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Gregory T. Ambus v. Utah State Board of Education, The Estate of James R. Moss, Jay B. Taggart, Neola Brown, Keith T. Checketts, John M. R. Covey, Ruth Hardy Funk, Darlene Hutchison, Frances Hatch Merrill, M. Richard Maxfield, Donald G. Christensen, Margaret R. Nelson, Valerie J. Kenson, John Millecam, Gail L. Mladejovsky, Marilyn Wenzel, Jeanine T. Bosch, John L. Jaussi, Paul J. Rasband, Roger C. Mouritsen

Reply Brief

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IN THE SUPREME COURT, STATE OF UTAH

GREGORY T. AMBUS,

Plaintiff/Appellant,

vs.

UTAH STATE BOARD OF
EDUCATION, THE ESTATE OF
JAMES R. MOSS, deceased,
individually and as
Superintendent of the UTAH
STATE BOARD OF EDUCATION,
JAY B. TAGGART, NEOLA BROWN,
KEITH T. CHECKETTS, JOHN
M.R. COVEY, RUTH HARDY FUNK,
DARLENE HUTCHISON, FRANCES
HATCH MERRILL, M. RICHARD
MAXFIELD, DONALD G.
CHRISTENSEN, MARGARET R.
NELSON, VALERIE J. KENSON,
and JOHN MILLECAM, individually:
and as members of the UTAH
STATE BOARD OF EDUCATION;
GAIL L. MLADEJOVSKY, MARILYN
WENZEL, JEANINE T. BOSCH,
JOHN L. JAUSSI, and PAUL J.
RASBAND, individually and as
members of the Professional
Practices Advisory Commission;
and ROGER C. MOURITSEN,
individually and as Executive
Secretary of the UTAH STATE
BOARD OF EDUCATION,

Defendants/Appellee.

PLAINTIFF/APPELLANT'S
REPLY BRIEF

Appellate
Court No. 920204

District: 890901757AA

Priority No. 15

Appeal From Order Of
The Third Judicial
District Court, County
of Salt Lake, State of
Utah.

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UTAH

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STANDARD OF REVIEW	1
Point One -	
<u>THE DEFENDANT UTAH STATE BOARD OF EDUCATION AND THE INDIVIDUAL DEFENDANTS IN THEIR OFFICIAL CAPACITIES ARE PERSONS UNDER SECTION 1983 AND MAY BE SUED FOR PROSPECTIVE INJUNCTIVE RELIEF, ANCILLARY ATTORNEYS FEES AND COURT COSTS</u>	2
Point Two -	
<u>THE PLAINTIFF HAS STANDING TO SUE FOR INJUNCTIVE AND DECLARATORY RELIEF BECAUSE A CASE OR CONTROVERSY STILL EXISTS</u>	3
Point Three -	
<u>THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF'S CLAIMS UNDER 42 U.S.C. SECTION 1983 ARE BARRED BY THE UTAH GOVERNMENTAL IMMUNITY ACT AND THE LAW OF THE CASE</u>	7
Point Four -	
<u>THE TRIAL COURT ERRED IN FAILING TO RULE ON THE PLAINTIFF'S CAUSES OF ACTION ARISING DIRECTLY UNDER THE FEDERAL AND STATE CONSTITUTIONS</u>	9
Point Five -	
<u>THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS</u>	11
i. Applicable Statute of Limitations	11
ii. Relation Back	12

Point Six -

<u>THE TRIAL COURT ERRED IN FINDING THE INDIVIDUAL</u> <u>DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY</u>	14
CONCLUSION	20
RELIEF SOUGHT	21
CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Ambus v. Granite Board of Education</u> , Appellate No. 91-4015, issued 9/24/92, rehearing granted 11/12/92 on Eleventh Amendment Immunity	18
<u>Ambus v. Utah State Board of Education</u> , 800 P.2d 811 (1990)	3,12,19
<u>Board of Regents v. Roth</u> , 408 U.S. 564, 572, 92 S.Ct. 2701, 2706 (1972)	5
<u>Breault v. Chairman of Bd. of Fire Com'rs</u> , 513 N.E.2d 1277 (Mass. 1987)	15
<u>Coleman v. Utah St. Land Board</u> , 795 P.2d 622, 631 (Utah 1990)	1,8
<u>Corum v. University of North Carolina</u> , 413 S.E.2d 276 (1992)	8,10
<u>Davis v. Passman</u> , 422 U.S. 229 (1979)	10
<u>Davis v. Scherer</u> , 468 U.S. 183, n. 14 (1984)	15
<u>Doe v. Utah Department of Public Safety</u> , 782 P.2d 489 (1989)	19
<u>Doxy-Layton Co. v. Clark</u> , 548 P.2d 902, 906 (Utah 1976)	14
<u>Ex Parte Young</u> , 209 U.S. 123 (1908)	9
<u>Felder v. Casey</u> , 108 S.Ct. 2303 (1988)	7,12,13
<u>Forastiere v. Breault</u> , 108 S.Ct. 1078 (1988)	15
<u>Franklin v. Gwinnett County Public Schools & Prescott</u> , 112 S.Ct. 1028 (1992)	9
<u>Gomez v. Toledo</u> , 466 U.S. 635 (1980)	1,8
<u>Hafer v. Melo</u> , 112 S.Ct. 358 (1991)	2,3,5
<u>Harlow v. Fitzgerald</u> , 457 U.S. 800, 818 (1982)	15,16
<u>Hensly v. Eckerhart</u> , 461 U.S. 424 (1983)	6

<u>Hutto v. Finney</u> , 437 U.S. 678 (1978)	2,6
<u>Lorenc v. Call</u> , 789 P.2d 46 (Utah App. 1990)	5
<u>Luckey v. Harris</u> , 860 F.2d 1012 (11th Cir. 1988), cert. denied, 110 S.Ct. 2562, 109 L.Ed.2d 744 (1990) ...	9
<u>Maddock v. Salt Lake City Corp.</u> , 740 P.2d 1337 (Utah 1987)	7,12
<u>Maher v. Gagne</u> , 448 U.S. 122 (1980)	1,5
<u>Maine v. Thiboutot</u> , 488 U.S. 1, 100 S.Ct. 2502 (1980)	1,6
<u>Mangels v. Pena</u> , 789 F.2d 836, 839 (10th Cir. 1986)	19
<u>Martinez v. California</u> , 444 U.S. 277, 283-284, n.8, 100 S.Ct. 553, 558, n.8 (1980)	1,7
<u>Matter of Noren</u> , 621 P.2d 1247 (1980)	19
<u>Mismash v. Murray City</u> , 730 F.2d 1366 (10th Cir. 1984)	11
<u>Morrison v. Jones</u> , 607 F.2d 1269 (9th Cir. 1979), cert. den. 100 S.Ct. 1648 (1980)	1,8
<u>Mullane v. Central Hanover Bank & Trust Co.</u> , 339 U.S. 306, 313-314 (1950)	18
<u>Nixon v. Administrator of General Services</u> , 433 U.S. 425 (1977)	19
<u>Riggs v. City of Albuquerque</u> , 916 F.2d 582, 585-586 (10th Cir. 1990)	5
<u>Scheuer v. Rhodes</u> , 416 U.S. 232, 237-238 (1974)	9
<u>Utah State Univ., Etc. v. Stro & Co.</u> , 646 P.2d 715, 712 (Utah 1982)	15
<u>Vali Convalescent & Care Inst. v. Ind. Com'n.</u> , 649 P.2d 33 (Utah 1982)	10
<u>Vina v. Jefferson Ins. Co. of New York</u> , 761 P.2d 581, 586 (Utah App. 1988)	14

<u>Will v. Michigan Dept. of State Police</u> , 491 U.S. 58, 105 L.Ed.45, 109 S.Ct. 2304 (1989)	2,3,5
<u>Wilson v. Garcia</u> , 471 U.S. 261 (1985)	11,12

STANDARD OF REVIEW

The Plaintiff-Appellant (herein "Plaintiff") disputes the Defendant-Appellees' (herein "Defendants") mischaracterizations concerning the appropriate standard of review contained through their Brief. First, state courts have jurisdiction to entertain Section 1983 Actions. Martinez v. California, 444 U.S. 277, 283-284, n.8, 100 S.Ct. 553, 558, n.8 (1980) and Maine v. Thiboutot, 488 U.S. 1, 100 S.Ct. 2502 (1980). Second, a dismissal under Rule 12(b) U.R.C.P. is a severe measure and only should be granted unless it is clear that a party is not entitled to relief under any set of facts which could be proved in support of the party's claim. Coleman v. Utah State Land Bd., 795 P.2d 622 (Utah 1990). Third, under Section 1983, a plaintiff is required to make only two allegations in order to state a cause of action under the statute: (1) that some person deprived him of a federal right, and (2) that such person acted under color of state or territorial law. Gomez v. Toledo, 466 U.S. 635 (1980). Fourth, complaints asserting Section 1983 claims are to be liberally construed. Morrison v. Jones, 607 F.2d 1269 (9th Cir. 1979), cert. den. 100 S.Ct. 1648 (1980). Fifth, no specific reference to Section 1983 is required to state a claim under Section 1983. Maher v. Gagne, 448 U.S. 122, 128-29 n. 11 (1980).

Point One

THE DEFENDANT UTAH STATE BOARD OF EDUCATION AND THE INDIVIDUAL
DEFENDANTS IN THEIR OFFICIAL CAPACITIES ARE PERSONS UNDER
SECTION 1983 AND MAY BE SUED FOR PROSPECTIVE INJUNCTIVE
RELIEF, ANCILLARY ATTORNEYS FEES AND COURT COSTS

The Defendant has attempted to throw confusion into the analysis of this issue. While it is true that the State and its agencies are not persons under Section 1983 for damage actions, Will v. Michigan Dept. of State Police, 491 U.S. 58, 105 L.Ed.45, 109 S.Ct. 2304 (1989), Will makes it clear that a state, its agencies and officers in official capacities, are persons under Section 1983 for prospective injunctive relief. Will, supra, 105 L.Ed. at 58, n. 10. The reason for this is because such actions are not treated as actions against the state. This includes ancillary attorneys fees and court costs. Hutto v. Finney, 437 U.S. 678 (1978). Further, contrary to the Defendants' assertion, a Section 1983 action for damages may lie against state officials in their individual capacities. Hafer v. Melo, 112 S.Ct. 358 (1991). Hafer is significant because Hafer clarified its decision in Will. The Supreme Court in Hafer held, supra at 360:

"In Will v. Michigan Dept. of State Police, (citation omitted) we held that state officials 'acting in their official capacities' are outside the class of 'persons' subject to liability under 42 U.S.C. Section 1983. Petitioner takes this language to mean that Section 1983 does not authorize suits against state officers for damages arising from official acts. We reject this reading of Will and hold that state officials sued in their individual capacities are 'persons' for purposes of Section 1983."

In the present action, the Plaintiff filed an initial Complaint, Record, Page 2, an Amended Complaint, Record, Page 179, and a Second Amended Complaint. Exhibit A to Appellant's Brief. Each of these complaints allege that the Plaintiff was denied his federal rights by the Defendants under state law. In addition, the Plaintiff's Second Amended Complaint sets forth the parties with particularity and the manner in which they are sued. Paragraph 3 alleges that the Defendant State Board of Education is sued for prospective injunctive relief, attorneys fees and court costs. Will, supra. Paragraphs 4 through 7 allege that the named individual Defendants are sued both in their individual capacities for the damages alleged, and in their official capacities for the injunctive prospective relief alleged. Hafer, supra. The Plaintiff's Second Amended Complaint seeks an injunction restoring the Plaintiff's teaching certificate. It also seeks special, compensatory, and punitive damages. Lastly, it seeks ancillary attorneys fees and costs of court. Accordingly, the Plaintiff's Complaint sets forth appropriate causes of action and the District Court's dismissal under Rule 12(b) was plain error.

Point Two

THE PLAINTIFF HAS STANDING TO SUE FOR INJUNCTIVE AND DECLARATORY RELIEF BECAUSE A CASE OR CONTROVERSY STILL EXISTS

After this Court remanded the case following its decision in Ambus v. Utah State Board of Education, 800 P.2d 811 (1990),

the Plaintiff moved for partial summary judgment to immediately restore his certificate to teach. The District Court granted the Plaintiff's motion. As a consequence the Plaintiff's certificate was restored but without any further relief. The Court granted the Plaintiff the right to file an amended complaint before determining what relief would be appropriate. Thereafter, the District Court dismissed the entire action based upon the Defendants' Motion to Dismiss.

On appeal the Defendant argues that the Plaintiff's claims for injunctive relief to restore the Plaintiff's certificate are moot because the Defendant State Board of Education properly restored his certificate following the District Court's award of partial summary judgment. Although the Defendant did restore the Plaintiff's certificate, the Defendant did not fully comply with the District Court's Order and provide the Plaintiff with any proof that it complied with Paragraph 3 of the Order and notified every school district, in Utah and elsewhere, that the Plaintiff's certificate had been restored. The Defendant ignores this fact in its Brief to the Court. The fact remains that the Plaintiff has not been accepted for employment in the school system in Utah or elsewhere since his certificate was restored. The Plaintiff contends that the Defendants have not fully complied with the Court's order and, in addition, the Plaintiff claims that the

Defendants' dissemination of expunged information affected his liberty interests under Board of Regents v. Roth, 408 U.S. 564, 572-73, 92 S.Ct. 2701, 2706-07 (1972). These claims are ongoing in nature. Riggs v. City of Albuquerque, 916 F.2d 582, 585-586 (10th Cir. 1990). Not only is prospective injunctive relief proper as to all defendants, Will, supra, but also is the Plaintiff's damage action as to the individual defendants, Hafer, supra.

Moreover, the Plaintiff is entitled to attorney's fees as a prevailing party. Lorenc v. Call, 789 P.2d 46 (Utah App. 1990) and Maher v. Gagne, 448 U.S. 122 (1980). The District Court specifically refused to address this issue despite the Plaintiff's argument to do so. See Plaintiff's Reply to Defendant's Motion to Dismiss, Point Three, p. 11. Instead, the District Court dismissed the Plaintiff's action with prejudice in its entirety. Contrary to the Defendants' assertion, attorney's fees is not a collateral matter which may be filed as an action independently of the main merits action. Indeed, the Defendant never made this argument to the District Court. The Defendant insisted that the Plaintiff's claims for attorney's fees be dismissed along with the Plaintiff's Complaint. The Plaintiff is not aware of any authority which suggests that a prevailing party must file a separate action under Section 1988 in order to recover his fees. Attorney's

fees are, in fact, determined upon the extent a prevailing party is successful in his merits action. Hensly v. Eckerhart, 461 U.S. 424 (1983). Accordingly, attorney's fees and court costs are core elements in civil rights actions seeking injunctive prospective relief. Hutto v. Finney, 437 U.S. 678 (1978), reh denied, 439 U.S. 1112 (1979). In the present action, the District Court dismissed the Plaintiff's request for attorney's fees in dismissing the Plaintiff's amended complaint. It was plain error for the District Court to dismiss the Plaintiff's Complaint under Rule 12(b) seeking such fees.

The Defendants intimate that their actions merely violated the expungement code and, since they returned the certificate, no Section 1983 action may lie. Such is not the case. In Maine v. Thiboutot, *supra*, the Supreme Court held that this Court has authority to hear Section 1983 claims brought in state court within an administrative context where the administrative procedures violated federal law. The facts in Maine show that the Plaintiffs there sought initial judicial review of Maine's Human Services agency which denied them benefits after they prevailed. The Plaintiffs subsequently amended their complaint to specifically assert Section 1983 violations to recover their attorney's fees. The Supreme Court upheld their award of attorney's fees.

Point Three

THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF'S CLAIMS
UNDER 42 U.S.C. SECTION 1983 ARE BARRED BY THE UTAH
GOVERNMENTAL IMMUNITY ACT AND THE LAW OF THE CASE

The Defendant specifically argued at the District Court level that the Plaintiff's claims were barred by the Utah Governmental Immunity Act and the law of the case. See Defendant's Motion to Dismiss, Paragraphs 5, 6, and 7 (Record p. 405 and 406). The District Court dismissed the Plaintiff's Complaint based in part upon these specific arguments. See Order dated November 25, 1992, page 2. (Record, p. 490-492).

Now, on appeal, the Defendants have retreated from these positions. The Defendants' Brief, page 13, states for the first time in this case that, "Defendants do not claim that the Utah Governmental Immunity Act applies to the plaintiff's federal civil rights claims." Indeed, as Plaintiff argued before the District Court, Utah's Governmental Immunity Act cannot bar his federal civil rights claims. Martinez v. California, 444 U.S. 277 (1980) and Felder v. Casey, 108 S.Ct. 2303 (1988). "Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under Section 1983 is preempted even where the federal civil rights litigation takes place in state court...." *Id.* at 2307. Also see Maddock v. Salt Lake City Corp., 740 P.2d 1337 (Utah 1987) wherein this Court implicitly overruled the same argument.

The Defendants have apparently retreated from their "law of the case" argument in this regard as well. The Defendants' Brief makes no mention of this argument at all.

Instead, in an apparent attempt to mislead this Court, the Defendants assert that Utah's Governmental Immunity Act should apply to Plaintiff's state law claims. This argument is irrelevant. The Plaintiff's Complaint clearly asserts federal civil rights claims under Section 1983. Any confusion concerning this fact must be resolved against the Defendants under the liberal pleading rules set forth in Gomez v. Toledo and Morrison v. Jones, *supra*. If the Defendants are attempting to assert the statutory immunity found in the Act against the Plaintiff's claims founded directly under Utah's Constitution, the Defendants' arguments also must fail because Utah's Governmental Immunity Act cannot have precedence over Utah's Constitution. Coleman v. Utah St. Land Board, 795 P.2d 622, 631 (Utah 1990) and Corum v. University of North Carolina, 413 S.E.2d 276 (1992). As the North Carolina Supreme Court stated in Corum, which is a case surprisingly similar to the instant one,

"However, in determining the rights of citizens under the Declaration of Rights of our Constitution, it is the judiciary's responsibility to guard and protect those rights. The doctrine of sovereign immunity cannot stand as a barrier to North Carolina's citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights. It would indeed be a fanciful gesture to say on the

one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity." Id at 291.

Clearly, under the Defendants' argument the "sovereign immunity tail" would be wagging the "constitutional dog."

Point Four

THE TRIAL COURT ERRED IN FAILING TO RULE ON THE PLAINTIFF'S CAUSES OF ACTION ARISING DIRECTLY UNDER THE FEDERAL AND STATE CONSTITUTIONS

In Point IV of the Defendants' Brief, the Defendants challenge whether the Plaintiff may allege a direct violation of the Federal Constitution because the named individual Defendants are state officials and not federal officials. The Plaintiff submits the Defendants are incorrect in their position. Since Ex Parte Young, 209 U.S. 123 (1908), Courts have permitted suits against state officials for direct violations of the Federal Constitution. This includes damage actions against the officials when sued in an individual capacity. Franklin v. Gwinnett County Public Schools, & Prescott, 112 S.Ct. 1028 (1992), Scheuer v. Rhodes, 416 U.S. 232, 237-238 (1974). Also see Luckey v. Harris, 860 F.2d 1012, cert. denied, 110 S.Ct. 2562 (1990) (11th Cir. 1988), cert. denied, 110 S.Ct. 2562, 109 L.Ed.2d 744 (1990) and other cases cited in Plaintiff's Appellant Brief, p. 47-49.

Noteably, the Defendants do not contest on appeal the Plaintiff's right to sue directly under Utah's Constitution. Paragraphs 19, 37, 44, and 48 of the Plaintiff's complaint allege direct violations of Utah's Constitution. For example, Article I, Section 7 provides, "No person shall be deprived of life, liberty or property, without due process of law." This court has held that decisions relating to the Fifth and Fourteenth Amendments to the Federal Constitution are "highly persuasive" when interpreting the due process clause of the Utah Constitution. Vali Convalescent & Care Inst. v. Ind. Com'n., 649 P.2d 33, 35-36 (Utah 1982). In Davis v. Passman, 422 U.S. 228 (1979), the Supreme Court held that a cause of action and damage remedy may be implied directly under the Due Process Clause of the Federal Constitution. If Davis is highly persuasive, this court should also imply a direct cause of action under Article I, Section 7, of Utah's Constitution.

Despite either the Defendants' ignorance or cavalier attitude on this point, state appellate courts vigorously defend its citizens from unwarranted governmental abridgement of rights guaranteed by their own constitutions. Again, a most instructive case is Corum v. University of North Carolina, supra, where the Carolina Supreme Court specifically and directly enforced its freedom of speech and due process provisions.

Point Five

THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF'S CLAIMS
ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

i.

Applicable Statute of Limitations

The Defendant ignores the decision of Wilson v. Garcia, 471 U.S. 261 (1985). This seminal decision held that states must apply the limitations period which are applicable to personal injury cases. The rationale was due to the federal interests in "uniformity, certainty, and the minimization of unnecessary litigation". Id. at 275. The court held that these federal interests could best be achieved by "characterizing" Section 1983 claims as personal injury claims. "The characterization of all Section 1983 actions as involving claims for personal injuries minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by Section 1983". Id. at 279. This characterization prevents state laws from "discriminat[ing] against federal claims, or be inconsistent with federal law in any respect."

Utah's legislature, in attempting to truncate federal interests, enacted Section 78-12-28(3) U.C.A. (1953) to provide a two year statute of limitation, and was in direct response to the Tenth Circuit's decision of Mismash v. Murray City, 730 F.2d 1366 (10th Cir. 1984). Clearly this is an abuse of

legislative function. This legislative action is squarely contemptuous of Wilson and cannot be condoned. As stated in Federal v. Casey, supra, at 2306, which struck down Wisconsin's notice-of-claim statute, a "federal right cannot be defeated by the forms of local practice."

In Maddocks v. Salt Lake City Corp., supra, at 1339, footnote 1, this Court recognized the conflict between Wilson and Section 78-12-28(3). However, it left the validity of the statute for another day. The Plaintiff respectfully submits that the day has come to strike down the statute as unduly restrictive of federal civil rights.

ii.

Relation Back

The Defendants dispute that the concept of relation back is applicable in this case. In response, the Plaintiff submits that he did make a timely request to amend his complaint which was denied by the trial court.¹ Further, assuming that Utah's two year statute is applicable from the Plaintiff's second request to amend his complaint, the Plaintiff claims that the principle of relation back is indeed applicable to the facts of this case.

¹ This is contrary to the Defendant's assertion that the Plaintiff did not attempt to characterize his action as a Section 1983 action until after the remand in Ambus v. State Board of Education, supra.

The Plaintiff filed his original complaint and request for a preliminary injunction in a hurried fashion due to the fact the Defendants' actions removed the Plaintiff from his job and classroom. The Defendants filed a motion to dismiss the Plaintiff's original complaint based on Utah's Governmental Immunity Act. (Record 148-149). In response, the Plaintiff pointed out Felder v. Casey, supra, which rebutted the Defendant's motion in its entirety. In the Plaintiff's response, the Plaintiff specifically requested the right to amend to be more specific with his Section 1983 allegations. (Record 162-164). This request to amend was clearly within the limitations period. The District Court thereafter refused to permit an amendment to assert Section 1983 damages due to the belief that Felder v. Casey was not applicable but permitted an amendment only for purposes of claims involving judicial review. (See Exhibit A, at Record p. 178). Subsequently, following this Court's remand following the interlocutory appeal, the Plaintiff filed his Second Amended Complaint insisting on the Section 1983 damages which resulted in the dismissal which is before this Court. Based upon these facts, the Plaintiff did in fact make a timely application to amend his complaint which was erroneously denied by the trial court.

Additionally, even if this Court disregards the Plaintiff's initial request to amend, the Plaintiff's Second Amended Complaint should be viewed under the relation back

principle as set forth in Plaintiff's Appellant Brief. The Defendants were well aware that a civil rights action was pending due to their own motions to dismiss. Due to the trial court's intransigence the Plaintiff was not permitted to specifically name each of the additional parties. Changing the capacity in which the Defendants are sued did not change any of the material allegations of the complaint or add new causes of action. As stated in Vina v. Jefferson Ins. Co. of New York, 761 P.2d 581, 586 (Utah App. 1988) and Doxy-Layton Co. v. Clark, 548 P.2d 902, 906 (Utah 1976), an exception exists to the rule against adding new parties where the new and old parties have an identity of interest. The State Board of Education and the named individuals clearly have such identity of interest. The Attorney General has represented all Defendants in this action from the initial hearings in this case before the Defendant Board to the present time. The Defendant Utah State Board of Education and all other Defendants were clearly put on notice of these claims as argued in Plaintiff-Appellant's Brief, at p. 20-27.

Point Six

THE TRIAL COURT ERRED IN FINDING THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

The Defendants do not make any serious attempt to justify their actions under the ministerial distinction to the qualified immunity defense as argued in Appellant's Brief, p.

35-41. Ignoring this distinction, the Defendants primarily argue that they are entitled to the defense of qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

The ministerial distinction, however, is critical to an examination of the Plaintiff's claims. Only if the ministerial distinction fails must the court examine the test in Harlow. The ministerial distinction is based upon the difference between discretionary acts, such as the decision to bring charges to suspend or revoke the Plaintiff's certificate, and the ministerial acts which implement such discretionary decision. Ministerial acts are not clothed with qualified immunity if such acts violates the Plaintiff's civil or constitutional rights. See Appellant's Brief, p. 40-41. Also see Davis v. Scherer, 468 U.S. 183, 196 n. 14 (1984) where the Supreme Court emphasized this distinction and Breault v. Chairman of Bd. of Fire Com'rs, 513 N.E.2d 1277 (Mass. 1987), cert. denied subnom. Forastiere v. Breault, 108 S.Ct. 1078 (1988). Also cf. Utah State Univ., Etc. v. Stro & Co., 646 P.2d 715, 712 (Utah 1982) where this court recognized the distinction of discretionary-ministerial duties involving the qualified immunity defense in an action to recover investments improperly placed. In this case, the Plaintiff does not challenge the Defendant's decision to bring charges to suspend or revoke his certificate. Rather he challenges the method and manner of implementing such decision. He challenges whether

the Defendants can take his certificate, resulting in loss of employment and reputation, by taking his certificate without any pretermination hearing, by conducting hearings without compliance with the appropriate statutory notice, by taking his certificate without any findings of fact, by using evidence at the hearings which violated Utah's expungement code, and ultimately by relying upon a newspaper article in justifying its conduct. These are all well pleaded allegations contained in the Plaintiff's Complaint which should survive a motion to dismiss.

With respect to the Defendant's direct claim of qualified immunity, the Plaintiff points out that even acts deemed discretionary in character are not entitled to qualified immunity if such acts violate "clearly established" rights. Harlow, supra. The quarrel seems to lie in what the Plaintiff's clearly established rights were at the time they were violated. The Defendants contest only two items in their brief. First, they assert the notice provisions of Section 53A-7-111 U.C.A. (1953), as amended, were satisfied² by merely

² Section 53A-7-111(1) provides that the Educational Professional Practices Commission, an arm of the Defendant Board, may not adversely affect a person's certificate "without giving the individual an opportunity for a fair hearing." Subsection (2) provides, "If an individual fails to request a hearing within 30 days after written notice is sent to the last known address and to the address shown on the records of the commission, the commission may take action against the certificate holder under this section." (Emphasis added).

sending notice to the Plaintiff's last known address. The Defendants claim that a notice was mailed certified but returned. However, the Defendants do not discuss Plaintiff's contentions that the face of the documents do not show any official postmark, postage, certified fee, or date stamp. See Appellant's Brief, p. 7. Moreover, even assuming the notice was merely mailed to the Plaintiff's last known address, such act violates Section 53A-7-111 which also requires mailing to the Plaintiff's permanent mailing address which was not done in this case.³ Notwithstanding the fact that the alleged mailing was returned, no other action was taken to provide actual notice to the Plaintiff despite the fact the Defendants knew the Plaintiff had filed suit in federal court, was represented by specific counsel, and was teaching in the Salt Lake School District which is generally supervised and controlled by the Defendant Board. Section 53A-7-111 is a mandatory act where no discretion is permitted. Moreover, it was clearly established that notice, in order to comport with due process, be

³ Contrary to the Defendants' contentions, the records show the Plaintiff's permanent address as different from the address to where the notice was allegedly mailed. It is significant to note that someone other than the Plaintiff, and presumably a Defendant, crossed off the Plaintiff's permanent address in these records in an apparent attempt to show that the two addresses were the same. See Exhibit B attached. The Plaintiff's permanent address has never changed and remains the El Serrito address to this date.

"reasonably calculated under all the circumstances" to give interested parties an opportunity to protect their interests. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-314 (1950). Ignoring a party's actual permanent address contained in their own records, ignoring a party's counsel, and ignoring the Plaintiff's actual place of work which was under the Defendants' control, and blindly relying upon mailing to a questionable last known address, violated the Mullane standard.

With respect to the expungement matter, contrary to Defendants' desires, Utah's Expungement Act has been around for a long time. The Defendants cannot deny that Utah's Expungement Act, Section 77-18-2(5)(a) U.C.A. (1953), as amended, was clearly established. Within the context of the specific facts of this case, the Tenth Circuit recently ruled that Granite Board of Education's violation of Utah's Expungement Act violated Plaintiff's Section 1983 rights to due process of law. Ambus v. Granite Board of Education, Appellate No. 91-4015, issued 9/24/92, rehearing granted 11/12/92 on Eleventh Amendment Immunity issue only. In advance of the hearing in this case⁴ before the Defendant Board, and at the

⁴ In advance of the "reconsideration hearings" Plaintiff's counsel made the Defendants aware of their constitutional violations surrounding their actions, Defendants refused to return the Plaintiff's certificate, and instead sent notice to all fifty states and Utah School Districts of the revocation. (Plaintiff's Initial Brief, Exhibit G).

time of the hearing, the Plaintiff specifically informed the Board of the expungement law and the fact the plain language of the act prohibited what they intended to do and ultimately did. Instead, the Defendants attempted to carve out an "exception" to this plain language and failed. This Court in Ambus v. State Board of Education, 800 P.2d 811 (1990) did not invent any protection for the Plaintiff but instead merely enforced the plain language of the expungement statute. In addition, this court had already held against the position advanced by the Defendants as early as 1980 in Matter of Noren, 621 P.2d 1247 (1980). Doe v. Utah Department of Public Safety, 782 P.2d 489 (1989) had also been decided adversely to the Defendants' position by the district court and the Attorney General was involved in that case as well. Lastly, it was clearly established under Nixon v. Administrator of General Services, 433 U.S. 425 (1977) that one element of privacy, protected by the constitution, is the unwelcomed disclosure of personal matters protected by statute. As stated in Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986), citing Nixon, "Information is constitutionally protected when a legitimate expectation exists that it will remain confidential while in the state's possession."

The Defendants' lame excuse that it didn't know the law is unacceptable. The rights which were violated were clearly

established and were rights which a reasonable person should have known. The trial court's finding of qualified immunity was in error and should be reversed by this Court.

CONCLUSION

The Plaintiff's certificate to teach was revoked by the Defendants based upon a newspaper account without any notice to the Plaintiff, without any pretermination hearing, and with sealed and expunged records during a "reconsideration" post-termination hearing, without first restoring the Plaintiff's certificate, and with no findings of fact or conclusions of law. Such action resulted in his dismissal as a teacher from the Salt Lake School District. Ultimately the District Court ordered the return of his certificate. However, the Plaintiff suffered real and substantial damages in the form of attorney's fees and loss of income. The core inquiry is whether the state Board and its officials may be shielded from any responsibility for their unconstitutional conduct. The critical question is whether the Defendants are protected from federal Section 1983 liability in some fashion under state law. The Plaintiff suggests not. The Plaintiff in this case spent six years achieving a college education and a certificate to practice what our society deems a professional calling. Not only was this abruptly taken from the Plaintiff in violation of the law, it resulted in the loss of significant employment

income, future pay, and substantial attorney's fees. Not only was the Plaintiff banned from teaching in Utah schools but, through the Defendants notification procedures to other states, he was banned from seeking employment anywhere in the United States. Even though his certificate was returned, no school district in Utah has since hired the Plaintiff due to the widespread dissemination of the events which were supposed to be sealed and expunged. Accordingly the Plaintiff's liberty interests, or his name and reputation, has been adversely affected.

The founders of our State and Federal Constitutions envisioned a system of government that would be accountable for its irresponsible actions. The Defendants are required by law, Section 53A-13-101(4) U.C.A. (1988), to establish statewide curriculum requirements which teach "obedience to law, respect for and the understanding of the Constitutions of the United States and for the State of Utah." The Plaintiff respectfully submits that the District Court erred in dismissing his complaint for damages and attorney's fees. The Defendants' actions in this case were clearly unlawful. The Plaintiff respectfully requests that this Court reinstate the Plaintiff's case, hold that the Plaintiff has stated proper claims, and remand with instructions to proceed with the evidence.

RELIEF SOUGHT

The Plaintiff respectfully requests that this Court

reverse the District Court and reinstate the Plaintiff's Complaint in full. The Plaintiff respectfully requests that this Court remand with instructions to the District Court to:


1. Determine whether the Defendant Utah State Board of Education complied with the Order of the District Court to notify all jurisdictions of the reinstatement of Plaintiff's certificate.

2. Award attorney's fees against the Defendant Utah State Board of Education and its officials in their official capacities as ancillary to the equitable relief already granted in restoring the Plaintiff's certificate and ancillary to the proof of compliance with the District Court's Order.

3. Consider the Plaintiff's claims for damages due to his employment, and special, general and punitive damages against the individual defendants in their individual capacities.

4. Consider what additional attorney's fees may be due should the Plaintiff prevail on his theories of damages against the individual defendants in their individual capacities.

DATED this 19 day of November, 1992.



STEPHEN W. COOK
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

STATE OF UTAH)
 : ss.
County of Salt Lake)

STEPHEN W. COOK, being duly sworn, says:

Stephen W. Cook, of the law firm COOK & DAVIS, attorney
for Plaintiff/Appellant herein; served the attached
PLAINTIFF/APPELLANT'S REPLY BRIEF upon:


Brent A. Burnett
Assistant Attorney General
236 State Capitol Bldg.
Salt Lake City, Utah 84114

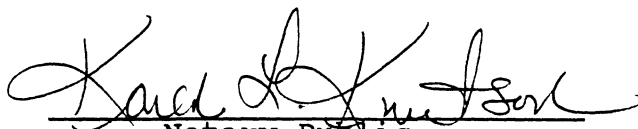
by placing a true and correct copy thereof in an envelope and
depositing the same, sealed, with first-class postage prepaid
thereon, in the United States Mail at Salt Lake City, Utah, on
the 19th day of November, 1992.



STEPHEN W. COOK

Subscribed and sworn to before me this 19th day of
November, 1992.


Notary Public
KAREN L. KNUTSON
1815 E. Osage Orange Ave.
Salt Lake City, Utah 84121
My Commission Expires
December 30, 1992
State of Utah
My Commission Expires:
12-30-92



Notary Public

Residing at Salt Lake County

EXHIBIT A

**PLAINTIFF'S CONSTITUTIONAL CLAIMS FOR DAMAGES BARRED
BY UTAH GOVERNMENTAL IMMUNITY ACT**

THIRD JUDICIAL DISTRICT
County of Salt Lake - State of Utah

FILE NO. 890901757 AA

TITLE: (✓ PARTIES PRESENT)

COUNSEL: (✓ COUNSEL PRESENT)

GREGORY AMBUS

Stephen W. Cook

-vs-

UTAH STATE BOARD OF EDUCATION

John S. McAllister

CLERK

HON. James S. Sawaya

JUDGE

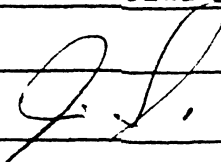
REPORTER

DATE: May 16, 1989

BAILIFF

The matter of defendant's Motion to Dismiss came on regularly for hearing on the 15th day of May, 1989 with appearances as above stated. The matter was fully presented, argued and submitted, and decision of the Court taken under advisement. The Court having reviewed the pleadings and the submissions of the parties and having considered the argument of counsel, now makes its ruling as follows:

Plaintiff's claim for damages is barred by the Utah Governmental Immunity Act as applied to the uncontroverted facts of this case and the claim of the Plaintiff for damages. See Utah Code Annotated, Sec. 63-30-1 et. seq. The Motion to Dismiss Plaintiff's claim for damages is granted. Plaintiff's Petition for judicial review of the order of the administrative board is not dismissed, however that claim is vague, and Plaintiff is granted ten days from date of this Minute Entry ruling to file and amended Petition setting forth his ~~xxx~~ claim and the relief sought.



178

Copies to counsel m. C. J. M. 16 1989.

EXHIBIT B

PERMANENT ADDRESS OF PLAINTIFF

Rec. by Westminster 8-13-81
Record of Teaching Experience

Applicant May Write in This Space
(List Chronologically--Do Not Include Substitute or Student Teaching)

[illegible]

33764-Secretary, AEC 84109 831 5-14-81
UTAH STATE BOARD OF EDUCATION, Division of Staff Development
250 East Fifth South, Salt Lake City, Utah 84111
Gregory Thomas Ambus
See RCM
Date July 30, 1981

Full Name Gregory Thomas Ambas Soc. Sec. No. 529-94-5946
Mailing address 3316 EL Serrito Dr SLC, UT 84106 Date of Birth 10-2-55
Sex M Marital Status Single Citizenship U.S. Place of Birth Odgen, Utah
Certificate applied for Teaching Certificate Tchg. Major Biology Tchg. Minor _____
Degrees (Inst., Yr.) B.S. Biology 1980 - Secondary Credential 1981
Previous Utah Certification (if any) _____ Year granted _____
Have you ever had a certificate revoked or suspended? NO Where? _____ Have you ever been
convicted of violating any law (except traffic violations)? NO If yes, explain on separate sheet.

Applicant Should Not Write in This Space

[illegible]

STEPHEN W. COOK
ROBERT H. WILDE
RONALD E. KUNZ
JOHN K. RICE

—
REID C. DAVIS
KELLY DE HILL

COOK AND WILDE

A PROFESSIONAL LAW CORPORATION

6925 UNION PARK CENTER, SUITE 490
MIDVALE, UTAH 84047

TELEPHONE 801-255-6000
FAX 801-561-3829

April 3, 1989

HAND DELIVERED

Honorable James S. Sawaya
240 East 400 South
Salt Lake City, Utah 84111

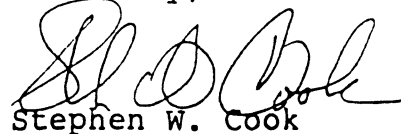
Re: Gregory Ambus v. Granite Board of Education
Civil No. 890901757AA

Dear Judge Sawaya:

Following the hearing on Wednesday, March 29, 1989, Mr. Ambus obtained the enclosed record of address from Granite School District. He obtained this document from Mary Lou Stark, director of secondary personnel. Please note that Mr. Ambus' permanent and present address is listed as 3316 El. Serrito Drive, Salt Lake City, Utah. I am also informed Mary Lou Stark would testify that she was not contacted by Roger Mauritzen or his office concerning Mr. Ambus' address.

If at all possible, I would like this added to the record. If you would like the information in the form of an Affidavit or other testimony, please do not hesitate to contact to me.

Sincerely,



Stephen W. Cook

SWC/ard
Enclosure
cc: John McAllister (hand delivered)

COMPLETE ALL SECTIONS
OF THIS FORM

AN EQUAL OPPORTUNITY EMPLOYER

Date of Application March 20, 1981

Name Ambus Gregory Thomas () Date of Birth 7-8-37
LAST FIRST MIDDLE MAIDEN

Present Address 3316 El. Serrito Dr. Tel 487-4853 Permanent Address 3316 El. Serrito Dr. Tel 4874853
City & State Salt Lake City, Utah City & State Salt Lake City, Utah 24109

Sex Male Marital Status Divorced Age of Children 2 year old daughter Height _____ Weight _____

Name of Spouse _____ Social Security No 529-94-5946

Name of spouse		COLLEGES & UNIVERSITIES YOU HAVE ATTENDED				Social Security No.	
INSTITUTION	LOCATION	DATES OF ATTENDANCE FROM		TO	DEGREE & DATE RECEIVED	HOURS OF CREDIT QUARTER	SEMESTER
Westminster College	Salt Lake City	1973	1979		B.S. Biology May 1980		

UTAH CERTIFICATION

Type	Expiration Date	Date to be Applied For
Elementary		
Secondary ***		May 8, 1981
(other)		

Granite School District offers a self insured health and medical insurance coverage to its employees and their spouses and dependent children. After employment a new employee will be asked to fill out a detailed health history report on himself/herself and his/her family which may result in an insurance waiver(s) for a pre-existing condition(s). Further, each new employee will be asked to furnish the District with a personal health examination report by a medical doctor.

ORDER - NUMBER

KIND _____	Art _____	Science _____
1ST _____	Counseling _____	Soc Studies _____
2ND _____	Foreign Language _____	Spec Ed (Specify) _____
3RD _____	(Specify) _____	_____
4TH _____	Lang Arts _____	(other) _____
5TH _____	Math _____	_____
_____	Media _____	_____
W. J. FINE SCHOOL	Music (Vocal) _____	_____
Self Contained _____	Music (Instrument) _____	_____
Team Teaching _____	Piano _____	_____
(other) _____	Phys Ed _____	_____
	Reading _____	_____

~~Biology~~

Major(s) _____

Minor(s) Physical Science

Could Teach 7-12 Science in Jr. High up to advanced Biology in High School Biology-Tennis Coach

Prefer Junior High _____ Senior High _____ *****

Tennis Coach- Tennis Scholarship Westminster
Currently ranked 5th in State Men's A single

FROM WHICH PLACEMENT BUREAU MAY WE OBTAIN YOUR CREDENTIALS OR CONFIDENTIAL FILE

Westminster College Placement

Experienced teachers list any teaching references not in your confidential file:

Name	Position	
Street Address	City	State
Name	Position	
Street Address	City	State
Name	Position	
Street Address	City	State

DO NOT WRITE IN THIS SPACE

Exp. in both yr
+ sec. high.
S.O. S.C.R.
Probably a career
Person. 3/24/81

PROFESSIONAL EXPERIENCE

School	Address	From		To		Total Years	Grade or Subjects Taught	Principal
		Mo.	Yr	Mo	Yr			
Jordan Intermediate	11thW 4thS	Sept	78	Dec	78	half-year	8th Science	Mr. Allen
East High School	13E 8thS	Sept	1980	Dec	1980	half-year	Adv. Placement (10-12)	Dr. Devries
Indian Hills Middle	116S 13thE	Feb	1981	May	1981	half-year	7-8 Science	Kocheave

at any school district or organization to which you are now under contract

have you ever been discharged from employment? (explain)

have you ever been convicted of a crime other than traffic violations? (explain) NO

are you a relative of any administrator of Granite School District? Yes ** No . If yes, Name Bill Christopulous

hereby certify that my statements on this application are true and correct.

U. S. Citizenship Yes
Yes or No

nephew.
ole.

Signature Greg Ambus

Employment approved by Date 8/20/82 School Grade/Subj. Replaces

Salary: 6-2 1/2