

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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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 930368

IN THE COURT OF APPEALS

WILLIAM V. PENNEY,

Plaintiff/Appellant,

vs.

E-SYSTEMS, INC., a Delaware  
corporation doing business in  
Utah, DAVID A. WILLIAMS and  
ALFRED B. BUCHANAN,

Defendants/Appellees.

Case No. 930368-CA

Priority No. 15

BRIEF OF PLAINTIFF/APPELLANT

APPEAL FROM SEVEN (7) ORDERS, RULINGS, OR 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. 900903522CV

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Utah Court of Appeals

JUN 28 1993

*May T. Noonan*  
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Clerk of the Court

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Plaintiff/Appellant William V. Penney ("Penney") hereby submits the following Brief of Plaintiff/Appellant. All references "R." are to the district court record.

#### JURISDICTION OF APPELLATE COURT

This Court has jurisdiction over this action pursuant to Utah Code Annotated § 78-2a-3(k) and Utah Rule of Appellate Procedure 42. This case was poured-over to the Utah Court of Appeals by order the Utah Supreme Court dated June 3, 1993.

#### STANDARD OF APPELLATE REVIEW

**Summary judgment by the trial court.** Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Because a summary judgment resolves only questions of law, the appellate court is to give no deference to the trial court's determination. In reviewing an entry of summary judgment, the appellate court is to view the facts in the light most favorable to the opposing party and affirm only where it appears no genuine dispute exists as to any material fact, and where the moving party is entitled to judgment as a matter of law. Druffner v. Mrs. Fields, Inc., 828 P.2d 1075 (Utah App. 1992); Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 999-1000 (Utah 1991); New West Fed. Sav. & Loan Ass'n v. Guardian Title Co., 818 P.2d 585, 588 (Utah App. 1991). Where a party opposing a motion for summary judgment timely presents his affidavit stating reasons why he is presently unable to proffer evidentiary affidavits, he directly and forthrightly invokes the trial court's discretion.

Unless dilatory or lacking in merit, the motion should be liberally treated. Exercising a sound discretion the trial court then determines whether the stated reasons are adequate. Cox v. Winters, 678 P.2d 311 (Utah 1984); Strand v. Associated Students of University of Utah, 561 P.2d 191 (Utah 1977).

#### **DETERMINATIVE PROVISIONS**

No constitutional provision, statute, ordinance, rule, or regulation necessarily is determinative of this appeal. Utah Rule of Civil Procedure 56 applies, however, to the Court's appellate decision.

#### **STATEMENT OF CASE**

##### **Nature of Case**

Plaintiff William V. Penney ("Penney") was wrongfully terminated by defendants on June 18, 1986, after more than five (5) years of continuous exemplary employment with defendant E-Systems' Montek Division in the State of Utah. Penney, as an employee, had rights to not be discriminated against because of his disabilities, not to be fired when he refused to engage in or keep quiet about illegal acts involving his employer and its management, to be dealt with in good faith, to have his employment contract faithfully performed by his employer, and not to have his employer or its management intentionally inflict emotional distress upon Penney. Penney commenced this action to recover damages for his wrongful termination and for defendants' violation and breach of each of the enumerated rights.

### Course of Proceedings Below

Penney filed his verified complaint ("Verified Complaint") in this action about June 15, 1990 for judgment against defendants on 5 causes of action (I. Discrimination against Disabled; II. Fraudulent & Dishonest Acts; III. Covenant of Good Faith & Fair Dealing; IV. Breach of Contract; V. Infliction of Emotional Distress). Defendants filed an Answer about August 2, 1990, more than 45 days after the Verified Complaint was filed and served on defendants.

About July 11, 1990 Penney served upon defendants Plaintiff's First Set Of Interrogatories and Request For Production Of Documents. On September 26, 1990, defendants responded to Penney's 1st Set of Interrogatories & Request For Production of Documents, more than 60 days after the interrogatories were served on defendants. On October 2, 1990, Penney noticed up the depositions of defendants David A. Williams and Alfred B. Buchanan. Neither of these depositions were ever taken because of scheduling objections of defendants and their counsel.

On July 11, 1990 Penney answered defendants' First Set of Interrogatories And Requests For Production Of Documents. Subsequently Defendants noticed up the deposition of Penney. Penney's counsel agreed to the taking of Penney's deposition subject to scheduling (mornings only) that would protect Penney's health, not impair his recovery from injury and consequent surgeries and allow him to be clear headed enough to

understand and answer deposition questions. The promise of mornings only was not kept. Penney was pushed beyond his physical and mental limits while being subjected to 2 1/2 full days of grueling interrogation, which Penney was able to endure only by the use of strong prescription pain medication which substantially affected Penney's ability to understand and answer deposition questions.

About September 24, 1991 defendants served their MOTION FOR PARTIAL SUMMARY JUDGMENT, together with their MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT, on Penney seeking dismissal of causes I, III, IV, IV, and V of the Verified Complaint. Defendants' Motion was granted by the district court's Order dated July 10, 1992.<sup>1</sup>

About August 3, 1992, the district court served on Penney a scheduling order requiring all discovery to be complete by December 1, 1992, and "all depositive motions to be heard by Jan 4, 1992." [sic.]

About December 31, 1992, defendants mailed to Penney defendants' MOTION FOR SUMMARY JUDGMENT, together with defendants' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, seeking dismissal of cause II, the only

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<sup>1</sup> On June 18, 1992, Penney, an out-of-state litigant residing more than 1,000 miles away in Texas who had undergone major surgeries on 11/13/91 and 3/10/92 and was still convalescing therefrom, requested the district court to postpone a hearing on defendants' Motion For Partial Summary Judgment set for 6/19/1992. The ONLY basis given by the district court in its July 10, 1992 Order rejecting Penney's request was "(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."

remaining cause of Penney's Verified Complaint.

February 16, 1993, Penney filed with the district court PLAINTIFF'S MOTION FOR CONTINUANCE & FOR LEAVE TO COMPLETE DISCOVERY, together with supporting affidavits of Dr. Allen J. Meril, M.D., and Mr. William V. Penney.

The district court never granted or denied Penney's Motion For Continuance & For Leave. About February 16, 1993, the district court issued a Minute Entry granting defendants' Motion For Summary Judgment. About February 18, 1993, the district court issued a Minute Entry reaffirming its Minute Entry of February 16, 1993.<sup>2</sup>

About March 9, 1993, the district issued its ORDER granting defendants' Motion for Summary Judgment, dismissing Penney's action, including all claims asserted therein, with prejudice. About March 9, 1993, the district court issued its JUDGEMENT granting judgment in favor of defendants and against Penney, dismissing plaintiff's action, including all claims asserted therein, with prejudice.

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<sup>2</sup> In its 2/16/1993 Minute Entry granting defendants' Motion For Summary Judgment, the district court concluded that it had been "patient with Mr. Penney's efforts to get his case prepared so that he could go to trial" and that "Plaintiff has conducted essentially no discovery", even though Penney on 7/11/90 had served upon defendants 87 separate detailed interrogatories and 31 separate detailed requests for production of documents which were only partially answered by defendants; even though Penney, on 10/2/1990, noticed up the depositions of defendants Williams and Buchanan which never took place because of scheduling objections of defendants & their counsel, see R.70-71; even though Penney had promptly and diligently responded to defendants' interrogatories and request for production of documents; even though Penney was subjected to 2 1/2 full days of gruelling deposition questions notwithstanding agreement among counsel that Penney's deposition be limited to mornings only; and, even though Penney had been constantly deluged with a never ending barrage of discovery proceedings including no less than 16 Notices of Taking of Depositions (see appeals Index pp. 1-2; Docketing Statement attachments).

Penney timely filed a NOTICE OF APPEAL followed by a DOCKETING STATEMENT about May 10, 1993.

**STATEMENT OF FACTS**

The following facts are supported by the record, and are the same facts that were relied on by Penney in defending himself against summary judgment at the District Court level.<sup>3</sup>

1. In 1980, defendant E-Systems, Inc., ("E-Systems") sought out plaintiff William V. Penney ("Penney") for the purpose of hiring him as a procurement manager.

2. Penney had received a total disability from Social Security in 1972 because of prior industrial and job-related accidents that left him with respiratory and spine problems. Defendant E-Systems was aware of Penney's health concerns. E-Systems induced Penney to accept its offer of employment by representing the fact that E-Systems was self-insured and would, therefore, provide Penney with an essential health care policy that otherwise would have been difficult for him to obtain.

3. Penney relied upon defendant's promise of insurance coverage, and he joined E-Systems as a procurement manager in December 1980. E-Systems required Penney to relocate from his home in Texas to the state of Utah, where he remained until he was unlawfully fired from E-Systems on June 18, 1986.

4. Because of Penney's health problems, insurance was an essential benefit that Penney took care to preserve. At all times while employed at E-systems, Penney purchased the maximum

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<sup>3</sup> See Addendum, Ex "F" Docketing Statement, p. 3 §4.

insurance provided under the company policy. He also made certain that he had long term disability insurance.

5. Penney had an excellent work record while he was employed at E-Systems. As procurement manager for the defendant, Penney earned numerous raises, commendations and promotions. Eventually, Penney rose to the position of Director of Purchasing in E-Systems' Montek division.

6. Throughout his employment with E-Systems, Penney never received any warnings, notices, progressive discipline or other negative or adverse personnel actions, and E-Systems was unable to cite any instance where Penney exceeded the budget for his department.

7. From about 1985, defendant David A. Williams ("Williams") became the general manager of E-Systems' Montek Division. Williams attempted to intimidate and coerce Penney into resigning his position with E-Systems. Williams' intimidation took various forms: 1) mocking and deriding Penney's physical disabilities, 2) forcing Penney and his department to work thousands of hours of uncompensated overtime (in direct violation of public policy and E-Systems regulations), and 3) taunting Penney with job termination if he did not meet all Williams' arbitrary goals or if the department did not remain under budget.

8. On or about May 9, 1986, Penney was injured in a hit-and-run accident, which caused him immediate, intense and continuous pain in three separate areas of his spine: cervical,

lumbar, and thoracic. Penney received an emergency room medical examination and treatment, a prescription for flexeril - a strong muscle relaxant, and a recommendation that he immediately see defendant E-Systems' inhouse doctor.

9. Though Penney then had about 200 hours of accrued sick leave and about 40 hours of vacation, his requests for time to see defendant E-Systems' inhouse physician Dr. Hensleigh or to obtain other medical help were refused by defendant Williams who threatened that Penney would lose his job if he did not promptly complete all of his assigned tasks.

10. Paranthetically it was not until after Penney was fired that he was finally examined by and received limited treatment from E-Systems' doctor, Dr. Hensleigh, who recommended that Penney go to his orthopedic specialist in Texas, Dr. Meril.

11. Penney asked defendant Williams for permission to take sick leave/leave of absence and a temporary abatement of excessive overtime to help Penney recover from the injuries he had sustained in the hit-and-run accident. Williams refused. Instead, he threatened to fire Penney if he failed to quickly complete the projects on which he was currently working.

12. Shortly before June 18, 1986, Penney completed the projects which he had been given. Penney then began to hear rumors that his department would soon be reorganized with a new director. He feared that Williams was finally taking steps to carry out his numerous threats.

13. Penney spent several days preparing a job Justification

Package which he intended to present as a last resort to persuade E-Systems Montek Division's management that he should not be fired.

14. As he had expected, on June 18, 1986, Penney was summoned to an "organizational meeting" chaired by defendant Williams. The purpose of the meeting was to carry out the firing of Penney.<sup>4</sup>

15. Penney brought with him to the meeting the "Justification Package" that he had prepared. Defendant Williams was furious that Penney had anticipated his actions, and he immediately fired Penney. Later that day, Williams issued orders that confirmed Penney's wrongful discharge of employment with E-Systems.

16. Following the "organizational meeting," Penney returned to his office. He followed the advice of defendant E-Systems' contract consultant and changed the title on the cover memo of his Justification Package to read "letter of resignation" (leaving the effective date blank) and modified the final paragraph of the memo. In a last ditch effort to keep his job, Penney delivered one set of his Justification Package to defendant Williams' and one set to Penney's immediate supervisor, Mr. Cocke.

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<sup>4</sup> Defendants expressly admitted that "the termination of plaintiff's employment was discussed by management prior to his [alleged] resignation" and that "Mr. Cocke recommended to Mr. Williams that plaintiff be terminated." Williams concurred and Cocke then consulted with Buchanan who also thought firing would be appropriate. (See Addendum Exhibit "A" Defendants' Response No. 54 to Plaintiff's 1st Set of Interrogatories. See also Affidavit of David A. Williams, paragraph 7 at R.478.)

17. The Justification Package submitted by Penney to Mr. Cocke and defendant Williams documented the "back-breaking overtime load" demanded by Williams and E-Systems, and that Penney objected to certain recent and proposed changes that would require additional excessive overtime to implement.

18. By said Justification Package, Penney also indicated that he was being forced out of employment with E-Systems by the excessive, uncompensated overtime being unfairly and illegally imposed upon exempt salaried employees, including himself.

19. Penney was summoned to Mr. Cocke's office to meet with him and defendant Mr. Alfred B. Buchanan ("Buchanan"), manager of Human Resources at E-Systems' Montek Division. Mr. Cocke confirmed Williams' earlier firing of Penney by filling in the blank resignation space on the face of the modified memo attached to Penney's Justification Package. Mr. Cocke wrote in the date June 18, 1986.

20. Penney immediately asked defendant Buchanan about severance benefits and specifically requested insurance conversion. Penney asked Buchanan to give him the necessary paperwork that would enable him to convert all of his E-Systems insurance to private non-E-Systems insurance. Defendant Buchanan promised to take care of the matter and report to Penney at his Exit Interview. Although Penney requested an Exit Interview, the interview was never granted. While Penney was packing up his personal belongings, he had a telephone conversation with Buchanan and again requested insurance conversion.

21. Although defendant Buchanan had promised to meet with Penney, perform an Exit Interview, and provide Penney with all necessary insurance conversion forms, he refused and failed to hold the Exit Interview.

22. Buchanan also delayed sending Penney the necessary insurance conversion forms until it was too late for him to convert his E-System insurance policy to a policy underwritten by a private (non E-Systems) insurance company. Buchanan's grossly negligent act has resulted in Penney's losing his insurance shortly after his wrongful termination and in Penney's remaining uninsured to this date.

23. Meanwhile, Penney has been forced to assume an enormous financial burden because of his uninsured status. After undergoing conservative treatment and physical therapy, Penney's physical condition and corresponding mental condition have continued to deteriorate. Penny underwent five major surgeries as medical treatment for the injuries and pain caused by the hit and run accident of May 9, 1986, while still employed by defendant E-Systems.<sup>5</sup>

24. On June 15, 1990, Penney initiated this current action in the Third Judicial District Court, In and For Salt Lake County, in the State of Utah. Penney sought relief under Utah contract and tort common law for his wrongful termination of employment.

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<sup>5</sup> See Docketing Statement, p. 6, for a complete description of the surgeries.

25. Promptly after filing the lawsuit, Penney began discovery against defendants by serving on them eighty-seven (87) separate detailed formal written interrogatories and thirty-one (31) separate detailed formal written requests for production of documents.

26. Many of these requests, defendants failed or refused to answer completely. Other of these requests, defendants failed or refused to answer at all. On numerous occasions, Penney's former attorney tried to schedule the depositions of the defendants, but he was prevented from doing so by scheduling conflicts of defendants and/or their counsel. However, Penney was subjected to a grueling multi-day deposition to facilitate the ongoing discovery process, although his injuries caused him severe pain during this ordeal.

27. Because of the horrendous medical and legal expenses occasioned by the acts and omissions of defendants complained of in Penney's Verified Complaint, Penney was forced to declare Chapter 7 bankruptcy and, consequently, has been forced to forego having counsel for and to represent himself Pro Se for much of the remainder of this proceeding.

28. Although Penney informed the trial court that he was proceeding without counsel and that he was scheduled for mandatory back surgery on August 19, 1992, as part of his ongoing medical treatment, the trial court imposed upon Penney an unreasonable scheduling order. Penney, who was then enduring day-to-day on strong prescription pain medication, was forced to

risk his life <sup>6</sup> to make a painful and expensive trip from Texas to Salt Lake City, Utah to attend an August 3, 1992 pre-trial hearing with the district judge or face immediately dismissal of his lawsuit per the terms of the district court's scheduling order.

29. The trial court was advised that Penney's recovery from the August 19, 1992, back surgery would be slow and painful and would greatly impair Penney's ability to complete his discovery and pre-trial motions. The trial court was also aware that Penney was greatly disadvantaged in his prosecution of this lawsuit because he was forced to remove from Utah and reside in Texas during the course of his medical treatment.

30. The scheduling order issued on August 3, 1992, (only two weeks prior to Penney's major surgery) set the case for trial on March 1, 1993, and required an end to discovery by 12/31/92 and all dispositive motions to be heard by "Jan 4. 1992." (sic.)<sup>7</sup> Penney assumed that the time had passed for dispositive motions, not realizing that the year listed in the date provided by the court was in error. In addition to incorrect dates contained in this scheduling order, it was further confusing to Penney because it omitted certain apparent critical information like the date by which jury instructions were due, and the date by which exhibit

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<sup>6</sup> See Affidavit of Allen J. Meril, M.D. at R.565.

<sup>7</sup> Other examples of confusing signals sent by the district court to Penney were omission in the 8/3/92 scheduling order of due date for jury instructions, due date for exhibit and witness list exchange, failure of district court to give Penney notice of cancellation of court scheduled 2/22/93 pretrial settlement conference. See R.423-424.

and witness lists were to be exchanged.

31. Defendants subsequently moved for Summary Judgment against Penney, and it was granted. When Penney petitioned the court to allow for a completion of discovery and an extension of the deadline for dispositive motions, the court did not rule on Penney's motion, choosing rather to issue the order granting Summary Judgment.

#### SUMMARY OF ARGUMENT

Mr. Penney seeks a ruling from this court overturning the trial court's order granting summary judgment to the defendants.

In support of this petition, Mr. Penney will show:

1. Mr. Penney will present case law and factual evidence demonstrating that the question of whether or not Mr. Penney resigned or was fired is a question of fact that should have been presented to a jury, and not a proper matter for summary judgment.
2. Mr. Penney will present case law, statutory law and factual evidence demonstrating that whether or not defendants attempted to coerce Mr. Penney into participating in activities that violate public policy - and then fired him in part because of his refusal - is a matter of material fact properly decided by a jury and not for summary judgment.
3. Mr. Penney will present factual evidence and policy arguments demonstrating that whether or not Mr. Penney's disabilities were a factor in his dismissal is properly a material fact that should be presented for jury determination.
4. Mr. Penney will present factual evidence demonstrating that whether or not defendants breached their own company policies and violated express and implied employment covenants is properly a question of material fact that should be presented for jury determination.
5. Mr. Penney will present case law and factual evidence demonstrating that the breach of contract issue is not governed by ERISA and that Mr. Penney's loss of benefits is simply a matter of damages and should not

be the controlling issue in this case. Damages are properly decided by the jury and not a matter for summary judgment.

6. Mr. Penney will present case law and factual evidence demonstrating that whether or not Mr. Penney's claim arises out of defendants' truly outrageous and intolerable "pattern of conduct" is a question of material fact that should be properly presented to a jury and is not a matter for summary judgment.
7. Mr. Penney will present case law and factual evidence demonstrating that his request for an extension of time to complete discovery should have been granted by the trial court and would not have been prejudicial to defendants' case.
8. Mr. Penney will present case law and factual evidence demonstrating that his Verified Complaint not only states valid legal claims upon which relief may be granted, but also avers many pertinent facts that bolster the claims of covenants both express and implied.

#### ARGUMENT

I. The trial court erred in concluding as a matter of law that Penney was not fired but rather resigned.

Defendants repeatedly alleged that Mr. Penney was not fired but rather resigned. The trial court seems to accept said allegation in its Minute Entry of February 16, 1993, where the court said, "On the other hand several affidavits have been filed by the defendants which support ... their position that Penney resigned from employment rather than being terminated."<sup>8</sup>

In Heslop v. Bank of Utah, 839 P.2d 828 (Utah 1992), the court held that the plaintiff was fired even though he "wrote a letter of resignation and delivered it to [one of the Bank's managers]" (emphasis added), even though the plaintiff "said that

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<sup>8</sup> See Minute Entry at R.539-540.

he would continue employment with the Bank so long as he received a reasonable assignment", and even though the defendants "sent [plaintiff] a letter ... which stated that [plaintiff] had resigned and the Board had accepted the resignation." Id., page 834. The court made it clear that a party coerced to "resign" is fired and not a voluntary termination.

The evidence before the trial court in the instant case was:

- a. Penney's sworn statement that he was unjustly involuntarily terminated or unjustly constructively terminated;<sup>9</sup>
- b. A copy of a memorandum ("Justification Package" to justify retention of Penney's job) submitted by Penney to defendants which was referenced as "SUBJECT: Letter of Resignation" but which contained NO resignation date, which complained of a "back-breaking overtime load" and of recent and proposed changes that would require additional excessive overtime to implement, and which ONLY offered resignation at some unspecified future time if suggested goals could not be met by Penney;<sup>10</sup>
- c. Defendants' express admissions that "the termination of plaintiff's employment was discussed by management prior to his [alleged] resignation"<sup>11</sup>, that at said time "Mr. Cocke recommended to [defendant] Mr. Williams that plaintiff be terminated.", that "Mr. Williams concurred with his recommendation [, and that] Mr. Cocke also consulted with [defendant] Mr. Buchanan, who likewise thought that termination would be ... appropriate ...";<sup>12</sup> and,
- d. Defendants' expressly admitted, in reference to said memorandum, that "The letter also contained a blank

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<sup>9</sup> Verified Complaint, ¶¶ 61 and 62

<sup>10</sup> Attachment "A" to defendants' Memorandum in Support of Their Motion for Summary Judgment dated 12/31/1992

<sup>11</sup> See Addendum Exhibit "A" Defendants' Response No. 54 to Plaintiff's 1st Set of Interrogatories

<sup>12</sup> See Addendum Exhibit "A" Defendants' Response No. 54 to Plaintiff's 1st Set of Interrogatories; Affidavit of [defendant] David A. Williams R. 48 ¶ 7.

resignation date" which was filled in by defendants.<sup>13</sup>

Summary judgement in a wrongful termination case might be appropriate where there is uncontroverted evidence that the plaintiff resigned rather than being fired. However, in Penney's case, like Heslop, supra, there is a genuine issue of material fact making summary judgment wholly inappropriate.

II. Trial court erred in concluding as a matter of law that Penney was not fired in violation of public policy.

In Peterson v. Browning Co., 832 P.2d 1280,1284 (Utah 1992) the court holds that the public policy exception to Utah's employment-at-will doctrine gives rise to an action in tort. Peterson also defines the public policy exception as generally involving termination of employment for (1) refusing to commit an illegal or wrongful act, (2) performing a public obligation, or (3) exercising a legal right or privilege. Id. at 1281.

In firing Penney, E-Systems willfully violated public policy in the following ways: (1) E-Systems fired Penney because of his refusal to commit or condone wrongful acts; (2) E-Systems fired Penney because of his attempt to exercise a legal right to take sick leave after his accident and because he sought temporary abatement of excessive overtime; and (3) E-Systems fired Penney because defendant Williams concluded that Penney might disclose certain clandestine and illegal electronic spying activities in

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<sup>13</sup> See Addendum Exhibit "A" Defendants' Response No. 58 to Plaintiff's 1st Set of Interrogatories

which defendant E-Systems was involved.<sup>14</sup>

(1) E-Systems fired Penney because of his refusal to commit or condone a wrongful act.

On several occasions defendant Williams requested that Penney participate in fraudulent and illegal falsification of reports and material pricing records sent to E-Systems' clients. These clients included Northrup, General Electric, Hazeltine and others.<sup>15</sup> In each instance, Penney refused to either condone or participate in the requested wrongful act.<sup>16</sup>

Because of his refusal to participate in unethical and unlawful practices, Penney fell out of favor with E-Systems' management personnel. He was harassed, criticized, and told that he was not a "team player."

Defendant Williams resented Penney's refusal and punished Penney by demanding increasingly more uncompensated overtime and by placing more and more demands upon him, creating an environment of duress in the work place. At all times, defendant Williams was fully aware of Penney's precarious health and disabilities. Yet, Williams repeatedly threatened to fire

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<sup>14</sup> See Penney's Jan. 23, 1993 "Affidavit", Addendum Exhibit "C" which testifies of E-System illegal involvement of KAL007 jet crash & shows newspaper articles re same.

<sup>15</sup> Verified Complaint, pp.10-13, Docketing Statement, pp. 32-36.

<sup>16</sup> Notwithstanding defendants' argument (R. ?? and R. ??) that no dispute did or could exist between E-Systems and Hazeltine Corporation, for incontrovertible evidence of a genuine issue of material fact, see Addendum Exhibit "E" E-Systems Inc./Montek Division v. Hazeltine Corporation, filed 7/20/89 as Civil No. C-89-890904469, in the Third Judicial District Court, Salt Lake County, State of Utah, where E-Systems (by Ray, Quinney & Nebeker) sues Hazeltine for "no less than \$20,000,000".

Penney, if Penney should fail in any measure to satisfy William's increasing demands.

Public policy has long been opposed to perpetuating fraudulent business practices, as evidenced by the numerous state and federal laws governing business fraud, by the development of law enforcement agency departments designed to investigate unlawful business practices, and by the creation of business organizations and bureaus designed to deter unethical and fraudulent business transactions.

The public at large has a vested interest in protecting those who would keep to a high standard of ethics in their business dealings, and the public also has a vested interest in punishing those companies that deal in misrepresentations, fraudulent pricing practices, and other illegal or unethical business methods. If the courts, lawmakers, and the general public were to tolerate business fraud in any form, it would be tantamount to supporting the deterioration of our society's economic structure. Wherever it is possible to do so, public policy must demand fair dealings and honest business practices.

In confirming the conclusions reached earlier in Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989), the Supreme Court of Utah stated that the public policy exception provides an incentive for employers to refrain from using their unique economic positions to coerce employee conduct that contravenes clear and substantial public policies. Peterson v. Browning Co. 832 P.2d 1280 (Utah 1992).

In Heslop v. Bank of Utah 839 P.2d 828 (Utah 1992) the plaintiff, Heslop, fell out of favor with the management at the Bank of Utah (where he was employed) when he refused to go along with falsifying bank records to hide an accrual error. Heslop was transferred and demoted. Although Heslop's forced resignation came much later, and after an apparently unrelated incident, it was clear that Heslop was a "marked man" from the moment that he refused to cooperate with what he felt were unethical and illegal business practices.

In reversing the trial court's decision granting the Bank of Utah a directed verdict on Heslop's public policy claims, the Utah Court of Appeals stated, "We do not agree with the trial court that reasonable minds could not differ on whether public policy was a substantial factor in Heslop's termination. While the question of causation in this case is close, we believe that plaintiff presented enough evidence of resentment toward him as a result of his defense of public policy that the question of whether that policy was a substantial factor in his termination should have been presented to the jury for determination." Id. at 837.

Penney, like Heslop in the above case, followed his conscience in matters of business practice and voiced his opinion as to what the company should legally do. Like Heslop, Penney fell out of favor with management and was no longer seen as a "team player" when he disagreed with the unethical business practices. Similar to the Bank of Utah's treatment of Heslop, E-

Systems' management created an atmosphere of duress and sought to punish Penney by removing responsibility from him while increasing his work load.

Eventually, Penney, like Heslop, was placed in a position where he was either wrongfully fired or, in the alternative, was forced to resign for good cause. In either event, the termination was done because of Penney's refusal to violate public policy. The trial court erred in granting summary judgment on this issue. In this case, issues of material fact exist that can only be decided by a jury.

Public interest in promoting honesty in business transactions demands that Penney have the opportunity of presenting his facts before a jury. Penney, therefore, requests that the Utah Court of Appeals reverse the trial court's Summary Judgment decision on this issue.

(2) In violation of public policy, E-Systems fired Penney for attempting to exercise his legal right to take sick leave after his accident and for seeking temporary abatement of excessive overtime.

The Fair Labor Standard's Act ("the Act"), U.S.C.A. 29:201-219, when read in its entirety, among other things stands for the proposition that when employees are hired for full-time employment, it is assumed that the standard work week will be 40 hours long, and that any additional work hours required by the employer will be duly compensated. The Act is adamant in defending a worker's right not to be forced to work excessive overtime, even to the point of saying that a laborer cannot agree to waive this right. The Act is ample evidence of the general

public policy against the "sweat-shop" mentality of the 19th century that brutally exploited men, women and children to the sole benefit of the employer.

Through the creation of labor unions and the passing of numerous laws governing fair labor practices, such as the Act aforementioned, the public has demonstrated its desire to set policy governing what employers may lawfully demand from employees. To ignore this general public policy would be to turn our backs on the progress society has made toward a humane work environment, and would be contrary to public interest.

In the instant case, E-Systems' own policies allowed for sick leave and discouraged excessive overtime.<sup>17</sup> When Penney was injured in a hit-and-run accident on May 9, 1986, he asked Williams if he could use some of his 240 hours of accrued sick leave for the purpose of recuperating from the accident.<sup>18</sup>

When Williams refused to allow Penney any sick leave, Penney asked Williams for at least a temporary abatement of excessive overtime until his injuries healed.<sup>19</sup>

Williams not only refused Penney's reasonable requests, but also threatened to fire Penney if he did not continue working at his former rate of production.

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<sup>17</sup> Verified Complaint, ¶ 18-19 R.5-6.

<sup>18</sup> See Addendum Exhibit "A" Defendants admit Mr. Penney had accrued 40.04 hours of vacation and 240 hours of sick leave at termination. See Defendants' Response No. 63 to Plaintiff's 1st Set of Interrogatories.

<sup>19</sup> Mr. Penney's department had been forced to work thousands of hours of uncompensated overtime, a fact that Mr. Penney well documented in his "Justification Package." See Addendum Exhibit "F" Docketing Statement, pp. 7-9.

Although Penney continued to work while suffering from his injuries, and although he completed all the tasks required by Williams, just one month later Penney was constructively fired. Penney believes that his attempt to exercise his legal right to use sick leave and his lawful request for an abatement of excessive overtime was a significant factor in Williams' decision to let him go.

A company that provides for sick leave and then fires its employees when they need to use that sick leave is violating public policy. To condone such inhumane treatment of employees is clearly and substantially opposed to the public policy and public interest. A company that demands and can require any arbitrary amount of overtime is attempting to return to the "sweat-shop" policies of a previous century. Public policy and public interest demand that employers impose reasonable requirements upon their workers. Public policy limits required overtime not only for humane reasons, but also for the necessity of creating jobs for the general public. The more overtime employers are allowed to require of their employees, the less need the employers will have to hire additional workers.

Other courts have recognized the necessity of limiting the amount of overtime that may be required by an employer. Some courts have ruled that the payment of a fixed salary - regardless of number of hours worked in a week - does not satisfy the overtime requirements of the Act, notwithstanding that such salary equals or exceeds the statutory minimum for regular time

plus time and a half for overtime, for hours actually worked, and notwithstanding the intention of parties that the fixed salary shall cover both regular and overtime work. See Walling v. Stone, 131 F.2d 461 (1942). See also, Colbeck v. Dairyland Creamery Co., 17 N.W.2d 262.

On the issue of uncompensated overtime, Johnson v. Dierks Lumber & Coal Co., 130 F.2d 115, finds that the Act does not allow an employer to claim all of an employee's time and compensate him for only part of it, and an agreement to pay for only a part of the actual hours which an employee is required to serve is invalid.

This issue - of whether or not abusive overtime requirements and refusal to allow use of rightfully accrued sick leave violates public policy - should be an issue for the jury to decide and should not be decided by summary judgment.

**III. Trial court erred in concluding as a matter of law that Penney was not fired in violation of laws against disabled.**

Although E-Systems recruited and hired Penney with full knowledge of his disabilities, defendant Williams continuously and consistently showed no toleration for Penney or any other E-Systems employee with health problems.<sup>20</sup>

Williams often made fun of those employees with disabilities or poor health. On one occasion, Williams insisted subordinates take work over to a sick employee who was recuperating at home with a back injury.

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<sup>20</sup> See R.5 of the Verified Complaint.

To Penney, it seemed apparent that Williams could not tolerate any employees with health or physical disabilities. Penney has reason to believe that Williams' constant threats to fire him, and his repeated derisive remarks concerning his disabilities were designed to create an atmosphere of duress that would make the work place intolerable for anyone with Penney's physical limitations.

Such treatment was especially unfair, considering the fact that E-Systems hired Penney with full knowledge that Penney was disabled. And this treatment was also unfair, considering the fact that Penney's job performance was of the highest productivity and level of excellence in spite of his physical challenges.

The following facts are in evidence before the court in the instant case:

- a. Penney offered uncontroverted sworn testimony that prior to his employment with E-Systems, Penney had received a total disability from Social Security in 1972 because of prior industrial and job related accidents that had left Penney with respiratory and back problems.<sup>21</sup>
- b. Penney offered uncontroverted sworn testimony that, on or about May 9, 1986, Penney was injured in a hit-and-run accident, which caused Penney immediate, intense and continuous pain.<sup>22</sup>
- c. As a result of said hit-and-run accident, Penney underwent major surgery on his neck in 1988 and 1989, on his lower back on November 13, 1991, on his T7 vertebral body on March 10, 1992, and on his L3-4 and L4-5 vertebral body on August

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<sup>21</sup> Verified Complaint, R.4, ¶ 9; Answer, R.35, ¶ 9.

<sup>22</sup> Verified Complaint, R.7, ¶ 27-28; Answer, R.37, ¶ 27-28.

19, 1992.<sup>23</sup>

- d. Penney testified that when Defendant Williams became the General Manager of the Montek Division of E-Systems which employed Penney, Defendant Williams showed a lack of toleration for health problems and made fun of Penney because of his disabilities, which Defendant Williams denied.<sup>24</sup> So great was defendant Williams' animosity toward Penney, that Penney felt compelled to and did begin from this time forward to seek a transfer to another division of E-Systems or to obtain employment elsewhere.
- e. Penney testified that, despite his physical disabilities and recent injury, he was required by Defendant Williams to work a vast number of overtime hours,<sup>25</sup> and defendants conceded that Penney "may sometimes have worked long hours."<sup>26</sup>
- f. Penney testified that Defendant Williams refused to give Penney sick leave or leave of absence to recuperate from the hit and run accident and, instead, gave Penney a ultimatum timely to complete all current projects or to lose his job, forcing Penney to work for the following five or six weeks in extreme back-breaking pain.<sup>27</sup>
- g. On June 18, 1986, Defendant Williams instructed Penney's supervisor Mr. J. G. Cocke to involuntarily terminate Penney.
- h. Defendant E-Systems was, at all relevant times, a Federal contractor under contract with the Federal government, both as a prime contractor and as a subcontractor, working under more than one Federal contract, each of which was for more than \$2,500 in goods and/or services.
- i. Penney, at all relevant times, as an employee of defendant E-Systems, was an employee of a Federal contractor working on contracts or subcontracts each of which was for more than \$2,500 in goods and/or services.
- j. There was in effect at all relevant times a Federal law

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<sup>23</sup> Affidavits of Dr. Allen J. Meril, M.D. R.603-605, and William V. Penney R.573-585.

<sup>24</sup> Verified Complaint R.5, ¶ 15 & 16; Answer, R.47-48.

<sup>25</sup> Verified Complaint R.6, ¶ 21.

<sup>26</sup> Answer, R.35, ¶ 14.

<sup>27</sup> Verified Complaint, R.7, ¶¶ 29, 30, & 31.

requiring that all Federal contractors engaged in Federal contracts take affirmative action to employ and advance in employment qualified handicapped individuals having a physical impairment which substantially limits one or more of such person's major life activities, has a record of such impairment or is regarded as having such an impairment;<sup>28</sup>

- k. One or more of the defendants discriminated against Penney in his employment and advancement while he was employed with defendant E-Systems and said discrimination was on the basis of Penney's physical handicap and disabilities.
- l. One or more of the defendants discriminated against Penney by involuntarily terminating Penney's employment with defendant E-Systems on the basis of Penney's physical handicap and disabilities.

Federal laws implicitly preempt otherwise applicable state law because of the Federal laws' comprehensiveness and pervasiveness of enforcement scheme and implementing regulations, dominance of federal interest in field of federal contracts, and need for uniform, consistent federal approach to discrimination against handicapped persons by Federal contractors, which would be frustrated by varying state law interpretations.<sup>29</sup>

IV. Trial court erred in concluding as a matter of law that Penney was not fired in violation of a covenant of good faith and fair dealing.

In Defendants' Memorandum In Support Of Their Motion For Partial Summary Judgment, defendants provided a lengthy but misguided analysis of the issue at hand. Defendants' request for summary judgment was based on their mistaken assumption that E-System's covenant of good faith and fair dealing was an "implied"

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<sup>28</sup> 29 United States Code Annotated §793

<sup>29</sup> Howard v. Uniroyal, Inc., 719 F.2d 1552 (C.A. Ala. 1983)

covenant.

Defendants cite Utah case law which they allege does not recognize any claim for breach of an "implied" covenant of good faith and fair dealing in the employment context.

Penney, however, has alleged from the outset that E-Systems policies and their personal communications to Penney, both oral and written, expressly promised that E-Systems would not arbitrarily and without good cause, refuse to retain Penney

The defendants also admitted the existence of express employment covenants.

Defendants expressly admitted<sup>30</sup> that E-Systems entered into an "oral contract" with Penney.

Defendants expressly admitted<sup>31</sup> that E-Systems had a corporate policy concerning "terminations" contained in E-Systems/Montek Directive No. 200.4, and that consistent with that policy, the procedure established and used at E-Systems' Montek Division for processing voluntary and involuntary terminations was to have the terminating employee sign a document entitled "Termination Checklist", affirming that he or she had discussed certain topics with a member of the employee relations department and has received a final paycheck for all wages.

Defendants expressly admitted that E-Systems has a written policy regarding performance appraisals and merit increases as

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<sup>30</sup> Defendants' Response to Plaintiff's 1st Set of Interrogatories, Response No. 30 Addendum Exhibit "A".

<sup>31</sup> Defendants' Response to Plaintiff's 1st Set of Interrogatories, Response No. 44 Addendum Exhibit "A".

set forth in E-Systems/Montek Division Directive No. 200.6<sup>32</sup> and that Penney received periodic performance appraisals as a condition of continued employment with E-Systems.<sup>33</sup>

Defendants expressly admitted that E-Systems had a written policy governing "severance pay" as set forth in E-Systems/Montek Division Directive No. 200.3 where severance pay was available for laid off employees but not for those involuntarily terminated.<sup>34</sup>

Defendants expressly admitted that E-Systems had written policies regarding and governing "treatment of the disabled" (E-Systems/Montek Division Directive No. 200.42),<sup>35</sup>, "business conduct and ethics" (E-Systems/Montek Division Directive No. 200.46)<sup>36</sup>,

Defendants expressly admitted that Penney had never been warned or disciplined prior to termination.<sup>37</sup>

Defendants expressly admitted that E-Systems management

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<sup>32</sup> See Addendum "Exhibit A" Defendants' Response to Plaintiff's 1st Set of Interrogatories, Response Nos. 46 & 31.

<sup>33</sup> See Addendum Exhibit "A" Defendants' Response to Plaintiff's 1st Set of Interrogatories, Response No. 32 Addendum.

<sup>34</sup> See Addendum Exhibit "A" Defendants' Response No. 47 to Plaintiff's 1st Interrogatories.

<sup>35</sup> See Addendum Exhibit "A" Defendants' Response No. 49 to Plaintiff's 1st Set of Interrogatories.

<sup>36</sup> See Addendum Exhibit "A" Defendants' Response No. 52 to Plaintiff's 1st Set of Interrogatories.

<sup>37</sup> See Addendum Exhibit "A" Defendants Response No. 54 to Plaintiff's 1st Set of Interrogatories.

fired Penney on June 18, 1986.<sup>38</sup>

Defendants admit that, before they fired Penney, defendant E-Systems had issued numerous formal written policies in the form of E-Systems/Montek Directives which established a contract for employment between E-Systems and Penney which was more than a contract at will.

The contract of employment between defendant E-Systems and Penney provided for progressive discipline prior to any involuntary termination and required the defendants not arbitrarily to terminate Penney nor arbitrarily to force him to resign BUT rather required defendants to give Penney adequate notice and warning regarding any actions by Penney that could result in his termination, together with an opportunity to cure any deficiency in Penney's actions or behavior that might result in his termination;

Until the very day defendants involuntarily terminated him, Penney had an excellent record with E-Systems including, and without limitation, numerous raises, promotions, and commendations and ABSOLUTELY devoid of any warnings, notices, progressive discipline or other negative or adverse personnel actions. Defendants, in violation of the terms and conditions of defendant E-Systems' own express written policies and employment contract with Penney, arbitrarily, capriciously and without any justification involuntarily terminated Penney without any prior

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<sup>38</sup> See Addendum Exhibit "A" Defendants' Response No. 58 to Plaintiff's 1st Set of Interrogatories.

notice, warning, progressive discipline or opportunity to cure any alleged deficiency in Penney's actions or behavior that might result in his termination.

In summary, there is a genuine issue of material fact as to whether or not E-Systems' established an "express" covenant of good faith and fair dealing with Penney.

The trial court was misled by defendants' motion for summary judgment into believing that Penney had alleged only an "implied" covenant.

The issue of whether the contract covenant of good faith and fair dealing is "implied" or "express" is one that should properly be certified to a jury for determination and not a matter for summary judgment.

V. **Trial court erred in concluding as a matter of law that defendants did not breach E-Systems' contract with Penney, resulting in Penney's loss of benefits.**

In Defendants' Memorandum in Support of Their Motion for Partial Summary Judgment, defendants' claim that Penney's breach of contract cause of action is preempted by ERISA. Defendants base this assertion on the fact that ERISA governs employee benefit plans.

However, Penney contends that ERISA does not apply in the instant case. Case law cited by defendants in support of their argument illustrates that ERISA applies only where a benefit plan itself, or specific benefits provided under such a plan, are at issue.

In the instant case, Penney has raised no issue regarding

any benefit plan, nor has he raised any issue regarding specific benefits under any plan.

In Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987), the United States Supreme Court explains the governing policy behind ERISA. The Court refers to the plan as "balancing the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans."

The Court continues on to say that the plan would be undermined if ERISA plan participants and beneficiaries were allowed to seek alternative remedies under state law. *Id.* at 54.

Clearly, Penney is neither an ERISA participant nor an ERISA beneficiary. Neither does Penney seek any "claim settlement" as referred to by the Court in Pilot Life Ins. Co..

Penney's cause of action arises solely from defendant's failure to follow and fulfill contract obligations.

The end result of these willful or negligent contract violations was to deprive Penney of the participant or beneficiary status under ERISA referred to by the Court.

Defendants are confusing damages with issues. Penney presents no claim against any benefit plan. Nor does he seek the court's ruling on any aspect of the benefit plan.

Penney merely claims the loss of benefits as substantial damages sustained because of defendants' violation of their own company policy and express oral covenants.

Indeed, defendants violated their own policies by the manner

in which Penney was fired.

The relevant facts in evidence before this court are:

- a. The contract of employment between defendant E-Systems and Penney provided for progressive discipline prior to any involuntary termination and required the defendants not arbitrarily to terminate Penney nor arbitrarily to force him to resign. The contract of employment required defendants to give Penney adequate notice and warning regarding any actions by Penney that could result in his termination, together with an opportunity to cure any deficiency in Penney's actions or behavior that might result in his termination.
- b. Defendants, in violation of the terms and conditions of E-Systems' own express written policies and employment contract with Penney, arbitrarily, capriciously and without any justification involuntarily terminated Mr. Penney without any prior notice, warning, progressive discipline or opportunity to cure any alleged deficiency in Penney's actions or behavior that might result in his termination.
- c. Defendants expressly admitted that E-Systems had a corporate policy concerning "terminations" contained in E-Systems/Montek Directive No. 200.4, and that consistent with that policy, the procedure established and used at E-Systems' Montek Division for processing both voluntary and involuntary terminations was to have an Exit Interview with the terminating employee and to have that terminating employee sign a document entitled "Termination Checklist," affirming that he or she had discussed certain topics with a member of the employee relations department and had received a final paycheck for all wages. (See Defendants' Response to Plaintiff's 1st Set of Interrogatories, Response No. 44.)
4. On or about 6/18/86, defendant Buchanan made an oral promise to provide Penney with the proper forms for insurance conversion at Penney's Exit Interview. In violation of this oral covenant and E-Systems' express policies, no Exit Interview was granted Penney (despite his repeated requests for such an interview), no Termination Checklist was ever presented to Penney, and no insurance conversion papers were provided to Penney until it was too late for him to use them. (See Deposition of William v. Penney, at pp. 277-279. See also, Verified Complaint p. 2, paragraph 5, and p. 8, paragraphs 41-47.

In summary, defendants willfully or negligently violated their own express oral and written covenants and policies

regarding their employment contract with Penney. These violations occurred in the form of (1) firing Penney without warning or good cause; (2) failing to follow termination procedures governing both voluntary and involuntary terminations, regarding Exit Interviews, Termination Checklists, and benefit conversion documentation; and (3) failing to honor oral commitments and covenants to hold an Exit Interview and furnish benefit conversion documents.

The aforementioned violations resulted in monetary damages to Penney that defendants expressly admit include Health Care and Weekly Income Disability Plan (Salaried Flexcomp Plan A), Long Term Disability Plan, Long Term Disability Plan Plus, and Term Life Insurance.<sup>39</sup>

Whether or not defendants violated their own contract covenants and obligations is a matter of material fact that is appropriate only for jury determination. Therefore, the trial court erred in granting defendants summary judgment on this issue.

VI. Trial court erred in concluding as a matter of law that defendants' alleged actions did not state a claim for intentional infliction of emotional distress, pain and suffering.

Defendants' Memorandum In Support Of Their Motion For Partial Summary Judgment cites Sperber v. Galligher Ash Co., 747 P.2d 1025 (Utah 1987) as support for the proposition that the

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<sup>39</sup> For a more complete list of damages, see Defendants' Response No.61 to Plaintiff's 1st Set of Interrogatories Addendum Exhibit "A".

district court should dismiss Penney's emotional distress case.<sup>40</sup>

In Sperber, the plaintiff sued his former employer for, among other things, intentional infliction of emotional distress. The appellate court upheld the summary judgment dismissal of the emotional distress claim, but the court expressly recognized that an emotional distress claim could be successfully maintained against a former employer if "outrageous and intolerable" conduct is alleged and proven. The Sperber court cited the applicable rules governing intentional infliction of emotional distress:

Mere discharge from employment does not constitute outrageous or intolerable conduct by an employer. Id. at 347.

To state a claim, ... a plaintiff must additionally allege conduct on the part of the defendant that is outrageous and intolerable to the extent that it offends societal standards of morality and decency. Id. at 347.

In Larson v. SYSCO Corp., 767 P.2d 557, 560 (Utah 1989) the court found that if sufficient "outrageous conduct" has attended termination, the plaintiff may maintain an action of emotional distress. Larson had the legal right but lost because the facts alleged against the employer did not meet the "outrageous conduct" test.

While the same rules should apply in Penney's case, Penney's factual allegations and evidence are distinguishable from the facts in Sperber and in Larson.

Penney's emotional distress claim is not based merely on

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<sup>40</sup> See R.205-210.

being fired. Rather, Penney's claim arises out of a truly "outrageous and intolerable" pattern of conduct by defendant Williams, individually and as General Manager of Montek Division of defendant E-Systems, as assisted by defendant Buchanan. It was a pattern of conduct that was outrageous and intolerable to the extent that it offends societal standards of morality and decency. So much so, that in recent years new federal and state laws have been passed to prevent employers and management from engaging in the very acts defendants perpetrated against Penney.

In Samms v. Eccles, 358 P.2d 344, 11 Utah 2d 289 (Utah 1961), the plaintiff filed a claim for "infliction of severe emotional distress by wilful and wanton conduct of an outrageous and intolerable nature," alleging that the defendant repeatedly and persistently called plaintiff by phone soliciting plaintiff to have illicit sexual relations. Defendant came to plaintiff's house and continued to make said solicitations and indecently exposed his person. Plaintiff's complaint was dismissed by the district court upon a summary judgment motion. In **reversing** the summary judgment dismissal of plaintiff's claim, the Samms court set down the following pertinent rules:

Where the act is willful or malicious, as distinguished from being merely negligent, that recovery may be had for mental pain, though no physical injury results. Id. at 346.

While mental suffering, unaccompanied by injury to purse or person, affords no basis for an action predicated upon wrongful acts, merely negligent, yet such damages may be recovered in those cases where the plaintiff had suffered at the hands of the defendant a wanton, voluntary, or intentional wrong the natural result of which is the causation of mental suffering and wounded feelings. Id. at 346.

Though the Samms court concluded that merely asking another to have sexual intercourse is not sufficient grounds to support an emotional distress claim, in reversing the summary judgment the court observed that the plaintiff's allegations involved more than a mere request and constituted aggravated circumstances.

Dismissal of Penney's emotional distress claim might be appropriate if the claim were based solely on defendants' firing of Penney. However, whether or not defendants' pattern of conduct - that preceded and attended Penney's firing - rises to the level of "outrageous and intolerable" is a question of material fact properly decided by a jury and not by summary judgment.<sup>41</sup>

- B. Penney's emotional distress claim is NOT barred by the exclusive remedy provision of the Utah Worker's Compensation Act.

Defendants Memorandum In Support Of Their Motion For Partial Summary Judgment contains at R. 202 a lengthy argument mistakenly relying upon Utah Code Annotated (1988) §35-1-60 and Mounteer v. Utah Power & Light Co., 773 P.2d 405 (Utah Ct. App.), cert. granted, 795 P.2d 1138, Star v. Indus. Comm'n, 615 P.2d 436, 637 (Utah 1980), as support for the erroneous proposition that the Utah Worker's Compensation Act bars a claim by an employee against a former employer for intentional infliction of emotional distress.

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<sup>41</sup> For further relevant facts concerning Penney's emotional distress claim, see Docketing Statement, p.42, § VI Addendum Exhibit "A".

In Munteer, supra, the plaintiff sued his former employer for, among other things, intentional infliction of emotional distress. The final resolution of the Munteer case was reported in Munteer v. Utah Power & Light Co. ("Munteer II"), 823 P.2d 1055 (Utah 1991), where the appellate court made it absolutely clear that the Utah Worker's Compensation Act does NOT bar a claim by an employee against an employer for intentional infliction of emotional distress.

The appellate court in Bryan v. Utah International, 533 P.2d 892 (Utah 1975), was just as clear on the subject declaring that:

Nowhere does the [Utah Worker's Compensation] act deal directly with intentional acts, such as the [intentional infliction of emotional distress] alleged here . . . We think that such a[n] [exclusivity] provision is not a prohibition against the maintenance of an action for damages, because of an intentional act. The policy of our law has always been to allow one injured through the intentional act of another, to seek redress from the one intending harm. That policy has the salutary effect of deterring intentional injury. Id. at 894.

C. Penney's emotional distress claim is NOT barred by the Statute of Limitations.

On June 18, 1986, Mr. Penney left the State of Utah and moved to Texas where he has lived continuously ever since. Other than a few short visits to Utah in connection with the initiation of this lawsuit, Penney has not been in the State of Utah since his relocation to Texas in January 1987.

(1) Penney's absence from Utah tolls the statute of limitations.

Utah Code Annotated 1953, as amended, §78-12-35 provides, in

pertinent part:

... If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

Hence, the four (4) year statute of limitations on Penney's emotional distress claim was tolled for all but approximately seven (7) months between June 18, 1986 and the filing of the lawsuit on June 15, 1990.

In Keith-O'Brien Co. v. Snyder, 51 Utah 227, 169 P.954 (1917), the court held that the statute of limitations runs only during the time the debtor is openly in state, and immediately on his leaving it the statute again ceases to run until his return. In computing time, all periods of absence must be considered and added together. Van Tassell v. Shaffer, 742 P.2d 111 (Utah Ct. App. 1987) holds that Utah allows the statute of limitations to be tolled during absences, even where the defendant resides in the state and service can be made upon persons at his residence, and that proceedings under Nonresident Motorist Act are the only Utah proceedings in which the applicable statute of limitations is not tolled by absence from the state.

This is particularly fair in Penney's case since the defendants were responsible for driving Penney from Utah by firing him and wrongfully depriving him of insurance, leaving Penney no alternative but to relocate to Texas where he could receive essential medical treatment for his 1986 automobile accident.

- (2) Penney's emotional distress claim accrued within the applicable four (4) year statute of limitations.

Even if the four (4) year statute of limitations against Penney's emotional distress claim had not been tolled by Penney's absence from the State of Utah of almost four (4) years prior to filing this lawsuit, Defendants assertion that Penney's emotional distress claim accrued outside of the four (4) year statute of limitations is still in error.

Defendants seem to take the position that Penney's emotional distress claim, if actionable at all, is actually six (6) separate claims, one for each of the six (6) actions defendants say Penney is alleging. Defendants argue that Penney's emotional distress claim is time-barred to the extent any of said six separate claims occurred before June 15, 1986.

Defendants' mischaracterization of the facts omits any reference to defendant Williams' unjustified constant threats of immediate termination, and defendant Williams' unjustifiably circumventing the standard chain of command to order and impose upon Penney and those who worked for him excessive amounts of overtime work.

Penney's emotional distress claim did not accrue from a single instance of excessive overtime, or of unjustified threats by defendant Williams to immediately terminate Penney, or of the wrongful termination, or from defendants' wrongfully depriving Penney of his insurance rights.

Rather, Penney's emotional distress claim accrued from a

pattern of conduct that was outrageous and intolerable in that it offends societal standards of morality and decency. Penney's evidence shows the defendants' conduct ripened into an actionable claim within 4 years of when Penney filed his lawsuits.

Hence, Penney contends that his emotional distress claim accrued within the four (4) year statute of limitations, even without considering his absence from the State of Utah.

(3) Penney Suffered Emotional Distress.

Defendants assert that Penney's emotional distress claim should have been dismissed because during the entire time he was employed at E-Systems, he never received any medication or treatment from a medical professional for emotional distress.

However, defendants offer no evidence that Penney did not suffer emotional distress, and defendants admit that Penney sought medical treatment for his severe emotional distress in May of 1989.<sup>42</sup>

Whether the severe emotional distress for which Penney sought treatment in May of 1989 was a continued manifestation of the emotional distress caused by defendants or was caused by the acts or omissions of one or more of the defendants clearly is a genuine material issue of fact to be determined by a trier of fact and not by counsel for the defendants.

VII. Trial court abused its discretion and otherwise erred in failing to grant Penney's Motion for extension of time to complete discovery and trial preparation.

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<sup>42</sup> See Defendants' Memorandum in Support of their Motion for Partial Summary Judgment at R.210.

On February 16, 1993, Penney filed with the district court a PLAINTIFF'S MOTION FOR CONTINUANCE & FOR LEAVE TO COMPLETE DISCOVERY. The Motion requested that the 2/22/93 Pretrial Settlement Conference and the 3/1/93 Trial be continued for five (5) months and that Penney be allowed during that time to resume and complete discovery. Penney's Motion was supported by his own affidavit and by an AFFIDAVIT OF ALLEN J. MERIL, M.D.

Dr. Allen J. Meril's affidavit documented that Penney had undergone five (5) major surgeries on the following dates as a result of his 1986 automobile accident: 7/27/1988, 5/4/1989, 11/13/1991, 3/10/1992, and 8/19/1992.<sup>43</sup>

Penney's motion for continuance and leave to complete discovery, together with the supporting affidavits of Dr. Allen J. Meril, M.D. and Penney, clearly established that Penney's mandatory surgeries on November 13, 1991, March 10, 1992, and August 19, 1992 and consequent convalescence had left Penney physically, mentally, and emotionally incapable of completing discovery by December 31, 1992, or completing preparations for trial by March 1, 1993.

The district court never entered a ruling granting or denying Penney's Motion For Continuance & For Leave To Complete Discovery. Instead, the court entered on the same day February 16, 1993, a MINUTE ENTRY granting defendants' Motion For Summary Judgment. Yet no mention is ever made of Penney's Motion For Continuance & For Leave To Complete Discovery in the court's

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<sup>43</sup> See Docketing Statement Addendum Exhibit "F" p. 6.

Minute Entries of 2/16/1993 or 2/18/1993, its Order of 3/9/1993 or in its Judgment of 3/9/1993.

Utah Rules of Civil Procedure Rule 56(f) allows a party defending against a summary judgment motion to complete or to conduct further discovery prior to the entry of summary judgment. In Cox v. Winters, 678 P.2d 311 (Utah 1984), the Utah Supreme Court reversed as an abuse of discretion a trial court's grant of summary judgment because the party defending against the summary judgment motion had not been given an adequate opportunity to complete discovery. The Cox court quoted with approval the rule enunciated in Strand v. Associated Students of University of Utah, 561 P.2d 191 (Utah 1977), as follows:

Where, however, the party opposing summary judgment timely presents his affidavit under Rule 56(f) stating reasons why he is presently unable to proffer evidentiary affidavits he directly and forthrightly invokes the trial court's discretion. Unless dilatory or lacking in merit, the motion should be liberally treated. Exercising a sound discretion the trial court then determines whether the stated reasons are adequate. Id. at 194.

In Cox, supra, the party defending against the summary judgment motion had timely initiated discovery proceedings but was never afforded an appropriate response. The record showed that the plaintiffs in Cox "initiated discovery to gather facts relative to the statements made in Stehl's affidavit, but were never answered by defendant as required under the rules of discovery." Cox v. Winters, 678 P.2d 311, 314 (Utah 1984).

The Cox court also found that a party's failure to answer to discovery is also grounds to grant a party a motion for

continuance and for leave to complete discovery. Id. at 314.<sup>44</sup>

See also Auerbach's, Inc. v. Kimball, 572 P.2d 572 P.2d 376 (Utah 1977) which held that,

The granting of the motion for summary judgment was premature, because Kimball's discovery was not then complete. It was the information sought in the proceedings for discovery, which Kimball claimed would infuse the issues with facts sufficient to defeat a motion for summary judgment, and sustain his counter-claim. Whether that would be the case can not now be determined because such facts, if they exist, were not allowed to be discovered. Id. at 377.

Like the party in Strand, Penney's case has been prejudiced because (a) he has not been adequate opportunity to complete discovery and (b) defendants have failed to respond to discovery.

Penney's timely commencement.

In 1990, promptly after commencement of this action, Penney served upon defendants PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS consisting of 87 separate detailed interrogatories and 31 detailed requests for production of documents consisting of 87 separate interrogatories.<sup>45</sup>

The FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS were prepared in substance and with sufficient detail that complete and honest responses to them would have provided Penney with much of the evidence necessary to both prove

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<sup>44</sup> See also Auerbach's, Inc. v. Kimball, 572 P.2d 572 P.2d 376, 377 (Utah 1977) which held that the granting of the motion for summary judgment was premature, because Kimball's discovery was not then complete and because whether discovery would have provided Kimball with sufficient evidence to defeat summary judgment was now impossible to determine.

<sup>45</sup> See Addendum, Exhibit "A".

his case and successfully defend Penney against any motion for summary judgment.

Defendants' RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS were incomplete, misleading, not honest, and were of such an obstructionist nature that Penney found it necessary to serve upon defendants a motion to compel discovery, a second set of interrogatories and requests for production of documents, the additional taking of depositions of certain potential witnesses, and similar discovery-related activities.

Additionally, Penney's former counsel on numerous occasions tried to schedule the depositions of defendants, but he was prevented from doing so by scheduling conflicts of defendants and/or their counsel.<sup>46</sup>

Penney's illness.

From the commencement of the lawsuit on June 15, 1990, Penney advised the trial court of his physical disabilities and of his diligent efforts to overcome said his limitations in order effectively and fully to participate in the discovery process.

The trial court had been advised in writing by Penney that he was scheduled for mandatory back surgery on August 19, 1992, and that his recovery from the August 19, 1992, back surgery would be slow and painful and would - for its duration - greatly impair Penney's ability to complete his discovery and pre-trial motions by district court-imposed dates.

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<sup>46</sup> See R.70-71

Penney's Pro Se status.

The trial court was aware that Penney was greatly disadvantaged in his prosecution of this lawsuit in that he was forced to remove himself from Utah and to reside in Texas in order to receive necessary medical treatment, even though the trial court was in Utah, most of Penney's potential witnesses were in Utah, Penney's causes of action against the defendants had arisen in Utah during Penney's almost 6 years of employment there with defendant E-Systems.

Penney's discovery was further limited when he was forced to represent himself PRO SE in the above action because of his financial distress and impoverishment caused by the combination of his ongoing medical treatment and the defendants' illegally discharging Penney in a manner that left him devoid of any health or other insurance benefits.

No prejudice to defendants.

The trial court's reasonably extending the time for Penney to complete his discovery and his pre-trial motions would not have materially prejudiced any of the defendants, especially where the lawsuit was less than two and one-half (2 1/2) years old, having been commenced on June 15, 1990, the delays were caused in part because the actions of defendants had left Penney without any health, medical or other insurance and forced him to move to Texas where he could receive adequate medical treatment, and the probable witnesses and evidence were and would remain available for the reasonably foreseeable future.

In Cox v. Winters, 678 P.2d 311, 315 (Utah 1984), the court indicated Rule 56(f) motions for continuance and leave to complete discovery are denied generally where (a) the movant failed timely to utilize available discovery proceedings or (b) in order to thwart an attempted "fishing expedition" for purely speculative facts after substantial discovery has been conducted without producing any significant evidence.

Penney did not fail timely to utilize available discovery proceedings. He began his discovery in earnest in 1990 and proceeded as fast as he could limited only by the lack of cooperations by the defendants and Penney's own illness, surgeries and convalescence. Furthermore, Penney's only purpose in discovery has been to gather the evidence needed to prove his case and not to engage in a "fishing expedition."

The Cox court's conclusion is accurate and appropriate in Penney's case:

Under such circumstances, it was an abuse of discretion to grant defendant's motion. The [district] court should have ordered a continuance to permit discovery, or denied the motion for summary judgment, without prejudice to its renewal, after adequate time had elapsed in which plaintiff could have obtained the desired information. Id. at 315.

VIII. **Trial court erred in mandating that all discovery be completed by December 31, 1992.**

Penney advised the trial court - in writing - that he was scheduled for mandatory back surgery on August 19, 1992 as part of an ongoing medical treatment necessitated by the injuries he had sustained in a May 9, 1986 automobile accident.

Penney further advised the trial court that his recovery from the August 19, 1992, back surgery would be slow and painful. Therefore, Penney's ability to complete his discovery and pre-trial motions would be greatly impaired during the recuperation period.

The trial court was aware that Penney was greatly disadvantaged in the prosecution of this lawsuit and that he was forced to move from Utah to Texas in order to receive the necessary medical treatment. Penney's move to Texas greatly hampered his ability to pursue his law suit, especially because the trial court was in Utah and most of Penney's potential witnesses were in Utah.

Penney was forced to represent himself PRO SE in the above action because of his financial distress and impoverishment caused by the combination of his ongoing medical treatment and the defendants' illegally discharging Penney in a manner that left him devoid of any health or other insurance benefits.

The trial court's reasonably extending the time for Penney to complete his discovery and his pre-trial motions would not have materially prejudiced any of the defendants, especially where the lawsuit was less than two and one-half (2 1/2) years old, having been commenced on June 15, 1990.

In fact, the delays in Penney's finishing his discovery were caused in part because the actions of defendants made it difficult, and in some cases impossible, to schedule a time to take their depositions. Penney, on the other hand, made himself

available to defendants and cooperated in their taking his deposition.

He commenced discovery in a timely manner and might have finished it in a timely manner had defendants given more reasonable and complete answers to interrogatories, been more considerate in document production, and had made themselves readily available to the taking of depositions.

Therefore, the trial court ought to have allowed Penney an extension of time to complete his discovery, rather than cutting it off in the middle of Penney's recuperation from major surgery and at the sole completion of defendants' discovery.

IX. Trial court erred in concluding and ruling that Penney's Verified Complaint failed to state any claim for which relief could be granted.

The instant brief and all other records before the court show that the Plaintiff, Penney, has stated numerous claims for which relief could be granted. The arguments and facts heretofore presented are sufficient to defeat any motion based on insufficiency of pleadings.

In Samms v. Eccles, 358 P.2d 344, 347 (Utah 1961), the court found that even though a complaint may not flawlessly state a particular cause of action, the facts - if sufficiently disclosed - could be found to fall within the requirements of sufficient pleadings. See also Carnes v. Carnes, 668 P.2d 555 (Utah 1983).

Penney's Verified Complaint not only states valid legal claims upon which relief may be granted, but also avers many pertinent facts that bolster the claims both express and implied.

### CONCLUSION

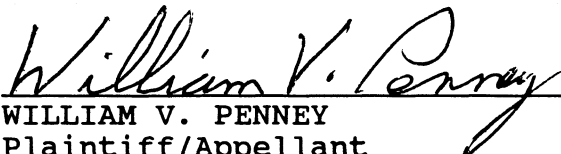
For all the foregoing reasons expressed in the preceding arguments, the court should reverse the trial court's ruling granting summary judgment.

Penney sincerely believes that a primary motivating objective of E-Systems is to keep from the public and governmental scrutiny the embarrassing details of why Penney was wrongfully terminated. E-Systems has spared no expense in its all-out effort to achieve summary judgment rulings on all of Penney's causes of action.

In the past, the court system has been generous in assisting PRO SE litigants so that each might have his or her day in court. Financially impoverished by the wrongful actions of a former employer, and physically disabled by serious long term injuries from an auto accident, Penney should not be precluded from the full benefit of the justice system.

Viewing the facts of the case in a light most favorable to Penney, the court will agree that Penney not only deserves, but has a right to present his claims before a jury of his peers.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of June, 1993.

  
WILLIAM V. PENNEY  
Plaintiff/Appellant  
Appearing Pro Se