

**APPROVED**

Movant shall serve copies of this ORDER on any pro se parties, pursuant to CRCP 5, and file a certificate of service with the Court within 10 days.

DISTRICT COURT, CITY AND COUNTY
OF DENVER, STATE OF COLORADO
1437 Bannock Street
Denver, Colorado 80202

William W. Hood III**District Court Judge**

FILED Document
DATE OF ORDER INDICATED ON AFFIDAVIT 07:21 PM
CO Denver County District Court 2nd JD

Filing Date: Feb 1 2010 5:21PM MST

Filing ID: 29336791

Review Clerk: Nancy E Magdaleno

Plaintiff:**MURRAY SALBY****Defendants:**

**UNIVERSITY OF COLORADO,
PROVOST PHILLIP DiSTEFANO,
and JOHN DOES.**

Attorney for Defendant University of Colorado:

David P. Temple, #13499
Special Assistant Attorney General
Senior Associate University Counsel
Office of University Counsel
1800 Grant Street, Suite 700
Denver, Colorado 80203
303-860-5691
David.Temple@cu.edu

Case Number: 09 CV 3789
Division 7

Attorney for Defendant DiStefano

Thomas S. Rice, #9923
Senter Goldfarb & Rice, LLC
1700 Broadway, Suite 1700
Denver, Colorado 80290
303-320-0509
trice@sgrllc.com

Attorney for Plaintiff:

Robert M. Liechty
Cross & Liechty, P.C.
7100 E. Belview Ave., Suite G11
Greenwood Village, CO 80111
rliechty@crossliechty.com

STUPULATED MOTION TO DISMISS WITH PREJUDICE

The Parties submit the following Stipulated Motion to Dismiss With Prejudice.

The University and Plaintiff have resolved and settled all issues between them and as part of their agreement stipulate that this lawsuit be dismissed with prejudice, each party to bear its own fees, costs and expenses.

WHEREFORE, the parties respectfully request that this action and all claims herein be dismissed with prejudice.

Respectfully submitted this 27th day of January, 2010.

CROSS & LIECHTY, P.C.

/s/ Robert M. Liechty

Robert M. Liechty, #14652

Attorney for Plaintiff

OFFICE OF UNIVERSITY COUNSEL

/s/ David P. Temple

David P. Temple, #13499

Attorney for Defendant University of Colorado

SENDER GOLDFARB & RICE LLC

/s/ Thomas S. Rice

Thomas S. Rice, #9923

Attorney for Defendant DiStefano

In accordance with C.R.C.P. 121 §1-26(9) a printed copy of this document with signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

This document constitutes a ruling of the court and should be treated as such.

Court: CO Denver County District Court 2nd JD

Judge: William W Hood

File & Serve

Transaction ID: 29252197

Current Date: Feb 01, 2010

Case Number: 2009CV3789

Case Name: SALBY, MURRY vs. UNIV OF COLO et al

Court Authorizer: William W Hood III

/s/ Judge William W Hood III

**DISTRICT COURT, CITY AND COUNTY
OF DENVER, STATE OF COLORADO**

1437 Bannock Street
Denver, Colorado 80202

Plaintiff:

MURRAY SALBY

Defendants:

**UNIVERSITY OF COLORADO,
PROVOST PHILLIP DiSTEFANO,
and JOHN DOES.**

**Attorney for Defendant University of
Colorado:**

David P. Temple, #13499
Special Assistant Attorney General
Senior Associate University Counsel
Office of University Counsel
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Attorney for Defendant DiStefano

Thomas S. Rice, #9923
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Denver, Colorado 80290
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trice@sgrllc.com

Attorney for Plaintiff:

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EFILED Document

CO Denver County District Court 2nd JD

Filing Date: Jan 27 2010 2:16PM MST

Filing ID: 29252197

Review Clerk: Eric Dew

Case Number: 09 CV 3789
Division 7

STUPULATED MOTION TO DISMISS WITH PREJUDICE

The Parties submit the following Stipulated Motion to Dismiss With Prejudice.

The University and Plaintiff have resolved and settled all issues between them and as part of their agreement stipulate that this lawsuit be dismissed with prejudice, each party to bear its own fees, costs and expenses.

WHEREFORE, the parties respectfully request that this action and all claims herein be dismissed with prejudice.

Respectfully submitted this 27th day of January, 2010.

CROSS & LIECHTY, P.C.

/s/ Robert M. Liechty

Robert M. Liechty, #14652

Attorney for Plaintiff

OFFICE OF UNIVERSITY COUNSEL

/s/ David P. Temple

David P. Temple, #13499

Attorney for Defendant University of Colorado

SETER GOLDFARB & RICE LLC

/s/ Thomas S. Rice

Thomas S. Rice, #9923
Attorney for Defendant DiStefano

In accordance with C.R.C.P. 121 §1-26(9) a printed copy of this document with signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO	EFILED Document CO Denver County District Court 2nd JD Filing Date: Jan 12 2010 8:40AM MST Filing ID: 28954580 Review Clerk: Angie D Guenther
Plaintiff(s): MURRY SALBY Defendant(s): UNIVERSITY OF COLORADO, et al	Case Number: 09CV3789 Courtroom 7
<u>SHOW CAUSE ORDER</u>	

THIS MATTER is before the Court, *sua sponte*.

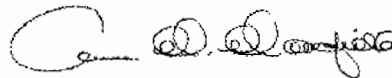
The Parties are hereby ORDERED to show cause in writing within thirty (30) days of this date why the matter should not be dismissed for failure to comply with one or more of the following:

1. The Court's Delay Reduction Order and/or Alternate Dispute Resolution Order.
2. Failure to prosecute. C.R.C.P. 41(b)(2) and C.R.C.P. 121 Section 1-10.
3. Failure to file pleadings pursuant to C.R.C.P. 16.

In the absence of such showing, the case will be dismissed without prejudice and without further notice. Costs shall be awarded pursuant to C.R.S. 13-16-113(1).

DATED: January 12, 2010

BY THE COURT:



Anne M. Mansfield
District Court Judge

cc: Counsel of Record

**DENIED**

Movant shall serve copies of this ORDER on any pro se parties, pursuant to CRCP 5, and file a certificate of service with the Court within 10 days.

ANNE MANSFIELD

District Court Judge

DATE OF ORDER INDICATED**FILED FOR ENTRY**

CO Denver County District Court 2nd JD

Filing Date: Dec 10 2009 1:04PM MST

Filing ID: 28449113

Review Clerk: Angie D Guenther

DISTRICT COURT, CITY AND COUNTY OF DENVER,
STATE OF COLORADO

Address: 1437 Bannock Street
Denver, Colorado 80202
Telephone: 720 865-8307

Plaintiff: MURRY SALBY

Defendants: UNIVERSITY OF COLORADO,
PROVOST PHILLIP DiSTEFANO,
and JOHN DOES.

Attorneys for Plaintiff:

Robert M. Liechty, No. 14652
CROSS & LIECHTY, P.C.
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▲ COURT USE ONLY ▲

Case No.: 09-CV-3789

Division 7

MOTION TO RECONSIDER

Plaintiff Murry L. Salby, by and through his attorney Robert M. Liechty of CROSS & LIECHTY, P.C., moves this Court to reconsider its order of October 28, 2009, dismissing the federal claims against defendant DiStefano as follows:

1. This motion concerns the dismissal of the fourth amendment, 14th amendment, and first amendment claims against Mr. Distefano.

2. This Court dismissed the fourth amendment claim on two grounds. First, this Court found that Professor Salby's personal property was returned to him (or he at least had access to it). That is incorrect. As he said in his affidavit, his lab was dismantled and destroyed so that the computers did not function. See his original affidavit, reattached hereto, ¶ 6. Because his computers could not function, he could not retrieve information stored on them. He asked for a copy of the files that were stored on his computers in December and in January, but his requests were ignored (possibly because since the computers would not function, it was impossible to comply with his request). *Id.*, ¶ 7. Although Mr. Distefano may have presented evidence to the contrary, this simply establishes a factual dispute. On a motion for summary judgment "all doubts as to whether a triable issue of fact exists must be resolved against the

moving party.” *Bayou Land Co. v. Talley*, 924 P.2d 136, 151 (Colo. 1996). Therefore, the issue of fact as to whether Professor Salby had access to his property must be resolved against Mr. Distefano.

3. This Court also said that Professor Salby cited no law indicating that Mr. Distefano’s actions violated the Fourth Amendment. That is incorrect. Professor Salby relied upon *O’Connor v. Ortega*, 480 U.S. 709, 719-20 (1987),¹ which concerned the search of a medical professor’s office. The U.S. Supreme Court stated that the search had to be reasonable under the Fourth Amendment. Given that Professor Salby’s property was destroyed when the computers were made nonfunctional, there is at least a factual question as to whether this was reasonable.

4. This Court then held that it was not convinced that Professor Salby presented sufficient evidence that he was constructively discharged, thus making it unnecessary to provide any process. However, Professor Salby stated the following:

I retired because my laboratory had been destroyed and my professional records had either been reduced to a state of disarray or resided on computers and archival tapes that were made inaccessible. During that same period, I also discovered that my students were not allowed to enroll in my classes. Consequently, I had no choice but to leave the University.

See affidavit, ¶ 10. The law of constructive discharge is set out in *Price v. Boulder Valley School District*, 782 P.2d 821 (Colo. App. 1989), *aff’d*, *Boulder Valley School District v. Price*, 805 P.2d 1085 (Colo. 1991). *Price* concerned the constructive discharge of a teacher as a predicate to a due process claim under §1983, substantially the same claim as herein. Mr. Price began teaching in 1967 and was asked to resign in 1979. The pertinent facts are as follows:

In 1975, Price was diagnosed as manic-depressive. He suffered an emotional breakdown in the summer of 1979, having undergone, in 1978, the death by cancer of his former wife, and his assumption of the custody of their two minor children.

Beginning in the 1978-79 school year and continuing into the 1979-80 school year, Price began seriously to neglect certain job duties. Specifically, he failed to take attendance and post absence lists, failed to prepare required lesson plans and course outlines, failed to prepare a record student grades, and a failed to return a grade book and the keys to the school at which he had taught in 1978-79. [His principal] Zeckser received several complaints from both parents and students regarding Price. Repeated oral and written directives by Zeckser did not result in correction of the deficiencies in Price’s performance.

See the Court of Appeals recitation of facts, 782 P.2d at 823. Mr. Price and his principal had a meeting in October, 1979, in which they discussed Mr. Price’s personal and psychological

¹ See his Response, page 6, ¶ 2 and 3.

problems. Approximately one week later, Mr. Zeckser presented a letter of resignation to Mr. Price which Mr. Price eventually signed after repeated requests by Mr. Zeckser. *Id.* Mr. Price testified that he did not voluntarily resign because he felt he had no real alternative but to sign the letter. *Id.* The key issue was whether he was forced out or voluntarily resigned.

5. The question of constructive discharge was given to a jury who found in favor of Mr. Price. The Colorado Court of Appeals held that it was error for the trial court to have a granted judgment notwithstanding the verdict in favor of the school on this issue and held that the jury could find there was a constructive discharge under these facts. *Id.*, at 824.

For a constructive discharge to be demonstrated, there must be a showing that there was deliberate action on the part of the employer which made the employee's working conditions, or allowed them to become, so difficult or intolerable that the employee had no other choice but to resign.

Id. The court concluded that because the principal drafted the letter of resignation and presented it to Mr. Price on several locations until he finally signed the letter, this "militates against the voluntariness of Price's resignation, and in favor of the imposition of intolerable working conditions." *Id.*, at 825. Professor Salby's case is worse—he had no lab, no office and no students. What was he to do?

6. The Colorado Supreme Court affirmed, citing the following legal standard:

... [A] constructive discharge depends upon whether a reasonable person under the same or similar circumstances would view the new working conditions as intolerable, and not upon the subjective view of the individual employee. ... To prove a constructive discharge, a plaintiff must present sufficient evidence establishing deliberate action on the part of an employer which makes or allows an employee's working conditions to become so difficult or intolerable that the employee has no other choice but to resign.

* * * * *

The trial court's basis for granting JNOV was that a reasonable jury could not have found that Zeckser took deliberate action to make the working conditions intolerable as required for a constructive discharge. The court of appeals reversed, stating that the jury could have reasonably concluded that Zeckser's actions were deliberate and calculated to deprive Price of his employment without resort to the hearing to which he was entitled.

* * * * *

Viewing the evidence in the light most favorable to Price, a reasonable jury could find that Price had been constructively discharged.

805 P.2d at 1088 (citations and internal quotations omitted). Under *Price*, there is at least a factual issue as to whether the destruction of Professor Salby's lab and not allowing students to enroll his classes would cause him to resign.

7. Finally, this Court dismissed the first amendment claim upon grounds that there was no causal nexus between the filing of the grievance and the seizure of Professor Salby's lab. However, the Committee's letter to Mr. Distefano, upon which the seizure herein was based, specifically referred to the National Science Foundation's February, 2005, inquiry into matters regarding Professor Salby (which were a continuation of his initial complaints). Additionally, Professor Salby referred to this ongoing dispute in his letter to Mr. Distefano. See affidavit, ¶ 11. Although he could not conclusively prove the causal nexus at this time, evidence indicated that such a causal nexus exists and, pursuant to Rule 56(f), he asked in his affidavit for additional discovery on this point. See affidavit, ¶ 11. Therefore, it was error to dismiss this claim without allowing discovery.

WHEREFORE, plaintiff Salby respectfully requests that this Court reconsider its order dismissing the federal claims against Mr. Distefano.

Respectfully submitted this November 9, 2009.

CROSS & LIECHTY, P.C.

By: s/ Robert M. Liechty
Robert M. Liechty
Email: rliechty@crossliechty.com

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2009, a true and correct copy of the foregoing **MOTION TO RECONSIDER** was served upon the following persons as indicated below:

Thomas S. Rice, Esq.
Courtney B. Kramer, Esq.
SETER GOLDFARB & RICE, L.L.C.
1700 Broadway, Suite 1700
Denver, Colorado 80290
Attorneys for Defendant DiStefano

☐ by First-Class U.S. Mail, postage prepaid
☐ by Hand Delivery
☐ by Facsimile to 303-320-0210
☐ by Overnight Mail
☒ Justice Link electronic filing

David P. Temple, Esq.
Senior Associate University Counsel
Office of University Counsel - Litigation
1800 Grant Street, Suite 700
Denver, Colorado 80203
Attorneys for Defendant C.U.

☐ by First-Class U.S. Mail, postage prepaid
☐ by Hand Delivery
☐ by Facsimile to 303-860-5650
☐ by Overnight Mail
☒ Justice Link electronic filing

Duly signed original on file in the offices of Cross & Liechty, P.C.

s/ Kelsey Ihrig

This document constitutes a ruling of the court and should be treated as such.

Court: CO Denver County District Court 2nd JD

Judge: Anne M Mansfield

File & Serve

Transaction ID: 27962113

Current Date: Dec 10, 2009

Case Number: 2009CV3789

Case Name: SALBY, MURRY vs. UNIV OF COLO et al

Court Authorizer: Anne M Mansfield

Court Authorizer

Comments:

The primary purpose of a motion to amend judgment or for new trial is to give the court an opportunity to correct any errors that it may have had. See *In re Jones*, 668 P.2d 980 (Colo. App. 1983). After review of Plaintiff's Motion, the Court finds that no new legal or factual issues have been raised which would cause the Court to amend its prior ruling.

/s/ Judge Anne M Mansfield

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO	FILED Document DATE FILED: November 19, 2009 5:17 PM CO Denver County District Court 2nd JD Filing Date: Nov 19 2009 3:17PM MST Filing ID: 28138781 Review Clerk: Sean McGowan
1437 Bannock Street Denver, Colorado 80202 (720) 865-8307	
Plaintiff(s):	
MURRY SALBY,	
v.	
Defendant(s):	
UNIVERSITY OF COLORADO, PROVOST PHILIP DISTEFANO, and JOHN DOES.	
Attorney: Thomas S. Rice, # 9923 Courtney B. Kramer, # 40097 Address: Senter Goldfarb & Rice, L.L.C. 1700 Broadway, Suite 1700 Denver, CO 80290 Phone No.: 303-320-0509 Fax No.: 303-320-0210 E-mail: trice@sgrllc.com ckramer@sgrllc.com	▲ COURT USE ONLY ▲ Case Number: 09 CV 3789 Div.: 7
RESPONSE IN OPPOSITION TO MOTION TO RECONSIDER	

Defendant, **PHILIP DISTEFANO** ("DiStefano"), by his attorneys, **THOMAS S. RICE** and **COURTNEY B. KRAMER** of the law firm **SENER GOLDFARB & RICE, L.L.C.**, hereby submits the following Response in Opposition to Motion to Reconsider:

1. Plaintiff's Motion to Reconsider in essence argues that the Court should re-evaluate the very same facts and law already presented to reach an opposite result. Such is a wasteful exercise which is neither procedurally sound, nor substantively supported by the record.

2. Plaintiff's motion to reconsider the summary judgment determination must be characterized as a motion for new trial under C.R.C.P. 59(d). *See Bowlen v. Federal Deposit Ins. Corp.*, 815 P.2d 1013, 1015 (Colo. Ct. App. 1991). The primary purpose of a motion for a new trial is to give the court an opportunity to correct any legal errors it may have made, *In re*

Marriage of Jones, 668 P.2d 980, 981 (Colo. Ct. App. 1983), or to evaluate newly discovered evidence. *Aspen Skiing Co. v. Peer*, 804 P.2d 166, 172 (Colo. 1991). Here, neither of these circumstances is presented.

3. Plaintiff improperly uses his Motion to Reconsider to ask the Court to “re-think” that which the Court has already analyzed. *Johnson v. City of Richmond*, 102 F.R.D. 623, 623-24 (D.C. Va. 1984). A motion to reconsider is not proper where a litigant merely complains about the decision rendered against him. When “the plaintiff has brought up nothing new . . . [the Court] has no proper basis upon which to alter or amend the judgment previously entered.” *Durken v. Taylor*, 444 F.Supp. 879, 889 (E.D. Va. 1977). A fundamental prerequisite to a motion for reconsideration is that the party seeking reconsideration must demonstrate that the case’s outcome would be different if the motion for reconsideration is granted. *Wright ex rel. Trust Co. of Kansas v. Abbott Laboratories, Inc.*, 259 F.3d 1226, 1236 (10th Cir. 2001).

4. After DiStefano asserted the defense of qualified immunity, the heavy burden shifted to Plaintiff to demonstrate that (1) DiStefano’s actions violated a constitutional or statutory right, and (2) the right was clearly established at the time such that reasonable persons in DiStefano’s position would have known his conduct violated that right. *Migneault v. Peck*, 158 F.3d 1131, 1139 (10th Cir. 1998) (citing *Clanton v. Cooper*, 129 F.3d 1147, 1153 (10th Cir. 1997)). “If the plaintiff fails to carry either part of his two-part burden, the defendant is entitled to qualified immunity.” *Migneault*, 158 F.3d at 1139. Thus, the burden was squarely placed on Plaintiff to bring forth facts and law to show that DiStefano violated his clearly established constitutional rights. Barring such a showing, DiStefano was and is entitled to qualified immunity from Plaintiff’s lawsuit just as the Court has ruled.

5. In seeking to buttress his Fourth Amendment claim, Plaintiff argues that *O’Connor v. Ortega*, 480 U.S. 709 (1987) constitutes clearly established law that DiStefano’s limited actions in this matter violated the Fourth Amendment. [Pl. Motion at p. 2.] *O’Connor* involved the reasonableness of a search of a medical professor’s office and is readily distinguishable. 480 U.S. at 712-15. In that case, the defendant’s direct involvement included placing plaintiff on administrative leave, prohibiting him from returning to the hospital, organizing a specific committee to investigate misconduct, and authorizing the office search with no prior notice to plaintiff. *Id.* Here, Plaintiff never alleged or provided evidence that DiStefano searched the office, authorized a search of the office contents, or violated Plaintiff’s expectation of privacy. Regardless, *O’Connor* does not clearly establish that a government actor’s discretionary conduct in accepting a committee’s recommendations results in a violation of Plaintiff’s constitutional rights. Plaintiff has not met his heavy burden to pierce DiStefano’s qualified immunity because he has failed to bring forth any facts showing that DiStefano illegally searched his office, illegally destroyed his property, or personally condoned or authorized same. Plaintiff also fails in his burden because he has shown no law demonstrating that DiStefano’s actions in accepting a duly constituted committee’s recommendations to bar the professor from his office violated any clearly established constitutional right.

6. Further, Plaintiff attempts to support his Fourteenth Amendment Due Process claim with the assertion that *Price v. Boulder Valley Sch. Dist. R-2*, 782 P.2d 821 (Colo. Ct. App. 1989) is substantially the same as this case with regard to Plaintiff's claim of constructive discharge [Pl. Motion at p. 2]. In *Price*, the Court held that "the essential question [with regard to constructive discharge] is whether the employer's awareness of the employee's condition was sufficient to enable the trier of fact to conclude that the employer's actions were of a deliberate character." *Price*, 782 P.2d. at 824. (Emphasis added). The Court found plaintiff's resignation involuntary due to a number of factors including plaintiff's weakened mental condition and the fact that plaintiff did not draft the resignation letter but was presented with the letter on several occasions by defendant. *Id.* at 823-24. Here, Plaintiff has presented no evidence of any conduct by DiStefano which constitutes deliberate action calculated to deprive Plaintiff of his employment. *Id.* at 825. Indeed, Plaintiff fails to provide any evidence tying DiStefano to the creation of an alleged hostile work environment. Contrary to Plaintiff's allegation, *Price* does not provide clearly established law that a government actor's limited conduct creates a hostile environment in violation of the Fourteenth Amendment. More importantly, the entire concept of an alleged deprivation of pre-termination due process is nonsensical on its face when it is the employee who resigned his post (simply stated: how can any pre-termination process be provided when it is plaintiff who leaves his post?). Here again, Plaintiff has not met his heavy burden as he shows neither fact nor law implicating DiStefano in any violation of clearly established constitutional rights.

7. Lastly, Plaintiff argues in support of his First Amendment Retaliation claim by suggesting that there might be some causal link between DiStefano's actions in accepting the committee's recommendations and the Plaintiff's decade old grievance (of which DiStefano has affirmed he had no knowledge) that can perhaps be found if he be allowed to conduct discovery. This approach ignores the entire thrust of the qualified immunity doctrine. Public officials such as DiStefano who act in discretionary roles are protected from the burdens of non-stop litigation regarding their decisions unless and to the extent that a plaintiff can show that there is real merit to his claim. Hoping and praying that discovery might unearth some supporting evidence is wholly non-responsive to the qualified immunity motion. Indeed, such an argument only serves to highlight why the case is properly dismissed.

8. In conclusion, procedurally Plaintiff must present adequate grounds for requesting reconsideration and bring forth evidence that the outcome of the motion for summary judgment is improper. Plaintiff fails to meet his burden. Plaintiff's renewed factual assertions are not material to the issue of qualified immunity and do not pertain to DiStefano's liability with respect to the federal claims alleged against him. Specifically, Plaintiff cannot establish facts overlooked by the Court, cannot provide new evidence that ties DiStefano to these claims, and cannot identify clearly established law holding that the discretionary actions of a University Provost in accepting a committee's recommendations violate constitutional rights.

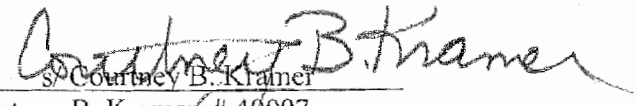
WHEREFORE, for the reasons stated herein, DiStefano respectfully requests that this Court:

- A. Denying Plaintiff's Motion to Reconsider the Court's Order dated October 28, 2009;
- B. Granting DiStefano his attorney fees necessitated in responding to this motion; and
- C. Ordering such other and further relief as the Court deems just and proper.

Respectfully submitted,

SETER GOLDFARB & RICE, L.L.C.


By s/ Thomas S. Rice
Thomas S. Rice, # 9923


By s/ Courtney B. Kramer
Courtney B. Kramer, # 40097
1700 Broadway, Ste. 1700
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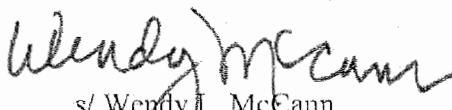
Attorneys for Defendant Philip DiStefano

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November, 2009, a true and correct copy of the above and foregoing **DEFENDANT DISTEFANO'S RESPONSE IN OPPOSITION TO MOTION TO RECONSIDER** was electronically filed with the Court and served upon all counsel via LexisNexis File and Serve, addressed to:

Robert M. Liechty, Esq.
rliechty@crossliechty.com

David P. Temple, Esq.
David.temple@cu.edu


s/ Wendy L. McCann
Wendy L. McCann
Legal Secretary

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Address: 1437 Bannock Street Denver, Colorado 80202 Telephone: 720 865-8307		FILED Document CO Denver County District Court 2nd JD Filing Date: Nov 9 2009 3:14PM MST Filing ID: 27962113 Review Clerk: Orathay Khiem
Plaintiff: MURRY SALBY Defendants: UNIVERSITY OF COLORADO, PROVOST PHILLIP DiSTEFANO, and JOHN DOES.		▲ COURT USE ONLY ▲
Attorneys for Plaintiff: Robert M. Liechty, No. 14652 CROSS & LIECHTY, P.C. Address: 7100 E. Belleview Ave., Suite G-11 Greenwood Village, CO 80111 Phone No. (303) 333-4122 e-mail: rliechty@crossliechty.com		Case No.: 09-CV-3789 Division 7
MOTION TO RECONSIDER		

Plaintiff Murry L. Salby, by and through his attorney Robert M. Liechty of CROSS & LIECHTY, P.C., moves this Court to reconsider its order of October 28, 2009, dismissing the federal claims against defendant DiStefano as follows:

1. This motion concerns the dismissal of the fourth amendment, 14th amendment, and first amendment claims against Mr. Distefano.

2. This Court dismissed the fourth amendment claim on two grounds. First, this Court found that Professor Salby's personal property was returned to him (or he at least had access to it). That is incorrect. As he said in his affidavit, his lab was dismantled and destroyed so that the computers did not function. **See** his original affidavit, reattached hereto, ¶ 6. Because his computers could not function, he could not retrieve information stored on them. He asked for a copy of the files that were stored on his computers in December and in January, but his requests were ignored (possibly because since the computers would not function, it was impossible to comply with his request). *Id.*, ¶ 7. Although Mr. Distefano may have presented evidence to the contrary, this simply establishes a factual dispute. On a motion for summary judgment "all doubts as to whether a triable issue of fact exists must be resolved against the

moving party.” *Bayou Land Co. v. Talley*, 924 P.2d 136, 151 (Colo. 1996). Therefore, the issue of fact as to whether Professor Salby had access to his property must be resolved against Mr. Distefano.

3. This Court also said that Professor Salby cited no law indicating that Mr. Distefano’s actions violated the Fourth Amendment. That is incorrect. Professor Salby relied upon *O’Connor v. Ortega*, 480 U.S. 709, 719-20 (1987),¹ which concerned the search of a medical professor’s office. The U.S. Supreme Court stated that the search had to be reasonable under the Fourth Amendment. Given that Professor Salby’s property was destroyed when the computers were made nonfunctional, there is at least a factual question as to whether this was reasonable.

4. This Court then held that it was not convinced that Professor Salby presented sufficient evidence that he was constructively discharged, thus making it unnecessary to provide any process. However, Professor Salby stated the following:

I retired because my laboratory had been destroyed and my professional records had either been reduced to a state of disarray or resided on computers and archival tapes that were made inaccessible. During that same period, I also discovered that my students were not allowed to enroll in my classes. Consequently, I had no choice but to leave the University.

See affidavit, ¶ 10. The law of constructive discharge is set out in *Price v. Boulder Valley School District*, 782 P.2d 821 (Colo. App. 1989), *aff’d*, *Boulder Valley School District v. Price*, 805 P.2d 1085 (Colo. 1991). *Price* concerned the constructive discharge of a teacher as a predicate to a due process claim under §1983, substantially the same claim as herein. Mr. Price began teaching in 1967 and was asked to resign in 1979. The pertinent facts are as follows:

In 1975, Price was diagnosed as manic-depressive. He suffered an emotional breakdown in the summer of 1979, having undergone, in 1978, the death by cancer of his former wife, and his assumption of the custody of their two minor children.

Beginning in the 1978-79 school year and continuing into the 1979-80 school year, Price began seriously to neglect certain job duties. Specifically, he failed to take attendance and post absence lists, failed to prepare required lesson plans and course outlines, failed to prepare a record student grades, and a failed to return a grade book and the keys to the school at which he had taught in 1978-79. [His principal] Zeckser received several complaints from both parents and students regarding Price. Repeated oral and written directives by Zeckser did not result in correction of the deficiencies in Price’s performance.

See the Court of Appeals recitation of facts, 782 P.2d at 823. Mr. Price and his principal had a meeting in October, 1979, in which they discussed Mr. Price’s personal and psychological

¹ See his Response, page 6, ¶ 2 and 3.

problems. Approximately one week later, Mr. Zeckser presented a letter of resignation to Mr. Price which Mr. Price eventually signed after repeated requests by Mr. Zeckser. *Id.* Mr. Price testified that he did not voluntarily resign because he felt he had no real alternative but to sign the letter. *Id.* The key issue was whether he was forced out or voluntarily resigned.

5. The question of constructive discharge was given to a jury who found in favor of Mr. Price. The Colorado Court of Appeals held that it was error for the trial court to have a granted judgment notwithstanding the verdict in favor of the school on this issue and held that the jury could find there was a constructive discharge under these facts. *Id.*, at 824.

For a constructive discharge to be demonstrated, there must be a showing that there was deliberate action on the part of the employer which made the employee's working conditions, or allowed them to become, so difficult or intolerable that the employee had no other choice but to resign.

Id. The court concluded that because the principal drafted the letter of resignation and presented it to Mr. Price on several locations until he finally signed the letter, this "militates against the voluntariness of Price's resignation, and in favor of the imposition of intolerable working conditions." *Id.*, at 825. Professor Salby's case is worse—he had no lab, no office and no students. What was he to do?

6. The Colorado Supreme Court affirmed, citing the following legal standard:

... [A] constructive discharge depends upon whether a reasonable person under the same or similar circumstances would view the new working conditions as intolerable, and not upon the subjective view of the individual employee. ... To prove a constructive discharge, a plaintiff must present sufficient evidence establishing deliberate action on the part of an employer which makes or allows an employee's working conditions to become so difficult or intolerable that the employee has no other choice but to resign.

* * * * *

The trial court's basis for granting JNOV was that a reasonable jury could not have found that Zeckser took deliberate action to make the working conditions intolerable as required for a constructive discharge. The court of appeals reversed, stating that the jury could have reasonably concluded that Zeckser's actions were deliberate and calculated to deprive Price of his employment without resort to the hearing to which he was entitled.

* * * * *

Viewing the evidence in the light most favorable to Price, a reasonable jury could find that Price had been constructively discharged.

805 P.2d at 1088 (citations and internal quotations omitted). Under *Price*, there is at least a factual issue as to whether the destruction of Professor Salby's lab and not allowing students to enroll his classes would cause him to resign.

7. Finally, this Court dismissed the first amendment claim upon grounds that there was no causal nexus between the filing of the grievance and the seizure of Professor Salby's lab. However, the Committee's letter to Mr. Distefano, upon which the seizure herein was based, specifically referred to the National Science Foundation's February, 2005, inquiry into matters regarding Professor Salby (which were a continuation of his initial complaints). Additionally, Professor Salby referred to this ongoing dispute in his letter to Mr. Distefano. See affidavit, ¶ 11. Although he could not conclusively prove the causal nexus at this time, evidence indicated that such a causal nexus exists and, pursuant to Rule 56(f), he asked in his affidavit for additional discovery on this point. See affidavit, ¶ 11. Therefore, it was error to dismiss this claim without allowing discovery.

WHEREFORE, plaintiff Salby respectfully requests that this Court reconsider its order dismissing the federal claims against Mr. Distefano.

Respectfully submitted this November 9, 2009.

CROSS & LIECHTY, P.C.

By: s/ Robert M. Liechty
Robert M. Liechty
Email: rliechty@crossliechty.com

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2009, a true and correct copy of the foregoing **MOTION TO RECONSIDER** was served upon the following persons as indicated below:

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Courtney B. Kramer, Esq.
SENER GOLDFARB & RICE, L.L.C.
1700 Broadway, Suite 1700
Denver, Colorado 80290
Attorneys for Defendant DiStefano

- ☐ by First-Class U.S. Mail, postage prepaid
- ☐ by Hand Delivery
- ☐ by Facsimile to 303-320-0210
- ☐ by Overnight Mail
- ☒ Justice Link electronic filing

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- ☐ by Overnight Mail
- ☒ Justice Link electronic filing

Duly signed original on file in the offices of Cross & Liechty, P.C.

s/ Kelsey Ihrig

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Address: 1437 Bannock Street Denver, Colorado 80202 Telephone: 720 865-8307		FILED Document CO Denver County District Court 2nd JD Filing Date: Nov 9 2009 3:14PM MST Filing ID: 27962113 Review Clerk: Orathay Khiem ▲ COURT USE ONLY ▲ Case No.: 09-CV-3789 Division 7
Plaintiff: MURRY SALBY Defendants: UNIVERSITY OF COLORADO, PROVOST PHILLIP DISTEFANO, and JOHN DOES.		
Attorneys for Plaintiff: Robert M. Liechty, No. 14652 CROSS & LIECHTY, P.C. Address: 7100 E. Belleview Ave., Suite G-11 Greenwood Village, CO 80111 Phone No. (303) 333-4122 e-mail: rliechty@crossliechty.com		
AFFIDAVIT OF MURRY SALBY		

I, Murry Salby, being of lawful age and duly sworn, state the following based on personal knowledge:

1. From December, 2006, to August, 2007, I was on a sabbatical leave in Australia, which was approved by the University and conducted pursuant to University policy. While on leave, I was never contacted regarding the conflict of interest issues referenced in my complaint. However, a group from the University met with me in February, 2006, and in June, 2006, before my sabbatical, when I provided the group with all the information it requested. At that time, we communicated via e-mail. However, while in Australia, no one from the University contacted me concerning the issue via this e-mail address; hence, I had no idea if anything had come of it.

2. I returned to the University at the end of August, 2007. No one from the University contacted me regarding any conflict of interest issue and I was not denied access to my laboratory. Nor was I told about, let alone asked to complete, the conflict-of-interest form (the DEPA). During the prior year, my staff had resigned (due to lack of funding), leaving a backlog of work and correspondence that was overwhelming and I was attending to that. I was still unaware of any conclusions that the working group referenced in ¶ 1 had reached, preliminary or otherwise, and I was unaware that the matter had been referred to what I now know as the Conflict of Interest Committee.

3. I received a letter dated September 19, 2007, from Mr. DiStefano stating that he had accepted the recommendations of the Committee (at the time, I did not know to what he was referring) and that I was to provide to this Committee, by October 1, 2007, information that the Committee had been seeking. Because I had no idea what he was talking about, I wrote a memo to Mr. DiStefano on September 28, 2007, stating that I did not know to what he was referring. I told Mr. DiStefano that I had received no subsequent communication from the University since the summer of 2006. Because I did not know who was on the Committee, I asked Mr. DiStefano to have the Committee contact me, whereupon I would provide any additional material that the Committee desired.

4. Neither Mr. Distefano nor anyone from the Conflict of Interest Committce contacted me. Instead, on October 18, 2007, the University evicted me from my office and seized my laboratory. No one provided me a rationale for the seizure. With University police present to enforce the seizure, the University dismantled the facilities, including image-processing, interactive graphics, and video recording equipment. I was then locked out. My office contents were reduced to a state of disarray, packaged haphazardly into some 50 storage cartons. They were moved into a small storage area, where there was not even enough room to open the contents, let alone to determine what was where. This was my new office.

5. Other personal property, including books, data, and professional records spanning my 30-yr career, resided in the lab adjacent to my office. Some of that property could not be located among the debris that remained after the seizure of the facilities. Nor was it found among the contents of the approximately 50 cartons into which my 30-yr career had been packaged. This property was never recovered. Among the equipment confiscated were several large computer platforms, as well as a large array of computer disks and archival tapes, on which my professional files and other intellectual property were stored. Included in this were teaching records, records from federal research, scientific publications, conference presentations, professional correspondence to colleagues, to scientific journals, and to funding agencies for whom I served as a reviewer, and files from my graduate text, a new edition of which had been invited by two international publishers. Around October 25, 2007, my department, the Department of Atmospheric and Oceanic Sciences (ATOC), notified me that the computers on which that material was stored would no longer be accessible, even remotely.

6. My lab was constructed over two and a half decades. At the time it was seized, its facilities were contractually bound to an ongoing federal research project. As Principal Investigator, I was responsible for meeting the research obligations, which in turn relied upon those facilities. The technical facilities that were dismantled were the fruit of years of development, as well as millions of federal research dollars that had been invested to integrate those facilities. That development enabled those facilities to interact with one another and with the computer platforms through the use of locally-developed software and programmable memory, which was no longer available. The University's actions on October 18 permanently destroyed that functionality. Professional records spanning my 30-yr career, which supported teaching, research, and service to the scientific community, were likewise seized or destroyed. Most of the actions of October 18, 2007 were irreversible.

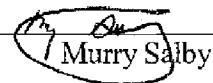
7. I contacted the departmental chair of ATOC regarding the above actions. He advised me that he had not even been consulted and, like me, had learned of the University's actions only when they occurred. I told him that the University had seized personal property, professional records supporting federal research, and property titled or copyrighted to other parties, requesting access. Then, and again later, I requested through my department that the University provide me with a copy of my files that were stored on the computers which had been seized. That request was repeated in December and again in January, in my letter of resignation. My requests were ignored.

8. After the seizure of my lab and office, I asked the ATOC department to clarify the circumstances. Because Mr. DiStefano's letter left me bewildered, and neither he nor anyone else responded to my September 28 letter, I asked ATOC to find out to what Mr. DiStefano was referring. After some investigating, ATOC obtained a copy of an e-mail that had been sent to me while I was living in Australia, but sent to an incorrect e-mail address. That e-mail address was not the one I used nor the one through which I had communicated previously with the group referenced in ¶ 1 above.

9. This mis-directed e-mail said that the University had installed a new policy while I was on sabbatical and instructed that faculty were to complete the DEPA form on a University web site. However, the University's web site refused to permit me to log in. After repeated attempts, I had to contact the University's office of IT services. Even they were unsuccessful. After numerous measures to the correct the problem, the office of IT services found it necessary to erase my account entirely and then reinstall it. I was then able to log in and complete the DEPA form online, a procedure that took only a few minutes. I never was told if the Committee reached a conclusion on whether there was a conflict of interest. By then, however, the damage had been done.

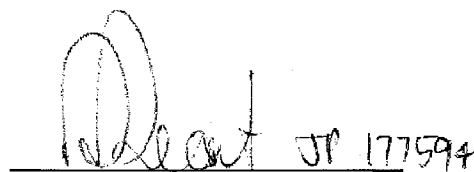
10. I retired because my laboratory had been destroyed and my professional records had either been reduced to a state of disarray or resided on computers and archival tapes that were made inaccessible. During that same period, I also discovered that students were not allowed to enroll in my classes. Consequently, I had no choice but to leave the University. I did not retire voluntarily.

11. I believe that Mr. DiStefano had knowledge of my grievances filed in 1997 and in 2000. They alerted the University to its misuse of federal research funds, actions which ultimately led to a criminal investigation of the University by the National Science Foundation. As a result of those grievances and the subsequent criminal investigation, the University eventually released some \$100,000 to my research projects, funds that it had previously refused to release. At that time, Mr. DiStefano was in the upper echelon of University administration—he would have known of the release of the \$100,000 and of the University coming under criminal investigation. I also referenced this dispute in my September 28 letter to Mr. DiStefano. However, we need to investigate this to determine the full extent of what he knew.


Murry Salby

SUBSCRIBED AND SWORN to before me this 6th day of July, 2009, by Murry Salby
as being true and correct to the best of his knowledge, information and belief.

WITNESS my hand and official seal.


Justice of the Peace

District Court, City and County of Denver, Colorado 1437 Bannock St. Denver, CO 80202	EFILED Document <small>DATE FILED: October 28, 2009 5:57 PM</small> CO Denver County District Court 2nd JD Filing Date: Oct 28 2009 5:57PM MDT Filing ID: 27790004 Review Clerk: Angie D Guenther ▲ COURT USE ONLY ▲
Plaintiff: MURRY SALBY v. Defendants: UNIVERSITY OF COLORADO, PROVOST PHILIP DISTEFANO, and JOHN DOES.	
	Case Number: 09CV3789 Division: 7
ORDER	

This matter is before the Court on Defendant Philip DiStefano's ("DiStefano") Motion for Summary Judgment, filed on June 15, 2009. The Court, having considered the response, the reply, the pleadings and file, and otherwise being sufficiently advised, finds and Orders as follows:

BACKGROUND

Murray Salby's ("Salby") claims against DiStefano arise out of the employment relationship between Salby, a former professor at the University of Colorado, and the Regents of the University of Colorado ("University"). At all relevant times, DiStefano was the Provost and Executive Vice Chancellor for Academic Affairs for the Boulder campus of the University. As Provost, DiStefano was responsible for making final decisions concerning disciplinary actions for tenured faculty. In March 2007, while Salby was employed at the University, the University requested that Salby complete certain conflict of interest reporting procedures. Salby failed to comply in a manner that met the University's satisfaction, and the Conflict of Interest Committee ("Committee") recommended disciplinary action against Salby. Ultimately, DiStefano accepted the Committee's recommendation and commenced disciplinary action against Salby in September 2007. Salby subsequently announced his retirement and resigned from the University.

In April 2009, Salby filed his Complaint, naming the University and DiStefano as defendants. Salby claims that DiStefano violated his First, Fourth, and Fourteenth Amendment rights under 42 U.S.C. §1983 and §1988, as well as the Colorado

Whistleblower Statute, Colo. Rev. Stat. §24.50.5-103 (2009), when DiStefano commenced disciplinary action against Salby and restricted his access to the University's lab. DiStefano then filed a Motion for Summary Judgment, followed by Salby's Response and DiStefano's Reply. The issue that the parties ask the Court to resolve is whether the affirmative defense of qualified immunity bars Salby's 42 U.S.C. §1983 and §1988 claims against DiStefano, thus requiring dismissal of these claims against DiStefano prior to the commencement of discovery.

STANDARD OF REVIEW

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with evidences, if any, show that there is no genuine issue as to any material fact and that that the moving party is entitled to judgment as a matter of law." Colo. R. Civ. P. 56(c); Casey v. Christie Lodge Owners Ass'n, Inc., 923 P.2d 365, 366 (Colo. App. 1996). The moving party has the burden of demonstrating the absence of a genuine issue of material fact. Ellerman v. Kite, 625 P.2d 1006, 1008 (Colo. 1981). "All doubts as to whether a triable issue of fact exists must be resolved against the moving party." Bayou Land Co. v. Talley, 924 P.2d 136, 151 (Colo. 1996). In his Motion, DiStefano asserts that there are no genuine issues of material fact because the affirmative defense of qualified immunity bars Salby's claims against him.

DISTEFANO'S QUALIFIED IMMUNITY STATUS

DiStefano's Motion for Summary Judgment focuses primarily on whether qualified immunity applies to DiStefano and bars Salby's claims against him. DiStefano argues that Salby's claims are barred because they arose out of a situation in which DiStefano, as a government official, acted within his discretionary authority when he accepted the Committee's recommendations for disciplinary action concerning Salby and restricted Salby's access to the University's research lab. DiStefano argues that he could not know that it would violate clearly established law for him to take these actions against Salby. This Court agrees with DiStefano's argument.

Qualified immunity protects government officials performing discretionary functions from liability if their conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Generally, in order to defeat an assertion of qualified immunity, the plaintiff has the burden of proving that a government official, acting within his discretionary authority: (a) violated a constitutional or statutory right; and (b) that the infringed right at issue was clearly established at the time of the allegedly unlawful activity such that a reasonable individual in his position would have known his challenged conduct was illegal. See Martinez v. Carr, 479 F.3d 1291, 1295 (10th Cir. 2007); see also Pearson v. Callahan, 129 U.S. 808, 818 (2009). Lower courts are permitted to use discretion to determine which of the two prongs of the qualified

immunity analysis should be addressed first based on the particular circumstances of the case. Pearson, supra, at 818.

Public policy favors the application of qualified immunity. Qualified immunity shields defendants from liability, but “is also intended to protect the defendant from the burdens associated with trial.” Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988). Furthermore, it ensures that “insubstantial claims” will be resolved before discovery. Pearson, supra at 815. Trial courts are encouraged to resolve the issue of qualified immunity at the summary judgment level, rather than waiting until the close of discovery or beginning of trial. The question of whether qualified immunity should apply to any given defendant is “purely legal, and a court cannot avoid answering the question by framing it as factual. The court must first determine whether the actions defendants allegedly took are ‘actions that a reasonable [person] could have believed lawful.’ If the actions are those that a reasonable person could have believed were lawful, defendants are entitled to dismissal before discovery.” Workman v. Jordan, 958 F.2d 332, 336 (1992). It is the Court’s role to make a determination not only as to the applicable law, but as to “whether that law was clearly established at the time an action occurred. If the law at the time was not clearly established, an official could not reasonably be expected to ‘know’ that the law forbade conduct not previously identified as unlawful.” Harlow v. Fitzgerald, supra at 818.

The first prong of the test requires that the individual engaging in an alleged constitutional violation be a government official acting within his or her discretionary authority. Here, it is undisputed that DiStefano was a government official during his time as Provost and Vice Chancellor of Academic Affairs at the University. Secondly, it is undisputed that the actions he took were within his discretionary authority when he adopted the recommendations of the Committee. See Defendant’s Exhibit F-1; Plaintiff’s Exhibit 3. Thus, this Court finds that the first prong of the qualified immunity test has been satisfied. The Court will now evaluate Salby’s remaining claims utilizing the remaining two prongs of the qualified immunity test: by determining whether DiStefano violated a clearly established Constitutional right, and whether a reasonable person in DiStefano’s situation would have known that his actions violated such a right.

SALBY’S FOURTH AMENDMENT CLAIM

Salby alleges that DiStefano violated his Fourth Amendment rights when DiStefano accepted the recommendations of the Committee by denying Salby access to the research lab. Salby also claims that his personal property was seized and never returned to him, despite multiple requests. However, the evidence submitted in this case indicates otherwise. It is indisputed that the research laboratory was the property of the University, not the property of Salby. See Defendant’s Exhibit A-1. Furthermore, the evidence shows that Salby was given an opportunity to recover any personal property that had been removed from the University laboratory. See Defendant’s Exhibit D-1. Finally, Salby cites no law which would indicate that DiStefano’s actions violated the law. Since

DiStefano's actions did not violate clearly established law, the issue of whether he should have known that his actions violated clearly established law is moot. Accordingly, Salby's first claim fails as a matter of law.

SALBY'S FOURTEENTH AMENDMENT CLAIM

Salby also claims that DiStefano violated his procedural due process rights by depriving him of a post-termination hearing. However, the evidence submitted in this case indicates otherwise. First, Salby has provided no evidence to show that he was terminated from his position at the University. Rather, the evidence shows that Salby submitted a letter of resignation and resigned from his position as a professor at the University. See Defendant's Exhibit A-3. Although Salby argues that he was constructively discharged, the Court is not convinced. Merely calling a resignation a "constructive discharge" does not make it so. Since this Court finds that the evidence does not support a finding of wrongful termination in violation of Salby's due process rights, the analysis of whether DiStefano should have known of this alleged violation is moot. Thus, Salby's second claim fails as a matter of law.

SALBY'S FIRST AMENDMENT CLAIM

Additionally, Salby alleges that DiStefano violated his first amendment rights when, in retaliation for grievances Salby had filed against the University, DiStefano confiscated Salby's laboratory, personal effects, and records. This Court finds Salby's argument unpersuasive. First, as discussed previously, the affidavits reflect that the laboratory belonged to the University, and that Salby was given an opportunity to retrieve his personal belongings after he was denied access to the laboratory. See Defendant's Exhibit D-1. Second, even if the laboratory had belonged to Salby and his personal effects had not been returned, Salby still fails to show a causal nexus between the filing of a grievance ten years prior and the acts of DiStefano in this case. There is no evidence showing that DiStefano knew of the grievances Salby had previously filed. Since Salby fails to establish that DiStefano's actions constitute a violation of clearly established first amendment law, the issue of whether DiStefano should have known that his actions constituted a violation of clearly established law is once again moot. Thus, Salby's third claim fails as a matter of law.

CONCLUSION

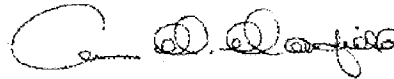
This Court finds that DiStefano has met his burden to establish that qualified immunity applies. The undisputed facts reveal that DiStefano was a government official, and that he was acting within his discretionary authority when he accepted the recommendations submitted to him by the Committee. The majority of Salby's proposed disputed facts relate to issues outside the qualified immunity analysis and do not impact DiStefano's liability in this case. In order to show that an act violated clearly established law, a plaintiff must come forward with developed law under a similar factual scenario

which provides notice or fair warning to a defendant that his conduct was unlawful. See Hope v. Palzer, 536 U.S. 730, 739-40 (2002). Salby has presented no disputed material facts, nor cited any precedent showing that DiStefano acted outside of his discretion, violated Salby's constitutional rights, or should have known that his actions in this situation would violate clearly established law.

The Court agrees with DiStefano's analysis and finds that DiStefano has met his burden of establishing the absence of a genuine issue of a material fact. See Ellerman v. Kite, 625 P.2d at 1008. Therefore, the Court finds that summary judgment in favor of DiStefano is appropriate. Defendant's Motion for Summary Judgment is GRANTED, and Plaintiff's 42 U.S.C. §1983 and §1988 claims against DiStefano will be dismissed.

DATED this 28th day of October, 2009.

BY THE COURT



Anne M. Mansfield
District Court Judge

Cc: All parties via e-file.

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO</p> <p>1437 Bannock Street Denver, Colorado 80202 (720) 865-8307</p> <hr/> <p>Plaintiff(s):</p> <p>MURRY SALBY,</p> <p>v.</p> <p>Defendant(s):</p> <p>UNIVERSITY OF COLORADO, PROVOST PHILIP DISTEFANO, and JOHN DOES.</p> <hr/> <p>Attorney: Thomas S. Rice, # 9923 Courtney B. Kramer, # 40097</p> <p>Address: Senter Goldfarb & Rice, L.L.C. 1700 Broadway, Suite 1700 Denver, CO 80290</p> <p>Phone No.: 303-320-0509 Fax No.: 303-320-0210 E-mail: trice@sgrllc.com ckramer@sgrllc.com</p>	<p>FILED Document CO Denver County District Court 2nd JD Filing Date: Jul 23 2009 2:51PM MDT Filing ID: 26260825 Review Clerk: Sean McGowan</p> <p>DATE FILED: Jul 23 2009 2:51 PM</p> <hr/> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 09 CV 3789</p> <p>Div.: 7</p>
<p align="center">DEFENDANT DISTEFANO'S REPLY IN SUPPORT OF SUMMARY JUDGMENT BASED UPON QUALIFIED IMMUNITY</p>	

Defendant, **PHILIP DISTEFANO** ("DiStefano"), by his attorneys, **THOMAS S. RICE** and **COURTNEY B. KRAMER** of the law firm **SENER GOLDFARB & RICE, L.L.C.**, and pursuant to C.R.C.P. 56, hereby submits the following Reply in Support of Motion for Summary Judgment Based Upon Qualified Immunity:

I. INTRODUCTION

In order to avoid summary judgment, C.R.C.P. 56(e) requires a plaintiff to set forth specific facts through affidavits or other competent evidence “showing that a genuine issue for trial” exists. Further, “in a response to a motion for summary judgment, a party cannot rest on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial.” *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1998) (internal citations and footnote omitted); *see also*, C.R.C.P. 56(e). “The mere possibility that a factual dispute may exist, without more, is not sufficient to overcome convincing presentation by the moving party” but rather some affirmative indication that the litigant’s version of the relevant events is not fanciful is required. *Conaway*, 853 F.2d at 794.

The Court may consider only admissible evidence when ruling on a summary judgment motion. *See, World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985). Conclusory statements and testimony based merely on conjecture or subjective belief are not competent summary judgment evidence. *See, Suncor Energy (USA), Inc. v. Aspen Petroleum Prods., Inc.*, 178 P.3d 1263, 1269 (Colo. Ct. App. 2007); *see also, Western Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1161 (Colo. Ct. App. 2008).

Here, Plaintiff Murry Salby (“Salby”) has not provided any evidence to create a genuine dispute of material fact sufficient to avoid summary judgment with respect to qualified immunity. The majority of Salby’s proposed disputed facts speak to issues outside the qualified immunity analysis and do not bear on DiStefano’s liability in this matter. Salby has not presented disputed material facts that DiStefano acted outside of his discretion, violated Salby’s constitutional rights, or

should have known that his limited actions in this matter would violate clearly established law. As such, DiStefano should be dismissed from this case at the onset of this litigation.

II. STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS

22. Jean Wylie (“Wylie”), Compliance Director for Conflicts of Interest and Commitment, sent correspondence to Salby requesting that Salby submit a Disclosure of External Professional Activities (DEPA). The first correspondence was sent to Salby’s University e-mail address on May 15, 2007. Another correspondence, identical in substance to the first, was mailed to Salby’s home address when he did not respond. On June 22, 2007, Wylie emailed a similar letter to Salby’s University e-mail address and to his private e-mail address. On June 25, 2007, Wylie mailed a substantially similar letter to Salby’s home address. [See, Affidavit of Kelly Duong (“Duong”), Professional Research Assistant in the Department of Atmospheric & Oceanic Sciences, appended hereto as **Ex. D-1**, at ¶ 4; May 15, 2007 email to Salby, appended hereto as **Attachment 1-D**; May 29, 2007 letter to Salby, appended hereto as **Attachment 2-D**; June 22, 2007 email to Salby, appended hereto as **Attachment 3-D**; June 25, 2007 letter to Salby, appended hereto as **Attachment 4-D**.] None of these communications were responded to by Salby.

23. The implementation of the Conflict of Interest Committee’s (“Committee”) recommendations did not occur until approximately October 18, 2007 in order to provide Salby additional time to comply with the Committee’s requests. At this time, Brian Toon (“Toon”), Chair of the Department of Atmospheric & Oceanic Sciences, and his staff initiated attempts to coordinate the move of Salby’s office with Salby in order to ensure that Salby could obtain all of his personal property. [See, Affidavit of Brian Toon, appended hereto as **Ex. E-1**, at ¶¶ 3-4.]

24. Toon informed Salby on October 25, 2007, that he could identify all personal items in his former laboratory for return to him or for removal to his new office. [See, Ex. E-1, at ¶ 6; October 25, 2007 email to Salby, appended hereto as **Attachment 1-E**.]

25. Salby was uncooperative with the University's efforts to have Salby inspect the contents of his former laboratory and to remove non-research materials. However, Salby eventually met with Duong on December 15, 2007 to identify personal items and items requiring his access. Salby went through his belongings unsupervised and without an imposed time limit. Salby was allowed to remove any items from his office apart from research pertaining to his pending grant. [See, Ex. D-1, at ¶¶ 7-10; Ex. E-1, at ¶¶ 4-9; November 15, 2007 email to Duong, appended hereto as **Attachment 2-E**.]

26. Salby was able to access his University-issued computer for non-research materials, including but not limited to teaching materials and e-mails. [See, Ex. D-1, at ¶ 10.]

27. All non-research materials belonging to Salby were removed to Salby's new office, including personal property. Salby never informed Toon that he was missing personal property. [See, Ex. E-1, at ¶ 8.]

28. Toon intended Salby to go through his laboratory unsupervised to determine what he believed was personal property and to take it with him. Salby was also invited to be present when the remaining contents were packed, but he declined. All unclaimed materials remain in storage, including the research data from the grant he was working on upon retirement. [See, Ex. E-1, at ¶ 9.]

29. Pursuant to University policy, data and research generated pursuant to a grant award belong to the University and not the individual faculty member. All of Salby's grants,

including data generated in connection with research performed, are University property. Upon separation of employment, the University may (1) terminate the grant; (2) allow another University researcher to complete the work; or (3) allow the departing faculty member to take the grant with him. [See, Supplemental Affidavit of Russell Moore, appended hereto as **Ex. F-1**, at ¶¶ 3-6; University Administrative Policy Statement regarding Intellectual Property, appended hereto as **Ex. Attachment 1-F**, at ¶ 2.a.1.]

III. ARGUMENT

A. DiStefano is Entitled to Qualified Immunity.

Salby has not met his burden to demonstrate that DiStefano violated clearly established law. He has provided no articulation of Tenth Circuit or United States Supreme Court precedent that could have put DiStefano on notice that his conduct herein was unlawful. *See, Medina v. City and County of Denver*, 960 F.2d 1493, 1497 (10th Cir. 1992). The numerous facts stated by Salby in support of his request to conduct discovery in this case all speak to issues outside of the qualified immunity analysis. The undisputed facts of this case indicate that DiStefano had every reason to believe his very limited actions in this situation were reasonable and constitutional.

To defeat DiStefano's assertion of qualified immunity, the burden shifts to Salby to demonstrate that (1) DiStefano's actions violated a constitutional or statutory right, and (2) the right was clearly established at the time such that reasonable persons in DiStefano's position would have known his conduct violated that right. *See, Garrett v. Stratman*, 254 F.3d 946, 951 (10th Cir. 2001) (citing *Cruz v. City of Laramie*, 239 F.3d 1183, 1187 (10th Cir. 2001)); *see also, Migneault v. Peck*, 158 F.3d 1131, 1139 (10th Cir. 1998) (citing *Clanton v. Cooper*, 129 F.3d 1147, 1153 (10th Cir. 1997)). "If the plaintiff fails to carry either part of his two-part burden, the

defendant is entitled to qualified immunity.” *Migneault*, 158 F.3d at 1139. Salby has come forward with no arguments regarding qualified immunity, much less the required particularized showing that the law is sufficiently clear that DiStefano would have known his conduct was unconstitutional. *See, Patrick v. Miller*, 953 F.2d 1240, 1243 (10th Cir. 1992). Because Salby has come forward with no argument or evidence that could establish that DiStefano violated clearly established law, he is entitled to qualified immunity on all of Salby’s federal claims.

1. DiStefano’s Actions were Discretionary.

Discretion is the essence of qualified immunity. Though discretion alone does not confer immunity, the existence of discretion is the first step in the analysis. *See, Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (establishing that a government official taking discretionary acts is immune unless and to the extent that he violates clearly established law). The Provost at the University of Colorado is a government official whose job entails many discretionary functions, including the responsibility to accept or reject the recommendation of a faculty committee. [SUF at ¶ 3.]

“In order to receive qualified immunity, the public official ‘must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.’” *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002). DiStefano’s sole action in this case consisted of accepting the recommendations of the Committee. DiStefano, as established by the undisputed facts, did not implement the recommendations of the Committee or have any subsequent involvement concerning same. [SUF at ¶ 19.] Though Salby cites *Walker v. City of Denver*, 720 P.2d 619 (Colo. Ct. App. 1986), for the proposition that qualified immunity is inapplicable when the governmental official goes beyond the scope of the law,

Salby fails to provide any support or facts for how DiStefano exceeded the scope of his discretion. Indeed, this argument constitutes unsupported speculation, which is insufficient to defeat summary judgment. It is undisputed that DiStefano accepted the recommendations as submitted by the Committee, and there is no case law rendering these recommendations as unconstitutional.

2. DiStefano did not Violate Clearly Established Law.

To demonstrate that an act violated clearly established law, Salby must come forward with developed law under a factual scenario similar to this case which provides notice or fair warning to DiStefano that his conduct was unlawful. *See, Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002). Salby must not simply show that the law is clearly established. He must also show facts that, if believed, would constitute a violation of that clearly established law.

a. DiStefano did not Violate the First Amendment.

In order to meet his burden on the First Amendment retaliation claim, Salby must prove a causal nexus between the claimed retaliatory conduct and the claimed protected speech. One such showing could be a close temporal proximity between the speech and the challenged action. However, when such temporal proximity does not exist, any presumed connection is weakened. *See, Maestas v. Segura*, 416 F.3d 1182, 1189 (10th Cir. 2005) (stating that a long delay between the speech and challenged conduct undermines any inference of retaliatory motive and weakens the causal link). Here, Salby has not shown that DiStefano knew of the claimed protected speech (i.e. the grievances), nor that any adverse employment action occurred in close temporal proximity thereto. *See, Maestas*, 416 F.3d at 1189; *see also, Deschenie v. Board. of Edu. of Cent. Consolidated School Dist. No. 22*, 473 F.2d 1271, 1277 (10th Cir. 2007). Indeed, Salby's

Response cites no facts showing a causal nexus between his prior grievances in 1997 and 2000 and DiStefano's actions in accepting the Committee's recommendations.

Salby's blanket statement that he seeks additional discovery with regard to this matter is insufficient to overcome qualified immunity. [See, Pl. Response, pg. 7.] Salby may not rest on mere belief or speculation to support his allegations. Rather, it is his burden to provide competent evidence contradicting DiStefano's defense of qualified immunity. The undisputed facts demonstrate that DiStefano knew nothing of grievances filed by Salby in 1997 and 2000, prior to DiStefano's appointment as Provost in 2001. [SUF at ¶ 21.] Salby himself is not competent to testify to what DiStefano knew or did not know at the time he accepted the Committee's recommendations. [See, Exhibit 2 to Pl. Response, Salby Affidavit at ¶ 11.] Salby's reliance on the substance of his September 28, 2007 letter [Exhibit 4 to Pl. Response] is misplaced as DiStefano accepted the recommendations on September 19, 2008. Moreover, the passage of some seven to ten years between the purported protected speech and alleged adverse action is far too remote and tenuous to establish a causal connection.

b. DiStefano did not Violate the Fourth Amendment.

Salby argues that following the lead of another who acts unconstitutionally is not a valid defense. [See, Pl. Response at pgs. 5-6.] However, there is no clearly established law that a university official who adopts the recommendations of a faculty committee violates an individual's constitutional rights. As such, DiStefano violated no clearly established law in contradiction of the Fourth Amendment by accepting the recommendations of the Committee.

Salby argues that the Committee acted impermissibly because he was not sent any emails prior to DiStefano's acceptance of the recommendations. [See, Pl. Response at pg. 3.] Even

were it so, and it is not [SUF at ¶ 22], Salby provides no evidence that this alleged failure to send emails to the correct address is connected to DiStefano or that DiStefano should have known of the claimed communication failures. Nevertheless, the University made numerous attempts to contact Salby via letter sent to his house and e-mails sent to his University account and his private account. [SUF at ¶ 22.] Salby never responded. [SUF at ¶ 22.]

Despite Salby's recitation of facts that are not material to the qualified immunity analysis, Salby submits no facts that tie DiStefano to the claimed unconstitutional conduct, namely seizure and dismantling of Salby's former office and computer. It is undisputed that DiStefano's sole action in this matter was his decision to accept the Committee's recommendations. [SUF at ¶¶ 13, 19.] The recommendations and DiStefano's directive accepting same state that Salby be denied access to his laboratory but mention nothing about the dismantling of the laboratory. [SUF at ¶ 11.] Implementation of the Committee's recommendations did not begin until October 18, 2007, at which time Toon and his staff attempted to obtain Salby's assistance with the removal of his property. [SUF at ¶ 23.] Toon informed Salby on October 25, 2007, that Salby could identify all personal items for removal to his new office. [SUF at ¶ 24.] Salby was completely uncooperative with these efforts to remove non-research materials and to identify personal belongings. [SUF at ¶ 25.] However, Salby eventually inspected the contents of his former laboratory, unsupervised, to identify personal belongings to pack and remove on December 15, 2007. [SUF at ¶¶ 25-26, 28.] The only limitation imposed was Salby's inability to remove data from one University-issued computer, which stored research pertaining to his pending grant. [SUF at ¶ 25.] Data and research generated pursuant to a grant award belong to the University and not the individual faculty member. [SUF at ¶ 29.] As such, Salby's grant

constituted intellectual property belonging to the University. [SUF at ¶ 29.] Salby never informed Toon that he was missing personal property. [SUF at ¶ 27.] Because of Salby's failure to cooperate and remove items from his former laboratory, the University packed the remaining items into boxes and stored them in Salby's new office. [SUF at ¶ 28.] But of greater import, there are no facts submitted that establish that DiStefano was involved in any of the actions regarding the removal of materials from the office.

c. DiStefano did not Violate the Fourteenth Amendment.

It is undisputed that DiStefano did not terminate Salby's employment with the University. Salby announced his retirement in a letter to Toon. [SUF at ¶ 20.] The Committee's recommendations, as accepted by DiStefano, mention nothing of terminating Salby's employment. [SUF at ¶ 11.] DiStefano's acceptance of these recommendations does not equate to employment termination. The case cited by Salby, *Calhoun v. Gaines*, 982 F.2d 1470 (10th Cir. 1992), involves a situation of actual termination. There, a college professor met with the executive vice president of the college to discuss the professor's contract for renewal. *Calhoun*, 982 F.2d at 1473. During the meeting, the vice president withdrew the contract during the meeting, rendering the professor unable to sign it. *Id.* Subsequently, the vice president terminated the professor for abandonment of his position. *Id.* As well, *Wolfenbarger v. Williams*, 774 F.2d 358 (10th Cir. 1985), is also distinguishable as it involves a pawnshop owner's property interest in stolen goods. The Tenth Circuit held that the pawnbroker had a constitutionally protected property interest in the stolen items to support a due process violation when the police released the items to the true owner without a hearing. *Williams*, 774 F.2d at 264-65. DiStefano did not terminate Salby's employment or deprive him of his property. [SUF

at ¶¶ 19-20.] Salby's entire procedural due process argument is a *non sequitur* because the condition precedent to notice and hearing (namely the University's intent to terminate Salby's employment) never occurred. Salby cites no law, and none exists, for the proposition that a University has a duty to afford procedural due process notice and hearing when the professor or employee resigns or retires.

IV. CONCLUSION

DiStefano acted within his official role as Provost at all times relevant to the Complaint, and he is thus entitled to qualified immunity for protection from nuisance litigation. Salby has failed to meet his heavy two-part burden of establishing a constitutional violation of clearly established law and specific facts that tie DiStefano to the violation. For the reasons stated above and in DiStefano's Motion, DiStefano is entitled to summary judgment based on qualified immunity on all of Plaintiff's federal claims.

Respectfully submitted,

SENDER GOLDFARB & RICE, L.L.C.

By s/ Thomas S. Rice
Thomas S. Rice, # 9923

By s/ Courtney B. Kramer
Courtney B. Kramer, # 40097
1700 Broadway, Ste. 1700
Denver, CO 80290
Telephone: 303-320-0509
Facsimile: 303-320-0210
Attorneys for Defendant Philip DiStefano

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 2009, a true and correct copy of the above and foregoing **DEFENDANT DISTEFANO'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BASED UPON QUALIFIED IMMUNITY** was electronically filed with the Court and served upon all counsel via LexisNexis File and Serve, addressed to:

Robert M. Liechty, Esq.
rliechty@crossliechty.com

David P. Temple, Esq.
David.temple@cu.edu

s/ Stephanie Hood
Stephanie Hood
Legal Secretary

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202 (720) 865-8307	FILED Document CO Denver County District Court 2nd JD Filing Date: Jul 23 2009 2:51PM MDT Filing ID: 26260825 Review Clerk: Sean McGowan
Plaintiff: MURRY SALBY Defendants: UNIVERSITY OF COLORADO, PROVOST PHILLIP DiSTEFANO, and JOHN DOES.	Case Number: 09 CV 3789 Division 7
Attorney for Defendant DiStefano: Thomas S. Rice, #9923 Courtney B. Kramer, #40097 Senter Goldfarb & Rice, L.L.C. 1700 Broadway, Suite 1700 Denver, CO 80290 Phone: 303-320-0509 Fax: 303-320-0210 E-Mail: trice@sgrllc.com ckramer@sgrllc.com	
AFFIDAVIT OF BRIAN TOON	

Affiant, **OWEN BRIAN TOON**, after being duly sworn, states as follows:

1. I have been the Chair of the Department of Atmospheric & Oceanic Sciences for the University of Colorado at Boulder since October 1, 2000 and was Professor Murry Salby's supervisor from then until January 2008 when he resigned.
2. I have personal knowledge of the matters set forth in this Affidavit.
3. On September 19, 2007 Chancellor DiStefano directed that Professor Salby not be allowed access to his research laboratory space because of his failure to provide conflict of interest information to the University. The administration delayed implementing this directive to allow Professor Salby more time to submit the requested information. After waiting until approximately October 18, 2007, the lock on the lab door was changed and Professor Salby was denied entry.
4. Because Professor Salby's research lab was connected to his office the University administration directed that he be provided another office and that the contents of his lab/office, except those materials which were related to his research, be moved to his new space. I and my staff began trying to coordinate the move with

Professor Salby in early October 2007. This proved difficult as Professor Salby was difficult to find and not cooperative. One reason why we wanted Professor Salby involved with the move was to ensure that he could have, and decide what to do with, all of his personal property.

5. The initial phase of the move began with the relocation of his office's contents. This was done on October 4, 2007. Professor Salby was present that morning when the process was started. The contents of his lab space were not moved at that time.

6. In an e-mail dated October 25, 2007 I advised Professor Salby: "I would like to walk through your lab space with you and identify all personal items so that we can return them to you, or move them to your current office." A copy is *Attachment 1* hereto. I received no response to this e-mail.

7. My Professional Research Assistant, Kelly Duong, was able to speak with Professor Salby about the contents of his lab and Professor Salby did go through his lab on December 15, 2007. He was allowed to do this unsupervised and was allowed as much time as he wanted.

8. It was our intent to provide Professor Salby with access to all of his personal property. To my knowledge this happened. I know of no item of personal property that Professor Salby was not given access to and he has never identified any personal property that he was not given, or could not have taken had he desired.

9. Our intent to allow Professor Salby to go through his lab unsupervised and to decide what he believed was personal property, and then to pack it up and give it to him or store it. I also intended that he could be present when the lab was packed, as described in my November 15, 2007 e-mail to Kelly Duong. A copy is *Attachment 2* hereto. It is my understanding that Professor Salby declined the invitation to be present when his lab was packed up. All unclaimed materials from his lab are still in storage as is the research data from the grant he was working on when he retired.

FURTHER AFFIANT SAYETH NAUGHT.

Owen B. Toon
Owen B. Toon

STATE OF COLORADO)
COUNTY OF Boulder) ss.

SUBSCRIBED AND SWORN to before me this 22nd day of July, 2009, by Owen
Brian Toon.

By: Cheryl Glenn
Notary Public

My Commission Expires: 6/29/2013

Message for murry

Subject: Message for murry
 From: Brian Toon <Brian.Toon@lasp.colorado.edu>
 Date: Thu, 25 Oct 2007 15:44:10 -0600
 To: Kelly A Duong <Kelly.Duong@Colorado.EDU>
 CC: Russell Moore <Rmoore@Colorado.EDU>

Murry:

Unfortunately the university cannot allow you to have your email on the same server you might use for research. ATOC will shut off the ethernet lines and other lines to your server on or about Nov 1. Please transfer your email and teaching materials to the ATOC server, or a university server. If you need help doing this let Kelly know and we will see what we can do to help you.

ATOC plans to transfer your lab space to Peter Pilewskie's group. I would like to walk through your lab space with you and identify all personal items so that we can return them to you, or move them to your current office. It appears to me that you have old surplus computers in the lab. If you can identify what you no longer need we will surplus them. We will move your server and any other computers you plan to use again in the future into the ATOC air conditioned space on the third floor so that it can be used again if and when you restart your research.

Although we cannot transfer any items purchased on federal grants, or university matching funds, to you at this time, we will transfer any other items. We will begin the process of moving materials in early Nov. If you do not take action to identify how you want things moved, we will move them into storage as best we can.

Brian

 Owen Brian Toon 303-492-1534
 Chair, Department of Atmospheric 303-492-6946 fax
 and Oceanic Sciences toon@lasp.colorado.edu
 Laboratory for Atmospheric Duane Physics, Room D-245
 and Space Physics
 Campus Box 392
 University of Colorado
 Boulder, Co 80309-0392

Attachment 1-E

Schedule to clear out Murry's office

Subject: Schedule to clear out Murry's office

From: Brian Toon <Brian.Toon@lasp.colorado.edu>

Date: Thu, 15 Nov 2007 17:09:31 -0700

To: Kelly A Duong <Kelly.Duong@Colorado.EDU>, Russell Moore <rmoore@Colorado.EDU>, Rebecca Currey <Rebecca.Currey@cu.edu>

Kelly:

1. Murry is allowed to spend time in his lab unsupervised to identify which materials he wants, and which he does not. However, he is not allowed to remove data from his computers. Please try to tell him so that he can do this next week if he wishes. Let's set a deadline for him to do this, which should be a week after you manage to communicate this to him.

2. Please arrange to surplus all the left over old computers in the third floor computer area, and all of those in Murry's lab which he identifies as surplus.

3. Please arrange after Murry's one week to have someone box up everything in Murry's lab. Materials he decides are personal should be given to him or stored. For now we can store this material in the third floor space rather than renting space. Trash should be removed. Murry can be present at the packing.

4. The University will have IT backup his computers. We will then shut them down after the day of his finals and move them to the third floor.

5. Hopefully this will allow us to move Peter's office into Murry's lab before Katja arrives. Does this seem possible to you? I know Peter wants the rugs and such replaced. It is not clear to me how to fit that in. Perhaps we can do this after Peter moves and we have time to arrange it and decide what to do.

Does this all seem possible?

Brian

--

```
*****
Owen Brian Toon          303-492-1534
Chair, Department of Atmospheric and Oceanic Sciences 303-492-6946 fax
Laboratory for Atmospheric and Space Physics          toon@lasp.colorado.edu
Campus Box 392          Duane Physics, Room D-245
University of Colorado
Boulder, Co 80309-0392
*****
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Attachment 2-E

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DISTRICT COURT, CITY AND COUNTY
OF DENVER, STATE OF COLORADO
1437 Bannock Street
Denver, Colorado 80202
(720) 865-8307

Plaintiff:
MURRY SALBY

Defendants:
**UNIVERSITY OF COLORADO,
PROVOST PHILLIP DiSTEFANO,
and JOHN DOES.**

Attorney for Defendant DiStefano:

Thomas S. Rice, #9923

Courtney B. Kramer, #40097

Senter Goldfarb & Rice, L.L.C.

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Fax: 303-320-0210

E-Mail: trice@sgrllc.com

ckramer@sgrllc.com

Case Number: 09 CV 3789

Division 7

SUPPLEMENTAL AFFIDAVIT OF RUSSELL MOORE

Affiant, **RUSSELL MOORE**, after being duly sworn, states as follows:

1. From May 15, 2006 to May 15, 2009, I was the Associate Vice Chancellor for Research for the University of Colorado at Boulder. Beginning May 16, 2009, I now serve as the Interim Vice Chancellor for Research.

2. I have personal knowledge of the matters set forth in this Affidavit.

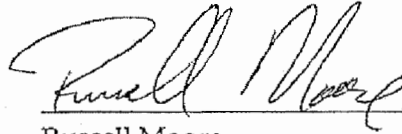
3. When faculty members do research pursuant to federal grants as part of their faculty responsibilities, they obtain the grants in the role of what is known as the Primary Investigator. This means that they are responsible for the work on the grant. However, the grant award actually belongs to the University.

4. The data and all research findings which are generated pursuant to a grant awarded to the University belong to the University and not to the faculty member/Primary Investigator. The University's Administrative Policy Statement effective June 1, 2006 and entitled *Intellectual Property That is Educational Materials*, at Paragraph 2.a.1, also confirms that research data and analysis conducted by faculty members as part of their University employment belongs to the University. A copy of this Administrative Policy Statement is *Attachment 1* hereto.

5. I have examined Professor Salby's grants file from our Office of Grants and Contracts. Consistent with what I have stated above, all of the grants are University property as is the data generated in connection with the research done on the grants.

6. If a faculty member separates from his University employment before the work on a grant is completed, the University, at its option, may: (1) terminate the grant; (2) allow another University researcher to complete the work (with the agreement of the grant agency); or (3) allow the departing faculty member to take the grant (typically when they move to a different university and also with permission from the grant agency).

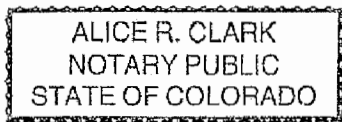
FURTHER AFFIANT SAYETH NAUGHT.



Russell Moore

STATE OF COLORADO)
) ss.
COUNTY OF Boulder)

SUBSCRIBED AND SWORN to before me this 21 day of July, 2009, by Russell Moore.



By: Alice R. Clark
Notary Public
My Commission Expires: 4.20.2012



University of Colorado

Boulder • Colorado Springs • Denver

ADMINISTRATIVE POLICY STATEMENT

Policy Title: Intellectual Property That is Educational Materials

POLICY DETAILS

Effective Date: June 1, 2006

Responsible Office: Office of the Vice President for Academic Affairs and Research

Approved by: Michel R. Dahlin
Interim Vice President for Academic Affairs and Research

Application: All campuses

Replaces: 01/16/2003

1. Introduction

Creating and disseminating knowledge are fundamental missions for the University of Colorado. The creative environment of the University fosters the development of intellectual property. The objective of this policy statement is to enhance the environment for the development of educational materials and for their commercialization by clarifying the rights, responsibilities and rewards for the University and its employees. The University of Colorado in this policy, as elsewhere, reaffirms its commitment to the principles of academic freedom. The University of Colorado also reaffirms its commitment to encouraging and rewarding authors, creators, researchers and inventors who are developing intellectual property. The University supports the creative works of authors and creators who will under most circumstances retain broad rights in support of their creative endeavors. This policy does not change the traditional relationship between the University and employees who, independent from using substantial University resources, retain broad rights of ownership of scholarly and artistic works. This policy functions in accord with other University of Colorado policies and federal and state statutes and regulations.

2. General Policy

2.a. General Rights of Ownership

While current copyright law generally allocates ownership rights to the University as an employer, the University of Colorado agrees to make no ownership claims on intellectual property by the person or people who create Educational Materials, except under the special circumstances as described in this policy and in the Administrative Policy Statement (APS), "Intellectual Property Policy on Discoveries and Patents for their Protection and Commercialization." This policy shall act as an assignment of all copyrights in scholarly and artistic works such as, but not limited to, textbooks, electronic media, syllabi, tests, assignments, monographs, papers, models, musical compositions, works of art and unpublished manuscripts, as the sole and exclusive property of the person or people who create Educational Materials. Exceptions are:

1. those cases in which the production of such materials is a part of sponsored programs;
2. those cases in which the materials are created under the specifically assigned duties of employees other than faculty;
3. those cases in which substantial University resources were used in creating educational materials; and
4. those cases which are specifically commissioned by University contract or done as part of an explicitly designated assignment other than normal faculty scholarly pursuits

In cases where it is not clear whether or not these exemptions apply, creators are strongly encouraged to pursue a negotiated written agreement as stipulated in Section 3(c) of this policy.

2.b. Substantial Use of Resource

"Substantial use of resources" means use of university resources that goes above and beyond those that are customarily and currently provided to University employees. University resources include such things as equipment, staff support, supplemental pay, and offloading from regular duties. Decisions about whether use of these resources is "substantial" or "customary and current" shall be determined by the department/academic unit, school/college, or campus level, as designated in campus policy. The University of Colorado does not assign its interests in the intellectual property created by University employees making substantial use of University resources.

Attachment 1-F

2.c. Who is Covered by This Policy

This policy is applicable to all units of the University including its colleges, schools, departments, centers, institutes, and hospitals, and to all University employees including faculty, instructors, and staff. Employees receiving salaries or other remuneration from the University, including part-time employees, student employees, University employees on sabbatical who receive remuneration from the University, and employees on a leave of absence who are using substantial University resources are bound by this policy. The Vice President for Academic Affairs and Research is the University officer who is authorized to approve exemptions to individuals bound by this policy.

Students are covered under this policy under the following circumstances. A student who is not employed by the University or has not used substantial University resources to develop educational materials, will own the materials she or he creates, unless the student's work is part of a larger work over which the University has rights and intends to exercise them. Students who hold awards such as scholarships or fellowships through the University on which a funding body has placed restrictions as to intellectual property of educational materials developed during the course of the award will be bound by this Administrative Policy Statement.

2.d. Rights to Educational Materials

2.d.1. Rights of the person or people who create Educational Materials Educational Materials created for classroom and learning programs, including electronic media, such as syllabi, assignments, and tests, shall be the property of the creator.

2.d.2. Rights of the University of Colorado While the person or people who create Educational Materials shall own the rights to all Educational Materials developed pursuant to Section 2.d.1 herein, the University of Colorado shall be permitted to use such Educational Materials for administrative purposes, such as satisfying requests of accreditation agencies for faculty-authored syllabi, assessments and course descriptions. Such usage shall extend beyond employment with the University.

2.d.3. Copyright of Professional Journals and Books Consistent with the terms of this policy, the University assigns any interest and ownership claims on publication of research and/or other scholarly materials and activities that typically occur in professional/academic journals, books, and other professional resources. Nothing in this policy shall be construed to restrict or constrain these actions.

3. Process

3.a. Duty to Disclose and Reporting Requirements. Any person formally affiliated with the University shall be obligated to report in a timely manner any efforts to create educational materials that might fall under the authority of University policies, including this policy; the APS, "Conflict of Interest Policy"; and Regent policy, "Use of University's Name in Advertising." Such reporting shall be to the direct supervisor, and, if deemed appropriate by the supervisor, to the University Technology Transfer Office.

3.b. Designation of responsible authority. The campus Chancellor shall designate one or more individuals at the campus level who shall be responsible for undertaking an initial assessment of any matters relating to Educational Materials, including making a determination as to whether substantial University resources have been used, and whether a negotiated agreement is necessary. Such designee shall seek out appropriate assistance and expertise from the Office of University Counsel, Technology Transfer, Finance and other departments as may be necessary and shall be responsible for developing any such written agreement. The Chancellor shall further designate a central campus repository for all Educational Material matters, including written agreements and the disposition of any Educational Material matters.

3.c. Negotiated Written Agreements

Negotiated written agreements are required under the following circumstances:

Substantial Use of University Resources

If substantial University resources are used, or their use is anticipated, at any point in the creation of educational materials, then a negotiated written agreement must be signed by the creator(s) and a designated representative from the campus where the educational materials shall be created. It is the responsibility of the creator to seek clarification of whether the resources being used in the development of educational materials constitutes "substantial uses of University resources." If so, the creator shall negotiate a written agreement with the University.

"Substantial use of University resources" in and of itself does not require that ownership rights be automatically shifted to the University. However, depending on the terms of the negotiated contract, "substantial use of University resources" may result in an obligation to share revenues, reimburse the University, or confer a license. Ownership rights specified in this policy may be altered by mutual agreement.

Multiple Parties If more than one party is responsible for creating specific educational materials, a negotiated written agreement signed by all creators and the University shall be required. That agreement shall usually specify (1) the rights of each party to use, distribute, and sell the materials; and (2) the division of revenues between the parties. Parties may include but are not limited to individuals, research teams, external funding agencies, the University, etc.

3.c.1. A negotiated written agreement will usually specify:

1. the rights of the person or people who create Educational Materials and the University to use, distribute, and sell the materials;
2. the division of revenues between the University and the person or people who create Educational Materials;
3. the rights of the University to use and to modify the materials during and after the period of formal association with the University; and
4. the rights of the person or people who create Educational Materials, the University, and/or external funding parties to be acknowledged or to withhold acknowledgement in the distribution or modification of the materials by the University.

3.c.2. Modifications to Agreements Any negotiated written agreement made in connection with the creation of educational materials may be modified at any time upon the unanimous agreement of all signatories. Such modifications will normally be necessary when changes occur in any of the following:

1. participation of the person or people who create Educational Materials in a continuing project;
2. the University's contribution of substantial resources; or
3. when a dispute is resolved by the Educational Materials Intellectual Property Board through adjudication.

3.c.3. Educational Materials Intellectual Property Board

The University shall establish a system-wide Educational Materials Intellectual Property Board composed of faculty, administrators, staff, and students, to hear and recommend resolution of disputes related to educational materials intellectual property to the Vice President for Academic Affairs and Research, with final recourse to the University President. The Faculty Assembly from each campus shall appoint a faculty member to represent its campus on the Board. The Board also interprets and oversees the implementation of the policies stated in this document and may advise the Vice President for Academic Affairs and Research about exemptions under this policy.

4. Review of Policy

The University System Faculty Council and System Administration shall jointly review the operation of this policy every three years after its adoption and shall report its effectiveness and any suggested changes to the policy to the Board of Regents.

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202 (720) 865-8307	FILED Document CO Denver County District Court 2nd JD Filing Date: Jul 23 2009 2:51PM MDT Filing ID: 26260825 Review Clerk: Sean McGowan
Plaintiff: MURRY SALBY Defendants: UNIVERSITY OF COLORADO, PROVOST PHILLIP DiSTEFANO, and JOHN DOES.	Case Number: 09 CV 3789 Division 7
Attorney for Defendant DiStefano: Thomas S. Rice, #9923 Courtney B. Kramer, #40097 Senter Goldfarb & Rice, L.L.C. 1700 Broadway, Suite 1700 Denver, CO 80290 Phone: 303-320-0509 Fax: 303-320-0210 E-Mail: trice@sgrllc.com ckramer@sgllc.com	
AFFIDAVIT OF KELLY DUONG	

Affiant, **KELLY DUONG**, after being duly sworn, states as follows:

1. I have been employed as a Professional Research Assistant in the Department of Atmospheric & Oceanic Sciences for the University of Colorado at Boulder since September 1993.
2. I have personal knowledge of the matters set forth in this Affidavit.
3. Murry Salby formerly worked in the Department of Atmospheric & Oceanic Sciences and I communicated with Professor Salby about various administrative issues.

4. I have examined four letters sent from Jean Wylie, Compliance Director, to Professor Salby. The first letter is dated May 15, 2007. It requests that Professor Salby submit a Disclosure of External Professional Activities for the purpose of identifying any conflicts of interest. This letter was sent to Professor Salby's University e-mail address, murry.salby@colorado.edu. A copy is *Attachment 1* hereto. The second letter, dated May 29, 2007, identical in substance to the first, was mailed to Professor Salby's home address. A copy is *Attachment 2* hereto.

5. The third letter, dated June 22, 2007, is virtually identical to the May 15, 2007 letter. A copy is *Attachment 3* hereto. This letter was e-mailed to Professor Salby at his University e-mail address and also to his e-mail address at the private company which he worked for. The fourth letter, dated June 25, 2007, identical in substance to the three letters referenced above, was mailed to Professor Salby's home address. A copy is *Attachment 4* hereto.

6. I was never advised by Professor Salby that his University e-mail account was not operational.

7. In the fall of 2007 after Chancellor DiStefano directed that Professor Salby not have access to his research lab, I assisted Brian Toon, the Chair of my department, in trying to get Professor Salby to participate in inspecting his old office's contents and assist in moving the non-research materials. It was difficult to get Professor Salby to cooperate in these efforts. I was finally able to get Professor Salby to agree to meet me on December 15, 2007 so he could go through his old office. On that date I hand delivered to him a note which stated:

"Murry,

Please identify

- ☐ personal items
- ☐ items that can be disposed of
- ☐ items you will need access to

Please copy info you need from the whiteboards as they are not being stored.

No research items are to be removed.

Kelly"

9. Professor Salby was allowed to go through his office unsupervised and no time limit was placed on his time in the office.

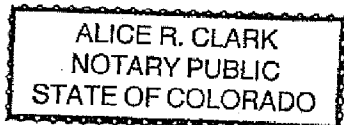
10. Professor Salby was allowed to remove any items he wanted from his office as long as he did not remove research from his University-issued computer. He was allowed to access the computer for non-research materials, if they existed, such as teaching materials or e-mails. He was trusted to do this unsupervised.

FURTHER AFFIANT SAYETH NAUGHT.

Kelly Duong
Kelly Duong

STATE OF COLORADO)
) ss.
COUNTY OF Boulder)

SUBSCRIBED AND SWORN to before me this 22 day of July, 2009, by Kelly Duong.



By: Alice R. Clark
Notary Public
My Commission Expires: April 20, 2012

Jean E. Wylie

From: Jean E. Wylie
 Sent: Tuesday, May 15, 2007 5:25 PM
 To: 'Murry.Salby@Colorado.EDU'
 Cc: Russell Moore
 Subject: conflict of interest forms
 Attachments: UCB COI PolicyProcedures - FINAL 3-20-07.doc

Dear Professor Salby,

In October, 2006, the University of Colorado at Boulder instituted a Disclosure of External Professional Activities (DEPA) for the purposes of identifying any conflicts of interest. The University's policy is that all faculty members submit such a disclosure, and that any conflicts identified be managed. At this point, we do not have a DEPA on file for you.

I am writing to ask that you fill out and submit a DEPA in order to resolve the questions that have arisen in the past 18 months about your research program here at CU and at Atmospheric Systems and Analysis (ASA). I have reviewed the information you provided in February, 2006 and it does not provide the level and kind of detail that is needed to determine if you indeed have a conflict of interest. (To fill out a DEPA, please log in to CUCConnect, then click on the Academics & Research tab (next to the Welcome!) tab. The DEPA is listed in the Faculty Reporting channel, which is usually in the bottom right side of the page.)

The University has a new policy on conflict of interest and commitment. I have attached a copy for you. I recommend that you read it before answering the questions on the DEPA, as I think it will provide you with useful guidance. More importantly, I urge you to answer the questions as fully and completely as possible. The more detail you provide, the easier it will be to determine if there is a conflict of interest involved.

The University is anxious to resolve this in a timely fashion. To that end, I am requesting that you complete the DEPA within the next two weeks (by May 30, 2007). Failure to do so, as well as failure to provide complete and accurate information, will be considered a violation of the new policy. If there is any way I can help you with the form, or answer any questions you might have, please do contact me via any of the mechanisms listed below.

Sincerely,

Jean Wylie

cc: Russell Moore, Associate Vice Chancellor for Research

Jean E. Wylie
 Compliance Director, Conflicts of Interest and Commitment
 3031 Regent
 26 UCB
 University of Colorado at Boulder
 Boulder, CO 80903-0026
 phone: 303-492-3024
 fax: 303-492-5777
 email: Jean.Wylie@colorado.edu

Attachment 1-D

5/29/2007

CU-01-00018

University of Colorado at Boulder

Associate Vice Chancellor for Research
Office of the Vice Chancellor for Research
026 UCB – Graduate School

May 29, 2007

Murry L. Salby, Ph.D.
10698 Hobbit Lane
Westminster, CO 80030

Dear Professor Salby:

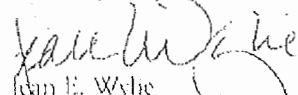
In October, 2006, the University of Colorado at Boulder instituted a Disclosure of External Professional Activities (DEPA) for the purposes of identifying any conflicts of interest. The University's policy is that all faculty members submit such a disclosure, and that any conflicts identified be managed. At this point, we do not have a DEPA on file for you.

I am writing to ask that you fill out and submit a DEPA in order to resolve the questions that have arisen in the past 18 months about your research program here at CU and at Atmospheric Systems and Analysis (ASA). I have reviewed the information you provided in February, 2006 and it does not provide the level and kind of detail that is needed to determine if you indeed have a conflict of interest. (To fill out a DEPA, please log in to CUConnect, then click on the Academics & Research tab (next to the Welcome!) tab. The DEPA is listed in the Faculty Reporting channel, which is usually in the bottom right side of the page.)

The University has a new policy on conflict of interest and commitment. I have attached a copy for you. I recommend that you read it before answering the questions on the DEPA, as I think it will provide you with useful guidance. More importantly, I urge you to answer the questions as fully and completely as possible. The more detail you provide, the easier it will be to determine if there is a conflict of interest involved, and to manage one if found.

The University is anxious to resolve this in a timely fashion. To that end, I am requesting that you complete the DEPA within the next two weeks (by June 12, 2007). Failure to do so, as well as failure to provide complete and accurate information, will be considered a violation of the new policy. If there is any way I can help you with the form, or answer any questions you might have, please do contact me via any of the mechanisms listed below.

Sincerely,



Jean E. Wylie

Compliance Director, Conflict of Interest and Commitment

cc: Russell Moore, Associate Vice Chancellor for Research

Attachment 2-D

Jean E. Wylie

From: Jean E. Wylie
Sent: Friday, June 22, 2007 4:12 PM
To: mis@asac.org; Murry.Salby@Colorado.EDU
Subject: Disclosure of External Professional Activities

Dear Professor Salby:

I have been trying for a month now to contact you about the following information. Please get in touch with me as soon as possible.

In October, 2006, the University of Colorado at Boulder instituted a Disclosure of External Professional Activities (DEPA) for the purposes of identifying any conflicts of interest. The University's policy is that all faculty members submit such a disclosure, and that any conflicts identified be managed. At this point, we do not have a DEPA on file for you.

I am writing to ask that you fill out and submit a DEPA in order to resolve the questions that have arisen in the past 18 months about your research program here at CU and at Atmospheric Systems and Analysis (ASA). I have reviewed the information you provided in February, 2006 and it does not provide the level and kind of detail that is needed to determine if you indeed have a conflict of interest. (To fill out a DEPA, please log in to CUConnect, then click on the Academics & Research tab (next to the Welcome!) tab. The DEPA is listed in the Faculty Reporting channel, which is usually in the bottom right side of the page.)

The University has a new policy on conflict of interest and commitment. I have attached a copy for you. I recommend that you read it before answering the questions on the DEPA, as I think it will provide you with useful guidance. More importantly, I urge you to answer the questions as fully and completely as possible. The more detail you provide, the easier it will be to determine if there is a conflict of interest involved.

The University is anxious to resolve this in a timely fashion. To that end, I am requesting that you complete the DEPA immediately. Failure to do so, as well as failure to provide complete and accurate information, will be considered a violation of the new policy. If there is any way I can help you with the form, or answer any questions you might have, please do contact me via any of the mechanisms listed below.

Sincerely,

Jean Wylie

cc: Russell Moore, Associate Vice Chancellor for Research

Jean E. Wylie
Compliance Director, Conflicts of Interest and Commitment
3031 Regent
26 UCB
University of Colorado at Boulder
Boulder, CO 80903-0026

Attachment 3-D

10/1/2007

CU 01-00030

phone: 303-492-3024
fax: 303-492-5777
email: Jean.Wylie@colorado.edu

Jean E. Wylie
Compliance Director, Conflicts of Interest and Commitment
3031 Regent
26 UCB
University of Colorado at Boulder
Boulder, CO 80903-0026
phone: 303-492-3024
fax: 303-492-5777
email: Jean.Wylie@colorado.edu

10/1/2007

CU 01-00031

University of Colorado at Boulder
 Associate Vice Chancellor for Research
 Office of the Vice Chancellor for Research
 026 UCB - Graduate School

June 25, 2007

Murry L. Salby, Ph.D.
 10698 Hobbit Lane
 Westminster, CO 80030

Dear Professor Salby:

I sent the following to you a month ago. I understand that you have been out of the country and so have been unable to answer. However, it is vital that you do so immediately.


In October, 2006, the University of Colorado at Boulder instituted a Disclosure of External Professional Activities (DEPA) for the purposes of identifying any conflicts of interest. The University's policy is that all faculty members submit such a disclosure, and that any conflicts identified be managed. At this point, we do not have a DEPA on file for you.

I am writing to ask that you fill out and submit a DEPA in order to resolve the questions that have arisen in the past 18 months about your research program here at CU and at Atmospheric Systems and Analysis (ASA). I have reviewed the information you provided in February, 2006 and it does not provide the level and kind of detail that is needed to determine if you indeed have a conflict of interest. (To fill out a DEPA, please log in to CUConnect, then click on the Academics & Research tab (next to the Welcome!) tab. The DEPA is listed in the Faculty Reporting channel, which is usually in the bottom right side of the page.)

The University has a new policy on conflict of interest and commitment. I have attached a copy for you. I recommend that you read it before answering the questions on the DEPA, as I think it will provide you with useful guidance. More importantly, I urge you to answer the questions as fully and completely as possible. The more detail you provide, the easier it will be to determine if there is a conflict of interest involved, and to manage one if found.

The University is anxious to resolve this in a timely fashion. To that end, I am requesting that you complete the DEPA within the next two weeks (by June 12, 2007). Failure to do so, as well as failure to provide complete and accurate information, will be considered a violation of the new policy. If there is any way I can help you with the form, or answer any questions you might have, please do contact me via any of the mechanisms listed below.

Sincerely,


 Jean E. Wylie

Compliance Director, Conflict of Interest and Commitment

cc: Russell Moore, Associate Vice Chancellor for Research

Attachment 4-D

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Address: 1437 Bannock Street Denver, Colorado 80202 Telephone: 720 865-8307		FILED Document CO Denver County District Court 2nd JD Filing Date: Jul 9 2009 4:36PM MDT Filing ID: 26040330 Review Clerk: Orathay Khiem
Plaintiff: MURRY SALBY Defendants: UNIVERSITY OF COLORADO, PROVOST PHILLIP DISTEFANO, and JOHN DOES.		▲ COURT USE ONLY ▲ Case No.: 09-CV-3789
Attorneys for Plaintiff: Robert M. Liechty, No. 14652 CROSS & LIECHTY, P.C. Address: 7100 E. Bellevue Ave., Suite G-11 Greenwood Village, CO 80111 Phone No. (303) 333-4122 e-mail: rliechty@crossliechty.com		Division 7
PLAINTIFF'S RESPONSE TO DISTEFANO'S MOTION FOR SUMMARY JUDGMENT		

Plaintiff, Murry L. Salby, by and through his attorney, Robert M. Liechty of CROSS & LIECHTY, P.C., responds to defendant DiStefano's Motion for Summary Judgment based upon Qualified Immunity as follows:

Mr. DiStefano has filed an immunity-based motion for summary judgment premised principally upon his claim that he cannot be found liable for following the recommendations of a faculty committee upon which he would normally rely. However, there is no merit to this argument because (1) following someone else's lead in violating the Constitution is no defense and (2) he was not, in fact, following the committee's recommendation. The facts are as follows.

STATEMENT OF FACTS

As background, Professor Salby believes that the genesis of his dispute with the University began with two grievances he filed in 1997 and in 2000 with the National Science Foundation because the University was withholding NSF funds meant for Professor Salby's projects. As a result of that set of grievances, the University had to release approximately \$100,000 in funds and became the subject of a criminal investigation. Then, in 2005, the NSF

began an investigation into an alleged conflict of interest that Professor Salby may have had. That investigation was never resolved.

Apparently, the NSF investigation of conflict of interest developed into the University's own investigation regarding the purported conflict of interest.¹ See Exhibit 1, the Conflict of Interest Committee's letter to Mr. DiStefano, page 1, ¶ 2, which defendants also submitted as their exhibit B-3. The University assembled a working group that investigated these questions, meeting with Professor Salby in February, 2006, and in June, 2006, when he provided the group with all the information it requested. See Exhibit 2, affidavit of Salby, ¶ 1. Then, from December, 2006, to August, 2007, Professor Salby was on approved sabbatical leave in Australia. *Id.* While on leave, he was never contacted regarding the conflict of interest issues referenced in his complaint. *Id.* He and the group had communicated via e-mail in Colorado and Professor Salby used this same e-mail address in Australia, but no one from the University concerning this issue contacted him via this e-mail address.² *Id.*

The working group then passed the matter to a Conflict of Interest Committee and, on August 20, 2007, the Committee wrote its recommendations to Mr. DiStefano. See exhibit 1, the recommendations. As stated above, the letter first referred to the inquiry from the National Science Foundation in February, 2005, about a possible conflict of interest. The Committee then referred to the above-referenced working group that had initially conducted the investigation. The Committee could not come to a conclusion as to whether there was a conflict of interest, but, instead, made the following recommendation:

Until such time as Dr. Salby provides the Conflict of Interest Committee with sufficient information to make a determination of whether or not he has a conflict of interest and how to manage such a conflict, if it exists, the Committee recommends that:

* * * * *

3. Dr. Salby should be denied access to his laboratory space in the Department of Atmospheric and Oceanic Sciences.

When Dr. Salby has completed a current Disclosure of External Professional Activities (DEPA), it will be reviewed by the Compliance Director and the Committee. At that time, a determination will be made about the existence of a conflict of interest. If a conflict is found to exist, a management plan will be developed with Dr. Salby and the chair of his department.

See exhibit 1, pages 1-2. In other words, the Committee did not have enough information to conclude whether Professor Salby performed too much outside work or not, but decided that

¹ The alleged conflict of interest primarily focused on whether Professor Salby had excessive outside employment.

² Mr. Moore states that somebody from the University tried to contact Professor Salby, but was unsuccessful. See defendants' exhibit B-1, ¶ 4. Compare Salby's affidavit, ¶¶ 8-9, where he states that no one from the University used this e-mail address, which the University had previously used to contact him.

Professor Salby should be denied access to his laboratory until he completed the DEPA form (the disclosure form) so that the Committee could come to a conclusion. In other words, the Committee used the above strategy to force Professor Salby to contact it so that it could complete its deliberation.

Professor Salby returned to the University at the end of August, 2007, within a week of the above-referenced recommendations. Exhibit 2, ¶ 2. In spite of the recommendations, he was not denied access to his laboratory and no one from the Conflict of Interest Committee (or anyone else at the University concerned with the matter) contacted him. He was not asked to complete, nor told about, the conflict-of-interest form (the DEPA). *Id.* Professor Salby was unaware of any conclusions that the working group had reached, preliminary or otherwise, and was unaware that the matter had been referred to the Committee. He was unaware of the recommendations the Committee had made to Mr. DiStefano. *Id.* Because the Committee never contacted Professor Salby at any time after he returned from Australia, the Committee never, presumably, determined whether Professor Salby's outside activities demonstrated a conflict of interest.

It was not until a month after his return, on September 19, 2007, that Mr. DiStefano sent a letter to Professor Salby (re-attached hereto as Exhibit 3) stating that he had accepted the recommendations of the Committee and that Professor Salby was to provide to the Committee, by October 1, 2007, the information that the Committee had been seeking. See Exhibit 2, ¶ 3.

Professor Salby replied to Mr. DiStefano on September 28, 2007, stating that he did not know to what Mr. DiStefano was referring. *Id.*, and Exhibit 4, the memo that Professor Salby sent to Mr. DiStefano on September 28. Professor Salby referenced the fact that he had already spoken to people investigating the matter during the summer of 2006, and he did not know what else the University wanted from him. He told Mr. DiStefano that he had received no subsequent communication from the University since the summer of 2006. Professor Salby did not know who was on the Committee and, therefore, he asked Mr. DiStefano to have the Committee contact Professor Salby and he would provide any materials that the Committee requested. *Id.*, ¶ 3, and Exhibit 4, page 2, last ¶.

As stated above, neither Mr. DiStefano nor anyone from the Conflict of Interest Committee contacted him. Exhibit 2, ¶ 4. Instead, on October 18, 2007, the University, with the assistance of the University police, dismantled Professor Salby's laboratory and office. *Id.* The items from his office and laboratory were haphazardly put into some 50 storage cartons and put in a small storage area. *Id.* But, more importantly, his laboratory was taken apart, much of which could not be put back together again. *Id.*, ¶ 6. In short, he was not simply locked out of his laboratory until he cooperated with the Committee; instead, his laboratory was confiscated and, to a substantial degree, destroyed. This laboratory had been built over 25 years and, because of what happened on October 18, could not be put back together again. *Id.*

No one provided Professor Salby a rationale for this seizure and destruction of his lab and office. Indeed, that remains a mystery today—Mr. DiStefano states he was following the recommendations of the Committee, but the Committee only recommended that Professor Salby be denied access to his laboratory until he completed the DEPA. Nor is there any indication that the

seizure was part of a conflict-of-interest investigation because Professor Salby was never given any conclusion to such an investigation. In short, the actions of October 18 were done for no reason at all, except to force Professor Salby to resign.

Professor Salby talked to the head of his department who also was unaware of what was going on. *Id.*, ¶ 7. Neither Mr. DiStefano nor anyone from the Committee had called Professor Salby and he was still confused as to why his lab was destroyed. Through his department, he discovered that an e-mail to him had been sent to a wrong e-mail address while he was in Australia which informed all faculty of the need to fill out a newly-instituted conflict of interest form (the DEPA form) online.³ *Id.*, ¶¶ 8-9. This form is reattached as Exhibit 5—it has three questions and four subparts, *i.e.*, it is not extensive. Professor Salby tried to complete it, but he could not log onto the system. It was not until the University's IT staff provided him a new log-on that he could complete the DEPA form. *Id.*, ¶ 9. He completed this in a few minutes and filed it electronically. *Id.* Nonetheless, the Committee has apparently still not determined whether he had a conflict of interest⁴ even though, in its recommendations to Mr. DiStefano, that is what it requested.⁵ *Id.*

Professor Salby made repeated attempts through his department to retrieve the items that had been seized, without success. *Id.*, ¶¶ 7 & 8. He then discovered that students were not allowed to sign up for his classes the following semester. *Id.*, ¶ 10. Under these circumstances, he had no choice but to resign. *Id.*

ARGUMENT

The law regarding qualified immunity is well established. A Court is to determine (in either order) whether a constitutional right is implicated by the facts and, if so, whether that right was clearly established. *See Pearson v. Callahan*, 129 S.Ct. 808 (2009). If such a right did not exist or was not clearly established, then the governmental actor has qualified immunity.

³ Mr. DiStefano states that this new policy was instituted on March 20, 2007, when Professor Salby was on sabbatical. *See* defendant's Brief, page 4, ¶ 5. Professor Salby, in his memo to Mr. DiStefano, quoted the faculty handbook which said that while he was on sabbatical, he would be free from direct or indirect pressures or interference from the University. On the other hand, Mr. Moore states in his affidavit that Professor Salby was still obligated to fulfill this particular duty (although he gives no basis as to why Professor Salby would have to fulfill his duty of disclosure while on sabbatical, but not fulfill other duties). *See* defendant's Exhibits B-1, ¶ 5.

⁴ Mr. Moore states in his affidavit that the Department attempted to resolve the issues with Professor Salby in December through January, presumably December, 2007, through January, 2008, after the seizure occurred. *See* defendant's Exhibit to B-1, ¶ 7. Perhaps Mr. Moore was referring to Professor Salby's department's efforts to have Professor Salby log on to, and complete, the DEPA form.

⁵ As quoted above on page 2, the Committee recommended that "When Dr. Salby has completed a current Disclosure of External Professional Activities (DEPA), it will be reviewed by the Compliance Director and the Committee. At that time, a determination will be made about the existence of a conflict of interest. If a conflict is found to exist, a management plan will be developed with Dr. Salby and the chair of his department." He complete it, but nothing occurred.

Mr. DiStefano is only asserting a qualified immunity defense against the three federal claims arising under 42 U.S.C. §1983. These claims concern the unreasonable seizure and destruction of Professor Salby's personal property on the computer (an alleged fourth amendment violation), the deprivation of Professor Salby's continued employment by failing to grant him a hearing before making his working conditions unbearable (an alleged procedural due process violation), and retaliation against Professor Salby's exercise of his First Amendment rights when he initiated the complaints into which the National Science Foundation inquired.

In several places in his brief, Mr. DiStefano appears to claim that he is entitled to qualified immunity simply because he was acting within his discretionary authority. See DiStefano's Brief, page 3, ¶ 3; page 8, ¶ 2; page 10, ¶ 3; and page 12, ¶ 2. There is no authority for this proposition as a defense to the federal claims, although such an argument has some historical roots in a concept sometimes known as discretionary or official immunity. See *Walker v. City of Denver*, 720 P.2d 619, 623 (Colo. App. 1986), which explains the defense in the context of a state tort, although should the "officer go beyond the scope of the law, he may become civilly liable and is not shielded by the doctrine of official immunity."⁶ However, the mere fact that a governmental actor exercises his discretion does not mean that this alone establishes qualified immunity.

Mr. DiStefano suggests that *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002), provides authority for this proposition. See Brief, page 9. It does not. *Vinyard* cites to *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002), for this proposition. But *Lee* merely states that "[i]f the defendant was not acting within his discretionary authority, he is ineligible for the benefit of qualified immunity." In other words, if the defendant is not acting within his discretionary authority, he cannot even raise the qualified-immunity defense. See *County of Adams v. Hibbard*, 918 P.2d 212, 220 (Colo. 1996), which explains the same concept, in quoting the U.S. Supreme Court, "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." In short, the key to the qualified-immunity inquiry is whether the official violated clearly established law.

Mr. DiStefano's second argument is that he "could not know that it would violate clearly established law for him to accept the recommendations of the Committee," a variation of the Nuremberg defense. See Brief, page 12, ¶ 1. But he did not follow the recommendations of the Committee. The Committee stated that it needed to have Professor Salby complete the DEPA before it could come to any conclusion. Hence, its recommendations were merely designed to pressure Professor Salby into completing the form.

⁶ Ironically, the officers in *Walker* were liable under facts similar to those herein. The district attorney secured a warrant to seize items at an after-hours bar. The deputy district attorney on site told the officers to seize the fixtures—fixed stools, booths, recessed lighting, inlaid speakers. Such destruction was unlawful just as Professor Salby claims herein that the destruction of his laboratory was unlawful.

But that is not what occurred. Instead of simply restricting access to his laboratory (presumably a change of locks would have accomplished this purpose), the University, with Mr. DiStefano acting as the authorizing force, dismantled and destroyed a laboratory that took 25 years to construct. Perhaps others will also be responsible for the seizure and destruction (hence, the John Doe defendants), but the actions were authorized by Mr. DiStefano and he is liable for the consequences.⁷ Of course, once Professor Salby figured this out and completed the form some six weeks later, the Committee made no determination—the damage had been done and everyone knew that Professor Salby had no choice but to resign.

Mr. DiStefano's liability is further established given Professor Salby's communication to Mr. DiStefano on September 28 asking Mr. DiStefano to have the Committee contact Professor Salby (because Professor Salby did not know who was on the Committee). Not only did Professor Salby not receive a hearing before his laboratory was destroyed, he did not even receive a telephone call from the Committee.

Under these circumstances, the seizure of Professor Salby's property on the computer was at least, arguably, unreasonable, making it a violation of the Fourth Amendment. See *O'Connor v. Ortega*, 480 U.S. 709, 719-20 (1987), which concerns the principle that a governmental employee has a right that his employer's search of his office be reasonable under the circumstances. *O'Connor* concerned the search of a medical professor's office, the purpose of which was in dispute: either to secure or inventory property belonging to the hospital or to secure evidence to be used against the professor. 480 U.S. at 713-14. The Court noted that "[s]earches and seizures by government employers or supervisors of the private property of their employees ... are subject to the restraints of the Fourth Amendment." *Id.*, at 715. In order for the Fourth Amendment to apply, the Court first found that the professor had an expectation of privacy in his desk and file cabinets (an issue that Mr. DiStefano does not raise). *Id.*, at 719.

The Court then discussed how to determine the appropriate standard of reasonableness applicable to such a search of an employee. The standard would not be that of "probable cause," but the Court remanded for further findings regarding the purpose of the search so that an appropriate standard could be fashioned. *Id.*, at 727. At the very least, there is a factual dispute on this point herein because Professor Salby claims that, although there may have been justification to restrict his access to his laboratory, there was no justification to destroy it. Compare *Hibbard*, 918 P.2d at 220-21, which held that the officers who destroyed the plaintiff's residence and personal property, which lay outside the order of an ALJ providing for limited destruction of "blighted areas," did not have qualified immunity: "Clearly established law should have made the individual defendants hesitate before destroying property not covered by the ALJ's order." In short, this Court should deny Mr. DiStefano's motion as it concerns the alleged improper fourth amendment seizure.

⁷ See *O'Connor v. Ortega*, 480 U.S. 709 (1987), discussed below, in which the professor-plaintiff sued Mr. O'Connor, the executive director of the hospital where the plaintiff worked, for commencing an investigation which led to a Mr. Friday making the decision to search the professor's office. 480 U.S. at 712-13.

The same applies to the procedural due process claim in which Professor Salby alleges that defendants destroyed his lab, causing the constructive discharge, without providing him a hearing. A lack of hearing for a tenured professor, under these facts, constitutes a violation of the 14th Amendment. *See Calhoun v. Gaines*, 982 F.2d 1470, 1476 (10th Cir. 1992)(the 14th Amendment requires that a tenured professor receive a hearing before his employment is taken away). *See also Wolfenbarger v. Williams*, 774 F.2d 358 (10th Cir. 1985)(the 14th Amendment requires a hearing before someone's property is taken from him). The 14th amendment violation was fully accomplished when the lab was dismantled on October 18. Prior to that time, Professor Salby had requested that the Committee contact him (under these unusual facts, this constitutes the request for a hearing), which Mr. DiStefano ignored. Thus, the deprivation of property, either the deprivation of the continued expectation of future employment or the deprivation of the actual property itself, involved clearly established rights.

This whole matter could have been cleared up with a telephone call and, perhaps, a follow-up meeting. It goes without saying that these actions may amount to a constitutional violation and that the law was clearly established. A state actor may not unreasonably authorize the destruction someone's property. Nor may Mr. DiStefano authorize the removal of everything that Professor Salby needed to continue his employment with the University without providing Professor Salby some type of hearing so that Professor Salby could explain his side of the story.

Mr. DiStefano then argues that because he was unaware of the grievances filed between 1997 and 2000, he could not have retaliated against Professor Salby for the filing of these grievances. *See* defendant's Brief, page 13, ¶ 3. However, the Committee's letter to Mr. DiStefano specifically refers to the National Science Foundation's February, 2005, inquiry into the alleged conflict of interest. Professor Salby, in his September 28, 2007, memo to Mr. DiStefano (Exhibit 4) reminds Mr. DiStefano of what Professor Salby claims was wrongdoing by the University years before it withheld the funds—the object of the grievances. Furthermore, Professor Salby submits by affidavit that because Mr. DiStefano was a high ranking official within the University administration, he would have known of the NSF criminal investigation concerning Professor Salby's earlier allegations. In short, there was a history of disputes between the two individuals (which also may explain why Mr. DiStefano did not even call Professor Salby before authorizing the destruction of Professor Salby's laboratory), upon which the retaliation claim rests.

Absent any discovery on this issue, it is simply unknown what further facts Mr. DiStefano has regarding this inquiry (which concerns only the First Amendment retaliation claim). *See* Exhibit 2, ¶ 11, where Professor Salby demonstrates that he believes that Mr. DiStefano knew of the series of events, because it required the University to release \$100,000 and because it began the process which led to the DEPA form, but he needs further discovery on this point to determine what Mr. DiStefano actually knew.

Thus, Professor Salby has met his obligation under Rule 56(f) for additional discovery on this point, especially given the fact that discovery has been stayed.

Mr. DiStefano's argument that Professor Salby retired does not deserve comment. **See** Brief, page 14. Professor Salby resigned because no one would communicate with him, his laboratory was destroyed, students were not allowed to enroll in his classes, he had no access to his computer, *etc.* **See** Exhibit 2, ¶ 10. This is the definition of constructive discharge.

Mr. DiStefano finally argues that because the computers were owned by the University, Professor Salby had no right to his professional record spanning his 30-year career that, not surprisingly, resided on the computer. Professor Salby is a scientist. He is a professor. He lives on the computer. On the computer he had his teaching records, records from federal research, professional correspondence to colleagues, correspondence to scientific journals, correspondence to funding agencies, and a graduate text. *Id.*, ¶ 5. In other words, his professional life was on the computer. Although the computer may have belonged to the University, much of the information on the computer belonged to Professor Salby.

WHEREFORE, Professor Salby respectfully requests that this Court deny Mr. DiStefano's motion for summary judgment and allow discovery on these claims.

Respectfully submitted this July 9, 2009.

CROSS & LIECHTY, P.C.

By: s/ Robert M. Liechty
Robert M. Liechty
Email: rliechty@Crossliechty.com

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2009, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DISTEFANO'S MOTION FOR SUMMARY JUDGMENT** was served upon the following persons as indicated below:

Thomas S. Rice, Esq.
Courtney B. Kramer, Esq.
SENDER GOLDFARB & RICE, L.L.C.
1700 Broadway, Suite 1700
Denver, Colorado 80290
Attorneys for Defendant DiStefano

☐ by First-Class U.S. Mail, postage prepaid
☐ by Hand Delivery
☐ by Facsimile to 303-320-0210
☐ by Overnight Mail
☒ Justice Link electronic filing

David P. Temple, Esq.
Senior Associate University Counsel
Office of University Counsel - Litigation
1800 Grant Street, Suite 700
Denver, Colorado 80203
Attorneys for Defendant C.U.

☐ by First-Class U.S. Mail, postage prepaid
☐ by Hand Delivery
☐ by Facsimile to 303-860-5650
☐ by Overnight Mail
☒ Justice Link electronic filing

Duly signed original on file in the offices of Cross & Liechty, P.C.

s/ Linda L. DeVico

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO		EFILED Document CO Denver County District Court 2nd JD Filing Date: Jul 9 2009 4:36 PM MDT Filing ID: 26040330 Review Clerk: Orathay Khiem
Address: 1437 Bannock Street Denver, Colorado 80202 Telephone: 720 865-8307		▲ COURT USE ONLY ▲ Case No.: 09-CV-3789 Division 7
Plaintiff: MURRY SALBY Defendants: UNIVERSITY OF COLORADO, PROVOST PHILLIP DiSTEFANO, and JOHN DOES.		
Attorneys for Plaintiff: Robert M. Liechty, No. 14652 CROSS & LIECHTY, P.C. Address: 7100 E. Belleview Ave., Suite G-11 Greenwood Village, CO 80111 Phone No. (303) 333-4122 e-mail: rliechty@crossliechty.com		
AFFIDAVIT OF MURRY SALBY		

I, Murry Salby, being of lawful age and duly sworn, state the following based on personal knowledge:

1. From December, 2006, to August, 2007, I was on a sabbatical leave in Australia, which was approved by the University and conducted pursuant to University policy. While on leave, I was never contacted regarding the conflict of interest issues referenced in my complaint. However, a group from the University met with me in February, 2006, and in June, 2006, before my sabbatical, when I provided the group with all the information it requested. At that time, we communicated via e-mail. However, while in Australia, no one from the University contacted me concerning the issue via this e-mail address; hence, I had no idea if anything had come of it.

2. I returned to the University at the end of August, 2007. No one from the University contacted me regarding any conflict of interest issue and I was not denied access to my laboratory. Nor was I told about, let alone asked to complete, the conflict-of-interest form (the DEPA). During the prior year, my staff had resigned (due to lack of funding), leaving a backlog of work and correspondence that was overwhelming and I was attending to that. I was still unaware of any conclusions that the working group referenced in ¶ 1 had reached, preliminary or otherwise, and I was unaware that the matter had been referred to what I now know as the Conflict of Interest Committee.



3. I received a letter dated September 19, 2007, from Mr. DiStefano stating that he had accepted the recommendations of the Committee (at the time, I did not know to what he was referring) and that I was to provide to this Committee, by October 1, 2007, information that the Committee had been seeking. Because I had no idea what he was talking about, I wrote a memo to Mr. DiStefano on September 28, 2007, stating that I did not know to what he was referring. I told Mr. DiStefano that I had received no subsequent communication from the University since the summer of 2006. Because I did not know who was on the Committee, I asked Mr. DiStefano to have the Committee contact me, whereupon I would provide any additional material that the Committee desired.

4. Neither Mr. Distefano nor anyone from the Conflict of Interest Committee contacted me. Instead, on October 18, 2007, the University evicted me from my office and seized my laboratory. No one provided me a rationale for the seizure. With University police present to enforce the seizure, the University dismantled the facilities, including image-processing, interactive graphics, and video recording equipment. I was then locked out. My office contents were reduced to a state of disarray, packaged haphazardly into some 50 storage cartons. They were moved into a small storage area, where there was not even enough room to open the contents, let alone to determine what was where. This was my new office.

5. Other personal property, including books, data, and professional records spanning my 30-yr career, resided in the lab adjacent to my office. Some of that property could not be located among the debris that remained after the seizure of the facilities. Nor was it found among the contents of the approximately 50 cartons into which my 30-yr career had been packaged. This property was never recovered. Among the equipment confiscated were several large computer platforms, as well as a large array of computer disks and archival tapes, on which my professional files and other intellectual property were stored. Included in this were teaching records, records from federal research, scientific publications, conference presentations, professional correspondence to colleagues, to scientific journals, and to funding agencies for whom I served as a reviewer, and files from my graduate text, a new edition of which had been invited by two international publishers. Around October 25, 2007, my department, the Department of Atmospheric and Oceanic Sciences (ATOC), notified me that the computers on which that material was stored would no longer be accessible, even remotely.

6. My lab was constructed over two and a half decades. At the time it was seized, its facilities were contractually bound to an ongoing federal research project. As Principal Investigator, I was responsible for meeting the research obligations, which in turn relied upon those facilities. The technical facilities that were dismantled were the fruit of years of development, as well as millions of federal research dollars that had been invested to integrate those facilities. That development enabled those facilities to interact with one another and with the computer platforms through the use of locally-developed software and programmable memory, which was no longer available. The University's actions on October 18 permanently destroyed that functionality. Professional records spanning my 30-yr career, which supported teaching, research, and service to the scientific community, were likewise seized or destroyed. Most of the actions of October 18, 2007 were irreversible.


7. I contacted the departmental chair of ATOC regarding the above actions. He advised me that he had not even been consulted and, like me, had learned of the University's actions only when they occurred. I told him that the University had seized personal property, professional records supporting federal research, and property titled or copyrighted to other parties, requesting access. Then, and again later, I requested through my department that the University provide me with a copy of my files that were stored on the computers which had been seized. That request was repeated in December and again in January, in my letter of resignation. My requests were ignored.

8. After the seizure of my lab and office, I asked the ATOC department to clarify the circumstances. Because Mr. DiStefano's letter left me bewildered, and neither he nor anyone else responded to my September 28 letter, I asked ATOC to find out to what Mr. DiStefano was referring. After some investigating, ATOC obtained a copy of an e-mail that had been sent to me while I was living in Australia, but sent to an incorrect e-mail address. That e-mail address was not the one I used nor the one through which I had communicated previously with the group referenced in ¶ 1 above.

9. This mis-directed e-mail said that the University had installed a new policy while I was on sabbatical and instructed that faculty were to complete the DEPA form on a University web site. However, the University's web site refused to permit me to log in. After repeated attempts, I had to contact the University's office of IT services. Even they were unsuccessful. After numerous measures to correct the problem, the office of IT services found it necessary to erase my account entirely and then reinstall it. I was then able to log in and complete the DEPA form online, a procedure that took only a few minutes. I never was told if the Committee reached a conclusion on whether there was a conflict of interest. By then, however, the damage had been done.

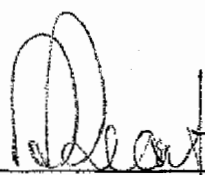
10. I retired because my laboratory had been destroyed and my professional records had either been reduced to a state of disarray or resided on computers and archival tapes that were made inaccessible. During that same period, I also discovered that students were not allowed to enroll in my classes. Consequently, I had no choice but to leave the University. I did not retire voluntarily.

11. I believe that Mr. DiStefano had knowledge of my grievances filed in 1997 and in 2000. They alerted the University to its misuse of federal research funds, actions which ultimately led to a criminal investigation of the University by the National Science Foundation. As a result of those grievances and the subsequent criminal investigation, the University eventually released some \$100,000 to my research projects, funds that it had previously refused to release. At that time, Mr. DiStefano was in the upper echelon of University administration—he would have known of the release of the \$100,000 and of the University coming under criminal investigation. I also referenced this dispute in my September 28 letter to Mr. DiStefano. However, we need to investigate this to determine the full extent of what he knew.


Murry Salby

SUBSCRIBED AND SWORN to before me this 6th day of July, 2009, by Murry Salby
as being true and correct to the best of his knowledge, information and belief.

WITNESS my hand and official seal.

 JP 177594
Justice of the Peace

UNIVERSITY OF COLORADO
 Department of Atmospheric and Oceanic Sciences
 Campus Box 311, Boulder, Colorado 80309-0311
 Telephone (303) 492-6487 Fax (303) 492-6487

To: Phil DiStefano, Provost
 From: Murry Salby
 Date: September 28, 2007
 Subject: Letter of September 19
 Cc: GP Pearson
 Stein Sture
 Todd Gleeson
 Brian Toon
 Russ Moore

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I have been alerted to the above letter.

I don't know what you are referring to. The assertions regarding COI and cooperation thereto are preposterous.

The last communication I received on this subject was during the summer of 2006, prior to my going overseas on sabbatical. Material that had been requested was provided.

I draw your attention to the following institutional policy:

- During sabbatical leave, faculty shall be "free of from direct and indirect pressures or interference from within or without the university." (*Faculty Handbook*, VI-7).
- Email is an official means for communication within CU Boulder (<http://www.colorado.edu/policies>).

Also relevant to your assertions are the following: (1) A chronic obstruction of federally-sponsored research, including the confiscation of facilities developed through such sponsorship, (2) the misappropriation of research funds, with the knowledge and tacit approval of CU administration (corrected only after an IG investigation), and, most recently, (3) the disruption of funding which secured the considerable investment of federal sponsorship (~\$20 M) by maintaining research staff and facilities that had been developed under such sponsorship and by supporting travel to present the findings derived therefrom: the deliverables of that sponsorship, for which CU charged considerable overhead. Such actions reflect a callous disregard for the federal government's investment in this research program to advance American Science. They have now had the following consequences:

- (i) The PRA who, for 2 decades, held oversight of all elements of my research program, of the extensive facilities developed under federal sponsorship, and for delivering to NASA products generated therein became fed up and left.
- (ii) As fallout, it will be difficult *not* to default on the university's obligations for the \$0.5M that NASA recently awarded to CU.*

* An award rated highly enough to receive congratulations from the Office of Mark Udall.



- (iii) I was scheduled during July to present three invited papers at the international IUGG Conference in Italy. Attended by some 5000 scientists from around the globe, the IUGG is the largest conference in the Earth Sciences. All three invited presentations were left unfulfilled.

Those presentations represented the fruit of the federal government's investment. They should have garnered positive recognition, for the university and for American Science. Instead, they were supplanted by conspicuous absence.

- (iv) I returned from Australia at the end of the summer to research facilities that are inoperative and to a mountain of mail and unaddressed research responsibilities: Publications to fulfill the responsibilities of prior and current sponsorship, which, without oversight, disappeared or were automatically withdrawn, products to have been delivered to NASA, and innumerable other research tasks that remain incomplete. The backlog is being addressed methodically - between teaching and other responsibilities.

If the COI committee wishes more than it was already provided, then it is incumbent upon it to make that request and to do so through an official means of communication that I am likely to see in the foreseeable future. If it does so, I will continue to provide any/all material that is pertinent to my appointment at the university.

University of Colorado-Boulder
Disclosure of External Professional Activity (DEPA)

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1. Do you or any member of your family have, or expect to acquire during this reporting year, any of the following regarding a business entity that either (1) engages in commercial research and/or scholarly or creative activity; or (2) engages in commercial activities that directly relate to your university activities?

- income of \$10,000 or more from the business entity (includes but is not limited to royalties, consulting fees, salary, dividends, etc.)?
- an equity interest in the business entity valued at \$10,000 or representing 5% ownership (regardless of worth)?
- a seat on the board of directors or advisory board?
- an executive position in the business?

YES _____ NO _____

IF YES, please provide the following information for each business entity:

Business name

Amount/value of income (per year)/equity (with option to decline to respond)

You and/or your family's relationship with this business

Describe the relationship of the business to your university activities

Are students, postdocs, or trainees involved in any of your university activities that are related to this business?

Do any of your university activities that are related to this business involve research with human subjects?

- If YES, do you have HRC (IRB) approval for this research?

1a. If you answer YES to Question 1, are you an investigator on any research project and/or scholarly or creative activity funded by external sources (federal/state/local government, industry, foundation, etc.) or Technology Transfer Office (TTO)?

YES _____ NO _____

IF YES please provide the following information for each project:

Project name

Funding source

Your role on project/activity

Is this project an SBIR/STTR (Small Business Innovation Research/Small Business Technology Transfer Program) Phase I project?

EXHIBIT

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2. Do you assign, or expect to assign during this report year, books or materials for any classes that you teach that bring you royalties or income?

YES _____ NO _____

IF YES please provide the following information for each course:

Course

Number of students

Materials description:

3. Regardless of compensation, do you provide, or expect to provide during this report year, professional services that are related to your University activities to any outside organization(s)? *Note that remunerated scholarship that is an expected activity in your discipline (such as for professional presentations, work on review panels, or membership in advisory committees) does not count as professional services in this question. For more information on the meaning of remunerated scholarship and conflict of commitment, see <http://www.colorado.edu/facultyaffairs/atoz/one-sixthrule.pdf>. University policy limits outside professional activities to 19.5 days per semester.*

YES _____ NO _____

IF YES please provide the following information for each organization to which you provide services:

Organization Name

Organization Type

Description of professional services

How many days per month do you spend on this activity ON CAMPUS? Answer to the nearest quarter day, e.g., 6.25

How many days per month do you spend on this activity OFF CAMPUS? Answer to the nearest quarter day, e.g., 6.25

Name (please print)

Department

Signature

Date

August 20, 2007

Provost Philip DiStefano
University of Colorado at Boulder
40 UCB

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Filing Date: Jul 9 2009 4:36 PM MDT
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Review Clerk: Orathay Khien

RE: Professor Murry Salby's potential conflict of interest

Dear Provost DiStefano:

As you may remember, the University of Colorado was contacted by the National Science Foundation in February, 2005 about a possible conflict of interest concerning Professor Murry Salby, Department of Atmospheric and Oceanic Sciences. NSF asked for details about Professor Salby's disclosures regarding possible conflicts of interest, as well as about the University's conflict of interest policies and procedures.

CU-Boulder responded to NSF, and then formed a working group to investigate the circumstances. A copy of a summary of the information they found has been appended for your information. The end result of the investigation was a request by the CU-Boulder Conflict of Interest Committee to Professor Salby for more information. To date, Professor Salby has not responded to numerous emails sent to both his CU-Boulder office and to his private company, nor to the two certified letters sent to his home.

The Conflict of Interest Committee met on Friday, August 17, 2007 and considered all of the information to date. It is the determination of the Committee that Dr. Salby's continued inadequate responses to requests for information, especially in light of NSF's requests to the University for action, is a significant violation of the CU-Boulder Conflict of Interest policy.

The Boulder Conflict of Interest policy states that, if allegations of violations of the policy cannot be resolved at the unit level, "... the Conflict of Interest Committee will be ultimately responsible for providing the AVCR, the Compliance Director, and the appropriate appointing authorities with a written report of the committee's findings, and any recommendations for corrective or disciplinary action." This letter and the attached report constitute the written report of our findings. Our recommendations to you for "corrective or disciplinary action" are as follows.

Until such time as Dr. Salby provides the Conflict of Interest Committee with sufficient information to make a determination of whether or not he has a conflict of interest and how to manage such a conflict, if it exists, the Committee recommends that:

1. The University should not sign or submit any requests for funding (grant, contracts, etc.) on Dr. Salby's behalf;

CU-11:00



2. Any current grants that Dr. Salby has should be frozen; and
3. Dr. Salby should be denied access to his laboratory space in the Department of Atmospheric and Oceanic Sciences.

When Dr. Salby has completed a current Disclosure of External Professional Activities (DEPA), it will be reviewed by the Compliance Director and the Committee. At that time, a determination will be made about the existence of a conflict of interest. If a conflict is found to exist, a management plan will be developed with Dr. Salby and the chair of his department.

Please feel free to contact me or the Compliance Director, Jean Wylie, if you have any questions or we can assist you in any way.

Respectfully yours,

Rodger Kram, Ph.D.
Chair, Conflict of Interest Committee



University of Colorado at Boulder

Office of the Provost and Executive Vice Chancellor for Academic Affairs

501 Regent Administrative Center

40 UCB

Boulder, CO 80309-0040

303-492-5537; 303-492-8861(Fnx)

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Filing Date: Jul 9 2009 4:36PM MDT

Filing ID: 26040330

Review Clerk: Orathay Khiem

September 19, 2007

Murry L. Salby, PhD
 10698 Hobbit Lane
 Westminster, CO 80030

Dear Professor Salby:

I have received the written report from the Conflict of Interest Committee concerning your continued refusal to provide adequate responses to requests for information about a possible conflict of interest that was initiated by the National Science Foundation. The Conflict of Interest Committee has made the following recommendations to me, which I have accepted.

"Until such time as Dr. Salby provides the Conflict of Interest Committee with sufficient information to make a determination of whether or not he has a conflict of interest and how to manage such a conflict, if it exists, the Committee recommends that:

1. the University should not sign or submit any requests for funding (grant, contracts, etc.) on Dr. Murry Salby's behalf;
2. funds in any of Dr. Murry Salby's current and active research grants be frozen, and
3. Dr. Murry Salby should be denied access to his research laboratory space in the Department of Atmospheric and Oceanic Sciences."

These recommendations will go into effect immediately. Furthermore, your failure to cooperate in this investigation of conflict of interest initiated by NSF puts the University and other faculty at risk of losing millions of dollars in grant funding. Therefore, please be advised that, if you do not provide the Conflict of Interest Committee with the information that the Committee has been seeking by October 1, 2007, the University will have no choice but to

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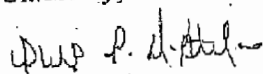
EXHIBIT

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tabbies

initiate disciplinary proceedings against you, which proceedings may result in sanctions which could include dismissal for cause.

Sincerely,



Philip P. DiStefano
Provost & Executive Vice Chancellor

Cc: Chancellor G.P. "Bud" Peterson
Vice Chancellor Stein Sture
Dean Todd Gleason
Chair Brian Toon ✓
Associate Vice Chancellor Russ Moore

**GRANTED**

Movant shall serve copies of this ORDER on any pro se parties, pursuant to CRCP 5, and file a certificate of service with the Court within 10 days.

ANNE MANSFIELD

District Court Judge

DATE OF ORDER INDICATED**FILED FOR DOCUMENT**

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Filing Date: Jul 9 2009 8:11AM MDT

Filing ID: 26022271

Review Clerk: Angie D Guenther

DISTRICT COURT, CITY AND COUNTY OF DENVER,
STATE OF COLORADO

Address: 1437 Bannock Street
Denver, Colorado 80202
Telephone: 720 865-8307

Plaintiff: MURRY SALBY

Defendants: UNIVERSITY OF COLORADO,
PROVOST PHILLIP DiSTEFANO,
and JOHN DOES.

▲ COURT USE ONLY ▲

Case No.: 09-CV-3789

Division 7

ORDER GRANTING PLAINTIFF'S MOTION FOR EXTENSION OF TIME

This matter comes before the Court on plaintiff's motion for a three-day extension of time in which to respond to a Motion for Summary Judgment filed by defendant Philip DiStefano; Mr. DiStefano has no objection to the extension. Therefore, the motion is granted and plaintiff shall file a response on or before July 9, 2009.

 Judge Anne Mansfield

 date

Cc: counsel

This document constitutes a ruling of the court and should be treated as such.

Court: CO Denver County District Court 2nd JD

Judge: Anne M Mansfield

File & Serve

Transaction ID: 25936438

Current Date: Jul 09, 2009

Case Number: 2009CV3789

Case Name: SALBY, MURRY vs. UNIV OF COLO et al

Court Authorizer: Anne M Mansfield

/s/ Judge Anne M Mansfield

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Address: 1437 Bannock Street Denver, Colorado 80202 Telephone: 720 865-8307	FILED Document CO Denver County District Court 2nd JD Filing Date: Jul 2 2009 11:07AM MDT Filing ID: 25936438 Review Clerk: Sean McGowan
Plaintiff: MURRY SALBY Defendants: UNIVERSITY OF COLORADO, PROVOST PHILLIP DiSTEFANO, and JOHN DOES.	▲ COURT USE ONLY ▲
Attorneys for Plaintiff: Robert M. Liechty, No. 14652 CROSS & LIECHTY, P.C. Address: 7100 E. Belleview Ave., Suite G-11 Greenwood Village, CO 80111 Phone No. (303) 333-4122 e-mail: rliechty@crossliechty.com	Case No.: 09-CV-3789 Division 7
PLAINTIFF'S MOTION FOR EXTENSION OF TIME	

Plaintiff Murry L. Salby, by and through his attorney Robert M. Liechty of CROSS & LIECHTY, P.C., moves for a three-day extension of time to respond to Mr. DeStefano's Motion for Summary Judgment and as grounds therefore states as follows:

1. As soon as the undersigned received Mr. Distefano's Motion, he forwarded it via e-mail to Professor Salby, who is now teaching in Australia. Unbeknownst to the undersigned, Professor Salby was indisposed with a case of the swine flu and did not return his e-mail until July 1, 2009 (actually, July 2 in Australia). He is now close to recovery and can help develop his affidavit within a few days.

2. The response is due Monday, July 6, 2009, and Professor Salby asks to file it by Thursday, July 9. Counsel for Mr. DiStefano has no objection to this extension.

WHEREFORE, plaintiff Murry Salby respectfully requests that this Court grant him an extension until July 9 to file a response to Mr. DiStefano's Motion for Summary Judgment.

Respectfully submitted this July 2, 2009.

CROSS & LIECHTY, P.C.

By: s/ Robert M. Liechty
Robert M. Liechty
Email: rliechty@crossliechty.com

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2009, a true and correct copy of the foregoing **PLAINTIFF'S MOTION FOR EXTENSION OF TIME** was served upon the following persons as indicated below:

Thomas S. Rice, Esq.
Courtney B. Kramer, Esq.
SENDER GOLDFARB & RICE, L.L.C.
1700 Broadway, Suite 1700
Denver, Colorado 80290
Attorneys for Defendant DiStefano

☐ by First-Class U.S. Mail, postage prepaid
☐ by Hand Delivery
☐ by Facsimile to 303-320-0210
☐ by Overnight Mail
☒ Justice Link electronic filing

David P. Temple, Esq.
Senior Associate University Counsel
Office of University Counsel - Litigation
1800 Grant Street, Suite 700
Denver, Colorado 80203
Attorneys for Defendant C.U.

☐ by First-Class U.S. Mail, postage prepaid
☐ by Hand Delivery
☐ by Facsimile to 303-860-5650
☐ by Overnight Mail
☒ Justice Link electronic filing

Duly signed original on file in the offices of Cross & Liechty, P.C.

s/ Kelsey J. Ihrig

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Address: 1437 Bannock Street Denver, Colorado 80202 Telephone: 720 865-8307	FILED Document CO Denver County District Court 2nd JD Filing Date: Jul 2 2009 11:07AM MDT Filing ID: 25936438 Review Clerk: Sean McGowan
Plaintiff: MURRY SALBY Defendants: UNIVERSITY OF COLORADO, PROVOST PHILLIP DiSTEFANO, and JOHN DOES.	▲ COURT USE ONLY ▲
	Case No.: 09-CV-3789 Division 7
ORDER GRANTING PLAINTIFF'S MOTION FOR EXTENSION OF TIME	

This matter comes before the Court on plaintiff's motion for a three-day extension of time in which to respond to a Motion for Summary Judgment filed by defendant Philip DiStefano; Mr. DiStefano has no objection to the extension. Therefore, the motion is granted and plaintiff shall file a response on or before July 9, 2009.

 Judge Anne Mansfield

 date

Cc: counsel

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Address: 1437 Bannock Street Denver, Colorado 80202 Telephone: 720 865-8307	FILED Document CO Denver County District Court 2nd JD Filing Date: Jul 2 2009 11:07AM MDT Filing ID: 25936438 Review Clerk: Sean McGowan	CASE FILED: July 2, 2009 11:07 PM
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 Judge Anne Mansfield

 date

Cc: counsel

**GRANTED**

Movant shall serve copies of this ORDER on any pro se parties, pursuant to CRCP 5, and file a certificate of service with the Court within 10 days.

ANNE MANSFIELD

District Court Judge

DATE OF ORDER INDICATED

FILED DOCUMENT

CO Denver County District Court 2nd JD

Filing Date: Jun 20 2009 2:12PM MDT

Filing ID: 25754093

Review Clerk: Angie D Guenther

DISTRICT COURT, CITY AND COUNTY OF
DENVER, STATE OF COLORADO

1437 Bannock Street
Denver, Colorado 80202
(720) 865-8307

Plaintiff(s):

MURRY SALBY,

v.

Defendant(s):

UNIVERSITY OF COLORADO, PROVOST PHILIP
DISTEFANO, and JOHN DOES.

▲ COURT USE ONLY ▲

Case Number: 09 CV 3789

Div.:

Ct.:

**ORDER GRANTING MOTION TO STAY DISCOVERY
PENDING DETERMINATION ON QUALIFIED IMMUNITY**

THIS MATTER having come before the Court upon the Motion to Stay Discovery pending the Court's determination on qualified immunity and the Court being fully advised in its premises,

HEREBY ORDERS that the Motion to Stay is **GRANTED**:

1. All discovery concerning Plaintiff's claims, including Rule 26(a)(1) disclosures is stayed; and
2. No trial date shall be set, pending the Court's determination of qualified immunity.

DATED this _____ day of _____, 2009.

BY THE COURT:

District Court Judge

This document constitutes a ruling of the court and should be treated as such.

Court: CO Denver County District Court 2nd JD

Judge: Anne M Mansfield

File & Serve

Transaction ID: 25657548

Current Date: Jun 20, 2009

Case Number: 2009CV3789

Case Name: SALBY, MURRY vs. UNIV OF COLO et al

Court Authorizer: Anne M Mansfield

/s/ Judge Anne M Mansfield

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO</p> <p>1437 Bannock Street Denver, Colorado 80202 (720) 865-8307</p> <hr/> <p>Plaintiff(s):</p> <p>MURRY SALBY,</p> <p>v.</p> <p>Defendant(s):</p> <p>UNIVERSITY OF COLORADO, PROVOST PHILIP DISTEFANO, and JOHN DOES.</p> <hr/> <p>Attorney: Thomas S. Rice, # 9923 Courtney B. Kramer, # 40097</p> <p>Address: Senter Goldfarb & Rice, L.L.C. 1700 Broadway, Suite 1700 Denver, CO 80290</p> <p>Phone No.: 303-320-0509 Fax No.: 303-320-0210 E-mail: trice@sgrllc.com ckramer@sgrllc.com</p>	<p>FILED Document CO Denver County District Court 2nd JD Filing Date: Jun 15 2009 2:25PM MDT Filing ID: 25657548 Review Clerk: Charmaine Bright</p> <p>DATE FILED: June 15 2009 4:25 PM</p> <hr/> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 09 CV 3789</p> <p>Div.: Ctrm.:</p>
<p align="center">MOTION TO STAY DISCOVERY PENDING DETERMINATION ON QUALIFIED IMMUNITY</p>	

Defendant, **PHILIP DISTEFANO**, by his attorneys, **SENDER GOLDFARB & RICE, L.L.C.**, hereby moves this Court for an order staying discovery. Specifically, Defendant has asserted and is entitled to qualified immunity.¹ Thus, Defendant respectfully moves the Court for an order staying discovery pending the resolution of his Motion for Summary Judgment raising this defense.

AND IN SUPPORT THEREOF, Defendant states as follows:

¹ Defendant has filed an Answer and Motion for Summary Judgment, both of which assert the defense of qualified immunity.

1. **Certificate of Compliance with C.R.C.P. 121 § 1-12(5)**: Undersigned counsel certifies that he conferred with Plaintiff's counsel regarding this motion. Plaintiff's counsel indicated that Plaintiff opposes the Motion for Summary Judgment, but expresses no opinion with regard to this Motion to Stay Discovery Pending Determination on Qualified Immunity.

I. INTRODUCTION

2. This matter arises out of an employment relationship between Plaintiff Murry L. Salby ("Salby") and the Regents of the University of Colorado ("University"). Salby originally brought suit against the University and Provost Philip DiStefano ("DiStefano") in federal court on November 19, 2008. [08-cv-02517-RPM]. DiStefano filed a Motion for Summary Judgment and Motion to Stay on February 25, 2009, asserting the defense of qualified immunity. Because the court granted the University's Motion to Dismiss based on absolute immunity on February 2, 2009, Salby filed an Unopposed Motion to Dismiss the case without prejudice, which was granted on March 29, 2009. Accordingly, the federal court action terminated before DiStefano's qualified immunity defense was addressed. Subsequently, Salby brought this suit against the University, DiStefano, and John Does in this court on April 14, 2009, asserting essentially the same claims as originally pled in federal court.

3. Salby asserts claims against the DiStefano for alleged violations of his First, Fourth, and Fourteenth Amendment rights as well as violation of C.R.S. § 24-50.5-103. However, as set forth in the motion for summary judgment filed contemporaneously herewith, Salby's claims are barred from suit based upon the doctrine of qualified immunity. In essence, all actions taken by DiStefano were within his authority and discretion as the Provost of the University and therefore, he is cloaked with qualified immunity from suit. Moreover, under the facts of this case, DiStefano could not have known that his discretionary actions violated clearly established law.

4. The defense of immunity is meant to "protect the official both from liability as well as from ordinary burdens of litigation, including far-ranging discovery." *Workman v. Jordan*, 958 F.2d 332, 335 (10th Cir. 1992) *cert. denied*, 514 U.S. 1015 (1995). Here, DiStefano should not be subjected to the demands of discovery on the federal law claims until the Court determines the threshold issue of immunity.²

II. ARGUMENT

5. Until this threshold immunity question is resolved, discovery should not be allowed. See *Cummins v. Campbell*, 44 F.3d 847, 851 (10th Cir. 1994) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982); *Workman*, 958 F.2d at 336).

² On May 5, 2009, DiStefano was appointed Chancellor of the University of Colorado at Boulder. This new office heightens the need for him to not be burdened with litigation for which he is immune.

6. The Colorado Supreme Court has stated that the “purpose of qualified immunity is to shield a government employee from the burdens associated with trial which include distraction from governmental responsibilities, inhibiting discretionary decision making, and the disruptive effects of discovery. *Moody v. Ungerer*, 885 P.2d 200, 202 (Colo. 1994) (citing *Hannula v. City of Lakewood*, 907 F.2d 129, 130 (10th Cir. 1990)).

7. Staying discovery serves the salutary purpose of sparing the litigants the burden, expense, and inconvenience of engaging in discovery that may prove unnecessary and also conserves judicial resources. See *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) (“[f]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on a failure to state a claim for relief, should, however, be resolved before discovery begins”). For example, the Eleventh Circuit has cogently explained:

Discovery imposes several costs on the litigant from whom discovery is sought. These burdens include the time spent searching for and compiling relevant documents; the time, expense and aggravation of preparing for and attending depositions; the costs of copying and shipping documents; and the attorneys’ fees generated in interpreting discovery requests, drafting responses to interrogatories and coordinating responses to production requests, advising the client as to which documents should be disclosed and which ones withheld, and determining whether certain information is privileged. The party seeking discovery also bears costs, including attorneys’ fees generated in drafting discovery requests and reviewing the opponent’s objections and responses. . . . Finally, discovery imposes burdens on the judicial system; scarce judicial resources must be diverted from other cases to resolve discovery disputes.

Id.

8. Doctrines of immunity are well recognized in a variety of contexts. As the Supreme Court has noted, “[o]ne of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.” *Siebert v. Gilley*, 500 U.S. 226, 232 (1991); see also, *Eaton v. Meneley*, 379 F.3d 949, 954 (10th Cir. 2004). Therefore, public officials who assert qualified immunity are entitled to have such immunity determined as a threshold issue of law before incurring the burdens of litigation associated with discovery and trial. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (“The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.”); *Harlow*, 457 U.S. at 817-18. This is especially true where a determination of the official’s qualified immunity “is dispositive” of the plaintiff’s claims. See *Saucier v. Katz*, 533 U.S. 194, 200 (2001) receded from by *Pearson v. Callahan*, 129 S.Ct. 808 (2009).

9. Discovery and other litigation activities should be stayed or limited as necessary to determine issues regarding immunity before reaching any other substantive issues. See *Workman*, 958 F.2d at 336; *Sawyer v. County of Clear Creek*, 908 F.2d 663, 665 (10th Cir. 1990) (Plaintiff was not allowed to conduct discovery in order to allege violation of clearly established right because discovery without sufficient allegations to support claim would defeat purpose of qualified immunity); *Zamora v. City of Belen*, 229 F.R.D. 225, 226 (D.N.M. 2005) (“Because qualified immunity protects against the burdens of discovery as well as trial, the Supreme Court has emphasized that the trial court should resolve the issue before discovery if at all possible.”).

10. The purpose of protecting defendants who are immune from the burdens of trial and pre-trial litigation is particularly important when those defendants are public officials. See *Harlow*, 457 U.S. at 816. In such cases, the public has a significant interest both in preserving public funds and in avoiding unnecessary interference with governmental activities and public services. See *id.* at 817. As noted by the Supreme Court, the intangible costs of forcing public entities or officials to defend lawsuits include “distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.” *Id.* at 816. The Court has “considerable discretion over the timing of discovery.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coors*, 357 F.Supp.2d 1277, 1280 (D. Colo. 2004) (citing *United States v. Evans & Assoc. Construction Co., Inc.*, 839 F.2d 656, 660 (10th Cir. 1988); C.R.C.P. 26(c) (permitting the court to “make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”).

11. Furthermore, the United States Supreme Court has made it clear that the defense of qualified immunity “is meant to give government officials a right, not merely to avoid ‘standing trial,’ but also to avoid the burdens of ‘such pretrial matters as discovery, as inquiries of this kind can be peculiarly disruptive of effective government.’” *Garrett v. Stratman*, 254 F.3d 946, 951 (10th Cir. 2001) (citing *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996)).

12. Indeed, the District of Colorado has previously ruled that defendants asserting qualified immunity were entitled to a stay of discovery while their immunity defenses were pending before the Court. See *Stine v. Swanson*, No. 07-cv-00799-WYD-KLM, 2008 WL 349971, at *1 (D. Colo. Feb. 6, 2008). “Although a stay of discovery is generally disfavored, the Court has broad discretion to stay an action while a dispositive motion is pending pursuant to Fed.R.Civ.P. 26(c). *Id.* “[A] court may decide that in a particular case it would be wise to stay discovery on the merits until certain challenges have been resolved.” *Id.* (internal quotations, citation, and alteration omitted). “When a particular issue may be dispositive, the court may stay discovery concerning other issues until the critical issue is resolved.” *Id.* (citing *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 804 (Fed. Cir. 1999)). This Court should similarly find in this case that “the potential harm to Plaintiff is outweighed by the burden on [Defendant]

resulting from conducting and responding to discovery while [his] Motion for Summary Judgment is pending.” *Stine*, 2008 WL 349971, at *1.³

13. All of the policy considerations set forth above apply to DiStefano and thus, Salby’s right to discovery before this Court rules on DiStefano’s Motion for Summary Judgment should be stayed because: (1) the Court has sufficient information before it upon which to rule; (2) DiStefano’s defense asserted is a question of law not fact; and (3) far-ranging discovery places an undue burden on DiStefano in his role as a public official and encourages unnecessary spending to defend an unsustainable action. See *Sprague v. Brook*, 149 F.R.D. 575, 577 (N.D. Ill. 1993) (citing *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253 (1968)); *Patterson v. United States Postal Serv.*, 901 F.2d 927, 929 (11th Cir. 1990).

14. DiStefano was the Provost and Executive Vice Chancellor for Academic Affairs for the Boulder campus of the University and is now its Chancellor. Burdensome discovery at this stage of the litigation is unnecessarily time consuming and disruptive to the flow of the University. In defending this action, DiStefano inevitably and unnecessarily expends public funds and precious time. To avoid such an unnecessary expense, discovery ought to be stayed pending resolution of immunity asserted within the Motion for Summary Judgment.

15. Allowing the case to proceed and for discovery to continue is judicially inefficient and is a waste of counsels’ time and efforts until such time as the Motion for Summary Judgment is ruled on. The time and resources of the parties should not be wasted in conducting unnecessary discovery. Plaintiff will not be prejudiced in any way by the stay of discovery and this Motion is not filed for the purposes of harassment or delay.

16. Successful ruling on the immunity motion will still result in the state law claim being made against DiStefano. However, that claim, brought pursuant to C.R.S. § 24-50.5-103 is far less complex and can be more readily litigated in an efficient manner once the immunity issues are ruled upon.

WHEREFORE, Defendant respectfully requests the Court issue orders as follows:

- A. All discovery concerning Plaintiff’s claims, including Rule 26(a)(1) disclosures, be stayed until Defendant’s Motion for Summary Judgment has been resolved;
- B. No trial date be set until the immunity motion is resolved; and
- C. Such other and further relief as this Court deems just.

³ As well, the qualified immunity defense may also be the subject of interlocutory appeal. See *Foote v. Spiegel*, 118 F.3d 1416, 1422 (10th Cir. 1997); *Clanton v. Cooper*, 129 F.3d 1147, 1153 (10th Cir. 1997). It makes little sense to litigate the case until such appeals have been decided.

Respectfully submitted,

SENDER GOLDFARB & RICE, L.L.C.

By s/ Thomas S. Rice
Thomas S. Rice, # 9923

By s/ Courtney B. Kramer
Courtney B. Kramer, # 40097
1700 Broadway, Ste. 1700
Denver, CO 80290
Telephone: 303-320-0509
Facsimile: 303-320-0210
Attorneys for Defendant Philip DiStefano

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of June, 2009, a true and correct copy of the above and foregoing **MOTION TO STAY DISCOVERY PENDING DETERMINATION ON QUALIFIED IMMUNITY** was electronically filed with the Court and served upon all counsel via LexisNexis File and Serve, addressed to:

Robert Liechty, Esq.
rliechty@crossliechty.com

David P. Temple, Esq.
david.temple@cu.edu

s/ Stephanie Hood
Stephanie Hood

DISTRICT COURT, CITY AND COUNTY OF
DENVER, STATE OF COLORADO

1437 Bannock Street
Denver, Colorado 80202
(720) 865-8307

Plaintiff(s):

MURRY SALBY,

v.

Defendant(s):

UNIVERSITY OF COLORADO, PROVOST PHILIP
DISTEFANO, and JOHN DOES.

Attorney: Thomas S. Rice, # 9923
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FILED Document

CO Denver County District Court 2nd JD

Filing Date: Jun 15 2009 2:25PM MDT

Filing ID: 25657548

Review Clerk: Charmaine Bright

▲ COURT USE ONLY ▲

Case Number: 09 CV 3789

Div.:

Ctrm.:

**DEFENDANT DISTEFANO'S MOTION FOR SUMMARY JUDGMENT
BASED UPON QUALIFIED IMMUNITY**

Defendant, **PHILIP DISTEFANO** ("DiStefano"), by his attorneys, **THOMAS S. RICE** and **COURTNEY B. KRAMER** of the law firm **SENDER GOLDFARB & RICE, L.L.C.**, and pursuant to C.R.C.P. 56, hereby moves the Court for an order of **summary judgment in his favor dismissing all Plaintiff's federal claims against him with prejudice.**

AND IN SUPPORT THEREOF, DiStefano states as follows:

1. DiStefano is entitled to qualified immunity; as such, Plaintiff's federal claims against DiStefano must be dismissed.

2. DiStefano acted within his discretionary authority at all time relevant, including but not limited to accepting the Committee's recommendations for disciplinary action concerning Plaintiff.

3. DiStefano could not know that his discretionary actions would violate clearly established law.

4. The facts and authorities supporting DiStefano's Motion are more fully set forth in his Memorandum Brief in Support of Motion for Summary Judgment Based Upon Qualified Immunity, filed contemporaneously herewith.

WHEREFORE DiStefano respectfully requests that this Court grant his Motion for Summary Judgment, award costs and reasonable attorneys fees and award such further and additional relief as the Court deems just and proper.

Respectfully submitted,

SENTER GOLDFARB & RICE, L.L.C.

By s/ Thomas S. Rice
Thomas S. Rice, # 9923

By s/ Courtney B. Kramer
Courtney B. Kramer, # 40097
1700 Broadway, Ste. 1700
Denver, CO 80290
Telephone: 303-320-0509
Facsimile: 303-320-0210
Attorneys for Defendant Philip DiStefano

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of June, 2009, a true and correct copy of the above and foregoing **DEFENDANT DISTEFANO'S MOTION FOR SUMMARY JUDGMENT BASED UPON QUALIFIED IMMUNITY** was electronically filed with the Court and served upon all counsel via LexisNexis File and Serve, addressed to:

Robert M. Liechty, Esq.
rliechty@crossliechty.com

David P. Temple, Esq.
David.temple@cu.edu

s/ Stephanie Hood

Stephanie Hood
Legal Secretary

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO</p> <p>1437 Bannock Street Denver, Colorado 80202 (720) 865-8307</p> <hr/> <p>Plaintiff(s):</p> <p>MURRY SALBY,</p> <p>v.</p> <p>Defendant(s):</p> <p>UNIVERSITY OF COLORADO, PROVOST PHILIP DISTEFANO, and JOHN DOES.</p> <hr/> <p>Attorney: Thomas S. Rice, # 9923 Courtney B. Kramer, # 40097 Address: Senter Goldfarb & Rice, L.L.C. 1700 Broadway, Suite 1700 Denver, CO 80290 Phone No.: 303-320-0509 Fax No.: 303-320-0210 E-mail: trice@sgrllc.com ckramer@sgrllc.com</p>	<p>FILED Document CO Denver County District Court 2nd JD Filing Date: Jun 15 2009 2:25PM MDT Filing ID: 25657548 Review Clerk: Charmaine Bright</p> <p>DATE FILED: Jun 15 2009 4:25 PM</p> <hr/> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 09 CV 3789</p> <p>Div.: Ctm.:</p>
<p align="center">DEFENDANT DISTEFANO'S MEMORANDUM BRIEF IN SUPPORT OF SUMMARY JUDGMENT BASED UPON QUALIFIED IMMUNITY</p>	

Defendant, **PHILIP DISTEFANO** ("DiStefano"), by his attorneys, **THOMAS S. RICE** and **COURTNEY B. KRAMER** of the law firm **SENER GOLDFARB & RICE, L.L.C.**, and pursuant to C.R.C.P. 56, hereby submits this Memorandum Brief in Support of Motion for Summary Judgment Based Upon Qualified Immunity.

I. INTRODUCTION

This case arises out of the employment relationship between Plaintiff Murry L. Salby (“Salby”) and the Regents of the University of Colorado (“University”). During his employment as a Professor at the University, Salby failed to comply with required conflict of interest reporting procedures. After months of lack of communication from Salby followed by vehement denial of deficiencies in his reporting, the Conflict of Interest Committee (“Committee”) recommended disciplinary action against Salby, which Philip DiStefano, acting as Provost, accepted pursuant to established University procedures and commensurate with his discretion. Accordingly, the disciplinary action was implemented against Salby in September of 2007.

II. STATEMENT OF THE CASE

Salby filed his Complaint on April 14, 2009 wherein he asserts the following substantive claims against DiStefano:¹

- Violation of Fourth Amendment. Salby alleges that pursuant to 42 U.S.C. § 1983 DiStefano violated his Fourth Amendment rights by restricting Salby’s access to his research laboratory.
- Violation of the Fourteenth Amendment. Salby alleges that pursuant to 42 U.S.C. § 1983 DiStefano deprived Salby of his procedural due process rights by ending Salby’s expectation of continued employment with the University without a pre- or post-termination hearing.

¹ Salby also seeks punitive damages and attorney fees pursuant to 42 U.S.C. § 1988 and asserts a breach of contract claim against the University.

- Violation of First Amendment. Salby alleges that pursuant to 42 U.S.C. § 1983 DiStefano took adverse disciplinary action against him in retaliation for his exercise of First Amendment protected speech.
- Violation of C.R.S. § 24-50.5-103. Salby alleges that the University and DiStefano's conduct violated the Colorado Whistleblower Statute, C.R.S. § 24-50.5-103.

DiStefano filed an Answer on May 13, 2009, wherein he asserts the affirmative defense of qualified immunity.² DiStefano is entitled to qualified immunity because he acted within his discretionary authority when he accepted the Committee's recommendations for disciplinary action concerning Salby and when he restricted Salby's access to the research lab. DiStefano could not know that it would violate clearly established law for him to take these actions against Salby. As such, DiStefano should be dismissed from this case at the onset of this litigation and prior to the commencement of discovery.

III. STATEMENT OF UNDISPUTED MATERIAL FACTS³

1. DiStefano was the Provost and Executive Vice Chancellor for Academic Affairs for the Boulder campus of the University and held that position at the time of the events involved in this case. In this position, he was the chief academic officer of the Boulder campus. On May 5, 2009, DiStefano was appointed Chancellor for the University of Colorado at Boulder. [See, Affidavit of Philip DiStefano, appended hereto as **Ex. A-1**, at ¶¶ 1, 3.]

2. The Provost oversees eight colleges and schools, over 29,000 students, and over 1,000 faculty members. [See, **Ex. A-1**, at ¶ 3.]

² DiStefano submits contemporaneously herewith a Motion to Stay Discovery Pending Determination on Qualified Immunity.

³ Cited within the text of this Brief as "SUF."

3. The position description for the Provost and Vice Chancellor of Academic Affairs states that the Provost is responsible for, among other things, “the administration of academic policies and programs, the allocation of resources to assure high quality academic programs, and direction and oversight of the instruction, research and creative work, and outreach activities of the campus.” The Provost assumes responsibility for all academic, arts, and research programs, including research institutes and centers. [See, **Ex. A-1**, at ¶ 4; Job description position statement of Provost, appended hereto as **Ex. A-2**.] As part of his job, the Provost is required to make many discretionary decisions on a regular basis. [See, **Ex. A-1**, at ¶ 4; **Ex. A-2**.]

4. As appointing authority, the Provost makes final decisions concerning disciplinary measures for tenured faculty. In this regard, the Provost receives recommendations from faculty committees. He has the discretion to then accept, reject, or modify a committee’s recommendations. [See, **Ex. A-1**, at ¶¶ 4, 6.]

5. Effective March 20, 2007, the University implemented a new Conflict of Interest and Conflict of Commitment policy. This policy requires faculty members to complete annual Disclosure of External Professional Activity (“DEPA”) forms on-line, which must be revised upon a significant change in outside interests or activities. [See, Affidavit of Russell Moore, appended hereto as **Ex. B-1**, at ¶ 3.]

6. Under the policy, if there are allegations of violations of a policy, they are initially to be resolved at the unit level. Should the unit level be unable to resolve the allegation, it is then referred to the Conflict of Interest Committee, which consists of at least eight faculty members, who are recommended by the Vice Chancellor for Research, the Deans of various colleges of the

University, and one member from outside the University. The Committee reviews the matter and makes a report of findings and recommendations for disciplinary action. [See, **Ex. B-1**, at ¶ 8.]

7. Possible sanctions and discipline include, but are not limited to, (a) emphasizing, orally or in writing, to the faculty member his professional responsibilities, (b) oral or written admonition of the faculty member, (c) reassignment, temporarily or permanently, of the faculty member's office or other work space (with appropriate consent of any academic unit affected), (d) temporary or continuing reduction in salary or privileges of the employee, and (e) freezing research funds or imposing other research restrictions. [See, **Ex. B-1**, at ¶ 9.]

8. Despite multiple requests for completion and advisements of the DEPA requirement, Salby failed to submit a DEPA in 2007. In fact, Salby consistently and deliberately violated the spirit of the University's conflict of interest policy by refusing to disclose information and insisting no conflicts existed. [See, **Ex. B-1**, at ¶ 4.]

9. Despite sabbatical leave in spring of 2007, Salby was still required to comply with disclosure duties as a member of the faculty of the University, and his failure to do so was considered a violation of the disclosure policy. [See, **Ex. B-1**, at ¶¶ 5-6.]

10. Upon allegations of violations of the policy, the department of Atmospheric and Oceanic Sciences attempted to resolve the matter by eliciting the necessary information. However, such efforts over the course of several months failed. [See, **Ex. B-1**, at ¶ 7.]

11. The Conflict of Interest Committee convened on August 17, 2007, and, upon investigation, found that Salby's inaction constituted a significant violation of the Conflict of Interest policy. On August 20, 2007, the Committee recommended that: (1) the University not submit any requests for funding of research proposals on Salby's behalf; (2) funds in any of

Salby's current and active research grants be frozen; and (3) Salby should be denied access to his research laboratory space in the Department of Atmospheric and Oceanic Sciences. [See, **Ex. A-1**, at ¶ 7; **Ex. B-1**, at ¶ 10; August 20, 2007 letter from Rodger Kram, Ph.D., appended hereto as **Ex. B-3**.]

12. Associate Vice Chancellor for Research Russell Moore forwarded the Committee's findings and recommendations to Vice Chancellor for Research Stein Sture on August 28, 2007. Vice Chancellor Sture concurred with the Committee's recommendations and forwarded the report to DiStefano on August 31, 2007, as DiStefano was the appointing authority able to enact such action against a tenured faculty member. [See, **Ex. A-1**, at ¶ 5; **Ex. B-1**, at ¶¶ 11-12; August 28, 2007 letter from Russell Moore, appended hereto as **Ex. B-4**; August 31, 2007 letter from Stein Sture, appended hereto as **Ex. B-5**.]

13. DiStefano notified Salby of his acceptance of the Committee's recommendations on September 19, 2007, and of his directive that the recommendations go into effect immediately. DiStefano instructed Salby to provide the conflict of interest information by October 1, 2007, in the absence of which the University would initiate additional disciplinary action against Salby. [See, **Ex. A-1**, at ¶ 7; **Ex. B-1**, at ¶ 13; September 19, 2007 letter from Provost DiStefano, appended hereto as **Ex. B-6**.]

14. The frozen research funds are property of the University because they are under contract between the University and the granting agencies. [See, **Ex. A-1**, at ¶ 9.]

15. Salby's former laboratory is owned by the Board of Regents of the University and is allocated at the discretion of the Provost, Deans, and other Vice Chancellors to employees for work-related activities and professional pursuits and are subject to reassignment or revocation

upon their discretion. [See, **Ex. A-1**, at ¶ 10; Affidavit of Frank Bruno, appended hereto as **Ex. C-1**, at ¶ 3.]

16. Neither a professor, nor a department, nor other academic or research unit has any right to or ownership interest in a specific office space. Such space is allocated pursuant to the discretion of the Chancellor, Provost, other Vice Chancellors, and the Deans. Spaces may be reassigned at any time based upon the needs and interests of the University. [See, **Ex. A-1**, at ¶ 10; **Ex. C-1**, at ¶¶ 4-5.]

17. This long-standing, written policy regarding allocation of space has been in place since at least 2002. [See, **Ex. C-1**, at ¶ 4.]

18. DiStefano understood that the University permitted Salby to remove his personal belongings from the lab. [See, **Ex. A-1**, at ¶ 11.]

19. DiStefano did not carry out the actual implementation of the Committee's recommendations. Such implementation was carried out by Associate Vice Chancellor Moore's office and the ATOC department. [See, **Ex. A-1**, at ¶ 8; **Ex. B-1**, at ¶ 14.]

20. DiStefano did not terminate Salby's employment with the University; rather, Salby submitted notice of his retirement to Brian Toon, department chair of ATOC, effective January 31, 2008. [See, **Ex. A-1**, at ¶ 12; January 29, 2008 letter from Salby, appended hereto as **Ex. A-3**.]

21. Before taking the action described above, DiStefano had never met Salby and had only indirect involvement in a single administrative issue years before. DiStefano had no knowledge of Salby's grievances, and his actions taken in response to the conflict of interest issue were wholly unrelated to those grievances. [See, **Ex. A-1**, at ¶ 13.]

IV. STANDARD OF REVIEW

Summary judgment should be granted where, taking the facts in the light most favorable to the non-moving party, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See, Deepwater Investments, Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110-11 (10th Cir. 1991). Upon a motion for summary judgment, the moving party bears the burden of showing the absence of a genuine issue of material fact. *See, Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to produce evidence creating a genuine issue of material fact to be resolved at trial. *See, Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993).

V. ARGUMENT

A. **DiStefano is Entitled to Qualified Immunity.**

DiStefano acted within his official role as Provost at all times relevant to the Complaint, and he is thus entitled to qualified immunity. Qualified immunity protects government officials performing discretionary functions from liability if their conduct violates no “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Only in exceptional cases will government actors have no shield against claims made against them in their individual capacities. *See, Harlow*, 457 U.S. at 818. “[I]nsubstantial lawsuits ‘against government officials [should] be resolved *prior to discovery and on summary judgment* if possible.’” *Lewis v. City of Ft. Collins*, 903 F.2d 752, 758 (10th Cir. 1990) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, n.2 (1987)) (emphasis added). As set forth herein, the undisputed facts demonstrate that at all relevant times DiStefano

was performing discretionary functions. Therefore, he is entitled to qualified immunity and summary judgment should enter in his favor.

1. The Concept of Qualified Immunity and Plaintiff's Burden.

As the undisputed facts demonstrate, DiStefano acted pursuant to the discretion afforded to him in his capacity as Provost of the University when he accepted the recommendations of the Conflict of Interest Committee concerning Salby and when he restricted Salby's access to the research lab. Consistent with the well-established purpose behind qualified immunity, DiStefano should be protected from suit and summarily dismissed from this lawsuit at the onset.

Generally, in order to defeat an assertion of qualified immunity, Salby has the burden of proving the following elements by a preponderance of the evidence: (a) DiStefano violated a constitutional or statutory right; and (b) the infringed right at issue was clearly established at the time of the allegedly unlawful activity such that a reasonable individual in his position would have known his challenged conduct was illegal. *See, Martinez v. Carr*, 479 F.3d 1292, 1295 (10th Cir. 2007); *see also, Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009) ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."). The qualified immunity analysis is premised on a showing that the official acted within the scope of his discretionary authority when the challenged conduct occurred. *See, Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002).

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 129 S.Ct. at 815. "The protection of qualified immunity applies regardless of whether the

government official's error is a 'mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Id.* Importantly, qualified immunity "not only shields a defendant from liability, but is also intended to protect the defendant from the burdens associated with trial." *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988). "These burdens include distraction of officials from their governmental responsibilities, the inhibition of discretionary decision making, the deterrence of able people from public service, and the disruptive effects of discovery on governmental operations." *Hannula*, 907 F.2d at 130.

The Supreme Court has held that:

Because qualified immunity is 'an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.' *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis deleted). Indeed, we have made clear that the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' against government officials [will] be resolved prior to discovery.' *Anderson v. Creighton*, 483 U.S. 635, 640 n. 2 (1987). Accordingly, 'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.' *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*).

Pearson, 129 S.Ct. at 815.

DiStefano is entitled to protection from this litigation because he was clearly acting within his discretionary authority, and he is thus entitled to qualified immunity. This Court should decide as a threshold matter that DiStefano should be summarily dismissed at the onset of this lawsuit.

a. **The Position of Provost.**

The Provost and Executive Vice Chancellor for Academic Affairs is the chief academic officer for the Boulder campus. [SUF at ¶ 1.] DiStefano held this position from March 2001 until his May 5, 2009 appointment as Chancellor. [SUF at ¶ 1.] In the capacity of Provost, DiStefano was responsible for overseeing eight colleges and schools, over 29,000 students, and more than 1,000 faculty members. [SUF at ¶ 2.] The Provost is also responsible for, *inter alia*, administration of academic policies and programs, the allocation of resources to assure high quality academic programs, and direction and oversight of the instruction, research and creative work, and outreach activities of the campus; the Provost also assumes responsibility for all research programs, including research institutes and centers. [SUF at ¶ 3.] The position of Provost demands oversight of many issues and therefore provides extensive discretion for tasks on a regular basis. [SUF at ¶ 3.]

In this position, the Provost has the right to determine appropriate disciplinary measures of tenure and tenure-track professors. [SUF at ¶ 4.] Under this extensive authority, it is within a Provost's discretion to accept findings of a committee and to implement such recommendations in part or in whole, to fashion a remedy of his own, or to reject the findings altogether, as he deems appropriate. [SUF at ¶ 4.]

Because of the extensive nature of the Provost's responsibilities, delegation to and reliance upon underlying committees is vital. It would be impossible for the Provost to oversee and implement every personnel decision without the aid of such committees. Here, DiStefano relied upon the Committee's recommendations and utilized his discretion to accept same.

DiStefano could not know that it would violate clearly established law for him to accept the recommendations of the Committee.

b. **The Provost's Actions Were Discretionary in Nature and Are Precisely the Type of Conduct Entitling DiStefano to Qualified Immunity.**

To defeat summary judgment, Salby must produce evidence that would allow a trier of fact to find that no reasonable person in DiStefano's position would have thought the facts justified his acts. *See, Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993). "The first part of the qualified immunity analysis is to show that the official acted within the scope of his discretionary authority when the challenged conduct occurred." *Vinyard*, 311 F.3d at 1346. Salby may avoid summary judgment "only by pointing to *specific evidence* that the official's actions were improperly motivated." *Subryan v. Regents of the University of Colorado*, 813 F.Supp. 753, 759 (D.Colo. 1993) (internal citation omitted) (emphasis original). The Complaint alleges that DiStefano was Provost of the University at the time the challenged conduct occurred. As such and as set forth herein, DiStefano was operating and acting within the scope of his discretionary authority.

i. ***DiStefano's Acceptance of the Committee's Recommendations Occurred Pursuant to University Policy.***

DiStefano followed University procedure with regard to Salby's disciplinary action at issue. The recommendations for corrective or disciplinary action were provided to DiStefano because he was the highest appointing authority able to enact this type of action against a faculty member. [SUF at ¶ 12.] University procedure requires faculty members to complete DEPA forms, which helps to ensure that conflicts of interest involving a professor's outside professional activities and financial interests are disclosed and managed appropriately to prevent adverse

affects for employees and for the University. [SUF at ¶ 5.] Faculty have a continuing duty to revise these on-line forms upon a significant change in outside interests or activities. [SUF at ¶ 5.] If the conflict cannot be resolved at the unit level, it is referred to the Conflict of Interest Committee, which investigates and considers the matter and then makes a recommendation for action or management to the Provost for a final ruling. [SUF at ¶¶ 4, 6.]

In this case, Salby failed to complete a DEPA in 2007, prior to which he had refused to disclose requested and necessary information, insisting he had no conflicts. [SUF at ¶ 8.] Despite being on sabbatical leave, as a professor of the University, Salby was still required to comply with DEPA reporting procedure. [SUF at ¶ 9.] Failure to submit a DEPA is considered a violation of the disclosure policy, and attempts by the ATOC department to obtain the necessary information from Salby over the course of several months proved unsuccessful. [SUF at ¶¶ 9-10.]

Upon the Committee's investigation, it may recommend various sanctions such as oral or written admonition, temporary or permanent reassignment of the faculty member's office or work space, temporary or continued reduction in privileges, or freezing of research funds and imposing other research restrictions. [SUF at ¶ 7.] While Salby alleges he submitted several grievances between 1997 and 2000, the facts demonstrate that DiStefano was unaware of the subject grievances Salby filed between 1997 and 2000 and does not remember receiving notice of any reference to them. [SUF at ¶ 21.] Accordingly, DiStefano's decision to implement the Committee's recommendations was wholly unrelated to the prior grievances because DiStefano had no knowledge of Salby's activities prior to implementation of this lawsuit. [SUF at ¶ 21.]

DiStefano's discretionary decision to accept the Committee's recommendations were completely unrelated to Salby's grievances. [SUF at ¶ 21.]

DiStefano could not have known that his actions against Salby for reasons unrelated to the grievances would violate clearly established law. To allow the exercise of discretion should not become unlawful conduct which would make DiStefano susceptible to suit for every discretionary act he performs. Such a result would circumvent the purpose of qualified immunity and substantially interfere with his official duties as Provost of the University. As such, DiStefano's actions are precisely those which qualified immunity is intended to protect.

ii. *DiStefano did not Terminate Salby's Employment.*

DiStefano utilized his discretion to accept the Committee's recommendations, which did not result in Salby's termination. Upon acceptance of the Committee's recommendations, DiStefano did not implement the corrective and disciplinary actions against Salby. [SUF at ¶ 19.] DiStefano did not terminate Salby from his employment with the University. [SUF at ¶ 20.] Salby chose to retire, effective January 31, 2008, via correspondence sent to Brian Toon, chair of ATOC. [SUF at ¶ 20.] Retirement does not trigger due process procedures. DiStefano could not have known that Salby was being deprived of any pre or post termination due process because Salby was not terminated; he retired. Under these circumstances, DiStefano could not have known that his actions with respect to Salby violated any clearly established law.

iii. *DiStefano's Discretionary Acceptance of the Committee's Recommendations to Restrict Access to the Research Lab Owned by the University was Reasonable.*

DiStefano's discretionary acceptance of the Committee's recommendations was also reasonable with regard to Salby's claim that he was denied access to his research lab. The

workspace at issue is owned and operated by the University; it is provided to employees for work purposes and professional pursuits. [SUF at ¶ 15.] The Provost, Deans, and other Vice Chancellors allocate such space at their discretion. [SUF at ¶¶ 15-16.] Per University policy, a professor has no ownership or proprietary interest in a particular office space. [SUF at ¶ 16.] Space allocation is specified in a written policy, in place since at least 2002. [SUF at ¶ 17.]

(1) **The Undisputed Facts Show that Research Data and Computers Were Owned by the University and/or Sponsoring Agency, Not by Salby.**

DiStefano's discretionary action was reasonable because the property belongs to the University rather than to Salby. [SUF at ¶¶ 15-16.] The University simply restricted access to its facility and equipment allocated to Salby and his research assistant to preclude University property from being utilized for research purposes. [SUF at ¶¶ 11, 14-16.] The Committee's recommendation stated that "Dr. Salby should be denied access to his research laboratory space in the Department of Atmospheric and Oceanic Sciences." [SUF at ¶ 11.] Indeed, the Committee's recommendation provided a clear and satisfactory rationale for this action, based upon Salby's failure to comply with necessary University reporting policy and procedure, upon which DiStefano also based his acceptance. [SUF at ¶ 11.] The Complaint states that the laboratory contents had been developed by Salby's federal research grants. [See, Complaint at ¶ 9]. Therefore, the alleged confiscation involved research-related University property in the form of frozen research funds because, under University policy, funds developed under contract between the University and the granting agencies are property of the University. [SUF at ¶ 14.]

(2) **The Record is Devoid of Any Evidence that Salby's Personal Items and Papers Were Seized.**

The Complaint asserts conclusory accusations without adequate support. DiStefano himself had no personal role in implementing the recommendation that Salby's access to the research lab be restricted. [SUF at ¶ 19.] Nevertheless, the undisputed facts, *infra*, also show that Salby was invited to claim his personal belongings, [SUF at ¶ 18] and there is no record of repeated requests by Salby for computer files. Attempts to communicate with Salby were impossible, and he often failed to attend his scheduled classes. DiStefano could not have known that his actions to bar Salby from his research lab based on the Committee's recommendations would violate clearly established law. DiStefano believed such space to be University property that is reassignable at the discretion of himself and other University administrators. [SUF at ¶¶ 15-16.] DiStefano believed Salby would have access to this lab in order to collect his personal belongings and would not be seized. [SUF at ¶ 18.]

(3) **The Undisputed Facts Show Salby was Invited to Come to the Lab and Collect Personal Property.**

The undisputed facts negate the Complaint's unsupported allegations. Salby was notified of the University's intention to freeze his access to the laboratory. [SUF at ¶ 13.] DiStefano understood that Salby had been invited to pick up his personal belongings in the laboratory. [SUF at ¶ 18.] Salby's personal belongings did not include research funds or equipment purchased with such funds. [SUF at ¶ 14.]

Based upon the foregoing, it is clear that the sum total of DiStefano's involvement in restricting Salby's access to the research lab was his acceptance of the Committee's recommendations and his communication to Salby regarding same. This is precisely the type of

discretionary conduct which the doctrine of qualified immunity was meant to shield from suit, and as such, DiStefano should be dismissed from this case at this early stage of the litigation.

c. **Other Similar Cases Support an Award of Qualified Immunity.**

In *Wood v. Strickland*, 40 U.S. 308 (1975), the Supreme Court defined the immunity defense in the specific context of school discipline. The similarities between the discretionary authority exercised by local school authorities in teacher employment matters supports the immunity test stated therein to apply in this case. The Supreme Court held that “a school board member is not immune from liability for damages under U.S.C. § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [person] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights.” *See, Wood*, 40 U.S. at 322.

The undisputed facts show that DiStefano’s actions were in good faith and within his discretion. *See, Bertot v. School Dist. No. 1, Albany County, Wyoming*, 522 F.2d 1171, 1184 (10th Cir. 1975). In *University of Wyoming v. Gressley*, the President of the University recommended Professor Gressley’s dismissal as a tenured professor of the University. *See*, 978 P.2d 1146, 1149 (Wyo. 1999). As per University procedure, the faculty senate’s Ad Hoc Hearing Committee held a preliminary proceeding and concluded that there existed adequate cause for the professor’s dismissal. *See, Gressley*, 978 P.2d at 1149. The Board of Trustees sustained the Committee’s decision, pursuant to their authority, and the professor’s lawsuit followed. *Id.* Among other claims, plaintiff pled that the President was liable because he had instituted the proceedings instead of another administrative officer appointed by the President as required by the applicable rules. *Id.* at 1152. The court held that the President and the Board of

Trustees were entitled to qualified immunity because the termination of plaintiff came within the ambit of their discretionary functions. *Id.* at 1151. According to the court, plaintiff could not demonstrate any prejudice on the part of the President sufficient to overcome the defense of qualified immunity. *Id.* at 1152.

Similarly, the Tenth Circuit has held that high ranking individuals at a University are immune from suit. *See, Prebble v. Brodrick*, 535 F.2d 605, 612-13 (10th Cir. 1975). In *Smith v. Losee*, 485 F.2d 334, 344 (10th Cir. 1973) the court had earlier recognized a qualified privilege or immunity for school authorities making decisions on nonrenewal of employment or discharge of instructors. The Tenth Circuit extended this immunity, stating “[w]e are satisfied that such a qualified immunity is available to the defendants in this case, the President, the Trustees and administrative officers of the State University.” *Prebble*, 535 F.2d at 612. There, in addition to the applicability of immunity as a defense, the evidence strongly showed a lack of malice or bad faith by the defendants. *Id.* at 613. Under this authority, it is appropriate to dismiss DiStefano at this juncture in order to further the purpose of qualified immunity. The undisputed facts show that DiStefano acted within his discretion and acted in good faith, without malice.

d. Salby’s Whistleblower Claim.

This threshold motion solely addresses the issue of qualified immunity; thus, the federal claims should be addressed prior to the state claim. Salby’s remaining state whistleblower claim can be addressed and litigated subsequent to the Court’s determination of qualified immunity.

VI. CONCLUSION

DiStefano was acting pursuant to his authority as Provost of the University at all times relevant. In this capacity, his ability to accept the Committee’s disciplinary recommendations is

purely discretionary and was reasonable under the circumstances. Moreover, DiStefano could not know that it would violate clearly established law for him to accept the recommendations of the Committee. Thus, for the foregoing reasons, DiStefano respectfully requests that the Court dismiss the claims addressed herein pursuant to C.R.C.P. 56, based on qualified immunity.

Respectfully submitted,

SENER GOLDFARB & RICE, L.L.C.

By s/ Thomas S. Rice
Thomas S. Rice, # 9923

By s/ Courtney B. Kramer
Courtney B. Kramer, # 40097
1700 Broadway, Ste. 1700
Denver, CO 80290
Telephone: 303-320-0509
Facsimile: 303-320-0210
Attorneys for Defendant Philip DiStefano

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of June, 2009, a true and correct copy of the above and foregoing **DEFENDANT DISTEFANO'S MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BASED UPON QUALIFIED IMMUNITY** was electronically filed with the Court and served upon all counsel via LexisNexis File and Serve, addressed to:

Robert M. Liechty, Esq.
rliechty@crossliechty.com

David P. Temple, Esq.
David.temple@cu.edu

s/ Stephanie Hood
Stephanie Hood
Legal Secretary

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202 (720) 865-8307	FILED Document CO Denver County District Court 2nd JD Filing Date: Jun 15 2009 2:25PM MDT Filing ID: 25657548 Review Clerk: Charmaine Bright
Plaintiff(s): MURRY SALBY, v. Defendant(s): UNIVERSITY OF COLORADO, PROVOST PHILIP DISTEFANO, and JOHN DOES.	▲ COURT USE ONLY ▲
Attorney: Thomas S. Rice, # 9923 Courtney B. Kramer, # 40097 Address: Senter Goldfarb & Rice, L.L.C. 1700 Broadway, Suite 1700 Denver, CO 80290 Phone No.: 303-320-0509 Fax No.: 303-320-0210 E-mail: trice@sgrllc.com ckramer@sgrllc.com	Case Number: 09 CV 3789 Div.: Ctrm.:
AFFIDAVIT OF RUSSELL MOORE	

Affiant, **RUSSELL MOORE**, after being duly sworn, states as follows:

1. I am the Associate Vice Chancellor for Research for the University of Colorado at Boulder.
2. I have personal knowledge of the matters set forth in this Affidavit.
3. Effective March 20, 2007, the University implemented a new Conflict of Interest and Conflict of Commitment policy. In essence, the policy requires all faculty members, and

other research employees, to make annual disclosure of financial interests and external professional activities that could compromise University decision making or duties. This disclosure is accomplished by a Disclosure of External Professional Activity ("DEPA") form. The DEPA is a web-based form that must be revised whenever there is any significant change in outside interests or activities. I hereby certify that attached to this Affidavit is a true and correct copy of the Disclosure of External Professional Activity form. [See, Ex. B-2.]

4. Professor Murry Salby of the Department of Atmospheric and Oceanic Science ("ATOC") was required to complete the DEPA form in 2007. Despite multiple requests and advisements of this requirement, Professor Salby did not submit the DEPA. Those requests and advisements are summarized as follows:

- a. One email and one returned certified letter in May 2007, requesting compliance;
- b. Two emails and one returned certified letter in June 2007, requesting compliance and advising Professor Salby of the DEPA procedure and of how to access the DEPA form online.

5. Although Professor Salby was on sabbatical leave during the spring term of 2007, he was still obligated to comply with his disclosure duties as a University professor, including completion of the DEPA.

6. Professor Salby's failure to complete the required DEPA form was considered a violation of the policy.

7. Initially, allegations of violations of the policy are sought to be resolved at the unit level. In the case of Professor Salby, efforts were undertaken to resolve the matter within the ATOC Department. Those efforts included sending email correspondence and certified

letters requesting compliance and seeking additional information from Professor Salby, who failed to respond to any of the communications. For over two months, attempts to contact and to elicit information from Professor Salby failed. Even prior to the implementation of the DEPA form, Professor Salby had consistently and deliberately violated the spirit of the University's conflict of interest policy by refusing to disclose information and insisting no conflicts existed. Subsequent to the Committee's recommendations, the Department still attempted to resolve the issues with Professor Salby for two additional months (December through January); however, Professor Salby remained unresponsive.

8. Under the policy, if an allegation is not resolved at the unit level, it is referred to the Conflict of Interest Committee ("Committee"). The Committee consists of at least eight faculty members, who are recommended by the Vice Chancellor for Research, the Deans of various colleges of the University, and one member from outside the University. When an alleged violation is referred to the Committee, the Committee is to review the matter and then make a report of findings and any recommendations for corrective or disciplinary action.

9. Among the sanctions and discipline that the Committee may recommend for a violation are the following:

- a. Disciplinary actions (including but not restricted to):
 - i. emphasizing, orally or in writing, to the faculty member his or her professional responsibilities;
 - ii. oral or written admonition of the faculty member;

- iii. reassignment, temporarily or permanently, of the faculty member's office or other working space (with appropriate consent of any academic unit affected);

- iv. temporary or continuing reduction in salary or privileges of the employee;

- b. Freezing of research funds, other research restrictions, etc.

10. In the case of Professor Salby, the Committee met August 17, 2007, and reviewed the allegations of violations for failure to file the required DEPA form. On August 20, 2007, the Committee forwarded its report finding that Professor Salby's inaction constituted a significant violation of the Conflict of Interest policy. The Committee further recommended the following corrective or disciplinary actions: (1) that the University should not sign or submit any requests for funding (grant, contracts, etc.) on Professor Salby's behalf; (2) that any current grants that Professor Salby has should be frozen; and (3) that Professor Salby should be denied access to his laboratory space at ATOC. I hereby certify that attached to this Affidavit is a true and correct copy of the August 20, 2007 letter from Rodger Kram, Ph.D. [See, Ex. B-3.]

11. On August 28, 2007, I forwarded the committee's findings and recommendations to Vice Chancellor of Research Stein Sture with the request that he forward the committee's report to Provost Philip DiStefano. I hereby certify that attached to this Affidavit is a true and correct copy of my letter. [See, Ex. B-4.]

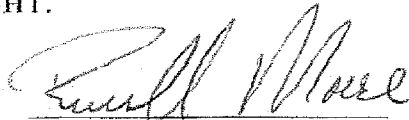
12. On August 31, 2007, Vice Chancellor Sture forwarded the Committee's report to Provost DiStefano stating his concurrence with the Committee's recommendations. I hereby certify that attached to this Affidavit is a true and correct copy of Vice Chancellor Sture's memorandum. [See, Ex. B-5.] The report was ultimately forwarded to Provost DiStefano as the

appointing authority with authority to enact corrective or disciplinary action against a tenured faculty member.

13. On September 19, 2007, Provost DiStefano forwarded correspondence to Professor Salby advising of his acceptance of the Committee's recommendations for corrective and disciplinary actions. The Provost further advised that the recommendations would go into effect immediately and directed Professor Salby to provide the conflict of interest information by October 1, 2007, in the absence of which the University would initiate further disciplinary action. I hereby certify that attached to this Affidavit is a true and correct copy of Provost DiStefano's letter. [See, Ex. B-6.]

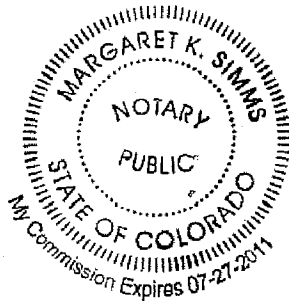
14. Thereafter, my office, in conjunction with the administration of ATOC, took steps to implement the measures recommended by the Committee and accepted by Provost DiStefano.

FURTHER AFFIANT SAYETH NAUGHT.


Russell Moore

STATE OF COLORADO)
)ss.
COUNTY OF Boulder)

SUBSCRIBED AND SWORN to me before this 8th day of May, 2009, by Russell Moore.



By: s/ Margaret K. Simms
Notary Public
My Commission Expires: July 27, 2011

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Attorney: Thomas S. Rice, # 9923 Courtney B. Kramer, # 40097 Address: Senter Goldfarb & Rice, L.L.C. 1700 Broadway, Suite 1700 Denver, CO 80290 Phone No.: 303-320-0509 Fax No.: 303-320-0210 E-mail: trice@sgrllc.com ckramer@sgrllc.com	Case Number: 09 CV 3789 Div.: Ctrm.:
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- iii. reassignment, temporarily or permanently, of the faculty member's office or other working space (with appropriate consent of any academic unit affected);
- iv. temporary or continuing reduction in salary or privileges of the employee;
- b. Freezing of research funds, other research restrictions, etc.

10. In the case of Professor Salby, the Committee met August 17, 2007, and reviewed the allegations of violations for failure to file the required DEPA form. On August 20, 2007, the Committee forwarded its report finding that Professor Salby's inaction constituted a significant violation of the Conflict of Interest policy. The Committee further recommended the following corrective or disciplinary actions: (1) that the University should not sign or submit any requests for funding (grant, contracts, etc.) on Professor Salby's behalf; (2) that any current grants that Professor Salby has should be frozen; and (3) that Professor Salby should be denied access to his laboratory space at ATOC. I hereby certify that attached to this Affidavit is a true and correct copy of the August 20, 2007 letter from Rodger Kram, Ph.D. [See, Ex. B-3.]

11. On August 28, 2007, I forwarded the committee's findings and recommendations to Vice Chancellor of Research Stein Sture with the request that he forward the committee's report to Provost Philip DiStefano. I hereby certify that attached to this Affidavit is a true and correct copy of my letter. [See, Ex. B-4.]

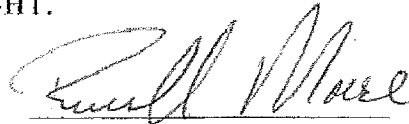
12. On August 31, 2007, Vice Chancellor Sture forwarded the Committee's report to Provost DiStefano stating his concurrence with the Committee's recommendations. I hereby certify that attached to this Affidavit is a true and correct copy of Vice Chancellor Sture's memorandum. [See, Ex. B-5.] The report was ultimately forwarded to Provost DiStefano as the

appointing authority with authority to enact corrective or disciplinary action against a tenured faculty member.

13. On September 19, 2007, Provost DiStefano forwarded correspondence to Professor Salby advising of his acceptance of the Committee's recommendations for corrective and disciplinary actions. The Provost further advised that the recommendations would go into effect immediately and directed Professor Salby to provide the conflict of interest information by October 1, 2007, in the absence of which the University would initiate further disciplinary action. I hereby certify that attached to this Affidavit is a true and correct copy of Provost DiStefano's letter. [See, Ex. B-6.]

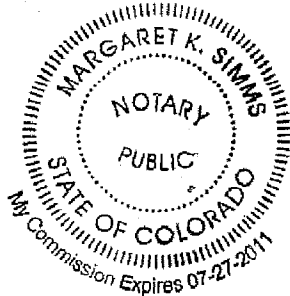
14. Thereafter, my office, in conjunction with the administration of ATOC, took steps to implement the measures recommended by the Committee and accepted by Provost DiStefano.

FURTHER AFFIANT SAYETH NAUGHT.


Russell Moore

STATE OF COLORADO)
)ss.
COUNTY OF Boulder)

SUBSCRIBED AND SWORN to me before this 8th day of May, 2009, by Russell Moore.

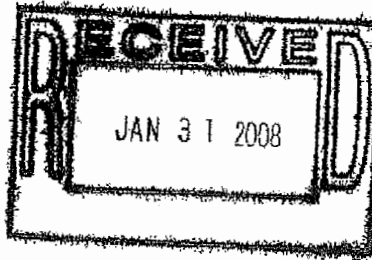


By: s/ Margaret K. Simms
Notary Public
My Commission Expires: July 27, 2011

1/31/08

Copied and hand delivered to

Russ Meese



To: Brian Toon, ATOC Chair

From: Murry Salby

Date: January 29, 2008

Subject: Retirement

FILED Document in Curry
CO Denver County District Court 2nd JD
Filing Date: Jun 15 2009 4:25 PM
Filing ID: 25657548
Review Clerk: Charmaine Bright

I believe that my contract has been violated
and that I have been forced out of my employment by the university.
This, I have been advised, amounts to constructive discharge.
Consequently, I hereby retire from my appointment at the University of Colorado,
effective January 31, 2008.

I should be provided, not later than February 5 2008,
with personal property that the university has confiscated,
along with a complete and accurate copy of all data
on computing facilities that were confiscated.
Otherwise, federal agencies, who invested millions
to produce those data, will be duly advised.

Murry L. Salby

Exhibit A-3

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202 (720) 865-8307	FILED Document CO Denver County District Court 2nd JD Filing Date: Jun 15 2009 2:25PM MDT Filing ID: 25657548 Review Clerk: Charmaine Bright
Plaintiff(s): MURRY SALBY, v. Defendant(s): UNIVERSITY OF COLORADO, PROVOST PHILIP DISTEFANO, and JOHN DOES.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Attorney: Thomas S. Rice, # 9923 Courtney B. Kramer, # 40097 Address: Senter Goldfarb & Rice, L.L.C. 1700 Broadway, Suite 1700 Denver, CO 80290 Phone No.: 303-320-0509 Fax No.: 303-320-0210 E-mail: trice@sgrllc.com ckramer@sgrllc.com	Case Number: 09 CV 3789 Div.: Ctrm.:
AFFIDAVIT OF FRANK W. BRUNO	

Affiant, **FRANK BRUNO**, after being duly sworn, states as follows:

1. I am the Vice Chancellor for Administration for the University of Colorado at Boulder. I have held this position since June of 2008.
2. I have personal knowledge of the matters set for in this Affidavit.
3. One of my responsibilities is to oversee the management of the physical property and facilities on the Boulder campus. Among the properties overseen by my office are the

research laboratories utilized by faculty and other employees to conduct research and other professional pursuits.

4. All campus buildings, including research laboratories, are titled to and owned by the University of Colorado under the legal name, "The Board of Regents of the University, body corporate," and that no ownership interest in such facilities rests with any colleges, departments, or other academic or research unit. Likewise, no faculty member or other employee enjoys any ownership interest in the facilities assigned to them. This is in accordance with Colorado statute, Colorado Fiscal Rules, and long-standing policies of the University, all of which have been in effect since at least 2002.

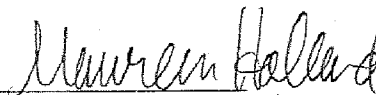
5. Decisions concerning allocation and assignment of research space rest with the Chancellor, Provost, other Vice Chancellors, and the Deans. No faculty member or other employee has any interest in being assigned to a particular research space for either a defined period or on a continuing basis. Instead, such space may be reassigned at any time based upon the needs and interests of the University.

FURTHER AFFIANT SAYETH NAUGHT.


Frank Bruno

STATE OF COLORADO)
)ss.
COUNTY OF Boulder)

SUBSCRIBED AND SWORN to me before this 8th day of May, 2009, by Frank Bruno.

By: s/ 
Notary Public
My Commission Expires: 01/04/2012



University of Colorado at Boulder
Office of the Vice Chancellor for Research
Graduate School
26 UCB
492-2890
Boulder, CO 80309

Stein Sture, Ph.D.
Vice Chancellor for Research
Dean of the Graduate School

(303)

EFILED Document

www.colorado.edu/GraduateSchool June 15, 2009 4:25 PM

CO Denver County District Court 2nd JD

Filing Date: Jun 15, 2009 4:25 PM MDT

Filing ID: 25657548

Review Clerk: Charmaine Bright

MEMORANDUM

To: Provost Philip DiStefano

From: Stein Sture, Vice Chancellor for Research and
Dean of the Graduate School *Stein Sture*

Subject: Findings of the CU Boulder Conflict of Interest Committee:
The case of Professor Murry Salby

Date: August 31, 2007

I have reviewed the findings of the CU Boulder Conflict of Interest Committee related to the apparent conflict-of-interest case of Professor Murry Salby, Department of Atmospheric and Oceanic Sciences. I concur with the Conflict of Interest Committee's recommendations that:

1. the University not submit any requests for funding of research proposals on Professor Murry Salby's behalf,
2. funds in any of Professor Murry Salby's current and active research grants be frozen, and
3. Dr. Murry Salby should be denied access to his research laboratory space in the Department of Atmospheric and Oceanic Sciences.

Attached you will find the findings and related documentation related to Professor Murry Salby's conflict-of-interest case.

Cc: AVCR Russell Moore



University of Colorado at Boulder
Office of the Vice Chancellor for Research
Graduate School
26 UCB
492-2890
Boulder, CO 80309

Stein Sture, Ph.D.
Vice Chancellor for Research
Dean of the Graduate School

EFILED Document

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www.colorado.edu/GraduateSchool/2009/06/15/2009-06-15-25 PM

Filing Date: June 15, 2009, 2:25 PM MDT

Filing ID: 25657548

Review Clerk: Charmaine Bright

MEMORANDUM

To: Provost Philip DiStefano

From: Stein Sture, Vice Chancellor for Research and
Dean of the Graduate School *Stein Sture*

Subject: Findings of the CU Boulder Conflict of Interest Committee:
The case of Professor Murry Salby

Date: August 31, 2007

I have reviewed the findings of the CU Boulder Conflict of Interest Committee related to the apparent conflict-of-interest case of Professor Murry Salby, Department of Atmospheric and Oceanic Sciences. I concur with the Conflict of Interest Committee's recommendations that:

1. the University not submit any requests for funding of research proposals on Professor Murry Salby's behalf,
2. funds in any of Professor Murry Salby's current and active research grants be frozen, and
3. Dr. Murry Salby should be denied access to his research laboratory space in the Department of Atmospheric and Oceanic Sciences.

Attached you will find the findings and related documentation related to Professor Murry Salby's conflict-of-interest case.

Cc: AVCR Russell Moore

August 20, 2007

Provost Philip DiStefano
University of Colorado at Boulder
40 UCB

EFILED Document
CO Denver County District Court 2nd JD
DATE FILED: June 15, 2009 4:25 PM
Filing Date: Jun 15 2009 2:25PM MDT
Filing ID: 25657548
Review Clerk: Charmaine Bright

RE: Professor Murry Salby's potential conflict of interest

Dear Provost DiStefano:

As you may remember, the University of Colorado was contacted by the National Science Foundation in February, 2005 about a possible conflict of interest concerning Professor Murry Salby, Department of Atmospheric and Oceanic Sciences. NSF asked for details about Professor Salby's disclosures regarding possible conflicts of interest, as well as about the University's conflict of interest policies and procedures.

CU-Boulder responded to NSF, and then formed a working group to investigate the circumstances. A copy of a summary of the information they found has been appended for your information. The end result of the investigation was a request by the CU-Boulder Conflict of Interest Committee to Professor Salby for more information. To date, Professor Salby has not responded to numerous emails sent to both his CU-Boulder office and to his private company, nor to the two certified letters sent to his home.

The Conflict of Interest Committee met on Friday, August 17, 2007 and considered all of the information to date. It is the determination of the Committee that Dr. Salby's continued inadequate responses to requests for information, especially in light of NSF's requests to the University for action, is a significant violation of the CU-Boulder Conflict of Interest policy.

The Boulder Conflict of Interest policy states that, if allegations of violations of the policy cannot be resolved at the unit level, "... the Conflict of Interest Committee will be ultimately responsible for providing the AVCR, the Compliance Director, and the appropriate appointing authorities with a written report of the committee's findings, and any recommendations for corrective or disciplinary action." This letter and the attached report constitute the written report of our findings. Our recommendations to you for "corrective or disciplinary action" are as follows.

Until such time as Dr. Salby provides the Conflict of Interest Committee with sufficient information to make a determination of whether or not he has a conflict of interest and how to manage such a conflict, if it exists, the Committee recommends that:

1. The University should not sign or submit any requests for funding (grant, contracts, etc.) on Dr. Salby's behalf;

2. Any current grants that Dr. Salby has should be frozen; and
3. Dr. Salby should be denied access to his laboratory space in the Department of Atmospheric and Oceanic Sciences.

When Dr. Salby has completed a current Disclosure of External Professional Activities (DEPA), it will be reviewed by the Compliance Director and the Committee. At that time, a determination will be made about the existence of a conflict of interest. If a conflict is found to exist, a management plan will be developed with Dr. Salby and the chair of his department.

Please feel free to contact me or the Compliance Director, Jean Wylie, if you have any questions or we can assist you in any way.

Respectfully yours,

Rodger Kram, Ph.D.
Chair, Conflict of Interest Committee

June 8, 2007

CONFLICT OF INTEREST SUMMARY REGARDING PROFESSOR MURRY SALBY

Factual Information and Background:

NSF inquiry

1. NSF contacted CU University Counsel in February, 2005 about a possible conflict of interest regarding Murry Salby. The contact arose from an internal NSF inquiry into an allegation of duplicate proposal submissions by Salby from CU and Atmospheric Systems and Analysis (ASA), Salby's company.
2. NSF asked for details about the employment status of Salby and his research associates Patrick Callaghan and Jaquelyn Gratrix from 1994 - 2005. NSF also asked for copies of all conflict of interest forms submitted by the three individuals for proposals submitted to NSF.
3. NSF also asked for clarification of the University's conflict of interest policies and the 1/6th rule, specifically, as applied to faculty and to staff.

CU response to NSF

1. The initial responses to NSF were provided by L. Louise Romero, Managing Senior Associate University Counsel. After her death, Kristin Diamond, Assistant General Counsel took on the investigation and response. Ms. Diamond formed a working group of Fred Pampel, newly appointed Associate Vice Chancellor for Research, Randy Draper, Director of OCG, and Tom Trager, CU-Boulder University Counsel. The working group investigated and provided information to NSF (see following). After a site visit by NSF on February 14, 2006, the working group met with the three individuals that were the subject of the NSF inquiry and the department chair.

2. CU provided information about Salby that showed that he had been on the CU payroll since 1984. Information was provided about sabbaticals, etc.

3. CU also provided copies of the "Application for Approval of Additional Remuneration" (the "1/6th rule" forms) that Salby had filed from 1995 to 2004.

From 1995 to 2001, he states that the work is "consultation" (as opposed to sponsored research or business) and lists the employer or sponsor of research as NASA, and he describes the activity as "synaptic mapping of satellite observations". He states he will spend 4.3 days/month or 19.5 days/semester on the activity. He either does not check the line that asks if the application is related to sponsored research at the University or states that "funding is not from CU sources". He also states that no other staff members will be involved, although two of the other employees of ASA, Jaquelyn Gratrix and Patrick Callaghan, also work at CU. The forms are signed by the Chair and, sometimes, the Dean.

June 8, 2007

From 2002-2005, he lists the employer or sponsor of research as "NASA, NSF". He describes the activity as "synaptic mapping of satellite observations" and "statistical analysis of solar variations". He no longer lists any time to be spent on the activity, saying that it will all be done on semester break, for 11 days. These forms also state that no staff members will be involved. These forms are not dated nor are they signed by the Chair or Dean.

4. CU provided NSF with copies of the OGC Proposal Application and Routing Forms for Salby from 1992 - 2002. Since 1996, the form has asked that PIs check a box if the following applies "There are significant financial interests involved that may be an actual or potential conflict of interest." Furthermore, the investigator has to initial one of the choices in the following statement: "There are ____ are not ____ significant financial interests (item 15 above.)" prior to signing the form. Professor Salby initialed the box indicating that there were no significant financial interests involved for all of the research proposals submitted during this time period.

Other information gathered by the working group

1. Salby's vitas during this time do not list any affiliation with ASA, other than "P Sassi, Atmospheric Systems and Analysis" under Recent Collaborators. Patrick Callaghan's vitas list his current positions as "Research Associate at CU, 1998-2001 and Scientist, at ASA, 1987-present." He is president of the company. His email is listed as patrick@asac.org.

2. An NSF "Current and Pending Support" form for Salby for a proposal submitted to NSF in 2001 lists him as PI on an existing grant from NSF to ASA, as well as one that is pending. Patrick Callaghan's form lists him as an investigator on both projects as well.

Information elicited from Salby by General Counsel during 2006

1. In February, 2006, Salby completed a University of Colorado Conflict of Interest Disclosure Form. The form asks that he "disclose any and all outside activities that may present actual or potential conflicts". He provided a very long list of such activities. (See attached.)

He stated that he did not have any equity or ownership interest related to the outside activities. He did indicate that he did/expected to "receive a salary, royalties, consulting fees, honoraria, gifts of more than nominal value or other payments related to the outside activity." He further answered yes to the question of whether he had or expected to "have a fiduciary or management role (such as service as a president, chief financial officer, director or trustee), or other legal obligation to any organization other than the University of Colorado" for which he did or did not receive compensation in any form.

He has consulted for many companies; the form does not specifically ask for those companies for which his consultation exceeded the \$10,000 threshold. He does list two of

June 8, 2007

interest: AMSP is his "personal corporation representing my interests in financial investments that are unrelated to scientific work" and ASA.

Atmospheric Systems and Analysis (ASA) was formed in July, 1994 as a non-profit 501(c)3 corporation in Colorado, although Salby was submitting proposals to NSF through the company in late 1993. Jacquelyn Gratrix was the incorporator, and there were three Board members: Salby, Callaghan and Rolando Garcia, who apparently had no relationship to CU. Until 1996, the address of the company was Gratrix's home address. In 1996, the company moved to its present location in Broomfield, CO. Salby's 2006 conflict of interest form lists him as a member of the Board of Directors.

For several of the companies/organizations (including ASA) he provides the following footnotes:

1. "This Applied Research (sic) is distinct and independent of the Pure Research (sic) conducted at CU. It is performed on time and facilities outside of CU. While supporting WCRP (World Climate Research Program) and the national effort on Global Change, this Applied Work (sic) has not and would not be performed at the university."
2. "Developed operational algorithm for mapping synoptic satellite data, producing satellite products for NASA. Also developed statistical-variational algorithm for identifying solar variations and computer model for interpreting behavior in the ionized upper atmosphere, which is removed from and governed by different physics than the neutral atmosphere upon which CU research focuses. The latter applications, which are likewise independent of the Pure Research (sic) conducted at CU, are pursued outside of the academic year."

In his cover letter for the form (to AVCR Pampel) he quoted the standards provided in the Chancellor's memo regarding conflict of interest distributed September 20, 1995.

"A significant financial interest...is

- (1) one that would reasonably appear to be directly and significantly affected by the research, educational, or service activities funded, or proposed for funding, by an external sponsor; or
- (2) one that involves entities whose financial interests would reasonably appear to be directly and significantly affected by such activities."

Salby concludes that his outside activities do not constitute a conflict of interest "because the outside remunerated activities in which I engage are Distinct (sic) and Independent (sic) of activities within the University."

2. On July 26, 2006 in a letter to Kristin Diamond, University Counsel, he provides information about the income he derived from various sources since 2001. He lists some lectures for which he received honoraria (although he states the amount as "unknown") and royalties from his textbook. He lists the following amounts from ASA:

2001	\$5,876
2002	\$4,157

June 8, 2007

2003 \$35,054 (when he was on teaching leave)
 2004 \$11,691
 2005 \$4,715.

Further investigation demonstrated that the information he provided was inaccurate, and perhaps misleading. Ms. Diamond was able to get copies of the invoices submitted by AMSP (his "personal corporation representing my interests in financial investments that are unrelated to scientific work") to ASA for his work for ASA. See attached table for the hours billed and amounts received. They are considerably greater than what he reported in his letter.

2006-2007 activity

1. A new system Conflict of Interest and Commitment policy was instituted in September, 2006. CU changed its conflict of interest disclosure forms in October, 2006 to require all faculty to submit a form annually. Roughly 50% of all tenure-track faculty have done so. (A reminder was sent in April, 2007.) Professor Salby has not done so.
2. In the fall of 2006, Professor Salby submitted a grant application to NSF through CU. Given the unresolved issues with NSF, his chair (Brian Toon) refused to sign off on the submission. In March, 2007, Dr. Salby attempted to submit the application through ASA; Patrick Callaghan, as president of ASA, refused to do so. Dr. Salby's response to Dr. Callaghan included the following statement: "How I apply my talents when not employed by the university is not the university's affair. Nor does the university have the authority to obstruct scientific progress and communication of research in which the federal government has invested. The decision to protect that investment should rest with NSF..."
3. An email was sent to Salby on May 16, 2007 asking him to submit a DEPA. When he had not done so by May 29, a registered letter was sent to him asking him to submit the form. The letter was not delivered; a notice of it was left at his house on May 30, 2007. As of 6/7/07 the letter has not been claimed.

Summary and conclusions

1. Dr. Salby did not disclose his relationship with ASA at any of the many opportunities to do so during the period 1996-2006. He did not do so until asked specifically about it. He contends that the relationship does not constitute a conflict of interest. He asserts that the kind of research he does at ASA is fundamentally different from the kind of research he does at the University of Colorado, and as such does not constitute a conflict. Also, he maintains that his relationship with ASA does not meet the definition of a "significant financial interest" as defined by the CU policy written in 1995.

Conclusion: It is conceivable that someone could interpret the CU policy and forms to believe that Dr. Salby's relationship with ASA is not a significant financial interest, and does not constitute

June 8, 2007

a conflict of interest. It is, however, beyond disingenuous for Professor Salby himself to claim that the "outside remunerated activities I engage in are Distinct and Independent of activities within the university" when he cites the same publications in applications from both sources, and references the same resulting publications, invited lectures, and presentations in the grant applications and reports from both. They cannot be independent of each other if the scientific basis and outcomes of each is related to the other.

Furthermore, Salby's statement that the work "... would not be performed at the university" indicates an understanding of the 2006 APS conflict of interest statement's prohibition on "conduct of research (that could and ordinarily would be carried on within the University) elsewhere to the disadvantage of the University and its legitimate interests." There is no evidence that Professor Salby consulted with anyone in administration about whether or not the research conducted at ASA could have been conducted at CU.

2. Professor Salby has provided misleading or inaccurate information on various forms requesting information about his non-CU professional activities throughout the period 1996-2006.

Conclusion: Professor Salby appears to have consistently violated the 1/6th rule for at least the past four years. He has billed ASA for at least 80-250 12 hour days each year. For the fall of 2005, he billed the company for 55 12 hour days, far in excess of the 19.5/semester or 39/academic year allowed under the 1/6th rule.

It is difficult to understand how Professor Salby could legitimately have provided the information he has given in response to the requests of him. It appears, from his words and actions, that Professor Salby does not think that CU has any authority to request compliance from him, and he is unwilling to do so adequately even when compelled.

Request to the Conflict of Interest Committee

Professor Salby has consistently and deliberately violated the spirit, if not the absolute letter, of the University of Colorado's conflict of interest policy since 1996.

As per the 2007 CU-Boulder Conflict of Interest and Commitment policy, the matter has been referred to the Unit Head and the Compliance Director. The Compliance Director has made the initial determination that there is indeed a violation of the conflict of interest policies (1995 and 2006). Salby has been repeatedly contacted in an attempt to resolve the conflict; however, he insists that there is no conflict and thus nothing to resolve. He has not responded to the latest requests for information. Since the matter has not been resolvable at the unit level, I, as Compliance Director, am referring the matter to the Conflict of Interest Committee for action. The Committee is responsible "for providing the AVCR, the Compliance Director, and the appropriate appointing authorities with a written report of the committee's findings, and any recommendations for corrective or disciplinary action."

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO</p> <p>1437 Bannock Street Denver, Colorado 80202 (720) 865-8307</p> <hr/> <p>Plaintiff(s):</p> <p>MURRY SALBY,</p> <p>v.</p> <p>Defendant(s):</p> <p>UNIVERSITY OF COLORADO, PROVOST PHILIP DISTEFANO, and JOHN DOES.</p>	<p>FILED Document <small>DATE FILED: June 15, 2009 2:25 PM</small> CO Denver County District Court 2nd JD Filing Date: Jun 15 2009 2:25PM MDT Filing ID: 25657548 Review Clerk: Charmaine Bright</p> <hr/> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 09 CV 3789</p> <p>Div.: Ctm.:</p>
<p align="center">ORDER GRANTING MOTION FOR SUMMARY JUDGMENT</p>	

THIS MATTER, having come before the Court, the Court having received and reviewed the Motion for Summary Judgment and the file, having considered said Motion for Summary Judgment, and being fully advised in the premises, the Court hereby

ORDERS that the Motion for Summary Judgment is granted and the Motion for Summary Judgment is incorporated herein. All federal claims Plaintiff, Murry Salby, asserted or that could have been asserted against Philip DiStefano shall be dismissed with prejudice.

DATED this _____ day of _____, 2009.

BY THE COURT:

District Court Judge

University of Colorado at Boulder

FILED Document
 Associate Vice Chancellor for Research
 Office of the Vice Chancellor for Research
 026 UCB - Graduate School
 Filing Date: Jun 15 2009 2:25 PM MDT
 Filing ID: 25687548
 Review Clerk: Charmaine Bright

August 28, 2007

Stein Sture, Vice Chancellor for Research
 Office of the Vice Chancellor for Research
 026 UCB - Graduate School

Dear Vice Chancellor Sture,

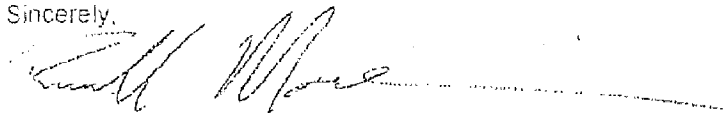
I am writing to inform you of the findings of the CU Boulder Conflict of Interest Committee (henceforth referred to as 'the Committee') in the matter involving Professor Murry Salby. After considerable deliberation, the Committee acted in accordance with the CU Boulder Conflict of Interest policy and is "... providing the AVCR, the Compliance Director, and the appropriate appointing authorities with recommendations for corrective or disciplinary action." The Committee has made three key recommendations to Provost Distefano since he is the highest appointing authority who has not been directly involved in attempts to identify and manage Professor Salby's apparent conflicts of interests. A letter with the Committee's recommendations, and support materials, accompany this cover letter.

Briefly, the Committee has recommended to the Provost that

1. the University not submit any requests for funding on Professor Salby's behalf;
2. funds in any of Professor Salby's currently active grants be frozen;
3. Dr. Salby should be denied access to his research laboratory space in the Department of Atmospheric and Oceanic Sciences.

Since the Committee operates under the auspices of this office, I am reporting their findings to you. Furthermore, on behalf of the Committee, I am asking that you forward their recommendations to Provost Distefano for his consideration.

Sincerely,



Russell Moore, Ph.D.
 Associate Vice Chancellor for Research

cc: Jean Wylie, Director of Compliance, Conflict of Interest and Commitment
 Rodger Kram, Chair, Conflict of Interest Committee

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO</p> <p>1437 Bannock Street Denver, Colorado 80202 (720) 865-8307</p> <hr/> <p>Plaintiff(s):</p> <p>MURRY SALBY,</p> <p>v.</p> <p>Defendant(s):</p> <p>UNIVERSITY OF COLORADO, PROVOST PHILIP DISTEFANO, and JOHN DOES.</p>	<p>FILED Document <small>DATE FILED: June 15, 2009 2:25 PM</small> CO Denver County District Court 2nd JD Filing Date: Jun 15 2009 2:25PM MDT Filing ID: 25657548 Review Clerk: Charmaine Bright</p> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 09 CV 3789</p> <p>Div.: Ctm.:</p>
<p align="center">ORDER GRANTING MOTION TO STAY DISCOVERY PENDING DETERMINATION ON QUALIFIED IMMUNITY</p>	

THIS MATTER having come before the Court upon the Motion to Stay Discovery pending the Court's determination on qualified immunity and the Court being fully advised in its premises,

HEREBY ORDERS that the Motion to Stay is **GRANTED**:

1. All discovery concerning Plaintiff's claims, including Rule 26(a)(1) disclosures is stayed; and
2. No trial date shall be set, pending the Court's determination of qualified immunity.

DATED this _____ day of _____, 2009.

BY THE COURT:

District Court Judge

University of Colorado-Boulder
Disclosure of External Professional Activity (DEPA)

1. Do you or any member of your family have, or expect to acquire during the next year, any of the following regarding a business entity that either (1) conducts your university research and/or scholarly or creative activity; or (2) engages in commercial or research activities that directly relate to your university activities?

- income of \$10,000 or more from the business entity (includes but is not limited to royalties, consulting fees, salary, dividends, etc.)?
- an equity interest in the business entity valued at \$10,000 or representing 5% ownership (regardless of worth)?
- a seat on the board of directors or advisory board?
- an executive position in the business?

YES _____ NO _____

IF YES, please provide the following information for each business entity:

Business name

Amount/value of income (per year)/equity (with option to decline to respond)

You and/or your family's relationship with this business

Describe the relationship of the business to your university activities

Are students, postdocs, or trainees involved in any of your university activities that are related to this business?

Do any of your university activities that are related to this business involve research with human subjects?

- If YES, do you have HRC (IRB) approval for this research?

1a. If you answer YES to Question 1, are you an investigator on any research project and/or scholarly or creative activity funded by external sources (federal/state/local government, industry, foundation, etc.) or Technology Transfer Office (TTO)?

YES _____ NO _____

IF YES please provide the following information for each project:

Project name

Funding source

Your role on project/activity

Is this project an SBIR/STTR (Small Business Innovation Research/Small Business Technology Transfer Program) Phase I project?

2. Do you assign, or expect to assign during this report year, books or materials for any classes that you teach that bring you royalties or income?

YES _____ NO _____

IF YES please provide the following information for each course:

Course

Number of students

Materials description:

3. Regardless of compensation, do you provide, or expect to provide during this report year, professional services that are related to your University activities to any outside organization(s)? *Note that remunerated scholarship that is an expected activity in your discipline (such as for professional presentations, work on review panels, or membership in advisory committees) does not count as professional services in this question. For more information on the meaning of remunerated scholarship and conflict of commitment, see <http://www.colorado.edu/facultyaffairs/atoz/one-sixthrule.pdf>. University policy limits outside professional activities to 19.5 days per semester.*

YES _____ NO _____

IF YES please provide the following information for each organization to which you provide services:

Organization Name

Organization Type

Description of professional services

How many days per month do you spend on this activity ON CAMPUS? Answer to the nearest quarter day, e.g., 6.25

How many days per month do you spend on this activity OFF CAMPUS? Answer to the nearest quarter day, e.g., 6.25

Name (please print)

Department

Signature

Date

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 Filing Date: Jun 15 2009 2:25 PM MDT
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 Review Clerk: Charmaine Bright

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202 (720) 865-8307		▲ COURT USE ONLY ▲ Case Number: 09 CV 3789 Div.: Ctrm.:
Plaintiff(s): MURRY SALBY, v. Defendant(s): UNIVERSITY OF COLORADO, PROVOST PHILIP DISTEFANO, and JOHN DOES.		
Attorney: Thomas S. Rice, # 9923 Courtney B. Kramer, # 40097 Address: Senter Goldfarb & Rice, L.L.C. 1700 Broadway, Suite 1700 Denver, CO 80290 Phone No.: 303-320-0509 Fax No.: 303-320-0210 E-mail: trice@sgrllc.com ckramer@sgrllc.com		
AFFIDAVIT OF PHILIP DISTEFANO		

Affiant, **PHILIP DISTEFANO**, after being duly sworn, states as follows:

1. I was the Provost and Executive Vice Chancellor for Academic Affairs for the University of Colorado at Boulder. I held this position from March 2001 to May 2009, with the exception that I served as Interim Chancellor for the Boulder campus from January 2005 until June 2006. On May 5, 2009, I was appointed Chancellor of the University of Colorado at Boulder.

2. I have personal knowledge of the matters set forth in this Affidavit.

Exhibit A-1

3. As Provost, I served as the chief academic officer over an institution of higher learning that includes eight colleges and schools, over 29,000 students, and over 1,000 tenured and tenure-track faculty.

4. The Provost position includes many duties which are summarized in the job description. I hereby certify that attached to this Affidavit is a true and correct copy of the job description position statement of Provost. [See, Ex. A-2.] My duties required me to make many discretionary decisions on a regular basis. One of the more significant responsibilities derived from my position as appointing authority and called upon me to make final decisions regarding disciplinary actions concerning tenured faculty. In this regard, there were several faculty committees that reported to me and made recommendations for any such discipline. One such committee was the Conflict of Interest Committee.

5. In early September of 2007, I received a report from the Conflict of Interest Committee concerning allegations that had been made against Professor Murry Salby relating to a failure to provide the Committee with conflict of interest information that it had requested. In essence, the Committee concluded that Professor Salby's inactions constituted significant violations of the University's conflict of interest policies and also made recommendations for corrective and disciplinary actions to be taken. This report was transmitted to me through Vice Chancellor of Research and Dean of the Graduate School Stein Sture who stated his concurrence with the Committee's recommendations.

6. Upon receipt of the Committee's report, I have the discretion to accept, reject, or modify the Committee's findings and recommendations. In the case of Professor Salby, I found the Committee's findings and recommendations to be well founded, and, accordingly, I accepted them.

7. On September 19, 2007, I forwarded correspondence to Professor Salby advising him that I had accepted the Committee's recommendations and explicitly advised him that the following corrective and disciplinary actions would take effect immediately: (1) that the University would not sign or submit any requests for funding (grants, contracts, etc.) on his behalf; (2) that any funds in his current and active research grants would be frozen; and (3) that he would be denied access to his research laboratory in the Department of Atmospheric and Oceanic Sciences ("ATOC"). These measures were intended to compel Professor Salby to provide the information sought by the Committee. I further directed Professor Salby to supply the requested information to the Committee by October 1, 2007, in the absence of which the University could take further disciplinary action against him.

8. Thereafter, the implementation of the corrective and disciplinary actions was handled by representatives of the office of the Associate Vice Chancellor for Research and the ATOC Department.

9. The research funds that were frozen are under contract between the granting agencies and the University. As a result, those funds are the property of the University.

10. Laboratory space on the Boulder campus is also the property of the University and is allocated at the discretion of the Provost, Deans, and the other Vice Chancellors. Faculty and their departments are advised that they have no ownership interest in the research space that is allocated to them and instead such always remains subject to revocation or reassignment by the administration.

11. It was my understanding that Professor Salby was allowed access to the laboratory so that he could retrieve any personal property that was left there.

12. To my knowledge, Professor Salby notified Brian Toon, Chair of the Department for Atmospheric and Oceanic Science, of his retirement, effective January 31, 2008. I hereby certify that attached to this Affidavit is a true and correct copy of the January 29, 2008 letter from Professor Salby. [See, Ex. A-3.] I did not terminate Professor Salby's employment with the University.

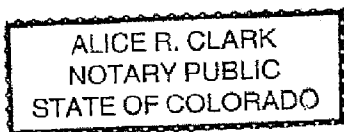
13. Before the actions of September 2007, I had no personal knowledge of Professor Salby's activities, and to my knowledge I had never met him. In reviewing files, it appears that in or about 1998, I was indirectly involved in an issue concerning payment of some expenses relating to Professor Salby's work that resulted from the division of two departments. I referred this matter back to the Associate Vice Chancellor for Research and Salby's Dean for further handling. It is also possible that my office may have been copied on documents relating to grievances that were filed by Professor Salby over the years. However, I have no personal recollection of having reviewed any such documents, and I have no knowledge of the circumstances surrounding those grievances. None of the actions taken by me in connection with the report from the Conflict of Interest Committee were in any way related to such grievances.

FURTHER AFFIANT SAYETH NAUGHT.

Philip DiStefano
Philip DiStefano

STATE OF COLORADO)
)ss.
COUNTY OF Boulder)

SUBSCRIBED AND SWORN to me before this 15th day of June, 2009, by Philip DiStefano.



By: s/ Alice R. Clark
Notary Public
My Commission Expires: April 20, 2012

Provost and Executive Vice Chancellor for Academic Affairs
 University of Colorado at Boulder
 Position Number 150035
 (Phil DiStefano)

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The provost and executive vice chancellor for academic affairs is the chief academic officer for the Boulder campus. As such, the position is responsible for the:

- Direction and oversight of the instruction, research and creative work, and outreach activities of the campus
- Administration of academic policies and programs
- Fostering excellence in academic departments and divisions
- Recruitment, development and promotion of faculty, deans and other academic leaders
- Promotion of the student learning environment with an emphasis on collaboration between curricular and co-curricular programs and services
- Implementation of diversity plans for those units under the provost's jurisdiction
- Coordination of academic planning with budget preparation and capital development needs
- Allocation of resources to assure high quality academic programs, teaching, research and creative work, and service

Reporting to the provost are the:

- Deans of the schools and colleges
- Vice chancellor for student affairs and the student affairs division
- Vice chancellor for research
- Dean of Graduate School

The provost and executive vice chancellor is deputy to the Chancellor of the University of Colorado at Boulder and assumes the role of Chief Operating Officer in the Chancellor's absence. As a University officer and member of the Chancellor's Executive Committee, the provost duties include:

- Responsibility for all academic, arts, and research programs, including research institutes and centers
- Increasing the strength and vitality of the University's research and creative work, graduate, professional and undergraduate programs
- Working effectively and communicating with the chancellor, the vice chancellors, the deans and faculty to formulate Boulder campus long-range academic, student development, capital development and financial plans, including fundraising priorities and strategies
- Working collaboratively with CU System administrators and the Colorado Commission on Higher Education

Qualifications for the position include significant academic and administrative achievement and an ability to articulate the mission of teaching, research (and creative work) and service for the Boulder campus throughout Colorado and the nation. The successful candidate will have outstanding academic credentials consistent with those of senior CU-Boulder faculty and substantial administrative experience at the executive level of AAU or other major comprehensive universities. An understanding of the unique challenges facing public higher education is important, as is the ability to develop, articulate and implement strategic plans, the ability to work collaboratively and a record of success.



University of Colorado at Boulder

Office of the Provost and Executive Vice Chancellor for Academic Affairs

301 Regent Administrative Center
40 UCB
Boulder, CO 80309-0040
303-492-5537; 303-492-8861(Fax)

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CO Denver County District Court 2nd JD

Filing Date: Jun 15 2009 2:25PM MDT

Filing ID: 25657548

Review Clerk: Charmaine Bright

September 19, 2007

Murry L. Salby, PhD
10698 Hobbit Lane
Westminster, CO 80030

Dear Professor Salby:

I have received the written report from the Conflict of Interest Committee concerning your continued refusal to provide adequate responses to requests for information about a possible conflict of interest that was initiated by the National Science Foundation. The Conflict of Interest Committee has made the following recommendations to me, which I have accepted.

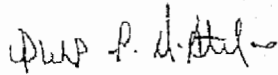
"Until such time as Dr. Salby provides the Conflict of Interest Committee with sufficient information to make a determination of whether or not he has a conflict of interest and how to manage such a conflict, if it exists, the Committee recommends that:

1. the University should not sign or submit any requests for funding (grant, contracts, etc.) on Dr. Murry Salby's behalf;
2. funds in any of Dr. Murry Salby's current and active research grants be frozen, and
3. Dr. Murry Salby should be denied access to his research laboratory space in the Department of Atmospheric and Oceanic Sciences."

These recommendations will go into effect immediately. Furthermore, your failure to cooperate in this investigation of conflict of interest initiated by NSF puts the University and other faculty at risk of losing millions of dollars in grant funding. Therefore, please be advised that, if you do not provide the Conflict of Interest Committee with the information that the Committee has been seeking by October 1, 2007, the University will have no choice but to

initiate disciplinary proceedings against you, which proceedings may result in sanctions which could include dismissal for cause.

Sincerely,



Philip P. DiStefano
Provost & Executive Vice Chancellor

Cc: Chancellor G.P. "Bud" Peterson
Vice Chancellor Stein Sture
Dean Todd Gleeson
Chair Brian Toon ✓
Associate Vice Chancellor Russ Moore

DISTRICT COURT, CITY AND COUNTY OF DENVER COLORADO Address: City and County Building 1437 Bannock Street Denver, CO 80202	EFILED Document <small>DATE FILED: May 28, 2009 8:43 AM</small> CO Denver County District Court 2nd JD Filing Date: May 28 2009 7:43AM MDT Filing ID: 25377780 Review Clerk: Angie D Guenther ▲ COURT USE ONLY ▲
Plaintiff(s): MURRY SALBY v. Defendant(s): UNIVERSITY OF COLORADO, et al	Case Number: 09CV3789 Courtroom: 7
<u>PRETRIAL ORDER</u>	

I. MOTIONS

1. **Motions for summary judgment must be filed at least 85 days before trial.**
Any Motion filed outside of this time limit may be summarily denied as untimely.
2. **All other pretrial motions, including motions *in limine*, must be filed no less than 30 days before trial** unless a different time is permitted by court order. A written response shall be filed no later than 10 days after the motion is filed, and no reply shall be allowed unless ordered by the Court. Any motion filed contrary to this time limit may be summarily denied as untimely.
3. If an expedited ruling is required, the moving party must specifically request an expedited schedule in the original motion and contact the Clerk of Courtroom 7 to advise of this request.
4. Do not combine motions or combine your own motions with a response or reply.
5. The requirements of C.R.C.P. 121(1-15) concerning the time for filing motions and the content and length of briefs will be strictly enforced. The Court may expedite the briefing schedule pursuant to C.R.C.P. 121(1-15) on its own motion, or by request of a party. The Court may rule on motions without a hearing pursuant to C.R.C.P. 121, or the Court may order a hearing prior to trial.

II. CASE MANAGEMENT ORDER

The provisions of C.R.C.P. 16 concerning a presumptive case management order will apply. If all parties have not participated in the preparation of a Proposed Case Management Order, this shall be specifically noted in the title of the Proposed Case Management Order.

III. TRIAL SETTINGS

1. A setting date must be designated in the Case Management Order, as set forth in C.R.C.P. 16.
2. **Cases must be set for trial no later than 30 days after the case is at issue.**
3. No case will be set for trial later than one year after the case is at issue without the Court's permission. No case will be set for more than 5 days without the Court's permission. Before permission is granted as to either issue, there may be a conference between counsel and the Court as to the reasons for the request. The Court will require counsel responsible for trial of the case to attend any such conference.
4. Trial settings will be done Tuesdays, Wednesdays, and Thursdays between 10:00 a.m. and noon.

IV. TRIAL MANAGEMENT ORDER

The Trial Management Order must comply strictly with the requirements of C.R.C.P. 16, as amended and **must be filed at least 30 days before trial**. All parties must participate in the preparation of the Trial Management Order. If a Trial Management Order is not filed in compliance with this Order, the Court may make further Orders to compel compliance.

V. BEFORE TRIAL

1. All exhibits must be pre-marked. Plaintiffs will use numbers; defendants will use letters. Plaintiffs and defendants shall not mix numbers and letters, even for related exhibits (e.g. 1(a), 1(b), 1(c), etc.). The civil action number of the case should also be placed on each of the exhibit labels. Copies of exhibits must be exchanged as required by C.R.C.P. 16, and counsel shall determine whether an objection will be made as to the admissibility of the exhibit. Only where counsel has not had a reasonable opportunity to view an exhibit in advance will trial be interrupted for such a review.
2. If counsel intends to use depositions in lieu of live testimony, said counsel must notify opposing counsel no later than 50 days prior to trial. Counsel must make objections to all or part of the offered deposition testimony no later than 30 days

prior to trial and must cite page, line, and the specific evidentiary grounds supporting the objection. The same rules apply to both videotape and written depositions. When applicable, counsel is required to provide someone to read testimony.

3. Original depositions will remain sealed until counsel request at trial that they be unsealed. Before trial begins, counsel must provide the Court with copies of all depositions likely to be used at the trial, as either direct evidence or impeachment.
4. If counsel needs an overhead projector, VCR, a monitor or any other form of audio-visual equipment, counsel must provide it.

VI. **TRIAL BRIEFS**

Trial briefs may be filed. They should be concise and should not repeat previously filed pleadings or motions. Trial briefs must be filed no later than seven days before the trial date.

VII. **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

For court trials, counsel should be prepared to file Proposed Findings of Fact and Conclusions of Law upon the conclusion of the presentation of evidence. The proposed factual findings shall be specific and supported by evidence elicited at trial. Each counsel also shall email them to the Court's Division Clerk (angela.guenther@judicial.state.co.us). The Court uses **Microsoft Word**.

VIII. **INSTRUCTIONS FOR JURY TRIALS**

1. **Jury Instructions and Orders of Proof.** Counsels are required to meet regarding jury instructions. **The proposed jury instructions shall be delivered directly to the Court no later than 12:00 p.m., the Wednesday before the commencement of trial. The instructions shall also be e-mailed within the same frame to the Court's Division Clerk (angela.guenther@judicial.state.co.us.).** The party responsible for arranging the jury instruction conference shall be responsible for supplying one set of agreed upon instructions. This set should be designated as "Stipulated Instructions" and should not be annotated. Each party shall also supply those instructions they wish to tender but which are opposed. This set should be designated as "Disputed Instructions." Two copies of the disputed instructions shall be filed, one with annotations and one without annotations. The Court uses **Microsoft Word**.

The parties shall agree upon a 2:1 simple statement of the case (Instruction No. 1) that the Court can read to the jury at the beginning of the trial. If the parties cannot agree, one 2:1 instruction shall be submitted with highlights on the language upon which the parties cannot agree.

2. **Exhibit lists.** Each counsel shall prepare an index of exhibits that counsel expects of offer, in a grid or spreadsheet format, that identifies with specificity the exhibit by number and description. The exhibit list shall specify whether or not the exhibit is received by stipulation, and shall allocate columns with the headings "Identified," Offered," and "Received." **The exhibit lists shall be delivered directly to the court no later than 12:00 p.m., the Wednesday before the commencement of trial. The exhibit lists shall also be e-mailed within the same frame to the Court's Division Clerk (angela.guenther@judicial.state.co.us.)**
3. **Witness lists and orders of proof.** Each counsel shall prepare a list of witnesses that will and may be called that the Court can read to the jury at the beginning of the trial. The list shall be in addition to any prior designation of witnesses. In addition to listing the names of the witnesses, the list may also specify the witnesses' title or degree and employment (e.g. Dr. Murray, M.D., Children's Hospital) but no other identifying information should be included (e.g. address, phone number etc.). Additionally, counsel **shall confer** and prepare a joint order of proof which identifies each counsel's good-faith estimate of the order in which witness will be presented and the time required for direct and cross-examination of each witness. In no event may the cumulative time for direct and cross-examination exceed the time allocated for presentation of the trial; the total time allocation shall also account for the time necessary for jury selection, opening statements, regularly scheduled breaks, the jury instruction conference, and closing arguments. The Court reserves the right to enforce the time estimates stated in the order of proof. **The witness lists and order of proof shall be delivered directly to the court no later than 12:00 p.m., the Wednesday before the commencement of trial. They shall also be e-mailed within the same frame to the Court's Division Clerk (angela.guenther@judicial.state.co.us.).**

IX. **JUROR NOTEBOOKS**

Each trial juror will be provided with a juror notebook. In each civil jury trial, there will be at least 1 and possibly 2 alternate jurors seated. The court will provide the one-inch binder notebooks, but the parties must prepare the contents. Each page must be three-hole punched in advance so it can be placed in a notebook and all exhibits must be tabbed so that the jurors can easily refer to them. All notebook materials must be submitted at the same time as jury instructions. No more than 50 pages per side shall be included in the juror notebooks without permission of the Court. All other exhibits shall be presented to the jury either by projector or other visual aids. Counsel must also provide three complete sets of exhibits, whether stipulated or not: 1 for the Court, 1 for the witness stand, and 1 for the use of the jury for exhibits that are not contained in the juror's notebooks.

1. **Exhibits or Excerpts of Exhibits.** Copies of stipulated exhibits may be put in the juror notebooks before trial, subject to the limitations above. If exhibits are

lengthy, stipulated excerpts may be used. Eight (8) copies of each exhibit shall be submitted, with three-hole punches, for the jury.

If a party wants a copy of an exhibit in the juror notebooks (subject to the page limitations above) and the parties have not stipulated to its inclusion, the party should bring to trial eight (three hole-punched) copies of the exhibit; copies will be placed in the notebook if and when the exhibit is admitted, along with the tabs for the exhibit.

2. **Glossary of Terms.** If there are any scientific or other specialized terms which will be used repeatedly, those should be set forth, with an agreed-upon definition. If the parties have a legitimate dispute about the definition of any term, just the term should be listed.

X. **JURY SELECTION**

1. Each side will normally have 20 minutes for *voir dire*. Additional time may be granted in unique cases. In multi-party cases, time must be divided between all parties on one side of the case.
2. *Voir dire* will be conducted from the podium unless a Court Reporter is used.
3. For most trials, there will be one alternate juror seated, but for lengthier trials, the Court may seat two alternate jurors. The Court will advise counsel on the first day of trial how the alternate will be designated.
4. Normally, challenges for cause will be exercised at the bench upon the conclusion of all parties' *voir dire*. Preemptory challenges will be announced orally in open court and indicated on the list of jurors remaining.

XI. CONDUCT OF TRIAL

1. Scheduling/Use of Time.

a. The trial day will start at 8:30 a.m. and end at 5:00 p.m. There will be a morning and an afternoon break of 15 to 20 minutes each. Lunch will run from approximately noon to 1:30 p.m.

b. Counsel and parties will be in court by 8:00 a.m. on the first day of trial and 8:15 a.m. thereafter so that counsel may discuss anything with the Court that needs to be dealt with before the trial begins.

c. It is the obligation of counsel to have witnesses scheduled to prevent any delay in the presentation of testimony or running out of witnesses before 5:00 p.m. on any trial day. Accordingly, there shall be no more than five minutes delay between witnesses.

2. Opening Statements. Each side will normally have 20 minutes for opening statement, although additional time may be granted in unique cases. In multiple-party cases, this time must be divided between the parties.

3. Questioning Witnesses. Because the Court utilizes FTR, all questioning must be done from the podium for the purposes of a record. If counsel arrange for a court reporter, the Court will address this issue prior to the commencement of trial.

4. Closing Arguments. The Court may impose limits on closing argument, most generally 20 minutes per side. In multiple-party cases, this time must be divided between the parties. Additional time may be permitted by court order.

5. Withdrawal of Exhibits. Because this courtroom no longer has a Court Reporter and because of a reduced work force in the clerk's office, the court will no longer maintain custody of exhibits at the conclusion of a trial or hearing. Unless all parties agree on the record that exhibits need not be maintained, the following procedure will be followed:

a. When the trial or hearing is concluded, each party will withdraw any exhibits or depositions which that party marked and/or admitted, whether or not admitted into evidence;

b. Each party will maintain in its custody the withdrawn exhibits and/or depositions without modification of any kind until sixty days after the time for the need of such exhibits for appellate or other review purposes has expired, unless all parties stipulate otherwise on the record or in writing. It will be the responsibility of the withdrawing parties to determine when the appropriate time period has expired.

XII. **SETTLEMENT**

The parties are to **notify the Court within 24 hours of settlement or resolution of the case. All documents confirming settlement shall be filed not later than 15 days from the date of settlement**, unless otherwise ordered by the Court.

XII. **GENERAL RULES**

1. This Order shall apply to pro se parties.
2. Counsel for the plaintiff or the pro se plaintiff shall send copies of this order to all future counsel/parties in this case, except where the Court has e-filed this Order to the parties. A certification of compliance with this portion of the Order shall be filed.

Dated: May 28, 2009

BY THE COURT:

A handwritten signature in black ink, appearing to read "Anne M. Mansfield", is written over a horizontal line.

Anne M. Mansfield
District Court Judge

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	FILED Document CO Denver County District Court 2nd JD Filing Date: May 26 2009 10:08AM MDT Filing ID: 25338886 Review Clerk: Orathay Khiem
Plaintiff: MURRAY SALBY Defendants: UNIVERSITY OF COLORADO, PROVOST PHILLIP DiSTEFANO, and JOHN DOES.	
Attorney for Defendant University of Colorado: David P. Temple, #13499 Special Assistant Attorney General Senior Associate University Counsel Office of University Counsel 1800 Grant Street, Suite 700 Denver, Colorado 80203 303-860-5691 David.Temple@cu.edu	Case Number: 09 CV 3789 Division 7
UNIVERSITY'S ANSWER TO PLAINTIFF'S COMPLAINT	

Defendant, The University of Colorado, through the Office of University Counsel, submits its Answer to Plaintiff's Complaint as follows:

1. The University admits the allegations in Paragraph 1.
2. The University admits the allegations in the first, second and third sentences in Paragraph 2. With respect to the allegations in the fourth sentence, the University is without sufficient knowledge to either admit or deny the allegations; to

the extent a response is deemed required, the allegations are denied. The University admits the remaining allegations in Paragraph 2.

3. The University admits the allegations in Paragraph 3.

4. The University admits the allegation in the first sentence of Paragraph 4. As to the second, third and fourth sentences of Paragraph 4, the grievances speak for themselves and no response is required. To the extent a response is deemed required, these allegations are denied. The University denies the remaining allegations in Paragraph 4.

5. The University admits the allegations in the first sentence in Paragraph 5. The University denies the remaining allegations in Paragraph 5.

6. The University admits that Plaintiff was on leave during the summer. The University denies the remaining allegations in Paragraph 6.

7. The University admits that the National Science Foundation started an investigation. The University is without sufficient knowledge to either admit or deny the remaining allegations in Paragraph 7. To the extent a response is deemed required, the allegations are denied.

8. The University admits that it formed a working group to review possible conflict of interest issues after being contacted by the NSF. The University admits that Plaintiff provided the group with information in response to requests. The University is without sufficient knowledge to either admit or deny the remaining allegations in Paragraph 8. To the extent a response is deemed required, the allegations are denied.

9. The University admits that Plaintiff was on approved sabbatical leave for the spring 2007 semester (spring semester is January May). The University is without sufficient knowledge to either admit or deny the remaining allegations in Paragraph 9. To the extent a response is deemed required, the allegations are denied.

10. The University admits that the working group's investigation concluded on approximately June 8, 2007. The University denies the remaining allegations in Paragraph 10.

11. The University denies the allegations in Paragraph 11.
12. The University admits the allegations in the first, second and third sentences in Paragraph 12. The University denies the allegations in the fourth sentence. The University is without sufficient knowledge to either admit or deny the remaining allegations. To the extent a response is deemed required, the allegations are denied.
13. The University is without sufficient knowledge to either admit or deny the allegation in the first sentence in Paragraph 13. To the extent a response is deemed required, the allegation is denied. The University denies the allegation in the second sentence. The University admits the remaining allegations in Paragraph 13.
14. With respect to the allegations in Paragraph 14, the September 19, 2007 letter from DiStefano speaks for itself. To the extent a response is deemed required, the allegations are denied.
15. With respect to the allegations in Paragraph 15, Professor Salby's letter speaks for itself and no response is required. To the extent a response is deemed required, the allegations are denied.
16. With respect to the allegations in Paragraph 16, the University denies that it "confiscated" any of Plaintiff's personal property. To the contrary, he was advised on multiple occasions that he could have his personal property. The administration did restrict access to his University owned lab.
17. The University denies the allegations in Paragraph 17.
18. The University denies the allegations in Paragraph 18.
19. The University denies the allegations in Paragraph 19.
20. The University admits the allegations in the first sentence in Paragraph 20. The University denies the remaining allegations in Paragraph 20.
21. The University denies the allegations in Paragraph 21.

22. The University admits that Professor Salby resigned his employment with the University. The University denies the remaining allegations in Paragraph 22.

23. The University incorporates its answers to the above allegations herein.

24. The allegations in Paragraphs 24 through 33 do not relate to the University and therefore no responses are required.

34. The University incorporates its answers to the above allegations herein.

35. The University denies the allegations in the first sentence in Paragraph 35. The University admits that the Court has subject matter jurisdiction.

36. The University denies the allegations in Paragraph 36.

37. The University incorporates its answers to the above allegations herein.

38. The University denies the allegations in Paragraph 38.

39. The University denies the allegations in Paragraph 39.

AFFIRMATIVE DEFENSES

1. Plaintiff has failed to state a claim against the University.

2. Even if the University retaliated against Plaintiff as alleged in the Fifth Claim, which it did not, it would have taken the same actions for legitimate reasons.

3. Plaintiff has failed to mitigate his damages.

Dated this 27th day of May, 2009:

OFFICE OF UNIVERSITY COUNSEL

/s/ David P. Temple

David P. Temple, #13499

In accordance with C.R.C.P. 121 §1-26(9) a printed copy of this document with signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing **UNIVERSITY'S ANSWER TO PLAINTIFF'S COMPLAINT** was served upon the following by electronic service on this 27th day of May, 2009:

Robert M. Liechty
Cross & Liechty, P.C.
7100 E. Belleview Ave., Suite G11
Greenwood Village, CO 80111

rliechty@crossliechty.com

Attorneys for Plaintiff

Thomas S. Rice
Courtney B. Kramer
Senter Goldfarb & Rice, L.L.C.
1700 Broadway, Suite 1700
Denver, CO 80290

trice@sgrllc.com
ckramer@sgrllc.com

/s/ Shirleen Jahraus

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Address: 1437 Bannock Street Denver, Colorado 80202 Telephone: 720 865-8307		FILED Document CO Denver County District Court 2nd JB Filing Date: May 21 2009 10:19 AM MDT Filing ID: 25296955 Review Clerk: Orathay Khiem
Plaintiff: MURRY SALBY Defendants: UNIVERSITY OF COLORADO, PROVOST PHILLIP DiSTEFANO, and JOHN DOES.		▲ COURT USE ONLY ▲
Attorneys for Plaintiff: Robert M. Liechty, No. 14652 CROSS & LIECHTY, P.C. Address: 7100 E. Belleview Ave., Suite G-11 Greenwood Village, CO 80111 Phone No. (303) 333-4122 e-mail: rliechty@crossliechty.com		Case No.: 09-CV-3789 Division 7
CERTIFICATE OF COMPLIANCE RE: <i>DELAY REDUCTION ORDER</i>		

Plaintiff, Murry L. Salby, by and through his attorney, Robert M. Liechty of CROSS & LIECHTY, P.C., hereby certifies that he is in compliance with the Court's *Delay Reduction Order* issued April 16, 2006, by providing a copy of same to counsel for Defendants Provost Philip DeStefano and University of Colorado.

Respectfully submitted this May 21, 2009.

CROSS & LIECHTY, P.C.

By: s/ Robert M. Liechty
 Robert M. Liechty
 Email: rliechty@crossliechty.com

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2009, a true and correct copy of the foregoing CERTIFICATE OF COMPLIANCE – *DELAY REDUCTION ORDER* was served upon the following persons as indicated below:

Thomas S. Rice, Esq.
Courtney B. Kramer, Esq.
SENDER GOLDFARB & RICE, L.L.C.
1700 Broadway, Suite 1700
Denver, Colorado 80290
Attorneys for Defendant DiStefano

☐ by First-Class U.S. Mail, postage prepaid
☐ by Hand Delivery
☐ by Facsimile to 303-320-0210
☐ by Overnight Mail
☒ Justice Link electronic filing

David P. Temple, Esq.
Senior Associate University Counsel
Office of University Counsel - Litigation
1800 Grant Street, Suite 700
Denver, Colorado 80203
Attorneys for Defendant C.U.

☐ by First-Class U.S. Mail, postage prepaid
☐ by Hand Delivery
☐ by Facsimile to 303-860-5650
☐ by Overnight Mail
☒ Justice Link electronic filing

Duly signed original on file in the offices of Cross & Liechty, P.C.

s/ Linda L. DeVico

Denver District Court Denver County, Colorado Court Address: 1437 Bannock St., Rm. 256, Denver, CO 80202	FILED Document CO Denver County District Court 2nd JD Filing Date: May 21 2009 10:19 AM MDT Filing ID: 25296955 Review Clerk: Orathay Khiem ▲ COURT USE ONLY ▲
SALBY, MURRY Plaintiff(s) v. UNIV OF COLO et al Defendant(s)	Case Number: 09CV3789 Courtroom: 7
<p align="center"><u>DELAY REDUCTION ORDER</u></p>	

I. All civil courtrooms are on a delay reduction docket. Deadlines that must be met are:

1. Service of Process: Returns of Service on all defendants shall be filed within 60 days after the date of the filing of the complaint.
2. Default Judgment: Application for default judgment shall be filed within 30 days after default has occurred.
3. Trial Setting: Plaintiff shall serve a Notice to Set in the case for trial and shall complete the setting of the trial within 30 days from the date the case becomes at issue. A case shall be deemed "at issue" when all parties have been served and have filed all pleadings permitted by C.R.C.P. 7, or defaults or dismissals have been entered against all non-appearing parties, or at such other time as the court shall direct.

The court will consider extending these time periods upon timely filing of a motion showing good cause.

IF AN ATTORNEY OR PRO SE PARTY FAILS TO COMPLY WITH PART I OF THIS ORDER, THE COURT MAY DISMISS THE CASE WITHOUT PREJUDICE. THIS ORDER SHALL BE THE INITIAL NOTICE REQUIRED BY RULE 121, SECTION 1-10, AND RULE 41(B)(2).

- II. Plaintiff shall mail a copy of this order to all other parties who enter an appearance.
- III. The parties shall include a self-addressed stamped envelope with any pleading for which the parties wish to receive a copy of the court's order.
- IV. The court encourages the use of recycled paper, and printing or copying on both sides of the paper.
- V. Any attorney entering an appearance in this case who is aware of a related case is ordered to complete and file in this case an Information Regarding Related Case(s) form available in Room 256 of the City and County Building.

Date: April 16, 2009

BY THE COURT:

/s/ Anne M. Mansfield
District Court Judge
Denver District Court

cc: Plaintiff(s) or Plaintiff(s) Counsel

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202 (720) 865-8307	FILED Document CO Denver County District Court 2nd JD Filing Date: May 13 2009 2:28PM MDT Filing ID: 25167783 Review Clerk: Charmaine Bright
Plaintiff(s): MURRY SALBY, v. Defendant(s): UNIVERSITY OF COLORADO, PROVOST PHILIP DISTEFANO, and JOHN DOES.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Attorney: Thomas S. Rice, # 9923 Courtney B. Kramer, # 40097 Address: Senter Goldfarb & Rice, L.L.C. 1700 Broadway, Suite 1700 Denver, CO 80290 Phone No.: 303-320-0509 Fax No.: 303-320-0210 E-mail: trice@sgrllc.com ckramer@sgrllc.com	Case Number: 09 CV 3789 Div.: Ctrm.:
ANSWER	

Defendant, **PROVOST PHILIP DISTEFANO**, by his attorneys, **SENDER GOLDFARB & RICE, L.L.C.**, and pursuant to C.R.C.P. 8 and 12, hereby answers and responds to Plaintiff's Complaint as follows:

ANSWER

1. Defendant denies the allegations contained in paragraphs 16, 17, 18, 19, 21, 22, 24, 25, 27, 28, 30, 31, 33, and 36.

2. Defendant is without sufficient information and knowledge to enable him to form a belief as to the veracity of the allegations contained in paragraphs 3, 4, 5, 6, 7, 9, 11, 13, 38, and 39 of Plaintiff's Complaint and, as a result, denies same.

3. Defendant admits the allegations contained in paragraph 14.
4. With respect to the allegations contained in paragraph 1 of Plaintiff's Complaint, Defendant admits that Plaintiff was a tenured professor in the Department of Atmospheric and Oceanic Sciences with the University of Colorado; however, Defendant is without sufficient information and knowledge to form a belief as to the veracity of all other allegations contained in said paragraph and, as a result, denies same.
5. With respect to the allegations contained in paragraph 2 of Plaintiff's Complaint, Defendant admits that Bruce Benson is the President of the University of Colorado and has an office in Denver, Colorado, that Plaintiff was employed as a tenured professor at the University of Colorado prior to his resignation, that Defendant holds the position of Provost and Executive Vice Chancellor Academic Affairs for the Boulder campus of the University of Colorado, and that a previous claim was filed in federal court, part of which was dismissed by motion filed by the Defendant Regents and part of which was dismissed upon Plaintiff's motion; however, Defendant is without sufficient information and knowledge to form a belief as to the veracity of all other allegations contained in said paragraph and, as a result, denies same.
6. With respect to the allegations contained in paragraph 8 of Plaintiff's Complaint, Defendant admits that the working group investigated a possible conflict of interest pertaining to Plaintiff; however, Defendant either denies or is without sufficient information and knowledge to form a belief as to the veracity of all other allegations contained in said paragraph and, as a result, denies same.
7. With respect to the allegations contained in paragraph 10 of Plaintiff's Complaint, Defendant admits the working group came to two conclusions; however, Defendant either denies or is without sufficient information and knowledge to form a belief as to the veracity of all other allegations contained in said paragraph and, as a result, denies same.
8. With respect to the allegations contained in paragraph 12 of Plaintiff's Complaint, Defendant admits that the Conflict of Interest Committee met on August 17, 2007, chaired by Professor Rodger Kram, Ph.D., that the Conflict of Interest Committee met on August 20, 2007 and recommended (1) that the University should not sign or submit any request for funding on Plaintiff's behalf, (2) that any current grants of Plaintiff's should be frozen, and (3) that Plaintiff should be denied access to his laboratory space in the Department of Atmospheric and Oceanic Sciences, and that the Committee requested that Plaintiff provide the information it had been requested; however, Defendant either denies or is without sufficient information and knowledge to form a belief as to the veracity of all other allegations contained in said paragraph and, as a result, denies same.
9. With respect to the allegations contained in paragraph 15 of Plaintiff's Complaint, Defendant admits that Plaintiff sent a letter to Defendant on September 28, 2007; however, Defendant either denies or is without sufficient information and knowledge to form a belief as to the veracity of all other allegations contained in said paragraph and, as a result, denies same.

10. With respect to the allegations contained in paragraph 20 of Plaintiff's Complaint, Defendant admits that, in general, employment contracts with tenured faculty span the nine month academic year; however, Defendant either denies or is without sufficient information and knowledge to form a belief as to the veracity of all other allegations contained in said paragraph and, as a result, denies same.

11. With respect to the allegations contained in paragraph 35 of Plaintiff's Complaint, Defendant admits that ninety days have passed since Plaintiff through legal counsel served a letter captioned "Notice of Intent to Sue"; however, Defendant denies all other allegations contained in said paragraph.

12. With respect to the allegations contained in paragraph 38 of Plaintiff's Complaint, Defendant admits that Plaintiff had tenure with the University; however, Defendant either denies or is without sufficient information and knowledge to form a belief as to the veracity of all other allegations contained in said paragraph, and, as a result, denies same.

13. Defendant hereby incorporates his responses to those paragraphs that are re-alleged in paragraphs 23, 26, 29, 32, 34, and 37 of Plaintiff's Complaint.

14. Defendant denies all allegations not otherwise expressly admitted herein.

DEFENSES

1. Plaintiff's Complaint fails, at least in part, to state a claim upon which relief can be granted as against this Defendant.

2. Plaintiff's claims against this Defendant are barred by the doctrine of qualified immunity.

3. Defendant would have reached the same conclusion concerning discipline imposed upon Plaintiff even in the absence of Plaintiff's alleged protected speech.

4. Plaintiff had no property interest in the laboratory referenced in the Complaint.

5. Plaintiff has failed to reasonably mitigate his alleged damages.

6. Plaintiff's claims are barred by the applicable statutes of limitation.

7. Plaintiff's claims are barred by the doctrines of waiver and/or estoppel.

8. Plaintiff's claims are subject to and diminished by the applicable provisions of the Colorado Governmental Immunity Act, C.R.S. 24-10-101, *et seq.*

9. Defendant reserves the right to add such additional defenses as become apparent upon disclosure and discovery.

REQUESTS FOR RELIEF

WHEREFORE, Defendant requests that the Court grant relief as follows:

- a. Dismissing Plaintiff's claims with prejudice;
- b. Entering judgment in favor of Defendant and against Plaintiff for attorney fees as Plaintiff's claims are groundless;
- c. Entering judgment in favor of Defendant and against Plaintiff for costs; and
- d. Such other and further relief as the Court deems just and proper.

JURY DEMAND

Defendant hereby demands this case be tried to a jury of not less than six.

Respectfully submitted,

SENTER GOLDFARB & RICE, L.L.C.

By s/ Thomas S. Rice
Thomas S. Rice, # 9923

By s/ Courtney B. Kramer
Courtney B. Kramer, # 40097
1700 Broadway, Ste. 1700
Denver, CO 80290
Telephone: 303-320-0509
Facsimile: 303-320-0210
Attorneys for Defendant
Provost Phillip DiStefano

DEFENDANT'S ADDRESS

Regents Administrative Center, Room 306
Boulder, Colorado 80309-0040

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of May, 2009, a true and correct copy of the above and foregoing **ANSWER** was electronically served upon all counsel via LexisNexis File and Serve, addressed to:

Robert Liechty, Esq.
Cross & Liechty, P.C.
7100 E. Belleview Avenue, Suite G11
Greenwood Village, Colorado 80111
rliechty@crossliechty.com

VIA U.S. MAIL

David P. Temple, Esq.
Office of University Counsel
1800 Grant Street, Suite 700
Denver, CO 80203
david.temple@cu.edu

s/ Stephanie Hood
Stephanie Hood

DISTRICT COURT, CITY AND COUNTY OF DENVER STATE OF COLORADO		FILED Document CO Denver County District Court 2nd JD Filing Date: May 4 2009 4:10PM MDT Filing ID: 25011256 Review Clerk: Sean McGowan
Court Address: 1437 Bannock Street Denver, Colorado 80202 720-865-8307		▲ COURT USE ONLY ▲
Plaintiff: MURRY SALBY Defendant: UNIVERSITY OF COLORADO, PROVOST PHILLIP DISTEFANO, and JOHN DOES.		
Attorney: Robert M. Liechty, No. 14652 Sean J. Lane, No. 32000 CROSS & LIECHTY, P.C. Address: 400 South Colorado Blvd., Suite 900 Denver, CO 80246 Phone No. (303) 333-4122		
		Case No.: 09-CV- 3789 Div.: <u>7</u> Ctrm:
SUMMONS		

**THE PEOPLE OF THE STATE OF COLORADO
TO THE DEFENDANTS NAMED ABOVE:**

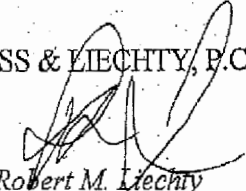
You are hereby summoned and required to file with the Clerk of this Court an answer or other response to the attached Complaint. If service of the Summons and Complaint was made upon you within the State of Colorado, you are required to file your answer or other response within 20 days after such service upon you. If service of the Summons and Complaint was made upon you outside of the State of Colorado, you are required to file your answer or other response within 30 days after such service upon you.

If you fail to file your answer or other response to the Complaint in writing within the applicable time period, judgment by default may be entered against you by the court for the relief demanded in the Complaint, without any further notice to you.

The following documents are also served with this Summons: Complaint and Civil Case Cover Sheet.

Dated: April 14, 2009

CROSS & LIECHTY, P.C.

By: 
 s/ Robert M. Liechty
 Robert M. Liechty, #14652
 ATTORNEYS FOR PLAINTIFF

RETURN OF SERVICE

STATE OF COLORADO)
) ss.
 COUNTY OF ARAPAHOE)

I declare under oath that I served this SUMMONS, COMPLAINT & JURY DEMAND, CIVIL CASE COVER SHEET and NOTICE OF CHANGE OF ADDRESS on COLORADO ATTORNEY GENERAL in Denver County on April 17, 2009 at 12:44 o'clock p m. at the following
 (Date) (Time)

location:
at 1525 Sherman Street, 7th Floor, Denver, Colorado

☒ by (State Manner of Service)
handing and delivering to DEB MONROE, personally, Receptionist, designated to accept service for the Colorado Attorney General's Office.

☒ I am over the age of 18 years and am not interested in nor a party to this case.

Signed under oath before me on April 20, 2009

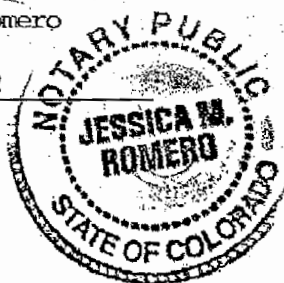
Charles J. Tafoya
 Name Charles J. Tafoya

April 20, 2009
 Date

Jessica M. Romero
 Notary Public * Jessica M. Romero
 County

☒ Private process server
☐ Sheriff

My Commission Expires: 10-12-12



Fee
 \$ 36.30

Mileage
 \$ _____

* Notary should include address and expiration date of commission.

DISTRICT COURT, CITY AND COUNTY OF DENVER STATE OF COLORADO		FILED Document CO Denver County District Court 2nd JD Filing Date: May 4 2009 4:10PM MDT Filing ID: 25011256 Review Clerk: Sean McGowan
Court Address: 1437 Bannock Street Denver, Colorado 80202 720-865-8307		▲ COURT USE ONLY ▲
Plaintiff: MURRY SALBY Defendant: UNIVERSITY OF COLORADO, PROVOST PHILLIP DiSTEFANO, and JOHN DOES.		
Attorney: Robert M. Liechty, No. 14652 Sean J. Lane, No. 32000 CROSS & LIECHTY, P.C. Address: 400 South Colorado Blvd., Suite 900 Denver, CO 80246 Phone No. (303) 333-4122		
		Case No.: 09-CV- 3789 Div.: <u>1</u> Ctrm:
SUMMONS		

THE PEOPLE OF THE STATE OF COLORADO
TO THE DEFENDANTS NAMED ABOVE:

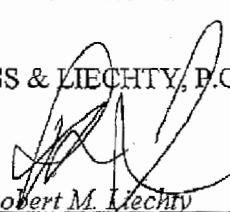
You are hereby summoned and required to file with the Clerk of this Court an answer or other response to the attached Complaint. If service of the Summons and Complaint was made upon you within the State of Colorado, you are required to file your answer or other response within 20 days after such service upon you. If service of the Summons and Complaint was made upon you outside of the State of Colorado, you are required to file your answer or other response within 30 days after such service upon you.

If you fail to file your answer or other response to the Complaint in writing within the applicable time period, judgment by default may be entered against you by the court for the relief demanded in the Complaint, without any further notice to you.

The following documents are also served with this Summons: Complaint and Civil Case Cover Sheet.

Dated: April 14, 2009

CROSS & LIECHTY, P.C.

By: 
s/ Robert M. Liechty
 Robert M. Liechty, #14652
 ATTORNEYS FOR PLAINTIFF

RETURN OF SERVICE

STATE OF COLORADO)
) ss.
 COUNTY OF ARAPAHOE)

I declare under oath that I served this SUMMONS, COMPLAINT & JURY DEMAND, CIVIL CASE COVER SHEET and NOTICE OF CHANGE OF ADDRESS on PROVOST PHILLIP DiSTEFANO in Boulder County on April 21, 2009 at 1:55 o'clock p. m. at the following
 (Date) (Time)

location:

at his usual place of business, at 914 Broadway, Boulder, Colorado

☒ by (State Manner of Service)
handing and delivering to ALICE CLARK, personally, Assistant to PROVOST PHILLIP DiSTEFANO. Alice Clark being over the age of eighteen years and authorized to accept service for Provost Phillip DiStefano.

☒ I am over the age of 18 years and am not interested in nor a party to this case.

Signed under oath before me on April 23, 2009

Deborah G. Tafoya
 Name Deborah G. Tafoya

April 23, 2009

Date

Jessica M. Romero
 Notary/Public * Jessica M. Romero
 County

☒ Private process server
☐ Sheriff,

My Commission Expires: 10-12-12

Fee
 \$ 49.50

Mileage
 \$



* Notary should include address and expiration date of commission.

DISTRICT COURT, CITY AND COUNTY OF DENVER STATE OF COLORADO		FILED Document CO Denver County District Court 2nd JD Filing Date: May 4 2009 4:10PM MDT Filing ID: 25011256 Review Clerk: Sean McGowan
Court Address: 1437 Bannock Street Denver, Colorado 80202 720-865-8307		
Plaintiff: MURRY SALBY Defendant: UNIVERSITY OF COLORADO, PROVOST PHILLIP DiSTEFANO, and JOHN DOES.		▲COURT USE ONLY ▲ Case No.: 09-CV- 3789 Div.: <u>7</u> Ctrm:
Attorney: Robert M. Liechty, No. 14652 Sean J. Lane, No. 32000 CROSS & LIECHTY, P.C. Address: 400 South Colorado Blvd., Suite 900 Denver, CO 80246 Phone No. (303) 333-4122		
SUMMONS		

**THE PEOPLE OF THE STATE OF COLORADO
TO THE DEFENDANTS NAMED ABOVE:**

You are hereby summoned and required to file with the Clerk of this Court an answer or other response to the attached Complaint. If service of the Summons and Complaint was made upon you within the State of Colorado, you are required to file your answer or other response within 20 days after such service upon you. If service of the Summons and Complaint was made upon you outside of the State of Colorado, you are required to file your answer or other response within 30 days after such service upon you.

If you fail to file your answer or other response to the Complaint in writing within the applicable time period, judgment by default may be entered against you by the court for the relief demanded in the Complaint, without any further notice to you.

The following documents are also served with this Summons: Complaint and Civil Case Cover Sheet.

Dated: April 14, 2009

CROSS & LIECHTY, P.C.

By: s/ Robert M. Liechty
 Robert M. Liechty, #14652
 ATTORNEYS FOR PLAINTIFF

RETURN OF SERVICE

STATE OF COLORADO)
) ss.
 COUNTY OF ARAPAHOE)

I declare under oath that I served this SUMMONS, COMPLAINT & JURY DEMAND, CIVIL CASE COVER SHEET and NOTICE OF CHANGE OF ADDRESS on UNIVERSITY OF COLORADO in Denver County on April 22, 2009 at 3:45 o'clock p m. at the following
 (Date) (Time)

location:
at 1800 Grant Street, Suite 800, Denver, Colorado

☒ by (State Manner of Service)
 by handing and delivering to JUDY ANDERSON, personally, Special Assistant to the Vice President, University Counsel and Secretary to the Board of Regents for the UNIVERSITY OF COLORADO. Judy Anderson being over the age of eighteen years and designated to accept service for the University of Colorado.

☒ I am over the age of 18 years and am not interested in nor a party to this case.

Signed under oath before me on April 23, 2009

Deborah G. Tafeyan
 Name Deborah G. Tafeyan

April 23, 2009

Date

Jessica M. Romero
 Notary Public * Jessica M. Romero
 County

☒ Private process server
☐ Sheriff,

My Commission Expires: 10-12-12

Fee
 \$ 36.30

Mileage
 \$



* Notary should include address and expiration date of commission.

Denver District Court Denver County, Colorado Court Address: 1437 Bannock St., Rm. 256, Denver, CO 80202	
SALBY, MURRY Plaintiff(s) v. UNIV OF COLO et al Defendant(s)	<div style="text-align: right;"> <small>DATE FILED: April 16, 2009 5:30 PM</small> FILED Document CO Denver County District Court 2nd JD Filing Date: Apr 16 2009 3:30PM MDT Filing ID: 24736976 COURT USE ONLY Review Clerk: Stacey Johnson </div> Case Number: 09CV3789 Courtroom: 7
<u>DELAY REDUCTION ORDER</u>	

- I. All civil courtrooms are on a delay reduction docket. Deadlines that must be met are:
1. Service of Process: Returns of Service on all defendants shall be filed within 60 days after the date of the filing of the complaint.
 2. Default Judgment: Application for default judgment shall be filed within 30 days after default has occurred.
 3. Trial Setting: Plaintiff shall serve a Notice to Set in the case for trial and shall complete the setting of the trial within 30 days from the date the case becomes at issue. A case shall be deemed "at issue" when all parties have been served and have filed all pleadings permitted by C.R.C.P. 7, or defaults or dismissals have been entered against all non-appearing parties, or at such other time as the court shall direct.

The court will consider extending these time periods upon timely filing of a motion showing good cause.

IF AN ATTORNEY OR PRO SE PARTY FAILS TO COMPLY WITH PART I OF THIS ORDER, THE COURT MAY DISMISS THE CASE WITHOUT PREJUDICE. THIS ORDER SHALL BE THE INITIAL NOTICE REQUIRED BY RULE 121, SECTION 1-10, AND RULE 41(B)(2).

- II. Plaintiff shall mail a copy of this order to all other parties who enter an appearance.
- III. The parties shall include a self-addressed stamped envelope with any pleading for which the parties wish to receive a copy of the court's order.
- IV. The court encourages the use of recycled paper, and printing or copying on both sides of the paper.
- V. Any attorney entering an appearance in this case who is aware of a related case is ordered to complete and file in this case an Information Regarding Related Case(s) form available in Room 256 of the City and County Building.

Date: April 16, 2009

BY THE COURT:

/s/Anne M. Mansfield
 District Court Judge
 Denver District Court

cc: Plaintiff(s) or Plaintiff(s) Counsel

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Address: 1437 Bannock Street Denver, Colorado 80202 Telephone: 720 865-8307		FILED Document CO Denver County District Court 2nd JD Filing Date: Apr 16 2009 11:53AM MDT Filing ID: 24729182 Review Clerk: Sean McGowan ▲COURT USE ONLY ▲ Case No.: 09-CV-3789 Division 7
Plaintiff: MURRY SALBY Defendants: UNIVERSITY OF COLORADO, PROVOST PHILLIP DiSTEFANO, and JOHN DOES.		
Attorneys for Plaintiff: Robert M. Liechty, No. 14652 CROSS & LIECHTY, P.C. Address: 400 South Colorado Blvd., Suite 900 Denver, CO 80246 Phone No. (303) 333-4122 e-mail: rliechty@crossliechty.com		
NOTICE OF CHANGE OF ADDRESS		

PLEASE TAKE NOTICE that effective **May 1, 2009**, the new address for the Law Firm of Cross & Liechty, P.C., will be 7100 E. Belleview Avenue, Suite G11, Greenwood Village, Colorado 80111. At this time the telephone number and email address will remain the same.

Respectfully submitted this April 16, 2009.

CROSS & LIECHTY, P.C.

By: s/ Robert M. Liechty
 Robert M. Liechty
 400 So. Colorado Blvd., Suite 900
 Denver, Colorado 80246
 Tel: (303) 333-4122
 Email: rliechty@Crossliechty.com

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Address: 1437 Bannock Street Denver, Colorado 80202 Telephone: 720 865-8307	FILED Document CO Denver County District Court 2nd JD Filing Date: Apr 14 2009 1:50PM MDT Filing ID: 24662806 Review Clerk: Stacy Shaul ▲ COURT USE ONLY ▲
Plaintiff: MURRY SALBY Defendants: UNIVERSITY OF COLORADO, PROVOST PHILLIP DiSTEFANO, and JOHN DOES.	Case No.: 09-CV-____ Courtroom: ____
Attorneys for Plaintiff: Robert M. Liechty, No. 14652 CROSS & LIECHTY, P.C. Address: 400 South Colorado Blvd., Suite 900 Denver, CO 80246 Phone No. (303) 333-4122 e-mail: rliechty@crossliechty.com	
COMPLAINT AND JURY DEMAND	

Plaintiff, Murry L. Salby, by and through his attorney, Robert M. Liechty of CROSS & LIECHTY, P.C., brings the following complaint:

1. Plaintiff Salby was a resident of Adams County, Colorado, but now resides in Australia. He had been a tenured professor in the Department of Atmospheric and Oceanic Sciences with defendant University of Colorado since 1997 and a tenured professor in predecessor departments since 1988.

2. The president of the University of Colorado, Mr. Bruce Benson, has his principal office in Denver, Colorado. The University was the former employer of Professor Salby. Defendant DiStefano was the Provost of the University during the complained of activities. Defendants John Does are unknown decision-makers regarding the actions set forth below. A substantially similar claim was filed in federal court but parts of that were dismissed due to lack of federal jurisdiction and, hence, the matter is refiled in this Court.

3. Under Professor Salby's employment duties as a professor, he obtained research grants in the name of the University of Colorado and held responsibilities for performing the attendant research.

4. Between 1997 and 2000, Professor Salby brought grievances involving the departmental chair, Peter Webster. The grievances stated that, among other offenses, the University had on two separate occasions diverted from Professor Salby's federal research projects some \$42,000 and some \$56,000, which monies were required to meet the responsibilities of those grants. Those funds were contractually committed to Professor Salby's federal research, for which he held primary responsibility. These funds were diverted from federal research projects during 1997 when Professor Salby was on sabbatical leave overseas. The University ignored Professor Salby's grievances for years, leaving the diversion of federal research funds uncorrected. Consequently, Professor Salby's responsibilities to the respective federal grants could not be met. After years of attempting to resolve the issue internally, Professor Salby advised the National Science Foundation of the circumstances which caused the matter to be forwarded to the United States Inspector General's Office, who opened a criminal investigation against the University. The investigation resulted in the above-referenced funds being restored to the research projects overseen by Professor Salby.

5. During 2001, Peter Webster resigned as departmental chair and, a year later, he announced his departure from the University as well. At approximately the same time, Mr. Webster, who figured centrally in Professor Salby's grievances, lodged with the University false allegations of research misconduct against Professor Salby. The allegations were incorporated into Professor Salby's personnel file without providing Professor Salby information regarding the substance of the allegations nor an opportunity to correct them.

6. Professor Salby was away from the University on approved leave or on sabbatical leave for 3 semesters from 2003-07. In addition, he was on leave from the University every summer.

7. The National Science Foundation received a similar set of allegations referenced in ¶ 5 above. On the basis of these false allegations, the National Science Foundation opened an investigation regarding a possible conflict of interest involving the outside work of Professor Salby and informed the University of same, according to the University, in February, 2005. There was no merit to these accusations because Professor Salby had complied with all relevant policies. Apparently, the investigation confused income gained while Professor Salby was on leave and not subject to the University's rules, with income gained while he was employed by the University.

8. As a result of the NSF contacting the University in February, 2005, referenced in ¶ 7 above, the University formed a working group to investigate the matter. Professor Salby met with members of this working group in February, 2006, and in June, 2006, and provided these people with all of the information they requested. He also communicated with them via e-mail.

9. From December, 2006, through August, 2007, Professor Salby was on a semester sabbatical leave in Australia. This leave was approved by the University and conducted pursuant to University policy.

10. Upon information and belief, the working group's investigation concluded on approximately June 8, 2007, when Professor Salby was residing in Australia on sabbatical. The working group came to two preliminary conclusions: (1) that Professor Salby allegedly had not initially disclosed his relationship with ASA, a nonprofit organization through which Professor Salby did outside work and through which the working group believed he was doing undisclosed outside work in conflict with the University, and (2) that from 2003 through 2007 Professor Salby allegedly had been compensated from outside sources for between 80 12-hour workdays and 250 12-hour workdays per year, which exceeded the number of hours the University allowed for outside work during the nine-month academic year. Neither one of these conclusions had any basis and Professor Salby was never provided an opportunity to dispute them.

11. The working group apparently realized that it needed input from Professor Salby before it could finalize its conclusions and it unsuccessfully attempted to contact Professor Salby regarding these two issues. Its requests never reached Professor Salby because the requests were either (1) sent to an incorrect e-mail address instead of to the e-mail address that the group had used before, referenced in ¶ 8, or (2) were sent via post to his Colorado home address, which mail was not forwarded to him in Australia. The working group made no other effort to contact Professor Salby.

12. The working group conveyed the matter to a Conflict of Interest Committee, chaired by Professor Rodger Kram, which met on August 17, 2007, to consider the University's next move. According to defendant Distefano, the Committee was acting under pressure from the NSF that the University take some type of action or risk losing NSF funding to the University. On August 20, 2007, the Committee recommended (1) that the University should not sign or submit any request for funding on Professor Salby's behalf, (2) that any current grants of Professor Salby's should be frozen, and (3) that Professor Salby should be denied access to his laboratory space in the Department of Atmospheric and Oceanic Sciences, until such time that Professor Salby provided the Committee sufficient information so it could make a determination of whether or not he had a conflict of interest. The Committee contemplated that after Professor Salby completed the conflict-of-interest form (called the Disclosure of External Profession Activities, DEPA), the Committee would determine whether Professor Salby's outside activities demonstrated a conflict of interest. The form, which Professor Salby independently found online after it was too late, was short and would have taken approximately 45 seconds to complete.

13. Professor Salby returned to the University at the end of August, 2007. For two months no one from the Committee contacted him and he was not asked to complete, nor told about, the conflict-of-interest form. Professor Salby was unaware of any conclusions that the working group had reached, preliminary or otherwise, and was unaware that the matter had been referred to the Committee. He was unaware of the three recommendations made in ¶ 12 above. Upon information and belief, the Committee never determined whether Professor Salby's outside activities demonstrated a conflict of interest.

14. On September 19, 2007, defendant Distefano sent a letter to Professor Salby stating that he had accepted the recommendations of the Committee and that Professor Salby was to provide to the Committee, by October 1, 2007, the information that the Committee had been seeking.

15. Professor Salby replied to Mr. Distefano on September 28, 2007, stating that he did not know to what Mr. Distefano was referring. Professor Salby referenced the fact that he had already spoken to people investigating the matter, allegedly with the working group, during the summer of 2006, and he did not know what else the Committee wanted from him. He told Mr. Distefano that he had received no subsequent communication from the University nor requests since the summer of 2006. Professor Salby did not know who was on the Committee and he had never met Professor Kram, the chair of the Committee. Professor Salby, therefore, asked Mr. Distefano to request that the Committee contact Professor Salby and he would provide any materials that the Committee requested.

16. Mr. Distefano did not convey this request to the Committee nor did Mr. Distefano ask the Committee to make any further findings as to whether a conflict of interest existed. Instead, on October 18, 2007, the University, Mr. DiStefano, and John Does without further notice caused an unreasonable seizure of Professor Salby's laboratory, which had been developed by his federal research grants. The facilities, which had been constructed over two decades, were dismantled and removed. Confiscated with them were professional records, correspondence, and copyrighted publications that had been compiled over Professor Salby's career of 30 years. The actions exceeded the Committee's recommendations, which were to temporarily restrict access until additional information could be acquired. Neither the University nor Mr. Distefano provided a rationale for this seizure.

17. Professor Salby repeatedly requested his seized computer files, which contained professional records spanning his 30-year career. Among the seized materials are teaching records, records from federal research, and professional correspondence to colleagues, to scientific journals, and to funding agencies for whom Professor Salby served as a reviewer. Likewise seized were files from Professor Salby's graduate text, a new edition of which has been invited by two international publishers. Defendants' refusal to release the files on his computer undermined his career through subsequent teaching, subsequent research, and the publication of a new addition to his book.

18. The physical contents of his office were put into a small storage area that could not serve as an office. The office contents (some 50 cartons) occupied half of the storage area which made it impossible to locate materials that were needed for Professor Salby to fulfill his teaching responsibilities. Other materials, including personal property, records supporting Professor Salby's teaching, and U.S. Mail were made inaccessible. The confiscation of Professor Salby's facilities, which were developed from his federal grants, prevented him from applying for new grants, from fulfilling teaching responsibilities, and from meeting his other duties as a professor.

19. Following the confiscation of Professor Salby's laboratory, students tried to enroll in his class for the spring of 2008, but the University prevented them from enrolling.

20. Professor Salby's employment contract spans the nine-month academic year. During the three months of summer, when not employed by the University, Professor Salby is free to generate income through other sources. During the academic year the University's external-work policy allows Professor Salby to devote 20% of his time to outside activities that generate supplemental income. By undermining his reputation for meeting research obligations and for presenting the results thereof through publication and presentation at scientific conferences, defendants' actions have damaged Professor Salby's ability to secure funding during his nine-month appointment and during the summer, and have also damaged his ability to generate outside income under the University's external-work policy.

21. Defendants' obstruction of his research and teaching has damaged Professor Salby as follows: (1) by preventing him from earning his salary as a professor; (2) by impairing his ability to attract research funding and, hence, to participate in his field; (3) by impairing his ability to generate outside income during his nine-month appointment; and (4) by impairing his ability to generate income during summer months, when he is not employed by the University. Defendants' obstruction of Professor Salby's employment has likewise damaged his capacity for future earning by preventing him from fulfilling research obligations, by preventing him from acquiring new research funding to maintain technical staff whom Professor Salby developed with two decades of federal support, and by preventing him from publishing the findings of federally-funded research (a contractual obligation of funds that were awarded to the University). Defendants' actions have also damaged Professor Salby by preventing him from presenting the findings of federally-funded research at international conferences. These obstructions of his professional responsibilities have damaged Professor Salby's reputation upon which his future livelihood rests.

22. The confiscation of Professor Salby's facilities, which support his research and teaching, effectively prevented Professor Salby from meeting his employment duties and made his employment situation untenable. Professor Salby resigned his employment with the University. A reasonable person in Professor Salby's position would have had no choice but to resign and, thus, the above actions amount to a constructive discharge.

FIRST CLAIM
VIOLATION OF FOURTH AMENDMENT RIGHTS
(against defendants DiStefano and John Does)

23. Plaintiff incorporates the above allegations herein.

24. The seizure of Professor Salby's laboratory and personal effects therein was unreasonable and violated Professor Salby's fourth amendment rights, for which a remedy is provided under 42 U.S.C. §§1983 and 1988. Mr. DiStefano and the John Does were the decision makers behind the seizure.

25. This unlawful seizure caused damages as stated above.

SECOND CLAIM

DEPRIVATION OF PROCEDURAL DUE PROCESS RIGHTS

(against defendants DiStefano and John Does)

26. Plaintiff incorporates the above allegations herein.

27. Professor Salby was a tenured professor at the University and had an expectation of continued employment with the University. Defendants Distefano and John Does caused a deprivation of this expectation without granting Professor Salby a pre-termination or post-termination hearing, thus violating his procedural due process rights under the 14th Amendment, for which a remedy is provided under 42 U.S.C. §§1983 and 1988.

28. This deprivation caused damages as set forth above.

THIRD CLAIM

RETALIATION AGAINST EXERCISE OF FIRST AMENDMENT RIGHTS

(against defendants DiStefano and John Does)

29. Plaintiff incorporates the above allegations herein.

30. The confiscation of Professor Salby's laboratory, personal effects, and professional records was undertaken in retaliation for the grievances that Professor Salby filed to recover federal research funds that had been diverted which, in turn, resulted in the criminal investigation of the University by the Inspector General's Office. Professor Salby's grievances led to unfounded accusations against him which led to the National Science Foundation investigation of him which led to the Committee recommendations referenced above which allegedly was the basis for the seizure of his laboratory. Mr. DiStefano and the John Does were the decision makers behind the seizure. Such retaliation violates Professor Salby's First Amendment rights, for which a remedy is provided under 42 U.S.C. §§1983 and 1988.

31. This unlawful retaliation caused damages as stated above.

FOURTH CLAIM

PUNITIVE DAMAGES

(against defendants DiStefano and John Does)

32. Plaintiff incorporates the above allegations herein.

33. The actions described above were done with deliberate disregard for Professor Salby's rights and, therefore, defendants DiStefano and the John Does are liable for punitive damages under federal law.

FIFTH CLAIM
VIOLATION OF C.R.S. §24-50.5-103
(against all defendants)

34. Plaintiff incorporates the above allegations herein.

35. The above retaliation constitutes a violation of C.R.S. §24-50.5-103. Ninety days have passed since Professor Salby sent to the University his timely notice of intent to sue letter under §24-10-109 and, therefore, this Court has subject-matter jurisdiction over this tort.

36. As a result of this retaliation, plaintiff has been damaged as stated above.

SIXTH CLAIM
BREACH OF CONTRACT
(against defendant University)

37. Plaintiff incorporates the above allegations herein.

38. Professor Salby had tenure with the University. The University breached its contract with Professor Salby when it caused his constructive termination.

39. As a result of this breach of contract, plaintiff has been damaged as stated above.

WHEREFORE, plaintiff Murry Salby respectfully requests that this Court enter judgment in his favor and for interest, costs, attorney's fees pursuant to 42 U.S.C. §1988, and such other relief as this Court may deem proper.

PLAINTIFF REQUESTS TRIAL TO A JURY.

CROSS & LIECHTY, P.C.

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AUSTRALIA

District Court <u>DENVER</u> County, Colorado		FILED Document CO Denver County District Court 2nd JD Filing Date: Apr 14 2009 1:50PM MDT Filing ID: 24662806 Review Clerk: Stacy Shaul ▲ COURT USE ONLY ▲
Court Address: 1437 Bannock Street Denver, CO 80202 720-865-8307		
Plaintiff(s):	MURRY SALBY	
v.		
Defendant(s): UNIVERSITY OF COLORADO, et al.,		
Attorney or Party Without Attorney (Name and Address): Robert Liechty, Esq., CROSS & LIECHTY, P.C. 400 So. Colorado Blvd., #900, Denver, Colorado 80246 Phone Number: 303-333-4122 E-mail: rliechty@crossliechty.com FAX Number: 303-388-1749 Atty. Reg. #: 14652		Case Number: 09-CV-_____ Division _____ Courtroom _____
DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT		

- This cover sheet shall be filed with the initial pleading of a complaint, counterclaim, cross-claim or third party complaint in every district court civil (CV) case. It shall not be filed in Domestic Relations (DR), Probate (PR), Water (CW), Juvenile (JA, JR, JD, JV), or Mental Health (MH) cases.
- Check the boxes applicable to this case.
 - ☐ Simplified Procedure under C.R.C.P. 16.1 **applies** to this case because this party does not seek a monetary judgment in excess of \$100,000.00 against another party, including any attorney fees, penalties or punitive damages but excluding interest and costs and because this case is not a class action or forcible entry and detainer, Rule 106, Rule 120, or other expedited proceeding.
 - ☒ Simplified Procedure under C.R.C.P. 16.1, **does not apply** to this case because (check one box below identifying why 16.1 does not apply):
 - ☐ This is a class action or forcible entry and detainer, Rule 106, Rule 120, or other similar expedited proceeding, **or**
 - ☒ This party is seeking a monetary judgment for more than \$100,000.00 against another party, including any attorney fees, penalties or punitive damages, but excluding interest and costs (see C.R.C.P. 16.1(c)), **or**
 - ☐ Another party has previously stated in its cover sheet that C.R.C.P. 16.1 does not apply to this case.
- ☐ This party makes a **Jury Demand** at this time and pays the requisite fee. See C.R.C.P. 38. (Checking this box is optional.)

Date: April 24, 2009s/ Robert M. Liechty

Signature of Party or Attorney for Party

NOTICE

- ✓ This cover sheet must be filed in all District Court Civil (CV) Cases. Failure to file this cover sheet is not a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.
- ✓ This cover sheet must be served on all other parties along with the initial pleading of a complaint, counterclaim, cross-claim, or third party complaint.
- ✓ This cover sheet shall not be considered a pleading for purposes of C.R.C.P. 11.

DISTRICT COURT, CITY AND COUNTY OF DENVER STATE OF COLORADO Court Address: 1437 Bannock Street Denver, Colorado 80202 720-865-8307		EFILED Document CO Denver County District Court 2nd JD Filing Date: Apr 14 2009 1:50PM MDT Filing ID: 24662806 Review Clerk: Stacy Shaul ▲ COURT USE ONLY ▲ Case No.: 09-CV-____ Div.: ____ Ctrm: ____
Plaintiff: MURRY SALBY Defendant: UNIVERSITY OF COLORADO, PROVOST PHILLIP DiSTEFANO, and JOHN DOES.		
Attorney: Robert M. Liechty, No. 14652 Sean J. Lane, No. 32000 CROSS & LIECHTY, P.C. Address: 400 South Colorado Blvd., Suite 900 Denver, CO 80246 Phone No. (303) 333-4122		
SUMMONS		

**THE PEOPLE OF THE STATE OF COLORADO
TO THE DEFENDANTS NAMED ABOVE:**

You are hereby summoned and required to file with the Clerk of this Court an answer or other response to the attached Complaint. If service of the Summons and Complaint was made upon you within the State of Colorado, you are required to file your answer or other response within 20 days after such service upon you. If service of the Summons and Complaint was made upon you outside of the State of Colorado, you are required to file your answer or other response within 30 days after such service upon you.

If you fail to file your answer or other response to the Complaint in writing within the applicable time period, judgment by default may be entered against you by the court for the relief demanded in the Complaint, without any further notice to you.

The following documents are also served with this Summons: Complaint and Civil Case Cover Sheet.

Dated: April 14, 2009

CROSS & LIECHTY, P.C.

By: s/ Robert M. Liechty
 Robert M. Liechty, #14652
 ATTORNEYS FOR PLAINTIFF

RETURN OF SERVICE

[illegible]

I declare under oath that I served this SUMMONS on _____
 _____ in _____ County on
 _____ at _____ o'clock _____ m. at the following
 (Date) (Time)
 location:

☐ by (State Manner of Service)

☐ I am over the age of 18 years and am not interested in nor a party to this case.

Signed under oath before me on _____

Name _____

Date _____

Notary Public *

☐ Private process server
☐ Sheriff,

County

My Commission Expires: _____

Fee

§ _____

Mileage

\$ _____

* Notary should include address and expiration date of commission.