Education v. Jeppson*, 74 Utah 576, 280 P. 1065, 1069 (Utah 1929).

This Court made short work of that argument stating that the presumption of knowledge of the legal effect of certain actions should even more readily be imputed to a political subdivision such as the fire department. *Id.* The same principle applies to KCH as a special service district in this case. *Highland* supports the proposition that as between KCH and its employees, KCH is not in as favorable a position as the employees to ask for equitable consideration. And if the presumption is applied equally in this case, the argument that KCH engaged in concealment or misleading conduct is strengthened.

Regardless of whether a fiduciary relationship existed, the failure to toll the limitation of action would be irrational and unjust. No reasonable person in the position of Ramsay and Smalling would know or suspect that between 1993 and 2009 they were entitled to defined benefit retirement money under the Act. The same cannot be said for the individuals at KCH who were responsible for ensuring that the KCH retirement benefit package complied with the Act. *Highland*, ¶s 44-46.

As to the balancing of hardship on the parties, it is very clear that KCH's only potential hardship is coming up with the funding to provide service credits for Ramsay and Smalling for the years between 1993 and 1995, respectively, and 2006. That hardship does not exist in light of the amendment to U.C.A. §26-9-5 in 2012. Funds are available to pay the value of the service credits Ramsay and Smalling seek.

KCH has, in the past, asserted that being required to fund service credits for its eligible employees would lead to closure of the hospital. However, no evidence has ever been provided to indicate that the threatened closure was anything more than a tactic to bully Ramsay and Smalling (along with the other employees) into abandoning or settling their claims. In any event, the funding necessary to satisfy the claim no longer calls for sufficient capital to cover all eligible KCH employees -- only Ramsay and Smalling and, perhaps, the other four eligible employees who did not accept the lump sum payment to relinquish their service credits.

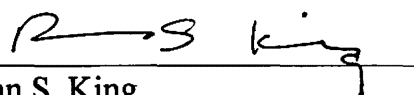
KCH has never argued that it does not have sufficient information about Ramsay and Smalling's hours worked and earnings over that time frame. There is no evidence to indicate that the System does not have the means to quickly and accurately produce a dollar amount in connection with funding Ramsay and Smalling's (and the other four employees') service credits for that time frame upon request. There are no witnesses involved and no lost or missing information. The hardship to KCH if the statute is tolled would be minimal, if it exists at all.

The hardship for Ramsay and Smalling, in contrast, would be significant. They relied on KCH, as their employer, to make accurate representations about the retirement plan in place for them as they went through the process of long-range financial planning for their futures. They also relied on KCH to comply with all statutory requirements in establishing their retirement benefits. They relied on KCH's honesty and competence to their detriment.

Both Ramsay and Smalling are loyal, long-term KCH employees and intend to

continue working at KCH until they are able to retire. Whether they are able to retire at all may depend on the outcome of their claim. Ramsay stands to lose thirteen years of retirement benefits and Smalling will lose eleven years of retirement benefits if this Court upholds the decision of the USRB that the statute of limitations should not be tolled. Under the facts of this case, denial of retirement benefits for governmental employees who have demonstrated their loyalty and longevity creates an unjust outcome.

DATED this 4th day of December, 2015.



Brian S. King
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been delivered via first class U.S. mail, postage prepaid, to the following:

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DATED this 4th day of December, 2015.

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CERTIFICATE OF COMPLIANCE

I certify that the appellant's brief is provided in 13-point text and contains 8,046 words.

DATED this 4th day of December, 2015.

s/ Linda Bosen

APPELLANTS' ADDENDUM

Part 10

Partial Lump-Sum Payments

Section

49-11-1001. Partial lump-sum payment option.

PART 1

GENERAL PROVISIONS

49-11-101. Title.

(1) This title is known as the "Utah State Retirement and Insurance Benefit Act."

(2) This chapter is known as the "Utah State Retirement Systems Administration." 2002

49-11-102. Definitions.

As used in this title:

(1) (a) "Active member" means a member who is employed or who has been employed by a participating employer within the previous 120 days.

(b) "Active member" does not include retirees.

(2) "Actuarial equivalent" means a benefit of equal value when computed upon the basis of mortality tables as recommended by the actuary and adopted by the executive director, including regular interest.

(3) "Actuarial interest rate" means the interest rate as recommended by the actuary and adopted by the board upon which the funding of system costs and benefits are computed.

(4) (a) "Agency" means:

(i) a department, division, agency, office, authority, commission, board, institution, or hospital of the state;

(ii) a county, municipality, school district, local district, or special service district;

(iii) a state college or university; or

(iv) any other participating employer.

(b) "Agency" does not include an entity listed under Subsection (4)(a)(i) that is a subdivision of another entity listed under Subsection (4)(a).

(5) "Allowance" or "retirement allowance" means the pension plus the annuity, including any cost of living or other authorized adjustments to the pension and annuity.

(6) "Alternate payee" means a member's former spouse or family member eligible to receive payments under a Domestic Relations Order in compliance with Section 49-11-612.

(7) "Annuity" means monthly payments derived from member contributions.

(8) "Appointive officer" means an employee appointed to a position for a definite and fixed term of office by official and duly recorded action of a participating employer whose appointed position is designated in the participating employer's charter, creation document, or similar document, and who earns during the first full month of the term of office \$500 or more, indexed as of January 1, 1990, as provided in Section 49-12-407.

(9) (a) "At-will employee" means a person who is employed by a participating employer and:

(i) who is not entitled to merit or civil service protection and is generally considered exempt from a participating employer's merit or career service personnel systems;

(ii) whose on-going employment status is entirely at the discretion of the person's employer; or

(iii) who may be terminated without cause by a designated supervisor, manager, or director.

(b) "At-will employee" does not include a career employee who has obtained a reasonable expectation of continued employment based on inclusion in a participating employer's merit system, civil service protection system, or career service personnel systems, policies, or plans.

(10) "Beneficiary" means any person entitled to receive a payment under this title through a relationship with or designated by a member, participant, covered individual, or alternate payee of a defined contribution plan.

(11) "Board" means the Utah State Retirement Board established under Section 49-11-202.

(12) "Board member" means a person serving on the Utah State Retirement Board as established under Section 49-11-202.

(13) "Contributions" means the total amount paid by the participating employer and the member into a system or to the Utah Governors' and Legislators' Retirement Plan under Chapter 19, Utah Governors' and Legislators' Retirement Act.

(14) "Council member" means a person serving on the Membership Council established under Section 49-11-202.

(15) "Covered individual" means any individual covered under Chapter 20, Public Employees' Benefit and Insurance Program Act.

(16) "Current service" means covered service as defined in Chapters 12, 13, 14, 15, 16, 17, 18, and 19.

(17) "Defined benefit" or "defined benefit plan" or "defined benefit system" means a system or plan offered under this title to provide a specified allowance to a retiree or a retiree's spouse after retirement that is based on a set formula involving one or more of the following factors:

(a) years of service;

(b) final average monthly salary; or

(c) a retirement multiplier.

(18) "Defined contribution" or "defined contribution plan" means any defined contribution plan or deferred compensation plan authorized under the Internal Revenue Code and administered by the board.

(19) "Educational institution" means a political subdivision or instrumentality of the state or a combination thereof primarily engaged in educational activities or the administration or servicing of educational activities, including:

(a) the State Board of Education and its instrumentalities;

(b) any institution of higher education and its branches;

(c) any school district and its instrumentalities;

(d) any vocational and technical school; and

(e) any entity arising out of a consolidation agreement between entities described under this Subsection (19).

(20) (a) "Employer" means any department, educational institution, or political subdivision of the state eligible to participate in a government-sponsored retirement system under federal law.

(b) "Employer" may also include an agency financed in whole or in part by public funds.

(21) "Exempt employee" means an employee working for a participating employer:

(a) who is not eligible for service credit under Section 49-12-203, 49-13-203, 49-14-203, 49-15-203, or 49-16-203; and

(b) for whom a participating employer is not required to pay contributions or nonselective contributions.

(22) "Final average monthly salary" means the amount computed by dividing the compensation received during the final average salary period under each system by the number of months in the final average salary period.

(23) "Fund" means any fund created under this title for the purpose of paying benefits or costs of administering a system, plan, or program.

(24) (a) "Inactive member" means a member who has not been employed by a participating employer for a period of at least 120 days.

(b) "Inactive member" does not include retirees.

(25) (a) "Member" means a person, except a retiree, with contributions on deposit with a system, the Utah Governors' and Legislators' Retirement Plan under Chapter 19, Utah Governors' and Legislators' Retirement Act, or with a terminated system.

(b) "Member" also includes leased employees within the meaning of Section 414(n)(2) of the Internal Revenue Code, if the employees have contributions on deposit with the office. If leased employees constitute less than 20% of the participating employer's work force that is not highly compensated within the meaning of Section 414(n)(5)(c)(ii), Internal Revenue Code, "member" does not include leased employees covered by a plan described in Section 414(n)(5) of the federal Internal Revenue Code.

(26) "Member contributions" means the sum of the contributions paid to a system or the Utah Governors' and Legislators' Retirement Plan, including refund interest if allowed by a system, and which are made by:

(a) the member; and

(b) the participating employer on the member's behalf under Section 414(h) of the Internal Revenue Code.

(27) "Nonelective contribution" means an amount contributed by a participating employer into a participant's defined contribution account.

(28) "Office" means the Utah State Retirement Office.

(29) "Participant" means an individual with voluntary deferrals or nonelective contributions on deposit with the defined contribution plans administered under this title.

(30) "Participating employer" means a participating employer, as defined by Chapters 12, 13, 14, 15, 16, 17, and 18, or an agency financed in whole or in part by public funds which is participating in a system or plan as of January 1, 2002.

(31) "Pension" means monthly payments derived from participating employer contributions.

(32) "Plan" means the Utah Governors' and Legislators' Retirement Plan created by Chapter 19, Utah Governors' and Legislators' Retirement Act, or the defined contribution plans created under Section 49-11-801.

(33) (a) "Political subdivision" means any local government entity, including cities, towns, counties, and school districts, but only if the subdivision is a juristic entity that is legally separate and distinct from the state and only if its employees are not by virtue of their relationship to the entity employees of the state.

(b) "Political subdivision" includes local districts, special service districts, or authorities created by the Legislature or by local governments, including the office.

(c) "Political subdivision" does not include a project entity created under Title 11, Chapter 13, Interlocal Cooperation Act, that was formed prior to July 1, 1987.

(34) "Program" means the Public Employees' Insurance Program created under Chapter 20, Public Employees' Benefit and Insurance Program Act, or the Public Em-

ployees' Long-Term Disability program created under Chapter 21, Public Employees' Long-Term Disability Act.

(35) "Public funds" means those funds derived, either directly or indirectly, from public taxes or public revenue, dues or contributions paid or donated by the membership of the organization, used to finance an activity whose objective is to improve, on a nonprofit basis, the governmental, educational, and social programs and systems of the state or its political subdivisions.

(36) "Qualified defined contribution plan" means a defined contribution plan that meets the requirements of Section 401(k) or Section 403(b) of the Internal Revenue Code.

(37) "Refund interest" means the amount accrued on member contributions at a rate adopted by the board.

(38) "Retiree" means an individual who has qualified for an allowance under this title.

(39) "Retirement" means the status of an individual who has become eligible, applies for, and is entitled to receive an allowance under this title.

(40) "Retirement date" means the date selected by the member on which the member's retirement becomes effective with the office.

(41) "Service credit" means:

(a) the period during which an employee is employed and compensated by a participating employer and meets the eligibility requirements for membership in a system or the Utah Governors' and Legislators' Retirement Plan, provided that any required contributions are paid to the office; and

(b) periods of time otherwise purchasable under this title.

(42) "System" means the individual retirement systems created by Chapter 12, Public Employees' Contributory Retirement Act, Chapter 13, Public Employees' Noncontributory Retirement Act, Chapter 14, Public Safety Contributory Retirement Act, Chapter 15, Public Safety Noncontributory Retirement Act, Chapter 16, Firefighters' Retirement Act, Chapter 17, Judges' Contributory Retirement Act, Chapter 18, Judges' Noncontributory Retirement Act, and Chapter 19, Utah Governors' and Legislators' Retirement Act.

(43) "Voluntary deferrals" means an amount contributed by a participant into that participant's defined contribution account.

2009

49-11-103. Purpose — Liberal construction.

(1) The purpose of this title is to establish:

(a) retirement systems and the Utah Governors' and Legislators' Retirement Plan for members which provide:

(i) a uniform system of membership;

(ii) retirement requirements;

(iii) benefits for members;

(iv) funding on an actuarially sound basis;

(v) contributions; and

(vi) economy and efficiency in public service; and

(b) a central administrative office and a board to administer the various systems, plans, and programs established by the Legislature or the board.

(2) This title shall be liberally construed to provide maximum benefits and protections consistent with sound fiduciary and actuarial principals.

2002

PART 2

RETIREMENT OFFICE AND BOARD

49-11-201. Establishment of retirement office — An independent state agency — Office exemption.

(1) (a) There is established the Utah State Retirement Office, which may also be known and function as the Utah State Retirement Systems.

(ii) qualified defined contribution plan offered by the participating employer if the participating employer does not participate in a qualified defined contribution plan administered by the board.

(c) Notwithstanding the provisions of Subsection (8)(b), if an employer is not participating in a qualified defined contribution plan administered by the board, the employer may elect to pay the contributions to a nonqualified deferred compensation plan administered by the board.

(9) Notwithstanding any other provision of this section, a retiree who has returned to work, accrued additional service credit, and again retires shall have the retiree's allowance recalculated using:

(a) the formula in effect at the date of the retiree's original retirement for all service credit accrued prior to that date; and

(b) the formula in effect at the date of the subsequent retirement for all service credit accrued between the first and subsequent retirement dates.

(10) This section does not apply to elected positions.

(11) The board may make rules to implement this section.

2009

PART 6

PROCEDURES AND RECORDS

49-11-601. Payment of employer contributions — Penalties for failure to comply — Adjustments to be made.

(1) The employer contributions, fees, premium taxes, contribution adjustments, and other required payments shall be paid to the office by the participating employer as determined by the executive director.

(2) A participating employer that fails to withhold the amount of any member contributions, as soon as administratively possible, shall also pay the member contributions to the office out of its own funds.

(3) If a participating employer does not make the contributions required by this title within 60 days of the end of the pay period, the participating employer is liable to the office as provided in Section 49-11-604 for:

(a) delinquent contributions;

(b) interest on the delinquent contributions as calculated under Section 49-11-503; and

(c) a 12% per annum penalty on delinquent contributions.

(4) The executive director may waive all or any part of the interest, penalties, expenses, and fees if the executive director finds there were extenuating circumstances surrounding the participating employer's failure to comply with this section.

(5) Contributions made in error will be refunded to the participating employer or member that made the contributions.

2003

49-11-602. Participating employer to maintain records — Time limit — Penalties for failure to comply.

(1) A participating employer shall maintain records necessary to calculate benefits under this title and other records necessary for proper administration of this title as required by the office.

(2) A participating employer shall maintain the records required under Subsection (1) until the earliest of:

(a) three years after the date of retirement of the employee from a system or plan;

(b) three years after the date of death of the employee; or

(c) 65 years from the date of employment with the participating employer.

(3) A participating employer shall be liable to the office for:

(a) any liabilities and expenses, including administrative expenses and the cost of increased benefits to members, resulting from the participating employer's failure to maintain records under this section; and

(b) a penalty equal to 1% of the participating employer's last month's contributions.

(4) The executive director may waive all or any part of the interest, penalties, expenses, and fees if the executive director finds there were extenuating circumstances surrounding the participating employer's failure to comply with this section.

(5) The executive director may estimate the length of service, compensation, or age of any member, if that information is not contained in the records.

2004

49-11-603. Participating employer to report and certify — Time limit — Penalties for failure to comply.

(1) As soon as administratively possible, but in no event later than 60 days after the end of each pay period, a participating employer shall report and certify to the office:

(a) the eligibility for service credit accrual of:

(i) all current members;

(ii) each new member as they begin employment; and

(iii) any changes to eligibility for service credit accrual of each member.

(b) the compensation of each current member eligible for service credit; and

(c) other factors relating to the proper administration of this title as required by the executive director.

(2) Each participating employer shall submit the reports required under Subsection (1) in a format approved by the office.

(3) A participating employer shall be liable to the office for:

(a) any liabilities and expenses, including administrative expenses and the cost of increased benefits to members, resulting from the participating employer's failure to correctly report and certify records under this section;

(b) a penalty equal to \$250 or 50% of the total contributions for the member for the period of the reporting error, whichever is greater; and

(c) attorney fees.

(4) The executive director may waive all or any part of the interest, penalties, expenses, and fees if the executive director finds there were extenuating circumstances surrounding the participating employer's failure to comply with this section.

(5) The executive director may estimate the length of service, compensation, or age of any member, if that information is not contained in the records.

2008

49-11-604. Office audits of participating employers — Penalties for failure to comply.

(1) (a) The office may perform on-site compliance audits of participating employers to determine compliance with reporting, contribution, and certification requirements under this title.

(b) The office may request records to be provided by the participating employer at the time of the audit.

(c) Audits shall be conducted at the sole discretion of the office after reasonable notice to the participating employer of at least five working days.

(d) The participating employer shall extract and provide records as requested by the office in an appropriate, organized, and usable format.

(e) Failure of a participating employer to allow access, provide records, or comply in any way with an office audit shall result in the participating employer being liable to the office for:

(2) The fund shall consist of all money paid into it, including interest, in accordance with this chapter, whether in the form of cash, securities, or other assets, and of all money received from any other source.

(3) Custody, management, and investment of the fund shall be governed by Chapter 11, Utah State Retirement Systems Administration.

2002

PART 2

MEMBERSHIP ELIGIBILITY

49-12-201. System membership — Eligibility.

(1) A regular full-time employee of a participating employer is eligible for service credit in this system upon the later of:

- (a) the date on which the participating employer began participating in this system; or
- (b) the effective date of employment of the regular full-time employee with the participating employer.

(2) Beginning July 1, 1986, a person entering employment with the state and its educational institutions may not participate in this system.

2002

49-12-202. Participation of employers — Limitations — Exclusions — Admission requirements — Exceptions — Nondiscrimination requirements.

(1) (a) Unless excluded under Subsection (2), an employer is a participating employer and may not withdraw from participation in this system.

(b) In addition to their participation in this system, participating employers may provide or participate in public or private retirement, supplemental or defined contribution plan, either directly or indirectly, for their employees.

(2) The following employers may be excluded from participation in this system:

(a) an employer not initially admitted or included as a participating employer in this system prior to January 1, 1982 if:

(i) the employer elects not to provide or participate in any type of private or public retirement, supplemental or defined contribution plan, either directly or indirectly, for its employees, except for Social Security; or

(ii) the employer offers another collectively bargained retirement benefit and has continued to do so on an uninterrupted basis since that date;

(b) an employer that is a charter school sponsored by the State Board of Education or a school district that makes an election of nonparticipation in accordance with Section 53A-1a-512 unless the charter school makes a one-time, irrevocable retraction of the election of nonparticipation in accordance with Subsection 53A-1a-512(9); or

(c) an employer that is a hospital created as a special service district under Title 17D, Chapter 1, Special Service District Act, that makes an election of nonparticipation in accordance with Subsection (4).

(3) An employer who did not become a participating employer in this system prior to July 1, 1986, may not participate in this system.

(4) (a) Until June 30, 2009, a employer that is a hospital created as a special service district under Title 17D, Chapter 1, Special Service District Act, may make an election of nonparticipation as an employer for retirement programs under this chapter.

(b) An election provided under Subsection (4)(a):

(i) is a one-time election made no later than the time specified under Subsection (4)(a);

(ii) shall be documented by a resolution adopted by the governing body of the special service district;

(iii) is irrevocable; and

(iv) applies to the special service district as the employer and to all employees of the special service district.

(c) The governing body of the special service district may offer employee benefit plans for its employees:

(i) under Title 49, Chapter 20, Public Employees' Benefit and Insurance Program Act; or

(ii) under any other program.

(5) If a participating employer purchases service credit on behalf of regular full-time employees for service rendered prior to the participating employer's admission to this system, the service credit shall be purchased in a nondiscriminatory manner on behalf of all current and former regular full-time employees who were eligible for service credit at the time service was rendered.

2009

49-12-203. Exclusions from membership in system.

(1) The following employees are not eligible for service credit in this system:

(a) An employee whose employment status is temporary in nature due to the nature or the type of work to be performed, provided that:

(i) if the term of employment exceeds six months and the employee otherwise qualifies for service credit in this system, the participating employer shall report and certify to the office that the employee is a regular full-time employee effective the beginning of the seventh month of employment; or

(ii) if an employee, previously terminated prior to being eligible for service credit in this system is reemployed within three months of termination by the same participating employer, the participating employer shall report and certify that the member is a regular full-time employee when the total of the periods of employment equals six months and the employee otherwise qualifies for service credit in this system.

(b) (i) A current or future employee of a two-year or four-year college or university who holds, or is entitled to hold, under Section 49-12-204, a retirement annuity contract with the Teachers' Insurance and Annuity Association of America or with any other public or private system, organization, or company during any period in which required contributions based on compensation have been paid on behalf of the employee by the employer.

(ii) The employee, upon cessation of the participating employer contributions, shall immediately become eligible for service credit in this system.

(c) An employee serving as an exchange employee from outside the state.

(d) An executive department head of the state, a member of the State Tax Commission, the Public Service Commission, and a member of a full-time or part-time board or commission who files a formal request for exemption.

(e) An employee of the Department of Workforce Services who is covered under another retirement system allowed under Title 35A, Chapter 4, Employment Security Act.

(f) (i) An employee who is employed on or after July 1, 2009 with an employer that has elected, prior to July 1, 2009, to be excluded from participation in this system under Subsection 49-12-202(2)(c).

(ii) Notwithstanding the provisions of this Subsection (1)(f), any eligibility for service credit earned by

an employee under this chapter before July 1, 2009 is not affected under this Subsection (1)(f).

(2) Upon filing a written request for exemption with the office, the following employees shall be exempt from coverage under this system:

- (a) a full-time student or the spouse of a full-time student and individuals employed in a trainee relationship;
- (b) an elected official;
- (c) an executive department head of the state, a member of the State Tax Commission, a member of the Public Service Commission, and a member of a full-time or part-time board or commission;
- (d) an employee of the Governor's Office of Planning and Budget;
- (e) an employee of the Governor's Office of Economic Development;
- (f) an employee of the Commission on Criminal and Juvenile Justice;
- (g) an employee of the Governor's Office;
- (h) an employee of the State Auditor's Office;
- (i) an employee of the State Treasurer's Office;
- (j) any other member who is permitted to make an election under Section 49-11-406;
- (k) a person appointed as a city manager or chief city administrator or another person employed by a municipality, county, or other political subdivision, who is an at-will employee; and

(l) an employee of an interlocal cooperative agency created under Title 11, Chapter 13, Interlocal Cooperation Act, who is engaged in a specialized trade customarily provided through membership in a labor organization that provides retirement benefits to its members.

(3) (a) Each participating employer shall prepare a list designating those positions eligible for exemption under Subsection (2).

(b) An employee may not be exempted unless the employee is employed in a position designated by the participating employer.

(4) (a) In accordance with this section, a municipality, county, or political subdivision may not exempt more than 50 positions or a number equal to 10% of the employees of the municipality, county, or political subdivision whichever is lesser.

(b) A municipality, county, or political subdivision may exempt at least one regular full-time employee.

(5) Each participating employer shall:

(a) file employee exemptions annually with the office; and

(b) update the employee exemptions in the event of any change.

(6) The office may make rules to implement this section.

2009

49-12-204. Higher education employees' eligibility requirements — Election between different retirement plans — Classification requirements — Transfer between systems — Supplemental plans authorized.

(1) (a) Regular full-time employees of institutions of higher education who are eligible to participate in either this system or in a retirement annuity contract with the Teachers' Insurance and Annuity Association of America or with any other public or private system, organization, or company, designated by the Board of Regents, shall, not later than January 1, 1979, elect to participate exclusively in this system or in an annuity contract allowed under this Subsection (1).

(b) The election is final, and no right exists to make any further election.

(2) (a) A regular full-time employee hired by an institution of higher education after January 1, 1979, may participate only in the retirement plan which attaches to the person's employment classification.

(b) Each institution of higher education shall prepare or amend existing employment classifications, under the direction of the Board of Regents, so that each classification is assigned with either:

(i) this system;

(ii) the Teachers' Insurance and Annuity Association of America; or

(iii) another public or private system, organization, or company designated by the Board of Regents.

(3) A regular full-time employee hired by an institution of higher education after January 1, 1979, whose employment classification requires participation in this system may elect to continue participation in this system upon change to an employment classification which requires participation in:

(a) an annuity plan with the Teachers' Insurance and Annuity Association of America; or

(b) another public or private system, organization, or company designated by the Board of Regents.

(4) A regular full-time employee hired by an institution of higher education after January 1, 1979, whose employment classification requires participation in this system shall participate in this system.

2002

PART 3

CONTRIBUTIONS

49-12-301. Contributions — Two levels — Election by a participating employer to pay employee contributions — Accounting for and vesting of member contributions — Deductions.

(1) Participating employers and members shall jointly pay the certified contribution rates to the office to maintain this system on a financially and actuarially sound basis.

(2) For purposes of determining contribution rates, this system is divided into two levels according to participating employers as follows:

(a) Level A includes the state, its independent agencies, independent entities, public corporations, and other instrumentalities, all participating educational institutions, and all other participating employers whose activities are associated with participating educational institutions.

(b) Level B includes all other participating employers in this system.

(3) (a) A participating employer may elect to pay all or part of the required member contributions, in addition to the required participating employer contributions.

(b) Any amount contributed by a participating employer under this section shall vest to the member's benefit as though the member had made the contribution.

(c) The required member contributions shall be reduced by the amount that is paid by the participating employer.

(4) (a) All member contributions are credited by the office to the account of the individual member.

(b) This amount, together with refund interest, is held in trust for the payment of benefits to the member or the member's beneficiaries.

(c) All member contributions are vested and nonforfeitable.

(5) (a) Each member is considered to consent to payroll deductions of member contributions.

(b) The payment of compensation less these payroll deductions is considered full payment for services rendered by the member.

2002

per week or more for a participating employer, regardless of benefits provided;

(iii) an officer, elective or appointive, who earns during the first full month of the term of office \$500 or more, indexed as of January 1, 1990, as provided in Section 49-13-407;

(iv) a faculty member or employee of an institution of higher education who is considered full-time by that institution of higher education; and

(v) an individual who otherwise meets the definition of this Subsection (4) who performs services for a participating employer through a professional employer organization or similar arrangement.

(5) "System" means the Public Employees' Noncontributory Retirement System.

(6) "Years of service credit" means:

(a) a period, consisting of 12 full months as determined by the board;

(b) a period determined by the board, whether consecutive or not, during which a regular full-time employee performed services for a participating employer, including any time the regular full-time employee was absent on a paid leave of absence granted by a participating employer or was absent in the service of the United States government on military duty as provided by this chapter; or

(c) the regular school year consisting of not less than eight months of full-time service for a regular full-time employee of an educational institution.

2008

49-13-103. Creation of system.

There is created for members employed by a participating employer the "Public Employees' Noncontributory Retirement System."

2002

49-13-104. Creation of trust fund.

(1) There is created the "Public Employees' Noncontributory Retirement Trust Fund" for the purpose of paying the benefits and costs of administering this system.

(2) The fund shall consist of all money paid into it, including interest, in accordance with this chapter, whether in the form of cash, securities, or other assets, and of all money received from any other source.

(3) Custody, management, and investment of the fund shall be governed by Chapter 11, Utah State Retirement Systems Administration.

2002

PART 2

MEMBERSHIP ELIGIBILITY

49-13-201. System membership — Eligibility.

(1) Beginning July 1, 1986, the state and its educational institutions shall participate in this system:

(a) A person entering regular full-time employment with the state or its educational institutions after July 1, 1986, is eligible for service credit in this system.

(b) A regular full-time employee of the state or its educational institutions prior to July 1, 1986, may either become eligible for service credit in this system or remain eligible for service in the system established under Chapter 12, Public Employees' Contributory Retirement Act, by following the procedures established by the board in accordance with this chapter.

(2) An employer, other than the state and its educational institutions, may participate in this system except that once

an employer elects to participate in this system, that election is irrevocable.

(a) A person entering regular full-time employment with a participating employer which elects to participate in this system is eligible for service credit in this system.

(b) A person in regular full-time employment with a participating employer prior to the participating employer's election to participate in this system may either become eligible for service credit in this system or remain eligible for service in the system established under Chapter 12, Public Employees' Contributory Retirement Act, by following the procedures established by the board in accordance with this chapter.

2002

49-13-202. Participation of employers — Limitations — Exclusions — Admission requirements — Nondiscrimination requirements — Service credit purchases.

(1) (a) Unless excluded under Subsection (2), an employer is a participating employer and may not withdraw from participation in this system.

(b) In addition to their participation in this system, participating employers may provide or participate in any additional public or private retirement, supplemental or defined contribution plan, either directly or indirectly, for their employees.

(2) The following employers may be excluded from participation in this system:

(a) an employer not initially admitted or included as a participating employer in this system prior to January 1, 1982 if:

(i) the employer elects not to provide or participate in any type of private or public retirement, supplemental or defined contribution plan, either directly or indirectly, for its employees, except for Social Security; or

(ii) the employer offers another collectively bargained retirement benefit and has continued to do so on an uninterrupted basis since that date;

(b) an employer that is a charter school sponsored by the State Board of Education or a school district that makes an election of nonparticipation in accordance with Section 53A-1a-512 unless the charter school makes a one-time, irrevocable retraction of the election of nonparticipation in accordance with Subsection 53A-1a-512(9); or

(c) an employer that is a hospital created as a special service district under Title 17D, Chapter 1, Special Service District Act, that makes an election of nonparticipation in accordance with Subsection (5).

(3) If an employer that may be excluded under Subsection (2)(a)(i) elects at any time to provide or participate in any type of public or private retirement, supplemental or defined contribution plan, either directly or indirectly, except for Social Security, the employer shall be a participating employer in this system.

(4) (a) An employer may, by resolution of its governing body, apply for admission to this system.

(b) Upon approval of the resolution by the board, the employer is a participating employer in this system and is subject to this title.

(5) (a) Until June 30, 2009, a employer that is a hospital created as a special service district under Title 17D, Chapter 1, Special Service District Act, may make an election of nonparticipation as an employer for retirement programs under this chapter.

(b) An election provided under Subsection (5)(a):

(i) is a one-time election made no later than the time specified under Subsection (5)(a);

- (ii) shall be documented by a resolution adopted by the governing body of the special service district;
- (iii) is irrevocable; and
- (iv) applies to the special service district as the employer and to all employees of the special service district.
- (c) The governing body of the special service district may offer employee benefit plans for its employees:
 - (i) under Title 49, Chapter 20, Public Employees' Benefit and Insurance Program Act; or
 - (ii) under any other program.
- (6) If a participating employer purchases service credit on behalf of regular full-time employees for service rendered prior to the participating employer's admission to this system, the service credit shall be purchased in a nondiscriminatory manner on behalf of all current and former regular full-time employees who were eligible for service credit at the time service was rendered.

2009

49-13-203. Exclusions from membership in system.

(1) The following employees are not eligible for service credit in this system:

- (a) An employee whose employment status is temporary in nature due to the nature or the type of work to be performed, provided that:
 - (i) if the term of employment exceeds six months and the employee otherwise qualifies for service credit in this system, the participating employer shall report and certify to the office that the employee is a regular full-time employee effective the beginning of the seventh month of employment; and
 - (ii) if an employee, previously terminated prior to becoming eligible for service credit in this system, is reemployed within three months of termination by the same participating employer, the participating employer shall report and certify to the office that the member is a regular full-time employee when the total of the periods of employment equals six months and the employee otherwise qualifies for service credit in this system.
- (b) (i) A current or future employee of a two-year or four-year college or university who holds, or is entitled to hold, under Section 49-13-204, a retirement annuity contract with the Teachers' Insurance and Annuity Association of America or with any other public or private system, organization, or company during any period in which required contributions based on compensation have been paid on behalf of the employee by the employer.
- (ii) The employee, upon cessation of the participating employer contributions, shall immediately become eligible for service credit in this system.
- (c) An employee serving as an exchange employee from outside the state.
- (d) An executive department head of the state or a legislative director, senior executive employed by the governor's office, a member of the State Tax Commission, a member of the Public Service Commission, and a member of a full-time or part-time board or commission who files a formal request for exemption.
- (e) An employee of the Department of Workforce Services who is covered under another retirement system allowed under Title 35A, Chapter 4, Employment Security Act.
- (f) (i) An employee who is employed on or after July 1, 2009 with an employer that has elected, prior to July 1, 2009, to be excluded from participation in this system under Subsection 49-13-202(2)(c).
- (ii) Notwithstanding the provisions of this Subsection (1)(f), any eligibility for service credit earned by

an employee under this chapter before July 1, 2009 is not affected under this Subsection (1)(f).

(2) Upon filing a written request for exemption with the office, the following employees shall be exempt from coverage under this system:

- (a) a full-time student or the spouse of a full-time student and individuals employed in a trainee relationship;
- (b) an elected official;
- (c) an executive department head of the state, a member of the State Tax Commission, a member of the Public Service Commission, and a member of a full-time or part-time board or commission;
- (d) an employee of the Governor's Office of Planning and Budget;
- (e) an employee of the Governor's Office of Economic Development;
- (f) an employee of the Commission on Criminal and Juvenile Justice;
- (g) an employee of the Governor's Office;
- (h) an employee of the State Auditor's Office;
- (i) an employee of the State Treasurer's Office;
- (j) any other member who is permitted to make an election under Section 49-11-406;
- (k) a person appointed as a city manager or chief city administrator or another person employed by a municipality, county, or other political subdivision, who is an at-will employee; and
- (l) an employee of an interlocal cooperative agency created under Title 11, Chapter 13, Interlocal Cooperation Act, who is engaged in a specialized trade customarily provided through membership in a labor organization that provides retirement benefits to its members.
- (3) (a) Each participating employer shall prepare a list designating those positions eligible for exemption under Subsection (2).
- (b) An employee may not be exempted unless the employee is employed in a position designated by the participating employer.
- (4) (a) In accordance with this section, a municipality, county, or political subdivision may not exempt more than 50 positions or a number equal to 10% of the employees of the municipality, county, or political subdivision, whichever is lesser.
- (b) A municipality, county, or political subdivision may exempt at least one regular full-time employee.
- (5) Each participating employer shall:
 - (a) file employee exemptions annually with the office; and
 - (b) update the employee exemptions in the event of any change.
- (6) The office may make rules to implement this section.

2009

49-13-204. Higher education employees' eligibility requirements — Election between different retirement plans — Classification requirements — Transfer between systems.

- (1) (a) Regular full-time employees of institutions of higher education who are eligible to participate in either this system or in a retirement annuity contract with the Teachers' Insurance and Annuity Association of America or with any other public or private system, organization, or company, designated by the Board of Regents, shall, not later than January 1, 1979, elect to participate exclusively in this system or in an annuity contract allowed under this Subsection (1)(a).
- (b) The election is final, and no right exists to make any further election.

(i) the trail is designated under a general plan adopted by a municipality under Section 10-9a-401 or by a county under Section 17-27a-401;

(ii) the trail right-of-way or the right-of-way where the trail is located is open to public use as evidenced by a written agreement between the owner or operator of the trail right-of-way, or of the right-of-way where the trail is located, and the municipality or county where the trail is located; and

(iii) the written agreement:

(A) contains a plan for operation and maintenance of the trail; and

(B) provides that an owner or operator of the trail right-of-way or of the right-of-way where the trail is located has, at minimum, the same level of immunity from suit as the governmental entity in connection with or resulting from the use of the trail.

(o) research or implementation of cloud management or seeding for the clearing of fog;

(p) the management of flood waters, earthquakes, or natural disasters;

(q) the construction, repair, or operation of flood or storm systems;

(r) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6a-212;

(s) the activities of:

(i) providing emergency medical assistance;

(ii) fighting fire;

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

(iv) emergency evacuations;

(v) 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

(vi) intervening during dam emergencies;

(t) the exercise or performance, or the failure to exercise or perform, any function pursuant to Title 73, Chapter 10, Board of Water Resources — Division of Water Resources; or

(u) unauthorized access to government records, data, or electronic information systems by any person or entity.

2008

63G-7-302. Specific remedies — "Takings" actions — Government Records Access and Management Actions.

(1) In any action brought under the authority of Article I, Section 22, of the Utah Constitution for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation, compensation and damages shall be assessed according to the requirements of Title 78B, Chapter 6, Part 5, Eminent Domain.

(2) (a) Notwithstanding Section 63G-7-401, a notice of claim for attorney fees under Subsection 63G-7-301(2)(e) may be filed contemporaneously with a petition for review under Section 63G-2-404.

(b) The provisions of Subsection 63G-7-403(1), relating to the governmental entity's response to a claim, and the provisions of Section 63G-7-601, requiring an undertaking, do not apply to a notice of claim for attorney fees filed contemporaneously with a petition for review under Section 63G-2-404.

(c) Any other claim under this chapter that is related to a claim for attorney fees under Subsection 63G-7-301(2)(e) may be brought contemporaneously with the claim for attorney fees or in a subsequent action. 2008

PART 4

NOTICE OF CLAIM AGAINST A GOVERNMENTAL ENTITY OR A GOVERNMENT EMPLOYEE

63G-7-401. Claim for injury — Notice — Contents — Service — Legal disability — Appointment of guardian ad litem.

(1) (a) Except as provided in Subsection (1)(b), a claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

(b) The statute of limitations does not begin to run until a claimant knew, or with the exercise of reasonable diligence should have known:

(i) that the claimant had a claim against the governmental entity or its employee; and

(ii) the identity of the governmental entity or the name of the employee.

(c) The burden to prove the exercise of reasonable diligence is upon the claimant.

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

(3) (a) The notice of claim shall set forth:

(i) a brief statement of the facts;

(ii) the nature of the claim asserted;

(iii) the damages incurred by the claimant so far as they are known; and

(iv) if the claim is being pursued against a governmental employee individually as provided in Subsection 63G-7-202(3)(c), the name of the employee.

(b) The notice of claim shall be:

(i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian; and

(ii) directed and delivered by hand or by mail according to the requirements of Section 68-3-8.5 to the office of:

(A) the city or town clerk, when the claim is against an incorporated city or town;

(B) the county clerk, when the claim is against a county;

(C) the superintendent or business administrator of the board, when the claim is against a school district or board of education;

(D) the presiding officer or secretary/clerk of the board, when the claim is against a local district or special service district;

(E) the attorney general, when the claim is against the state;

(F) a member of the governing board, the executive director, or executive secretary, when the claim is against any other public board, commission, or body; or

(G) the agent authorized by a governmental entity to receive the notice of claim by the governmental entity under Subsection (5)(e).

(4) (a) If an injury that may reasonably be expected to result in a claim against a governmental entity is sustained by a claimant who is under the age of majority or mentally incompetent, that governmental entity may file a request with the court for the appointment of a guardian ad litem for the potential claimant.

(b) If a guardian ad litem is appointed, the time for filing a claim under Section 63G-7-402 begins when the order appointing the guardian is issued.

- (5) (a) Each governmental entity subject to suit under this chapter shall file a statement with the Division of Corporations and Commercial Code within the Department of Commerce containing:

- (i) the name and address of the governmental entity;
- (ii) the office or agent designated to receive a notice of claim; and
- (iii) the address at which it is to be directed and delivered.

(b) Each governmental entity shall update its statement as necessary to ensure that the information is accurate.

(c) The Division of Corporations and Commercial Code shall develop a form for governmental entities to complete that provides the information required by Subsection (5)(a).

(d) (i) A newly incorporated municipality shall file the statement required by Subsection (5)(a) promptly after the lieutenant governor issues a certificate of incorporation under Section 67-1a-6.5.

(ii) A newly incorporated local district shall file the statement required by Subsection (5)(a) at the time that the written notice is filed with the lieutenant governor under Section 17B-1-215.

(e) A governmental entity may, in its statement, identify an agent authorized by the entity to accept notices of claim on its behalf.

(6) The Division of Corporations and Commercial Code shall:

(a) maintain an index of the statements required by this section arranged both alphabetically by entity and by county of operation; and

(b) make the indices available to the public both electronically and via hard copy.

(7) A governmental entity may not challenge the validity of a notice of claim on the grounds that it was not directed and delivered to the proper office or agent if the error is caused by the governmental entity's failure to file or update the statement required by Subsection (5).

2009

63G-7-402. Time for filing notice of claim.

A claim against a governmental entity, or against an employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the person and according to the requirements of Section 63G-7-401 within one year after the claim arises regardless of whether or not the function giving rise to the claim is characterized as governmental.

2008

63G-7-403. Notice of claim — Approval or denial by governmental entity or insurance carrier within 60 days — Remedies for denial of claim.

(1) (a) Within 60 days of the filing of a notice of claim, the governmental entity or its insurance carrier shall inform the claimant in writing that the claim has either been approved or denied.

(b) A claim is considered to be denied if, at the end of the 60-day period, the governmental entity or its insurance carrier has failed to approve or deny the claim.

(2) (a) If the claim is denied, a claimant may institute an action in the district court against the governmental entity or an employee of the entity.

(b) The claimant shall begin the action within one year after denial of the claim or within one year after the denial period specified in this chapter has expired, regardless of whether or not the function giving rise to the claim is characterized as governmental.

2008

PART 5

LEGAL ACTIONS UNDER THIS CHAPTER — JURISDICTION AND VENUE

63G-7-501. Jurisdiction of district courts over actions.

(1) The district courts have exclusive, original jurisdiction over any action brought under this chapter.

(2) An action brought under this chapter may not be tried as a small claims action.

2008

63G-7-502. Venue of actions.

(1) Actions against the state may be brought in the county in which the claim arose or in Salt Lake County.

(2) (a) Actions against a county may be brought in the county in which the claim arose, or in the defendant county, or, upon leave granted by a district court judge of the defendant county, in any county contiguous to the defendant county.

(b) Leave may be granted ex parte.

(3) Actions against all other political subdivisions, including cities and towns, shall be brought in the county in which the political subdivision is located or in the county in which the claim arose.

2008

PART 6

LEGAL ACTIONS UNDER THIS CHAPTER — PROCEDURES, REQUIREMENTS, DAMAGES, AND LIMITATIONS ON JUDGMENTS

63G-7-601. Actions governed by Utah Rules of Civil Procedure — Undertaking required.

(1) An action brought under this chapter shall be governed by the Utah Rules of Civil Procedure to the extent that they are consistent with this chapter.

(2) At the time the action is filed, the plaintiff shall file an undertaking in a sum fixed by the court that is:

(a) not less than \$300; and

(b) conditioned upon payment by the plaintiff of taxable costs incurred by the governmental entity in the action if the plaintiff fails to prosecute the action or fails to recover judgment.

2008

63G-7-602. Compromise and settlement of claims.

(1) A political subdivision, after conferring with its legal officer or other legal counsel if it does not have a legal officer, may compromise and settle any action as to the damages or other relief sought.

(2) The risk manager in the Department of Administrative Services may compromise and settle any action against the state for which the Risk Management Fund may be liable:

(a) on the risk manager's own authority, if the amount of the settlement is \$25,000 or less;

(b) with the concurrence of the attorney general or the attorney general's representative and the executive director of the Department of Administrative Services if the amount of the settlement is \$25,000.01 to \$100,000; or

(c) by complying with the procedures and requirements of Title 63G, Chapter 10, State Settlement Agreements, if the amount of the settlement is more than \$100,000.

2008

63G-7-603. Exemplary or punitive damages prohibited — Governmental entity exempt from execution, attachment, or garnishment.

(1) (a) A judgment may not be rendered against a governmental entity for exemplary or punitive damages.

BEFORE THE UTAH STATE RETIREMENT BOARD

UTAH STATE RETIREMENT BOARD,	:	FINDINGS OF UNDISPUTED FACT,
	:	CONCLUSIONS OF LAW, AND
Petitioner,	:	PARTIAL SUMMARY JUDGMENT
	:	
vs.	:	
	:	
KANE COUNTY HOSPITAL,	:	
	:	
Respondent.	:	
	:	File No. 09-22R
LORI RAMSAY and DAN SMALLING,	:	
	:	Hearing Officer: J. Dennis Frederick
Intervenors.	:	

A hearing was held on August 9, 2013, before the Adjudicative Hearing Officer, J. Dennis Frederick, on the Motion for Partial Summary Judgment filed by Respondent Kane County Hospital (the "Hospital"). The Hospital was represented by Timothy B. Anderson and Mark D. Tolman. Petitioner, the Utah State Retirement Board ("URS" or "Retirement Office"), was represented by David B. Hansen, Liza J. Eves, and Erin L. Gill. Intervenors Lori Ramsay and Dan Smalling were represented by Brian S. King.

The Hospital seeks a partial summary judgment that URS's claim for retirement contributions in this case is limited by the applicable three year statute of limitations to the period between August 11, 2006 (three years before this Board Action was filed) and April 30, 2009 (when the Hospital opted out of any requirement that it participate in the State Retirement Systems). Based upon the undisputed facts, and for the reasons stated in the Hospital's Motion and supporting papers, the Adjudicative Hearing Officer issued a decision granting the Hospital's Motion for Partial Summary Judgment on August 9, 2013.

STIPULATED UNDISPUTED FACTS

The parties stipulated to the following facts for purposes of this Motion only. The parties reserved the right to challenge these facts in any subsequent hearing in this matter.

1. Kane County Hospital (hereinafter the "Hospital") is a special service district within the meaning of Utah Code § 17D-1-101, et seq. The special service district was created by the Kane County Commission in 1989 to operate the only hospital in Kane County.

2. The Hospital, as a special service district, was an employer as defined under Utah Code Ann. § 49-11-102(23)(a) at all time relevant to this dispute.

3. The Utah State Retirement Office is an independent state agency, which is also known and functions as the Utah Retirement Systems (hereafter "URS" or "Retirement Office"). URS was created pursuant to Utah Code, Title 49, to administer the systems, plans and programs of the various state retirement systems and performs all other functions assigned to it under Title 49, the "Utah Retirement and Insurance Benefit Act" (the "Retirement Act").

4. In 1993, the Hospital began offering a 401(k) plan to its employees. Since that time, the 401(k) plan has been the only retirement benefit paid by the Hospital to its employees.

5. On January 5, 2007, Intervenor Lori Ramsay, an employee of the Hospital, spoke with Cindy Bon, Accounts Service Manager for the Retirement Office, to obtain information about state retirement benefits. Thereafter, the Retirement Office sent Ms. Ramsay a letter with the information that Ms. Ramsay requested and a copy of a Retirement New Group Questionnaire, which Ms. Ramsay provided to the Hospital. The purpose of the Retirement New Group Questionnaire is to determine eligibility for participation in the State Retirement Systems.

6. On January 22, 2007, the Hospital completed the Retirement New Group Questionnaire and returned it to the Retirement Office.

7. The Retirement Office was unaware that the Hospital was providing any kind of retirement benefit to its employees until the Retirement Office received the Hospital's completed New Group Questionnaire.

8. On February 12, 2007, the Retirement Office informed the Hospital that it was eligible for membership in the State Retirement Systems. The Hospital declined to make any retrospective or prospective retirement contributions to the State Retirement Systems.

9. On April 30, 2009, pursuant to legislation passed by the Utah State Legislature in the 2009 General Legislative Session, the Hospital's Board of Directors approved a resolution to irrevocably elect nonparticipation in the State Retirement Systems.

10. On August 11, 2009, the Retirement Office initiated this administrative proceeding by filing a Notice of Board Action against the Hospital. In its Notice of Board Action, the Retirement Office seeks an order declaring that, pursuant to the Retirement Act, the Hospital is liable for contributions to the State Retirement Systems for the years between 1993, when the Hospital first offered a 401(k) plan, and April 30, 2009, when the Hospital elected not to participate in the State Retirement Systems.

11. To date, the Retirement Office has received no retirement contributions from the Hospital on behalf of its employees.

UNSTIPULATED UNDISPUTED FACTS

The parties did not stipulate to the following facts. Nevertheless, there is no dispute about them.

12. There is no evidence in the record that the Hospital actually knew about any possible requirement that it report and make retirement contributions to the State Retirement

Systems prior to February 12, 2007—when URS informed the Hospital that it was eligible to participate.

13. There is no evidence in the record that the Hospital actively or affirmatively concealed its 401(k) plan from URS or anyone else.

CONCLUSIONS OF LAW

URS contends that the Hospital, as a special service district, was an employer as defined under the Retirement Act at all times relevant to this dispute. The Hospital disputes that contention. However, for purposes of this Motion only, the parties asked the Adjudicative Hearing Officer to assume for sake of argument that the Hospital was an eligible employer under the Retirement Act, and thus able to participate in the State Retirement Systems. Thus, the following conclusions of law assume that the Hospital was an employer as defined under the Retirement Act. The Hospital may challenge this assumption, and its underlying liability under the Retirement Act, at any subsequent hearing in this matter.

1. A three year statute of limitation period applies to this case. *See* U.C.A. § 78B-2-305(4).¹

2. In limited circumstances, the “discovery rule may operate to toll the period of limitations until the discovery of the facts forming the basis for the cause of action.” *Colosimo v. Roman Catholic Bishop of Salt Lake City*, 2004 UT App 436, ¶ 20. The discovery rule is applied in only three narrow situations:

¹ Relying on U.C.A. § 49-11-601(3), URS contends that a claim for retirement contributions under the Retirement Act does not accrue until 60 days following the end of each payroll period. Thus, URS contends that the statute of limitations does not begin to run on a claim for retirement contributions until 60 days after the end of each payroll period. However, the issue of when a claim for retirement benefits accrues under the Retirement Act is not part of the Hospital’s Motion for Partial Summary Judgment. Accordingly, the Adjudicative Hearing Officer declines to issue any ruling about that issue at this time.

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

Russell/Packard Dev. Inc. v. Carson, 2003 UT App 316, ¶ 13.

3. Here, there is no discovery rule mandated by statute. As a result, the limitations period on URS's contribution claim may only be equitably tolled upon a showing of concealment or exceptional circumstances. For the reasons stated below, and in the papers filed by the Hospital in support of its Motion, the Adjudicative Hearing Officer concludes that URS is not entitled to equitable tolling of the statute of limitations.

4. The exceptional circumstances version of the equitable discovery rule requires a showing that URS will suffer some hardship if the statute of limitations is imposed. *See Berneau v. Martino*, 2009 UT 87, ¶ 23. URS concedes that tolling under the exceptional circumstances version of the equitable discovery rule is not appropriate in this case. *See URS Memo. in Opposition to Motion for Partial Summary Judgment*, p. 16. URS will not suffer harm if the limitation period is imposed because a URS member shall not receive years of service credit if retirement contributions are not paid to URS by the employer. *See U.C.A. § 49-11-102(48)(a)*. Accordingly, the Adjudicative Hearing Officer finds that exceptional circumstances do not exist in this matter to warrant tolling of the statute of limitations.

5. Tolling under the concealment version of the equitable discovery rule also requires a showing that URS will suffer harm if the statute of limitations is imposed. *Russell/Packard*, 2003 UT App 316, ¶ 13 ("genesis" of concealment version is equitable estoppel); *Bahr v. Imus*, 2011 UT 19, ¶ 23 (injury is an element of equitable estoppel).

6. Additionally, tolling under the concealment version of the equitable discovery rule requires a showing that the Hospital actively or affirmatively concealed its 401(k) plan from URS. See *Russell Packard*, 2003 UT App 316, at ¶ 27; *Russell/Packard Dev. v. Carson*, 2005 UT 14, ¶¶ 38-39, see *Colosimo v. Roman Catholic Bishop of Salt Lake City*, 2007 UT 25, ¶ 49; see also *Utah State Retirement Board v. Utah Risk Management Mutual Association*, File No. 11-09, Findings of Fact and Conclusions of Law and Order dated August 6, 2012 and adopted by the Retirement Board on August 9, 2012 (finding the equitable discovery rule did not apply without evidence that the Respondent “actively concealed its status or engaged in misleading conduct with respect to URS”).

7. There is no evidence in the record that the Hospital actively or affirmatively concealed its 401(k) plan from URS. Without such evidence, the concealment version of the equitable discovery rule does not apply.

8. The Adjudicative Hearing Officer declines to extend Utah law to allow for tolling of the limitation period when a Respondent is silent about even an unknown statutory reporting obligation. Equitable tolling under such circumstances is not warranted by Utah law under *Russell Packard*, 2005 UT 14 and *Colosimo*, 2007 UT 25.

PARTIAL SUMMARY JUDGMENT

IT IS HEREBY ORDERED that the Hospital’s Motion for Partial Summary Judgment is GRANTED. URS’s claim for retirement contributions in this case is limited by the applicable three year statute of limitations to contribution claims that arose between August 11, 2006 and April 30, 2009.

DATED this ____ day of August, 2013.

J. Dennis Frederick
Adjudicative Hearing Officer

APPROVED AS TO FORM BY:

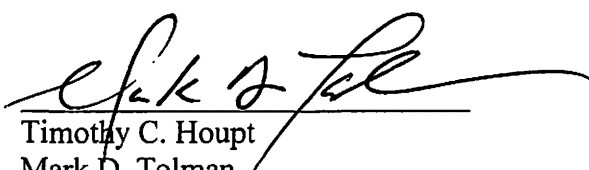
HOWARD, ANDERSEN, HANSEN, & EVES

David B. Hansen
Liza J. Eves
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BRIAN S. KING, ATTORNEY AT LAW

Brian S. King
Attorney for Intervenors

JONES WALDO HOLBROOK & McDONOUGH



Timothy C. Houpt
Mark D. Tolman
Attorneys for Respondent

DATED this ____ day of August, 2013.

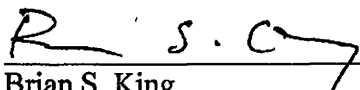
J. Dennis Frederick
Adjudicative Hearing Officer

APPROVED AS TO FORM BY:

HOWARD, ANDERSEN, HANSEN, & EVES

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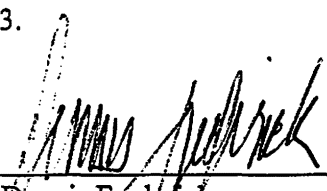


Brian S. King
Attorney for Intervenor

JONES WALDO HOLBROOK & McDONOUGH

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Mark D. Tolman
Attorneys for Respondent

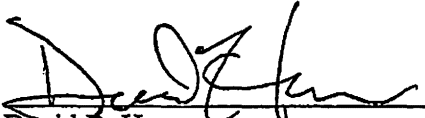
DATED this 26th day of August, 2013.



J. Dennis Frederick
Adjudicative Hearing Officer

APPROVED AS TO FORM BY:

HOWARD, ANDERSEN, HANSEN, & EVES



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BEFORE THE UTAH STATE RETIREMENT BOARD

UTAH STATE RETIREMENT BOARD,	:	FINDINGS OF UNDISPUTED FACT,
	:	CONCLUSIONS OF LAW, AND
Petitioner,	:	SUMMARY JUDGMENT
	:	
vs.	:	
	:	
KANE COUNTY HOSPITAL,	:	
	:	
Respondent.	:	
	:	File No. 09-22R
LORI RAMSAY and DAN SMALLING,	:	
	:	Hearing Officer: J. Dennis Frederick
Intervenors.	:	

A hearing was held on April 29, 2015, before the Adjudicative Hearing Officer, J. Dennis Frederick, on the Motion for Summary Judgment filed by Respondent Kane County Hospital (the "Hospital") and the Cross Motion for Summary Judgment filed by Intervenors Lori Ramsay and Dan Smalling ("Intervenors"). The Hospital was represented by Timothy B. Anderson and Mark D. Tolman. Petitioner, the Utah State Retirement Board ("URS" or "State Retirement Office"), was represented by David B. Hansen and Erin L. Gill. Intervenors Lori Ramsay and Dan Smalling were represented by Brian S. King.

By their Statement of Claim, Intervenors seek an order that the Hospital make retirement contribution payments to the State Retirement Systems to fund service credits on their behalf between 1993 and April 30, 2009. The Hospital seeks a summary judgment that Intervenors' claim for retirement contributions arising between August 11, 2006 and April 30, 2009 is moot and must be dismissed because the Hospital has funded contributions in the State Retirement Systems for them during this period. The Hospital also seeks a summary judgment dismissing Intervenors' claim for retirement contributions arising prior to August 11, 2006 as barred by the

statute of limitations. Intervenor seeks a summary judgment to establish the Hospital's liability for retirement contributions under the State Retirement Act.

Based upon the undisputed facts, and for the reasons stated in the Hospital's Motion and supporting papers, the Adjudicative Hearing Officer issued a decision granting the Hospital's Motion for Summary Judgment, and denying as moot the Intervenor's Cross Motion for Summary Judgment, on April 29, 2015.

STIPULATED UNDISPUTED FACTS

The parties stipulated to the following facts for purposes of this Motion only.

1. The Hospital is a special service district within the meaning of Utah Code § 17D-1-101, et seq. The special service district was created by the Kane County Commission in 1989 to operate the only hospital in Kane County.

2. Kane County Hospital, as a special service district, was an employer as defined under Utah Code Ann. § 49-11-102(23)(a) at all times relevant to this dispute.

3. In 1993, the Hospital began offering a 401(k) retirement plan to its employees.

4. Intervenor Lori Ramsay participated in the Hospital's 401(k) retirement plan from January 1, 1994 through July 20, 2007.

5. Intervenor Daniel Smalling participated in the Hospital's 401(k) retirement plan from October 7, 1995 through July 22, 2000.

6. On January 5, 2007, Intervenor Lori Ramsay, an employee of the Hospital, spoke with Cindy Bon, Accounts Service Manager for the Utah State Retirement Office ("Retirement Office"), to obtain information about state retirement benefits. Thereafter, the Retirement Office sent Ms. Ramsay a letter with the information that Ms. Ramsay requested and a copy of a Retirement New Group Questionnaire, which Ms. Ramsay provided to the Hospital. The purpose

of the Retirement New Group Questionnaire is to determine eligibility for participation in the State Retirement Systems.

7. On January 22, 2007, the Hospital completed the Retirement New Group Questionnaire and returned it to the Retirement Office.

8. On February 12, 2007, the Retirement Office informed the Hospital that it was eligible for membership in the State Retirement Systems. The Hospital declined to make any retrospective or prospective retirement contributions to the State Retirement Systems.

9. On April 30, 2009, pursuant to legislation passed by the Utah State Legislature in the 2009 General Legislative Session, the Hospital's Board of Directors approved a resolution to irrevocably elect nonparticipation in the State Retirement Systems.

10. The Hospital has paid all retirement contributions to the Retirement Office on behalf of the Intervenors for the period of time between June 2006¹ and April 30, 2009.

11. The Retirement Office has granted each of the Intervenors retirement service credit for the entire time period for which retirement contributions were received (i.e., June 2006 through April 30, 2009).

CONCLUSIONS OF LAW

Intervenors contend that the Hospital, as a special service district, was an employer as defined under the Retirement Act at all times relevant to this dispute. The Hospital disputes that contention. However, for purposes of the Hospital's Motion for Summary Judgment only, the parties asked the Adjudicative Hearing Officer to assume for sake of argument that the Hospital was an eligible employer under the Retirement Act, and thus able to participate in the State

¹ The Hospital funded retirement contributions from June 2006 through April 30, 2009, rather than from August 11, 2006, because the Retirement Office took the position that a claim for retirement contributions does not accrue until 60 days following the end of each pay period.

Retirement Systems. Thus, the following conclusions of law assume that the Hospital was an employer as defined under the Retirement Act.

1. A three year statute of limitation period applies to this case. *See* U.C.A. § 78B-2-305(4).

2. At the hearing on April 29, 2015, Intervenors argued that the claim they have made against the Hospital for retirement contributions has not yet accrued and will not accrue until they retire. Intervenors are judicially stopped from asserting this argument, which is contrary to the position they have taken all along in this case—that they have a right to seek retirement contribution payments from the Hospital now. However, even if Intervenors were not judicially stopped from making this argument, the claim they have made for retirement contributions has already accrued.

3. The statute of limitations begins to run upon the last act that forms the basis of the claim. *See Colosimo v. Roman Catholic Bishop of Salt Lake City*, 2004 UT App 436, ¶ 18. In a claim arising under the Retirement Act for retirement contributions against a participating employer, the last act that forms the basis of the claim is when the employer does not pay required retirement contributions to the State Retirement Office.

4. Thus, Intervenors claim for contributions against the Hospital began to run at the end of each pay period when retirement contributions should have been paid to the State Retirement Office. The Utah State Retirement Board recognized this in passing Resolution 13-05, which states in relevant part, “a cause of action arises under Utah Code § 49-11-613 when a payment is or should have been paid”

5. Intervenors’ argument that a claim for retirement contributions does not accrue until the age of retirement contravenes the purpose of the statute of limitations to encourage

litigants to diligently seek out and file their claims in a timely manner. A ruling that the statute does not begin to run until Intervenors retire would allow a claimant to sit on a claim for decades while interest accrues, documents are lost, memories fade, and witnesses pass away.

6. Accordingly, the statute of limitations in this case bars Intervenors' claims for retirement contributions that should have been paid to the State Retirement Office prior to August 11, 2006, three years before the Retirement Board initiated this matter by filing its Notice of Board Action.²

7. The Hospital has already funded retirement contributions for the Intervenors for the period of time within the statute of limitations—between August, 11, 2006 and April 30, 2009 (the date the Hospital elected nonparticipating in the State Retirement Systems). Thus, the Intervenors' claim to retirement contributions for this period of time is moot and must be dismissed.

8. For the reasons stated below, and in the papers filed by the Hospital in support of its Motion, the Adjudicative Hearing Officer concludes that Intervenors are not entitled to tolling of the statute of limitations for their claim to retirement contributions arising prior to August 11, 2006.

9. In limited circumstances, the "discovery rule may operate to toll the period of limitations until the discovery of the facts forming the basis for the cause of action." *Colosimo v.*

² The Retirement Office contends that the statute of limitations does not begin to run on a claim for retirement contributions until 60 days after the end of each payroll period because it allows for a 60 day grace period to pay retirement contributions. Thus, the statute of limitations may extend to June 11, 2006 (three years and 60 days prior to the filing of the Notice of Board Action). The Hearing Officer declines to issue a ruling on this issue because the Hospital has already paid retirement contributions for the Intervenors from June 2006 through April 30, 2009.

Roman Catholic Bishop of Salt Lake City, 2004 UT App 436, ¶ 20. The discovery rule is applied in only three narrow situations:

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

Russell/Packard Dev. Inc. v. Carson, 2003 UT App 316, ¶ 13.

10. Here, there is no discovery rule mandated by statute. As a result, the limitations period on Intervenor's contribution claim may only be equitably tolled upon a showing of concealment or exceptional circumstances.

11. "However, before a statute of limitations may be tolled under the equitable discovery rule, [Intervenor] must make an initial showing that [they] did not know nor should have reasonably known the facts underlying the cause of action in time to reasonably comply with the limitations period." See *Helfrich v. Adams*, 2013 UT App 37, ¶ 9, 299 P.3d 2 (internal quotation and alteration marks omitted). In other words, "[t]he limitations period is postponed only by belated discovery of key facts and not by delayed discovery of legal theories." *Anderson v. Dean Witter Reynolds, Inc.*, 920 P.2d 575, 579 (Utah Ct. App. 1996).

12. Intervenor's contribution claim arises from a single fact: the Hospital's provision of a 401(k) plan. Intervenor argues that when the Hospital provided a 401(k) benefit to them, it was required by the State Retirement Act to also participate in the State Retirement Systems and to make contributions to the State Retirement Systems on their behalf.

13. Intervenor has known about the fact underlying their cause of action—the provision of a 401(k) plan—since at least the mid-1990s. Although Intervenor may not have

discovered their legal theory until much later, the belated discovery of a legal theory does not justify equitable tolling of the statute of limitations.

14. Accordingly, because Intervenorors have not made the required threshold showing that they did not know, nor reasonably should have discovered, the facts underlying their claim in this case in time to bring a timely cause of action, they are not entitled to equitable tolling.

15. Even if Intervenorors could make this threshold showing, neither concealment nor exceptional circumstances would justify equitable tolling of the statute of limitations.

16. The Hospital has not concealed its 401(k) plan from Intervenorors, who admit knowledge of the 401(k) plan dating back to the mid-1990s.

17. Instead, Intervenorors argue that the Hospital engaged in concealment when it failed to comply with the reporting obligations of the State Retirement Act. However, there is no evidence in the record that the Hospital actually knew about any possible requirement that it report and make retirement contributions to the State Retirement Systems prior to February 12, 2007—when URS informed the Hospital that it was eligible to participate.

18. The Adjudicative Hearing Officer declines to extend Utah law to allow for tolling of the limitation period when a Respondent is silent about an unknown statutory reporting obligation. Equitable tolling under such circumstances is not warranted by Utah law.

19. Exceptional circumstances also do not justify tolling of the statute of limitations. Tolling under an exceptional circumstances theory “‘turns on a balancing test’ that ‘examines [t]he hardship the statute of limitations would impose on the plaintiff . . . [against] any prejudice to the defendant from difficulties of proof caused by the passage of time.’” *Helfrich v. Adams*, 2013 UT App 37, ¶ 18, 299 P.3d. 2 (quoting *Berneau v. Martino*, 2009 UT 87, ¶ 23, 223 P.3d 1128).

20. The Hospital did not impose a hardship on the Intervenor when it provided a 401(k) benefit to them—a benefit the Hospital had no obligation to provide. If the Hospital had never provided a 401(k) benefit to Intervenor, they would have no legal theory entitling them to benefits in the State Retirement Systems and would have received no retirement benefit at all. Exceptional circumstances are not present when the Hospital's conduct actually made Intervenor better off.

21. Further, the Hospital's ability to seek indemnification from third parties for liability dating back to 1993 would be impaired from difficulties of proof caused by the passage of time. Such difficulties could have been mitigated if Intervenor had not waited until January 2007 to investigate their possible entitlement to benefits in the State Retirement Systems.

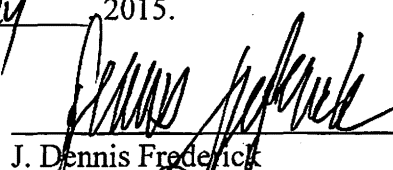
22. Accordingly, there are also no exceptional circumstances that justify equitable tolling of the limitation period.

23. Because Intervenor's claim for retirement contributions arising prior to August 11, 2006 is barred by the statute of limitations, the Adjudicative Hearing Officer declines to consider the merits of Intervenor's Cross Motion for Summary Judgment.

SUMMARY JUDGMENT

IT IS HEREBY ORDERED that the Hospital's Motion for Summary Judgment is GRANTED and Intervenor's claim is DISMISSED WITH PREJUDICE. IT IS FURTHER ORDERED that Intervenor's Cross Motion for Summary Judgment is DENIED as moot.

DATED this 18th day of May 2015.



J. Dennis Frederick
Adjudicative Hearing Officer

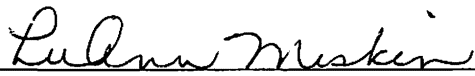
CERTIFICATE OF MAILING

I hereby certify that on the 18th day of May 2015, I mailed a true and correct copy of the foregoing **FINDINGS OF UNDISPUTED FACT, CONCLUSIONS OF LAW, AND SUMMARY JUDGMENT**, postage prepaid, to the following addresses:

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