

2005

Harlan Ashby v. Board of Education, South Sanpete School District : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

HARLAN ASHBY.

Appellant,

v.

BOARD OF EDUCATION, SOUTH
SANPETE SCHOOL DISTRICT,

Appellee.

Case No. 20050658-CA

BRIEF OF APPELLANT

Appeal from the Judgment and Order on Directed Verdict of the Sixth District Court in and for Sanpete County, State of Utah, Hon. David Mower, Sixth District Court Case No. 010600224, in which the Court granted a directed verdict and dismissed the case with prejudice.

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this case pursuant to U.C.A. §§ 78-2-2(4), having been transferred the case by order of the Supreme Court of Utah.

STATEMENT OF ISSUES

Whether the Court erred in granting a directed verdict / dismissing the case, particularly given that this was done before the plaintiff had presented all his witnesses and evidence.

STANDARD OF REVIEW

The standard of review is correctness. *See Grossen v. DeWitt*, 982 P.2d 581, 284 (Utah 1999); *Sorenson v. Kennecott-Utah Copper Corp.*, 873 P.2d 1141, 1144 (Utah Ct.App.1994).

PRESERVATION OF THE ISSUE

At trial Plaintiff's counsel opposed and argued against the motion for directed verdict/dismissal. *See* R. at 306 (Transcript - hereafter cited simply as "Tr."), p. 260-270.

RELEVANT STATUTES / RULES

Utah R. Civ. P. 41(b) provides as follows:

. . . After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

STATEMENT OF THE CASE

This case came on for bench trial in Manti, Utah, before Hon. David Mower, district judge in the Sixth District Court on April 12 and 13th, 2005. The Plaintiff/Appellant Harlan Ashby, alleged that the South Sanpete School District breached its teaching contract with him by firing him, and the School District countered that Mr. Ashby's firing was justified in that he had lied about having a Master's Degree. After Plaintiff had put on only two of its witnesses (he had several more witnesses subpoenaed and waiting to testify), the Court granted the Defendant's motion for a directed verdict and dismissed the case. *See* R. at 294 ("Judgment and Order on Directed Verdict") copy attached herewith in the Appendix.

The Court summarized and explained its basis for granting the Directed Verdict, as follows:

Plaintiff was hired as a special education teacher by the South Sanpete School District ("District") in 1976. Plaintiff had a Bachelor of Arts degree from BYU plus approximately 90 additional credit hours of education.

In 1976, the District had in place a salary schedule composed of lanes and steps. Placement in a salary lane was based upon education. Placement in a salary step was based upon teaching experience. Higher salary lanes and steps represented higher salaries.

When Plaintiff was hired he was properly placed in salary lane 3, the lane reserved for teachers with a bachelor's degree plus 55 or more credit hours of additional education.

Plaintiff signed employment contracts for each year of his employment with the District. The employment contracts reflected Plaintiff's lane and step. Plaintiff received his employment contracts in the mail. The received contracts were filled out

and signed by the District Business Administrator. Plaintiff signed his contracts and returned them to the District.

In 1986, the District added three additional lanes to the salary schedule. The result was as follows: Lane 1 - Bachelor's Degree, Lane 2 - Bachelor's degree plus 35 additional credit hours; Lane 3 - Bachelor's Degree plus 55 additional credit hours or professional certificate; Lane 4 - Master's Degree; Lane 5 - Master's Degree plus 45 additional credit hours; Lane 6 - Doctorate Degree.

On December 2, 1986, then District Superintendent Scott W. Bean sent a Memorandum to Professional Staff on the subject of the 1986-1987 Contracts. The memorandum accompanied two copies of the 1986-1987 contract and a teaching salary schedule. The memorandum asked staff to check the amount, step, and lane on the contract, and if correct, sign and return one copy of the contract.

Plaintiff received and signed employment contracts with the District that had Plaintiff on lane 4 of the salary schedule for the following school years: 1986-1987; 1987-1988; 1988-1989; 1989-1990; 1990-1991; 1991-1992; 1992-1993; 1993-1994; 1994-1995; 1995-1996. Plaintiff did not notify the District of the error or that he should have been placed on lane 3. Plaintiff's placement on lane 4 resulted in Plaintiff being overpaid in all of the above-listed school years except for the 1986-1987 school year.

Plaintiff admitted that he misrepresented to District employees that he had a Master's Degree.

In the Spring of 1995 or the Fall of 1996, the District requested that Plaintiff provide his school transcripts evidencing that he had a Master's Degree. Plaintiff testified that he did not give an honest answer in response to this request. He testified that he did not say he did not have a Master's Degree. Plaintiff finally admitted that he did not have a Master's Degree in June or July, 1997.

On August 13, 1997, Plaintiff was suspended without pay as a result of his claim to have Master's Degree and his continual misrepresentation when he was asked to produce transcripts to substantiate this claim.

On August 28, 1997, Plaintiff was terminated for cause. The specific reason for his termination, listed in the termination letter, were as follows: "1-Conduct which violates the criminal law of this state or of the United States; 2-Conduct which violates any established rule, regulation, policy, or directive; 3. Theft; 4. Dishonesty or falsification of any information supplied to the school district."

District policy, GCPD Teacher Code of Ethics, Principle II, Commitment to the Profession, states that the educator shall not misrepresent his/her professional qualifications.

Plaintiff filed his Complaint on or about August 20, 2001. . . . The Breach of Contract cause of action alleges that plaintiff was notified by letter that he was suspended without pay for the specific reason that he claimed to have a Master's Degree and continued to misrepresent that fact during the years he was employed by the District. The Complaint alleges that those charges were falsely made.

. . .

The reasons given for Plaintiff's termination are true. Specifically, reason number four in Plaintiff's termination letter have been conclusively established, namely, "Dishonesty or falsification of any information supplied to the school district." Furthermore, it was incumbent on the Plaintiff to speak out and not remain silent that his contracts placed Plaintiff on lane 4 rather than lane 3.

Therefore, there are no additional facts that could be presented through additional testimony or documentary evidence which would make it possible for Plaintiff to make out the first cause of action of the Complaint. . . .

Id.

The Court only allowed the Plaintiff, Mr. Ashby, and one other witness to testify. ~~Mr. Ashby~~ testified as follows:

1. When he was hired in 1976 by the South Sanpete School District ("SSSD"), he had a bachelor's degree plus 90 semester hours. Tr. at 25.
2. When he filled out the application for the SSSD job, he accurately and truthfully put down that he had a bachelor's degree. Tr. at 27-28.
3. This application, which indicated he had a bachelors degree, and which did not indicate he had a masters degree, was admitted into evidence without objection as Exhibit 44. *Id.*
4. With the application, Mr. Ashby also submitted his resume, which also accurately

reflected he had a bachelor's degree, not a master's degree, and a copy of this resume was also admitted into evidence without objection as Exhibit 50. Tr. at 32-33.

5. Furthermore, it was undisputed at trial that Mr. Ashby's employment file, kept and maintained by SSSD from the time Mr. Ashby was hired in 1976, until the present time, accurately reflects his education as follows: "Education, 1968, BA Degree." Tr. at 45.

6. Mr. Ashby also testified that the Lane he was originally placed in, Lane 3, was referred to at the time of his hiring as "the Master's track," and that he was placed on that lane as an incentive to sign. Tr. at 34-35, 38. Mr. Ashby was told by his principal not to discuss openly his education status and salary lane, since it could create hard feelings with other SSSD employees. Tr. at 115-119.

7. Further, when the Lane system was altered ten years after his hire, in 1986, to expand the number of Lanes, he was placed by SSSD in Lane 4, the Master's track; Mr. Ashby did not request or select Lane 4 – that was done by SSSD. Tr. 42-44.

8. Mr. Ashby's position, based on the clarity of his BA credentials at his hiring, as reflected in his application, resume, and employment record; and based on the fact he was placed in what was known as the "master's track" as an incentive for him to sign-on with SSSD back in 1976, was that when the modified system was adopted in 1986, SSSD kept him on the master's track while SSSD knew full well exactly what education he had: a Bachelor's degree plus ninety hours. Tr. at 27-28, 32-33, 34-35, 38, 42 -44, 45, 78-80, 86.

9. In 1995 there was a falling out between SSSD and Mr. Ashby which occurred which SSSD failed a "Chapter I" audit by the Utah State Office of State Education. "Chapter I" is a

program through which SSSD would receive extra funds for a remedial reading program. Tr. at 43-50.

10. Mr. Ashby was listed by SSSD as the teacher doing the Chapter I remedial reading program teaching, but in fact, in 1995, he was not assigned by SSSD to do Chapter I remedial reading, and was thus the Chapter I teacher in name only. Tr. at 50-51.

11. When the audit was announced, Mr. Ashby was approached by his principal, who was concerned about how the audit would go, since SSSD had Mr. Ashby listed as the Chapter I teacher when in fact he wasn't assigned to actually do the program, and the principal attempted to coach Mr. Ashby so that he would identify the Title I children and indicate falsely that he was working with them separately because of their special needs. Tr. at 50-54.

12. Mr. Ashby tried to accommodate his principal's desires and concerns but was unwilling to lie to the auditors, and SSSD failed the audit and the principal and SSSD superintendent were angry with and blamed Mr. Ashby for the failed audit and attempted to terminate him at that time, but Mr. Ashby responded by requesting a copy of the audit and that he would appeal his termination, after which SSSD and the principal changed course and did not terminate him at that time, at which time the superintendent stated to the principal to put Mr. Ashby on probation, and that the superintendent would show the principal how to terminate him. Tr. At 50-69.

13. At the end of that same year, 1995, or the beginning of the next year, 1996, the secretary for the superintendent began to question Mr. Ashby regarding his educational credentials vis-a-vis his salary lane. Tr. at 78.

14. Believing that the superintendent was simply trying to find a pretext for which to fire

him, Mr. Ashby did not respond directly, but told her “all my documentation [on] everything is in my file,” and so he thought that would be clear – the file contained his application and resume showing the BA credentials only. Tr. at 78-80.

15. In 1997, when Mr. Ashby received his proposed contract, it listed him on Lane 2 rather than Lane 4 where he had been. He went in to discuss the superintendent’s secretary regarding the salary lane issue, but she was not there, so he talked with the SSSD financial secretary. He told him that the secretary had been inquiring about the master’s degree issue, and that he wanted to straighten the issue out, and he indicated he did not have a master’s degree. Tr. at 85. Mr. Ashby then spoke with the superintendent, and indicated that he did not have a master’s degree, but that Mr. Ashby had believed that SSSD knew this from the beginning and had placed him on the “master’s track” due to the large number of hours he had post-bachelors, and as an incentive for him signing on with the district. Tr. at 86. The superintendent indicated that the school board may want to adjust him to lane 3. Instead, Mr. Ashby later learned he was fired. Tr. at 87-88.

16. Mr. Ashby did not deceive SSSD regarding his degree status; his SSSD employment file, resume, and application, show his degree status accurately, all of which remained in the possession of SSSD throughout the entire term of his employment. His firing was the result of a vendetta formed after the failed Chapter I audit, as was explicitly revealed by the superintendent, and SSSD used the master’s degree issue as a false excuse to fire him, even though SSSD knew all along he in fact did not have a master’s degree, as evidenced by its own employment file for Mr. Ashby. Tr. 118-119; 25-33, 50-69.

17. At trial, after Mr. Ashby’s and one other witness’s testimony, defense counsel moved

for directed verdict and the court indicated that it was going to grant the motion, even through the Plaintiff had additional witnesses to present; the Court indicated that nothing that could be presented could overcome its decision that the matter should be dismissed, but the Court allowed Plaintiff's counsel to proffer the additional testimony. Tr. at 275-278.

18. This testimony was proffered as follows:

A. That the superintendent would admit that he terminated Mr. Ashby because he was upset with him and dissatisfied with his services stemming from the Chapter I incident and because Mr. Ashby was sick, rather than because of the master's degree/falsehood issue; that he made an agreement with Mr. Ashby to resolve the master's degree issue by moving him down a step, but that the superintendent abandoned this agreement and fired Mr. Ashby instead; and that other employees of SSSD have been found to be on the wrong salary track/lane and that SSSD has not fired them; and that sometimes SSSD does put people on the salary track/lane that does not correspond with their educational record and that that is OK and sometimes happens, and that if it causes problems it can be corrected without firing. Tr. at 278-279.

B. That an SSSD employee would testify that she was in fact in charge of the Chapter I program during the year the audit was performed, and that she would corroborate Mr. Ashby's testimony regarding what happened with respect to the audit. Tr. at 279.

C. That Mr. Ashby's principal would testify that Mr. Ashby did a great job teaching after he was retained as an employee for the district after the audit debacle, and that SSSD was surprised by this and was hoping he would fail, as SSSD was looking for a way to get rid of Mr. Ashby. Tr. at 279.

D. That Mr. Ashby's principal at the time of the Chapter I audit would corroborate Mr. Ashby's testimony surrounding the Chapter I issues, and specifically the superintendant's statement to the principal that he would put Mr. Ashby on probation and find a way to terminate him." Tr. at 279.

E. That two other SSSD would corroborate Mr. Ashby's testimony regarding the Chapter I related incidents. *Id.*

F. That the principal at the time Mr. Ashby was hired would corroborate Mr. Ashby's testimony regarding how he was hired and how he was truthful, and how it was known that Mr. Ashby did not have a master's degree, and that Mr. Ashby was told not to tell others about how he was put on the master's track. *Id.*

G. That Mr. Ashby's principal during the Chapter I audit would corroborate Mr. Ashby's testimony that school officials asked him to mislead the auditors, and that the superintendent berated Mr. Ashby for the audit failure and indicated he would be put on probation and that they would find a way to terminate him. Tr. at 280.

H. That the superintendent's secretary and other SSSD employees would admit that Mr. Ashby never said he had a master's degree and that he directed them to inspect his employment file, and that while he may have been equivocal about the issue, he never directly represented that he had a master's degree, but instead directed them to his file. *Id.*

I. That an SSSD employee involved in Mr. Ashby's hiring would testify it was a practice of small school districts to offer people to be on higher salary tracks to get them to come to small districts, and that he was not deceived and that Mr. Ashby told him correctly of his actual

credentials. *Id.*

18. The Court ruled that even if the witnesses testified as proffered, he would still grant a directed verdict, and thus that his ruling stood, and the motion was granted and the case dismissed. Tr. at 281.

SUMMARY OF ARGUMENTS

It was error to grant a motion for directed verdict/dismissal in the middle of the Plaintiff's case.

An examination of the evidence, including the evidence which Plaintiff was not allowed to put on but which was presented by proffer, reveals conflicting evidence that elicits doubts which, if resolved in Plaintiff's favor, preclude such an early determination that he had no cause of action.

ARGUMENTS

It was error to grant a motion for directed verdict and grant dismissal in the middle of the Plaintiff's case.

The Utah Supreme Court treats appellate review of motions for directed verdict, which have been made and ruled upon in bench trials, as actually constituting review of what should substantively be considered motions for dismissal under Utah R. Civ. P. 41(b). *See Grossen v. DeWitt*, 982 P.2d 581, 284 (Utah 1999).

Utah R. Civ. P. 41(b) provides as follows:

. . . After the plaintiff, in an action tried by the court without a jury, has completed

the presentation of his evidence the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

It is clear from the plain language of this Rule that a motion under Rule 41 is properly considered *only after the plaintiff has completed the presentation of his evidence*. The motion and ruling in this case came in the middle of plaintiff's case, after only two witnesses. Yet the Court ruled on the motion and granted dismissal despite plaintiff's having witnesses who, according to the proffer made by Plaintiff's counsel, would have presented facts wholly supporting Plaintiff's case and stripping away the foundation of SSSD's accusation, which formed the basis of the Court's ruling, that it was misled by Plaintiff's misrepresentations/omissions regarding his educational status. The court simply determined, after only two witnesses, that the Defense's accusation was true, and that it would not be possible for the Court to be convinced otherwise. This is not the process contemplated or allowed by Rule 41 ("after the plaintiff . . . has completed the presentation of his evidence").

Various courts throughout the country have addressed the issue of whether a court may dismiss a plaintiff's case at some point prior to the close of the plaintiff's case, and the consensus is that it may, but only where it is apparent that there is a complete absence of any question justifying continuation of the trial. *See, e.g., Best v. District of Columbia*, 291 U.S. 411, 415, 54 S.Ct. 487, 489, 78 L.Ed. 882 (1933). If there remains any doubt as to the facts or any conflicting inferences which may be clarified with additional testimony and evidence, an early dismissal is inappropriate; where uncertainty arises either from a conflict of testimony or because the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question requires that the

trial proceed at least to the conclusion of the plaintiff's case. *See, e.g., id.; see e.g., also, Richmond & Danville Railroad Co. v. Powers*, 149 U.S. 43, 45, 13 S.Ct. 748, 37 L.Ed. 642; *Texas & Pacific Railway Co. v. Harvey*, 228 U.S. 319, 324, 33 S.Ct. 518, 57 L.Ed. 852; *Gunning v. Cooley*, 281 U.S. 90, 94, 50 S.Ct. 231, 74 L.Ed. 720. If a doubt exists, a premature dismissal is inappropriate. *See, e.g.,* 291 U.S. at 415.

Prior to the close of plaintiff's case, the standard for consideration of dismissal is even higher than if a motion therefore were considered at the conventional, rules-based time (the close of the plaintiff's case); as discussed in the cases provided in the previous paragraph, is appropriate only if after resolving all doubts in plaintiff's favor, it is clear that no cause of action exists. *See id.; see also Illinois Power & Light Corporation v. Hurley* (C.C.A.) 49 F.(2d) 681, 684; *Stuthman v. United States* (D.C.) 67 F.(2d) 521, 523.

In this case, resolving all doubts in plaintiff's favor, it cannot be said that no cause of action exists. The Plaintiff's position was that SSSD knew of his true educational credentials, and indeed SSSD's own employee file on Mr. Ashby contained his application, resume, and its own file marking/indication stating that Mr. Ashby had a bachelor's degree, and not indicating that he had a master's degree. His equivocalness and any claimed misrepresentation by omission are countered – and doubts regarding whether he may indeed have a cause of action – by his testimony that he was told not to discuss his educational credentials vis-a-vis his salary track/lane, after being put on the “master's track” when hired, as an incentive to come to this small, rural district. All doubt cannot be erased that the district knew of his bachelor degree status and used that false issue as a mere pretense for firing him due to blame wrongfully assigned to him for the district's failed Chapter I audit.

The District Court based its directed verdict on the ruling that Mr. Ashby's own testimony established conclusively that he was deceptive regarding having a master's degree. Mr. Ashby's

testimony, however, refutes this fact, and indicates the contrary – that when he was questioned regarding this issue, he directed the questioner to his employee file, where the true facts regarding his only having a bachelor's degree were found.

Resolving all doubts in favor of Mr. Ashby, it cannot be unqualifiedly said he had no cause of action for breach of contract, and the directed verdict/dismissal was thus error – the additional witnesses should have been allowed, and the issue considered only upon completion of the plaintiff's case.

Note, it would be inappropriate to apply a clearly erroneous standard to the Court's rulings in this case, which would treat those rulings as if they were final and conclusive findings of fact worthy of this more deferential standard; the District Court did not wait until after the close of the Plaintiff's case and thus position itself to consider the matter fully on the basis of all Plaintiff's evidence, per the dictates of Rule 41(b), and therefore it did not fully and finally adjudicate the facts per Rule 52(a) on the merits and its rulings should not be reviewed under the clearly erroneous standard.

The Court cut off the Plaintiff mid-stream, and thus his ruling should be given less deference than a clearly erroneous standard – the review should be stricter given that the Plaintiff was not allowed to complete its case. Either the “no doubt” standard articulated above should be applied, *see analysis supra*, or alternatively, the principles set forth in the directed verdict standard could be fairly applied. Under the directed verdict principles and standard, the evidence must be examined in the light most favorable to the non-moving party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party, the dismissal cannot be sustained. *See Management Comm. of Graystone Pine Homeowners Ass'n ex rel. Owners of Condominiums v. Graystone Pines, Inc.*, 652 P.2d 896 (Utah 1992). Further, the court must not weigh or determine the preponderance of the evidence. *See Finlayson*

v. Brady, 121 Utah 204, 240 P.2d 491 (Utah 1952). Finally, under these standards, the court should resolve every controverted fact in the non-moving party's favor. *Boskovich v. Utah Constr. Co.*, 123 Utah 387, 259 P.2d 885 (Utah 1953).

An examination of the evidence, including the evidence which Plaintiff was not allowed to put on but which was presented by proffer, in the light most favorable to the losing party, reveals a reasonable basis in the evidence and in the inferences to be drawn therefrom, that would support a judgment in favor of the Plaintiff/Appellant. Therefore the dismissal imposed in the middle of Plaintiff's case in this matter should not be upheld. *See Virginia S. v. Salt Lake Care Ctr.*, 741 P.2d 969, 971 (Utah Ct. App.1987).

Instead of applying any kind of deferential standard, the trial court in this case, pronounced that the defendant's reason for firing the Plaintiff was true, and that "there are no additional facts that could be presented through additional testimony or documentary evidence which would make it possible for Plaintiff to make out" his breach of contract claim. An examination of the entirety of the evidence presented and proffered, however, belies this conclusion; it cannot be correctly concluded that, when all this presented and proffered evidence is viewed in the light most favorable to the losing party, including all inference drawn therefrom – in favor of the plaintiff – that the Plaintiff could not make out his claim. The evidence viewed in the light most favorable to Mr. Ashby is as follows:

– When Mr. Ashby filled out the application for the SSSD job, he accurately and truthfully put down that he had a bachelor's degree. With the application, Mr. Ashby also submitted his resume, which also accurately reflected he had a bachelor's degree, not a master's degree. Furthermore, it was undisputed at trial that Mr. Ashby's employment file, kept and maintained by SSSD from the time Mr. Ashby was hired in 1976, until the present time, accurately reflects his education as follows: "Education, 1968, BA Degree." Mr. Ashby also testified that the Lane he was

originally placed in, Lane 3, was referred to at the time of his hiring as “the Master’s track,” and that he was placed on that lane as an incentive to sign. Mr. Ashby was told by his principal not to discuss openly his education status and salary lane, since it could create hard feelings with other SSSD employees. Further, when the Lane system was altered ten years after his hire, in 1986, to expand the number of Lanes, he was placed by SSSD in Lane 4, the Master’s track; Mr. Ashby did not request or select Lane 4 – that was done by SSSD.

- Mr. Ashby’s position, based on the clarity of his BA credentials at his hiring, as reflected in his application, resume, and employment record; and based on the fact he was placed in what was known as the “master’s track” as an incentive for him to sign-on with SSSD back in 1976, was that when the modified system was adopted in 1986, SSSD kept him on the master’s track while SSSD knew full well exactly what education he had: a Bachelor’s degree plus ninety hours.

- In 1995 there was a falling out between SSSD and Mr. Ashby which occurred which SSSD failed a “Chapter I” audit by the Utah State Office of State Education. “Chapter I” is a program through which SSSD would receive extra funds for a remedial reading program. Mr. Ashby was listed by SSSD as the teacher doing the Chapter I remedial reading program teaching, but in fact, in 1995, he was not assigned by SSSD to do Chapter I remedial reading, and was thus the Chapter I teacher in name only. When the audit was announced, Mr. Ashby was approached by his principal, who was concerned about how the audit would go, since SSSD had Mr. Ashby listed as the Chapter I teacher when in fact he wasn’t assigned to actually do the program, and the principal attempted to coach Mr. Ashby so that he would identify the Title I children and indicate falsely that he was working with them separately because of their special needs.

- Mr. Ashby tried to accommodate his principal’s desires and concerns but was unwilling to lie to the auditors, and SSSD failed the audit and the principal and SSSD superintendent were angry with and blamed Mr. Ashby for the failed audit and attempted to terminate him at that

time, but Mr. Ashby responded by requesting a copy of the audit and that he would appeal his termination, after which SSSD and the principal changed course and did not terminate him at that time, at which time the superintendent stated to the principal to put Mr. Ashby on probation, and that the superintendent would show the principal how to terminate him.

- At the end of that same year, 1995, or the beginning of the next year, 1996, the secretary for the superintendent began to question Mr. Ashby regarding his educational credentials vis-a-vis his salary lane. Believing that the superintendent was simply trying to find a pretext for which to fire him, Mr. Ashby did not respond directly, but told her “all my documentation [on] everything is in my file,” and so he thought that would be clear – the file contained his application and resume showing the BA credentials only.

- In 1997, when Mr. Ashby received his proposed contract, it listed him on Lane 2 rather than Lane 4 where he had been. He went in to discuss the superintendent’s secretary regarding the salary lane issue, but she was not there, so he talked with the SSSD financial secretary. He told him that the secretary had been inquiring about the master’s degree issue, and that he wanted to straighten the issue out, and he indicated he did not have a master’s degree. Mr. Ashby then spoke with the superintendent, and indicated that he did not have a master’s degree, but that Mr. Ashby had believed that SSSD knew this from the beginning and had placed him on the “master’s track” due to the large number of hours he had post-bachelors, and as an incentive for him signing on with the district. The superintendent indicated that the school board may want to adjust him to lane 3. Instead, Mr. Ashby later learned he was fired.

- Mr. Ashby did not deceive SSSD regarding his degree status; his SSSD employment file, resume, and application, show his degree status accurately, all of which remained in the possession of SSSD throughout the entire term of his employment. His firing was the result of a vendetta formed after the failed Chapter I audit, as was explicitly revealed by the superintendent, and

SSSD used the master's degree issue as a false excuse to fire him, even though SSSD knew all along he in fact did not have a master's degree, as evidenced by its own employment file for Mr. Ashby.

- The superintendent would admit that he terminated Mr. Ashby because he was upset with him and dissatisfied with his services stemming from the Chapter I incident and because Mr. Ashby was sick, rather than because of the master's degree/falsehood issue; that he made an agreement with Mr. Ashby to resolve the master's degree issue by moving him down a step, but that the superintendent abandoned this agreement and fired Mr. Ashby instead; and that other employees of SSSD have been found to be on the wrong salary track/lane and that SSSD has not fired them; and that sometimes SSSD does put people on the salary track/lane that does not correspond with their educational record and that that is OK and sometimes happens, and that if it causes problems it can be corrected without firing.

- An SSSD employee would testify that she was in fact in charge of the Chapter I program during the year the audit was performed, and that she would corroborate Mr. Ashby's testimony regarding what happened with respect to the audit.

- Mr. Ashby's principal would testify that Mr. Ashby did a great job teaching after he was retained as an employee for the district after the audit debacle, and that SSSD was surprised by this and was hoping he would fail, as SSSD was looking for a way to get rid of Mr. Ashby.

- Mr. Ashby's principal at the time of the Chapter I audit would corroborate Mr. Ashby's testimony surrounding the Chapter I issues, and specifically the superintendant's statement to the principal that he would put Mr. Ashby on probation and find a way to terminate him."

- Two other SSSD would corroborate Mr. Ashby's testimony regarding the Chapter I related incidents.

- The principal at the time Mr. Ashby was hired would corroborate Mr. Ashby's testimony regarding how he was hired and how he was truthful, and how it was known that Mr.

Ashby did not have a master's degree, and that Mr. Ashby was told not to tell others about how he was put on the master's track.

- Mr. Ashby's principal during the Chapter I audit would corroborate Mr. Ashby's testimony that school officials asked him to mislead the auditors, and that the superintendent berated Mr. Ashby for the audit failure and indicated he would be put on probation and that they would find a way to terminate him.

- The superintendent's secretary and other SSSD employees would admit that Mr. Ashby never said he had a master's degree and that he directed them to inspect his employment file, and that while he may have been equivocal about the issue, he never directly represented that he had a master's degree, but instead directed them to his file.

- An SSSD employee involved in Mr. Ashby's hiring would testify it was a practice of small school districts to offer people to be on higher salary tracks to get them to come to small districts, and that he was not deceived and that Mr. Ashby told him correctly of his actual credentials.


This evidence, together with all reasonable inferences therefrom, viewed in the light most favorable to Plaintiff, undermines the court's premature determination that Mr. Ashby misrepresented his educational status to the district and thus that his contract was not breached when he was fired.

The Court's premature pronouncement of a directed verdict/dismissal in this case was error.

CONCLUSION

The Judgement and Order on Directed Verdict should be reversed and the case should be remanded for trial.

Dated this 2nd day of Feb, 2006,



Randall C. Allen
Counsel for Appellant

CERTIFICATE OF SERVICE

I certified that on the 2nd day of Feb, 2006 I caused a true and correct copy of the foregoing to be served via mailing by US Mail first class postage prepaid to:

DEBORAH MOORE
J. CLIFFORD PETERSEN
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ADDENDUM

Judgment and Order on Directed Verdict

Cited Excerpts from Transcript

2005 JUN 30 PM 10 10

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IN THE SIXTH JUDICIAL DISTRICT COURT
IN AND FOR SANPETE COUNTY, STATE OF UTAH

HARLAN ASHBY,

Plaintiff,

v.

THE BOARD OF EDUCATION, SOUTH
SANPETE SCHOOL DISTRICT,

Defendant.

**JUDGMENT AND ORDER ON
DIRECTED VERDICT**

Case No. 010600224

Judge D. MOWER

This action came on for trial before the Court on April 12, 2005, the Honorable David L. Mower, District Judge, Presiding.

On April 13, 2005, at the conclusion of the testimony of Plaintiff Harlan Ashby, and the testimony of witness John Ross, Defendant moved for a Directed Verdict. In response, Plaintiff proffered the testimony of his remaining witnesses.

The Court, having considered the testimony of Plaintiff Harlan Ashby and witness John Ross, and the proffered testimony of Plaintiff's remaining witnesses, makes the following findings:

Plaintiff was hired as a special education teacher by the South Sanpete School District ("District") in 1976. Plaintiff had a Bachelor of Arts degree from BYU plus approximately 90 additional credit hours of education.

In 1976, the District had in place a salary schedule composed of lanes and steps. Placement in a salary lane was based upon education. Placement in a salary step was based upon teaching experience. Higher salary lanes and steps represented higher salaries.

When Plaintiff was hired, he was properly placed in salary lane 3, the lane reserved for teachers with a bachelor's degree plus 55 or more credit hours of additional education.

Plaintiff signed employment contracts for each year of his employment with the District. The employment contracts reflected Plaintiff's lane and step. Plaintiff received his employment contracts in the mail. The received contracts were filled out and signed by the District Business Administrator. Plaintiff signed his contracts and returned them to the District.

In 1986, the District added three additional lanes to the salary schedule. The result was as follows: Lane 1-Bachelor's Degree; Lane 2-Bachelor's degree plus 35 additional credit hours; Lane 3-Bachelor's Degree plus 55 additional credit hours or professional certificate; Lane 4-

Master's Degree; Lane 5-Master's Degree plus 45 additional credit hours; Lane 6-Doctorate Degree.

On December 2, 1986, then District Superintendent Scott W. Bean sent a Memorandum to Professional Staff on the subject of the 1986-1987 Contracts. The memorandum accompanied two copies of the 1986-1987 contract and a teaching salary schedule. The memorandum asked staff to check the amount, step, and lane on the contract, and if correct, sign and return one copy of the contract.

Plaintiff received and signed employment contracts with the District that had Plaintiff on lane 4 of the salary schedule for the following school years: 1986-1987; 1987-1988; 1988-1989; 1989-1990; 1990-1991; 1991-1992; 1992-1993; 1993-1994; 1994-1995; 1995-1996. Plaintiff did not notify the District of the error or that he should have been placed on lane 3. Plaintiff's placement on lane 4 resulted in Plaintiff being overpaid in all of the above-listed school years except for the 1986-1987 school year.

Plaintiff admitted that he misrepresented to District employees that he had a Master's Degree.

In the Spring of 1995 or the Fall of 1996, the District requested that Plaintiff provide his school transcripts evidencing that he had a Master's Degree. Plaintiff testified that he did not give an honest answer in response to this request. He testified that he did not say he did not have a Master's Degree. Plaintiff finally admitted that he did not have a Master's Degree in June or July, 1997.

On August 13, 1997, Plaintiff was suspended without pay as a result of his claim to have a Master's Degree and his continual misrepresentation when he was asked to produce transcripts to substantiate this claim.

On August 28, 1997, Plaintiff was terminated for cause. The specific reason for his termination, listed in the termination letter, were as follows: "1-Conduct which violates the criminal law of this state or of the United States; 2-Conduct which violates any established rule, regulation, policy, or directive; 3. Theft; 4. Dishonesty or falsification of any information supplied to the school district."

District policy, GCPD Teacher Code of Ethics, Principle II, Commitment to the Profession, states that the educator shall not misrepresent his/her professional qualifications.

Plaintiff filed his Complaint on or about August 20, 2001. The Complaint is cast in two causes of action: 1-Breach of Contract; and 2- Attorney's Fees. The Breach of Contract cause of action alleges that plaintiff was notified by letter that he was suspended without pay for the specific reason that he claimed to have a Master's Degree and continued to misrepresent that fact during the years he was employed by the District. The Complaint alleges that those charges were falsely made.

Based on the finding, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

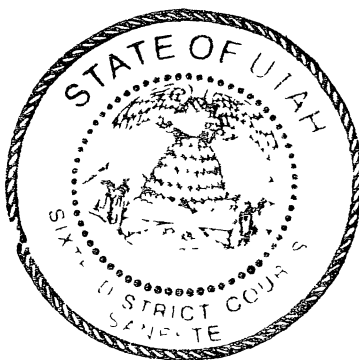
The reasons given for Plaintiff's termination are true. Specifically, reason number four in Plaintiff's termination letter have been conclusively established, namely "Dishonesty or falsification of any information supplied to the school district." Furthermore, it was incumbent on the Plaintiff to speak out and not remain silent that his contracts placed Plaintiff on lane 4 rather than lane 3.

Therefore, there are no additional facts that could be presented through additional testimony or documentary evidence which would make it possible for Plaintiff to make out the first cause of action of the Complaint. As a result, the second cause of action also can not be made out because it is derivative in nature and thus depends upon the success of the first cause of action.

The Motion for Directed Verdict is therefore granted and the case is dismissed with prejudice.

DATED this 29 day of JUN, 2005.

BY THE COURT:



David L. Mower
Honorable David L. Mower
DISTRICT COURT JUDGE

1 for me.

2 I kind of had gotten into volunteer work with special ed
3 children and fell in love with that. So I dropped out of
4 the graduate school of archeology and went into ed psych,
5 and received certificates of endorsements in that field.

6 Q. Okay. So you have a special ed endorsement?

7 A. Yes.

8 Q. And how many total post Bachelor's Degree hours did
9 you complete?

10 A. Probably in excess of 90 semester hours.

11 Q. You did not actually earn a Master's Degree; is that
12 correct?

13 A. I did not.

14 Q. I'm sorry?

15 A. I did not.

16 Q. Did you go into education as a profession?

17 A. Yes.

18 Q. Where did you go to work?

19 A. The first year?

20 Q. Yes.

21 A. The first year of certified teacher was at Shelly
22 Middle School in Shelly School District, Idaho.

23 Q. And after that?

24 A. College of Eastern Utah in Price, Utah.

25 Q. Okay, and at some point did you begin an association

1 with South Sanpete School District?

2 A. Yes, I was employed by them beginning the fall of
3 1976.

4 Q. Okay. How did you -- how did that relationship begin?

5 A. As a result of changes being made in the program, I
6 was teaching. I was dissatisfied with where it was going,
7 maybe even a little bored, so I decided I wanted to use my
8 degree -- or my training, which was special ed. So I put out
9 some resumes, and the South Sanpete School District told me
10 they had an opening. So I came over here to interview with
11 them and with Central Utah -- Central Utah Educational
12 Services.

13 Q. Did they come to interview you at CEU?

14 A. No, I came here to them. I interviewed with both CEU
15 -- no, CUES, C-U-E-S and South Sanpete the same day.

16 Q. Was the department at CEU downsizing?

17 A. No.

18 Q. They were just changing?

19 MR. STEUR: Objection, lacks foundation.

20 THE COURT: What was that question again, Mr. Allen.

21 MR. ALLEN: Was the department at CEU downsizing at
22 that time.

23 THE COURT: And what's the -- I got an objection. So
24 what's the --

25 MR. ALLEN: Lack of foundation was the objection.

1 THE COURT: Well, what difference does it make?

2 MR. ALLEN: I'll move on. No problem. I'll withdraw
3 that question.

4 Q. BY MR. ALLEN: And let's just go right into your
5 association with South Sanpete. Let me show you something --
6 this is from the exhibits.

7 THE COURT: Which one?

8 MR. ALLEN: It is Exhibit No. 44.

9 THE COURT: Let me ask the clerk, have you marked
10 exhibits?

11 COURT CLERK: I have marked exhibits.

12 THE COURT: Do you have an Exhibit 44 on your list?

13 COURT CLERK: I do.

14 THE COURT: And you're showing him --

15 MR. ALLEN: That's Exhibit 44.

16 THE COURT: Go ahead.

17 Q. BY MR. ALLEN: Do you recognize that?

18 A. That's the application form that I filled out for the
19 South Sanpete School District for employment.

20 Q. All right. So let me trade you. This is a copy of
21 that. Was it -- did you fill that form out?

22 A. Yes.

23 Q. Okay, and what did you indicate for your educational
24 credentials?

25 A. Says, "Credentials on file, Brigham Young University

1 degree, BA --" meaning Bachelor of Arts, and then a certificate
2 in special education, elementary education.

3 Q. Okay. Did you put down on this form that you had a
4 Master's Degree?

5 A. No, I did not.

6 MR. ALLEN: Okay. Move to admit Exhibit 44.

7 THE COURT: Mr. Steur?

8 MR. STEUR: No objection.

9 THE COURT: No. 44 is received.

10 (Exhibit No. 44 received into evidence)

11 MR. ALLEN: Your Honor, do you want a copy of --

12 THE COURT: Only as they're received.

13 MR. ALLEN: Only as received.

14 THE COURT: Have you got them bound in a book right
15 now?

16 MR. ALLEN: Well, no, I can take this off. Do you
17 prefer to have them as we do it?

18 THE COURT: Uh --

19 MR. ALLEN: Or do you want to just do it --

20 THE COURT: -- I don't need them right now. I'll tell
21 you what the big problem is, though. As we build up the number
22 of exhibits, and the clerk has them, somebody's going to want
23 them.

24 MR. ALLEN: Yeah.

25 THE COURT: So they'll say, "Where is Exhibit No. 35?"

1 Then it's going to be the bailiff's job to jump up and help
2 with that. So -- and the clerk is the official keeper of the
3 exhibits. So it's keeping them organized becomes the biggest
4 problem.

5 MR. ALLEN: Okay.

6 THE COURT: So 44 has been received.

7 MR. ALLEN: All right.

8 THE COURT: I'm sure I'm going to want to look at it,
9 but right now is probably not important.

10 Q. BY MR. ALLEN: Okay, and Mr. Ashby, would you also turn
11 to Defense Exhibit No. 47.

12 MR. STEUR: Your Honor, I hate to interrupt --

13 THE COURT: Go ahead.

14 MR. STEUR: -- and I apologize. Just as a matter of
15 housekeeping, we -- my paralegal went through, because we got,
16 when we came here yesterday, some exhibit stamps --

17 THE COURT: Uh-huh.

18 MR. STEUR: -- that we've attached to these exhibits we
19 intended to offer. I think it's a little bit different, and
20 there may be a way that we can streamline this a little bit to
21 make it easier for the clerk --

22 MR. ALLEN: Have them marked as a -- whatever.

23 MR. STEUR: -- as opposed to -- can we go off the
24 record for a second, your Honor?

25 THE COURT: What are you suggesting?

1 MR. STEUR: I would like my paralegal to make a
2 suggestion, because she's the one that went through all of
3 those exhibits and handed something to the clerk.

4 THE COURT: So where are the exhibits that have the
5 clerk's exhibit sticker attached to them?

6 ASSISTANT: Right here.

7 THE COURT: In the box?

8 COURT CLERK: Yes.

9 THE COURT: That the paralegal has?

10 ASSISTANT: If you would like I will pull the originals
11 and hand them to the clerk at this point --

12 THE COURT: Uh-huh.

13 ASSISTANT: -- if that would make it easier.

14 THE COURT: So you didn't really show the witness
15 what's been marked as Exhibit 44, did you?

16 MR. ALLEN: A copy.

17 THE COURT: Okay. So the one that's got the clerk's
18 exhibit tag on it is not the one that the witness had in hand,
19 and you're saying, Mr. Steur, that your paralegal has that?

20 MR. STEUR: Correct. What happened was when we made
21 our initial exchange of witness and exhibit list, I just
22 attached a copy of all the exhibits to that initial exchange.
23 When we got here and got the exhibit stamps, we were putting
24 them on originals and that kind of thing.

25 MR. ALLEN: Is your numbering the same?

1 ASSISTANT: No.

2 MR. STEUR: So the numbering kind of changed, and if --
3 and we could probably coordinate that. I don't want confusion
4 later on.

5 THE COURT: Okay. Let's take a break. You see if you
6 can coordinate your numbers.

7 MR. STEUR: All right. Thank you, your Honor.

8 THE COURT: There's always obstacles it looks like.
9 Okay, let me know when you're ready. Court's in recess.

10 (Recess taken)

11 COURT BAILIFF: Court resumes session. Be seated.

12 THE COURT: Thank you. We're back on the record.
13 Parties are present with Counsel. Exhibit 44 has been
14 received. So Mr. Allen, next question.

15 MR. ALLEN: Thank you. Your Honor, this exhibit, I
16 move to readmit it as -- with the corrected numbering. It's
17 going to be Plaintiff's Exhibit 49. Any objection to this?

18 MR. STEUR: No objection.

19 THE COURT: No. 49. So that's the one that's been
20 received as 49?

21 MR. ALLEN: Yes, and that is his application.

22 THE COURT: Application.

23 (Exhibit No. 49 received into evidence)

24 Q. BY MR. ALLEN: And then I'm now showing --

25 THE COURT: Let me just -- I'm sorry to interrupt. Let

1 me just ask the clerk. Do you have Exhibit 49 now?

2 COURT CLERK: I don't have any.

3 MR. ALLEN: I'm going to give them all to her.

4 THE COURT: So where's the --

5 MR. ALLEN: It's marked, and he's --

6 THE COURT: And you've got them in a collection?

7 MR. ALLEN: And I'm going to give them to him right
8 here.

9 Q. BY MR. ALLEN: Okay, Mr. Ashby, I'm going to show you
10 what's been marked as Plaintiff's Exhibit No. 50. I'm going to
11 ask you to tell me if you recognize it?

12 THE COURT: And your answer is?

13 THE WITNESS: I don't have a document to look at.

14 MR. ALLEN: Sorry, I thought you had that.

15 MR. STEUR: Randy, before you publish that to the
16 witness, could I see what document you're referring to?

17 MR. ALLEN: It's Plaintiff's Exhibit No. 49 -- or 47,
18 Plaintiff's Exhibit No. 47.

19 THE COURT: I just thought you referred to Exhibit
20 No. 50. So ask your question again.

21 MR. ALLEN: Thank you.

22 Q. BY MR. ALLEN: Okay. I'm going to show you what's been
23 marked as Plaintiff's Exhibit 50. Do you recognize that?

24 A. I recognize the content, but not the document itself.

25 Q. Okay. Would you turn in that to the resume that's in

1 there, and ask -- let me ask you if you recognize that?

2 A. I'm not finding the -- okay, I found it.

3 Q. Okay.

4 A. Way back after a whole lot of miscellaneous things.

5 Q. Okay. Is that the resume that you submitted when you
6 were applying for the job?

7 A. I believe it is, yes.

8 Q. And what education does it list?

9 A. Bachelor of Arts, Brigham Young University, Provo,
10 Utah, Special Education of Mentally Retarded. Minor in
11 Elementary Education.

12 Q. Okay. Does it state that you have a Master's Degree?

13 A. No, it does not.

14 Q. Okay. Did you tell the people who interviewed you for
15 the job that you had a Master's Degree?

16 A. No, I did not.

17 Q. Was there any discussion about Master's Degrees or
18 Master's Degree study whatsoever?

19 A. Not that I can recall, no.

20 Q. Okay. Are you aware of which track you were placed on
21 when you were hired?

22 A. Yes.

23 Q. Okay. Were you given a reason why you were placed on
24 that track?

25 MR. STEUR: Objection, your Honor.

1 THE COURT: Based on?

2 MR. STEUR: Based on the parol evidence rule, based
3 upon my motion in limine.

4 THE COURT: Objection's overruled, but if there's a
5 conversation here, I'd sure like to know something about it;
6 date, time, place, who was present, who said what.

7 Q. BY MR. ALLEN: Who interviewed you for the job?

8 A. Ken Graham was there. I'm fairly certain Darrell
9 Warren was there part of the time. Rodney Anderson says he
10 was there, but I actually don't remember him being there.

11 Q. Okay, and this took place in 19 --

12 A. This happened in I think June of 1976.

13 Q. Okay.

14 A. It may have been July.

15 Q. And it was here in Manti?

16 A. Yes.

17 Q. Okay, and did a discussion of your educational
18 qualifications --

19 A. Yes.

20 Q. -- take place?

21 A. Yes.

22 Q. Do you remember that conversation?

23 A. No details, no.

24 Q. Okay. Do -- but you've testified you didn't -- you
25 did not represent that you had a Master's Degree; is that true?

1 A. That's true. Would not have made sense in view of the
2 documents I submitted.

3 Q. Do you remember discussing salary?

4 A. Not actually, no.

5 Q. Do you remember discussing tracks?

6 A. Only that I would be placed on what was lane 3.

7 Q. Okay. Was it explained to you what that track was?

8 A. Subsequently it was only referred to as the Master's
9 lane, but whether or not that was the only thing that was
10 discussed in that meeting, I cannot swear to.

11 Q. Okay. So you're saying around the school the jargon
12 was that lane 3 was the Master's Degree track?

13 A. That was the conversation, yes.

14 Q. Or excuse me, not track, but lane?

15 A. Lane, yes.

16 Q. Okay, and do you know why you were placed on that
17 track?

18 MR. STEUR: Objection, your Honor.

19 THE COURT: See, this is what I've learned so far from
20 this last little sequence of questions and answers. I remember
21 being in a conversation June of '76 in Manti. Ken Graham and
22 another person were there. I don't remember what was talked
23 about. That's what I just learned.

24 MR. ALLEN: Okay.

25 THE COURT: Okay. So if that was your point, to teach

1 and answered. He's talking about that original conversation
2 and it misstates his testimony, because there was only two
3 people present. He said that he thought it was one additional
4 person, Darrell Warren, but it was Rodney Anderson.

5 Q. BY MR. ALLEN: I'll restate. In your conversation with
6 Ken Graham and Darrell Warren do you remember anyone explaining
7 what track you would be placed in?

8 A. I'm under the impression that that was discussed when
9 he met with the superintendent.

10 Q. Okay, and his name was?

11 A. Ronald Everett.

12 Q. Okay. So it was Superintendent Ronald Everett. Did
13 you meet with him subsequent to meeting with Ken and Darrell?

14 A. Yes.

15 Q. And this was prior to you beginning work?

16 A. Yes.

17 Q. And at this time did you discuss this contract that
18 you have before you?

19 A. My memory isn't so much of a discussion, as him
20 offering to put me on a lane based upon the additional hours.

21 Q. Okay.

22 A. As an incentive to sign.

23 Q. Okay, and did he present you with a contract? How
24 did that contract get into your hands? You signed it; is that
25 right?

1 point. Let's go back to 1986. You indicated that there was a
2 change after the first ten years that you had worked with --

3 A. I do not know if it was 1986 or '87 when they
4 instituted the additional --

5 Q. Okay, at some point there was a change?

6 A. Yes.

7 Q. And what was -- what was your understanding of that
8 change?

9 A. In order to accommodate the teachers with advanced
10 degrees and give the schedule more flexibility, they added
11 three additional lanes to the pay schedule.

12 Q. Did you select the lane that you were placed on at
13 that point?

14 A. No, I don't recall having anything to say about it.

15 Q. Okay. Were you given a contract that indicated a lane
16 that was part of this new system?

17 A. Yes.

18 Q. Okay, and what was the first contract that was under
19 the new system?

20 A. Do you want me to look that up?

21 Q. Well, you have Exhibit 51 in front of you.

22 A. Oh, I'm sorry.

23 Q. Look on that, and that's all your contracts, isn't it,
24 up through '86, '87?

25 A. Yes, and this one is '86; '87, it still has me on

1 lane 3.

2 Q. Okay. So '86, '87 you were still under the original
3 system; is that right?

4 A. Yes.

5 MR. ALLEN: Okay. I'm going to ask the clerk to mark
6 this Exhibit 52. This will be --

7 Q. BY MR. ALLEN: I'm going to show you what's been marked
8 as Plaintiff's Exhibit 52. This is the 1987 contract, or the
9 Defendant's Exhibit No. 8. Plaintiff's 1987 contract with
10 South Sanpete School District. Can you identify that?

11 A. Yes, it's again a standard contract. It says for the
12 school year '87, '88.

13 Q. Okay.

14 A. It doesn't actually say that, but the date starting
15 May '87.

16 Q. Is that the first contract that incorporated this new
17 system?

18 A. I believe so, yes.

19 Q. Okay. What lane is indicated on that contract?

20 A. Lane 4.

21 Q. Okay. Did you tell the district to put you in lane 4?

22 A. No, it wouldn't have done anything if I had.

23 Q. How -- did you re -- when you received the contract
24 from the district, was it as it is before you now, other than
25 your signature?

1 A. You're asking me if I --

2 Q. Did it have lane 4 on it; do you remember?

3 A. No, I don't.

4 Q. Okay.

5 A. And I would have said "yes," but Lewis did show me two
6 contracts in which he said were identical, and one said "lane
7 3" and one said "lane 4." If it wasn't for that, I would have
8 answered the question "yes," but now I've got doubts. So I
9 don't know.

10 Q. Okay. Did you ever request that your lane be changed
11 from three to four?

12 A. No, but if I had, again, it wouldn't have done me
13 any good. If I request a lane change, I have to produce
14 documentation --

15 Q. Uh-huh.

16 A. -- for that lane change.

17 Q. Did you receive anything in connection with this
18 contract asking you to verify the information that's on the
19 contract?

20 A. That would be the documentation, no.

21 Q. You did not receive anything?

22 A. A request for documentation?

23 Q. Yes.

24 A. No.

25 Q. Okay, and so you were presented with a contract and

1 you signed it?

2 A. Yes.

3 Q. And you continued to work for the district; is that
4 right?

5 A. Yes.

6 Q. And you worked from '87 through '97?

7 A. Yes.

8 Q. And were you on line 4 for that entire time?

9 A. Yes.

10 Q. Okay. Let me just jump back briefly to Plaintiff's
11 Exhibit 50, the personnel file, and ask you to look at the
12 second page of that exhibit under "Education." Will you please
13 indicate what is listed there?

14 A. Education, 1968, BA Degree, Archeology, Anthropology
15 and History.

16 Q. Okay. Is that accurate?

17 A. Yes.

18 Q. Okay. In the 1990's you began working under Chapter 1
19 work; is that right?

20 A. Yes.

21 Q. Can you explain what Chapter 1 is?

22 MR. STEUR: Objection, your Honor.

23 THE COURT: You're saying does he know? What's the
24 basis of the objection?

25 MR. STEUR: The objection is his work in Chapter 1 is

1 irrelevant.

2 THE COURT: It's overruled. It may be relevant. I'm
3 not sure yet. So it's overruled. Go ahead and answer the
4 question.

5 Q. BY MR. ALLEN: Explain.

6 A. Chapter 1 is basically a remedial program dealing
7 either in math or reading. In our school it was reading.

8 Q. Okay, it was for reading?

9 A. Yes.

10 Q. Kids with reading trouble?

11 A. Yes, children who were a certain percentage below in
12 testing in their reading skills.

13 Q. Did extra funds come to the school through Chapter 1?

14 A. Yes.

15 Q. Okay, and what years did you do Chapter 1 work?

16 A. As I recall, '93, '94 -- without (inaudible) sheet.
17 It says '91, '92 -- I recall '93, '94 through '95, '96.

18 MR. STEUR: Okay. Your Honor, for the purpose of the
19 record, can the record reflect that the witness was testifying
20 from a document, and not from personal recollection?

21 THE COURT: He was looking at a document.

22 THE WITNESS: No, I just said that I -- my recollection
23 differs from the document.

24 MR. ALLEN: Okay.

25 THE COURT: Well, let's remove the -- let's remove the

1 document from the witness so that there's no question about it.

2 Q. BY MR. ALLEN: Okay. Again, would you restate your
3 recollection as to what years you actually did Title 1 work?

4 A. Again, my recollection was it started in '93, '94.

5 Q. Okay. So '93, '94. What other years?

6 A. Through '95, '96, yes.

7 Q. Okay. So '93, '94 -- '93, '94 school year?

8 A. Right.

9 Q. And '95, '96 school year you did Chapter 1 work?

10 A. Well, I was paid.

11 Q. Okay. Explain the difference.

12 A. Well, if you notice, I was teaching special ed for
13 about 15 years. At the end of the special ed time what I
14 actually did is I set up a computer lab. I got grants. I
15 got computers in the school, and I actually set it up and ran
16 the computer lab.

17 Q. What year did you start doing that?

18 A. That would have been about '90.

19 Q. Okay. So you transitioned from special ed into the
20 computer lab?

21 A. Yes.

22 Q. Okay, and that began -- that transition began around
23 '90, '91?

24 A. Right, and sometime in that period -- I don't know
25 if it came from the district office or from the principal's

1 office, but they were concerned about paying my salary for a
2 computer lab, because they were -- I mean, it came down, "Well,
3 hey, we can hire an aid to do computer lab." So they wanted me
4 to do Chapter 1 as well. So I did Chapter 1 half day, computer
5 lab half day.

6 Q. Okay, and what year did you start doing half and half
7 like that; is that '90, '91 or --

8 A. It would probably be the following year.

9 Q. So '91, '92?

10 A. Probably, yes.

11 Q. Is it your recollection that you're doing half and
12 half that year?

13 A. Yes.

14 Q. Okay. At some point was there some type of audit by
15 the State Office of Education of this school's Chapter 1?

16 A. An audit or oversight. It came down in the March of
17 1995.

18 Q. Okay.

19 A. Late March.

20 Q. How did you learn that that was going to occur?

21 MR. STEUR: Objection, your Honor. I renew my -- if
22 I can just have a continuing objection to this entire subject
23 matter, then I won't renew my objection.

24 MR. ALLEN: I have no objection to that being
25 considered a continuing objection.

1 THE COURT: Yeah, you can have a continuing objection.
2 That makes it a lot easier. Now, the question was, how did you
3 become aware. Go ahead and answer.

4 THE WITNESS: I was notified by my principal and by the
5 district's Chapter 1 administrator, Rodney Anderson, that there
6 would be this audit or this inspection by auditors, and that
7 they were -- well, that's how I was notified. That was a week
8 or ten days before the actual occurrence.

9 Q. BY MR. ALLEN: Were you asked to do anything with
10 respect to preparing for that audit?

11 A. I was asked to post a list of students who were in
12 Chapter 1, since I didn't know who they were, since I --

13 Q. Who asked -- who asked you to do that?

14 A. I think -- I believe that was Rodney Anderson.

15 Q. Okay.

16 A. Or Kirk Anderson also was responsible for bringing me
17 the list, I think.

18 Q. Okay. Rodney Anderson asked you to make a list and
19 post it on --

20 A. No, no, no. I couldn't make the list. I had no idea
21 who they were.

22 Q. Okay.

23 A. The list was probably made by Wanda Hatton.

24 Q. Okay.

25 A. She was the Chapter 1 secretary. She was running the

1 program that year.

2 Q. So Rodney Anderson asked you to post a list, but you
3 didn't make the list yourself; is that what you're saying?

4 A. Yes.

5 Q. Okay. Did you talk to someone about getting a list
6 made?

7 A. To the principal, yes.

8 Q. And the principal was?

9 A. Kirk Anderson.

10 Q. So you requested that a list be provided to you?

11 A. I don't think I had to request it anything Rodney had
12 already told her there had to be a list.

13 Q. Did you know who the Title 1 students were at the time
14 that the audit announcement came down?

15 A. I had some pretty good ideas, because I work with them
16 in the computer lab and you pick out who's the slow children.

17 Q. So you could tell who was having trouble reading?

18 A. Yes.

19 Q. But you didn't -- you were never told, "These are the
20 students that are qualified under Title 1"?

21 A. There was no reason to tell them. I wasn't working
22 with -- I was the Chapter 1 teacher by name only.

23 Q. Now, you're talking about school year 1990 --

24 A. Of '94, '95.

25 Q. -- of 1994, '95?

1 A. Right.

2 Q. Okay. So you were in name only, is what you're saying
3 on Title 1?

4 A. Yeah, there had to be a certified teacher over the
5 program of the school.

6 Q. And that was you?

7 A. That was me.

8 Q. What exactly -- when you say "do Title 1 work," what
9 exactly are you saying?

10 A. In our school it was basically a pull out. The
11 children who were having problems, were identified for the
12 program, would be pulled out and worked with on the skills
13 that they were identified as being deficient in.

14 Q. Okay, and your understanding is that the Title 1 funds
15 were given, and it was required upon receiving those that this
16 would be done?

17 A. Yes.

18 Q. But you weren't doing that work in 1994, '95?

19 A. No, that was being done by Wanda Hatton and aids.

20 Q. So the audit announcement comes, and what do -- what
21 were -- did you have any discussions with the principal and/or
22 the superintendent regarding the upcoming audit?

23 A. The principal and Rodney Anderson about that. Had no
24 discussions with the superintendent until after the audit.

25 Q. Okay. Principal Kirk Anderson you had a discussion

1 with; and Rodney Anderson, what is his position?

2 A. Again, he was at that time the District Administrator
3 in charge of the Title 1 program.

4 Q. Okay, and this conversation, do you remember when it
5 occurred?

6 A. No.

7 Q. Was it before the audit?

8 A. Oh, yes.

9 Q. And where did it occur?

10 A. In my room in the chapter lab.

11 Q. Did you initiate the conversation?

12 A. No, they came in and talked to me.

13 Q. Okay. What did they say to you?

14 A. Basically --

15 MR. STEUR: I'm going to object.

16 THE COURT: Based on?

17 MR. STEUR: Hearsay. Hearsay.

18 THE COURT: Say that again.

19 MR. STEUR: Hearsay, your Honor.

20 THE COURT: What about that, Mr. --

21 MR. ALLEN: Statement against interest, admission,
22 plus it's not really offering it for the truth of the matter
23 asserted, but to show that this pressure was put on him, and
24 that it explains subsequent events.

25 THE COURT: Statement against interest.

1 MR. ALLEN: I mean, I think it's damaging to the school
2 district what they said.

3 THE COURT: And they're school district officials,
4 you're saying.

5 MR. ALLEN: Yes.

6 THE COURT: So that's why it's a statement against
7 interest.

8 MR. ALLEN: Yes.

9 THE COURT: That could be a basis. So the objection is
10 overruled. Go ahead and answer it.

11 THE WITNESS: I'm sorry, would you repeat the question?

12 Q. BY MR. ALLEN: What did they -- what did -- well, let's
13 start with do you remember who got -- what did Rodney Anderson
14 say?

15 A. Basically that they was concerned about how I would
16 present my program to these Chapter 1 state officials, because
17 I wasn't dealing with the program. Kirk was concerned that --
18 he said he hadn't been informed that they had increased the
19 amount of my salary that was taking from Chapter 1 that year.

20 At the same time he had taken me out of Chapter 1, so
21 he was concerned about that. Rodney was concerned about what
22 I was going to say to the Chapter 1 officials, and he kind of
23 coached me on what -- how I should present the program.

24 Q. And what did he tell you to say?

25 A. Basically that I had identified the children, and I

1 was working with them separately because of their special
2 needs.

3 Q. Okay. Did you -- what did you think when you were
4 told that?

5 MR. STEUR: Objection, irrelevant.

6 THE COURT: That is irrelevant. That's right. It's
7 sustained.

8 MR. STEUR: I'm also going to move to strike the last
9 testimony as being not against interest.

10 THE COURT: The motion is denied. The testimony can
11 remain.

12 Q. BY MR. ALLEN: So the audit came down and did happen;
13 is that right?

14 A. Yes.

15 Q. And did some folks come down from the State?

16 A. Two individuals did, yes.

17 Q. Who were they?

18 A. I believe it was Mr. Wilson and Mr. Ross.

19 Q. All right. Did they speak with you?

20 A. One of them did, yes.

21 Q. Who did?

22 A. That, I'm sorry I cannot tell you.

23 Q. One of the two?

24 A. One of the two.

25 Q. This is --

1 A. I believe it was probably Mr. Ross, but I'm not
2 certain.

3 Q. Did you -- did they inquire of you as to your Title 1
4 work?

5 A. Yes. That was the nature of the conversation.

6 THE COURT: Here's a problem. How did "they" say
7 anything?

8 MR. ALLEN: Okay. Well --

9 THE COURT: Only one person can speak.

10 MR. ALLEN: Yeah, one of the two of them.

11 Q. BY MR. ALLEN: Okay. Do you remember what you said to
12 the auditors?

13 A. Verbatim or content?

14 Q. Well, either one.

15 A. Yes.

16 Q. And what did you say?

17 A. Because I felt very bad about it. I found myself
18 in a really awkward position. I had thought myself a little
19 cowardly, because I had not objected to what Rodney had told me
20 to say. I had not told him that I thought that was a lie and
21 couldn't say it. I kept my mouth shut.

22 When these individuals came down, I still didn't
23 know what I was going to say to them. I couldn't say what
24 Rodney told me to, because that was an out and out lie. Yet
25 I couldn't say that -- I didn't feel like I could say the

1 truth, because I knew that would lose the school the monies.

2 So what I did instead was I presented the program as
3 being more than it was. That is, because I was working with
4 the Chapter 1 children, I said, "Yes, I'm working with those
5 children," and "Yes, I have identified them as having these
6 problems," which was all factually true, but was implying
7 something other than the truth.

8 Q. Okay. What was your -- well, let me ask this. Did
9 you at any point become aware of the results of the audit?

10 A. Yes.

11 Q. What did you -- what were those results that you
12 learned?

13 MR. STEUR: I'm going to object, lack of foundation.

14 THE COURT: That's true. I don't have any foundation.

15 Q. BY MR. ALLEN: Okay. The audit was completed?

16 A. Yes.

17 Q. The auditors left the school?

18 A. And they received notification of the results.

19 Q. Okay. Well, how did that notification come?

20 A. It came down to the district offices, and then was
21 distributed to the various schools.

22 Q. Written documents?

23 A. Yes.

24 Q. Okay. Do you remember what those written documents
25 said?

1 A. Basically that my program had failed.

2 Q. Okay. Do you remember how -- in what aspects they
3 said it had failed?

4 MR. STEUR: I'm going to object, your Honor. I think
5 this is --

6 THE COURT: I suppose I've got the document, Mr. Allen.

7 MR. ALLEN: Yeah, we do.

8 THE COURT: I think it would be better to look at the
9 document than to have a witness tell what he thought it meant.

10 MR. ALLEN: Okay.

11 THE COURT: And maybe he can't lay foundation for the
12 document. I don't know.

13 MR. STEUR: We'd stipulate to foundation on -- and the
14 correctness of these documents.

15 THE COURT: What number is that?

16 THE WITNESS: May I speak?

17 THE COURT: No, sir, you've got to wait for a question.
18 When you're a witness, that's your job, to wait for a question.

19 MR. ALLEN: We marked this as Plaintiff's Exhibit 52.
20 I'm not sure I have an exact document exactly explaining how
21 they failed the program. Let me start with this.

22 (Counsel conferring with clerk off the record)

23 Q. BY MR. ALLEN: Let me show you what's been marked
24 as Plaintiff's Exhibit 53. Ask you if you recognize those
25 documents?

1 A. The top document, two pages, is a letter from Kay
2 Bailey, my Chapter 1 aide -- Chapter 1 computer lab aide. Do
3 you want me to comment on the rest of them?

4 THE COURT: He's asking you if you recognize the
5 document.

6 THE WITNESS: Oh, the first two pages, yes.

7 Q. BY MR. ALLEN: Can you explain what the first two pages
8 are?

9 A. This is --

10 Q. Well, you know what, I don't want to -- let's --
11 I'm going to withdraw that. Let's go to -- let's go to the
12 memorandum that looks like that.

13 THE COURT: Is that an exhibit?

14 MR. ALLEN: It's in Exhibit No. 53.

15 Q. BY MR. ALLEN: Is there a page that has "Memorandum" in
16 bold lettering?

17 A. Yes.

18 Q. Okay, and do you recognize that document?

19 A. Yes.

20 Q. Is it dated April 7, 1995?

21 A. Yes.

22 Q. Okay. Did you receive that document from Lewis
23 Mullins?

24 A. Yes, I did.

25 Q. What does the document say?

1 A. "To Harlan Ashby from Lewis Mullins. Subject: Title 1
2 Audit. As per our --"

3 THE COURT: With all due respect, I can read as well as
4 the witness can. So there's no point in having him read it to
5 me.

6 Q. BY MR. ALLEN: Okay. Basically what did it tell you?

7 THE COURT: Same comment. I can still read -- are you
8 laying foundation that he's seen it before, and you want me to
9 look at it?

10 MR. ALLEN: Well, I can provide you with a copy, and
11 you can look at it, your Honor.

12 THE COURT: He's offering No. 53, Mr. Steur.

13 MR. STEUR: No objection.

14 MR. ALLEN: Okay.

15 MR. STEUR: Other than the preceding objection that
16 this entire subject matter is --

17 THE COURT: Is irrelevant.

18 MR. STEUR: -- is irrelevant.

19 THE COURT: Subject to that objection, 53 is received.

20 MR. ALLEN: Okay, thank you.

21 (Exhibit No. 53 received into evidence)

22 Q. BY MR. ALLEN: Did Lewis Mullins tell you by memorandum
23 that your salary is going to be eliminated by the Title 1
24 auditors?

25 A. This was a confirmation of an earlier conversation.

1 Q. Okay. You had a conversation with Lewis Mullins after
2 the audit had occurred?

3 A. Yes.

4 Q. And what --

5 A. After he got the results of the audit.

6 Q. And what did he tell you?

7 MR. STEUR: Objection.

8 THE COURT: Because of?

9 MR. STEUR: Hearsay.

10 THE COURT: What about that, Mr. --

11 MR. ALLEN: We're not offering it for the truth of the
12 matter asserted; and it's a statement against interest.

13 THE COURT: A statement against interest this
14 conversation by the --

15 MR. ALLEN: Superintendent.

16 THE COURT: -- superintendent. A conversation.

17 Mr. Steur, aren't all statements by the adverse party
18 admissible, or am I thinking wrong about that?

19 MR. STEUR: Well, your Honor, I don't know what the
20 testimony's going to be from this particular witness as to what
21 was said at that time.

22 THE COURT: Yeah.

23 MR. STEUR: You know, we are not disputing that there's
24 -- there was a problem with this Chapter 1, Title 1 audit. We
25 are not disputing that there was a problem with the plaintiff's

1 performance during this audit.

2 THE COURT: Well, then let's not object to --

3 MR. STEUR: And in terms of these extracurricular
4 statements that were made, I don't know what these statements
5 are that he's trying to bring in through this witness. He can
6 ask this witness who has been subpoenaed to testify and is
7 scheduled to testify.

8 THE COURT: It's a statement by an adverse party, so
9 the objection is overruled.

10 Q. BY MR. ALLEN: Okay. What did --

11 THE COURT: If you remember the question, go ahead and
12 answer it.

13 Q. BY MR. ALLEN: Okay. What did he say to you in the
14 conversation you had?

15 A. I was called into the principal's office, and then
16 Mr. Mullins was waiting. He had received results of the
17 Chapter 1 audit and was somewhat upset about it. He began
18 the conversation something like, "Because they cut off your
19 money, you now have a choice. You can choose to work one-and-
20 a-half days a week, or one-and-a-half hours per day for five
21 days a week."

22 The conversation went on like this for a while, with
23 me thinking I better keep my mouth shut until I talk to an
24 attorney. Then he said something about, "Oh, and I'm concerned
25 about what you're going to do over the summer."

1 That upset me, because this is now April, and we're paid on
2 a 12-month schedule for a 9 month pay a year. So virtually
3 you've already earned your summer pay by April.

4 So I said to him, "I'm not concerned about the summer.
5 I'm concerned about the rest of this year, this next month. He
6 became very irritated at that and said, "Well, in that case we
7 don't have a position for you here. I want you out of the
8 building." I told him he'd have to put that in writing, and he
9 said he did; and this is it here.

10 Q. And then you received this memorandum that's dated
11 April 7th?

12 A. An hour or so later.

13 Q. Did you do anything to try to remedy this situation?

14 A. Yes, that was Friday afternoon. I obtained some
15 information as to who I needed to talk to. For one reason
16 or another I wasn't able to contact anyone. If I remember, it
17 was too late in the day. I was finally able to contact him the
18 following week, which was probably Monday or Tuesday.

19 Q. Who did you contact?

20 A. I believe that was Mr. Ross.

21 Q. Okay.

22 A. And I talked to him about the results and what had
23 happened and the fact that I was being virtually terminated;
24 and he really didn't seem to care too much. So I got one of
25 those little moments of inspiration, and so I said, "Well,

1 would you please send me a copy of your audit."

2 He inquired as to why; and I said, "Well, I'll need it
3 because I plan on appealing this and going to Court about it."

4 At that point he became interested and asked me what I thought
5 he could do to help. I suggested that instead of taking away
6 our funds, that he put us on probation; and he agreed to that.

7 Subsequently I got a call from -- a couple days later,
8 several days later I got a call from the principal -- yeah,
9 Kirk Anderson -- saying the Chapter 1 funds had been restored,
10 and that I was to report back to work on that Monday.

11 Q. And did you?

12 A. Yes.

13 Q. Okay, and did the school enter into a probation on the
14 Chapter 1?

15 A. Informally, yeah.

16 Q. Okay, and if you look, for example, at the letter
17 with the date on top, May 10th, that's three pages into Exhibit
18 No. 53 --

19 A. Yes.

20 Q. -- do you have personal knowledge of that letter?

21 A. Only in that I would have -- this is probably the
22 basis of information on which the conversation with Rodney
23 Anderson about the coming visit was based.

24 Q. Okay. Was it your understanding that the school
25 communicated with the State office certain things it would do

1 to get back in compliance with what the Chapter 1 required?

2 A. Yes.

3 Q. Okay, and is that letter reflective of your
4 understanding of what those communications were?

5 A. This letter?

6 Q. Yeah.

7 A. No.

8 Q. Okay.

9 A. This letter is just an announcement of what was going
10 to happen, not what -- from the State. This is not from Rodney
11 Anderson. There is another letter that is from Rodney back to
12 the State, stating what they're going to do to correct it.

13 Q. Okay, and that's in this exhibit?

14 A. I actually don't see it there, but you do have it,
15 though.

16 Q. Did --

17 A. There is the audit results right there, though.

18 Q. Okay. What page is that on?

19 A. That's two pages later. That's the cover sheet for
20 the audit results.

21 Q. Oh, there we go. Okay.

22 A. Oh, here's the proposed correction. It's up to the
23 front.

24 Q. Okay, right. That's the May 10th letter, right?

25 A. No, that's April 25th, 19 --

1 Q. Oh, April 25th letter.

2 A. -- 95.

3 Q. The April 25th letter within Exhibit 25 is where Manti
4 School -- Manti Elementary School is describing how it's going
5 to come back into compliance?

6 A. This is proposed corrections, yes.

7 Q. Okay. Did you have any other conversations with the
8 principal or the school district superintendent regarding the
9 audit and the remedial measures?

10 A. Yes.

11 Q. Okay. When did that occur?

12 A. The day I came back after being told I could report
13 back. First class after lunch the principal and superintendent
14 came into my classroom.

15 Q. Okay, and what did they say to you?

16 A. The superintendent presented to me that all this had
17 to happened because I had not said what I'd been told to say.

18 Q. Okay, this is superintendent Lewis Mullins?

19 A. Yes.

20 Q. And by all this, what did you take that to mean?

21 A. Well, I took it to mean that I hadn't told the lie,
22 but I don't know that Lewis knew the lie. I don't know if he
23 knew what my assignment had been to that point.

24 Q. Okay. What else did he say to you?

25 A. Well, at that point I became rather irritated with

1 Kirk Anderson who was standing right there. Since he had
2 changed my assignment, I turned to him and I asked him to
3 defend me.

4 Q. Okay.

5 A. Since he knew that I -- I was teaching exactly what he
6 had told me to teach, and there was no way that I could pass
7 the audit. So I asked him to stand up for me.

8 Q. Okay.

9 A. And he said, "See how he is? He turns everything
10 around. I can't work with him anymore." To which Lewis
11 replied, "Well, put him on probation. I'll show you how to
12 terminate him."

13 Q. Okay. Were those his exact words?

14 A. I've got my notes right here. I could refresh my
15 memory, but I think they were, yes.

16 Q. Well, can you remember as you sit there?

17 A. I have to admit, my memory is probably based a lot
18 upon this. These notes were what I wrote in my journal
19 afterwards. It was a rather upsetting day. So I went right
20 home and wrote some things down about what had happened.

21 Q. Okay. So let me ask you again. I just am not clear.
22 Do you remember him saying that to you, or is it something that
23 you --

24 A. Are you asking me if I remember those absolute exact
25 words?

1 Q. Yes.

2 A. Yes.

3 Q. Okay, and was that the end of the conversation?

4 A. There were some other words that by that time I
5 probably wasn't listening.

6 Q. If you'll turn to the last two pages of Exhibit 53, at
7 the top it says, "Harlan Ashby, verbal warning April 20, 1995."
8 This is during the '94 -- do you recognize that document?

9 A. Oh, okay. Yes, I do.

10 Q. Did you receive that document?

11 A. Yes, I did.

12 Q. When?

13 A. April 20th, 1995.

14 Q. Was that after the audit was done?

15 A. That was after the audit and after our little
16 conversation in my room.

17 Q. Okay, and who is it from?

18 A. This is from Kirk Anderson.

19 Q. And he was the principal?

20 A. He was the principal at that time.

21 Q. Okay. In the letter he gives you basically a record
22 of a verbal warning that he gave. Did you remember receiving a
23 verbal warning?

24 A. Previous to this?

25 Q. Yes.

1 A. Other than that little statement as he walked out of
2 the room with the superintendent, no.

3 Q. Okay, and which statement are you referring to?

4 A. "See how he is? He changes everything around. I
5 can't work with him."

6 Q. Wasn't that in the fall, or wasn't that closer to
7 the beginning of the next school year that that conversation
8 occurred?

9 A. Oh, no, no. That was right after the audit.

10 Q. Oh, okay.

11 A. That was that day that we received -- I came back to
12 school.

13 Q. Okay. So this letter -- oh, so that -- the whole
14 termination and reinitiation of your employment, that whole
15 episode occurred still in 1995?

16 A. In one week's time.

17 Q. In April?

18 A. Yes.

19 Q. Okay.

20 A. Well, the audit was the end of March, and then
21 everything else was in April.

22 Q. And this is a true and accurate reflection of -- is
23 it a true and accurate reflection of the verbal warning you
24 were -- received from Kirk Anderson?

25 A. Well, there wasn't a verbal warning. There was this

1 written --

2 Q. Okay. So what's written here on this April 20th, 1995
3 verbal warning from Kirk Anderson, does it -- does it or does
4 it not reflect what he spoke to you, what he actually said to
5 you in your conversation after the audit?

6 A. Well, if you actually read this, there's very little
7 conversation in here. There's more accusations.

8 Q. Okay. Does he basically blame you for that audit
9 failure?

10 A. Well, if you read paragraph 2, yes.

11 Q. Okay, and the very last page of Exhibit 53, South
12 Sanpete School District at the top, April 17th, 1995 is the
13 date, a letter from Sherry Neeley to you.

14 A. Yes.

15 Q. Do you remember that document?

16 A. Oh, yes.

17 Q. Is that a letter you received?

18 A. April 17th, 1995?

19 Q. You did receive it?

20 A. Yes, along with a check.

21 Q. And basically what does it tell you? I don't want to
22 -- his Honor can read it, but --

23 A. Basically it tells me I'm terminated.

24 Q. Okay. Does it give you figures as to what you're
25 still owed on your contract?

1 that wasn't a normal part of my schedule, you would have had to
2 beat me over the head with a baseball bat to get me to do it.

3 Q. Okay. Now, you're talking about she (inaudible)
4 things?

5 A. She was wanting to get --

6 Q. What did she ask you to do?

7 A. I believe it was starting in 19 -- in the spring
8 of '95, but it could have been the fall of '96, she asked
9 for documentation referring to my Master's Degree, which
10 unfortunately instead of giving her an honest answer and
11 saying, "I don't have a Master's Degree," I panicked. Assumed
12 this was something that Lewis was using to try to find an
13 excuse to fire me, and I avoided telling her about it.

14 Q. Okay.

15 A. So I simply didn't tell her.

16 Q. Did you tell her that you had a Master's Degree?

17 A. No, I never told her that I had a Master's Degree.

18 Q. Okay. Do you remember the specific things that she
19 asked you to do?

20 A. She or the principal, one, asked me to send for a
21 transcript at the University of New Mexico, which is where I
22 did my Master's Degree work.

23 Q. Okay. Did you do that?

24 A. Yes.

25 Q. Did you receive those transcripts?

1 A. Yes, and I do have documentation on that.

2 Q. Did you give them to the school district?

3 A. That I do not remember. I think they already had it,
4 but I don't remember.

5 Q. Okay. What else did she ask you to do, if anything?

6 A. As far as I can recall, that was it.

7 Q. Okay. Why didn't you tell her about your not having a
8 Master's Degree?

9 A. Basically just what I said; I jumped to the conclusion
10 that this was something that Lewis was going to use to -- as a
11 reason to terminate me. I thought there was a justification
12 for my being placed on the Master's lane in my personnel file.

13 So the first time when I realized what she was trying
14 to get from me, I directed her to go to the file. I told her,
15 "Well, all my documentation is everything is in my file,"
16 thinking that whatever explanation had been made was written in
17 my personnel file.

18 Q. Okay. You hadn't seen your personnel file at that
19 point, right?

20 A. To this day I still haven't.

21 Q. Okay. You -- so you thought that everything was on
22 the up and up; is that --

23 A. I still think it was on the up and up.

24 Q. Okay. In other words -- all right. You, in directing
25 her to your file, you felt that she would look and see all this

1 information about how you were hired, and then everything would
2 be --

3 A. I thought, because of the way that Ron Everett did
4 things, there would be a documentation, a letter, stating that
5 they had placed me on the advanced lane for this reason.

6 Q. Okay. Now, back to your June -- or to your 1997, '98
7 contract, okay, you were given a proposed contract; is that
8 right?

9 A. Well, that was a contract. It wasn't a proposed
10 contract; it was a contract.

11 Q. For you to sign?

12 A. Yes.

13 Q. And you say it had errors on it?

14 A. Yeah.

15 Q. What errors were those?

16 A. I think it had both the wrong lane and the wrong step
17 -- or maybe it was just the wrong step. I don't have it here.
18 You have it, though.

19 Q. I've got a copy here.

20 A. I know the thing that caught my attention is the only
21 thing I ever noticed on my contract is the pay amount. Oh,
22 excuse me. Ever since the secretary pointed out that they had
23 made an error on my sick leave totals, I also was in the habit
24 of looking at that, but those are the two facts that -- the
25 contracts never change. You never notice anything else.

1 A. Yes.

2 Q. So you go to the superintendent. Is Mr. Gottfredson
3 still there?

4 A. Yes, he still works for the district.

5 Q. Okay. So you're speaking with the three of you?

6 THE COURT: He said he still works for the district,
7 but that wasn't your question.

8 Q. BY MR. ALLEN: Okay, so now there's three of you
9 speaking, right; Mr. Gottfredson, Mr. Mullins -- Mr. Lewis
10 Mullins and yourself?

11 A. Yes, but I -- at some point in the conversation Paul
12 leaves.

13 Q. What did you say to the superintendent, Mr. Lewis
14 Mullins?

15 A. Verbatim I cannot tell you. The conversation basically
16 was I told him that I didn't have a Master's. That I was sorry
17 that I had avoided this because of the conflict that we had
18 had.

19 We had a discussion about how I'd gotten placed on
20 that lane, and I told him I thought it was because of the two
21 factors. One, I had all these hours beyond the B.A. when I was
22 hired; and two they wanted me sufficiently that they wanted to
23 make sure they were going to pay me more than what CUES might
24 be asking -- offering.

25 Q. Okay.

1 A. But I told him that was speculation on my part,
2 because I didn't, you know, remember the details. I didn't
3 know what they were thinking anyhow.

4 At the end of this conversation he said to me, "I
5 will present this matter to the board. They may want to put
6 you down on lane 3 instead of lane 4 that you're on now." I
7 said, "That's acceptable to me." That was the end of that
8 conversation. That was in June of '97. The contract that you
9 see here was submitted by me a month later.

10 THE COURT: Wait a minute. There's no question. You
11 got to the end of the conversation. Let's wait for the next
12 question.

13 Q. BY MR. ALLEN: Okay. So Mr. Mullins indicated in
14 response to your explaining the situation about the Master's
15 Degree that the board may want to put you onto lane 3 instead
16 of lane 4?

17 A. Yes.

18 Q. Now, the contract you had with you at that time had
19 lane 2.

20 A. Yes.

21 Q. Okay, but you weren't -- you're not privy to why that
22 was; that's not something you did?

23 A. Somewhere in the conversations after I was fired,
24 Lewis claimed that they'd made these errors in order to get me
25 to come in.

1 Q. Okay, but you don't have any personal knowledge as to
2 why that was done on lane 2?

3 A. No.

4 Q. Okay. So who made -- who made the actual -- who
5 actually changed the contract to have lane 3 on it?

6 A. I did.

7 Q. Okay, and did you sign it?

8 A. Yes.

9 Q. And you turned it in to the school district?

10 A. Yes.

11 Q. And at some point did you receive notice that there
12 was a change in your employment status?

13 A. Yes, in August of '97 I received a -- I think it was a
14 notarized letter. It was a registered mail, anyhow. It was
15 the two days before reporting day that notified me that I was
16 suspended without pay.

17 Q. Okay. So this was in what date?

18 A. This was August -- somewhere around August.

19 Q. And you had spoken with Mr. Mullins back when?

20 A. In June and then again in July of that summer.

21 Q. Okay. Now, you say "again." When did you speak to
22 him again?

23 A. Someplace in there there was a letter. I was
24 concerned because --

25 THE COURT: He's asking for a date.

1 charge is that he was deceptive, and I think his state of mind
2 goes to that issue.

3 THE COURT: So you're not asking him to repeat what
4 other people said. You're asking him to give a diagnosis of
5 his mental condition at the time?

6 MR. ALLEN: Yeah, or his motivation and his intent.

7 THE COURT: Mr. Steur, do you want to say something
8 else?

9 MR. STEUR: Yes, your Honor. This is not a criminal
10 case, and his motive is not at issue.

11 THE COURT: It certainly is a fair topic for argument,
12 but I don't think it's a fair question for the witness. So the
13 objection is sustained. The witness is directed not to answer.
14 Next question.

15 Q. BY MR. ALLEN: When you were hired were you told
16 anything about whether or not you should discuss your degree
17 status with other people?

18 MR. STEUR: I'm going to object, lacks foundation. To
19 a large extent there's been already testimony as to when he was
20 hired, by which it was asked and answered.

21 THE COURT: You're going back to a conversation he had
22 when he was hired?

23 MR. ALLEN: Yeah. I'll lay a little foundation.

24 THE COURT: Okay.

25 Q. BY MR. ALLEN: You spoke with Ken Graham?

1 A. Referring to the time when I was hired?

2 Q. Yes.

3 A. Yes.

4 Q. Was he one of the interviewers?

5 A. Yes.

6 Q. And this was in 1976; is that right?

7 A. June of 1976.

8 Q. And do you remember being told anything by Ken Graham
9 regarding whether the -- whether you were supposed to mention
10 anything about your degree status to other employees?

11 A. Not in that conversation, but at a later time.

12 Q. Okay. What other time?

13 MR. STEUR: Your Honor, I'm going to object. It's
14 irrelevant.

15 THE COURT: Based on what?

16 MR. STEUR: Relevancy.

17 MR. ALLEN: The relevancy is that they're saying he was
18 deceitful, and some of their evidence of that deceit is that he
19 hid his degree status from other employees. The inquiry here
20 goes to whether there was a reason for that, other than being
21 deceptive.

22 THE COURT: Okay, let's get some foundation for the
23 conversation.

24 MR. ALLEN: Okay.

25 THE COURT: I'm not ruling on the objection yet, but I

1 want to find out when and where and who was present.

2 Q. BY MR. ALLEN: Okay. When was this discussion with Ken
3 Graham?

4 A. I don't remember.

5 Q. Do you remember a year?

6 A. Well, it would have been '76, but --

7 Q. Okay. Was it before you were actually starting on the
8 job?

9 A. No.

10 Q. It was after you'd started on the job?

11 A. I believe it was the first week or so.

12 Q. Okay, the first week, and where did it occur?

13 A. In Mantl Elementary.

14 Q. Okay, and why were you talking? You don't remember?

15 A. It was my principal, and he wanted to talk to me about
16 something.

17 Q. Okay. So he came to you?

18 A. That --

19 Q. I'm sorry?

20 A. No, I do not remember.

21 Q. You don't remember, okay. You had a conversation with
22 him the first week you were employed at the school?

23 A. I believe it was the first week.

24 Q. And he was your principal, and what did he tell you?

25 MR. STEUR: Objection, hearsay, irrelevant.

1 THE COURT: It's a statement by a representative of the
2 party opponent. So --

3 MR. STEUR: It's not an admission of a party opponent,
4 your Honor. It's not an exception to the hearsay rule, at
5 least in my understanding. Ken Graham was the principal at
6 the school. There's been no testimony that he was involved
7 in the contract negotiations. There's been no testimony that
8 he was a person who signed the contract, had the power to sign
9 the contract.

10 THE COURT: I think I got evidence that he conducted an
11 interview before employment. So that leads me to conclude that
12 he was involved in the decision to hire.

13 MR. STEUR: But not that it's not the terms -- the
14 financial terms.

15 THE COURT: Probably true, but in any event, the
16 objection is overruled. Go ahead and answer.

17 Q. BY MR. ALLEN: What did he say to you?

18 A. To my best recollection -- I'm not going to claim
19 that I know the exact words -- the impression was that he was
20 asking me not to discuss my degree status, because concern
21 that particular individuals, staff members, would regard this
22 as some kind of un -- prejudicial treatment which they would
23 resent; and there would be problems because of that.

24 Q. Okay. Did you -- did you deceive the school district
25 about your -- this is my concluding question. Did you deceive

1 the school district about your degree status?

2 A. No.

3 MR. ALLEN: No further questions.

4 THE COURT: Mr. Steur, over to you.

5 MR. STEUR: Okay, your Honor. At this time I'd like to
6 move for a directed verdict.

7 THE COURT: Mr. --

8 MR. STEUR: I know normally this waits until after the
9 plaintiff has closed its case, but the plaintiff has admitted
10 there was a contract. He's admitted that he didn't have a
11 Master's Degree. He admitted he was on the wrong lane. He
12 admitted he didn't tell the individuals when they initially
13 asked him for his degree status about his degree status.

14 He's admitted all the elements that are necessary for
15 this case. He's admitted that he didn't have that status and
16 he admitted that he signed the contract that said he had that
17 status. That's it.

18 THE COURT: Mr. Ashby, we're going to have some
19 argument. It's going to take some time. You might as well
20 return to your seat, and you can be a spectator and listen to
21 the proceedings.

22 THE WITNESS: Thank you.

23 THE COURT: I'd like to ask the clerk about the
24 exhibits that have been received. Do you have them?

25 MR. ALLEN: They're right here.

1 contract." Second cause of action is entitled, "Attorney's
2 fees." The first cause of action includes an allegation that
3 he was terminated because he misrepresented having a Master's
4 Degree. That's a part of his breach of contract cause of
5 action.

6 Based on the evidence that's been presented to me, it
7 appears to me that that's true; that he was terminated because
8 he misrepresented that he had a Master's Degree, and that fits
9 reason No. 4 in the August 28th, 1997 notice. That means that
10 there's no way that Mr. Ashby can ever make out his cause of
11 action for cause No. 1.

12 His second cause of action for attorney's fees is in
13 the nature of a derivative cause of action, and he's claiming
14 attorney's fees in the event that he prevails and can prove
15 that the defendant acted in bad faith. So because of my ruling
16 on his first cause of action, he's never going to be able to
17 prevail on his second cause of action.

18 That's the total complaint that he's filed in this
19 case. So it appears to me that the motion for a directed
20 verdict ought to be granted and this case ought to be dismissed
21 because there's no set of facts that can be presented where
22 Mr. Ashby can overcome the evidence that's been presented so
23 far.

24 Mr. Steur, I'm appointing you to draft an appropriate
25 order. We're coming close to the end of these proceedings and

1 I want to ask about the facts that I have found, if anybody's
2 got any disagreement about these facts, about dates and events,
3 if I've missed anything in terms of the sequence of events that
4 leads up to this conclusion that I've made.

5 It's in your favor, Mr. Steur. So I'll ask you first.
6 Have I missed anything or have I got any facts wrong or have I
7 missed any dates or events?

8 MR. STEUR: I think that your recollection is accurate.
9 My feeling is when you were looking at everything, the only
10 testimony that I recall that was different was that when
11 plaintiff was hired in 1976, he was placed on lane 3, and
12 that was also -- that was at the time the correct lane for
13 him, because it was not only just for Master's Degree people.
14 It was for people with a Bachelor's Degree plus 55. So he was
15 correctly placed when his initial employment began.

16 THE COURT: I think that that's right. I agree with
17 that. He was on a lane that would give him recognition for
18 post graduate work, even without a Master's Degree, but that
19 changed when the payment grid changed.

20 Mr. Allen, any events that I've missed or facts that
21 I've missed or things that I should have stated that I haven't?

22 MR. ALLEN: Well, your Honor, I -- in response to that,
23 I want to just say that I don't think that I can sit here right
24 now -- it's hard for me to respond to that.

25 THE COURT: Right.

1 MR. ALLEN: I incorporate all the testimony and all
2 the exhibits that have been submitted, and state that there
3 is probably some discrepancies in what was ruled upon.

4 THE COURT: Okay.

5 MR. ALLEN: Furthermore, I just want to reiterate we
6 do have other witnesses, and my understanding of your Honor's
7 ruling is that you're not interested in a proffer of what they
8 would say because his admissions can't be overcome, no matter
9 what?

10 THE COURT: That's the way it looks to me.

11 MR. ALLEN: Okay.

12 THE COURT: Do you think you can convince me to the
13 contrary, even with a proffer?

14 MR. ALLEN: Well, I mean, yes, I do, but I -- I just
15 wanted to clarify your ruling. That basically you're saying it
16 can't be -- it can't be overcome no matter what, because he's
17 admitting to the grounds that they terminated him on.

18 THE COURT: Yeah.

19 MR. ALLEN: And so I'm not going to give a proffer. I
20 can, but it sounds to me like it's not going to overcome your
21 Honor's ruling.

22 THE COURT: Well, this is what I'm afraid of. That any
23 other witnesses would come in and say, "I was here. My name is
24 such and such. I talked to or I had a conversation. Nothing
25 was misrepresented to me."

1 MR. ALLEN: Well, there was -- there will be testimony
2 -- let me just take five minutes --

3 THE COURT: Sure.

4 MR. ALLEN: -- to put this on the record. Give me a
5 moment to gather my thoughts here. We believe that there would
6 be testimony from Dr. Mullins that he terminated him because he
7 was upset with him and dissatisfied with his services stemming
8 from this Chapter 1 incident and from the sickness problem.

9 Furthermore, that he made an agreement with Harlan to
10 resolve the issues; that that would be involved moving him down
11 a step. We believe -- now, this is all best case scenario for
12 me, your Honor. I don't know what the testimony would be.

13 THE COURT: Don't know until it comes out of the
14 person's mouth.

15 MR. ALLEN: I don't, but what I have to do is proffer
16 what I hope it would say.

17 THE COURT: Right.

18 MR. ALLEN: And Dr. Mullins would testify that they had
19 an agreement as to resolving this issue when it was discussed
20 with Mr. Ashby that would involve him bumping down a level; but
21 that he abandoned that agreement and fired him instead.

22 Furthermore, that other people have been found to
23 be on the wrong track and they haven't fired them; and that
24 there are -- sometimes people are put on the track that doesn't
25 jive exactly with their record. That's okay. Sometimes that

1 happens. Sometimes it causes problems. It can be corrected
2 without firing.

3 We would have Wanda Hatton testify that she was in
4 fact in charge of Chapter 1 during that audit year. We would
5 have Marilyn Miller testify that she knew of Harlan's teaching
6 job the year of the audit, and that -- just corroborate his
7 testimony regarding what happened with that.

8 Barbara Eliason would testify that he did great in his
9 third grade teaching a year after the dispute, and that there
10 was surprise in the district about that. In other words, they
11 would -- she'll be used to show that they were hoping he would
12 fail. They were looking for a way to get rid of him.

13 Rodney Anderson would testify that -- he would
14 corroborate everything with respect to the Chapter 1 incident.
15 He was the principal during that -- about his and Dr. Mullins'
16 discussion that, "Yeah, put him on probation. We'll find a way
17 to terminate him." Dr. Mullins also would admit that.

18 Janice Peterson would testify -- corroborate the
19 Chapter 1 evidence. Jim Peterson would corroborate the Chapter
20 1 evidence. Ken Graham would -- who was tes -- the principal
21 at -- back when he was hired, would corroborate the testimony
22 regarding how he was hired and how he was truthful, and how it
23 was known he didn't have a Bachelor's, and how he was told not
24 to tell others that he was put on a higher track.

25 Kirk Anderson would testify that he was the principal

1 at the time of the Chapter 1 audit, and that he was there when
2 he was asked -- when the school officials asked him to mislead
3 the auditors, and when Mr. Lewis attacked -- emotionally
4 attacked Harlan and -- for the failure, and indicated that he
5 needed to be put on probation. They needed to find a way to
6 terminate him.

7 Secretary Neeley would testify that -- and Janine
8 Henningson and all of the witnesses which the secretary --
9 which the school district says would corroborate the allegation
10 that he misled them would testify and admit that he never said
11 he had a Master's Degree. That he directed them to the file,
12 and that he may have been equivocal about it, but he never
13 directly represented that he directed them to the file.

14 Mr. Willardson -- this is Tom Willardson would testify
15 that it was a practice of small school districts to offer
16 people to be on a higher track to get them to come to small
17 districts, and that he doesn't -- and he was the guy who was
18 involved in the hiring, but he didn't -- he wasn't deceived
19 by Lewis, and he was told that he didn't -- that he was told
20 correctly about his credentials. Thank you.

21 THE COURT: Thank you. The two copies that you've
22 just discussed are the Title 1 audit and equal protection.
23 The Title 1 audit may have been a reason for the firing. If
24 it was, it probably wasn't a good reason; but I found that they
25 had a good reason. So I don't think I'd be convinced by the

1 witnesses about the Title 1 audit.

2 Two of the witnesses you mentioned go to the claim of
3 equal protection. That some people are treated different. So
4 why single out Mr. Ashby? That's not a cause of action in the
5 complaint, and if you haven't pled it, then there's no notice
6 or opportunity to be heard. So if it's not pled, you can't
7 claim anything for it.

8 So my ruling stands. Motion is granted. Case is
9 dismissed. All the exhibits will remain here. Mr. Steur,
10 you've still got the assignment to prepare an appropriate
11 order. Follow the correct procedure in submitting it so that
12 Mr. Allen has a chance to see it.

13 I suspect you could probably get him to approve it as
14 to form. I don't think you could get him to approve that he
15 agrees with it, but if you want to try and get his signature
16 on it, I think he'd be cooperative. If that won't work, then
17 at least when it comes to me I want to find some certificate
18 that he's had a chance to see it before it's submitted to me
19 for execution.

20 Okay, I think we're done. Thank you all.

21 MR. STEUR: Thank you, your Honor.

22 THE COURT: Court's in recess.

23 MR. ALLEN: Thank you, your Honor.

24 (Trial concluded)