

1993

William V. Penney v. E-Systems Inc., a Delaware corporation doing business in Utah, David A. Williams and Alfred B. Buchanan : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Penney v. E-Systems*, No. 930368 (Utah Court of Appeals, 1993).

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UTAH COURT OF APPEALS

BRIEF

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IN THE COURT OF APPEALS

FILED
Utah Court of Appeals

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Mary T. Noonan
Mary T. Noonan
Clerk of the Court

WILLIAM V. PENNEY,

Appellant,

vs

E-SYSTEMS, INC., a Delaware
corporation, DAVID A. WILLIAMS,
ALFRED B. BUCHANAN,

Defendants-Appellees.

Case No. 930368-CA

Priority No. 15

BRIEF OF APPELLEES

APPEAL FROM SEVEN ORDERS, RULINGS, REFUSALS TO
RULE OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH, GRANTING DEFENDANTS-APPELLEES' MOTIONS
FOR SUMMARY JUDGMENT

District Court Civil No. 900903522-CV

The Honorable Frank G. Noel, District Court Judge

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Appellees

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WILLIAM V. PENNEY,)	
)	
Appellant,)	
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vs)	
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E-SYSTEMS, INC., a Delaware)	
corporation, DAVID A. WILLIAMS,)	
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JURISDICTION

Jurisdiction of this Court is proper under Utah Code Ann. § 78-2a-3(2)(k) (Michie Supp. 1993).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Whether the District Court correctly granted defendants' Motion for Partial Summary Judgment. The Appellate Court reviews the District Court's decision for correctness. Sanderson v. First Security Leasing, 844 P.2d 303, 306 (Utah 1992).

2. Whether the District Court correctly granted defendants' Motion for Summary Judgment. The Appellate Court reviews the District Court's decision for correctness. Sanderson, 844 P.2d at 306.

3. Whether the District Court abused its discretion when it entered the Scheduling Order which mandated that all discovery be completed by December 31, 1992. The Appellate Court reviews the District Court's actions for abuse of discretion. Berrett v. Denver and Rio Grande W.R., 830 P.2d 291, 293 (Utah Ct. App. 1992), cert. denied, 836 P.2d 1383 (Utah 1992).

4. Whether the District Court abused its discretion when it refused to grant plaintiff's Motion for Extension of Time to Complete Discovery and Trial Preparation. The Appellate Court reviews the District Court's actions for abuse of discretion. Berrett, 830 P.2d at 293.

DETERMINATIVE STATUTES AND RULES

The following statutes and rules are determinative: (1) 29 U.S.C.A. § 793(b) (West Supp. 1993); (2) 29 U.S.C.A. § 794(a) (West

Supp. 1993); (3) 29 U.S.C.A. § 1002(1)(A) West Supp. 1993); (4) 29 U.S.C.A. § 1104(a)(1)(D) (West Supp. 1993); (5) 29 U.S.C.A. § 1144(a) (West 1985); (6) Utah Code Ann. § 34-45-6(1)(a)(i) (Michie Supp. 1993); (7) Utah Code Ann. § 34-35-7.1(15) (Michie Supp. 1993); (8) Utah Code Ann. § 35-1-60 (Michie 1988); (9) Utah Code Jud. Admin. R. 4-501(1) (Michie 1992); and (10) Utah Code Jud. Admin. R. 4-501(2)(b) (Michie 1993). In accordance with Utah R. App. P. 24(a)(6), these provisions are set out verbatim in the addendum to this Brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

Plaintiff has appealed from inter alia, (1) the District Court's grant of defendants' Motion for Partial Summary Judgment and his rulings related thereto; (2) the District Court's grant of defendants' Motion for Summary Judgment and his rulings related thereto; (3) the District Court's setting of the discovery cutoff date; and (4) the District Court's denial of plaintiff's Motion for Extension of Time to Complete Discovery and Trial Preparation. See Plaintiff's Brief.

II. COURSE OF PROCEEDINGS.

A. Complaint.

On June 15, 1990, plaintiff filed his Complaint in the Third Judicial District Court of Salt Lake County. R.2-19. Plaintiff asserted five causes of action, all of which are related to the cessation of his employment with defendant E-Systems. R.2-19.

B. Legal representation of plaintiff.

Plaintiff was represented by L. Zane Gill at least from the time he filed his Complaint on June 15, 1990 until August 6, 1991, when Gill withdrew as plaintiff's counsel of record. R.2, 156. Plaintiff was represented by David K. Isom and Associates from sometime prior to September 18, 1991 until March 22, 1992, when that firm withdrew as plaintiff's counsel of record. R.325, 390.

C. Discovery.

On July 11, 1990, plaintiff served on defendants his extensive First Set of Interrogatories and Requests for Production of Documents, which consisted of "87 separate detailed interrogatories and 31 detailed requests for production of documents." Plaintiff's Brief at 44; R.21. On September 26, 1990, defendants fully responded thereto. R.68. On September 10-13, 1990, defendants deposed plaintiff. R.100-111. On December 6, 1991, plaintiff served his Second Set of Interrogatories and Request for Production of Documents on defendants. R.306. On January 24, 1992, defendants fully responded thereto. R.366.

D. Plaintiff's Motion to Disqualify Defendants' Counsel.

On November 26, 1991, plaintiff filed a Motion to Disqualify Defendants' Counsel. R.285, 288. On December 9, 1991, defendants filed their opposing memorandum. R.307. On December 19, 1991, plaintiff filed his reply memorandum. R.336. On February 4, 1992, plaintiff filed a supplemental supporting memorandum. R.368. On February 28, 1992, a hearing was held on plaintiff's Motion, and the District Court denied that Motion. R.391, 384, 394.

E. Defendants' Motion for Partial Summary Judgment.

On September 25, 1991, defendants filed a Motion for Partial Summary Judgment. R.164-253. On October 28, 1991, the parties stipulated that plaintiff would be allowed until November 5, 1991 within which to respond thereto, and the District Court signed an Order to that effect. R.254, 258. Defendants later agreed to extend this deadline to November 8, 1991. R.327. On November 8, 1991, plaintiff filed a Motion for Enlargement of Time Within Which to File a Rule 56(f) Motion. R.258. On November 12, 1991, the District Court signed an Order granting plaintiff until November 12, 1991 within which to file a 56(f) motion. R.283. On November 12, 1991, plaintiff filed a 56(f) motion. R.265, 268. On November 27, 1991, the District Court, based on the stipulation of the parties, signed an Order which provided that the discovery plaintiff claimed to need in order to respond to the Motion for Partial Summary Judgment be completed by January 31, 1992 and that plaintiff's Memorandum in Opposition to the Motion for Partial Summary Judgment be filed by January 31, 1992. R.304-05. On February 10, 1992, the District Court, based on the stipulation of the parties, signed an Order which extended the foregoing deadlines and provided that the discovery needed to respond to the Motion for Partial Summary Judgment be completed by March 16, 1992 and that plaintiff's Memorandum in Opposition to the Motion for Partial Summary Judgment be filed by March 16, 1992. R.304-05. Despite these many extensions of time to complete discovery and to file a

Memorandum in Opposition to defendants' Motion, plaintiff never filed an opposing memorandum.

Thereafter, on April 14, 1992, defendants filed a Notice to Submit their Motion for Partial Summary Judgment for Decision. R.399. On June 9, 1992, the District Court approved oral argument on the Motion for Partial Summary Judgment, instructed defendants' counsel to notice the matter on the court's Friday law and motion calendar, and sent copies of the Approval for Oral Argument to the parties. R.405. On June 12, 1992, defendants noticed the hearing on June 19, 1992. R.406-408. On the afternoon of June 18, 1992, plaintiff sent, via facsimile, a letter to the clerk of the District Court requesting that the hearing on the Motion for Partial Summary Judgment be rescheduled. R.409. On June 19, 1992, the hearing on the Motion for Partial Summary Judgment was held, at which the District Court granted defendants' Motion for Partial Summary Judgment and dismissed plaintiff's first, third, fourth, and fifth causes of action with prejudice. R.416, 420-22. Plaintiff did not participate in the hearing. R.416.

F. Scheduling conference.

On June 19, 1992, the District Court, on its own motion, ordered that a scheduling conference be held on August 3, 1992. R.414. On August 3, 1992, a scheduling conference was held. R.423. Plaintiff and counsel for defendants attended the hearing. The District Court discussed relevant cutoff dates with the parties

and set a discovery cutoff of December 1, 1992 and a dispositive motion cutoff of January 4, 1993. R.423.¹

G. Defendants' Motion for Summary Judgment.

On December 31, 1992, defendants filed a Motion for Summary Judgment. R.425-525. On January 14, 1993, plaintiff filed a letter with the District Court, without sending a copy to counsel for defendants, requesting it to allow him to respond to the Motion via facsimile on January 19, 1993. R.526. On January 15, 1993, defendants filed a Notice to Submit for Decision. R.527. On January 19, 1993, plaintiff apparently sent the District Court a letter, again without sending a copy to counsel for defendants, requesting it to allow him to respond to the Motion via facsimile on January 22, 1993. R.581. On January 23, 1993, plaintiff sent the District Court, via facsimile, a Response to Defendants' Motion and Notice to Submit for Decision.² On February 3, 1993, defendants' filed a reply memorandum. R.530. On February 16, 1993, the District Court directed that a Minute Entry be made in which it granted the Motion for Summary Judgment. R.539-40. On the same day (February 16, 1993), plaintiff filed: (1) a Motion for Continuance and for Leave to Complete Discovery, R.542; and (2) a Memorandum in Opposition to Defendants' Reply Memorandum in

¹ The scheduling order, which was prepared by the trial court's clerk, mistakenly states that the dispositive motion cutoff was January 4, 1992; however both parties were present at the scheduling conference at which the correct dates were discussed and confirmed. R.423.

² This Response was never filed and thus was not made part of the record.

Support of Motion for Summary Judgment. R.545. On February 18, 1993, defendants filed a Response to Plaintiff's Motion for Continuance and for Leave to Complete Discovery. R.593. On that same day (February 18, 1993) the District Court made a second a Minute Entry reaffirming its earlier ruling granting the Motion for Summary Judgment. R.590-91. On February 23, 1993, defendants sent plaintiff: (1) a proposed Order Granting Defendants' Motion for Summary Judgment, R.610-612; and (2) a proposed Judgment in favor of defendants dismissing plaintiff's action with prejudice, and awarding defendants costs. R.623-24. On March 1, 1993, plaintiff filed Objections to Defendants' Draft Order Granting Defendants' Motion for Summary Judgment and Proposed Judgment. R.597. On March 2, 1993, defendants filed their Response to Plaintiff's Objections to Defendants' Proposed Order and Form of Judgment. R.606. On March 9, 1993, the District Court signed the Order Granting Defendants' Motion for Summary Judgment and the Judgment in favor of defendants dismissing plaintiff's action with prejudice and awarding defendants costs. R.610-11. On March 16, 1993, defendants filed a Motion to Tax Costs and a Verified Memorandum of Costs. R.626, 628.

H. Plaintiff's Deposition.

In May 1993, it came to the attention of defendants' counsel that the transcript of plaintiff's deposition had inadvertently not been filed with the District Court. Consequently, on June 7, 1993, defendant filed a Motion to File Plaintiff's Deposition and Modify the Judgment. The District Court denied the Motion to Modify the

Judgment, but ordered that: (1) the original transcript of plaintiff's deposition be filed as of July 9, 1993 and unsealed as previously provided by the Court's granting of defendants' September 25, 1991 Motion to Publish the Plaintiff's Deposition; and (2) pursuant to Utah R. App. P. 11(h) the record be clarified to show that the original transcript of plaintiff's deposition was inadvertently not filed but that, in connection with their Motion for Partial Summary Judgment, defendants provided the Court with courtesy copies of the pages of plaintiff's deposition on which they relied in support of that Motion, and it is the District Court's practice to review such deposition pages provided to it as courtesy copies in connection with its consideration of motions. See Order and Statement of Proposed Changes to the Record, a copy of which is included in the addendum to this Brief.³

III. STATEMENT OF FACTS.

Plaintiff is a former employee of defendant E-Systems. At all times relevant to this action, plaintiff was employed at E-Systems Montek Division in Salt Lake City; he held the title of Director of Procurement. Plaintiff had no written employment contract and was employed for an indefinite period of time. The principal businesses of E-Systems' Montek Division, located in Salt Lake City, are the design, development and manufacture of hydraulic, electrohydraulic, and electromechanical flight controls systems for commercial and military aircraft and the design and development of various

³ While this Order is not technically part of the record at this trial, defendants believe the Court of Appeals should be aware of it.

electronic systems used for navigation and air traffic control. R.479. Defendant Williams is the Vice President and General Manager of E-Systems' Montek Division. R.478. Defendant Buchanan is the Director of Human Resources of E-Systems' Montek Division. R.224.

During the time plaintiff was employed at E-Systems, the Montek Division worked on various contracts with other business entities, including General Electric, Northrop, and Hazeltine, Corp.

On June 18, 1986, a meeting was held to discuss organizational changes which were being considered, as part of a cost cutting initiative, by the Montek Division. R.479. Plaintiff and defendant Williams, among others, participated in this meeting. R.480. During the course of the meeting, plaintiff became very upset, hostile, and abusive because he disagreed with the decisions which were being made by the rest of the group. R.480-81. A short time after the meeting ended, plaintiff met with defendant Buchanan and Jim Cocke, the Director of Finance at the Montek Division, and gave them a memorandum entitled "Letter of Resignation," which tendered plaintiff's resignation unless the Company yielded to plaintiff's demands. R.481-82, 585. Defendant Buchanan, Mr. Cocke, and Defendant Williams met to discuss the situation and decided to accept plaintiff's resignation as tendered. R.482.

SUMMARY OF ARGUMENT

I. The District Court correctly granted defendant's Motion for Partial Summary Judgment. The Appellate Court cannot consider

plaintiff's arguments related to this Motion because they were never raised before the District Court; therefore, plaintiff has failed to show that the District Court erred in granting that Motion. Even if the Appellate Court were to consider plaintiff's argument, it still must affirm the District Court's granting of this Motion because the District Court correctly dismissed with prejudice the four causes of action addressed in this Motion for the following reasons: (A) plaintiff's first cause of action is barred by the Utah Anti-Discrimination Act as a matter of law; (B) plaintiff's third cause of action fails because a claim for breach of an implied covenant of good faith and fair dealing is not recognized by Utah law in the employment context, and there is no genuine issue as to whether E-Systems established an express covenant of good faith and fair dealing; (C) plaintiff's fourth cause of action is preempted by the Employee Retirement Income Security Act as a matter of law; and (D) plaintiff's fifth cause of action fails because there is no admissible evidence in the record which would allow plaintiff to establish key elements of this claim. Further, this claim is preempted by the Utah Workers' Compensation Act.

II. The District Court also properly granted defendants' Motion for Summary Judgment on plaintiff's claim for wrongful termination in violation of public policy. The undisputed facts are that plaintiff's employment ended as a result of his submission of his Letter of Resignation, which was accepted by E-Systems. Further, even if plaintiff had been discharged from his employment,

he would have no claim that his termination violated a clear and substantial public policy of this State. Finally, in response to defendants' Motion, plaintiff offered no admissible evidence in the record showing the existence of any triable issue of material fact.

III. The District Court did not abuse its discretion when it set the discovery cutoff date. The Appellate Court must assume that the District Court properly exercised its discretion when it set the discovery cutoff date unless the record clearly shows to the contrary. Plaintiff has failed to make such a showing.

IV. The District Court did not abuse its discretion when it denied plaintiff's belated Motion for Extension of Time. The Appellate Court must assume that the District Court properly exercised its discretion when it denied plaintiff's Motion for Extension of Time unless the record clearly shows to the contrary. Plaintiff has failed to make such a showing.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

A. The Appellate Court Cannot Consider Plaintiff's Arguments Related To Defendants' Motion for Partial Summary Judgment Because They Were Never Raised Before The District Court.

The Utah Supreme Court and the Utah Court of Appeals have repeatedly held that they will not consider issues on appeal which were not raised before the District Court. See, e.g., Turtle Management, Inc. v. Haggis Management, 645 P.2d 667, 671 (Utah 1982) ("This Court will not consider on appeal issues which were not submitted to the District Court"); State v. Castner, 825 P.2d 699, 705 n.4 (Utah Ct. App. 1992) ("We will not consider an argument on appeal unless it was raised at the District Court."); LeBaron & Assoc. v. Rebel Enters., 823 P.2d 479, 482-84 (Utah Ct. App. 1991).

In the instant case, none of plaintiff's arguments opposing defendants' Motion for Partial Summary Judgment, which plaintiff now asserts for the first time in his Brief, were raised before the District Court, and the District Court did not have an opportunity to rule on them. Therefore, these arguments cannot be considered. Turtle Management, 645 P.2d at 671; Castner, 825 P.2d at 705 n.4; LeBaron, 823 P.2d at 482-84. There is no justification for departure from this rule in the instant case. Plaintiff had more than ample opportunity to respond to the Motion for Partial Summary

Judgment and to make arguments opposing the Motion before the District Court; he simply failed to do so.⁴

Therefore, plaintiff has failed to show that the District Court erred in granting the Motion for Partial Summary Judgment, and the District Court's decision must be affirmed.

B. The District Court Correctly Dismissed With Prejudice The Four Causes Of Action Addressed In Defendants' Motion for Partial Summary Judgment.

Even if the Court of Appeals could consider plaintiff's arguments now attacking the granting of defendants' Motion for Partial Summary Judgment, it still must affirm the District Court's

⁴ Prior to the trial court's ruling on the Motion for Partial Summary Judgment, plaintiff, while represented by counsel, conducted extensive discovery. See discussion on discovery above. For nearly six months after defendants filed their Motion for Partial Summary Judgment, plaintiff, who was represented by counsel at the time, was repeatedly granted extensions to complete discovery related to that Motion and to respond to that Motion. R.254, 258, 327, 304-05. Plaintiff conducted discovery, R.306; however, he never responded to the Motion. On April 14, 1992, one month after the expiration of plaintiff's final extension, defendants filed a Notice to Submit for Decision and sent a copy of the Notice to plaintiff. R.399, 402. On June 9, 1992, the trial court approved oral argument on defendants' Motion for Partial Summary Judgment, instructed defendants' counsel to notice the matter on the court's Friday law and motion calendar, and sent copies of the Approval for Oral Argument to the parties. R.405. On June 12, 1992, defendants noticed the hearing for June 19, 1992 and sent notice of the hearing date to plaintiff. R.406-408. On the afternoon before the hearing was scheduled to take place, plaintiff, despite having had nearly two months notice that a hearing on the Motion would be held, sent, via facsimile, a letter to the clerk of the trial court requesting that the hearing on defendants' Motion for Partial Summary Judgment be rescheduled. R.409. The trial court went ahead with the hearing on June 19, 1992 (nearly nine months after defendants filed their Motion for Partial Summary Judgment) at which it granted defendants' Motion for Partial Summary Judgment and dismissed plaintiff's first, third, fourth, and fifth causes of action with prejudice. R.416, 420-22. Plaintiff did not participate in the hearing in person or via telephone. R.416

ruling because, as the following discussion shows, the District Court's ruling was proper.

1. Plaintiff's first cause of action (breach of public policy against employment discrimination of the disabled).

In his Complaint's first cause of action, plaintiff alleges defendants violated public policy by terminating him because of his disability. R.11. Id.⁵

The District Court correctly dismissed this claim with prejudice because it is barred by the Utah Anti-Discrimination Act ("UADA").⁶

⁵ Plaintiff also claims that Utah public policy requires all employers receiving federal financial assistance to comply with the requirements of § 504 of the Rehabilitation Act of 1973. R.10. Plaintiff offers no support for the proposition that the federal Rehabilitation Act is somehow incorporated into Utah State public policy. In any event, § 504 of the Rehabilitation Act is inapplicable to the instant case because defendant E-Systems does not receive and has not received, at any time relevant to this action, "federal financial assistance," which is required under § 504. R.222; 29 U.S.C. § 794(a). Therefore, plaintiff's claim related to § 504 fails.

In his Brief, plaintiff for the first time invokes § 503 of the Rehabilitation Act of 1973. Section 503 cannot support plaintiff's claim. First, there is no private right of action under § 503. Hodges v. Atchison, Topeka and Santa Fe Ry. Co., 728 F.2d 414 (10th Cir. 1984) cert. denied, 469 U.S. 822 (1984). Second, § 503 preempts "a qualified handicapped individual's claim under state law as a third party beneficiary of the affirmative action clause contained in contracts between his employer and the federal government." Howard v. Uniroyal, Inc., 719 F.2d 1552, 1555 (11th Cir. 1983). Third, plaintiff offers no support for the proposition that the federal Rehabilitation Act is somehow incorporated into Utah State public policy. Finally, plaintiff points to no admissible evidence in the record which supports the key factual allegations related to this claim.

⁶ As noted above at § I.A., none of plaintiff's arguments related to his fourth cause of action should be considered because plaintiff did not raise those arguments below.

The UADA provides the exclusive remedy under state law for employment discrimination based on handicap; therefore, the UADA bars all common law claims for employment discrimination based upon handicap, including plaintiff's first cause of action. Utah Code Ann. § 34-35-7.1(15) (Michie Supp. 1993); Retherford v. AT&T Communications, 844 P.2d 949, 963 (Utah 1992).

In the instant case, under the indispensable element test, which the Utah Supreme Court adopted in Retherford, plaintiff's first cause of action is preempted by the UADA because the UADA addresses employment discrimination based on handicap, which is a necessary element of plaintiff's claim. Retherford, 844 P.2d at 965.; Utah Code Ann. § 34-35-6(1)(a)(i) (Michie Supp. 1993). Indeed, plaintiff's proposed public policy claim is indistinguishable from the claim found to be barred in Retherford. In that case, the plaintiff relied upon the UADA's express prohibition of "retaliation" against persons complaining of discrimination as the basis for her "public policy" claim. Retherford, 844 P.2d at 965. Here, plaintiff relies upon the prohibition against "handicap"

In support of their Motion for Partial Summary Judgment, defendants established through admissible evidence the underlying material facts which supported their Motion. See R.5-7. Plaintiff failed to specifically controvert these material facts in an opposing memorandum; therefore, these facts are deemed admitted for the purpose of summary judgment. Utah Code Jud. Admin. R.4-501(2)(b). Even if these material facts were not deemed to be admitted, plaintiff has failed to point out any admissible evidence in the record which could now be used to controvert the material facts upon which defendants' Motion for Partial Summary Judgment was based.

discrimination. Plaintiff's claim is thus foreclosed for the very reasons articulated in Retherford.⁷

2. Plaintiff's third cause of action (breach of covenant of good faith and fair dealing).

In his third cause of action, plaintiff alleges he was forced to resign arbitrarily and without good cause in violation of a covenant of good faith and fair dealing. R.14.

The District Court correctly dismissed this claim with prejudice for the following reasons.⁸ First, a claim for breach of an implied covenant of good faith and fair dealing is not recognized by Utah law in the employment context. Brehany v. Nordstrom, Inc., 812 P.2d 49, 55-56 (Utah 1991); Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).

Second, there is no genuine issue as to whether E-Systems established anything that plaintiff now would call an "express" covenant of good faith and fair dealing.⁹ In support of his

⁷ Courts in other jurisdictions have also uniformly refused to recognize a public policy common law claim where a statutorily-created administrative process provides a remedy for the underlying injury, even in the absence of an express exclusive remedy provision. See e.g., Polson v. Davis, 895 F.2d 705, 709 (10th Cir. 1990) (holding that Kansas would not recognize a public policy wrongful discharge claim based on a statutorily-created public policy prohibiting employment discrimination where administrative remedy available); Jones v. Indus. Elec.-Seattle, 768 P.2d 520, 522 (Wash. App. 1989) (no public policy wrongful discharge claim for retaliatory discrimination where statute provides administrative remedy).

⁸See note 6 above.

⁹ Again, plaintiff should not be permitted to declare and respond to defendant's Motion in the lower court, and now re-characterize his claim on appeal.

argument that there is such an issue, plaintiff relies entirely on defendants' responses to plaintiff's First Set of Interrogatories. See Plaintiff's Brief at 28-30. Plaintiff's reliance on those responses is misplaced because: (1) those responses are not even properly before this Court; (2) plaintiff mischaracterizes some of those responses;¹⁰ and (3) those responses could not be the basis for any conclusion that E-Systems established an "express" covenant of good faith and fair dealing with plaintiff. Therefore, plaintiff has failed to raise a genuine issue as to this fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)

Therefore, the District Court correctly dismissed plaintiff's second cause of action with prejudice.

3. Plaintiff's fourth cause of action (breach of contract).

In his breach of contract claim, plaintiff alleges defendant Buchanan failed to provide plaintiff with conversion forms necessary to convert his health and life insurance to individual insurance policies. R.7-9.

The District Court correctly dismissed this claim with prejudice because it is preempted by the Employee Retirement Income Security Act ("ERISA").

ERISA preempts all state laws, including private causes of action, which "relate to" any "ERISA-governed employee benefit plan." 29 U.S.C.A. § 1144(a) (West 1985); Shaw v. Delta Airlines,

¹⁰ See, e.g., plaintiff's characterizations of defendants' responses to interrogatories 32, 54, and 58 on pages 29 and 30 of plaintiff's Brief.

Inc., 463 U.S. 85, 90 (1983); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45, 54 (1987). "'A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" Ingersoll-Rand Co. v. McClendon, 498 U.S. ___, 111 S. Ct. 478, 112 L. Ed. 474, 484 (1990) (quoting Shaw, 463 U.S. at 96-97). In short, any state statute, state common law claim, or regulation which refers to or has a connection with an ERISA-governed plan is preempted by ERISA.

In McClendon, the Supreme Court held that a state common law claim, which asserted that an employee was unlawfully terminated to prevent the attainment of rights under an employee benefit plan, was explicitly preempted by ERISA because it made reference to and was premised on the existence of an ERISA-governed employee benefits plan, and thus it "related to" that plan. Id. at 484-86. The Court held that the state common law claim was also impliedly preempted by ERISA because it conflicted directly with ERISA due to the fact that it was essentially a claim under ERISA Section 510, which prohibits interference with an employee's rights or attainment of rights under a plan. Id. at 486-87.

In the instant case, plaintiff's breach of contract claim is expressly preempted by ERISA. Plaintiff's breach of contract claim is premised entirely upon the alleged failure of defendant Buchanan to provide plaintiff with conversion forms necessary to convert his health and life insurance to individual insurance policies.¹¹ R.7-

¹¹ Even though plaintiff alleges in his Complaint that he was entitled to a one-on-one "exit interview" with Buchanan, he has failed to identify anything he would have gained out of such an

9. The duty to provide plaintiff with the conversion forms arises out of and is wholly dependent on the E-Systems Health Care and Weekly Income Disability Plan and the E-Systems Pru-opt Plan,¹² both of which are "welfare benefit plans" under ERISA.¹³ See 29 U.S.C.A. § 1002(1)(A) (West Supp. 1993) (expressively defining "welfare benefit plans"). Definition of "Welfare Benefit Plan" quoted above. Therefore, plaintiff's breach of contract claim, like the common law claim in McClendon, "relates to" ERISA-governed employee benefit plans and is explicitly preempted by ERISA.¹⁴ See

interview other than an insurance conversion form.

¹² The procedure for converting to an individual hospital and surgical expense policy is set forth in E-Systems' Health Care and Weekly Income Disability Plan as follows: "Application for the individual policy must be made and the first premium paid within 31 days from the termination of the Plan coverage A form to be used for this purpose will be furnished by the benefits office." R.236 (Exhibit A to Buchanan Affidavit at 14). Similarly, the procedure for converting to an individual life insurance policy upon termination is set forth in E-Systems' PRU-OPT Plan as follows: "You must obtain a conversion form from the Benefits office and take it, along with your certificate of Pru-Opt coverage, to the nearest Prudential office for processing within 31 days of your termination date." R.242, 248 (Exhibit B to Buchanan Affidavit at 3, 15).

¹³ In his brief, plaintiff attempts to avoid preemption by arguing that his breach of contract claim arises solely from defendants' failure to fulfill contract obligations which arose out of company policy and oral covenants. Id. This argument fails for the following two reasons. First, as the discussion in the main text of this brief illustrates, the duty defendant Buchanan allegedly breached arose out of ERISA-governed employee benefit plans; therefore, plaintiff's claim "relates to" those plans and is preempted by ERISA. Second, plaintiff has failed to point to any admissible evidence in the record which could support a finding that there were such contract obligations which arose out of company policy or any oral covenants.

¹⁴ Plaintiff's claim related to the PRU-OPT plan also fails on the merits because the plan provides that it is the responsibility of the plan participant to "obtain a conversion form from

also Pilot Life, supra, 481 U.S. at 57 (state common law tortious breach of contract suit asserting improper processing of claim for benefits under an ERISA-regulated plan preempted by ERISA); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 62 (1987) (state common law contract and tort suit asserting improper denial of benefits, mental anguish, wrongful termination, and retaliation in connection with an ERISA-regulated insurance plan preempted by ERISA). ¹⁵

In sum, plaintiff's breach of contract claim is preempted by ERISA as a matter of law; therefore, the District Court was correct in dismissing that claim with prejudice.

4. Plaintiff's fifth cause of action (infliction of emotional distress).

In his fifth cause of action, plaintiff alleges defendants' conduct caused him to incur mental and emotional suffering. R.16.

the Benefits office and take it, along with your certificate of PRU-OPT coverage, to the nearest Prudential office for processing within 31 days of your termination date." R.248 (emphasis added).

¹⁵ Plaintiff's claim is also impliedly preempted by ERISA because, like the plaintiff in McClendon, plaintiff here is attempting to assert what is at bottom an ERISA claim through a state common law cause of action. Plaintiff asserts that defendant Buchanan and others, who are responsible for supplying "conversion" forms in accordance with the terms of the ERISA-governed employee benefit plans at issue, failed to provide him such forms. R.7-9. Section 404 of ERISA requires plan fiduciaries (persons who administer the terms of employee benefit plans) to administer employee benefit plans in accordance with the terms of the plans themselves. 29 U.S.C.A. § 1104(a)(1)(D) (West Supp. 1993). Consequently, plaintiff's breach of contract claim falls squarely within the ambit of ERISA Section 404; therefore, it conflicts with ERISA and also is impliedly preempted by ERISA.

The District Court correctly dismissed this claim with prejudice because: (a) there is no admissible evidence in the record which would allow plaintiff to establish key elements of this claim; and (b) this claim also is preempted by the Utah Workers' Compensation Act as a matter of law.¹⁶

a. Lack of admissible evidence in the record as to key elements of this claim.

i. Outrageous conduct.

A plaintiff claiming infliction of emotional distress must prove, inter alia, that the defendant engaged in conduct which was so "outrageous and intolerable [as to] offend against generally accepted standards of decency and morality." Samms v. Eccles, 358 P.2d 344, 346 (Utah 1961). The Samms "outrageous and intolerable standard should be interpreted in light of Restatement (Second) of Torts § 46, comment d (1965), which states:

Liability has been found only where the conduct has been so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

. . . . It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.

Amos v. Corp. of Presiding Bishop, 618 F. Supp. 1013, 1029 (D. Utah 1985), rev'd in part on other grounds, 483 U.S. 327 (1987). Thus, the requirement that the defendant's conduct be outrageous and intolerable is a substantial one. This is further illustrated by

¹⁶ See note 6 above.

the types of conduct in the workplace which courts applying Utah law have held does not rise to the necessary level of outrageousness.¹⁷

Whether the conduct in which a defendant has engaged rises to the necessary level of "outrageousness" is a question of law for the court to decide. See Sperber v. Galligher Ash Co., 747 P.2d 1025, 1028 (Utah 1987) (affirming summary judgment on ground that conduct was not outrageous enough to support action for infliction of emotional distress); Howcroft v. Mountain States Tel. & Tel. Co., 712 F. Supp. 1514, 1521-22 (D. Utah 1989).

In the instant case, plaintiff simply makes wholly conclusory and unsupported allegations related to the conduct in which he claims defendants engaged. See Plaintiff's Brief at 36-41. Plaintiff has failed to point to any admissible evidence in the record which would allow a reasonable fact finder to conclude that defendants engaged in outrageous conduct, and thus, has failed to raise any genuine issues as to this factual element of his claim.

¹⁷ See e.g., Jenks v. Mountain States Tel. & Tel. Co., 53 Fair Empl. Prac. Cas. (BNA) 1708, 1720-22 (D. Utah 1989) (supervisor's racial slurs, jokes, and other rude and non-sympathetic behavior toward the plaintiff was not outrageous); Maxfield v. North Am. Philips Consumer Elec. Corp., 5 Indiv. Empl. Rts. Cas. (BNA) 442, 446 (D. Utah 1989) (supervisor's statement that the plaintiff must sell 120% of his quota and that he would see to that the plaintiff could not do so was not outrageous); Sperber, 747 P.2d at 1028 (wrongful discharge and lying to employee about reasons for discharge was not outrageous); Amos v. Corp. of Presiding Bishop, 618 F. Supp. 1013, 1029 (D. Utah 1985) (discriminatory discharge which caused embarrassment, distress, and humiliation was not outrageous), rev'd in part on other grounds, 483 U.S. 327 (1987).

Therefore, the District Court correctly dismissed plaintiff's infliction of emotional distress claim with prejudice.

ii. Severe emotional distress as a result of defendants' conduct.

A plaintiff claiming infliction of emotional distress must also prove, that he or she actually suffered "severe" emotional distress as a result of the defendant's conduct. Samms, 358 P.2d at 347.

Whether a plaintiff suffered "severe" emotional distress as a result of the defendant's conduct is also a question of law for the court to decide. See, Jenks, 53 Fair Empl. Prac. Cas. (BNA) at 1721-22 (dismissed emotional distress claim because, inter alia, the plaintiff had not established that the distress she suffered as a result of the defendant's actions was severe emotional distress); Polson v. Davis, 635 F. Supp. 1130, 1151 (D. Kan. 1986) (dismissed emotional distress claim because plaintiff failed to establish "that the emotional distress she suffered was so severe that no reasonable person should be expected to endure it"), aff'd on other grounds, 895 F.2d 705 (10th Cir. 1990).

In the instant case, plaintiff has failed to point to any admissible evidence in the record which could support a reasonable finding that he suffered "severe" emotional distress as a result of defendants' conduct.¹⁸ Therefore, the District Court correctly

¹⁸ In his brief, plaintiff argues that defendants, in their Memorandum in Support of Their Motion for Partial Summary Judgment, "admit that [plaintiff] sought medical treatment for his severe emotional distress in May of 1989." Plaintiff's Brief at 41. This is false. Defendants stated that plaintiff testified that he did not seek medical treatment for his alleged emotional distress until

dismissed plaintiff infliction of emotional distress claim with prejudice.

b. Plaintiff's infliction of emotional distress claim is barred by the Utah Workers' Compensation Act as a matter of law.

The Utah Workers' Compensation Act bars claims by employees against their employers or co-workers for intentional or negligent infliction of emotional distress unless the employer or co-worker actually intended that the employee be injured. Utah Code Ann. § 35-1-60 (Michie 1988); Mounteer v. Utah Power & Light Co., 823 P.2d 1055 (Utah 1991) (damages arising from the plaintiff-employee's claims of intentional and negligent infliction of emotional distress could only be compensated under the workers' compensation scheme unless the plaintiff-employee could prove that the defendant-employer directed or intended the act which allegedly caused the plaintiff-employee emotional distress);¹⁹ Lantz v.

after his neck surgery in May of 1989, nearly three years after he left E-Systems. R.215. This is not an admission plaintiff actually did seek medical treatment for his "severe emotional distress" in May of 1989. Furthermore, even if plaintiff could point to admissible evidence in the record to prove that he sought medical treatment for emotional distress in May of 1989, that is far short of the required showing that his emotional distress is severe and a result of defendants' conduct. See Eklund v. Vincent Brass & Aluminum Co., 351 N.W.2d 371 (Minn. Ct. App. 1984) (employee who consulted physician because of nervous condition and psychologist because of stress did not establish severe emotional distress).

¹⁹ In his Brief, plaintiff argues that in Mounteer v. Utah Power & Light Co., 823 P.2d 1055 (Utah 1991) and Bryan v. Utah Int'l, 533 P.2d 892 (Utah 1975), the Utah Supreme Court "made it absolutely clear that the Utah Workers' Compensation Act does NOT bar a claim by an employee against an employer for intentional infliction emotional distress." Plaintiff's Brief at 38. This argument misses the point. As the discussion in the main text of this brief illustrates, the Utah Workers' Compensation Act does bar

National Semi-Conductor Corp., 775 P.2d 937, 939-40 (Utah Ct. App. 1989). See also Star v. Industrial Comm'n, 615 P.2d 436, 437 (Utah 1980); Davis v. Utah Power & Light Co., 53 Fair Empl. Prac. Cas. (BNA) 1047, 1049-50 (D. Utah 1990).

In the instant case, plaintiff has pointed to no admissible evidence in the record that the defendants deliberately intended to injure plaintiff; therefore, plaintiff's infliction of emotional distress claim is barred by the exclusive remedy provision of the Utah Workers' Compensation Act, and the District Court correctly dismissed that claim with prejudice.

a claim by an employee against an employer for intentional infliction of emotional distress unless the employer actually intended that the employee be injured. Munteer directly supports this interpretation. See discussion the main text of this brief. Bryan also supports this interpretation. In Bryan, the plaintiff employee sued his employer and a co-worker for injuries he received when the co-worker intentionally and with malice aforethought started his pickup intending to jerk a cable against the plaintiff's body. Bryan, 533 P.2d at 892. The court held that the Workers' Compensation Act did not bar the plaintiff's suit against the co-worker for damages which resulted from the co-worker's intentional act by which he intended to injure the plaintiff. Id. at 894. The court held that the plaintiff's claim against his employer was barred by the Utah Workers' Compensation Act because there was no evidence that the injurious act was directed or intended by the employer. Id. at 894-95.

In sum, the District Court correctly dismissed plaintiff's First, Third, Fourth, and Fifth Causes of Action with prejudice; thus it correctly granted Defendants' Motion for Partial Summary Judgment, and its ruling should be affirmed.

II. THE DISTRICT COURT PROPERLY GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT ON PLAINTIFF'S SECOND ASSERTED CAUSE OF ACTION.

In Count II of his Complaint, Plaintiff claims he was terminated from his employment in violation of an asserted public policy "against fraudulent business activities." R.11. Plaintiff alleged that he was terminated because of his actions in connection with three separate E-Systems contracts, the General Electric contract, the Northrop actuator contract and the Hazeltine contract. R.12-13.²⁰

A. Plaintiff's Public Policy Allegations Fail to State a Claim Under Utah Law.

The Utah Supreme Court has recognized a claim for wrongful termination in violation of a fundamental public policy. The Court has repeatedly emphasized, however, that this is a narrow exception to the at-will employment rule. Such claims must be based upon "substantial and important public policies." Berube Fashion Centre

²⁰ As the following argument shows, the District Court properly granted defendants' Motion in part because, as the Court noted in its second Minute Entry, "[Plaintiff's] statements are purely conclusory and Mr. Penney has offered no admissible evidence to support these conclusions." R. 591. Defendants will rely upon plaintiff's deposition in the following argument only for the purpose of explaining why his submissions are indeed conclusory and lacking in foundation: Because plaintiff lacks any personal knowledge to support his claim. Even without considering plaintiff's deposition testimony, however, it is clear that the District Court properly dismissed his public policy claim.

Ltd. 771 P. 2d 1033, 1042 (emphasis in original). See also Peterson V. Browning 832 P.2d 1280, 1283, 1285-86 (Utah 1992) (same). In cases of employee termination, public policy is to be derived from: (1) legislative enactments which "protect the public or promote public interests;" and (2) judicial pronouncements. Berube, supra, 771 P.2d at 1043.

It is a plaintiff's burden to demonstrate, first, that he was involuntarily terminated and second, that the termination "implicate[s] a clear and substantial public policy." Heslop v. Bank of Utah, 839 P.2d 828, 837 (Utah 1992). As the materials before the District Court demonstrate, plaintiff could establish neither of these elements.

1. The Undisputed Material Facts Before the District Court Show that Plaintiff Resigned From His Employment.

In their affidavits supporting their Motion for Summary Judgment, defendants established that plaintiff was not discharged but instead resigned from his employment. In 1986, defendant David Williams was General Manager of the Montek Division of E-Systems. R.478 (Affidavit of David A. Williams ¶ 1). During 1984, 1985 and 1986 the Montek Division undertook a number of organization and cost-cutting initiatives to improve Division performance. One of the organizational changes being considered was the reassignment of the traffic and receiving function from the materials organization, which was managed by the plaintiff, to the manufacturing organization. R.479 (Id. ¶ 4).

On June 18, 1986, a meeting was held to review the progress of this initiative and to discuss it among the involved parties. In addition to Mr. Williams, the meeting was attended by Mr. Jim Cocke, the Vice President of Finance, who was the plaintiff's supervisor. Also at the meeting were two other Directors for the Company, including Mr. Ed Head, Director of Manufacturing. R.479-80 (Id. ¶ 5).

When it became apparent in the meeting that a decision would likely be made to reassign the shipping and receiving function to the manufacturing department, the plaintiff suddenly embarked on a lengthy monologue on the contributions that he had made to the Division and on his superior management capabilities. During the course of his monologue, plaintiff became very hostile and abusive. He suggested that the management of the Division was incompetent and that he was much better qualified to perform management functions than those presently given the responsibility. His immediate supervisor, Mr. Jim Cocke, cautioned him several times to refrain from personal attacks and to concentrate on the issues at hand; Mr. Cocke indicated to plaintiff that his behavior was insubordinate and inappropriate. Instead of responding to Mr. Cocke's suggestions, plaintiff continued to be abusive and hostile, at which time Mr. Williams ended the meeting, indicating that we would address resolution of the issues in a separate meeting. R.480-81 (Id. ¶ 6)²¹

²¹ Plaintiff's own account of this meeting in his deposition does not materially differ from the foregoing. He acknowledged in his deposition that (1) during the course of the meeting, plaintiff

Later the same day, Mr. Penney requested a meeting with Mr. Cocke, who invited Mr. Buchanan, Employee Relations Director, to attend the meeting as well. At that meeting, the plaintiff presented to Mr. Cocke a memorandum entitled "Letter of Resignation." R.481-82 (Id. ¶ 8). It is undisputed that the plaintiff drafted the Letter of Resignation and that he submitted it to Mr. Cocke. Id. That letter lists a number of demands for support which plaintiff states he "must have as a minimum." The Letter of Resignation goes on to state:

"I hereby submit my resignation in advance if I cannot layout and implement a scheduled plan to reduce division cost to a level that we pre-establish. The effective date of my resignation is _____.

If you elect not to fill in today's date, I will be glad to discuss the plan, with supporting facts and documents at your convenience." R.471, 585.

Following the meeting with the plaintiff, Mr. Cocke discussed the Letter of Resignation with Mr. Williams and Mr. Buchanan. They jointly decided that the best course of action was to accept the resignation as tendered, by filling in "today's date," which Mr. Cocke did. R.481-82 (Id. ¶ 8).

____ In his First Affidavit, apparently to avoid the effect of his own actions, plaintiff refers to the Letter of Resignation

began "debating" with Williams over the issue of the proposed transfer, prompting Cocke, plaintiff's immediate supervisor, to warn plaintiff that he was "talking to the General Manager," Pl. Depo. at 250; (2) during the meeting while plaintiff "was involved in a very emotional discussion with Williams . . . [Cocke] was interrupting . . . , trying to put on a show for Dave [Williams]," Id. at 255; and (3) plaintiff believed that his immediate supervisor, Mr. Cocke, "didn't know what he [Cocke] was talking about," so plaintiff ignored Cocke's warning and continued debating with Williams. Id. at 250.

(attached to his First Affidavit as Exhibit F-1 (R.585)), as a "Letter of Recommendation." R. 575-76. Plaintiff cannot change the legal effect of his own actions simply by trying to rename the document he submitted. Nor can he turn his resignation into a discharge simply by claiming, after the fact, that he did not have "any intention to resign." Id. The legal effect of submitting a Letter of Resignation with a blank date, and informing his superior that he was free to fill in the blank date of resignation with "today's date," was that plaintiff effectively resigned from his job. That is particularly true where the only alternative to accepting the Letter of Resignation offered to Mr. Cocke by plaintiff was to negotiate with plaintiff regarding what support the plaintiff "must have as a minimum" to continue to do his job.

In sum, plaintiff's belated contention in his First Affidavit that he was discharged instead of quitting his job created no triable issue of fact in connection with his separation from employment. Therefore, plaintiff cannot make out the threshold requirement of a claim for discharge from employment in violation of public policy.

2. Plaintiff Did Not Identify the Basis for Any Substantial and Important Public Policy Implicated by His Alleged Termination.

While plaintiff's Complaint alleges he was terminated in violation of a "Public Policy Against Fraudulent Business Activities," in the District Court plaintiff never identified any legislative enactments or other grounds on which this alleged public policy would be based. Moreover, though plaintiff appears

to claim that he was asked to participate in or facilitate fraud in connection with two of the contracts mentioned in his Complaint, he did not set out the circumstances constituting the alleged fraud with particularity, as required by Rule 9 of the Utah Rules of Civil Procedure.²²

In Retherford v. AT&T Communications, 844 P.2d 949 (Utah 1992) the Utah Supreme Court made it clear that in order to prove the tort of discharge in violation of public policy, the plaintiff must show that the employer discharged him or her "in a manner or for a reason that contravened a 'clear and substantial public policy' of the state of Utah, a public policy rooted in Utah's constitution or statutes." Retherford, 844 P.2d at 966 (quoting Peterson, 832 P.2d at 1281). The Court explained in more detail as follows:

In determining whether a public policy is sufficiently "clear and substantial" to support a cause of action for discharge in violation of public policy, one must examine the strength of the policy as well as the extent to which it affects the public as a whole. The very words "clear and substantial" require a lack of ambiguity on both points. As the majority of this court recognized in Peterson, all statements made in a statute are not expressions of public policy. Many statutes merely regulate conduct between private individuals or "'impose requirements whose fulfillment does not implicate fundamental public policy concerns.'" (citation omitted).

The following questions are relevant to determining whether a statute embodies a clear and substantial public policy. First, one must ask whether the policy in question is one of overarching importance to the public, as opposed to the parties only. Second one must inquire whether the public interest is so strong and the policy so clear and weighty that we should place the policy beyond the reach of contract,

²² As explained below, plaintiff does not even claim he was asked to do or participate in anything fraudulent in connection with the General Electric contract. Rather, he alleges he "reported" an improper billing practice in connection with that contract. No evidence in the record, however, supports that claim.

thereby constituting a bar to discharge that parties cannot modify, even when freely willing and of equal bargaining power. (citation omitted).

Retherford, 844 P.2d at 966 n.9.

Plaintiff's conclusory allegations about "fraudulent business activities" do not satisfy the standards articulated in Retherford. No specific public policy of "overarching importance" against dishonesty or misrepresentation in the business world exists. Rather, persons and organizations in business relationships have private, contractually enforced economic rights and interests which they also are free to waive and compromise by agreement. One cannot, moreover, by inquiring into any public policy, begin to determine what the parties may have permitted or forbidden to each other in their private agreements. Indeed, fraud claims arising out of complicated contractual relationships are always intimately connected to the private agreements or course of dealings between the parties. Accordingly, because public policy in this area does not supply any standards articulable and enforceable independently of the parties' own private agreements, it should not be used as a basis for creating a wrongful discharge cause of action.

Finally, should Utah courts ever recognize some "overarching" public policy against business fraud or dishonesty, it should be strictly limited to cases where actual fraud, pled with particularity and proven by clear and convincing evidence, can be made out.²³

²³See Turner v. General Adjustment Bureau, Inc., 832 P.2d 62, 66 (Utah Ct. App. 1992) (noting fraud requires proof by clear and convincing evidence).

Plaintiff's pleading and evidence offered to the District Court fall far short of such a showing.²⁴

For these reasons, Count II of plaintiff's Complaint was properly dismissed.

B. In Response to Defendants' Motion, Plaintiff Failed to Identify Any Triable Issues of Material Fact Precluding Summary Dismissal of His Claim.

In Heslop v. Bank of Utah, supra, the Supreme Court identified two additional elements of a public policy wrongful termination claim:²⁵

- (2) The employer must violate the pertinent public policy "by requiring the employee to engage in conduct violating the policy or by punishing conduct furthering the policy"; and
- (3) Violation of the public policy must be a "substantial factor" in the plaintiff's termination.

Id., 839 P.2d at 837. The District Court also properly dismissed plaintiff's claim because he failed to raise any triable issue in connection with these second two elements of a public policy claim.

In support of their Motion for Summary Judgement on Count II, defendants offered three affidavits. See R.472-85. Through the Motion and those supporting affidavits, defendants satisfied their burden under Rule 56 to demonstrate that no triable issue of

²⁴The District Court was entitled, in this connection, to apply the "clear and convincing" standard of proof when assessing plaintiff's ability to prove the elements of fraud. See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (in ruling on a motion for summary judgment, the judge must view the evidence through "the prism" of the party's evidentiary burden).

²⁵ The first two elements, discussed above, are that the plaintiff be terminated and that his termination "implicate a clear and substantial public policy." Heslop, supra, 839 P.2d at 837.

material fact precluded entry of judgment in defendants' favor on Count II. In response, plaintiff offered no admissible evidence, but only conclusory allegations.

1. No Triable Issue of Fact Existed in Connection with the General Electric Contract.

In support of their Motion for Summary Judgement, defendants established the following material facts in connection with the General Electric contract:

The contract with GE was a "firm fixed price" contract awarded to E-Systems in 1976, under which E-Systems was to design and manufacture earthquake shock suppressors for use in nuclear power plants built by GE and others. R.486 (Johnson Affidavit ¶ 2).

In order to meet the lead time requirements of the customer (GE), E-Systems purchased mill runs of nuclear certified raw material for use on that contract. R.486-87 (Id. at ¶ 4). To protect E-Systems from the risk of making these advanced purchases, GE agreed to pay for the material. Id. It was understood by E-Systems, however, that any residual material remaining at the end of the contract would be owned by E-Systems, as it would be in any other firm fixed price contract. Id. E-Systems never billed GE for the use by E-Systems of any materials owned by GE. R.487 (Id. at ¶ 6). In other words, E-Systems never double-billed GE for any materials. Id.

Neither plaintiff nor Still ever mentioned the issue of GE being double-billed to anyone, including Johnson and Williams, the General Manager. R.487, 483 (Johnson Affidavit ¶ 5; Williams

Affidavit ¶ 10). Mr. Still had no responsibility for pricing or invoicing on the GE contract. R.487 (Johnson Affidavit ¶ 5).

The events leading up to plaintiff's resignation had nothing to do with the GE contract. R.479-82 (Affidavit of David Williams ¶¶ 4-8).

Plaintiff's only evidentiary response to these material facts in the District Court are paragraphs 16 and 17 of the First Affidavit of William V. Penney. See R.576, 539-40. Plaintiff's wholly conclusory statements in those paragraphs, that some materials purchased for the GE contract were "knowingly, illegally and/or improperly used" by E-Systems and that he reported this "knowing, illegal and/or improper use" to someone at E-Systems did not raise any issue of material fact. Plaintiff's statements in his First Affidavit are wholly lacking in foundation, because, as he conceded in his deposition, he had no personal knowledge of the General Electric contract and did not actually "report" any alleged impropriety to anyone.²⁶

²⁶ According to plaintiff's deposition testimony, he has no personal knowledge of whether General Electric was, in fact, "double-billed" for any material on any General Electric contract. Pl. depo. at 402-08, 414. Indeed, plaintiff admitted in his deposition that he knows virtually nothing about the General Electric contract. Id. Plaintiff's Affidavit also lacks any foundation on this issue precisely because, as he acknowledged in his deposition, he did not "report" any alleged impropriety regarding the General Electric contract to anyone. Rather, plaintiff's testimony was that Mr. Still allegedly told plaintiff that he thought General Electric was being billed for material it had already paid for. According to plaintiff's testimony, after Mr. Still allegedly told him this, he stated to Still: "that [is] an extremely dangerous-type situation especially in that product line." Plaintiff's depo. at 415. Plaintiff never said or did anything else in response to these alleged statements by Still.

The District Court thus properly concluded that "These statements are purely conclusory and Mr. Penney has offered no admissible evidence to support these conclusions." R.591. See Winter v. Northwest Pipeline Corp., 820 P.2d 916 (Utah 1991) (pro se plaintiff's conclusory statements in affidavit created no issue of material fact regarding his public policy discharge claim).²⁷

2. No Triable Issue of Fact Existed in Connection with the Northrop Contract.

Plaintiffs' claims regarding the Northrop contract also fail because, in response to the admissible evidence offered by defendants through their Motion, plaintiff again responded only with conclusory allegations. In connection with the Northrop contract, defendants established, inter alia, the following facts:

In 1985, Northrop had a contract with the United States Air Force to build an aircraft. In 1984, E-Systems submitted a proposal to Northrop which anticipated a firm fixed price subcontract under which E-Systems was to build an actuator (a hydraulic device used to operate moving parts on an aircraft). In May 1985, Northrop awarded the subcontract to E-Systems for the supply of actuators, and E-Systems commenced work on that contract. R.487-88 (Johnson Affidavit ¶ 7).

The Northrop Contract was bid and subsequently signed as a firm fixed price contract in May 1985. R.487-88, 518 (Id. ¶¶ 7, 9;

²⁷See also, Norton v. Blackham, 669 P.2d 857 (Utah 1983) (plaintiff's statements in affidavit were conclusory in form and accordingly not admissible in evidence and could not defeat summary judgment motion); Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985) (affidavit reflecting affiant's opinions and conclusions insufficient to raise issue of material fact precluding summary judgment).

Exhibit A thereto, document control no. P200354). Under a firm fixed price contract, the ultimate contract price is agreed to and fixed at the time the contract is entered into. R.488 (Johnson Affidavit ¶ 10). In contrast, under a cost-plus contract, the price is determined based on a contractor's actual cost, plus an agreed-upon profit margin. Id.

Under a firm fixed price contract, sourcing changes (e.g., purchasing contract items from outside vendors rather than making them in-plant) are customarily made by the seller (here, E-Systems) without notice to the government. Sourcing changes have no impact on the firm fixed price charged by the seller because, regardless of the source of manufacture, the seller is always paid only the firm fixed price on which the parties to the contract originally agreed. R.489 (Id. at ¶ 12).

Under the terms of the Northrop Contract, E-Systems was free to either make the parts for the "actuators" within its own plant or purchase them from outside vendors, so long as the other contract requirements (e.g. technical performance and schedule) were met. R.489, 520 (Id. at ¶ 11 and Exhibit "A" thereto, document control no. P200356).

When the Northrop contract was originally bid in 1984, certain parts were planned to be made by E-Systems within its own plant; however, as the design of the program evolved, sourcing was reviewed and revised, and some of the sourcing for such parts was changed from being made by E-Systems in its own plant to being purchased from outside vendors. R.489 (Id. at ¶ 12). Such

sourcing changes are customarily made in order to accommodate technical considerations, schedule, shop loading, cost, etc. of the contractor. Id.

Northrop was fully aware of all sourcing changes made under the Northrop contract because in approximately March 1987, Northrop representatives audited the costs associated with the Northrop contract in order to establish a negotiation position for subsequent requirements it entered into to purchase more actuators from E-Systems. R.490 (Id. at ¶ 13).

In July 1988, E-Systems properly invoiced Northrop for the tooling in accordance with E-Systems' government property control systems, which was set up to specifically comply with Federal Acquisition Regulations. R.490, 522-25 (Id. at ¶ 14 and Exhibit "B" thereto). Both the Federal Government's Property Administrator and Northrop's Property Administrator have audited and signed off on E-Systems' tooling list every year since 1986. R490 (Id. at ¶ 15).

In response to this admissible evidence regarding the Northrop contract, plaintiff again responded only with foundationless, conclusory allegations that are not admissible evidence and raised no triable issue of material fact in the District Court.²⁸ It is

²⁸Plaintiffs' First Affidavit simply declares that: "Defendants' involuntary termination of Plaintiff was, at least in part, a result of Plaintiff's informing Defendant E-Systems' management that Defendants, contrary to the terms of the Northrop Contract and without Northrop's knowledge or consent, subcontracted out the work of producing actuators for Northrop, knowingly, illegally and/or improperly made representations to Northrop that certain of said actuators had been manufactured, and knowingly, illegally and/or improperly accepted progress payments, based on said representa-

not surprising that plaintiff's allegations are conclusory and lack foundation, because the auditing and invoicing of the Northrop contract did not even occur until 1987 and 1988, long after June 1986 when plaintiff's employment with E-Systems ended. See R.490 (Johnson Affidavit ¶¶ 13, 14).²⁹ Further, absolutely nothing in the record evidence relating to events preceding plaintiff's resignation could support an inference that his employment was terminated because of any alleged improprieties in connection with the Northrop contract. See R.479-82 (Affidavit of David Williams ¶¶ 4-8).

3. No Triable Issue of Fact Existed in Connection with the Hazeltine Contract.

With respect to the Hazeltine contract, defendants established, in support of their Motion, the following facts:

1. In 1984, the Federal Aviation Administration ("F.A.A.") awarded Hazeltine a contract to develop certain electronic airplane guidance equipment. R.473-74 (Ausman Affidavit ¶ 3). In January 1984, Hazeltine awarded E-Systems a subcontract to build precision

tions, for certain tools necessary for making actuators when said tools had not yet been manufactured." First Affidavit of William V. Penney, ¶ 18; R. 576-77.

²⁹ Moreover, in his deposition plaintiff acknowledged that he has virtually no personal knowledge about the Northrop contract. Pl. depo at 424-29. Plaintiff has no personal knowledge of when the Northrop contract was awarded (id. at 424-25), whether it was a firm fixed price or a cost-plus contract (id. at 425, 427), or whether E-Systems ever informed Northrop that the tooling and tools were being purchased from outside vendors (id. at 428). In addition, plaintiff admitted he had no personal knowledge of whether Northrop ever paid for tools or tooling that were not actually obtained for the contract by E-Systems and, in fact, does not believe anyone at E-Systems was trying to cheat Northrop on the "tooling" work done under the contract. Id. at 438, 435.

distance measuring equipment ("PDME") for Hazeltine's use on its contract with the F.A.A., and E-Systems started work on the PDME. Id. At that same time (January 1984), the contract price for E-Systems' work (approximately \$11 million) was set. Id.

The Hazeltine contract was bid, negotiated, and signed as a firm fixed price contract. R.474 (Id. at ¶ 4). Under a firm fixed price contract, the ultimate contract price is agreed to and fixed at the time the contract is entered into. R.474 (Id. at ¶ 5). The contract price stays the same unless there is a change in the scope of the work to be performed under contract. There was no change in the scope of the work to be performed by E-Systems under the Hazeltine Contract. R.474 (Id. at ¶ 6). Although it was a development contract and the bill of material changed, thereby increasing the cost of certain items to E-Systems, the price never changed (i.e., this just resulted in a decrease of E-Systems' profit margin). Id.

In connection with the Hazeltine contract, plaintiff claims that Williams had both plaintiff and another company "price" a part of the electronic materials to be used in that contract. R.13-14. This process involves creating a "bill of materials" that itemizes the cost of materials needed for the contract. Plaintiff alleged Williams told him that he wanted to use the material costs set out in a "bill of materials" by the other firm (which were higher) for negotiations with Hazeltine and the F.A.A. and use plaintiff's

costs for the materials (which were lower) for division budget reporting to the Corporation. Id.³⁰

In response to defendants' specific facts, however, plaintiff again offered only conclusory allegations. See R.577 (First Affidavit of William V. Penney ¶¶ 19-21). There is absolutely no foundation in the record for these statements by plaintiff. Further, conclusory allegations about obtaining "funny numbers" to use "knowingly, illegally, and/or improperly" fall far short of the specific facts and clear and convincing proof required for a showing of fraud.³¹ See Turner v. General Adjustment Bureau, Inc., 832 P.2d 62, 66 (Utah Ct. App. 1992) (noting fraud requires proof by clear and convincing evidence).

In addition, plaintiff's allegations also do not make sense in light of the fact that the Hazeltine contract was a firm fixed price contract. In such a contract, the price cannot be changed unless the scope of the contract is changed. Yet it is undisputed that the scope of the Hazeltine contract never changed, nor did the price. Moreover, the contract price for the Hazeltine contract was set in 1984. Therefore, in order for E-Systems somehow to benefit

³⁰Plaintiff acknowledged in his deposition, however, that he did not believe, at the time he allegedly spoke to Williams about the Hazeltine contract, that Williams or any one else at E-Systems was intentionally violating any law or regulation. Plaintiff's depo at 449-50.

³¹ Again, it is not surprising that plaintiff resorts to conclusory allegations because, as he acknowledged in his deposition, he has no personal knowledge about whether anyone at E-Systems ever did commit fraud, and he does not actually believe anyone at E-Systems intended to commit fraud. Pl. depo. at 314-16, 435, 438.

from the conduct which plaintiff apparently alleges, that conduct would have to have occurred before the contract was awarded to E-Systems in 1983, and not in 1986, as plaintiff apparently asserts.

Finally, plaintiff's allegations regarding the Hazeltine contract also fail because, as with the other two contracts, they were entirely unrelated to the reasons plaintiff's employment with E-Systems ended.³² See e.g., Hamman 910. F.2d 1417, 1420-21 (7th Cir. 1990) (in public policy wrongful discharge case, plaintiff must prove causal connection with more evidence than showing of her refusal to act, her discharge, and the timing between the two events).

The District Court properly concluded that these conclusory allegations failed to raise any triable issue of material fact in connection with Defendants' Motion.

³² Note also that plaintiff cannot even maintain that the transfer of the traffic function from his department to the manufacturing department, which was the subject of the meeting immediately preceding his resignation, was an improper decision. Plaintiff conceded that the General Manager, David Williams, had the right to make that decision. Pl. depo. 245-46. Plaintiff also acknowledged that the transfer of the traffic function was a "management decision" about which reasonable people could disagree. Id. at 338. Further, a transfer of some functions away from the plaintiff's department would appear to be exactly what was needed, given his complaints about working excessive overtime in plaintiff's Letter of Resignation.

4. The District Court Also Properly Rejected Plaintiff's Belated and Conclusory Allegations Regarding Two Other Alleged Projects.

In his February 16, 1993 First Affidavit, plaintiff also attempted to assert for the first time that his employment with E-Systems was terminated because of "Plaintiff's refusal to participate in the amoral and illegal KAL Project." R.577. Plaintiff also asserted for the first time that his "involuntary termination by Defendants was, at least in part, a result of Plaintiff's unwillingness to overlook or ignore Defendants' knowing, illegal and/or improper conduct regarding the Dolphin Castings." R.577-78.

These belated and conclusory allegations were not made in plaintiff's Complaint or prior to the filing of plaintiff's First Affidavit, after defendants' Motion had already been submitted for decision and the Court had, in its first Minute Entry, granted defendants' Motion.³³

The District Court properly concluded that these allegations also lacked any foundation and did not create any triable issue of fact in connection with plaintiff's loss of employment at E-Systems.

For the reasons, the District Court properly granted defendants' Motion for Summary Judgment and dismissed plaintiff's public policy claim with prejudice.

³³Throughout his lengthy deposition, in which plaintiff testified at length regarding his claims, plaintiff never testified that he was terminated because of either of these projects; he never even mentioned either project.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT SET THE DISCOVERY CUTOFF DATE.

On June 19, 1992, more than two years after plaintiff filed his Complaint, the District Court, on its own motion, ordered that a scheduling conference be held on August 3, 1992. R.18, 414. On August 3, 1992, a scheduling conference was held. R.423. Plaintiff and counsel for defendants attended the hearing. The District Court discussed relevant cutoff dates with the parties and set a discovery cutoff of December 1, 1992. R.423

The Appellate Court must assume that the District Court properly exercised its discretion when it set the discovery cutoff date unless the record clearly shows to the contrary. Donohue v. Intermountain Health Care, Inc., 748 P.2d 1067, 1068 (Utah 1987); Matter of Estate of Justheim, 824 P.2d 432, 433 (Utah Ct. App. 1991). Furthermore, considerable weight should be given to the District Court's setting of the discovery cutoff date due to the District Court's close involvement with the parties and total circumstances of the case. Barber v. Calder, 522 P.2d 700, 702 (Utah 1974).

In the instant case, plaintiff has failed to point to any evidence in the record which shows the District Court abused its discretion when it set the discovery cutoff date.

Plaintiff's allegation that he has not had adequate opportunity to complete discovery is untrue. Plaintiff had from June 15, 1990 to December 1, 1992 (nearly two-and-one-half years) to conduct discovery. See R.18, 423. In fact, plaintiff conducted extensive discovery during that time. Specifically, plaintiff served on

defendants two separate sets of interrogatories and requests for production of documents, the first of which consisted of "87 separate detailed interrogatories and 31 detailed requests for production of documents." Plaintiff's Brief at 44; R.21; R.306. Defendants fully responded to both sets of interrogatories and requests for production of documents. R.68; R.366.³⁴

Plaintiff argues that the District Court's reasonably extending the time to complete discovery would not have prejudiced defendants; however, at the Scheduling Conference, the District Court did reasonably extend the time to complete discovery - he gave plaintiff an additional four months to complete discovery. R.423.

Plaintiff's references to his illness, pro se status, and move to Texas fail to support his argument. Plaintiff was represented and assisted by local counsel for nearly one-and-one-half years. R.2, 156, 325, 390. Also, plaintiff maintains a local address and apparently spends a significant amount of time in the Salt Lake

³⁴ In his brief, plaintiff alleges that defendants did not properly respond to plaintiff's interrogatories and document requests and failed to make themselves available for deposition. Plaintiff's Brief at 48-49. These allegations are conclusory, completely unsupported, and simply wrong. Defendants fully responded to both sets of plaintiff interrogatories and requests for production of documents, R.68, 366, and both defendant Buchanan's and defendant Williams' depositions were scheduled by plaintiff while he was still represented by counsel, but were re-scheduled at the request of plaintiff's counsel and were never re-noticed. In any event, the appropriate method for addressing these allegations is through a motion to compel under Utah R. Civ. P. 37. Contrary to plaintiff's representation, he never served upon defendants a motion to compel discovery. In fact, plaintiff never even raised these allegations before the trial court; therefore, they should not be considered by the Appellate Court. See discussion above at § I.A.

City area. R.592. Furthermore, plaintiff does not claim that he has been incapacitated at all times since the date he commenced this law suit or since the date of the scheduling conference. Indeed, his behavior since receiving defendants' Motion for Summary Judgment indicate that despite the foregoing considerations, plaintiff has been quite active in pursuing his lawsuit. See, e.g., R.542-589, 597-605, 613-622; Docketing Statement; Plaintiff's Brief.

In short, the District Court did not abuse its discretion in setting the discovery cutoff date; therefore, the District Court's action should be affirmed.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO GRANT PLAINTIFF'S MOTION FOR EXTENSION OF TIME TO COMPLETE DISCOVERY AND TRIAL PREPARATION.

On February 16, 1993, after all of the allowed briefing related to defendants' Motion for Summary Judgment had been completed, see Utah Code Jud. Admin. R. 4-501(1); R.425-525, 530, and two months after defendants filed a Notice to Submit for Decision, R.527, the District Court directed that a Minute Entry be made in which it granted the Motion for Summary Judgment. R.539-40. On the same day (February 16, 1993), plaintiff filed: (1) a Motion for Extension of Time to Complete Discovery and Trial Preparation, R.542; and (2) a Memorandum in Opposition to Defendants' Reply Memorandum in Support of Motion for Summary Judgment. R.545. On February 18, 1993, defendants filed a Response to Plaintiff's Motion for Continuance and for Leave to Complete Discovery. R.593. On that same day (February 18, 1993) the

District Court made a second a Minute Entry reaffirming its earlier ruling granting the Motion for Summary Judgment. R.590-91.

As noted above, the Appellate Court must assume that the District Court properly exercised its discretion when it refused to grant plaintiff's Motion for Extension of Time unless the record clearly shows to the contrary. Donohue, 748 P.2d at 1068; Matter of Estate of Justheim, 824 P.2d at 433.

In the instant case, plaintiff has failed to point to any admissible evidence in the record which clearly shows the District Court abused its discretion when it denied plaintiff's Motion for Extension of Time.

Plaintiff's argument that the District Court never entered a ruling granting or denying his Motion for Extension is misplaced. There was no need for the District Court to do so because plaintiff's Motion was untimely. See discussion above. Furthermore, plaintiff has not cited to any authority for the proposition implicit in his argument that the District Court must make a formal ruling on all untimely motions.

Plaintiff's argument related to Utah R. Civ. P. 56(f) also is misplaced because plaintiff never moved for additional time under this rule,³⁵ and the cases which plaintiff cites in support of this argument are clearly distinguishable from the instant case.³⁶

³⁵ Even had plaintiff filed a motion pursuant to Rule 56(f), he could not have met his burden of showing that he had not had adequate opportunity to conduct discovery. See discussion above.


³⁶ See Strand v. Assoc. Student of U. of Utah, 561 P.2d 191 (Utah 1977) (the plaintiff only had one month to conduct discovery in general and four days to conduct discovery related to the

In short, the District Court did not abuse its discretion in denying plaintiff's Motion for Extension of Time; therefore, the District Court's action should be affirmed.

CONCLUSION

For the foregoing reasons, defendants respectfully request the Court of Appeals to affirm: (1) the District Court's granting of defendants' Motion for Partial Summary Judgment; (2) the District Court's granting of defendants' Motion for Summary Judgment; (3) the District Court's entering of the Scheduling Order which mandated that all discovery be completed by December 31, 1992; (4) the District Court's refusal to grant plaintiff's Motion for Extension of Time to Complete Discovery and Trial Preparation; and (5) any other judgments, decisions or orders of the District Court from which plaintiff has appealed.

RESPECTFULLY SUBMITTED this 10th day of August, 1993.



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Attorneys for Defendants-Appellees

affidavit upon which the motion was based, and the plaintiff filed an affidavit which conformed with the requirements of Utah R. Civ. P. 56(f)); Cox v. Winters, 678 P.2d 311 (Utah 1984) (the defendant had not responded to plaintiff's discovery requests, and the plaintiff filed an affidavit which met the requirements of Utah R. Civ. P. 56(f)); Auerbach's Inc. v. Kimball, 572 P.2d 376 (Utah 1977) (the party requesting more time to conduct discovery had received no response to his discovery requests).

ADDENDUM TO BRIEF OF APPELLEES

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- A. DETERMINATIVE STATUTES AND RULES
- B. COPIES OF THOSE FACTS OF THE RECORD THAT ARE OF
CENTRAL IMPORTANCE TO THE DETERMINATION OF THIS
APPEAL.
- C. COPY OF ORDER AND STATEMENT OF PROPOSED CHANGES
TO THE RECORD.

Tab A

DETERMINATIVE STATUTES AND RULES

1. 29 U.S.C.A. § 793(b) (West Supp. 1993).

(b) Administrative enforcement; complaints; investigations; departmental action.

If any individual with a disability believes any contractor has failed or refused to comply with the provisions of a contract with the United States, relating to employment of individuals with disabilities, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

2. 29 U.S.C.A. § 794(a) (West Supp. 1993).

(a) Promulgation of rules and regulations.

No otherwise qualified individual with a disability in the United States, as defined in Section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

3. 29 U.S.C.A. § 1002(1)(A) (West Supp. 1993).

(A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) . . .

4. 29 U.S.C.A. § 1104(a)(1)(D) (West Supp. 1993).

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

5. 29 U.S.C.A. § 1144(a) (West 1985).

(a) Supersedure; effective date.

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this title and not exempt under Section 1003(b) of this title. This section shall take effect on January 1, 1975.

6. Utah Code Ann. § 34-35-6(1)(a)(i) (Michie Supp. 1993).

(1) It is a discriminatory or prohibited employment practice:

(a)(i) for an employer to refuse to hire, or promote, or to discharge, demote, terminate any person, or to retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified, because of race, color, sex, pregnancy, childbirth, or pregnancy-related conditions, age, if the individual is 40 years of age or older, religion, national origin, or handicap. No applicant nor candidate for any job or position may be considered "otherwise qualified," unless he possesses the

education, training, ability, moral character, integrity, disposition to work, adherence to reasonable rules and regulations, and other job related qualifications required by an employer for any particular job, job classification, or position to be filled or created;

7. Utah Code Ann. § 34-35-7.1(15) (Michie Supp. 1993).

The procedures contained in this section are the exclusive remedy under state law for employment discrimination based upon race, color, sex, retaliation, pregnancy, childbirth, or pregnancy-related conditions, age, religion, national origin, or handicap.

8. Utah Code Ann. § 35-1-60 (Michie 1988).

Exclusive remedy against employer, or officer, agent or employee - Occupational Disease excepted.

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained aggravated or incurred by such employee in the course of or because of arising out of his employment, and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee. Nothing in this section, however, shall prevent an employee (or his dependents) from filing a claim with the industrial commission of Utah for compensation in those cases within the provisions of the Utah Occupational Disease Disability Act, as amended.

9. **Utah Code of Judicial Administration Rule 4-501(2) (b) (Michie 1993).**

Memorandum in opposition to a motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

10. **Utah Code of Judicial Administration Rule 4-501(1) (Michie 1993).**

(1) Filing and service of motions and memoranda.

(a) Motion and supporting memoranda. All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(b) Memorandum in opposition to motion. The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation.

If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(d) of this rule.

(c) **Reply memorandum.** The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(d) **Notice to submit for decision.** Upon the expiration of the five-day period to file a reply memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

Tab B

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WILLIAM V. PENNEY,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 900903522 CV
vs.	:	JUDGE FRANK G. NOEL
E-SYSTEMS, INC., a Delaware	:	
corporation, DAVID A. WILLIAMS,	:	
ALFRED B. BUCHANAN,	:	
Defendants.	:	

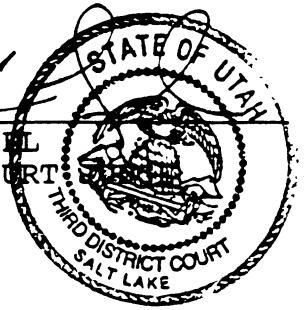
On February 28, 1992 the Court denied plaintiff's Motion to Disqualify Counsel. The Court recalls that it instructed Counsel for defendant to prepare an order reflecting the Court's ruling. In reviewing the file the Court notes that said Order has not yet been submitted for the Court's signature.

In addition the Court has before it a Motion for Withdrawal of Counsel filed by plaintiff's Counsel. The Court has granted said Motion and has signed the Order submitted in connection with the Motion for Withdrawal but hereby instructs Counsel, David K. Isom, to serve upon plaintiff a notice to

appoint Counsel or appear in person consistent with our rules of practice.

DATED this 23 day of March, 1992.

Frank G. Noel
FRANK G. NOEL
DISTRICT COURT



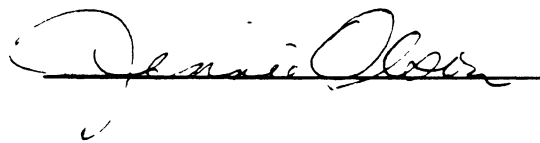
CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 23 day of March, 1992:

David K. Isom
J. Preston Stieff
DAVID K. ISOM & ASSOCIATES
Attorneys for Plaintiff
1680 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

David A. Anderson
Paul E. Dame
PARSONS, BEHLE & LATIMER
Attorneys for Defendants
P. O. Box 11898
Salt Lake City, Utah 84147-0898

William V. Penney
Plaintiff
709 West Busk, Suite A-101
Rockwell, Texas 75087

A handwritten signature in cursive script, appearing to read "William V. Penney", is written over a horizontal line. A small checkmark is visible below the line to the left of the signature.

FILED DISTRICT COURT
Third Judicial District

MAR 2 1992

Branda
SALT LAKE COUNTY
Deputy Clerk

DAVID A. ANDERSON (0081)
PAUL E. DAME (5683)
of and for
PARSONS BEHLE & LATIMER
Attorneys for Defendants
201 South Main Street, Suite 1800
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

WILLIAM V. PENNEY,)	
)	
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	MOTION TO DISQUALIFY COUNSEL
vs.)	
)	
E-SYSTEMS, INC., a Delaware)	
corporation, DAVID A.)	
WILLIAMS, ALFRED B. BUCHANAN,)	Civil No. 900903522CV
)	Judge Frank G. Noel
Defendants.)	

* * * * *

Plaintiff's Motion to Disqualify Counsel came on for hearing before the Court on February 28, 1992. Plaintiff was represented by David K. Isom and J. Preston Stieff of David K. Isom & Associates, P.C., and defendants were represented by David A. Anderson of Parsons Behle & Latimer. The Court having reviewed the memoranda, affidavits and other materials submitted by the parties, and having heard the arguments of counsel, now being fully advised in the premises, and having issued its oral

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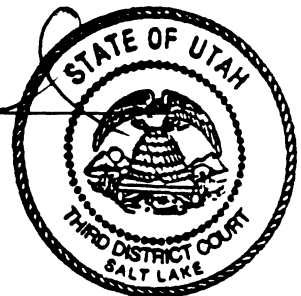
ruling denying plaintiff's Motion on the grounds that plaintiff has failed to prove that Parsons Behle & Latimer formerly represented him or that confidential information was transmitted to Parsons Behle & Latimer by plaintiff, and the Court having further concluded that plaintiff has waived his right to bring the instant Motion by filing it untimely,

NOW, THEREFORE, IT IS HEREBY ORDERED that plaintiff's Motion to Disqualify Counsel should be and is hereby denied.

ENTERED this 21 day of March, 1992.

BY THE COURT:


HON. FRANK G. NOEL



CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, postage prepaid, a copy of the foregoing ORDER ON PLAINTIFF'S MOTION TO DISQUALIFY DEFENDANTS' COUNSEL to the following on this 2nd day of March, 1992:

David K. Isom, Esq.
J. Preston Stieff, Esq.
Suite 1680 Eaglegate Tower
Salt Lake City, Utah 84111-1006



DAA/022892A

JUL 10 1992

DAVID A. ANDERSON (0081)
PAUL E. DAME (5683)
of and for
PARSONS BEHLE & LATIMER
Attorneys for Defendants
201 South Main Street, Suite 1800
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

CLERK OF COURT
J. B. BROWN

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

WILLIAM V. PENNEY,)	
)	
Plaintiff,)	ORDER GRANTING
)	DEFENDANTS' MOTION FOR
vs.)	PARTIAL SUMMARY JUDGMENT
)	
E-SYSTEMS, INC., a Delaware)	
corporation, DAVID A. WILLIAMS,)	Civil No. 900903522CV
ALFRED B. BUCHANAN,)	
)	Judge Frank G. Noel
Defendants.)	

* * * * *

Defendants' Motion for Partial Summary Judgment was filed on September 25, 1991. After an order granting plaintiff additional time to conduct discovery, dated February 10, 1992, defendants' Motion came on for hearing before the Court on June 19, 1992, with David A. Anderson and Paul E. Dame appearing for the defendants. On June 18, 1992, the Court received a telecopied letter and Notice of Appearance Pro Se from plaintiff. In his letter, plaintiff requested the Court to postpone the hearing on defendants' Motion. After considering plaintiff's

request, the Court noted that: (1) plaintiff is now representing himself; (2) plaintiff has not requested additional time to retain other counsel; and (3) there is no indication of when, if ever, plaintiff will be ready to attend a hearing on defendant's Motion. Accordingly, the Court elected to proceed with the hearing on defendants' Motion.

Having read defendants' supporting memorandum and affidavits, and now being fully advised in the premises, and the Court having issued its oral ruling granting defendants' Motion for Partial Summary Judgment,


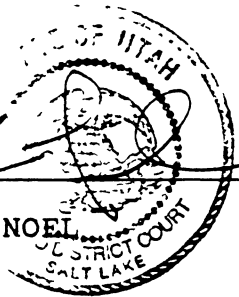
NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Defendants' Motion for Partial Summary Judgment should be and is hereby granted; and

2. Plaintiff's First Cause of Action (breach of public policy against discrimination against disabled), Third Cause of Action (breach of implied covenant of good faith and fair dealing), Fourth Cause of Action (breach of contract), and Fifth Cause of Action (infliction of emotional distress) should be and are hereby dismissed with prejudice.

Entered this 10th day of July 1992.

BY THE COURT:


HON. FRANK G. NOEL


CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, postage prepaid, a copy of the foregoing ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT to the following on this 22nd day of June, 1992.

William V. Penney
709 West Rusk, Suite A101
Rockwall, TX 75087


PAUL E. DAME

PED/061992A

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

PENNEY, WILLIAM V :
PLAINTIFF, :
-VS- : SCHEDULING ORDER AND
E-SYSTEMS, INC : TRIAL NOTICE
DEFENDANT. : CASE NO. 900903522 CV
HONORABLE FRANK G NOEL

PURSUANT TO THE SCHEDULING CONFERENCE HELD ON AUGUST 3, 1992
THE FOLLOWING DATES WERE SET AND MATTERS DISCUSSED:

1. THIS CASE IS SET FOR TRIAL ON MARCH 1, 1993 AT 10:00 A.M.
2. ANTICIPATED TRIAL TIME IS 03 DAYS.
3. THE CASE IS SET FOR JURY TRIAL. COUNSEL ARE TO
SUBMIT AN AGREED SET OF JURY INSTRUCTIONS TO THE COURT BY
. OBJECTED TO INSTRUCTIONS ARE TO BE SUBMITTED
SEPARATELY.
4. ALL DISCOVERY INCLUDING RESPONSES MUST BE CONCLUDED BY
DEC 1, 1992
5. ALL DISPOSITIVE MOTIONS ARE TO BE HEARD BY JAN 4, 1992
6. EXHIBIT AND WITNESS LISTS ARE TO BE EXCHANGED BY
7. A FINAL PRETRIAL SETTLEMENT CONFERENCE WILL BE HELD ON
FEBRUARY 22, 1993 AT 8:30 A.M. TRIAL COUNSEL AND CLIENTS, OR
AN INDIVIDUAL WITH AUTHORITY TO SETTLE THIS CASE ARE TO BE
PRESENT. OUT OF STATE PARTIES MUST BE AVAILABLE BY PHONE AT THE
TIME OF THE PRETRIAL SETTLEMENT CONFERENCE.
8. FAILURE TO APPEAR AT THE PRETRIAL SETTLEMENT CONFERENCE
MAY RESULT IN A DEFAULT.
9. THE FOREGOING DATES SHOULD BE CONSIDERED FIRM SETTINGS
AND WILL NOT BE MODIFIED WITHOUT COURT ORDER, AND THEN ONLY
UPON A SHOWING OF MANIFEST INJUSTICE. COUNSEL ARE INSTRUCTED TO
STAY IN CONTACT WITH THE CLERK OF THIS COURT AS THE TRIAL DATE
APPROACHES REGARDING THE TRIAL SETTING.
10. IF PLAINTIFF'S COUNSEL ANTICIPATES THAT EVIDENCE AT TRIAL
WILL SHOW DAMAGES OF LESS THAN \$20,000, COUNSEL SHOULD PERPARE AN
ORDER TRANSFERRING THE CASE TO THE CIRCUIT COURT.
DATED THIS 3RD DAY OF AUGUST, 1992.


DISTRICT COURT JUDGE

COPIES MAILED TO PARTIES AT THE ADDRESSES INDICATED ON THE
ATTACHED MAILING CERTIFICATE.

000423

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT I MAILED A TRUE AND CORRECT COPY OF THE
ATTACHED SCHEDULING ORDER AND TRIAL NOTICE, BY FIRST CLASS MAIL,
POSTAGE PREPAID, TO THE FOLLOWING:

PENNEY, WILLIAM V.
ATTORNEY FOR DEFENDANT
709 W. RUSK, SUITE A101
P.O. BOX 11898
ROCKWALL TX 75087

ANDERSON, DAVID A.
ATTORNEY FOR PLAINTIFF
50 WEST BROADWAY #400
SALT LAKE CITY UT 84147

DATED THIS 3rd DAY OF Aug 1992

Deputy Clerk
DEPUTY CLERK

000424

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

William V. Penney,
Plaintiff,

vs.

E-Systems, Inc., a Delaware corporation,
David A. Williams and Alfred B. Buchanan,
Defendants.

:
:
:
:
:
:
:
:
:

MINUTE ENTRY

CASE NO: 900903522 CV

JUDGE FRANK G. NOEL

Now before the Court is defendants' Motion for Summary Judgment on the plaintiff's second cause of action. The Court has reviewed the substantial materials submitted in connection with this Motion including memos, affidavits, news clippings, magazine articles and other matter submitted by the plaintiff and now rules as follows:

The Court is of the opinion that the plaintiff simply has not appropriately established in the record a question of fact on his second cause of action that would allow the Court to submit that matter to the jury. Plaintiff has conducted essentially no discovery and the materials submitted in opposition to the Motion do not appear to the Court to create questions of fact sufficient to overcome a Motion for Summary Judgment.

Much of the information contained in Mr. Penney's rather lengthy response is not information of which he has personal knowledge. The news clippings, magazine article, brochures and seminar advertisements of course are not admissible and do not in any way support Mr. Penney's claim. On the other hand several affidavits have been filed by the defendants which support their position both as to the fraud claims and their position that Mr.


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Penney resigned from employment rather than being terminated.

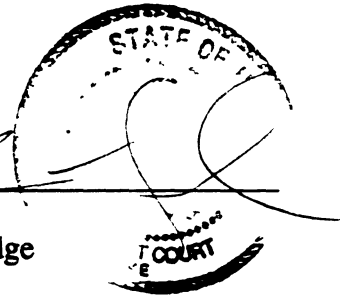
Throughout a large portion of this litigation Mr. Penney has not been represented by Counsel and the Court in recognition of that fact has given Mr. Penney the benefit of the doubt on occasions, has been patient in Mr. Penney's efforts to get his case prepared so that he could go to trial, but the Court feels that it simply must apply the rule of law in the final analysis that is applied to all litigants and must require that Mr. Penney establish in an appropriate manner in accordance with the Rules of Civil Procedure facts on the record that establish a genuine issue of material facts. In the opinion of the Court Mr. Penney's submittals in response to the defendants' Motion for Summary Judgment fails to do so. Accordingly, defendants' Motion is granted.

Counsel for defendants is to prepare an order consistent with this ruling.

Dated this 16th day of February, 1993.



Frank G. Noel
District Court Judge



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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry,
postage prepaid, to the following on this 16 day of February, 1993.

William V. Penney
Plaintiff Pro Se
709 West Rusk, Suite A101
Rockwall, Texas 75087

WILLIAM V. PENNEY
PLAINTIFF PRO SE
2333 EAST CLIFT SWALLOW DRIVE
SANDY, UT 84093

David A. Anderson
Paul E. Dame
PARSONS, BEHLE & LATIMER
Attorney for Defendants
P. O. Box 11898
Salt Lake City, Utah 84147-0898

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

SALT LAKE COUNTY, STATE OF UTAH

• • • • •


JUDGE FRANK G. NOEL

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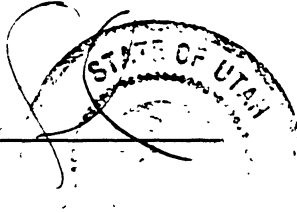
of fact has not been raised by Mr. Penney. Mr. Penney's affidavit contains certain paragraphs where Mr. Penney expresses his belief that he was terminated as a result of his refusal to engage in certain questionable activities at the company and as a result of informing management of certain questionable activities by other employees. These statements are purely conclusory and Mr. Penney has offered no admissible evidence to support these conclusions. The Court is still of the opinion that Mr. Penney has not raised a triable issue of fact in this matter and considering all of the admissible evidence that Mr. Penney has established on the record it would still require the jury to purely speculate as to the reason for Mr. Penney's termination.

Accordingly, the Court reaffirms its earlier ruling granting the Motion for Summary Judgment.

Dated this 18th day of February, 1993.



Frank G. Noel
District Court Judge



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry,
postage prepaid, to the following on this 18 day of February, 1993.

William V. Penney
Plaintiff Pro Se
709 West Rusk, Suite A101
Rockwall, Texas 75087

William V. Penney
Plaintiff Pro Se
2333 East Cliff Swallow Drive
Sandy, Utah 84093

David A. Anderson
Paul E. Dame
PARSONS, BEHLE & LATIMER
Attorney for Defendants
P. O. Box 11898
Salt Lake City, Utah 84147-0898

A handwritten signature in dark ink, appearing to read "David A. Anderson", is written over a horizontal line.

DAVID A. ANDERSON (0081)
PAUL E. DAME (5683)
of and for
PARSONS BEHLE & LATIMER
Attorneys for Defendants
201 South Main Street, Suite 1800
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

MAR 09 1993

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

WILLIAM V. PENNEY,)	
)	
Plaintiff,)	ORDER GRANTING DEFENDANTS'
)	MOTION FOR SUMMARY JUDGMENT
vs.)	
)	
E-SYSTEMS, INC., a Delaware)	Civil No. 900903522CV
corporation, DAVID A. WILLIAMS,)	
ALFRED B. BUCHANAN,)	
)	Judge Frank G. Noel
Defendants.)	

* * * * *

On December 31, 1992, defendants, through their attorney David A. Anderson, filed their Motion for Summary Judgment on plaintiff's second cause of action, all previous causes of action having been dismissed by the Court in response to defendants' prior Motion for Partial Summary Judgment. After defendants filed their Motion for Summary Judgment, plaintiff William Penney, acting as attorney pro se, submitted materials, including an affidavit, in opposition to that Motion and defendants submitted a Reply

Memorandum. The Court having reviewed the materials submitted by the parties that relate to defendants' Motion, and having issued its ruling on the Motion set forth in its Minute Entry dated February 16, 1993, and having issued its further ruling set forth in the Court's Minute Entry dated February 18, 1993, and being fully advised regarding the parties' positions on the subject Motion, and good cause appear therefor,

IT IS HEREBY ORDERED that defendants' Motion for Summary Judgment should be and is hereby granted and plaintiff's Second Cause of Action ("Violation of Public Policy Against Fraudulent Business Activities") is hereby dismissed with prejudice.

ENTERED this 9th day of March, 1993.

BY THE COURT:


HON. FRANK G. NOEL

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT to the following at the two addresses indicated on this 23rd day of February, 1993:

William V. Penney
709 West Rusk, Suite A101
Rockwall, TX 75087

William V. Penney
2333 East Cliff Swallow Drive
Sandy, Utah 84093

David X. Anderson

MAR 09 1993

DAVID A. ANDERSON (0081)
PAUL E. DAME (5683)
of and for
PARSONS BEHLE & LATIMER
Attorneys for Defendants
201 South Main Street, Suite 1800
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

Pat Jones
Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

WILLIAM V. PENNEY,)	
)	
Plaintiff,)	JUDGMENT
)	
vs.)	
)	
E-SYSTEMS, INC., a Delaware)	Civil No. 900903522CV
corporation, DAVID A. WILLIAMS,)	
ALFRED B. BUCHANAN,)	
)	Judge Frank G. Noel
Defendants.)	

* * * * *

The Court having issued its Order Granting Defendants' Motion for Partial Summary Judgment on July 10, 1992, and having thereafter issued its Order Granting Defendants' Motion for Summary Judgment, which Orders dismissed with prejudice all claims in plaintiff's Complaint herein against defendants,

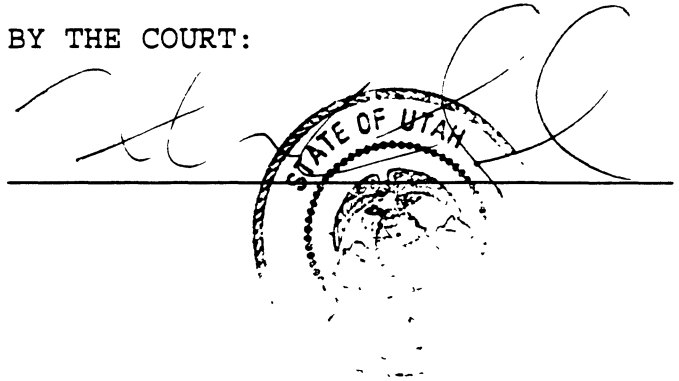
NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment in favor of defendants and against plaintiff should be and is hereby entered, dismissing plaintiff's action,

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including all claims asserted therein, with prejudice. As prevailing parties, defendants are awarded their costs herein.

ENTERED this 9th day of March, 1993.

BY THE COURT:


A handwritten signature is written over a horizontal line. To the right of the signature is the official seal of the State of Utah, which features a circular design with the words "STATE OF UTAH" and a central emblem.

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing JUDGMENT to the following at the two addresses indicated on this 23rd day of February, 1993:

William V. Penney
709 West Rusk, Suite A101
Rockwall, TX 75087

William V. Penney
2333 East Cliff Swallow Drive
Sandy, Utah 84093



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AUG 09 1993

SALT LAKE COUNTY
By Pat Jones
Deputy Clerk

DAVID A. ANDERSON (0081)
PAUL E. DAME (5683)
of and for
PARSONS BEHLE & LATIMER
Attorneys for Defendants
201 South Main Street, Suite 1800
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

WILLIAM V. PENNEY,)	
)	
Plaintiff,)	ORDER AND STATEMENT OF
)	PROPOSED CHANGES TO THE
vs.)	RECORD
)	
E-SYSTEMS, INC., a Delaware)	
corporation, DAVID A. WILLIAMS,)	
ALFRED B. BUCHANAN,)	Civil No. 900903522CV
)	
Defendants.)	Judge Frank G. Noel

* * * * *

Defendants' Motion To File Plaintiff's Deposition and to Modify the Judgment came on for hearing before the Court on July 9, 1993. Plaintiff William V. Penney, who was present by telephone, represented himself, and Defendants were represented by David A. Anderson and Paul E. Dame of Parsons Behle & Latimer. At the hearing, through colloquy with counsel, the Court determined that counsel for defendants had inadvertently failed to file the

original transcript of the deposition of the plaintiff, even though counsel had filed on September 25, 1991, their Motion to Publish the Plaintiff's Deposition, which was granted by the Court. The Court further determined that courtesy copies of the pages of the deposition relied upon by defendants were provided to the Court in connection with defendants' Motion for Partial Summary Judgment. It is the practice of the Court to consider the pages thus submitted prior to ruling on a Motion for Summary Judgment.

The Court is not inclined to use Rule 60(b) of the Utah Rules of Civil Procedure to deal with this situation. Rather, the Court, on its own initiative, pursuant to Utah R. App. P. 11(h), and in order to clarify what actually occurred in the trial court, makes this Statement and Order.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

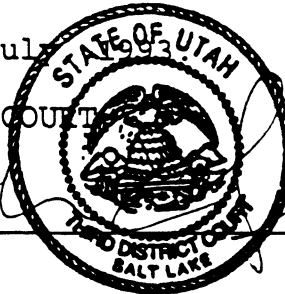
1. The original transcript of the Plaintiff's deposition may be filed as of July 9, 1993;
2. The original transcript of the Plaintiff's deposition may be unsealed as previously provided by the Court's granting of the Defendants' September 25, 1991 Motion to Publish the Plaintiff's Deposition;
3. Defendants' Motion under Rule 60(b) is denied; and

4. Pursuant to Utah Rule of Appellate Procedure 11(h), the record should be clarified to show that the original transcript of plaintiff's deposition was inadvertently not filed but that, in connection with their Motion for Partial Summary Judgment, defendants provided the Court with courtesy copies of the pages of the Plaintiff's deposition on which they relied in support of that Motion, and it is the Court's practice to review such deposition pages provided to it as courtesy copies in connection with its consideration of motions.

This Order and Statement constitutes the Court's Statement pursuant to Rule 11(h) of the Utah Rules of Appellate Procedure, and in accordance with that Rule, the parties now have 10 days after the service of this signed Order and Statement to serve and file their objections, if any, to the preceding Statement.

ENTERED this 30 day of July

BY THE COURT



APPROVED AS TO FORM:

William V. Penney
William V. Penney
Plaintiff Pro Se

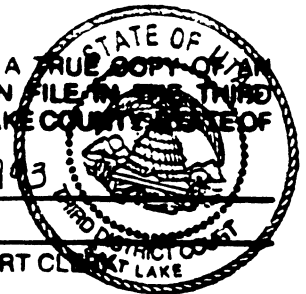
I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE

Aug. 9, 1943

Pat Jones

DEPUTY COURT CLERK



APPROVED AS TO FORM:

Paul E. Dame
David A. Anderson
Paul E. Dame
Counsel for Defendants

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, via federal express, a true and correct copy of the foregoing Order to the following at the indicated addresses on this 14th day of July, 1993:

William V. Penney
709 West Rusk, Suite A101
Rockwall, TX 75087

W. V. Penney

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, two true and correct copies of the foregoing document to the following BRIEF OF APPELLEES and ADDENDUM thereto at the indicated addresses on this 10th day of August, 1993:

William V. Penney
2333 East Cliff Swallow Drive
Sandy, UT 84093

William V. Penney
709 West Rusk, Suite A101
Rockwall, TX 75087

Paul E. Davis