

Section 2. Section [34A-2-410.5](#) is enacted to read:

77 **34A-2-410.5. Employee cooperation with reemployment.**

78 (1) As used in this section:

79 (a) "Controlled substance" is as defined in Section [58-37-2](#).

80 (b) "Correctional facility" means:

81 (i) a correctional facility as defined in Section [76-8-311.3](#); or

82 (ii) a facility operated by or contracting with the federal government to house a
criminal

83 offender in either a secure or nonsecure setting.

84 (c) "Disability claim" means a claim for compensation for:

85 (i) a temporary total disability benefit; or

86 (ii) a temporary partial disability benefit.

87 (d) "Local governmental entity" is as defined in Section [34-41-101](#).

88 (e) "Reemployment" means employment that:

89 (i) is after an accident or occupational disease that is the basis for a disability
claim; and

90 (ii) in a manner consistent with Subsection (2)(b), offers to an employee an
opportunity

91 for earnings, considering the employee's:

92 (A) education;

93 (B) experience; and

94 (C) physical and mental impairment or condition.

95 (f) "State institution of higher education" means an institution listed in Section
[53B-3-102](#).

97 (g) "Valid prescription" is a prescription, as defined in Section [58-37-2](#), that is:

98 (i) prescribed for a controlled substance for use by the employee for whom it is
prescribed; and

100 (ii) not altered or forged.

101 (2) In accordance with this section, the commission may reduce or terminate an
employee's disability compensation for a disability claim for good cause shown by
the employer

103 including if:

104 (a) the employer terminates the employee from the reemployment and the
termination

105 is:

106 (i) reasonable;

107 (ii) for cause; and

108 (iii) as a result, in whole or in part, of:

109 (A) criminal conduct;

110 (B) violent conduct; or

111 (C) a violation of a reasonable, written workplace health, safety, licensure, or
nondiscrimination rule that is applied in a manner that is reasonable and
nondiscriminatory;

113 (b) the employee is incarcerated in a correctional facility for a period of time
that would

114 result in the termination of the employee's reemployment in accordance with a
reasonable,
115 written workplace rule that is applied in a manner that is reasonable and
nondiscriminatory; or
116 (c) subject to Subsection (6), the employee is terminated from the
reemployment:
117 (i) (A) for use of a controlled substance that the employee did not obtain under
a valid
118 prescription;
119 (B) for intentional abuse of a controlled substance that the employee obtained
under a
120 valid prescription, if the employee uses the controlled substance intentionally:
121 (I) in excess of a prescribed therapeutic amount; or
122 (II) in an otherwise abusive manner; or
123 (C) for the use of alcohol that results in intoxication from alcohol with a blood
or breath
124 alcohol concentration of .08 grams or greater; and
125 (ii) in accordance with a reasonable, written workplace rule that is applied in a
manner
126 that is reasonable and nondiscriminatory.
127 (3) Notwithstanding the other provisions of this section, the employee
described in
128 Subsection (2) is eligible for medical benefits to the extent otherwise allowed under
this title.
129 (4) (a) An employer or the employer's insurance carrier may file an application
for a
130 hearing with the Division of Adjudication to request that an employee's disability
compensation
131 for a disability claim be reduced or terminated under this section.
132 (b) An action under this Subsection (4) is barred if an application for a hearing
is not
133 filed within one year from the day on which the employer terminates the employee
from
134 reemployment as described in Subsection (2).
135 (c) An employer or the employer's insurance carrier shall notify the employee
that the
136 employer or employer's insurance carrier has filed a request for a hearing under this
section
137 within three business days of the day on which the filing is made.
138 (5) (a) The commission may reduce or terminate the disability compensation of
an
139 employee for a disability claim if after a hearing requested under Subsection (4),
the commission
140 determines that the conditions of Subsection (2) are met.
141 (b) The commission shall issue an order as to whether or not an employee's
disability

142 compensation is reduced or terminated under this section by no later than 45 days
143 from the day
144 on which an application for a hearing is filed.
145 (c) A reduction or termination of disability compensation under this Subsection
146 (5)
147 takes effect on the day determined by the commission.
148 (d) If the disability compensation is ordered **terminated** or reduced, the
149 employer or
150 employer's insurance carrier shall treat a resulting overpayment as an offset against
151 the
152 employer's or employer's insurance carrier's future obligations to pay disability
153 compensation to
154 the employee.
155 (6) (a) For purposes of Subsection (2)(c), the commission may consider a
156 chemical test
157 that conforms to scientifically accepted analytical methods and procedures and
158 includes
159 verification or confirmation of any positive test result by gas chromatography, gas
160 chromatography-mass spectroscopy, or other comparably reliable analytical
161 method showing
162 that the employee has:
163 (i) in the employee's system during employment:
164 (A) any amount of a controlled substance or its metabolites if the employee did
165 not
166 obtain the controlled substance under a valid prescription; or
167 (B) a controlled substance the employee obtained under a valid prescription or
168 the
169 metabolites of the controlled substance if the amount in the employee's system is
170 consistent with
171 the employee using the controlled substance intentionally:
172 (I) in excess of prescribed therapeutic amounts; or
173 (II) in an otherwise abusive manner; or
174 (ii) a blood or breath alcohol concentration of .08 grams or greater during
175 employment.
176 (b) A local governmental entity or state institution of higher education shall
177 comply
178 with Title 34, Chapter 41, Local Governmental Entity Drug-Free Workplace
179 Policies, in
180 engaging in a test for a controlled substance that is the basis of a presumption
181 under this
182 section.
183 (7) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking
184 Act, the
185 commission may make rules:

170 (a) describing factors to be considered under Subsection (2); and
171 (b) related to the procedures for a request for a hearing under this section.
172 (8) The adjudication of a dispute arising under this section is governed by Part
173 8.
173 Adjudication.
174 (9) An issue related to an employee's cooperation with regard to a claim for
175 compensation for permanent total disability benefits is governed by Section [34A-2-](#)
[413.](#)

176 Section 3. Section [34A-2-413](#) is amended to read:

177 **34A-2-413. Permanent total disability -- Amount of payments --
178 Rehabilitation.**

178 (1) (a) In [~~eases~~] the case of a permanent total disability resulting from an
179 industrial

179 accident or occupational disease, the employee shall receive compensation as
180 outlined in this

180 section.

181 (b) To establish entitlement to permanent total disability compensation, the
182 employee

182 must prove by a preponderance of evidence that:

183 (i) the employee sustained a significant impairment or combination of
184 impairments as a

184 result of the industrial accident or occupational disease that gives rise to the
185 permanent total

185 disability entitlement;

186 (ii) the employee is permanently totally disabled; and

187 (iii) the industrial accident or occupational disease [~~was~~] is the direct cause of
188 the

188 employee's permanent total disability.

189 (c) To establish that an employee is permanently totally disabled the employee
190 must

190 prove by a preponderance of the evidence that:

191 (i) the employee is not gainfully employed;

192 (ii) the employee has an impairment or combination of impairments that limit
193 the

193 employee's ability to do basic work activities;

194 (iii) the industrial or occupationally caused impairment or combination of
195 impairments

195 prevent the employee from performing the essential functions of the work activities
196 for which

196 the employee has been qualified until the time of the industrial accident or
197 occupational disease

197 that is the basis for the employee's permanent total disability claim; and

198 (iv) the employee cannot perform other work reasonably available, taking into
199 consideration the employee's:

200 (A) age;

201 (B) education;

202 (C) past work experience;

203 (D) medical capacity; and

204 (E) residual functional capacity.

205 (d) Evidence of an employee's entitlement to disability benefits other than those
206 provided under this chapter and Chapter 3, Utah Occupational Disease Act, if
207 relevant:

207 (i) may be presented to the commission;

208 (ii) is not binding; and
209 (iii) creates no presumption of an entitlement under this chapter and Chapter 3,
Utah
210 Occupational Disease Act.
211 (e) In determining under Subsections (1)(b) and (c) whether an employee
cannot
212 perform other work reasonably available, the following may not be considered:
213 (i) whether the employee is incarcerated in a facility operated by or contracting
with a
214 federal, state, county, or municipal government to house a criminal offender in
either a secure or
215 nonsecure setting; or
216 (ii) whether the employee is not legally eligible to be employed because of a
reason
217 unrelated to the impairment or combination of impairments.
218 (2) For permanent total disability compensation during the initial 312-week
entitlement,
219 compensation [~~shall be~~] is 66-2/3% of the employee's average weekly wage at the
time of the
220 injury, limited as follows:
221 (a) compensation per week may not be more than 85% of the state average
weekly
222 wage at the time of the injury;
223 (b) (i) subject to Subsection (2)(b)(ii), compensation per week may not be less
than the
224 sum of \$45 per week[~~, plus~~] and:
225 (A) \$5 for a dependent spouse[~~, plus~~]; and

226 (B) \$5 for each dependent child under the age of 18 years, up to a maximum of
four
227 dependent minor children[~~, but not exceeding~~]; and
228 (ii) the amount calculated under Subsection (2)(b)(i) may not exceed:
229 (A) the maximum established in Subsection (2)(a) [~~not exceeding~~]; or
230 (B) the average weekly wage of the employee at the time of the injury; and
231 (c) after the initial 312 weeks, the minimum weekly compensation rate under
232 Subsection (2)(b) [~~shall be~~] is 36% of the current state average weekly wage,
rounded to the
233 nearest dollar.
234 (3) This Subsection (3) applies to claims resulting from an accident or disease
arising
235 out of and in the course of the employee's employment on or before June 30, 1994.
236 (a) The employer or its insurance carrier is liable for the initial 312 weeks of
permanent
237 total disability compensation except as outlined in Section [34A-2-703](#) as in effect
on the date of
238 injury.

239 (b) The employer or its insurance carrier may not be required to pay
240 compensation for
241 any combination of disabilities of any kind, as provided in this section and Sections
242 [34A-2-410](#)
243 through [34A-2-412](#) and Part 5, Industrial Noise, in excess of the amount of
244 compensation
245 payable over the initial 312 weeks at the applicable permanent total disability
246 compensation rate
247 under Subsection (2).

244 (c) ~~[Any]~~ The Employers' Reinsurance Fund shall for an overpayment of [this]
245 compensation [shall be reimbursed] described in Subsection (3)(b), reimburse the
246 overpayment:

246 (i) to the employer or its insurance carrier ~~[by the Employers' Reinsurance~~
247 ~~Fund];~~ and

247 ~~[shall be paid]~~

248 (ii) out of the Employers' Reinsurance Fund's liability to the employee.

249 (d) After an employee ~~[has received]~~ receives compensation from the
250 employee's

250 employer, its insurance carrier, or the Employers' Reinsurance Fund for any
251 combination of

251 disabilities amounting to 312 weeks of compensation at the applicable permanent
252 total disability

252 compensation rate, the Employers' Reinsurance Fund shall pay all remaining
253 permanent total

253 disability compensation.

254 (e) Employers' Reinsurance Fund payments shall commence immediately after
255 the

255 employer or its insurance carrier ~~[has satisfied]~~ satisfies its liability under this
256 Subsection (3) or

256 Section [34A-2-703](#).

257 (4) This Subsection (4) applies to claims resulting from an accident or disease
258 arising

258 out of and in the course of the employee's employment on or after July 1, 1994.

259 (a) The employer or its insurance carrier is liable for permanent total disability
260 compensation.

261 (b) The employer or its insurance carrier may not be required to pay
262 compensation for

262 any combination of disabilities of any kind, as provided in this section and Sections
263 [34A-2-410](#)

263 through [34A-2-412](#) and Part 5, Industrial Noise, in excess of the amount of
264 compensation

264 payable over the initial 312 weeks at the applicable permanent total disability
265 compensation rate

265 under Subsection (2).

266 (c) ~~[Any overpayment of this compensation shall be recouped by the]~~ The

employer or

267 its insurance carrier may recoup the overpayment of compensation described in
268 Subsection (4)

269 by reasonably offsetting the overpayment against future liability paid before or
after the initial

269 312 weeks.

270 (5) Notwithstanding the minimum rate established in Subsection (2), [~~the~~
271 ~~compensation~~

271 ~~payable by the~~ an employer, its insurance carrier, or the Employers' Reinsurance
Fund, after an

272 employee [~~has received~~] receives compensation from the employer or the
employer's insurance

273 carrier for any combination of disabilities amounting to 312 weeks of
compensation at the

274 applicable total disability compensation rate, shall [~~be reduced,~~] reduce the
275 compensation

275 payable:

276 (a) to the extent allowable by law[~~;~~]; and

277 (b) by the dollar amount of 50% of the Social Security retirement benefits
received by

278 the employee during the same period.

279 (6) (a) A finding by the commission of permanent total disability is not final,
unless

280 otherwise agreed to by the parties, until:

281 (i) an administrative law judge reviews a summary of reemployment activities

282 undertaken pursuant to Chapter 8, Utah Injured Worker Reemployment Act;

283 (ii) the employer or its insurance carrier submits to the administrative law
judge:

284 (A) a reemployment plan as prepared by a qualified rehabilitation provider
reasonably

285 designed to return the employee to gainful employment; or

286 (B) notice that the employer or its insurance carrier will not submit a plan; and

287 (iii) the administrative law judge, after notice to the parties, holds a hearing,
unless

288 otherwise stipulated, to:

289 (A) consider evidence regarding rehabilitation; and

290 (B) review any reemployment plan submitted by the employer or its insurance
carrier

291 under Subsection (6)(a)(ii).

292 (b) Before commencing the procedure required by Subsection (6)(a), the
administrative

293 law judge shall order:

294 (i) the initiation of permanent total disability compensation payments to
provide for the

295 employee's subsistence; and

296 (ii) the payment of any undisputed disability or medical benefits due the
employee.

297 (c) Notwithstanding Subsection (6)(a), an order for payment of benefits
described in

298 Subsection (6)(b) is considered a final order for purposes of Section [34A-2-212](#).

299 (d) The employer or its insurance carrier shall be given credit for any disability
300 payments made under Subsection (6)(b) against its ultimate disability
compensation liability

301 under this chapter or Chapter 3, Utah Occupational Disease Act.

302 (e) An employer or its insurance carrier may not be ordered to submit a
reemployment

303 plan. If the employer or its insurance carrier voluntarily submits a plan, the plan is
subject to

304 Subsections (6)(e)(i) through (iii).

305 (i) The plan may include, but not require an employee to pay for:

306 (A) retraining[;];

307 (B) education[;];

308 (C) medical and disability compensation benefits[;];

309 (D) job placement services[;]; or

310 (E) incentives calculated to facilitate reemployment [~~funded by the employer or~~
its

311 ~~insurance carrier~~].

312 (ii) The plan shall include payment of reasonable disability compensation to
provide for

313 the employee's subsistence during the rehabilitation process.

314 (iii) The employer or its insurance carrier shall diligently pursue the
reemployment plan.

315 The employer's or insurance carrier's failure to diligently pursue the reemployment
plan ~~shall~~

316 ~~be~~ is cause for the administrative law judge on the administrative law judge's own
motion to

317 make a final decision of permanent total disability.

318 (f) If a preponderance of the evidence shows that successful rehabilitation is not
319 possible, the administrative law judge shall order that the employee be paid weekly
permanent

320 total disability compensation benefits.

321 (g) If a preponderance of the evidence shows that pursuant to a reemployment
plan, as

322 prepared by a qualified rehabilitation provider and presented under Subsection
(6)(e), an

323 employee could immediately or without unreasonable delay return to work but for
the

324 following, an administrative law judge shall order that the employee be denied the
payment of

325 weekly permanent total disability compensation benefits:

326 (i) incarceration in a facility operated by or contracting with a federal, state,
327 county, or

327 municipal government to house a criminal offender in either a secure or nonsecure
328 setting; or

328 (ii) not being legally eligible to be employed because of a reason unrelated to
329 the

329 impairment or combination of impairments.

330 (7) (a) The period of benefits commences on the date the employee became
331 permanently totally disabled, as determined by a final order of the commission
based on the

332 facts and evidence, and ends:

333 (i) with the death of the employee; or

334 (ii) when the employee is capable of returning to regular, steady work.

335 (b) An employer or its insurance carrier may provide or locate for a
permanently totally

336 disabled employee reasonable, medically appropriate, part-time work in a job
earning at least

337 minimum wage [~~provided that employment~~], except that the employee may not be
required to

338 accept the work to the extent that it would disqualify the employee from Social
Security

339 disability benefits.

340 (c) An employee shall:

341 (i) fully cooperate in the placement and employment process; and

342 (ii) accept the reasonable, medically appropriate, part-time work.

343 (d) In a consecutive four-week period when an employee's gross income from
the work

344 provided under Subsection (7)(b) exceeds \$500, the employer or insurance carrier
may reduce

345 the employee's permanent total disability compensation by 50% of the employee's
income in

346 excess of \$500.

347 (e) If a work opportunity is not provided by the employer or its insurance
carrier, a

348 permanently totally disabled employee may obtain medically appropriate, part-time
work subject

349 to the offset provisions [~~contained in~~] of Subsection (7)(d).

350 (f) (i) The commission shall establish rules regarding the part-time work and
offset.

351 (ii) The adjudication of disputes arising under this Subsection (7) is governed
by Part 8,

352 Adjudication.

353 (g) The employer or its insurance carrier [~~shall have~~] has the burden of proof to
show

354 that medically appropriate part-time work is available.

355 (h) The administrative law judge may:
356 (i) excuse an employee from participation in any ~~[job]~~ work:
357 (A) that would require the employee to undertake work exceeding the
employee's:
358 (I) medical capacity ~~[and]; or~~
359 (II) residual functional capacity; or
360 (B) for good cause; or
361 (ii) allow the employer or its insurance carrier to reduce permanent total
disability
362 benefits as provided in Subsection (7)(d) when reasonable, medically appropriate,
part-time
363 ~~[employment has been]~~ work is offered, but the employee ~~[has failed]~~ fails to fully
cooperate.
364 (8) When an employee ~~[has been]~~ is rehabilitated or the employee's
rehabilitation is
365 possible but the employee has some loss of bodily function, the award shall be for permanent
366 partial disability.
367 (9) As determined by an administrative law judge, an employee is not entitled
to
368 disability compensation, unless the employee fully cooperates with any evaluation
or
369 reemployment plan under this chapter or Chapter 3, Utah Occupational Disease
Act. The
370 administrative law judge shall dismiss without prejudice the claim for benefits of
an employee if
371 the administrative law judge finds that the employee fails to fully cooperate, unless
the
372 administrative law judge states specific findings on the record justifying dismissal
with prejudice.
373 (10) (a) The loss or permanent and complete loss of the use of the following
constitutes
374 total and permanent disability that is compensated according to this section:
375 (i) both hands~~[;]~~;
376 (ii) both arms~~[;]~~;
377 (iii) both feet~~[;]~~;
378 (iv) both legs~~[;]~~;
379 (v) both eyes~~[;]~~; or
380 (vi) any combination of two ~~[such]~~ body members ~~[constitutes total and~~
~~permanent~~
381 ~~disability, to be compensated according to this section]~~ described in this Subsection
(10)(a).
382 (b) A finding of permanent total disability pursuant to Subsection (10)(a) is
final.
383 (11) (a) An insurer or self-insured employer may periodically reexamine a

permanent

384 total disability claim, except those based on Subsection (10), for which the insurer
or

385 self-insured employer had or has payment responsibility to determine whether the
[worker]

386 employee remains permanently totally disabled.

387 (b) Reexamination may be conducted no more than once every three years after
an

388 award is final, unless good cause is shown by the employer or its insurance carrier
to allow

389 more frequent reexaminations.

390 (c) The reexamination may include:

391 (i) the review of medical records;

392 (ii) employee submission to one or more reasonable medical evaluations;

393 (iii) employee submission to one or more reasonable rehabilitation evaluations
and

394 retraining efforts;

395 (iv) employee disclosure of Federal Income Tax Returns;

396 (v) employee certification of compliance with Section [34A-2-110](#); and

397 (vi) employee completion of one or more sworn affidavits or questionnaires
approved

398 by the division.

399 (d) The insurer or self-insured employer shall pay for the cost of a
reexamination with

400 appropriate employee reimbursement pursuant to rule for reasonable travel
allowance and per

401 diem as well as reasonable expert witness fees incurred by the employee in
supporting the

402 employee's claim for permanent total disability benefits at the time of
reexamination.

403 (e) If an employee fails to fully cooperate in the reasonable reexamination of a
404 permanent total disability finding, an administrative law judge may order the
suspension of the

405 employee's permanent total disability benefits until the employee cooperates with
the

406 reexamination.

407 (f) (i) [~~Should~~] If the reexamination of a permanent total disability finding
[reveal]

408 reveals evidence that reasonably raises the issue of an employee's continued
entitlement to

409 permanent total disability compensation benefits, an insurer or self-insured
employer may

410 petition the Division of Adjudication for a rehearing on that issue. The [~~petition~~]
insurer or

411 self-insured employer shall [~~be accompanied by~~] include with the petition,

documentation

412 supporting the insurer's or self-insured employer's belief that the employee is no longer

413 permanently totally disabled.

414 (ii) If the petition under Subsection (11)(f)(i) demonstrates good cause, as determined

415 by the Division of Adjudication, an administrative law judge shall adjudicate the issue at a

416 hearing.

417 (iii) Evidence of an employee's participation in medically appropriate, part-time work

418 may not be the sole basis for termination of an employee's permanent total disability entitlement,

419 but the evidence of the employee's participation in medically appropriate, part-time work under

420 Subsection (7) may be considered in the reexamination or hearing with other evidence relating

421 to the employee's status and condition.

422 (g) In accordance with Section [34A-1-309](#), the administrative law judge may award

423 reasonable [~~attorneys~~] attorney fees to an attorney retained by an employee to represent the

424 employee's interests with respect to reexamination of the permanent total disability finding,

425 except if the employee does not prevail, the [~~attorneys~~] attorney fees shall be set at \$1,000. The

426 [~~attorneys~~] attorney fees awarded shall be paid by the employer or its insurance carrier in

427 addition to the permanent total disability compensation benefits due.

428 (h) During the period of reexamination or adjudication if the employee fully cooperates,

429 each insurer, self-insured employer, or the Employers' Reinsurance Fund shall continue to pay

430 the permanent total disability compensation benefits due the employee.

431 (12) If any provision of this section, or the application of any provision to any person or

432 circumstance, is held invalid, the remainder of this section [~~shall be~~] is given effect without the

433 invalid provision or application.

434 Section 4. **Effective date.**

435 This bill takes effect on July 1, 2008.

HB 384 Changes to the Workers' Compensation Act

I. Introduction:

Workers' compensation is a mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, whose premiums are passed on in the cost of the product.

Workers' compensation is fundamentally different from strict tort liability in its basic test of liability, which is work connected rather than fault; in its underlying philosophy of social protection rather than righting a wrong; in the nature of injuries compensated; in the elements of damage; in the defenses available; in the amount of compensation; in the ownership of the award; and the significance of insurance. Arthur Larson & Lex Larson, *Larson=s Workers= Compensation Law* ' 1.01[1] at 1-1.

II. History:

Original Utah Workers' Compensation Act enacted in 1917.

III. General Policies Associated With Workers' Compensation Laws.

Exclusive remedy provisions protect employer from tort liability. *See*: Utah Code § 34A-2-105.

Workers' Compensation Act also limits the amount of recovery available to an injured employee protecting the employer from unlimited damages available in tort actions. *See*: Utah Code §§ 34A-2-410 (temporary total disability compensation), 411 (temporary partial disability compensation), 412 (permanent partial disability compensation), 413 (permanent total disability compensation) and 414 (dependents' benefits in death cases)..

Provisions of Workers' Compensation Act award medical care and limited cash benefits to an employee who is "injured ... by accident arising out of and in the course of the employee's employment...." Utah Code § 34A-2-401 (1). The Workers' Compensation Act generally shields the injured employee's right to compensation from the defenses derived from concepts of fault available in tort law.

[u]nlike tort, the right to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame.

“A correctly balanced underlying concept of the nature of workers’ compensation is indispensable to an understanding of current cases and to a proper drafting and interpretation of compensation acts. **Almost every major error that can be observed in the development of compensation law, whether judicial or legislative, can be traced to either the importation of tort ideas**, or less frequently, to the assumption that the right to compensation resembles the right to proceeds from a personal insurance policy.

Among common-law trained lawyers and judges, it has naturally been the tort-connection fallacy that has been most prevalent.

The most familiar and persistent effect is the difficulty lawyers and judges feel in reconciling themselves to the notion that the employee’s misconduct causing his or her own injury must really be altogether disregarded. Arthur Larson & Lex Larson, *Larson=s Workers= Compensation Law* ' 1.02 at 1-3 to 1-4.

IV. HB 384.

1. HB 384 creates a process whereby an employer or insurance carrier may through an expedited hearing process can terminate or reduce an employee’s right to temporary total disability compensation based on the employee’s misconduct as defined by the statute. (See: Section 34A-2-410.5).
2. HB 384 also denies payment of permanent total disability benefits to persons incarcerated or not legally eligible for reemployment. (See: Section 34A-2-413 (6) (g)).

V. Litigation and Adjudication Issues yet to be Determined with Respect to HB 384 Regarding Termination or Reduction of Temporary Total Disability Compensation.

1. **HB 384 Creates an Expedited Process New to Workers’ Compensation Cases As to Determining Eligibility for Temporary Total Disability Compensation.**

- a. Section 34A-2-410.5 (5)(b) Requires the Administrative Law Judge to hold a hearing and issue a decision within 45 days after an Application for Hearing is filed.
- b. The expedited process restricts the method, extent and availability of discovery otherwise available to parties in an adjudicative proceeding pursuant to Utah Administrative Code R. 602-2-1.F.
- c. The expedited process restricts motion practice otherwise available under Utah Administrative Code R. 602-2-1.J.
- d. The expedited process eliminates the availability of Medical Panels to help resolve medical disputes otherwise available under Utah Code Section 34A-2-601 and Utah Administrative Code R. 602-2-2.
- e. No provision for attorneys' fees for injured employee defending the Application to Terminate or Reduce temporary total disability compensation. Attorneys' fees awarded in workers compensation claims for temporary total disability compensation are limited to a contingent sum based on benefits generated. Utah Administrative Code R. 602-2-4.C. No benefits generated when an injured employee defends an action to terminate or reduce benefits. (possible due process issue with Utah Constitution Article I §11 "[n]o person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party." [emphasis added]).

2. Litigation and Adjudication Issues Yet to be Determined With Respect to the Elements Required by HB 384 to Terminate or Reduce Temporary Total Disability Compensation.

- a. What constitutes reasonableness pursuant to Utah Code Section 34A-2-410.5 (2) (a) (i)?
- b. What constitutes good cause pursuant to Utah Code Section 34A-2-410.5 (2) (a) (ii)?
- c. What constitutes criminal conduct pursuant to Utah Code Section 34A-2-410.5 (2) (a) (iii) (A)? Is this a misdemeanor or felony? Must the crime have occurred at work or be associated with work in some manner? Does this require a conviction in state or federal court? If not, does this require the administrative law judge to determine if the employee engaged in criminal conduct? Absent an

Article III (federal) or Article VIII (state) court determination of criminal conduct, is the administrative law judge required to make a determination of criminal conduct using beyond a reasonable doubt standard?

- d. Does the determination of improper use of a controlled substance pursuant to Utah Code Section 34A-2-410.5 (2) (c) require expert testimony?

3. Issues Associated With Determinations Made by the Labor Commission Concerning Termination Reasons.

- a. Decisions rendered in administrative adjudicative proceedings can invoke the principles of **res judicata** and **collateral estoppel** for the same claims or issues brought in Article III (federal) or Article VIII (state) court actions. See: *Career Service Review Board v. Utah Department of Corrections*, 942 P. 2d 933, Utah Lexis 60 No. 950409 (Utah 1997).
- b. **Affirmative defenses raised in workers' compensation cases that could possibly be raised in a wrongful termination claim brought in state or federal court as issue preclusion under the doctrine of collateral estoppel.**
 - (i) *Touchard v. La-Z-Boy*, 148 P. 3rd 945 (Utah 2006). An employee has a claim for wrongful discharge against an employer who terminates the employee's employment in retaliation for asserting a workers' compensation claim.
 - (ii) Claims for retaliation based on disability pursuant to Utah Code Section 34A-5-106 (1) (a)(i) (H) or The Americans with Disabilities Act 42 U.S.C. §§ 12101 -12117.

V. Litigation and Adjudication Issues yet to be Determined with Respect to HB 384 Regarding Eligibility for Permanent Total Disability Compensation.

1. HB 384 Denial of Permanent Total Disability Compensation for Persons Unable to Return to Work by Reason of Incarceration or Not Legally Eligible to be Reemployed.

Utah Code Section 34A-2-413 (6) (g) (as amended) requires an administrative law judge to order denial payment for permanent total disability compensation to persons unable to return to work by reason of incarceration or not legally eligible for reemployment.

2. Potential Issues Concerning Effect on Exclusive Remedy Provisions of Workers' Compensation Act.

Utah Code Section 34A-2-105 (1) states that:

The right to recover compensation pursuant to this chapter for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer... and the liability of the employer imposed by this chapter shall be in place of any and all civil liability whatsoever at common law or otherwise to the employee or the employee's spouse, widow, children, parents dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death in any way contracted, sustained, sustained, aggravated or incurred by the employee in the course or because of or arising out of the employee's employment and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based on any accident, injury or death of an employee.

Masich v. United States Smelting, Refining & Mining Co. 113 Utah 101, 191 P.2d 612 (Utah1948)

3. Who Constitutes a Person Not Being Legally Eligible to Be Reemployed.

a. Undocumented Workers.

Does Utah Code Section 34A-2-413 (6) (g) (as amended) require the administrative law judge to apply immigration law? If so, what is the standard of proof?

b. Minors (Child Labor).

Does Utah Code Section 34A-2-413 (6) (g) (as amended) deny permanent total disability compensation to an injured minor employee not legally employed by the employer in the first instance when injured and therefore not eligible for reemployment pursuant to the provisions of Utah Code Section 34-23-201. (Federal Law is stricter as to permitted employment for minors see Fair Labor Standards Act 29 U. S.C. 201 et seq. and 29 CFR 570).

4. Equal protection Issues.

Equal protection provisions of the Fourteenth Amendment applies to undocumented aliens living within the jurisdiction of a United States territory. *Plyler v. Doe*, 457 U.S. 202 (1982).

Issue arose once before in a Utah workers' compensation setting. *Martinez v. Industrial Commission*, 720 P. 2d 416 (Utah 1986).

***This opinion is subject to revision
before final publication in the Pacific Reporter.***

IN THE SUPREME COURT OF THE STATE OF UTAH

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Career Service Review Board,
an agency of the State of Utah,
Plaintiff and Appellant,

v.

Utah Department of Corrections,
an agency of the State of Utah,
and O. Lane McCotter, in his
capacity as Executive Director
of the Utah Department of Corrections,
Defendants and Appellee.

No. 950409

FILED
July 22, 1997

Third District, Salt Lake Division I
The Honorable J. Dennis Frederick

Attorneys:

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Frank D. Mylar, Asst. Att'y Gen., Salt Lake City, for defendants

DURHAM, Justice:

The Utah Career Service Review Board ("the Board" or "CSRB") brought this action to enforce its administrative order to the Utah Department of Corrections and to O. Lane McCotter in his capacity as director of the Department of Corrections (collectively, "Corrections" or "UDC"). The district court granted Corrections' motion for summary judgment and dismissed the action. We reverse.

In April 1992, Corrections conducted an internal evidentiary hearing to consider allegations against Tim Parker, a senior correctional supervisor employed by the UDC. Corrections concluded from the evidence at that hearing that Parker had violated UDC weapons policy and had lied to a superior officer. Parker was disciplined and demoted from his supervisory grade 23 position to a nonsupervisory position at grade 21.

Parker appealed Corrections' decision and disciplinary action by filing a grievance with CSRB which granted him an evidentiary hearing before a hearing officer (what the Board calls a "step 5" hearing). The hearing officer considered the evidence of both parties de novo and found, as had Corrections, that Parker had violated department policy. Nevertheless, the hearing officer concluded that Corrections had imposed "excessive discipline" and consequently reduced the sanctions against Parker. The Board approved Corrections' decision to give Parker a ten-day suspension and to place a letter of reprimand in his file, but the Board held that Parker's demotion was unlawful and therefore ordered Corrections to restore Parker to his former rank and pay.

Corrections appealed this decision to the full review board of the CSRB, and Parker cross-appealed. The CSRB, sitting as a board of appellate review ("step 6"), ultimately upheld the decision of the hearing officer and on October 6, 1993, issued a "Decision, Order, and Final Agency Action" ("the 1993 Order"). The 1993 Order stated, "Grievant should be reinstated forthwith to his prior step and rank at Grade 23, and immediately reimbursed for the full amount of any salary and benefits not paid to date as a result of the demotion to Grade 21." Corrections sought judicial review in the Utah Court of Appeals, but upon stipulation of both parties the case was dismissed.

In the meantime, and unknown to the Board, Parker had voluntarily transferred to a grade 17 position as a truck driver at Utah Correctional Industries. Also, Parker's former position was eliminated when Corrections disbanded the Enforcement Bureau in November 1993. Corrections assumed that Parker's acceptance of the grade 17 position excused UDC from any further obligation to him; because the disbanding of the Enforcement Bureau rendered Parker's reinstatement to his former position impossible, UDC took the position that it could fully comply with the Board's 1993 Order merely by reimbursing Parker for the wages and benefits he lost between his dismissal and his subsequent acceptance of the truck-driving job, a period of approximately three months. Corrections calculated that the net difference in salary and benefits between grade 21 and grade 23 for the given period was \$362.47. Accordingly, on February 1, 1994, Corrections sent Parker a check in that amount, along with a letter stating that this payment satisfied Corrections' full obligation to him under the Board's 1993 Order. Parker objected to Corrections' position and demanded that they comply with the order as given, but Corrections replied to Parker's objection by insisting that it had already fully complied with the Board's decision. Parker then moved the Board for an order directing Corrections to implement the Board's 1993 Order.

The Board treated Parker's motion for enforcement as a motion for clarification of the 1993 Order. It solicited responses and exhibits from both Parker and Corrections but determined on the basis of these submissions that further oral argument was not needed. On October 20, 1994, the Board issued an "Order Directing Agency to Implement Step 6 Decision ("the 1994 Order"). The 1994 Order clarified the Board's 1993 Order and altered it in subtle ways. Essentially, the 1994 Order made clear that while Corrections was not required to restore Parker to his former position (which had been eliminated in

1993), it was obligated to restore him to his former rank and salary. The new order also required Corrections to pay Parker the difference in salary and benefits between grade 23 and his current grade 17 position rather than the difference between grade 23 and the grade 21 position to which he had been demoted by Corrections. The order further clarified that Corrections was to continue to pay Parker at his former grade 23 salary until "a legitimate personnel action effectuates a valid change in Grievant's pay."

Upon notification of the 1994 Order, Corrections took the position that the Board had exceeded its jurisdiction and sent the Board a letter indicating that Corrections would not comply. Corrections did not, however, apply to the Board for reconsideration, nor did it seek review of the decision in the Utah Court of Appeals as it had done in the case of the 1993 Order. Instead, insisting that the order was unlawful and void, Corrections ignored it and allowed it to become final. On January 27, 1995, the Board filed a complaint in the Third District Court, seeking enforcement of its 1994 Order. Both parties moved the district court for summary judgment; the Board's motion was denied, and Corrections' motion was granted.

The district court concluded that the Board lacked standing and authority to bring an enforcement action against Corrections and that the Board had exceeded its jurisdiction. The court also characterized the Board's enforcement action as a suit in mandamus and denied relief because it found that enforcement of the 1994 Order--which the court held unlawfully infringed upon Corrections' statutory duty to maintain strict safety and security standards--was not in the public interest and was therefore not compelled by equity. The Board argues that the district court erred in these findings and further maintains that its 1994 Order is res judicata and that many of the issues the trial court found dispositive should have been precluded from that court's consideration because they had already been decided in the Board's previous administrative action, from which Corrections failed to appeal. However, the trial court found that res judicata and collateral estoppel did not apply to the Board's administrative decision because the parties never fully and fairly litigated several issues before the Board.

We must first determine whether the Board had standing and authority to bring an enforcement action in civil court against Corrections, another agency of state government. If we conclude that the Board had standing and was legally authorized to bring this action, we must next decide whether the district court erred by considering issues that should have been precluded as res judicata or collateral estoppel. If estoppel applies to the Board's administrative action, our only other consideration should be whether the Board exceeded its jurisdiction in issuing the 1994 Order. If estoppel does not apply, we may consider the other collateral attacks on the Board's decision. This case was decided on summary judgment below, and "[b]ecause entitlement to summary judgment is a question of law, we accord no deference to the trial court's resolution of the legal issues presented." K & T, Inc. v. Koroulis, 888 P.2d 623, 627 (Utah 1994).

I. STANDING, AUTHORITY, DUE PROCESS

The trial court found that the Board's enforcement action against Corrections should have been barred because (i) the Board was not an "aggrieved party" and therefore did not have standing, and (ii) the Board did not have statutory authority to bring a lawsuit against another agency. Corrections further

argues that the action violates constitutional guarantees of due process by combining adjudication and enforcement powers in one agency. We find no merit in any of these contentions.

The Board brought this enforcement action against Corrections under the Utah Administrative Procedures Act ("UAPA"), which states, "In addition to other remedies provided by law, an agency may seek enforcement of an order by seeking civil enforcement in the district court." Utah Code Ann. 63-46b-19(1)(a) (1993).⁽¹⁾ The Career Service Review Board is an agency within the meaning of UAPA, which defines "agency" broadly as "a board, commission, department, division, officer, council, office, committee, bureau, or other administrative unit of this state, including the agency head, agency employees, or other persons acting on behalf of or under the authority of the agency head." *Id.* 63-46b-2(1)(b) (emphasis added). Also, because the injury alleged by the Board is "within the scope of statutory concerns," Corrections' refusal to submit to the Board's statutory authority constitutes an injury sufficient to establish the Board's standing in this case. See Utah Bankers Ass'n v. America First Credit Union, 912 P.2d 988, 993 (Utah 1996).

Corrections' due process argument concerns the bias that could potentially color an agency's judgment if it is both judge and advocate in an action. Here, however, the Board did not undertake its advocacy role until its judicial function had been completed. That a party seeks enforcement of its administrative order does not imply bias in the adjudication upon which the order was based.

II. COLLATERAL ESTOPPEL

The Board argues that Corrections should have been estopped from collaterally attacking the 1994 Order and that the district court erred by considering nonjurisdictional issues because all such substantive issues had already been settled by the Board in its administrative adjudication of Parker's grievance.

Res judicata, which "subsumes the doctrine of collateral estoppel," Stevenson v. Goodson, 924 P.2d 339, 353 (Utah 1996), applies to administrative adjudications in Utah.⁽²⁾ We noted recently in Salt Lake Citizens v. Mountain States, 846 P.2d 1245 (Utah 1992), that "the doctrine of res judicata has been applied to administrative agency decisions in Utah since at least 1950." *Id.* at 1251 (citing North Salt Lake v. Joseph Water & Irr. Co., 223 P.2d 577, 582-83 (Utah 1950)). In Mountain States, we reiterated the rule that "'the principles of res judicata apply to enforce repose when an administrative agency has acted in a judicial capacity in an adversary proceeding to resolve a controversy over legal rights and to apply a remedy.'" *Id.* (quoting Utah Dep't of Admin. Servs. v. Public Serv. Comm'n, 658 P.2d 601, 621 (Utah 1983)); see also United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966), quoted in Mountain States, 846 P.2d at 1251 n.4. The Board's adjudication of Parker's grievance falls within this description; it is precisely the sort of quasi-judicial adversary proceeding to which the doctrines of res judicata and collateral estoppel should apply.

Four elements of issue preclusion are required for collateral estoppel: (1) The issue decided in the prior adjudication must be identical to the one presented in the action in question; (2) there must be a final judgment on the merits; (3) the party against whom the plea is asserted must be a party in privity with a party to the prior adjudication; and (4) the issue in the first action must be completely, fully, and

fairly litigated. Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978).

The trial court found that collateral estoppel should not apply to the Board's 1994 Order because there had not been a full and fair litigation by the Board as to three issues: "whether Parker voluntarily accepted his UCI [truck driving] position, whether the UDC fully complied with the Board's October 6, 1993 order, or whether the CSRБ exceeded its authority." An examination of the record reveals that the Board did in fact consider and decide each of these questions. Corrections, however, claims that this review did not constitute a full and fair litigation for various reasons, including the facts that "[n]o party made a motion to clarify the order" and "no hearing was held and no opportunity to present testimony was provided."

But the record shows that on July 10, 1994, Parker did move the Board for an "Order directing [Corrections] to implement the Step 6 Decision heretofore entered." In light of Corrections' insistence that it had already complied with the previous decision, the Board could not have disposed of Parker's enforcement motion without also clarifying the controversy about what the 1993 Order required. The Board's decision to clarify its order was thus reasonable and in fact necessary to resolve the question of compliance raised by Parker's motion. Furthermore, our case law does not require either a motion or a hearing for full and fair litigation but says only that "the parties must receive notice, reasonably calculated, under all the circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections." Copper State Thrift & Loan v. Bruno, 735 P.2d 387, 391 (Utah Ct. App. 1987), quoted in Atiya v. Salt Lake County, 988 F.2d 1013, 1020 (10th Cir. 1993). Corrections does not claim to have received inadequate notice, nor does it appear to have been denied an opportunity to object to Parker's motion. Before the Board issued its 1994 Order, Corrections received a copy of the above-mentioned motion from Parker, submitted a response and accompanying exhibits of its own, received a copy of a reply and counterexhibits from Parker, and then submitted another response in reply to Parker's. On the basis of these documents, the Board determined that oral argument was not necessary, but even without oral argument it is apparent that Corrections had abundant opportunity to present its objections, which is all the rule requires. We therefore find that the review granted by the Board was adequate to constitute full and fair litigation.

Corrections makes other arguments as to why its collateral attacks on the 1994 Order should not be estopped under issue preclusion rules. Although none of these arguments persuades us that the Board's order is subject to collateral attack, Corrections does raise some defenses not addressed in the Board's 1994 Order. These issues require separate treatment.

First, Corrections claims that collateral estoppel is not a defense to arguments that the Board lacked jurisdiction to enter the orders. While this is true, see Utah Code Ann. 67-19-19(3)(a); Olson v. Salt Lake City Sch. Dist., 724 P.2d 960, 964 (Utah 1986) (lack of jurisdiction may be raised at any time), we note that the Board does not argue that Corrections' jurisdictional arguments should be precluded, but only that the 1994 Order "was res judicata in regard to all defenses in the enforcement action other than jurisdiction." We will address Corrections' jurisdictional arguments below.

Second, Corrections argues that collateral estoppel does not apply to actions to enforce agency decisions because "the enforcement action is merely a continuation of the agency action." Our case law, cited above, clearly establishes that res judicata and collateral estoppel do apply to final agency

adjudications. The Utah Code also clearly establishes that an enforcement action under section 63-46b-19 of the Utah Code, which authorizes an agency to seek enforcement of its order in district court, is distinct from the grievance procedures set forth in sections 67-19a-301 to -408 and from the appeal procedures set forth in sections 63-46b-14 and -16. While agency actions such as the Board's adjudication of Parker's grievance may be continued in the civil court system by filing an appeal in the Utah Court of Appeals, see 63-46b-14, -16, an action seeking enforcement of a final order is not a continuation of the grievance. Corrections declined its opportunity to appeal and cannot now successfully argue that the Parker grievance is still pending. The fact that agencies may seek enforcement of their orders against recalcitrant parties in the civil courts does not mean that their decisions are not final until enforced by the courts. The enforcement action before us now is not a continuation of the former administrative adjudication, but a separate action to enforce the order in Parker's grievance proceeding.

Third, Corrections argues that the issues decided by the Board were not identical to those before the district court. Specifically, Corrections argues that the district court's decision was based, at least in part, on various equitable defenses that the Board had never considered, including "[i]ssues regarding the public interest and statutory duties of McCotter to regulate conduct of peace officers and handling of weapons by supervisors" and the jurisdictional issue "of whether the October 1994 order violates DHRM rules and statutes." To the extent that the Board did not consider these issues, they cannot be precluded from the district court's determinations in the enforcement action. We will thus consider these equitable defenses and jurisdictional claims in their turn.

Finally, Corrections argues that the Board, under section 63-46b-19(3), is entitled to raise any defense allowed by law, which Corrections takes to include collateral attacks on the decision underlying the order. We disagree. Section 63-46b-19(3) states that in a civil enforcement proceeding, a defendant may raise certain enumerated defenses "in addition to any other defenses allowed by law." This section does not create a loophole in the doctrine of collateral estoppel by permitting defendants to resurrect issues in an enforcement action that were decided and put to rest in previous administrative proceedings between the parties. Defenses based on such precluded issues are not "allowed by law" so as to fall within section -19(3).

We conclude that the district court should have applied collateral estoppel principles to the Board's 1994 Order and that it erred by permitting Corrections' collateral attack on that order. Various arguments, including arguments that Corrections complied with the 1993 Order, that Parker's voluntary transfer mooted Corrections' obligation to comply with Board orders, and that Parker waived his rights to be made whole by voluntarily accepting other work, were decided by the Board in its own adjudication and should not have been considered by the district court. The proper place for Corrections to have raised these arguments was on appeal to the court of appeals after the adverse decision of the Board. Corrections failed to appeal the Board's order, and it became final. The district court was thus precluded from considering the issues decided by the Board in its 1994 Order. Issues not decided by the Board, including Corrections' equitable arguments, were properly considered by the district court. The district court was also justified in considering Corrections' arguments that the Board lacked jurisdiction to enter the 1994 Order, because lack of subject matter jurisdiction may be raised at any time, Utah R. Civ. P. 12(h)(2); Barnard v. Wasserman, 855 P.2d 243, 248 (Utah 1993), and is specifically allowed as a defense in enforcement actions by our statutes. Utah Code Ann. 63-46b-19(3) (a).

III. EQUITABLE DEFENSES

Corrections argues that because the Board "seeks enforcement of its order to command defendants to do a specified act," and because it "is seeking to compel a public official to comply with an allegedly legal mandate," the Board's enforcement action is an equitable action seeking an extraordinary writ of mandamus, and the district court's judgment should therefore be disturbed only if "necessary to prevent manifest injustice." See Mackay v. Hardy, 896 P.2d 626, 629 (Utah 1995). Corrections then raises, as an equitable defense, various arguments as to why enforcement of the 1994 Order would not be in the public interest and is therefore not "necessary to prevent manifest injustice." However, we do not reach this equitable defense because we find that the Board's enforcement action against Corrections is not a suit in mandamus but an action at law. Rule 65B of the Utah Rules of Civil Procedure authorizes extraordinary relief when no adequate remedy at law exists. The Board's enforcement action was brought under the statutory authority of UAPA, which provides, "In addition to other remedies provided by law, an agency may seek enforcement of an order by seeking civil enforcement in the district courts." Utah Code Ann. 63-46b-19(1)(a) (1993). The fact that the statute also permits an agency to seek injunctive relief, id. 63-46b-19(1)(d)(ii), does not turn this action at law into a suit in equity.

[W]here the administrative decision or order merely provides a basis for the suit in the courts, a suit to enforce such an administrative decision or order is an original and independent proceeding, and such actions are actions at law, even though equitable relief is sought, and are not actions on the administrative decision or order.

73A C.J.S. Public Administrative Law and Procedure 273 (1983) (citations omitted). The district court erred in granting summary judgment based on its perception that the Board's enforcement action was a suit in equity. Its subsequent conclusions that the Board was not entitled to mandamus relief and that enforcement of the 1994 Order would not be in the public interest were likewise in error.

IV. JURISDICTION

The trial court found that the Board was without subject matter jurisdiction to enter the 1994 Order. The subject matter jurisdiction of the Board is described in chapter 67-19a of the Utah Code, which sets forth the grievance and appeal procedures available to Utah career service employees. Section -202(1) (a) provides:

[T]he board shall serve as the final administrative body to review appeals from career service employees and agencies of decisions about promotions, demotions, suspensions, written reprimands, wages, salary, violations of personnel rules, [etc.,] . . . that have not been resolved at an earlier stage in the grievance procedure. The board has no jurisdiction to review or decide any other personnel matters.

Utah Code Ann. 67-19a-202(1)(a). Sections -404 through -406 provide for an initial evidentiary hearing before a hearing officer (step 5); sections -407 and -408 provide for an appeal of the hearing officer's

decision before the entire review board (step 6). Section -408 says, "The board shall . . . hold a hearing to review the hearing officer's decision . . . [and] review the decision of the hearing officer by considering the official record of that hearing and the briefs of the parties." Utah Code Ann. 67-19a-408 (1)(a)-(b).

The Board clearly had subject matter jurisdiction over Parker's appeal. Parker was a career service employee. See Utah Code Ann. 67-19a-101(3), 67-19-3(2), 67-19-15(2)(b). The Board's review involved an appeal from a decision involving allegations that he had violated personnel policies. Corrections' decision resulted in a written reprimand as well as a demotion and a consequent reduction in Parker's wages or salary. These facts place Parker's grievance squarely within the Board's subject matter jurisdiction as it is described in section 67-19a-202.

The district court nevertheless gave the following six reasons for finding that the Board lacked subject matter jurisdiction:

- a. Mr. Parker's voluntary acceptance of a truck driver job . . . dissolved the CSRB's jurisdiction to hear his grievance
- b. The abolishment of Mr. Parker's former enforcement position . . . further dissolved the CSRB's jurisdiction
- c. The dismissal of the appeal of the October 6, 1993 order ended the CSRB's authority to make further orders and findings
- d. The UDC fully complied with the CSRB's October 6, 1993 [step 6] order
- e. The CSRB exceeded its jurisdiction by failing to properly "review" the UDC's hearing record
- f. The CSRB's orders violated DHRM policy and state law.

While some of these "reasons" for the trial court's decision may be persuasive arguments, it is hard to see how any one of them goes to the issue of subject matter jurisdiction. In fact, many of these arguments are not jurisdictional at all but are substantive arguments that should have been outside the court's consideration as precluded issues.

The trial court's first reason for denying the Board's jurisdiction--"Parker's voluntary acceptance of a truck driver job"--seems to go to the issue of Parker's failure to mitigate his damages. If Corrections had pursued its appeal of the 1993 Order, his voluntary failure to mitigate, if proved, might perhaps have reduced the damages Corrections would have been required to pay Parker. But Parker's failure to fully mitigate his damages could not have eliminated his claim entirely and certainly should not affect the Board's jurisdiction. Likewise, the second "jurisdictional" issue--"the abolishment of Mr. Parker's former enforcement position"--might conceivably have reduced the damages Corrections was

obligated to pay Parker, but we can see no reason why this should affect the Board's jurisdiction over Parker's grievance; the district court should not have considered this issue.

The fourth issue cited by the trial court--"the UDC fully complied with the CSRB's October 6, 1993 order"--would, if accepted, be a valid defense in an action to enforce that order and is specifically preserved by section 63-46b-20(3)(c), which states that "a defendant may defend on the ground that . . . the defendant has not violated the order." The order that the Board is seeking to enforce in this action, however, is the 1994 Order, not the 1993 Order. Corrections may claim to have complied with the 1993 Order as it understood that order, but Corrections does not and cannot claim to have complied with the 1993 Order as it was clarified by the 1994 Order.

The fifth issue--whether the Board failed to properly review Corrections' hearing record--challenges the standard of review employed by the Board; it does not challenge its jurisdiction. The Utah Administrative Code sets forth the standard of review and the degree of deference the Board should give to employment decisions of other administrative agencies: "The hearing officer shall give latitude and consideration to an agency's prior decision when the latter is supported by the findings of fact based on the evidence."⁽³⁾ Utah Admin. Code R137-1-20 (1992). This rule has been interpreted in various decisions by the courts of this state. See In re Discharge of Jones, 720 P.2d 1356, 1363 (Utah 1986); Utah Dep't of Corrections v. Despain, 824 P.2d 439, 442-43 (Utah Ct. App. 1991); Utah Dep't of Corrections v. Sucher, 796 P.2d 721, 722-23 (Utah Ct. App. 1990). These cases establish the rule that

the CSRB must give "latitude and deference" to the Department's personnel actions. The CSRB's role in examining the Department's personnel actions is a limited one. The CSRB is restricted to determining whether there is factual support for the Department's charges against [a grievant] and, if so, whether the Department's sanction of dismissal is so disproportionate to those charges that it amounts to an abuse of discretion.

Despain, 824 P.2d at 443. In the case at hand, the Board's hearing officer did not give "latitude and deference" to Corrections' hearing record but, ignoring the record below, took new evidence on Parker's case and determined the facts de novo. Then, despite the fact that the CSRB hearing officer's findings largely reconfirmed the findings of Corrections' own hearing, the hearing officer determined that Corrections' actions in Parker's case constituted an abuse of discretion. In light of the administrative rule in force at the time of the 1992 hearing and the case law interpreting it, Corrections' argument that the hearing officer of the CSRB granted insufficient deference to Corrections' hearing record may well be correct. This finding is irrelevant to our present considerations, however, because Corrections failed to pursue an appeal of the 1994 Order instead allowing it to become final. The Board's decision is therefore res judicata, and issues decided by the Board are not subject to collateral attack. While we are sympathetic to Corrections' argument about the standard of review employed by the Board's hearing officer, it is one Corrections should have pursued before the court of appeals; it is not a question that should have been before the district court in this action. This case involves only the enforcement of the Board's 1994 Order, not the review of Parker's grievance.

Ultimately, Corrections does identify two valid jurisdictional issues: first, whether the dismissal of the case in the court of appeals "dissolved" the Board's authority to make further factual findings and issue new orders in the form of clarifying the original order, and second, whether the Board has authority to

prescribe a remedy requiring that state employees be paid a salary above their rank.

While neither of these issues properly goes to subject matter jurisdiction, they both are broadly "jurisdictional" within the meaning of section 63-46b-19(3) of UAPA: "In a proceeding for civil enforcement of an agency's order, in addition to any other defenses allowed by law, a defendant may defend on the ground that . . . the order sought to be enforced was issued by an agency without jurisdiction to issue the order." Utah Code Ann. 63-46b-19(3). Thus, while it is clear that the Board had the requisite subject matter jurisdiction to hear Parker's grievance and to issue a decision and order, Corrections may still argue under section -19(3) that the Board lacked jurisdiction to issue the 1994 Order or that the Board exceeded its jurisdiction by prescribing remedies not within its authority to order.

A. Did the Board have continuing jurisdiction to issue the 1994 Order?

The trial court held, "The dismissal of the appeal of the October 6, 1993 order ended the CSRB's ability to make further orders and findings regarding Parker's grievance." The trial court's conclusion presents us with two issues: (i) whether an administrative agency retains jurisdiction over a matter after an appeal from the agency's decision has been dismissed by the appellate court, and (ii) if it does retain jurisdiction, whether the agency's continuing jurisdiction includes the authority to modify its previous order on the basis of subsequently discovered facts.

When a party institutes proceedings to review a decision or an order of an administrative agency, the agency is deprived of its jurisdiction over the matter during the pendency of the appeal. The Supreme Court of Nevada states, "It is generally accepted that where an order of an administrative agency is appealed to a court, that agency may not act further on that matter until all questions raised by the appeal are finally resolved." Westside Charter Serv., Inc. v. Gray Line Tours of Southern Nevada, 664 P.2d 351, 353 (Nev. 1983); see also Fischback & Moore of Alaska, Inc. v. Lynn, 407 P.2d 174, 176 (Alaska 1965), overruled on other grounds by City & Borough of Juneau v. Thibodeau, 595 P.2d 626, 629 n.6 (Alaska 1979); American Smelting & Refining Co. v. Arizona Air Pollution Control Hearing Bd., 550 P.2d 621, 622 (Ariz. 1976); O'Bryant v. Public Utils. Comm'n, 778 P.2d 648, 655-56 (Colo. 1989); Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc., 355 P.2d 83, 86 (Colo. 1960). See generally 73A C.J.S. Public Administrative Law and Procedure 194 (1983) ("[T]he continuing power of a board to modify or change its orders is suspended during the pendency of an appeal as to questions raised by such appeal."). The Board was therefore without authority to modify its 1993 Order while the court of appeals was considering Corrections' petition for review of that order.

However, Corrections' appeal was dismissed by the court of appeals upon stipulation of both parties in January of 1994. Thus, when the Board issued its modified order in October of 1994, all questions raised by the appeal had been resolved, and the appeal was no longer pending. Furthermore,

[o]peration of the rule [divesting agencies of jurisdiction while an appeal is pending] is limited to situations where the exercise of administrative jurisdiction would conflict with the proper exercise of the court's jurisdiction. "If there would be no conflict, then there would be no obstacle to the administrative agency exercising a continuing jurisdiction that may be conferred upon it by law."

Westside Charter Serv., 664 P.2d at 353 (quoting Fischback & Moore, 407 P.2d at 176). The Board's actions in no way invaded the jurisdiction of the reviewing court. Once the court of appeals had dismissed Corrections' appeal of the 1993 Order, there could have been no conflict between the Board's administrative jurisdiction and the court's jurisdiction, and the rule divesting the Board of its jurisdiction would no longer apply.

This rule is consistent with the rule that when an appeal is taken from the decision of a trial court, the dismissal of that appeal results in the return of the matter to the jurisdiction of the trial court as if no appeal had ever been taken. See In re Brady's Estate, 213 P.2d 125, 127 (Cal. 1950); Stites v. Duit Constr. Co., 903 P.2d 293, 303 n.43 (Okla. 1995); In re Estate of Burkhart, 594 P.2d 361, 363 (Okla. 1979); 5 C.J.S. Appeal and Error 653 (1993). Indeed, this court has also stated that "a voluntary dismissal without prejudice 'render[s] the proceedings a nullity and leave[s] the parties as if the action had never been brought.'" Barton v. Utah Transit Auth., 872 P.2d 1036, 1039 (Utah 1994) (quoting In re Piper Aircraft Distribution Sys. Antitrust Litig., 551 F.2d 213, 219 (8th Cir. 1977)). The dismissal of Corrections' appeal was voluntary, and under rule 41 of the Utah Rules of Civil Procedure, a voluntary dismissal is without prejudice unless otherwise specified in the order. Utah R. Civ. P. 41(a)(2). We can see no reason, and Corrections has argued none, why the effect should not be the same for the dismissal of an appeal from the decision or order of an administrative agency. This seems particularly true in light of Utah Rule of Civil Procedure 81, which indicates that "[t]hese rules [of civil procedure] shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency . . ." Utah R. Civ. P. 81(d); see also Utah R. App. P. 18. Thus, the dismissal of Corrections' appeal of the 1993 Order rendered that appeal a nullity, and to the extent that the Board had continuing jurisdiction to modify its 1993 Order, that jurisdiction was reinvested in the Board upon the court of appeals' dismissal of Corrections' appeal.

The remaining question is whether the Board had continuing jurisdiction to modify its 1993 Order to account for facts that were not available to the Board when it made its initial determination. The Board did not discover that Parker was working at a grade 17 position until after it had issued its 1993 decision (ordering Corrections to pay him "any salary and benefits not paid to date as a result of the demotion to Grade 21"). When Parker sought enforcement of the 1993 Order, the Board took new evidence, including evidence of Parker's current employment at grade 17. On the basis of this evidence, the Board amended its decision and ordered Corrections to give Parker back pay on the difference between grade 23 and grade 17. The trial court found that the Board's amendment of its previous order exceeded the Board's jurisdiction.

Section 69-19a-202(3) says, "In conjunction with any inquiry, investigation, hearing, or other proceeding, any member of the board may . . . subpoena witnesses, documents, and other evidence." Utah Code Ann. 69-19a-202(3). It does not say that the Board may reopen an adjudication and amend its final order to account for newly discovered facts, but as the clarification and enforcement of its 1993 Order is a "proceeding" within the meaning of this statute, the further investigation and fact finding of the Board are statutorily authorized.

Statutory authority for the Board's amendment of its prior order is more difficult to find. The Board argues that it is authorized to "clarify" its decisions under section 63-46b-1. But this section says only

that the agency may request or order conferences with the parties to clarify the issues "prior to the beginning of an adjudicative proceeding" or "during an adjudicative proceeding." Id. 63-46b-1(4)(a)(ii). This section provides no authority for the Board's "clarification" of its order after the proceeding is complete and the order has been issued.

The Board also defends its 1994 Order by citing language in section 67-19a-408(2) that the Board claims gives it authority to "grant 'whatever other remedy' it deems appropriate." However, the language quoted does not, as the Board supposes, give the Board the broad remedial powers it claims. Read in context the statute merely states, "In addition to whatever other remedy the board grants, it may order that the employee be placed on the reappointment roster." Id. 67-19a-408(2). The Board's reliance on this statute is misplaced, but it is understandable because the Board's remedial powers are nowhere defined in the Utah Code, and section -408(2)'s oblique reference to "other remedies" appears to be the only mention in the Code of the Board's remedial powers. It appears that the legislature assumed the Board would have the power to prescribe remedies through administrative orders but failed to elaborate on the extent of that power.

Finally, the Board argues that because it is authorized to seek enforcement of its orders under section 63-46b-19(1), it has the implied power to determine whether its orders have been complied with or are in need of enforcement. The Board further argues that its members are authorized to gather evidence in conjunction with any inquiry, investigation, hearing, or other proceeding. See id. 67-19a-202(3). We are willing to accept the proposition that the Board has the implied authority to determine whether its remedy has been instituted, but whether the Board has authority to correct previous orders by prescribing a modified remedy or awarding additional damages based on facts that arise during its compliance investigation is still not clear. We find unconvincing the Board's attempts to establish such authority under the various provisions of the Utah Code and conclude that the Board does not have any explicit statutory authority to make subsequent modifications to previously entered orders.

Courts in various jurisdictions are divided on the question of whether administrative tribunals, like courts, have the authority in the absence of a controlling statute to modify orders still under their control. While courts in some states have held that this authority is inherent and exists independent of, or apart from, any statutory authority, others have held that "since all administrative action must be grounded in statutory authority, the power of an administrative body to amend or modify its decision is also entirely statutory." 73A C.J.S. Public Administrative Law 163 (1983); see also Comment Note, Annotation, Power of Administrative Agency to Reopen and Reconsider Final Decision as Affected by Lack of Specific Statutory Authority, 73 A.L.R.2d 939, 946-48 (1960). In Clark v. Hansen, this court joined the former jurisdictions in holding that "[i]nherent in the power to make an administrative decision is the authority to reconsider a decision." 631 P.2d 914, 915 (Utah 1981) (citing Wammack v. Industrial Comm'n of Arizona, 320 P.2d 950 (Ariz. 1958); Handlon v. Town of Belleville, 71 A.2d 624 (N. J. 1950)). We further stated: "The absence of specific authority in the governing statutes is not determinative. Every tribunal has some power to correct its own mistakes." Id. at 915; see also DLB Collection Trust v. Harris, 893 P.2d 593, 595 n.1 (Utah Ct. App. 1995).

Utah is among the majority of western states to have held that administrative agencies have the power to reconsider their decisions in the absence of statutory provisions to the contrary. See Wammack, 320 P.2d at 954 ("The power to reconsider is inherent in the power to decide."); In re Fain, 65 Cal. App. 3d

376, 391, 135 Cal. Rptr. 543, 551 (1977) ("Any deliberative body--administrative, judicial or legislative--has the inherent power to reconsider an action taken by it unless the action is such that it may not be set aside or unless reconsideration is precluded by law."); Moschetti v. Board of Zoning Adjustment, 574 P.2d 874, 875 (Colo. Ct. App. 1978) (applying principle from other jurisdictions that "an administrative board has authority to modify a decision at any time prior to the date an appeal must be perfected"); In re Petition of City of Shawnee, 687 P.2d 603, 614-15 (Kan. 1984) (rule that trial court retains broad discretionary power to reexamine its rulings up until appeal is docketed in appellate court also applies to administrative board when acting in a quasi-judicial capacity); SAIF Corp. v. Fisher, 785 P.2d 1082, 1083 (Or. Ct. App. 1990) ("In the absence of a statutory provision limiting its authority to do so, an agency has plenary authority . . . to withdraw an order and to reconsider the decision embodied in the order."); Hupp v. Employment Sec. Comm'n, 715 P.2d 223, 227-28 (Wyo. 1986) (Urbigkit, J., concurring specially, joined by Thomas, C.J., & Brown, J., in separate special concurrence) ("[A]n agency . . . may reconsider a decision if the agency has adopted rules . . . regarding such reconsideration procedures."). But see In re Application for Authority to Conduct Savings & Loan Activities, 597 P.2d 84, 87-88 (Mont. 1979) (declining to rule on "whether an administrative agency has inherent power to reconsider its decision"); Suryan v. Alaska Indus. Bd., 12 Alaska 571, 573 (D. Alaska 1950) ("[A]n administrative body has no power to grant a rehearing or to set aside or modify its decisions except by virtue of express statutory provision or by necessary implication."); Yamada v. Natural Disaster Claims Comm'n, 513 P.2d 1001, 1004 (Haw. 1973) (holding that "a statutory basis is necessary for an administrative body to initiate reconsideration of its prior final quasi-judicial decisions"); Armijo v. Save 'N Gain, 771 P.2d 989, 993 (N.M. Ct. App. 1989) (holding that "the power of any administrative agency to reconsider its final decision exists only where the statutory provisions creating the agency indicate a legislative intent to permit the agency to carry into effect such power").

We thus find that the Board was not without jurisdiction to issue the 1994 Order. Until an appeal was perfected, the Board retained jurisdiction and had the inherent authority to reconsider and modify its 1993 Order in light of subsequently discovered facts. The Board was temporarily divested of this authority during the pendency of Corrections' appeal but regained that authority upon the dismissal of the appeal and retained it until the time it issued the 1994 Order. While we may share some of Corrections' misgivings about the wisdom of the Board's modifications, Corrections failed to seek review of either the 1994 Order containing those modifications or the 1993 Order preceding it and cannot now be heard to attack collaterally the justice or equity of those orders.

B. Did the Board order remedies contrary to law and thus outside the Board's jurisdiction?

Finally, we address Corrections' argument that the Board's order to restore Parker to his former grade 23 pay rate "would require the UDC to violate Department of Human Resource Management ("DHRM") policies in that Parker would be paid at a higher rate than his grade allows." In the alternative, Corrections argues that because Parker's position was abolished before the order was issued, the Board's order would violate DHRM policy by "placing Parker in a supervisory or higher grade position without going through a competitive process [of hiring and selection]." The district court agreed that the Board's order violated DHRM policy and state law, and the court concluded that the Board exceeded its jurisdiction in issuing the order.

However, the Board's 1994 Order to reinstate Parker to his former rank and pay is not a voluntary

transfer and therefore is not subject to the requirements of section 67-19-15.7(4) regarding DHRM policy. What is at issue here is not a hiring or promotion decision, but the enforcement of the Board's order that an employee who was illegally demoted be made financially whole. The policies of the DHRM do not apply to the issue of pay restoration. Holding otherwise would deprive the CSRB of much of its remedial power.

The district court erred in holding that the Board lacked standing to enforce its orders in district court and in failing to recognize the preclusive effect of the Board's 1994 Order. That order was *res judicata*, and Corrections' failure to appeal from the decision precludes it from assailing the issues decided therein by collateral attack. As to other claims raised by Corrections--that the Board lacked jurisdiction to issue the 1994 Order and that the Board's enforcement action was a suit in equity that cannot be enforced for policy reasons--we are unpersuaded. Therefore, we hold that the trial court erred by refusing to enforce the Board's final order of October 20, 1994.

Reversed.

STEWART, Associate Chief Justice, concurring:

I agree with Justice Durham's opinion, but I am dubious about the breadth of some of her language concerning the scope of the continuing jurisdiction of an administrative agency to change an order after it has become final for the purpose of an appeal.

Nevertheless, I conclude that the Career Service Board's 1994 order was lawful. The Board's 1993 order stated, "Grievant [Tim Parker] should be reinstated forthwith to his prior step and rank at Grade 23, and immediately reimbursed for the full amount of any salary and benefits not paid to date as a result of the demotion to Grade 21." The essence of the 1993 order, as far as is pertinent here, was to return Parker to his prior rank and pay retroactively as of the time his ten-day suspension terminated so that he would lose no salary by virtue of his demotion. The 1994 order awarded Parker the difference between the grade 23 salary and a grade 17 salary, the grade for the position that he had taken after his demotion. If the Board erred in changing that aspect of the 1994 order, and even if the error were jurisdictional (which may or may not be the case), the Department of Corrections should have taken an appeal at that time. In not doing so, it waived its right to raise the issue on an appeal and cannot circumvent the waiver rule by a subsequent collateral attack on the 1994 order. In any event, the nub of the matter, as I see it, is that the 1994 order was simply intended to give full effect to what the Board sought to accomplish by its 1993 order, that is, to make Parker whole after the unlawful demotion.

Chief Justice Zimmerman concurs in the concurring opinion of Associate Chief Justice Stewart.

Opinion Endnotes:

1. Section 63-46b-1(2)(e) of UAPA provides, "This chapter does not govern . . . applications for employment and internal personnel actions within an agency concerning its own employees, or judicial review of those actions." Utah Code Ann. 63-46b-1(2)(e) (1993). From this section, we conclude that UAPA does not apply to those personnel decisions of an agency that involve the agency's own employees, such as Corrections' original decision to demote Parker in April 1992. Nor does it apply to judicial review of an agency's internal personnel decisions, which are governed by the Utah Rules of Civil Procedure. Utah R. Civ. P. 1(a). UAPA's section -1(2)(e) does not exclude administrative review of an agency's personnel decisions, however, and so we conclude that this section does not exclude the Board's review of Parker's grievance. Because the Board's review is controlled by the provisions of UAPA, the Board has explicit authority to seek enforcement of its orders in court under section 63-46b-2(1)(b) of that act. Section 67-19-30(2) of the Utah State Personnel Management Act also indicates that "[a]ll grievances based upon a claim or charge of injustice or oppression, including dismissal from employment, resulting from an act, occurrence, commission, or condition shall be governed by Title 67, Chapter 19a, Grievance and Appeal Procedures, and Title 63, Chapter 46b, Administrative Procedures Act."

2. Although the term "res judicata" is often used to describe the overall doctrine of preclusion, a distinction should properly be made between that branch of the doctrine which precludes the relitigation of previously decided claims, called either res judicata or claim preclusion, and that branch which precludes the relitigation of previously decided issues, known as either collateral estoppel or issue preclusion. See Noble v. Noble, 761 P.2d 1369, 1374 n.5 (Utah 1988).

3. In January of 1993, the language of this rule was substantially changed. The new rule states that the "evidentiary/step 5 hearing shall be a new hearing for the record, held de novo" and further states that "[t]he CSRFB hearing officer shall first make factual findings based solely on the evidence presented at the hearing without deference to any prior factual findings of the agency." Utah Admin. Code R137-1-20.C. (1993). Because the hearing at issue in this case took place in June of 1992, the standard set forth in the amended administrative code is inapplicable to the case at hand.

HOWE, Justice, dissenting:

I dissent. I will not attempt to respond to all of the extended analysis of the majority. Stripped to its essentials, the issue in this case is whether an administrative agency, after it has entered a final order and the time for rehearing has expired and a petition for judicial review has been filed and subsequently voluntarily dismissed, may then reopen its proceedings and enter a new and different order. It is clear to me that the agency may not do so. I would affirm the district court, which dismissed

this action under section 63-46b-19(3), which provides:

In a proceeding for civil enforcement of an agency's order . . . a defendant may defend on the ground that:

(a) the order sought to be enforced was issued by an agency without jurisdiction to issue the order[.]

I agree with the district court that

[t]he dismissal of the appeal of the October 6, 1993 order ended the CSR's authority to make further orders and findings.

The October 6, 1993, order (the 1993 order) was captioned by CSR as a "Decision, Order, and Final Agency Action" (emphasis added). A petition for judicial review of that order was filed by Corrections in the court of appeals pursuant to section 63-46b-14(1), which provides, "A party aggrieved may obtain judicial review of final agency action . . ." (emphasis added). That petition was subsequently dismissed upon stipulation of the parties.

As was his statutory right, Parker sought civil enforcement of the 1993 order by CSR, but instead of promptly filing an enforcement action in the district court, CSR reopened the 1993 decree and proceeded to substantially amend it, including ordering Corrections to pay Parker the difference in salary and benefits between grade 23 and grade 17 instead of the difference between grades 23 and 21 as ordered in the 1993 decree. CSR apparently made this amendment because it learned that in August 1992, Parker had voluntarily applied for, competed for, and accepted employment as a truck driver at grade 17. None of the parties had notified CSR of this event prior to its making the 1993 order. However, the only grievance that Parker had filed with CSR was in April 1992 that he had been demoted from grade 23 to grade 21. He filed no additional grievance when he voluntarily accepted grade 17 employment. Finally, in October 1994, one year after CSR had made the 1993 final order, it made its 1994 order and sought its enforcement in the district court in this action.

The majority opinion correctly observes that there is no express statutory authority for CSR to amend a previously entered order that has become final and appealable. However, the majority holds that it had "inherent" authority to "reconsider Parker's grievance and modify its order in the light of" "subsequently discovered facts." I disagree.

First, there had not been any "subsequently discovered facts." When the 1993 decree was entered, Parker, more than one year earlier, had voluntarily applied for, competed for, and accepted employment at grade 17. For reasons which only he knows, he did not bring this fact to the attention of CSR before it entered its 1993 order. Nor did Parker ever file a grievance regarding his grade 17 employment. The CSR is limited by section 67-19a-407 to hearing appeals from the decisions of hearing officers on grievances filed by Career Service employees. Parker did not file a grievance, and a hearing officer has never made a decision regarding his grade 17 employment. Thus I can only conclude that Parker had no complaint with his grade 17 employment, because he voluntarily left his

grade 21 employment to seek it and did not file a grievance.

Second, and more fundamental, I am persuaded that in view of our statutory scheme contained in the Utah Administrative Procedures Act, 63-46b-0.5 to -22, the CSRB had no authority to open up the 1993 decree and grant Parker additional relief. The Act authorizes any party to file a written request for reconsideration within twenty days after final agency action. 63-46b-13. If reconsideration is not granted, then the agency's final order is subject to judicial review within thirty days. 63-46b-14. There is no provision for reconsideration or rehearing by the agency thereafter. The same A.L.R. annotation that the majority cites and relies upon, 73 A.L.R.2d 939, Power of Administrative Agency to Reopen and Reconsider Final Decision as Affected by Lack of Specific Statutory Authority, states:

The fact that a statute creating an administrative agency provided for an appeal to the courts to review its determinations of a judicial nature has been held a factor tending to show that the statute was not intended to confer the power of rehearing and reconsideration upon the agency.

73 A.L.R.2d at 957.

The leading case cited by the annotation for this statement is Magma Copper Co. v. Arizona State Tax Commission, 67 Ariz. 77, 191 P.2d 169, 175 (1948). There, the court held that the fact that a statute provided for an appeal from the decision of the commission was conclusive evidence that its decision should be final, that an appeal should constitute the exclusive remedy of the taxpayer, and that the commission could not rescind its order and enter a new order upon reconsideration. Similarly, in Olive Proration Program, Etc. v. Agricultural Prorate Committee, 17 Cal. 2d 204, 109 P.2d 918, 921 (1941), the court observed that the governing statute contained no provision giving the commission the authority to change its determination, and the fact that any order made by it may be reviewed in a judicial proceeding to be commenced within thirty days after its effective date was evidence of legislative intent to the contrary. See also Armijo v. Save 'n Gain, 108 N.M. 281, 771 P.2d 989, 994 (Ct. App. 1989) ("[I]n the absence of an express grant of authority, the power of any administrative agency to reconsider its final decision exists only where the statutory provisions creating the agency indicate a legislative intent to permit the agency to carry into effect such power.").

In attempting to demonstrate how CSRB regained jurisdiction after the voluntary dismissal of the review taken from the 1993 decree by Corrections, the majority cites and relies on cases from other jurisdictions which supposedly hold that when an appeal is dismissed, the lower court that entered the judgment regains jurisdiction of the case. Without taking the time or the space to analyze those cases here, suffice it to state that in Utah, after a district court has entered its final judgment and an appeal has been taken that is later voluntarily dismissed by the appellant, the district court does not have the authority to reopen its judgment, take additional evidence, and then alter or amend its judgment. There are a few narrow exceptions, such as a timely motion under rule 60(b), Utah Rules of Civil Procedure, and in divorce matters where jurisdiction is continuous as provided for in Utah Code Ann. 30-3-5. This same limitation on district courts would apply to administrative agencies. The majority relies on Clark v. Hansen, 631 P.2d 914 (Utah 1981), but there a rehearing was granted by the state engineer upon a timely motion before an appeal was taken.

The majority and concurring opinions attempt to make much of the fact that Corrections did not seek review of the 1994 order. Corrections was not required to do so. Section 63-46b-19(3)(a) provides, "In a proceeding for civil enforcement of an agency's order . . . a defendant may defend on the ground that . . . the order sought to be enforced was issued by an agency without jurisdiction to enter the order [.]" Thus in this enforcement action, Corrections correctly defended on the ground that the CSRB had no jurisdiction to amend the 1993 order by entering the 1994 order with its substantial changes. The trial court properly upheld that defense. The majority opinion recognizes in the last sentence of part II that lack of subject matter jurisdiction may be raised at any time.

In conclusion, there have been no real "subsequently discovered facts" here. Parker was working at grade 17 for more than one year before the 1993 decree was entered but did not inform the CSRB of that fact until after the decree had been entered. More fundamental, however, is the fact that the Utah Administrative Procedures Act requires agencies to make final orders and provides that reconsideration may be sought by any party for twenty days thereafter. Following that window for reconsideration, provision is made for a petition for review to be filed within thirty days. No further provision is made for agency action following an appeal except that the agency may enforce its order in the district court. But the agency's authority to enforce its orders does not include the authority to reconsider the order and enter a new one with material changes. It is fundamental that administrative agencies are created by statute and their authority is limited to that conferred upon them. As pointed out in Heap v. Los Angeles, 6 Cal. 2d 405, 57 P.2d 1323, 1324 (1936), if a commission can reopen a final order and make a new order, how many times can the commission do so, and within what time limits? Litigation must come to an end, and we should adhere to the orderly procedures set out in the Administrative Procedures Act, not circumvent them. Today's decision, with its "continuing jurisdiction" theme, introduces uncertainty and chaos into practicing before administrative agencies in this state.

Justice Russon concurs in the dissenting opinion of Justice Howe.

*This opinion is subject to revision before final
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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Marilyn Touchard, et al.,
Plaintiffs and Respondents,

No. 20050361

v.

La-Z-Boy Inc.,
Defendant and Petitioner.

F I L E D

November 17, 2006

Certification from the Federal Court

Attorneys: Erik Strindberg, Ralph E. Chamness, Salt Lake City,
for respondent
Jathan W. Janove, Salt Lake City, for petitioner

On Certification from the United States District Court
for the District of Utah, the Honorable Teena Campbell

DURHAM, Chief Justice:

INTRODUCTION

¶1 We accepted the following question on certification from the United States District Court for the District of Utah: "Whether the termination of an employee in retaliation for the exercise of rights under the Utah Workers' Compensation Act . . . implicates a 'clear and substantial public policy' of the State of Utah that would provide a basis for a claim of wrongful termination in violation of public policy." If we conclude that it does, the federal court then asks whether the cause of action applies (1) when "the employee is not fired but resigns under circumstances that constitute a 'constructive discharge'"; (2) when "the employee who has filed for benefits under the [Workers' Compensation Act] is neither fired nor constructively discharged, but experiences other discriminatory treatment or harassment from an employer"; or (3) when "the employee has not filed for benefits under the [Workers' Compensation Act] but is retaliated against for opposing an employer's treatment of other injured employees who are entitled to file for benefits under the [Act]." We hold that retaliatory discharge for filing a workers' compensation claim violates the public policy of this state; thus, an employee who has been fired or constructively discharged

in retaliation for claiming workers' compensation benefits has a wrongful discharge cause of action. We decline to extend this cause of action, however, to an employee who has suffered only harassment or discrimination or to an employee who has been retaliated against for opposing an employer's treatment of employees who are entitled to claim workers' compensation benefits.

ANALYSIS

¶2 When a federal court certifies a question of law to this court, we "are not presented with a decision to affirm or reverse." Robert J. Debry & Assocs. v. Qwest Dex, Inc., 2006 UT 41, ¶ 11, 144 P.3d 1079. Consequently, "traditional standards of review do not apply." Id. Moreover, "[o]n certification, we 'answer the legal questions presented' without 'resolving the underlying dispute.'" In re Kunz, 2004 UT 71, ¶ 6, 99 P.3d 793 (quoting Spackman ex rel. Spackman v. Bd. of Educ., 2000 UT 87, ¶ 1 n.2, 16 P.3d 533). We therefore proceed directly to our analysis of Utah law.

¶3 Under Utah law, all employment relationships "entered into for an indefinite period of time" are presumed to be at-will. Hansen v. Am. Online, Inc., 2004 UT 62, ¶ 7, 96 P.3d 950. When employment is at-will, either "the employer or the employee may terminate the employment for any reason (or no reason) except where prohibited by law." Id. Accordingly, an employer's decision to terminate an employee is presumed to be valid. Id. A discharged employee can overcome this presumption in three narrow situations by showing that

"(1) there is an implied or express agreement that the employment may be terminated only for cause or upon satisfaction of [some] agreed-upon condition; (2) a statute or regulation restricts the right of an employer to terminate an employee under certain conditions; or (3) the termination of employment constitutes a violation of a clear and substantial public policy."

Id. (alteration in original) (quoting Fox v. MCI Commc'ns Corp., 931 P.2d 857, 859 (Utah 1997)).

¶4 The federal court's questions invoke the public policy exception to the at-will rule. We have stated that "all employers have a duty not to terminate any employee, 'whether the employee is at-will or protected by an express or implied employment contract,' in violation of clear and substantial public policy." Ryan v. Dan's Food Stores, Inc., 972 P.2d 395,

404 (Utah 1998) (quoting Retherford v. AT&T Commc'ns of the Mountain States, Inc., 844 P.2d 949, 960 (Utah 1992)). "If an employer breaches that duty, an employee has a tort cause of action against the employer" for wrongful discharge. Id.

¶5 We thus begin our analysis by answering the federal court's first question: whether the termination of an employee for "the exercise of rights under the Utah Workers' Compensation Act . . . implicates a 'clear and substantial public policy'" that gives rise to a wrongful termination claim.

I. AN EMPLOYEE WHO HAS BEEN TERMINATED FOR EXERCISING RIGHTS UNDER THE WORKERS' COMPENSATION ACT HAS A WRONGFUL DISCHARGE CAUSE OF ACTION

¶6 A discharged employee has a cause of action under the public policy exception if his or her termination violated a "clear and substantial" public policy. Hansen v. Am. Online, Inc., 2004 UT 62, ¶ 7, 96 P.3d 950. We have previously identified four categories that invoke a "clear and substantial public policy": (1) discharging an employee for "refusing to commit an illegal or wrongful act"; (2) discharging an employee for "performing a public obligation"; (3) discharging an employee for "exercising a legal right or privilege"; and (4) discharging an employee for reporting an employer's criminal activities to the appropriate authorities. Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 408 (Utah 1998).

¶7 We have not yet had the opportunity to consider whether retaliatory discharge for claiming workers' compensation benefits falls under one of the public policy categories. We did mention workers' compensation claims as an example of the third category in Ryan, 972 P.2d at 408, but the issue was not before us in that case, nor had it been decided in any prior case. Thus, Ryan did not conclusively establish that claiming workers' compensation benefits constituted the exercise of a legal right or privilege for purposes of the public policy exception to the at-will rule. We now conduct that analysis.

¶8 Under the Utah Workers' Compensation Act (the Act), Utah Code Ann. §§ 34A-2-101 to -905 (2005 & Supp. 2006), "[a]n employee . . . who is injured . . . by accident arising out of and in the course of the employee's employment" is entitled to compensation pursuant to the provisions of the Act. Id. § 34A-2-401(1) (2005); see also id. § 34A-2-105(1) (2005). By its terms, the Act establishes that an employee injured in the course of employment has a right to receive workers' compensation benefits. Thus, if an employee's attempts to claim workers' compensation fall within one of the recognized categories of public policy, it

must be because it is "the exercise of a legal right or privilege."

¶9 Nevertheless, the fact that an employee can point to a legal right or privilege does not automatically mean that the employee has established a clear and substantial public policy for purposes of the exception to the at-will rule. We have recognized that the "exercise of a legal right or privilege" category "poses analytical challenges different from, and generally greater than, [the other categories of the public policy exception]." Hansen, 2004 UT 62, ¶ 10. With regard to the other categories, we have explained that "[a]n employer owes a duty to an employee . . . not to exploit the employment relationship by demanding that an employee choose between continued employment and violating a law or failing to perform a public obligation of clear and substantial import." Id. This is because an employer's use of termination to "coerce an employee to commit unlawful acts or avoid public obligations serves no legitimate economic objective and corrodes civil society." Id. In contrast, an employer's attempts to dissuade or prevent an employee from exercising a legal right may not always lack a legitimate objective. Rather, when the "exercise of a legal right" category is implicated, both the employer and the employee may be able to invoke public policy "in aid of their cause." Id. ¶ 11. This was the case in Hansen, where the employer terminated three employees for possessing firearms on business premises in violation of company policy. Id. ¶¶ 1-5. The employees argued that their termination contravened public policy because they had a constitutional "right to keep and bear arms," id. ¶¶ 13-14, while the employer invoked its right to maintain a safe workplace, see id. ¶ 14 & n.6. Recognizing that both the employer and the employee could support their positions with public policy, this court stated:

The analysis of whether the public policy exception applies to a particular legal right or privilege will frequently require a balancing of competing legitimate interests: the interests of the employer to regulate the workplace environment to promote productivity, security, and similar lawful business objectives, and the interests of the employees to maximize access to their statutory and constitutional rights within the workplace.

Id. ¶ 11.

¶10 Thus, under Hansen, we must determine whether an employee's exercise of his or her workers' compensation rights

invokes a clear and substantial public policy that outweighs the employer's interests in "regulat[ing] the workplace environment to promote productivity, security, and similar lawful business objectives." Id.

A. Workers' Compensation Is a Clear
and Substantial Public Policy

¶11 In order to conduct the balancing required by Hansen, we first determine whether the exercise of workers' compensation rights amounts to a public policy that is both clear and substantial. We make determinations of "clear and substantial" public policy under the at-will rule on a case-by-case basis. Indeed, we have stated that

determining what employee conduct implicates or furthers a clear and substantial public policy is a still-developing inquiry. Although we have established certain conduct that will almost always implicate a clear and substantial public policy . . . there are other situations that we will have to address as they come before us.

Ryan, 972 P.2d at 408. When making determinations of public policy for purposes of the exception to the at-will rule, we "will construe public policies narrowly[,] . . . applying only those principles which are so substantial and fundamental that there can be virtually no question as to their importance for promotion of the public good." Berube v. Fashion Ctr., Ltd., 771 P.2d 1033, 1043 (Utah 1989). This is much narrower "than what may typically be characterized as 'public policy.'" Ryan, 972 P.2d at 405 (defining public policy as "'community common sense and common conscience' and 'general and well-settled public opinion relating to [people's] plain, palpable duty to [others].'" (alterations in original) (quoting Black's Law Dictionary, 1231 (6th ed. 1990))).

¶12 We begin our discussion of the status of workers' compensation under the public policy exception by addressing whether the exercise of workers' compensation rights furthers a clear public policy. We conclude that it does. "A public policy is 'clear' only if plainly defined by legislative enactments, constitutional standards, or judicial decisions." Ryan, 972 P.2d at 405. In this case, the Utah Legislature has declared that "[a]n employee . . . who is injured . . . by accident arising out of and in the course of the employee's employment" is entitled to compensation pursuant to the provisions of the Act. Utah Code Ann. § 34A-2-401(1); see also id. § 34A-2-105(1). An employee's right to compensation for injuries sustained in the course of

employment arises "irrespective of negligence on the part of employers or employees." Sheppick v. Albertson's, Inc., 922 P.2d 769, 773 (Utah 1996). In accordance with the Act's requirement that an employee injured in the course of employment has the right to compensation, the Act requires an employer to "secure the payment of workers' compensation benefits for its employees," Utah Code Ann. § 34A-2-201 (2005), and imposes criminal penalties on employers who fail to comply, id. § 34A-2-209 (2005). We think that by adopting the Act and imposing penalties on an employer for noncompliance, the legislature plainly established the public policy that an employee injured in the scope of employment has the right to receive compensation.

¶13 However, it is not enough that a public policy be clear; it must also be substantial. To determine whether a public policy is substantial, we conduct a two-step inquiry. First, we ask "whether the policy in question is one of overarching importance to the public as opposed to the parties only." Retherford v. AT&T Commc'ns of the Mountain States, Inc., 844 P.2d 949, 966 (Utah 1992). A policy that affects a duty that inures solely to the benefit of the employer and employee is generally insufficient to give rise to a substantial and important public policy. Ryan, 972 P.2d at 405. Second, we ask "whether the public interest is so strong and the policy so clear and weighty that we should place the policy beyond the reach of contract, thereby constituting a bar to discharge that parties cannot modify, even when freely willing and of equal bargaining power." Retherford, 844 P.2d at 966.

¶14 We conclude that workers' compensation is a policy of "overarching importance to the public, as opposed to the parties only." Id. at 966. This court has previously discussed the policy underlying workers' compensation. "The Workers' Compensation Act was enacted to provide economic protection for employees who sustain injuries arising out of their employment, therefore alleviating hardship upon workers and their families." Drake v. Indus. Comm'n, 939 P.2d 177, 182 (Utah 1997) (internal quotation marks omitted). Accordingly, we have stated that we will liberally construe the Act in favor of employee compensation. Olsen v. Samuel McIntyre Inv. Co., 956 P.2d 257, 260 (Utah 1998). While workers' compensation provides economic support for injured workers and their families, it was not enacted solely for their benefit. Rather, workers' compensation was designed to "provide speedy compensation" to injured workers, Sheppick, 922 P.2d at 773, thereby "reliev[ing] society of the care and support of the unfortunate victims of industrial accidents." Reteuna v. Indus. Comm'n, 185 P. 535, 537 (Utah 1919) (emphasis added). Indeed, this court has stated, "The theory of workmen's compensation is based largely upon the doctrine that society itself is vitally concerned in the prompt

payment of compensation to injured and the dependents of killed employs [sic]. It is a matter relating to the promotion of the general welfare." Id. (emphasis added) (quoting Rosen Steel v. Niles Forge & Mfg. Co., 7 Neg. & Comp. Cases Ann. 798).

¶15 The text of the Act lends further support to the proposition that workers' compensation is not just a private benefit affecting only the interests of the employer and the employee. For example, the Act provides a means by which an injured employee can obtain compensation even where his or her employer fails to comply with the Act's requirements. Utah Code Ann. § 34A-2-208(1) (2005). To this end, the Act creates the Uninsured Employers' Fund to "assist[] in the payments of workers' compensation benefits to any person entitled to the benefits, if: . . . that person's employer . . . does not have sufficient funds . . . to cover workers' compensation liabilities." Id. § 34A-2-704(1) (2005). Moreover, an employer who fails to provide sufficient workers' compensation insurance "is guilty of a class B misdemeanor." Id. § 34A-2-209(1)(a)(I). Similarly, it is a criminal misdemeanor for an employer to "deduct[] any portion of the [workers' compensation insurance] premium from the wages or salary of any employee entitled to the benefits of [the Act]." Id. § 34A-2-108(3) (2005).

¶16 Workers' compensation not only is a "question . . . of . . . importance to the public," but also furthers a "public interest [that] is so strong . . . that we should place the policy beyond the reach of contract." Retherford, 844 P.2d at 966. Evidence of this lies within the text of the Act itself. Section 34A-2-108(1) declares that "an agreement by an employee to waive the employee's rights to compensation . . . is not valid."¹ Similarly, that section provides that an employee's agreement "to pay any portion of the [insurance] premium paid by his employer is not valid." Id. § 34A-2-108(2). Thus, by statute, an employer cannot relieve itself of its obligation to provide workers' compensation by asking employees to contract

¹ We note that section 34A-2-108 does provide for the settlement of workers' compensation claims in accordance with Utah Code section 34A-2-420. Section 34A-2-420(4) permits the parties to agree to a "settlement of disputed medical, disability, or death benefit entitlements" or the "commutation and settlement of reasonable future medical, disability, or death benefit entitlements." Id. 34A-2-420(4) (2005) (emphasis added). An administrative law judge must "review and . . . approve" these agreements. Utah Code Ann. § 34A-2-420(4). Thus, this section does not alter our conclusion that the Act does not allow an employee to contract away his or her workers' compensation rights.

away their rights. The legislature itself has placed workers' compensation "beyond the reach of contract." It follows that an employer should not be able to free itself of its workers' compensation obligations by discharging employees entitled to workers' compensation benefits. Accordingly, we hold that workers' compensation constitutes public policy that is both clear and substantial.

B. The Clear and Substantial Public Policy Underlying Workers' Compensation Outweighs La-Z-Boy's Interests

¶17 Having concluded that workers' compensation represents a clear and substantial public policy, we now must weigh that policy against La-Z-Boy's interests. In this case, La-Z-Boy has invoked the policy that underlies at-will employment--that employers ought to be able "to manage their workforces" and regulate their workplace environments "to promote productivity, security, and similar lawful business objectives." However, an employer's ability to regulate its workforce primarily inures to the benefit of the employer and the employee, not to the public in general. Moreover, while there may be public policies underlying an employer's general ability to manage its employees free from judicial interference, we can think of no public policy that would be furthered by permitting employers to discharge employees who seek to exercise their workers' compensation rights.

¶18 In contrast to La-Z-Boy's stated interests, La-Z-Boy's employees raise a public policy that provides a benefit outside of the private employer-employee relationship. By design, workers' compensation benefits the public as a whole. See supra ¶ 14. It follows, then, that limiting an employer's ability to interfere with workers' compensation serves the greater good. We therefore conclude that in order to give effect to the legislature's pronouncement that workers' compensation is in the public's interest, an employer's right to workplace autonomy must yield.² Accordingly, an employer owes its employees a duty "not

² This conclusion does not mark the first time an employer's interest in workplace autonomy has been outweighed by public interests. For example, an employer is not free to maintain an unsafe working environment, 29 U.S.C. § 654 (2000) (requiring employers to provide safe workplace environments in compliance with the federal Occupational Safety and Health Act), to compensate employees below the minimum wage, Utah Code Ann. §§ 34-40-101 to -106 (2005) (requiring employers to pay the minimum wage), or to make employment decisions, such as hiring or firing, based on race, national origin, sex, religion, pregnancy, (continued...)

to exploit the employment relationship" by forcing employees to choose between their jobs and compensation under the Act. See Hansen, 2004 UT 62, ¶ 10.

¶19 We therefore hold that an employee's exercise of workers' compensation rights constitutes the "exercise of a legal right" that embodies a clear and substantial public policy. An employer who terminates an employee in retaliation for the employee's exercise of that right has violated a clear and substantial public policy and may be sued for wrongful discharge by the discharged employee.

C. The Act Does Not Preempt Our Holding that Employees Terminated for Exercising Their Workers' Compensation Rights Have a Wrongful Discharge Cause of Action

¶20 La-Z-Boy has argued that the Act prohibits this court from using workers' compensation as the basis of a wrongful discharge cause of action because (1) the Act does not include a retaliation provision, and (2) the Act provides employees with their "exclusive remedy" against their employer.

¶21 La-Z-Boy notes, correctly, that the Act does not contain a provision that forbids an employer to discharge an employee in retaliation for claiming workers' compensation. According to La-Z-Boy, this court should not allow an employee who has been the subject of a retaliatory termination to bring a wrongful discharge cause of action in the absence of an anti-retaliation provision. To lend support to its argument, La-Z-Boy points to this court's general reluctance to construe a statute to include a private cause of action where the statute does not specifically provide one. It is true that Utah courts are reluctant to imply a private statutory cause of action in the absence of express statutory language. Buckner v. Kennard, 2004 UT 78, ¶ 40, 99 P.3d 842. In this case, however, we are not determining whether the Act includes a private statutory cause of action. Rather, we are applying our common law wrongful discharge cause of action to retaliatory termination for the exercise of rights guaranteed by the Act. Because wrongful discharge is a common law claim, this determination is entirely within our province. The lack of an anti-retaliation provision in the Act does not affect this court's ability to recognize this state's public policy for purposes of a wrongful discharge cause of action.

² (...continued)
or disability, Utah Code Ann. § 34A-5-106 (2005) (prohibiting employers from making discriminatory employment decisions).

¶22 Moreover, the absence of an anti-retaliation provision does not diminish the Act's function as a source of clear and substantial public policy. There would be no more effective means of undermining the purposes behind the Act than allowing an employer to terminate an employee in retaliation for filing workers' compensation claims. See Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 427 (Ind. 1973). As the Indiana Supreme Court stated:

The [Workers' Compensation Act] creates a duty in the employer to compensate employees for work-related injuries (through insurance) and a right in the employee to receive such compensation. But in order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation--opting, instead to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation.

Id. (construing a provision in the Indiana workers' compensation statute that prohibited an employer's use of any "device" to relieve the employer of his workers' compensation obligations). In other words, the recognition of a retaliatory discharge cause of action for seeking workers' compensation benefits is essential to maintaining an employee's rights under the Act.

¶23 Other courts have also concluded that workers' compensation implicates a clear public policy for wrongful discharge purposes despite the lack of a statutory prohibition against retaliation. For example, in Hansen v. Harrah's, 675 P.2d 394, 395 (Nev. 1984), two casino workers brought wrongful discharge suits alleging they were terminated for filing workers' compensation claims. The Nevada Supreme Court held that the "failure of the legislature to enact a statute expressly forbidding retaliatory discharge for filing workmen's compensation claims [did] not preclude [the court] from providing a remedy for what [it] conclude[d] to be tortious behavior." Id. at 396. In so holding, the court reasoned that "Nevada's workmen's compensation laws reflect a clear public policy

favoring economic security for employees injured while in the course of their employment." Id. Furthermore, the court realized that "[f]ailure to recognize the cause of action of retaliatory discharge for filing a workmen's compensation claim would only undermine [the Nevada Workmen's Compensation Act] and the strong public policy behind its enactment." Id. Other states have used similar reasoning to adopt a public policy exception to the at-will rule to make discharge in retaliation for filing workers' compensation claims an actionable tort. See Lathrop v. Entenmann's, Inc., 770 P.2d 1367, 1373 (Colo. Ct. App. 1989) (concluding that "since an employee is granted the specific right to apply for and receive compensation under the [Workers' Compensation Act], an employer's retaliation against such an employee for his exercise of such right violates Colorado's public policy . . . [that] provides the basis for a common law claim by the employee to recover damages sustained . . . as a result"); Kelsay v. Motorola, Inc., 384 N.E.2d 353, 358-61 (Ill. 1978) (recognizing that the Illinois Legislature did not intend to make injured employees choose between compensation and their jobs and thus holding that the plaintiff had a retaliatory discharge cause of action, despite the lack of a legislative anti-retaliation pronouncement at the time of discharge); Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs., 630 P.2d 186, 192-93 (Kan. Ct. App. 1981) (holding that the plaintiff alleged a valid cause of action for retaliatory discharge where he was terminated for claiming workers' compensation rights, despite the lack of a retaliation provision in the Act, because allowing an employer "to coerce employees in the free exercise of their rights under the act would substantially subvert the purpose of the act"); Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730, 732-34 (Ky. 1983) (recognizing a cause of action for discharge in retaliation for filing workers' compensation claims even though, at the time, the Kentucky Workers' Compensation Act did not contain a retaliation provision); Jackson v. Morris Commc'ns Corp., 657 N.W.2d 634, 640-41 (Neb. 2003) (recognizing that the Nebraska Workers' Compensation Act "was promulgated to serve an important public purpose" that would be undermined if employees fear retaliation, and thus recognizing a public policy exception to the at-will rule for retaliatory discharge due to the exercise of workers' compensation rights even though the statute did not contain an anti-retaliation provision); Shick v. Shirey, 716 A.2d 1231, 1237 (Pa. 1998) (holding that the "termination of an at-will employee for filing a workers' compensation claim violates public policy" despite the lack of a retaliation provision in the statute).

¶24 We also hold that the exclusivity provision of the Act does not bar an employee's wrongful discharge cause of action. Under the Act, "[t]he right to recover compensation . . . for injuries sustained by an employee . . . shall be the exclusive

remedy against the employer." Utah Code Ann. § 34A-2-105. However, "[i]t is well settled that the Act covers only mental and physical injuries sustained on the job." Shattuck-Owen v. Snowbird Corp., 2000 UT 94, ¶ 19, 16 P.3d 555. Accordingly, the exclusivity provision only "bars common-law tort actions requiring proof of physical or mental injury." Id. In this case, the employees' wrongful discharge cause of action does not arise out of work-related physical or mental injuries. Therefore, the exclusivity provision does not hinder an employee's wrongful discharge cause of action brought against an employer who has discharged an employee in retaliation for the employee's exercise of rights.

¶25 Having concluded that an employee who has been terminated for exercising his or her workers' compensation rights has a wrongful discharge cause of action under the public policy exception to the at-will rule, we turn to the federal court's remaining questions of whether this cause of action extends to constructive discharge, to workplace discrimination or harassment, or to the termination of an employee who has not actually sought compensation but who has opposed his or her employer's treatment of injured employees.

II. THE WRONGFUL DISCHARGE CAUSE OF ACTION EXTENDS TO CONSTRUCTIVE DISCHARGE

¶26 This court has not had the opportunity to address whether an employee who has been constructively discharged has a wrongful discharge cause of action. However, the Utah Court of Appeals has addressed this question. In Sheikh v. Department of Public Safety, the court of appeals held that "an employee who believes that he or she has been constructively discharged may bring an action for discrimination [based on pregnancy] because 'an involuntary or coerced resignation is equivalent to a discharge.'" 904 P.2d 1103, 1107 (Utah Ct. App. 1995) (quoting Bulaich v. AT&T Info. Sys., 778 P.2d 1031, 1033 (Wash. 1989) (internal quotation marks omitted)). In so holding, the court of appeals defined constructive discharge as resignation under "working conditions that a reasonable person would view as intolerable." Id. Like the court of appeals, other jurisdictions have recognized that a constructive discharge is the same as an actual discharge. See, e.g., Breitsprecher v. Stevens Graphics, Inc., 772 So. 2d 1125, 1130 (Ala. 2000) (recognizing that an employee who was constructively discharged for claiming workers' compensation benefits had a wrongful discharge cause of action against her former employer); Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380, 385 (Ark. 1988) (upholding a wrongful discharge jury instruction based on substantial evidence of constructive discharge); Casenas v. Fujisawa USA, Inc., 67 Cal. Rptr. 2d 827, 835 (Ct. App. 1997) ("[A]

constructive discharge is legally regarded as a firing rather than a resignation."); Lathrop v. Entenmann's, Inc., 770 P.2d 1367, 1372-73 (Colo. Ct. App. 1989) (holding that an employee who claimed that he had been constructively discharged for filing a workers' compensation claim had stated a proper wrongful discharge claim); GTE Prods. Corp. v. Stewart, 653 N.E.2d 161, 168 (Mass. 1995) (recognizing that "constructive discharge is legally regarded as a firing rather than a resignation").

¶27 We agree with the Utah Court of Appeals and hold that a resignation under working conditions that a reasonable employee would consider intolerable is equivalent to a termination. Thus, an employee's cause of action for wrongful discharge as a result of the exercise of workers' compensation rights extends to constructive discharge. Holding otherwise would make it possible for employers both to escape their obligations to provide compensation by retaliating against injured employees with intolerable working conditions and to avoid a wrongful discharge cause of action by never actually terminating the employee. Just as allowing an employer to terminate an injured employee seeking compensation undermines the purpose of the Act, so too does allowing an employer to make conditions so intolerable that an employee has no choice but to resign. Therefore, we believe that recognizing constructive discharge as actual termination is necessary to give effect to the purposes of the Act.

III. THE WRONGFUL DISCHARGE CAUSE OF ACTION DOES NOT EXTEND TO RETALIATORY HARASSMENT OR DISCRIMINATION

¶28 Having concluded that the public policy exception applies to both actual and constructive discharge, we now address the district court's question regarding whether the wrongful discharge cause of action extends to retaliatory harassment or discrimination. To answer this question, we look to the elements of wrongful discharge. "To make out a prima facie case of wrongful discharge, an employee must show (i) that his employer terminated him; (ii) that a clear and substantial public policy existed; (iii) that the employee's conduct brought the policy into play; and (iv) that the discharge and the conduct bringing the policy into play are causally connected." Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 404 (Utah 1998) (emphasis added) (footnotes omitted). When an employee alleges only retaliatory harassment or discrimination, that employee has failed to satisfy the first element and the wrongful discharge tort does not apply.

¶29 Moreover, we decline the invitation to create a new cause of action for retaliatory harassment or discrimination. While retaliatory discrimination or harassment is deplorable, it does not implicate a clear and substantial public policy to the same extent as a discharge. When an employee is discharged in

retaliation for pursuing a workers' compensation claim, that employee is placed in the untenable position of choosing between receiving compensation or maintaining employment. Because most employees would choose to retain their jobs, this would in turn relieve employers of their obligations under the Act. See Frampton v. Cent. Indiana Gas Co., 297 N.E.2d 425, 427 (Ind. 1973) (recognizing that when employees are forced to choose between their job and compensation, they will generally choose their job, the end result of which relieves the employer of his workers' compensation obligation). We do not think this policy applies to the same extent when the employee suffers unpleasantness, not amounting to constructive discharge, and does not have the fear of losing his or her employment.

¶30 In addition, we are concerned that creating a new cause of action for harassment would expand the public policy exception to the at-will rule beyond its intended narrow scope and encourage myriad claims against employers. The concept of discharge is fairly concrete--either the employer actually terminated the employee or the employee resigned under circumstances so unbearable that no reasonable employee could tolerate them. However, discrimination and harassment have the potential to implicate a much broader range of behavior, including demotions, salary reductions, job transfers, or disciplinary actions. See Zimmerman v. Buchheit of Sparta, Inc., 645 N.E.2d 877, 882 (Ill. 1994) (stating the adoption of a cause of action short of termination would "replace the well-developed element of discharge with a new, ill-defined, and potentially all-encompassing concept of retaliatory conduct or discrimination"). If employees were allowed to bring a cause of action for retaliatory discrimination, we fear the courts "would be called upon to become increasingly involved in the resolution of workplace disputes which center on employer conduct that heretofore has not been actionable at common law." Id. We therefore decline to extend the public policy exception to the at-will rule to encompass retaliatory discrimination. See Mintz v. Bell Atl. Sys. Leasing Int'l, 905 P.2d 559, 562 (Ariz. Ct. App. 1995) (refusing to recognize a cause of action for "wrongful failure-to-promote" where an employee claimed she had not been promoted due to retaliation against her for filing a sex discrimination claim); Zimmerman, 645 N.E.2d at 882 (refusing to "extrapolate . . . a cause of action predicated on retaliatory demotion" from a wrongful discharge tort); Below v. Skarr, 569 N.W.2d 510, 512 (Iowa 1997) (holding that "claimed harassment of a worker, including threatened termination, does not give rise to a claim at common law").

¶31 Much as we might lament the suffering of an employee who has been harassed for exercising his or her statutory rights, it is not our prerogative to remedy the situation in the absence

of a clear and substantial public policy. Employees under these circumstances should look to the legislature to define their recourse against employers who discriminate against them in retaliation for claiming the compensation to which they are entitled. Indeed, many states have enacted such legislation. See, e.g., Conn. Gen. Stat. § 31-290a (2005) (prohibiting the discharge of or discrimination against an employee who has exercised workers' compensation rights and granting employees a private cause of action against employers who violate the statute); Mo. Rev. Stat. § 287.780 (2000) (same); N.C. Gen. Stat. § 95-241 (2005) (prohibiting retaliatory discrimination against employees who have filed workers' compensation claims). Until our legislature joins these states, employees who have suffered retaliatory discrimination as a result of claiming workers' compensation benefits do not have a cause of action against their employers.

IV. THE WRONGFUL DISCHARGE CAUSE OF ACTION DOES NOT
EXTEND TO AN EMPLOYEE WHO OPPOSES HER EMPLOYER'S TREATMENT OF
OTHER EMPLOYEES WHO ARE ENTITLED TO WORKERS' COMPENSATION
BENEFITS

¶32 The final question the federal court has asked us to address is whether an employee who opposes her employer's treatment of injured employees has a wrongful discharge cause of action under the public policy exception to the at-will rule. To fully respond to this inquiry, however, we must recite the relevant facts.³

¶33 La-Z-Boy hired Marilyn Touchard to serve as an "environmental/assistant safety manager." Her job responsibilities included investigating the cause of La-Z-Boy's high workers' compensation costs. After conducting her investigation, Ms. Touchard wrote La-Z-Boy a memorandum concluding that the company had a high injury rate and that employees were "waiting for extensive periods of time to receive treatment, diagnostic testing, and/or resolution of their claims, due to the intentional mismanagement of their claims." Ms. Touchard also informed La-Z-Boy that its claims adjuster was "hostile" toward employees who filed workers' compensation claims and "documented that [the claims adjuster] attempted to deny

³ The facts we recite here are those alleged by the employees in their complaint before the federal court and in their brief before this court. We need only look to the facts as alleged to determine whether the plaintiffs have pled a valid cause of action under Utah law. We do not, however, comment upon the veracity of the plaintiffs' allegations.

benefits to . . . an employee with a documented work-related injury and extensive work history with the company."

¶34 In addition to her job investigating La-Z-Boy's workers' compensation costs, Ms. Touchard was the head of the ergonomics team. In this capacity, Ms. Touchard conducted a study and submitted a memorandum concluding that the practices employed on the upholstery production line could cause shoulder injuries.

¶35 The allegations of the complaint are that after submitting the memorandum detailing the problems in La-Z-Boy's production line, Ms. Touchard met with Mr. Smith, the Human Resources Director, and informed him of her belief that the "alternate duty assignments" given to injured employees were demeaning. Moreover, she informed him that employees were deciding not to report injuries to avoid being harassed by management. She alleges that, as a result of her complaint, Mr. Smith began criticizing her, recommending that she be "written up," and delaying the implementation of programs she had recommended.

¶36 Several months after meeting with Mr. Smith, Ms. Touchard met with Mr. Garren, La-Z-Boy's vice president. At this time, Mr. Garren "falsely accused Ms. Touchard of coaching employees on how they could sue La-Z-Boy and told her that she could not tell employees they had a legal right to contact Utah's Labor Commission" (emphasis added). A few months after this incident, Ms. Touchard voiced her objections to the proposed adoption of a "120-day return to work rule." She alleges that at this time Mr. Garren "got angry with [her] and told her she was never to discuss employees' rights with the employees."

¶37 The final incident alleged by Ms. Touchard is that she reported to Mr. Garren that an employee had been injured and that his benefits were being improperly denied. At this time, she was allegedly told "that she would be fired if she ever talked to any employees about their Workers' Compensation issues or their injuries." Several months after this final meeting, Ms. Touchard took maternity leave, during which she was informed she had been terminated and her position had been filled. Ms. Touchard's complaint alleges that La-Z-Boy terminated her "because she opposed its practices of abusing employees who applied for [workers' compensation benefits] and maintaining an unsafe workplace." The employees' brief asserts that Ms. Touchard was fired for "inform[ing] injured workers of their rights to workers' compensation." While the complaint does allege that Ms. Touchard was warned not to discuss workers' compensation claims with La-Z-Boy employees and was accused of "coaching employees on how they could sue La-Z-Boy," an accusation her brief claims was

false, she has not pled that she actually discussed workers' compensation benefits with La-Z-Boy employees or assisted them in pursuing claims.

¶138 We hold that Ms. Touchard's opposition to her employer's workers' compensation practices does not implicate a clear and substantial public policy of this state. This is not the first time this court has addressed whether an employee terminated for reporting to her employer potential policy or criminal violations has a cause of action under the public policy exception to the at-will rule. In Heslop v. Bank of Utah, 839 P.2d 828 (Utah 1992), we were asked whether Mr. Heslop, a senior vice president and manager of the bank's Salt Lake Division, had a cause of action for wrongful discharge. Id. at 831. Specifically, Mr. Heslop alleged that he had been terminated for reporting to a bank officer and the bank president that the bank had misstated its income and assets, thereby creating a deficiency between the bank's stated capital and its actual capital. Id. While Mr. Heslop eventually reported the deficiency to federal and state bank regulators, id. at 832, this court recognized that Mr. Heslop's reporting furthered a substantial public policy because he "pursued all internal methods for resolving the problem." Id. at 838. This court did not require him to go "outside the Bank to try to correct the policy violation." Id.

¶139 Several years later, we returned to the reporting question in Fox v. MCI Communications Corp., 931 P.2d 857 (Utah 1997). In Fox, a sales representative reported to her employer that her coworkers were "making existing customer accounts appear new on the corporate records so that they could meet sales quotas and earn higher commissions." Id. at 858-59. She was terminated shortly after reporting her coworkers' practices. Id. The employee claimed she had been terminated in violation of public policy because her internal reporting furthered the public policy found in the sections of the Utah Code that criminalized computer-assisted fraud, Utah Code Ann. § 76-6-703 (1995), and "acts of fraud or embezzlement," Utah Code Ann. §§ 76-6-403, 405 (1995), as well as a statute regulating corporate responsibility, Utah Code Ann. § 76-2-204 (1995). Fox, 931 P.2d at 859. This court disagreed. Id. at 861. While we recognized that the criminal code implicated a clear and substantial public policy, id. at 860, we held that "if an employee reports a criminal violation to an employer, rather than to public authorities, and is fired for making such reports, that does not, in our view, contravene a clear and substantial public policy." Id. In so holding, we explained that "[a]lthough employees may have a duty to disclose information concerning the employer's business to their employer, that duty ordinarily serves the

private interest of the employer, not the public interest." Id. at 861.

¶40 Despite its holding, Fox did not eliminate a cause of action for internal reporting in all cases. We recognized as much in Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 408 n.7 (Utah 1998). While internal reporting was not at issue in Ryan, we discussed both Heslop and Fox in a footnote to illustrate that "determining what employee conduct . . . furthers a clear and substantial public policy is a still-developing inquiry." Id. at 408 & n.7. The footnote suggests that Fox held only that internal reporting does not automatically further a clear and substantial public policy. See id. at 408 n.7. Specifically, we stated, "Although Heslop suggests that any internal reporting will support a wrongful discharge claim, we emphasize that only internal reporting that furthers a clear and substantial public policy will satisfy the third element of a wrongful discharge claim." Id. We now endorse this conclusion anew and hold that internal reporting can give rise to a wrongful discharge cause of action where it furthers a clear and substantial public policy.

¶41 Thus, the inquiry in this case is whether Ms. Touchard's complaints to La-Z-Boy management about La-Z-Boy's workers' compensation and ergonomic practices furthered a clear and substantial public policy. As we have previously stated, we "narrowly construe the public policies' which might be used to support a public policy claim." Ryan, 972 P.2d at 405 (quoting Peterson v. Browning, 832 P.2d 1280, 1282 (Utah 1992)). Although we rely on the Workers' Compensation Act to conclude that an employee who is terminated for exercising his or her workers' compensation rights has a wrongful discharge cause of action, it does not follow that all employee complaints relating to workers' compensation also further the same clear and substantial public policy.

¶42 We first discuss Ms. Touchard's objections to the menial tasks being assigned to injured employees. Reporting employee harassment in retaliation for the employees' exercise of workers' compensation rights does not further a clear and substantial public policy. The assignment of demeaning job responsibilities in retaliation for the exercise of workers' compensation rights constitutes harassment. As we discussed in the previous section, an employee who has claimed that he or she was harassed for filing a workers' compensation claim does not have a cause of action under our wrongful discharge tort or under the Act. Because the La-Z-Boy employees who have been assigned demeaning tasks do not have a cause of action, it follows that Ms. Touchard also does not have a cause of action for complaining about the way in which the employees were being treated.

¶43 Likewise, Ms. Touchard's complaints about La-Z-Boy's management of claims did not further a clear and substantial public policy. Ms. Touchard told La-Z-Boy that she believed claims were being "intentionally mismanaged," that La-Z-Boy's claims adjuster had a hostile attitude toward injured employees who sought workers' compensation benefits, and that the claims adjuster had, in the past, attempted to deny a claim to an employee with a documented injury. Ms. Touchard reported her findings as a result of an investigation, which she was hired to conduct, regarding La-Z-Boy's workers' compensation costs. Thus, it appears she conducted her study and reported her findings to further her employer's interests, to wit: to determine the cause of high workers' compensation costs. However, even if her reported findings furthered a public interest, we do not think it was sufficiently clear and substantial. Reporting the attempted denial of a past claim, however valid, does little to prevent an employer from avoiding its current or future obligations under the Act. Further, we think we would be construing public policy too broadly if we were to hold that an employee's complaint about a hostile claims adjuster or mismanagement of claims further a clear and substantial public policy. We fear that such a construction would render any complaint about an employer's workers' compensation practices actionable.

¶44 Moreover, Ms. Touchard's objections to the production line and the proposed 120-day rule did not invoke the actual policies furthered by the Workers' Compensation Act. For example, her claim that the production line had the potential to cause shoulder injuries did not directly implicate her employer's obligation to compensate employees for injuries incurred in the scope of employment; rather, it appears that Ms. Touchard's report regarding the ergonomics of the production line furthered the private interests of La-Z-Boy and its employees. Indeed, one reason to have an ergonomics team is to minimize employee injuries, thereby preventing a decrease in work productivity and an increase in workers' compensation claims. Likewise, while Ms. Touchard was opposed to the 120-day return-to-work rule, there is no indication that an employer may not implement such a rule under the Act. Ms. Touchard has not provided us with any evidence suggesting that her opposition to this rule furthered a clear and substantial public policy.

¶45 We note that Ms. Touchard's complaints about La-Z-Boy policies were all made in furtherance of her job duties. La-Z-Boy hired her to conduct investigations regarding both workers' compensation and ergonomics. Ms. Touchard did so, and as part of these duties, reported her concerns and recommendations to La-Z-Boy. Employers are free to create internal monitoring or investigation positions. While the public may benefit when an employer chooses to create such a position, the creation of an

investigatory or supervisory position is likely designed to serve the employer's private interests by minimizing its risk of liability. See Robinson v. Wal-Mart Stores, Inc., 341 F. Supp. 2d 759, 763 (W.D. Mich. 2004) (noting that an employee's complaints to the employer were made with "an eye toward correcting [improprieties in employer's wage and work hour reporting practices] and minimizing [the employer's] risk of liability"). Just as employers are free to create such positions, they likewise are free to disagree with the findings made by such employees and terminate employees who make findings with which the employer does not agree.

¶46 Finally, we hold that Ms. Touchard's allegation that she challenged La-Z-Boy's purported unfair treatment of an employee's claim also did not further a clear and substantial public policy. In this case, there is no evidence that Ms. Touchard was responsible for processing or overseeing claims or that she had any personal knowledge regarding the employee's claim. The public policy exception would be expanded beyond its intended narrow scope if we were to hold that an employee with no authority over or personal knowledge of an individual workers' compensation claim has a cause of action for expressing her beliefs about the propriety of the employer's treatment of that claim. We fear that if we were to so hold, employers could be held hostage by employees who complain about matters of which they have no personal knowledge.

¶47 We commend Ms. Touchard's willingness to express her objections to her employer's practices that she believed were unfair, but her complaints cannot be viewed to further a clear and substantial public policy. We therefore hold that Ms. Touchard does not have a wrongful discharge cause of action for complaining about La-Z-Boy's treatment of injured employees.⁴

⁴ We note that our holding is limited to the question certified to us--whether an employee who opposes an employer's treatment of employees who are entitled to workers' compensation has a wrongful discharge cause of action. Our opinion in this case does not address whether a wrongful discharge cause of action exists for an employee who goes beyond opposing employer practices and actually assists injured employees to file workers' compensation claims. Cf. McKenzie v. Renberg's Inc., 94 F.3d 1478, 1486 (10th Cir. 1996) (holding that a personnel manager who was terminated for reporting violations of the federal Fair Labor Standards Act did not allege a cause of action under that Act's anti-retaliation provision because she reported the violations within the scope of her employment, but recognizing that she would have had a cause of action under the anti-retaliation

(continued...)

CONCLUSION

¶48 Based on the foregoing, we hold that retaliatory discharge for filing workers' compensation violates this state's clear and substantial public policy as pronounced by the Workers' Compensation Act. Thus, an employee who has been terminated or constructively discharged from his or her job in retaliation for the exercise of workers' compensation rights has a wrongful discharge cause of action against his or her employer under the public policy exception to the at-will rule. However, we do not believe the same policy is implicated when an employee suffers retaliatory harassment or discrimination, or when an employer discharges an employee who opposes the employer's treatment of employees who are entitled to benefits.

¶49 Associate Chief Justice Wilkins, Justice Durrant, Justice Parrish, and Justice Nehring concur in Chief Justice Durham's opinion.

⁴ (...continued)

provision if she had "actively assist[ed] other employees in asserting their FLSA rights"). While the briefs in this case address whether a coworker's assistance furthers a clear and substantial public policy, that is not the question certified to us by the federal court, nor has Ms. Touchard alleged, either before us or in her complaint before the federal court, that she ever actually assisted an employee in filing a workers' compensation claim. Moreover, our opinion today does not address whether a wrongful discharge cause of action exists when an employer fires an employee who refused to follow the employer's order to interfere with an employee's workers' compensation claim, see Wilkerson v. Standard Knitting Mills, Inc., 1989 Tenn. App. LEXIS 666, *1-3, 7-8 (Tenn. Ct. App. 1989) (granting a wrongful discharge cause of action to a company nurse who claimed she had been terminated for her refusal to participate in the employer's scheme to cut workers' compensation costs by not sending injured employees for outside medical treatment), or to an employee who refused to terminate an employee who has filed a workers' compensation claim, see Lins v. Children's Discovery Ctrs. of Am., Inc., 976 P.2d 168, 172 (Wash. Ct. App. 1999) (recognizing the policy of workers' compensation would be "jeopardized if, without incurring liability, an employer can fire an employee for refusing to carry out a clearly unlawful order" (emphasis added)).

Plyler v. Doe (No. 80-1538)

Syllabus	Opinion [Brennan]	Concurrence [Marshall]	Concurrence [Blackmun]	Concurrence [Powell]	Dissent [Burger]
HTML version PDF version	HTML version PDF version	HTML version PDF version	HTML version PDF version	HTML version PDF version	HTML version PDF version

BRENNAN, J., Opinion of the Court

SUPREME COURT OF THE UNITED STATES

457 U.S. 202

Plyler v. Doe

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-1538 Argued: December 1, 1981 --- Decided: June 15, 1982 [*]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether, consistent with the Equal Protection Clause of the [Fourteenth Amendment](#), Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.

I

Since the late 19th century, the United States has restricted immigration into this country. Unsanctioned entry into the United States is a crime, [8 U.S.C. § 1325](#) and those who have entered unlawfully are subject to deportation, [8 U.S.C. §§ 1251](#) 1252 (1976 ed. and Supp. IV). But despite the existence of these legal restrictions, a substantial number of persons have succeeded in unlawfully entering the United States, and now live within various States, including the State of Texas.

In May, 1975, the Texas Legislature revised its education laws to withhold from local school districts any state funds for the education of children who were not "legally admitted" into the

United States. The 1975 revision also authorized local school districts to deny enrollment in their public schools to children not "legally admitted" to the country. Tex. Educ.Code Ann. § 21.031 (Vernon Supp.1981).^[n1] These cases involve constitutional challenges to those provisions. [p206]

No. 8158 Plyler v. Doe

This is a class action, filed in the United States District Court for the Eastern District of Texas in September, 1977, on behalf of certain school-age children of Mexican origin residing in Smith County, Tex., who could not establish that they had been legally admitted into the United States. The action complained of the exclusion of plaintiff children from the public schools of the Tyler Independent School District.^[n2] The Superintendent and members of the Board of Trustees of the School District were named as defendants; the State of Texas intervened as a party-defendant. After certifying a class consisting of all undocumented school-age children of Mexican origin residing within the School District, the District Court preliminarily enjoined defendants from denying a free education to members of the plaintiff class. In December, 1977, the court conducted an extensive hearing on plaintiffs' motion for permanent injunctive relief. [p207]

In considering this motion, the District Court made extensive findings of fact. The court found that neither § 21.031 nor the School District policy implementing it had "either the purpose or effect of keeping illegal aliens out of the State of Texas." 458 F.Supp. 569, 575 (1978). Respecting defendants' further claim that § 21.031 was simply a financial measure designed to avoid a drain on the State's fisc, the court recognized that the increases in population resulting from the immigration of Mexican nationals into the United States had created problems for the public schools of the State, and that these problems were exacerbated by the special educational needs of immigrant Mexican children. The court noted, however, that the increase in school enrollment was primarily attributable to the admission of children who were legal residents. *Id.* at 575-576. It also found that, while the "exclusion of all undocumented children from the public schools in Texas would eventually result in economies at some level," *id.* at 576, funding from both the State and Federal Governments was based primarily on the number of children enrolled. In net effect, then, barring undocumented children from the schools would save money, but it would "not necessarily" improve "the quality of education." *Id.* at 577. The court further observed that the impact of § 21.031 was borne primarily by a very small subclass of illegal aliens, "entire families who have migrated illegally and -- for all practical purposes -- permanently to the United States." *Id.* at 578.^[n3] Finally, the court noted that, under current laws and practices, "the illegal alien of today may well be the legal alien of tomorrow,"^[n4] and that, without an education, these undocumented [p208] children,

[a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial

prejudices, . . . will become permanently locked into the lowest socio-economic class.

Id. at 577.

The District Court held that illegal aliens were entitled to the protection of the Equal Protection Clause of the [Fourteenth Amendment](#), and that § 21.031 violated that Clause. Suggesting that

the state's exclusion of undocumented children from its public schools . . . may well be the type of invidiously motivated state action for which the suspect classification doctrine was designed,

the court held that it was unnecessary to decide whether the statute would survive a "strict scrutiny" analysis because, in any event, the discrimination embodied in the statute was not supported by a rational basis. *Id.* at 585. The District Court also concluded that the Texas statute violated the Supremacy Clause. ^[n5] *Id.* at 590-592.

The Court of Appeals for the Fifth Circuit upheld the District Court's injunction. 628 F.2d 448 (1980). The Court of Appeals held that the District Court had erred in finding the Texas statute preempted by federal law. ^[n6] With respect to [p209] equal protection, however, the Court of Appeals affirmed in all essential respects the analysis of the District Court, *id.* at 454-458, concluding that § 21.031 was "constitutionally infirm regardless of whether it was tested using the mere rational basis standard or some more stringent test," *id.* at 458. We noted probable jurisdiction. [451 U.S. 968](#) (1981).

No. 8194 *In re Alien Children Education Litigation*

During 1978 and 1979, suits challenging the constitutionality of 21.031 and various local practices undertaken on the authority of that provision were filed in the United States District Courts for the Southern, Western, and Northern Districts of Texas. Each suit named the State of Texas and the Texas Education Agency as defendants, along with local officials. In November, 1979, the Judicial Panel on Multidistrict Litigation, on motion of the State, consolidated the claims against the state officials into a single action to be heard in the District Court for the Southern District of Texas. A hearing was conducted in February and March, 1980. In July, 1980, the court entered an opinion and order holding that § 21.031 violated the Equal Protection Clause of the [Fourteenth Amendment](#). *In re Alien Children Education Litigation*, 501 F.Supp. 544. ^[n7] The court held that

the absolute deprivation of education should trigger strict judicial scrutiny, particularly when the absolute deprivation is the result of complete inability to pay for the desired benefit.

Id. at 582. The court determined that the State's concern for fiscal integrity was not a compelling state interest, *id.* at 582-583; that exclusion of these children had not been shown to be necessary to improve education within the State, *id.* at 583; and that the educational needs of the children statutorily excluded were not different from the needs of children not excluded, *ibid.* The court therefore concluded that [p210] § 21.031 was not carefully tailored to advance the asserted state interest in an acceptable manner. *Id.* at 583-584. While appeal of the District Court's decision was pending, the Court of Appeals rendered its decision in No. 80-1538. Apparently on the strength of that opinion, the Court of Appeals, on February 23, 1981, summarily affirmed the decision of the Southern District. We noted probable jurisdiction, [452 U.S. 937](#) (1981), and consolidated this case with No. 80-1538 for briefing and argument. ^[n8]

II

The [Fourteenth Amendment](#) provides that

[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to *any person within its jurisdiction* the equal protection of the laws.

(Emphasis added.) Appellants argue at the outset that undocumented aliens, because of their immigration status, are not "persons within the jurisdiction" of the State of Texas, and that they therefore have no right to the equal protection of Texas law. We reject this argument. Whatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and [Fourteenth Amendments](#). *Shaughnessy v. Mezei*, [345 U.S. 206](#), 212 (1953); *Wong Wing v. United States*, [163 U.S. 228](#), 238 (1896); *Yick Wo v. Hopkins*, [118 U.S. 356](#), 369 (1886). Indeed, we have clearly held that the [Fifth Amendment](#) protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government. *Mathews v. Diaz*, [426 U.S. 67](#), 77 (1976). ^[n9] [p211]

Appellants seek to distinguish our prior cases, emphasizing that the Equal Protection Clause directs a State to afford its protection to persons *within its jurisdiction*, while the Due Process Clauses of the Fifth and [Fourteenth Amendments](#) contain no such assertedly limiting phrase. In appellants' view, persons who have entered the United States illegally are not "within the jurisdiction" of a State even if they are present within a State's boundaries and subject to its laws. Neither our cases nor the logic of the [Fourteenth Amendment](#) support that constricting construction of the phrase "within its jurisdiction."^[n10] We have never suggested that the class of persons who might avail themselves of the equal protection guarantee is less than coextensive with that entitled to due process. To the contrary, we have recognized [p212] that both provisions

were fashioned to protect an identical class of persons, and to reach every exercise of state authority.

The [Fourteenth Amendment](#) to the Constitution is not confined to the protection of citizens. It says:

Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the protection of the laws is a pledge of the protection of equal laws.

Yick Wo, supra, at 369 (emphasis added).

In concluding that "all persons within the territory of the United States," including aliens unlawfully present, may invoke the Fifth and [Sixth Amendments](#) to challenge actions of the Federal Government, we reasoned from the understanding that the [Fourteenth Amendment](#) was designed to afford its protection to all within the boundaries of a State. *Wong Wing, supra*, at 238.^[n11] Our cases applying the Equal Protection Clause reflect the same territorial theme:^[n12] [p213]

Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities, each responsible for its own laws establishing the rights and duties of persons within its borders.

Missouri ex rel. Gaines v. Canada, [305 U.S. 337](#), 350 (1938).

There is simply no support for appellants' suggestion that "due process" is somehow of greater stature than "equal protection," and therefore available to a larger class of persons. To the contrary, each aspect of the [Fourteenth Amendment](#) reflects an elementary limitation on state power. To permit a State to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the [Fourteenth Amendment](#). The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection. [p214]

Although the congressional debate concerning § 1 of the [Fourteenth Amendment](#) was limited, that debate clearly confirms the understanding that the phrase "within its jurisdiction" was intended in a broad sense to offer the guarantee of equal protection to all within a State's boundaries, and to all upon whom the State would impose the obligations of its laws. Indeed, it appears from those debates that Congress, by using the phrase "person within its jurisdiction," sought expressly to ensure that the equal protection of the laws was provided to the alien population. Representative Bingham reported to the House the draft resolution of the Joint Committee of Fifteen on Reconstruction (H.R. 63) that was to become the [Fourteenth Amendment](#).^[n13] Cong.Globe, 39th Cong., 1st Sess., 1033 (1866). Two days later, Bingham posed the following question in support of the resolution:

Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential to the unity of the Government and the unity of the people that all persons, *whether citizens or strangers, within this land*, shall have equal protection in every State in this Union in the rights of life and liberty and property?

Id. at 1090.

Senator Howard, also a member of the Joint Committee of Fifteen, and the floor manager of the Amendment in the Senate, was no less explicit about the broad objectives of the Amendment, and the intention to make its provisions applicable to all who "may happen to be" within the jurisdiction of a State: [p215]

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but *any person, whoever he may be*, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. . . . It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, *and to all person who may happen to be within their jurisdiction*.

Id. at 2766 (emphasis added).

Use of the phrase "within its jurisdiction" thus does not detract from, but rather confirms, the understanding that the protection of the [Fourteenth Amendment](#) extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of a State's territory. That a person's initial entry into a State, or

into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction -- either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States -- he is entitled to the equal protection of the laws that a State may choose to establish.

Our conclusion that the illegal aliens who are plaintiffs in these cases may claim the benefit of the [Fourteenth Amendment's](#) guarantee of equal protection only begins the inquiry. The more difficult question is whether the Equal Protection Clause has been violated by the refusal of the State of Texas to reimburse local school boards for the education of children who cannot demonstrate that their presence within the [p216] United States is lawful, or by the imposition by those school boards of the burden of tuition on those children. It is to this question that we now turn.

III

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia*, [253 U.S. 412](#), 415 (1920). But so too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, [310 U.S. 141](#), 147 (1940). The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

But we would not be faithful to our obligations under the [Fourteenth Amendment](#) if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus, we have treated as presumptively invidious those classifications that disadvantage a "suspect class," [\[n14\]](#) or that impinge upon [p217] the exercise of a "fundamental right." [\[n15\]](#) With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances, we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a [p218] substantial interest of

the State.^[n16] We turn to a consideration of the standard appropriate for the evaluation of § 21.031.

A

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants -- numbering in the millions -- within our borders.^[n17] This situation raises the specter of a permanent [p219] caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.^[n18] The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.^[n19]

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply [p220] with the same force to classifications imposing disabilities on the minor children of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status." *Trimble v. Gordon*, 430 U.S. 762, 770 (1977). Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth, and penalizing the . . . child is an ineffectual -- as well as unjust -- way of deterring the parent.

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (footnote omitted).

Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic, since it is the product of conscious, indeed unlawful, action. But § 21.031 is directed against children,

and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of § 21.031. [p221]

Public education is not a "right" granted to individuals by the Constitution. *San Antonio Independent School Dist. v. Rodriguez*, [411 U.S. 1](#), 35 (1973). But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions and the lasting impact of its deprivation on the life of the child mark the distinction. The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." [411 U.S. 1](#), 35 (1973). But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions and the lasting impact of its deprivation on the life of the child mark the distinction. The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." *Meyer v. Nebraska*, [262 U.S. 390](#), 400 (1923). We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," [262 U.S. 390](#), 400 (1923). We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," *Abington School District v. Schempp*, [374 U.S. 203](#), 230 (1963) (BRENNAN, J., concurring), and as the primary vehicle for transmitting "the values on which our society rests." [374 U.S. 203](#), 230 (1963) (BRENNAN, J., concurring), and as the primary vehicle for transmitting "the values on which our society rests." *Ambach v. Norwick*, [441 U.S. 68](#), 76 (1979).

[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.

Wisconsin v. Yoder, [406 U.S. 205](#), 221 (1972). And these historic

perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.

Ambach v. Norwick, *supra*, at 77. In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals [p222] of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society." *Wisconsin v. Yoder*, *supra*, at [406 U.S. 221](#)]221. Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological wellbeing of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause. [\[n20\]](#) What we said 28 years ago in 221. Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological wellbeing of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause. [\[n20\]](#) What we said 28 years ago in *Brown v. Board of Education*, [347 U.S. 483](#) (1954), still holds true:

Today, education is perhaps the most important function of state and local governments. Compulsory school [p223] attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493.

B

These well-settled principles allow us to determine the proper level of deference to be afforded § 21.031. Undocumented aliens cannot

be treated as a suspect class, because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. *See San Antonio Independent School Dist. v. Rodriguez, supra*, at 28-39. But more is involved in these cases than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining [p224] the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.

IV

It is the State's principal argument, and apparently the view of the dissenting Justices, that the undocumented status of these children *vel non* establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents. The State notes that, while other aliens are admitted "on an equality of legal privileges with all citizens under nondiscriminatory laws," *Takahashi v. Fish & Game Comm'n*, [334 U.S. 410](#), 420 (1948), the asserted right of these children to an education can claim no implicit congressional imprimatur.^[n21] Indeed, in the State's view, Congress' apparent disapproval of the presence of these children within the United States, and the evasion of the federal regulatory program that is the mark of undocumented status, provides authority for its decision to impose upon them special disabilities. Faced with an equal protection challenge respecting the treatment of aliens, we agree that the courts must be attentive to congressional policy; the exercise of congressional power might well affect the State's prerogatives to afford differential treatment to a particular class of aliens. But we are unable to find in the congressional immigration scheme any statement of policy that might weigh significantly [p225] in arriving at an equal protection balance concerning the State's authority to deprive these children of an education.

The Constitution grants Congress the power to "establish an uniform Rule of Naturalization." Art. I., § 8, cl. 4. Drawing upon this power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders. *See Mathews v. Diaz*, [426 U.S. 67](#) (1976); *Harisiades v. Shaughnessy*, [342 U.S. 580](#), 588-589 (1952). The obvious need for

delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field. *Mathews, supra*, at 81. But this traditional caution does not persuade us that unusual deference must be shown the classification embodied in § 21.031. The States enjoy no power with respect to the classification of aliens. See *Hines v. Davidowitz*, [312 U.S. 52](#) (1941). This power is "committed to the political branches of the Federal Government." *Mathews*, 426 U.S. at 81. Although it is "a routine and normally legitimate part" of the business of the Federal Government to classify on the basis of alien status, *id.* at 85, and to "take into account the character of the relationship between the alien and this country," *id.* at 80, only rarely are such matters relevant to legislation by a State. See *Id.* at 84-85; *Nyquist v. Mauclet*, [432 U.S. 1](#), 7, n. 8 (1977)

As we recognized in *De Canas v. Bica*, [424 U.S. 351](#) (1976), the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal. In *De Canas*, the State's program reflected Congress' intention to bar from employment all aliens except those possessing a grant of permission to work in this country. *Id.* at 361. In contrast, there is no indication that the disability imposed by § 21.031 corresponds to any identifiable congressional policy. The [p226] State does not claim that the conservation of state educational resources was ever a congressional concern in restricting immigration. More importantly, the classification reflected in § 21.031 does not operate harmoniously within the federal program.

To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation. [8 U.S.C. §§ 1251](#) 1252 (1976 ed. and Supp. IV). But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen. See, e.g., [8 U.S.C. §§ 1252](#) 1253(h), 1254 (1976 ed. and Supp. IV). In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would, of course, be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.

We are reluctant to impute to Congress the intention to withhold from these children, for so long as they are present in this country through no fault of their own, access to a basic education. In other contexts, undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education. The State may borrow the federal classification. But to justify its use as a criterion for its own discriminatory policy, the State must demonstrate that the classification is reasonably adapted to "*the*

purposes for which the state desires to use it." *Oyama v. California*, [332 U.S. 633](#), 664-665 (1948) (Murphy, J., concurring) (emphasis added). We therefore turn to the state objectives that are said to support § 21.031. [p227]

V

Appellants argue that the classification at issue furthers an interest in the "preservation of the state's limited resources for the education of its lawful residents."^[n22] Brief for Appellants 26. Of course, a concern for the preservation of resources, standing alone, can hardly justify the classification used in allocating those resources. *Graham v. Richardson*, [403 U.S. 365](#), 374-375 (1971). The State must do more than justify its classification with a concise expression of an intention to discriminate. *Examining Board v. Flores de Otero*, [426 U.S. 572](#), 605 (1976). Apart from the asserted state prerogative to act against undocumented children solely on the basis of their undocumented status -- an asserted prerogative that carries only minimal force in the circumstances of these cases -- we discern three colorable state interests that might support § 21.031. [p228]

First, appellants appear to suggest that the State may seek to protect itself from an influx of illegal immigrants. While a State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population,^[n23] § 21.031 hardly offers an effective method of dealing with an urgent demographic or economic problem. There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc. 458 F.Supp. at 578; 501 F.Supp. at 570-571. The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education.^[n24] Thus, even making the doubtful assumption that the net impact of illegal aliens on the economy of the State is negative, we think it clear that "[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration," at least when compared with the alternative of [p229] prohibiting the employment of illegal aliens. 458 F.Supp. at 585. See 628 F.2d at 461; 501 F.Supp. at 579, and n. 88.

Second, while it is apparent that a State may "not . . . reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools," *Shapiro v. Thompson*, [394 U.S. 618](#), 633 (1969), appellants suggest that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education. But the record in no way supports the claim that exclusion of undocumented children is likely to improve the overall

quality of education in the State. ^{In251} As the District Court in No. 801934 noted, the State failed to offer any

credible supporting evidence that a proportionately small diminution of the funds spent on each child [which might result from devoting some state funds to the education of the excluded group] will have a grave impact on the quality of education.

501 F.Supp. at 583. And, after reviewing the State's school financing mechanism, the District Court in No. 80-1538 concluded that barring undocumented children from local schools would not necessarily improve the quality of education provided in those schools. 458 F.Supp. at 577. Of course, even if improvement in the quality of education were a likely result of barring some *number* of children from the schools of the State, the State must support its selection of *this* group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are "basically indistinguishable" from legally resident alien children. *Id.* at 589; 501 F.Supp. at 583, and n. 104.

Finally, appellants suggest that undocumented children are appropriately singled out because their unlawful presence [p230] within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State. Even assuming that such an interest is legitimate, it is an interest that is most difficult to quantify. The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State's borders. In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.

VI

If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here. Accordingly, the judgment of the Court of Appeals in each of these cases is

Affirmed.

² Together with No. 80-1934, *Texas et al. v. Certain Named and Unnamed Undocumented Alien Children et al.*, also on appeal from the same court.

¹ That section provides, in pertinent part:

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

² Despite the enactment of § 21.031 in 1975, the School District had continued to enroll undocumented children free of charge until the 1977-1978 school year. In July, 1977, it adopted a policy requiring undocumented children to pay a "full tuition fee" in order to enroll. Section 21.031 had not provided a definition of "a legally admitted alien." Tyler offered the following clarification:

A legally admitted alien is one who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation.

App. to Juris. Statement in No. 80-1538, p. A-38.

³ The court contrasted this group with those illegal aliens who entered the country alone in order to earn money to send to their dependents in Mexico, and who, in many instances, remained in this country for only a short period of time. 458 F.Supp. at 578.

⁴ Plaintiffs' expert, Dr. Gilbert Cardenas, testified that "fifty to sixty per cent . . . of current legal alien workers were formerly illegal aliens." *Id.* at 577. A defense witness, Rolan Heston, District Director of the Houston District of the Immigration and Naturalization Service, testified that

undocumented children can and do live in the United States for years, and adjust their status through marriage to a citizen or permanent resident.

Ibid. The court also took notice of congressional proposals to "legalize" the status of many unlawful entrants. *Id.* at 577-578. See also n. 17, *infra*.

⁵ The court found § 21.031 inconsistent with the scheme of national regulation under the Immigration and Nationality Act, and with federal laws pertaining to funding and discrimination in education. The court distinguished *De Canas v. Bica*, 424 U.S. 351 (1976), by emphasizing that the state bar on employment of illegal aliens involved in that case mirrored precisely the federal policy, of protecting the domestic labor market, underlying the immigration laws. The court discerned no express federal policy to bar illegal immigrants from education. 458 F.Supp. at 590-592.

⁶ The Court of Appeals noted that *De Canas v. Bica*, *supra*, had not foreclosed all state regulation with respect to illegal aliens, and found no express or implied congressional policy favoring the education of illegal aliens. The court therefore concluded that there was no preemptive conflict between state and federal law. 628 F.2d at 451-454.

⁷ The court concluded that § 21.031 was not preempted by federal laws or international agreements. 501 F.Supp. at 584-596.

⁸ Appellees in both cases continue to press the argument that § 21.031 is preempted by federal law and policy. In light of our disposition of the Fourteenth Amendment issue, we have no occasion to reach this claim.

⁹ It would be incongruous to hold that the United States, to which the Constitution assigns a broad authority over both naturalization and foreign affairs, is barred from invidious discrimination with respect to unlawful aliens, while exempting the States from a similar limitation. See 426 U.S. at 84-86.

¹⁰ Although we have not previously focused on the intended meaning of this phrase, we have had occasion to examine the first sentence of the Fourteenth Amendment, which provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. . . ." (Emphasis added.) Justice Gray, writing for the Court in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), detailed at some length the history of the Citizenship Clause, and the predominantly

geographic sense in which the term "jurisdiction" was used. He further noted that it was

impossible to construe the words "subject to the jurisdiction thereof," in the opening sentence [of the [Fourteenth Amendment](#)], as less comprehensive than the words "within its jurisdiction," in the concluding sentence of the same section; or to hold that persons "within the jurisdiction" of one of the States of the Union are not "subject to the jurisdiction of the United States."

Id. at 687.

Justice Gray concluded that

[e]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States.

Id. at 693. As one early commentator noted, given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance, no plausible distinction with respect to [Fourteenth Amendment](#) "jurisdiction" can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful. *See* C. Bouve, *Exclusion and Expulsion of Aliens in the United States* 425-427 (1912).

¹¹ In his separate opinion, Justice Field addressed the relationship between the Fifth and Fourteenth Amendments:

The term "person," used in the [Fifth Amendment](#), is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws. . . . The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar -- in face of the great constitutional amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Wong Wing v. United States, 163 U.S. at 242-243 (concurring in part and dissenting in part).

¹² *Leng May Ma v. Barber*, 357 U.S. 185 (1958), relied on by appellants, is not to the contrary. In that case, the Court held, as a

matter of statutory construction, that an alien paroled into the United States pursuant to 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. 1182(d)(5) (1952 ed.), was not "within the United States" for the purpose of availing herself of § 243(h), which authorized the withholding of deportation in certain circumstance. The conclusion reflected the longstanding distinction between exclusion proceedings, involving the determination of admissibility, and deportation proceedings. The undocumented children who are appellees here, unlike the parolee in *Leng May Ma*, supra, could apparently be removed from the country only pursuant to deportation proceedings. 8 U.S.C. § 1251(a)(2). See 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 3.16b, p. 3-161 (1981).

¹³ Representative Bingham's views are also reflected in his comments on the Civil Rights Bill of 1866. He repeatedly referred to the need to provide protection, not only to the freedmen, but to "the alien and stranger," and to "refugees . . . and all men." Cong. Globe, 39th Cong., 1st Sess., 1292 (1866).

¹⁴ Several formulations might explain our treatment of certain classifications as "suspect." Some classifications are more likely than others to reflect deep-seated prejudice, rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. See *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Finally, certain groups, indeed largely the same groups, have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938). The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.

¹⁵ In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein. But we have also recognized the fundamentality of participation in state "elections on an equal basis with other citizens in the jurisdiction," *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), even though "the right to vote, per se, is not a constitutionally protected right." *San Antonio Independent School Dist.*, supra, at 35, n. 78. With respect to suffrage, we have explained the need for strict scrutiny as arising from the

significance of the franchise as the guardian of all other rights. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

¹⁶. See *Craig v. Boren*, 429 U.S. 190 (1976); *Lalli v. Lalli*, 439 U.S. 259 (1978). This technique of "intermediate" scrutiny permits us to evaluate the rationality of the legislative judgment with reference to well-settled constitutional principles.

In expounding the Constitution, the Court's role is to discern "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place."

University of California Regents v. Bakke, [438 U.S. 265](#), 299 (1978) (opinion of POWELL, J.), quoting A. Cox, *The Role of the Supreme Court in American Government* 114 (1976). Only when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases do we employ this standard to aid us in determining the rationality of the legislative choice.

¹⁷. The Attorney General recently estimated the number of illegal aliens within the United States at between 3 and 6 million. In presenting to both the Senate and House of Representatives several Presidential proposals for reform of the immigration laws -- including one to "legalize" many of the illegal entrants currently residing in the United States by creating for them a special status under the immigration laws -- the Attorney General noted that this subclass is largely composed of persons with a permanent attachment to the Nation, and that they are unlikely to be displaced from our territory:

We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community. By granting limited legal status to the productive and law-abiding members of this shadow population, we will recognize reality and devote our enforcement resources to deterring future illegal arrivals.

Joint Hearing before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary and the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 9 (1981) (testimony of William French Smith, Attorney General).

¹⁸. As the District Court observed in No. 80-1538, the confluence of Government policies has resulted in

the existence of a large number of employed illegal aliens, such as the parents of plaintiffs in this case, whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state's natural citizens and business organizations may wish to subject them.

458 F.Supp. at 585.

¹⁹ We reject the claim that "illegal aliens" are a "suspect class." No case in which we have attempted to define a suspect class, see, e.g., n. 14, supra, has addressed the status of persons unlawfully in our country. Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a "constitutional irrelevancy." With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may independently exercise a like power. But if the Federal Government has, by uniform rule, prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction. See *De Canas v. Bica*, 424 U.S. 351 (1976).

²⁰ Because the State does not afford noncitizens the right to vote, and may bar noncitizens from participating in activities at the heart of its political community, appellants argue that denial of a basic education to these children is of less significance than the denial to some other group. Whatever the current status of these children, the courts below concluded that many will remain here permanently, and that some indeterminate number will eventually become citizens. The fact that many will not is not decisive, even with respect to the importance of education to participation in core political institutions. "[T]he benefits of education are not reserved to those whose productive utilization of them is a certainty. . . ." 458 F.Supp. at 581, n. 14. In addition, although a noncitizen

may be barred from full involvement in the political arena, he may play a role -- perhaps even a leadership role -- in other areas of import to the community.

Nyquist v. Mauclet, [432 U.S. 1](#), 12 (1977). Moreover, the significance of education to our society is not limited to its political and cultural fruits. The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained.

²¹. If the constitutional guarantee of equal protection was available only to those upon whom Congress affirmatively granted its benefit, the State's argument would be virtually unanswerable. But the Equal Protection Clause operates of its own force to protect anyone "within [the State's] jurisdiction" from the State's arbitrary action. See Part II, *supra*. The question we examine in text is whether the federal disapproval of the presence of these children assists the State in overcoming the presumption that denial of education to innocent children is not a rational response to legitimate state concerns.

²². Appellant School District sought at oral argument to characterize the alienage classification contained in § 21.031 as simply a test of residence. We are unable to uphold § 21.031 on that basis. Appellants conceded that, if, for example, a Virginian or a legally admitted Mexican citizen entered Tyler with his school-age children, intending to remain only six months, those children would be viewed as residents entitled to attend Tyler schools. Tr. of Oral Arg. 31-32. It is thus clear that Tyler's residence argument amounts to nothing more than the assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools. A State may not, however, accomplish what would otherwise be prohibited by the Equal Protection Clause merely by defining a disfavored group as nonresident. And illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State. *C. Bouve, Exclusion and Expulsion of Aliens in the United States* 340 (1912). Appellants have not shown that the families of undocumented children do not comply with the established standards by which the State historically tests residence. Apart from the alienage limitation, § 21.031(b) requires a school district to provide education only to resident children. The school districts of the State are as free to apply to undocumented children established criteria for determining residence as they are to apply those criteria to any other child who seeks admission.

²³. Although the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government, unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service. Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns. See *De Canas v. Bica*, 424 U.S. at 354-356.

²⁴. The courts below noted the ineffectiveness of the Texas provision as a means of controlling the influx of illegal entrants into the State. See 628 F.2d at 460-461; 458 F.Supp. at 585; 501 F.Supp. at 578 ("The evidence demonstrates that undocumented persons do not immigrate in search for a free public education. Virtually all of the undocumented persons who come into this country seek employment opportunities, and not educational benefits. . . . There

was overwhelming evidence . . . of the unimportance of public education as a stimulus for immigration") (footnote omitted).

²⁵ Nor does the record support the claim that the educational resources of the State are so direly limited that some form of "educational triage" might be deemed a reasonable (assuming that it were a permissible) response to the State's problems. *Id.* at 579-581.

**Elvira Moreno ALVAREZ MARTINEZ, widow of Samuel Martinez, aka Andres T. Rodriques,
deceased, Plaintiff, v. The INDUSTRIAL COMMISSION OF the STATE OF UTAH, Heaton
Brothers Roofing and/or State Insurance Fund and Second Injury Fund, Defendants**
Supreme Court of Utah
720 P.2d 416;34 Utah Adv. Rep. 32;1986 Utah LEXIS 806
No. 20348
May 19, 1986, Filed

Counsel **{1986 Utah LEXIS 1}** Bradley H. Parker and Randall Bunnell, Salt
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 David L. Wilkinson, A.G., Gilbert Martinez (2nd Inj) and Mary A. Rudolph, Salt
Lake City, Utah, for Defendant.

Judges: Stewart, Justice, wrote the opinion. We concur: Gordon R. Hall, Chief Justice, Richard C. Howe, Justice, Christine M. Durham, Justice and Michael D. Zimmerman, Justice.

Opinion

Opinion by: STEWART

{720 P.2d 416} The plaintiff, Elvira Moreno **Alvarez Martinez**, is a nonresident alien living in Mexico who claims workmen's compensation benefits for the death of her husband, Samuel Martinez, who was killed in an industrial accident while working for Heaton Brothers Roofing in Utah. The sole issue on appeal is whether the Utah Workmen's **{720 P.2d 417}** Compensation Act is unconstitutional insofar as it discriminates against nonresident alien dependents as to death benefits payable because of the death of a worker in Utah.

The parties have stipulated that the plaintiff is entitled to the maximum statutory benefits available for her husband's accidental death in the course of his employment. The Industrial Commission held that the death benefits due her were \$255 per week for 312 weeks for a total of \$79,560, **1{1986 Utah LEXIS 2}** reduced by one-half, to \$39,780, pursuant to U.C.A., 1953, § 35-1-72, which reads:

When any alien dependent of the deceased resides outside of the United States of America and any of its dependencies and Canada, such dependent shall be paid not to exceed one-half the amount provided herein.

The plaintiff raises four challenges to the constitutionality of § 35-1-72 under the federal Constitution. She asserts that it violates (1) the Supremacy Clause, (2) the Due Process Clause, (3) the Equal Protection Clause, and (4) the plenary power of Congress to control the immigration and naturalization of aliens.

A workmen's compensation statutory provision that discriminates against a nonresident alien dependent violates the Supremacy Clause of the United States Constitution, if the provision violates a treaty between the United States and the dependent's country. See *Iannone v. Radory Construction Corp.*, 285 A.D. 751, 141 N.Y.S.2d 311, 317, 285 A.D. 1208 (N.Y. App. **{1986 Utah LEXIS 3}** Div. 1955), *aff'd*, 1 N.Y. 2d 671, 150 N.Y.S.2d 199, 133 N.E.2d 708 (1956); *Antosz v. State Compensation Commissioner*, 130 W. Va. 260, 43 S.E.2d 397, 400 (1947). However, there is no treaty between the United States and Mexico which extends to Mexican nationals the same rights and privileges under United States workmen's compensation laws as United States citizens have. Furthermore, the general provisions of the charters of the Organization of American States and of the United Nations provide no such rights. *Pena v. Industrial Commission*, 140 Ariz. 510, 683 P.2d 309, 315 (Ariz. Ct. App. 1984). Since § 35-1-72 does not conflict with a treaty to which the United States and Mexico are signatories, § 35-1-72 does not violate the Supremacy Clause of the federal Constitution.

The plaintiff also contends that a state statute which interferes unreasonably with a fundamental right or a vested property interest violates the Due Process Clause of the Fourteenth Amendment. She relies on *United States v. Texas*, 252 F. Supp. 234, 251 (W.D. Tex.), *aff'd*, 384 U.S. 155, 16 L. Ed. 2d 434, 86 S. Ct. 1383 (1966), for the proposition that her workmen's compensation benefits are {1986 Utah LEXIS 4} fundamental property rights that have been arbitrarily diminished.

A dependent's right to workmen's compensation death benefits is created and defined by statute. *Pedrazza v. Sid Fleming Contractor, Inc.*, 94 N.M. 59, 607 P.2d 597, 599 (1980). *Accord Halling v. Industrial Commission*, 71 Utah 112, 118, 263 P. 78, 80 (1927). The right of a worker's dependents to death benefits is an original and independent right, separate from the worker's right to benefits for injuries he suffers in an industrial accident. The dependent's right is not derived from the right of an employee to compensation benefits. *Halling*, 71 Utah at 118, 263 P. at 80; *Mason v. Union Pacific Railroad*, 7 Utah 77, 81, 24 P. 796, 797 (1890); 2 A. Larson, *Workmen's Compensation Law* §§ 64.00, 64.10, 64.11 (1983). The right to death benefits vests at the death of the worker pursuant to the Workmen's Compensation Act, which creates that right. *Pedrazza*, 94 N.M. at 61-62, 607 P.2d at 600. Since the right to death benefits arises from the statute, it is also subject to the limitations imposed by it. In short, the Act does not deprive the plaintiff of a vested right. {720 P.2d 418} What vests is the right {1986 Utah LEXIS 5} defined by the statute itself.

Furthermore, while it is clear that § 35-1-72 treats certain nonresident alien dependents differently than other dependents, we cannot conclude that the Act is so arbitrary as to be unconstitutional. The workmen's compensation laws of this state are part of several interrelated social welfare enactments. The character and scope of the total fabric of such legislation differs from the social welfare strategies employed by foreign countries. Since the constitutionality of worker's compensation death benefits must be viewed in light of the laws and history of this country, the extension of full death benefits to foreign nationals is not constitutionally required.

The plaintiff next argues that § 35-1-72 is unconstitutional because it denies her equal protection of the law. She asserts that the Act's classifications, which allow Canadian nonresident alien dependents full death benefits while reducing the death benefits due nonresident aliens from all other countries, are racially discriminatory and have no rational relation to any legitimate state interest.

In the first place, the statute is not based on race at all. It applies to the citizens {1986 Utah LEXIS 6} of all countries except Canada, unless a treaty overrides it.

Furthermore, as stated above, it has long been the law of Utah that "the rights of the employee's dependents . . . [are] separate and distinct from the rights of the employee for such injury." *Halling*, 71 Utah at 122, 263 P. at 81. See 2 A. Larson, *Workmen's Compensation Law* §§ 64.11-64.13 (1983 and Supp. 1984), and cases cited therein. [2](#) Because a dependent's right is *sui generis* and not derivative from the worker's own rights, the determinative issue is whether the Equal Protection Clause of the Fourteenth Amendment is violated by treating nonresident aliens differently than resident aliens and Canadians.

{1986 Utah LEXIS 7} In general, the standard of review under the Equal Protection Clause with respect to resident aliens is that classifications made on the basis of alienage are subject to heightened judicial scrutiny because they are based on a suspect classification. *Graham v. Richardson*, 403 U.S. 365, 372, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971). That status is not, however, accorded *nonresident aliens*. *De Tenorio v. McGowan*, 510 F.2d 92, 101 (5th Cir.), *cert. denied*, 423 U.S. 877, 46 L. Ed. 2d 110, 96 S. Ct. 150 (1975); *Pedrazza*, 94 N.M. at 62, 607 P.2d at 600. In *Pedrazza*, the New Mexico Supreme Court held that aliens who resided within the territorial jurisdiction of the state were entitled to equal protection of the laws with respect to workmen's compensation laws, *Pedrazza*, 94 N.M. at 62, 607 P.2d at 600-01, but that residents of the Republic of Mexico "are beyond the reach of the equal protection

clause." *Id.* at 62, 607 P.2d at 600. That conclusion follows from the express language of the Equal Protection Clause which declares: "No state shall . . . deny to any person *within its jurisdiction* the equal protection of the laws." U.S. Const. amend. XIV (emphasis{1986 Utah LEXIS 8} added). The New Mexico court, on facts similar to the instant case, held that since the plaintiffs were nonresident aliens and "beyond the protective reach of the equal protection clause," they had no basis for challenging the New Mexico workmen's compensation statute which denied them death benefits. *Pedrazza*, 94 N.M. at 62, 607 P.2d at 600.

That holding follows from *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L. Ed. 220, [6 S. Ct. 1064](#) (1886), which held that the rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction . . ." *Id.* at 369. {720 P.2d 419} *Johnson v. Eisentrager*, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950), also held that the Equal Protection Clause was territorially limited. "In extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.* at 771. See also *Plyler v. Doe*, 457 U.S. 202, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982).

The plaintiff urges this Court to adopt the position that if an{1986 Utah LEXIS 9} adequate "nexus" exists between the state and nonresident alien the Equal Protection Clause applies. The plaintiff argues that a partial payment of benefits to a nonresident alien establishes such a nexus and that she therefore is entitled to the protection of the Equal Protection Clause. See generally *Jalifi v. Industrial Commission*, 132 Ariz. 233, 644 P.2d 1319, n.2 (Ariz. Ct. App.), *appeal dismissed*, 459 U.S. 899, 74 L. Ed. 2d 161, 103 S. Ct. 200 (1982).

The argument is without merit; if the state were to grant no death benefits to nonresident aliens whatsoever, there would be no nexus and no denial of equal protection. There is no basis in reason for the position that the Fourteenth Amendment is not applicable when the discrimination is complete, but is applicable when the discrimination is only partial. [3](#)

Finally, the plaintiff asserts that the Utah statute interferes with the plenary power of Congress to control the immigration and naturalization of aliens under *Graham v. Richardson*, 403 U.S. 365, 377, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971). In that case, the issue was the constitutionality of Arizona and Pennsylvania laws which made lawfully admitted aliens ineligible for state welfare benefits until they satisfied state durational residency requirements. A federal statute declared that aliens likely to become indigent should not be admitted to the United States or should be required to post bond, but that lawfully admitted aliens who became indigent after entry were entitled to the same benefits as all citizens. *Id.* at 377-78. The Court held that state statutes which set durational residency requirements for aliens requiring public assistance were unconstitutional because they were in conflict with the federal scheme by "overriding national policies in an area constitutionally entrusted to the Federal Government." *Id.* at 378. *Graham* is distinguishable. Unlike the statutes held unconstitutional in *Graham*, the Utah statute does not place a burden on an alien's{1986 Utah LEXIS 11} entrance into, or residence within, this country, or on an alien's dependents.

The plaintiff further asserts:

First, employers might be encouraged to seek out and hire aliens in preference to citizens in order to reduce their exposure to workers compensation claims. Second, nonresident aliens may be encouraged to join the resident worker so that, should anything happen to the worker, they could enjoy full benefits. Third, aliens may not come to Utah to work. The statute at issue has been on the books a long time. The plaintiff offers no evidence that it has had any such effects. Nor does she demonstrate how such effects would interfere with federal statutes or policy.

In sum, we hold that § 35-1-72 is constitutional.

Affirmed.

WE CONCUR: Gordon R. Hall, Chief Justice, Richard C. Howe, Justice, Christine M. Durham, Justice and Michael D. Zimmerman, Justice.

Footnotes

1

See U.C.A., 1953, § 35-1-68.

2

By holding that the dependent's right to compensation is independent of the worker's right, courts have awarded compensation despite releases signed by the worker and statutes of limitations which would act as a bar to a claim by the worker. See 2 A. Larson, Workmen's Compensation Law §§ 64.11-64.13 (1983 and Supp. 1984), and cases cited therein. See also *Halling*, 71 Utah at 122, 263 P. at 80-81.

3

As noted, New Mexico denies nonresident aliens benefits completely, *Pedrazza*, 94 N.M. 59, 607 P.2d at 599, and Arizona reduces them by 40 percent. *Jalifi*, 132 Ariz. at 235, 644 P.2d at 1321. In fact, the dependents of nonresident aliens have been the subject of special workmen's compensation provisions in all but nine states, and residents of Canada are usually exempted from those special rules. 2 A. Larson, *supra*, § 63-51.