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Soudabeh Darvish v. Utah Labor Commission Appeals Board, Salt Lake County Environmental Health Services : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

SOUDABEH DARVISH, Petitioner/Appellant, v. UTAH LABOR COMMISSION APPEALS BOARD & SALT LAKE COUNTY ENVIRONMENTAL HEALTH SERVICES, Respondents/Appellees.	BRIEF OF PETITIONER/APPELLANT Appeals Case No.: 20100981

ON PETITION FOR REVIEW FROM THE UTAH LABOR COMMISSION BOARD OF APPEALS

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IV. STATEMENT SHOWING JURISDICTION OF THE APPELLATE COURT

This court has appellate jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(a).

V. STATEMENT OF THE ISSUES

Issue 1. Darvish was fired because of her participation in protected activity.

Standard of review: This is an interpretation of a statute or its interpretive law or a regulation and is a question of law which is considered on a correctness standard. Jackson &

Thornton, *Utah Standards of Appellate Review - Third Edition*, Utah B.J., at 18, 19 (September/October, 2010); *Harvey v. Cedar Hills City,* 227 P.3d 256 (Utah 2010); *Ellis v. Estate of Ellis*, 169 P.3d 441 (Utah 2007).

Issue 2. Darvish was fired because of her opposition to improper activity.

Standard of review: This is an interpretation of a statute or its interpretive law and is a question of law which is considered on a correctness standard. Jackson & Thornton, *Utah Standards of Appellate Review - Third Edition*, Utah B.J., at 18, 19 (September/October, 2010); *Harvey v. Cedar Hills City,* 227 P.3d 256 (Utah 2010); *Ellis v. Estate of Ellis*, 169 P.3d 441 (Utah 2007).

Issue 3. The Appeals Board improperly considered issues raised for the first time on appeal.

Standard of review: This is an interpretation of common law and is a question of law which is considered on a correctness standard. Jackson & Thornton, *Utah Standards of Appellate Review - Third Edition*, Utah B.J., at 19 (September/October, 2010); *Daniels v. Gamma West Brachytherapy, LLC*, 221 P.3d 256 (Utah 2009).

Issue 4. The Order Granting Request for Reconsideration, November 30, 2010, is void by virtue of Utah Code Anno. § 63G-4-302(3)(b).

Standard of review: This is an interpretation of a statute and is a question of law which is considered on a correctness standard. Jackson & Thornton, *Utah Standards of*

Appellate Review - Third Edition, Utah B.J., at 18, 19 (September/October, 2010); *Harvey v. Cedar Hills City,* 227 P.3d 256 (Utah 2010).

Issue 5. Darvish is entitled to interest on her unpaid wages.

Standard of review: This is an interpretation of a statute and interpretive law and is a question of law which is considered on a correctness standard. Jackson & Thornton, *Utah Standards of Appellate Review - Third Edition*, Utah B.J., at 18, 19 (September/October, 2010); *Lefavi v. Bertoch*, 994 P.2d 817 (Utah Ct. App. 2000).

Issue 6. Darvish is entitled to her attorneys' fees on appeal.

Standard of review: Being based on the appeal itself there is no standard of review for the actions of the subordinate forum. The moving party is entitled to fees where they were authorized below so long as the basis for the award is stated in the brief. *Advanced Restoration, L.L.C. v. Priskos*, 126 P.3d 786 (Utah Ct. App. 2005).

VI. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, & RULES

All determinative law is included in the Addendum.

42 U.S.C. 2000e-3 et seq.

Utah Code Anno. § 15-1-1(2).

Utah Code Anno. § 34A-5-101 et seq.

Utah Code Anno. § 63G-4-302(3)(b).

Utah Code Anno. § 63G-4-401.

Labor Commission Regulation R602-7-6

VII. STATEMENT OF THE CASE

A. Nature of the Case

This is a petition for review from an order, on reconsideration, of the Appeals Board of the Utah Labor Commission which reversed the Board's prior holding and dismissed the matter. Darvish has also appealed the ruling of the Labor Commission's administrative law judge, ALJ, holding that she is not entitled to interest on her lost wages which the Respondent was ordered to pay by the ALJ's ruling.

B. Course of Proceedings

Petitioner Sue Darvish is of Persian decent and a native of Iran. She was hired by Respondent County Health Services as a food inspector. After making a suggestion in a business team meeting setting Darvish overheard Jesse Morris, her team mate with whom she shared a cubicle, say "these Persians can't come in here and tell us what to do" or words to that effect. In accordance with the County's Grievance Procedure, Darvish complained to her supervisor and asked for a change of cubicle assignments. The supervisor declined. Instead Darvish was written up and ultimately fired for failing to get along with her co-workers.

Darvish then filed a Charge of Discrimination with the Utah Anti-Discrimination and Labor Division of the Utah Labor Commission (UALD) which determined there was cause to believe Darvish's firing had been retaliatory under the Utah Anti Discrimination Act

(UADA). The County appealed that determination. After a multi-day trial the Administrative Law Judge (ALJ) found that Darvish had been terminated in retaliation for her complaints and awarded her back pay and attorneys' fees but declined to award prejudgment interest. The County again appealed and the Appeals Board of the Labor Commission sustained the the ALJ except that it required a hearing to determine the proper amount of attorneys' fees to award Darvish.

On October 6, 2010 the County filed a motion for reconsideration arguing that Darvish could not have had a good faith belief that she had been subjected to discrimination. This issue was not raised by the county before the ALJ. On November 30, 2010 the Appeals Board reversed itself in a two to one decision based on its understanding of the law of Title VII.

The Petition for Review followed.

C. Disposition at the Agency.

The Labor Commission Board of Appeals dismissed Darvish's case. It is important to note that in none of the Board of Review's actions did they suggest that the facts were other than those found by the ALJ. (Record at 847, 870). Accordingly, all the issues raised in this appeal are issues of law rather than issues of fact.

VIII. RELEVANT FACTS WITH CITATION TO THE RECORD

A. Background

Sue Darvish is of Persian decent, a Muslim and a native of Iran. (Record at 879, page 14:7-12; 106:6). She was hired by Respondent Salt Lake County Health Services as a food inspector in January, 2004. (Record at 879, page 54:6). Notwithstanding having a related masters degree and prior experience as a food inspector the County placed her on six month probationary status. (Record at 879, page 14:3; 28:17). Darvish had previously been employed by the County and understood she could be rehired without returning to probationary status. (Record at 879, page 17:4-7). During her prior time with the County Darvish inspected the same categories of facilities which she inspected after she returned. (Record at 879, page 18:13-16).

B. Issues with Jesse

After making a suggestion in a business team meeting setting Darvish overheard Jesse Morris, her team mate, with whom she shared a cubicle, say "these Persians can't come in here and tell us what to do" or words to that effect. (Record at 879, page 18:20-19:3). Upon hearing the statement Darvish told Ms. Morris that she was offended by the comment and that it created a harsh work environment. (Record at 879, page 19:5-9).

C. The County's Response

In accordance with the County's Grievance Procedure, Darvish complained to her supervisor, Eric Peterson, and asked for a change of cubicle assignments. (Record at 879, page 20:10; 22:1-22). The County's policy did not require that a complaint be submitted in

writing. (Record at 877, exhibit 32 ¶9.2.3; 879, page 167: 3-17). The County policy specifically directed Darvish to raise the issue with her supervisor, Peterson, within 15 days. (Record at 877, exhibit 30 ¶3.1). Peterson treated the complaint as a complaint under the County's EEO policy and investigated it shortly after January 27, 2004. (Record at 877, Exhibit 14). Peterson initially declined but did change Darvish's cubicle assignment three months later. (Record at 879, page 22:17-22). Prior to reporting the "those Persians" remark Darvish and Peterson had gotten along well. (Record at 879, page 21:16). After reporting the remark Peterson began calling Darvish into his office and making accusations against her. (Record at 879, page 21:20-22).

D. Getting Disciplined

Rather than sort out the racial issue Peterson wrote up Darvish for failing to get along with her co-workers. (Record at 877, exhibit 11). Darvish became the subject of a disciplinary vendetta in which she was disciplined for nominal infractions and then had those infractions multiplied and relied upon by the County, again and again. (Record at 877, exhibit 11, 13, 18, 19). At least one of these disciplinary documents lacked objective standards. (Record at 879, page 175:2-3). This was in spite of the fact that the County acknowledged that any problems she may have actually had were being corrected and her performance was getting better. (Record at 879, page 248:14-23). Ultimately, Darvish was terminated before her probationary term expired. (Record at 877, exhibit 18, 34).

On March 3, 2004 Darvish was written up for inspecting category 3 and 4 facilities even though she had been instructed to inspect these categories by Jeff Oaks, another supervisor. (Record at 879, page 23:17-24-7; exhibits 5 and 6). Once Darvish was aware that Peterson did not want her to inspect category 3 and 4 establishments she stopped. (Record at 879, page 25:22). On March 15, 2004 Darvish asked to be reassigned to supervisor other than Peterson. (Record at 879, page 27:18-21; exhibit 8). That request was denied. (Record at 879, page exhibit 9). For her efforts to ameliorate the situation Darvish was put on a corrective action plan and downgraded in "working effectively in team settings" on an evaluation. (Record at 879, page 29:17-24; exhibits 10 & 11). She was told that the reason for the downgrade included her having asked for a change of cubicle assignment. (Record at 879, page 29:17-24). The plan itself states "you requested to be moved from your initial assigned work space due to personal conflicts with a coworker within the first few weeks of your rehire." (Record at 879, exhibit 11, page 2). At least one of the disciplinary documents was factually incorrect. (Record at 879, page 178:3-25).

The corrective action plan was issued on April 6, 2004, a month after Darvish had the misunderstanding about inspecting category 3 and 4 establishments and after she had been given a disciplinary notice and more than a month after she had stopped inspecting these establishments unless directed to do so. (Record at 879, pages 23:19-23; 31:14-33:2; exhibits 5, 6, 10, 11).

On April 4, 2004 Darvish was again evaluated. (Record at 879, page 35:11, exhibit 13). Even though there had been no intervening incidents she was down graded in her rating from a 2 to a lower 1. (Record at 879, exhibit 13). On May 13, 2004, after Peterson failed to discuss any claimed defects in Darvish's performance with her he, as continued creating a paper trail against her, Darvish told him that he was retaliating against her and that she was going to file a complaint against him. (Record at 879, page 38:18 - 39:5). Darvish also complained of Peterson's retaliation to the County's director, Royal DeLegge. (Record at 879, page 40:2-14). Royle DeLegge, Director of the Environmental Health and Darvish's third level supervisor testified that Darvish would not have been terminated had she not written an e-mail complaining about retaliation. (Record at 879, page 180:6-23).

E. Getting Fired

During the time Darvish received the verbal warning, the corrective action plan and the evaluations she was never told that her job was in jeopardy. (Record at 879, page 47:7-22). On May 24, 2004 at 5:00 p.m. Darvish was fired in a meeting which included no discussion of her termination other than Bryce Larsen reading her termination letter in a shaky voice. (Record at 879, page 48:2-20; exhibit 18). At the time Darvish was fired Royle DeLegge was out of town.(Record at 879, page 170-3-13). Mr. DeLegge didn't want Darvish. fired. (Record at 879, page 294:8-22; 170:7-24).

F. UALD Proceedings

Darvish then filed a Charge of Discrimination with the Utah Anti-Discrimination and Labor Division of the Utah Labor Commission (UALD). (Record at 877, exhibit 39). After investigation the UALD determined there was cause to believe Darvish had been fired in retaliation for complaining about treatment by her co-workers in violation of the Utah Anti Discrimination Act (UADA). (Record at 877, exhibit 27). The County appealed that determination to the Adjudication Division of the Labor Commission. At the conclusion of a multi-day hearing the ALJ found that Darvish had, indeed, been terminated in retaliation for her complaints and awarded her back pay and attorneys' fees. (Record at 719-739). The ALJ declined to award Darvish prejudgment interest because there is no provision in the UADA allowing interest. (Record at 729).

The County again appealed. (Record at 771). Darvish also appealed the ALJ's failure to award interest. (Record at 740). Two years later the Appeals Board of the Labor Commission issued an order sustaining the findings and ruling of the ALJ as to liability and damages. (Record at 847). Like the ALJ, Appeals Board declined to allow interest, not because it was not found in the statute but because the UADA is intended to mirror Title VII of the Civil Rights Act of 1964 and the Appeals Board believed that Title VII did not allow for prejudgment interest. (Record at 852).

On October 6, 2010 the County filed a motion for reconsideration arguing that Darvish could not have had a good faith belief that she had been subjected to discrimination.

(Record at 857). This issue was not raised by the county before the ALJ. On November 30, 2010 the Appeals Board reversed itself in a two to one decision based on its understanding of the law of retaliation under Title VII. (Record at 870).

IX. SUMMARY OF THE ARGUMENT

Darvish's employment was terminated after she complained of a racist comment made by her coworker in a business meeting. Upon receiving the complaint her supervisor began to build a record against her. The County's policy allows for verbal complaints like that made by Darvish. The County investigated the complaint.

Under Title VII, upon which the UADA is patterned, it is illegal to discriminate against an employee who opposes an unlawful practice or who makes a charge or participates in any manner in an investigation. 42 U.S.C §2000e-3(a). The Board of Appeals' Order on Reconsideration turns on the artificial distinction between opposing the County's illegal behavior and participating in the complaint process. The record shows that Darvish's actions meet the standard for both opposition and participation as contemplated by Title VII and its interpretive law.

The ALJ improperly refused to award Darvish interest on her unpaid wages. An award of interest is required by Utah law on all damages which may be reasonably ascertained.

Similarly, Darvish is entitled to her attorneys' fees in bringing her claims against the County. The UADA allows for attorneys' fees and Title VII case law, which is used to

interpret the UADA, mandates attorneys' fees for prevailing employees. The matter was set for a hearing on the proper amount of attorneys' fees before the Board of Appeals Order on Reconsideration was entered.

There are also procedural defects which bear consideration. The Labor Commission's regulations and the Utah Administrative Code require that motions for reconsideration be decided within 20 days. The Order in this case exceeded that statutorily mandated time. Further, the County raised at least one point for the first time on appeal.

X. DETAIL OF THE ARGUMENT

A. PARTICIPATION VS. OPPOSITION

Title VII, 42 U.S.C. §2000e-3(a), has been interpreted as having two related retaliation provisions, an opposition clause and a participation clause. *Kelley v. City of Albuquerque*, 542 F.3d 802 (10th Cir. 2008). The distinction is that a person who participates in an EEO action has broader protections than one who only opposes the improper action. These distinctions are explained in detail in the EEOC Compliance Manual, copy included in the addendum.

If the employee's resistance constitutes opposition it must be based on a reasonable good faith belief that there has been improper action. EEOC Compliance Manual § 8-II(B)(3)(b). On the other hand, if the resistance constitutes participation in the process not even a reasonable good faith belief is required. The extent to which this principle applies to

participation claims is seen by its application in one of the earlier cases interpreting Title VII, *Pettway v. Am. Cast Iron Pipe, Co.*, 411 F.2d 998 (5th Cir. 1969). In *Pettway* the employee's retaliation claim was allowed to stand even though the written submission upon which his termination was based contained false and malicious allegations against the employer. *Id* at 1002.

The example from the Compliance Manual at § 8-II(B)(3)(b) shows the minimal level of belief required for opposition clause coverage.

> Example 1 - CP complains to her office manager that her supervisor failed to promote her because of her gender. (She believes that sex discrimination occurred because she was qualified for the promotion and the supervisor promoted a male instead.) CP has engaged in protected opposition regardless of whether the promotion decision was in fact discriminatory because she had a reasonable and good faith belief that discrimination occurred.

The contrasting example 2 explains that an employee could not have a good faith belief that she was not promoted because of her sex when the position was for the accounting department and the employee lacked a CPA license.

The Compliance Manual teases out the legal nuances between participation and opposition. Addressing opposition the manual states ". . . it is well settled that a violation of the retaliation provision can be found whether or not the challenged practice ultimately is found to be unlawful." . EEOC Compliance Manual § 8-II(B)(3)(b).

Addressing participation the manual describes the anti-retaliation provisions as prohibiting discrimination against any individual because she has made a charge, or

participated **in any manner**, in an investigation under Title VII or in state administrative proceedings. In the federal sector the triggering event which crosses the line from opposition to participation is initiating contact with an EEO counselor. . EEOC Compliance Manual § 8-II(C)(1). The manual notes that the participation clause applies ". . . regardless of the validity or reasonableness of the charge." . EEOC Compliance Manual § 8-II(C)(2).

B. DARVISH WAS FIRED BECAUSE OF HER PARTICIPATION IN PROTECTED ACTIVITY

The record is clear. Immediately upon hearing the "those Persians" comment Darvish went to Peterson, her supervisor, and asked for a cubicle change because of the comment, just as she was required to do by the County's grievance procedure. (Record at 877, exhibit 30 ¶3.1). The first level supervisor, Peterson in this case, is the functional equivalent to the EEO counselor described in the EEOC Compliance Manual. The County considered this grievance participation in the EEO process because it promptly investigated the allegations on January 27, 2004. (Record at 877, Exhibit 14). Because Darvish's grievance was brought within the EEO scheme the County had created it constituted participation, regardless of whether it was either valid or reasonable. For the sake of clarification, Darvish believed in 2004, and believes now, that her complaint was reasonable and valid.

C. DARVISH WAS FIRED BECAUSE OF HER OPPOSITION TO IMPROPER ACTIVITY

Applying the participation / opposition distinction, Darvish's grievance rose to the

level of actionable opposition as well as participation.

The Board of Appeals dismissed this matter based on its interpretation of *Clark County School Board District v. Breeden*, 532 U.S. 268 (2001), which the Board properly notes was raised by the County for the first time in its motion for reconsideration. The Board interprets *Breeden* to stand for the proposition that a single improper action cannot form the basis for a retaliation claim. It does not stand for that.

First, because they are typically factually diverse, discrimination actions must be analyzed individually. They do not readily lend themselves to comparisons between cases. *Wheeler v. BNSF Ry. Co.*, 2011 U.S. App. LEXIS 6865 (10th Cir. Apr. 4, 2011); *Piercy v. Maketa*, 480 F.3d 1192, 1203 (10th Cir. 2007); *Billings v. Town of Grafton*, 515 F.3d 39, 49 (1st Cir. 2008) (The highly fact-specific nature of a hostile environment claim tends to make it difficult to draw meaningful contrasts between one case and another for purposes of distinguishing between sufficiently and insufficiently abusive behavior.)

Second, the factual divergence between Darvish and *Breeden* shows that the analysis from *Breeden* is not helpful here. Breeden and two coworkers were reviewing job applications. One of the applications contained a comment that the applicant had once said "I hear that making love to you is like making love to the Grand Canyon." One of the co-reviewers commented that he didn't know what that meant and the other said he would explain it to him later. This was in October, 1994. It was a single comment, not directed to

Breeden. Almost a year later, in August, 1995, Breeden filed a Charge of Discrimination with the EEOC. The Supreme Court's holding was that the single comment, taken in context, could not be reasonably believed to have violated Title VII.*id* at 513. *Breeden* found that harassment was actionable if it could "alter the conditions of the victim's employment." *id.* Among the factors to be considered was the frequency of the conduct and whether it was humiliating. *id.*

Breeden had "conceded that it did not bother or upset her." *id* at 514. Compare that evidence to this case where Darvish's supervisor, Peterson, testified that "she was not happy and clearly upset." (Record at 879, page 335:6-7). *Breeden* also turned on the nature of the comment. The Grand Canyon comment was not directed at Breeden but was merely an aside made by a team member viewing employment applications. The "those Persians" comment was pointedly directed at Darvish. "Those Persians" said to Darvish that she was not going to be accepted in the work place for who she was, an experienced, educated, professional. Rather, her contributions were going to be viewed through the prism of her national origin. The comment was made by Darvish's cubicle mate, the person with whom Darvish would spend more work time than any other person.

Breeden further turned on timing. The Court found that the Grand Canyon comment was an isolated incident. *Breeden* at 514. The time from the comment to the adverse employment action to which Breeden objected was almost a year. The Court noted that

Breeden "relied wholly on the temporal proximity of the filing of her complaint" to establish causation. *Id.* That argument was rejected because of the time which lapsed from October to the following August. Here Darvish complained at the end of January, 2004, immediately after the comment and the investigation followed immediately. On March 4th she was written up for inspecting category 3 and 4 establishments, which Jeff Oaks had told her to inspect. On April 4th she was placed on a corrective action plan for the same claimed error in inspecting category 3 and 4 establishments. This despite the acknowledgment that she had not inspected establishments outside the scope of her instructions once it was brought to her attention and she had brought the misunderstanding to the County's attention in writing. These inspections occurred no later than February 23, 2004. (Record at 876, exhibit 2). Yet her January to April, 2004, probationary evaluation was then rewritten to downgrade her performance based on her inability to work "effectively in team settings", i.e. her complaint about the "those Persians" comment. (Record at 877, exhibit 13). Thereafter, when Peterson wrote a memo for the record to Darvish on May 19, 2004, (Record at 877, 14), he fabricated portions of his conversation with Darvish to ignore her statement that she was going to file a retaliation claim against him phrasing them to say she wanted to file against Jessie Morris. (Record at 879, page 46:7-10).

The timing of the retaliation in *Breeden* also distinguishes it from this case. As the dissenting member of the Appeals Board noted in *Breeden* the retaliation was claimed to

have occurred when Breeden was transferred 20 months later. (Record at 873). Here the retaliation was immediate and constant. Darvish was disciplined several times and then fired all within less than six months. The dissenting member of the panel describes what happened to Darvish.

> In *Breeden*, the Supreme Court concluded no one could reasonably believe the incident Breeden complained of violated Title VII. Not being upset by the comment and no transfer for more than 20 months appeared to be significant factors in determining the absence of a casual connection. In Darvish, however, we have a comment, a prompt complaint, a corrective action plan, an improving employee and termination within four (4) months of the complaint. In Darvish, the County demonstrated an extremely serious pattern of retaliation with such actions establishing a casual connection and violation of Title VII. (Record at 874).

1. One Complaint Was Enough

The legal conclusion that *Breeden* requires Darvish's case to be dismissed is based on the presumption that a single complaint will never be sufficient to meet the opposition standard of the code. A single racial comment is sufficient to alter the working conditions of a minority employee. *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993). Single acts of sexual harassment are also sufficient to support liability. *Lockard v. Pizza Hut,* 162 F.3d 1062, 1072 (10th Cir. 1998).

Counting the number of incidents misses the point in a retaliation case. In a harassment case the inquiry is are the actions complained of sufficient to create a hostile environment. In a retaliation case the issue is was the employee fired, or otherwise subjected

to an adverse employment action because she grieved an apparently improper action.

The standard for actionable retaliation is whether the incidents complained of are harmful to the point that they could dissuade a reasonable worker from making or supporting a charge of job discrimination." *Burlington N. & Santa Fe Ry. Co. v. White,* 126 S.Ct 2405, 2409 (2006). The history of what happened to Soudi Darvish would dissuade anyone from reporting anything to the County. The number of incidents is not an element of a retaliation claim.

2. There Was More than One Complaint and More than One Improper Action

The County's and the Appeals Board's position is based on the supposition that there was a single act of retaliation. The record shows that there was ongoing retaliation and that the line of causation runs directly from the complaint about the "those Persians" remark through the write ups and downgraded evaluations to Darvish's firing. The retaliatory actions began with Peterson's change in attitude towards Darvish. As a result of that attitude he created the disciplinary notices for improper inspections notwithstanding the concession that they stopped once Darvish was told not to inspect any more category 3 or 4 establishments and the acknowledgments that she was improving. Included are the references to working effectively in team settings all of which flow directly from the complaint about "those Persians." In response to these Darvish submitted a written rebuttal to the disciplinary notice, (Record at 877, exhibit 6) and told Peterson she was going to file a retaliation claim against

him. (Record at 879, page 46:7-10).

In short, Darvish complained first about the "those Persians" comment, then about being written up for performing inspections she had been told to perform, and then about Peterson's retaliation. Not only was the "those Persians" comment improper the other acts of retaliation which flowed from it were as well. Darvish's third level supervisor, Royal DeLegge, testified that she would not have been fired had she not written an e-mail complaining of retaliation. (Record at 879, page 180:6-23). There were at least seven retaliatory acts; 1) refusing to change her cubicle assignment for three months after her request, 2) refusing to change her inspection team assignment, 3) issuing a written verbal warning (Record at 877 Exhibit 5), 4) docking her score on her interim evaluation for working effectively in team settings (Record at 877 Exhibit 10), 5) writing her up for complaining about the team concept which virtually no one liked (Record at 877 Exhibit 11), 6) docking her score on her interim evaluation for working effectively in team settings a second time (Record at 877 Exhibit 13), and 7) firing her for sending an e-mail complaining about retaliation (Record at 879, page 180:6-23).

There was more than enough evidence of retaliation to show that Darvish's ought not to be compared to *Breeden* and to sustain the ALJ as the Board properly did on the first appeal.

In this case Darvish's resistance to improprieties in her work place meet both the

participation and the opposition provisions described by the EEOC Compliance Manual. Her complaint to her supervisor under the County regulation was participation. It was also opposition as were her ongoing objections to the paper trail her managers created to get her removed.

D. THE APPEALS BOARD IMPROPERLY CONSIDERED ISSUES RAISED FOR THE FIRST TIME ON APPEAL.

The Appeals Board correctly noted in its Order Granting Request for Reconsideration that the County cited *Breeden* for the first time in this case when it submitted its request for reconsideration. (Record at 871). One of the primary rules of appellate jurisprudence is that an appellate body will not consider an issue raised for the first time on appeal. *Rawlings v. Rawlings*, 240 P.3d 754, 765 (Utah 2010); *Latu v. Latu*, 2006 Utah App. LEXIS 482 (Utah Ct. App. 2006) (Court would not consider issue raised for the first time on appeal because it is fundamentally unfair). The County's closing argument gives no hint that they have argued the principles which they later discovered and argued on their motion for reconsideration. (Record at 879, pages 395-406). There is, as the Appeals Board noted, no citation to *Breeden* in the County's appeal brief.

By failing to raise this issue before the ALJ the County denied Darvish the opportunity to rebut it and to put on evidence which would substantiate, more solidly than she already does, the significance of the events which led to her termination. The County also denied the ALJ the opportunity to consider, make findings of fact, and reach conclusions of law on this

point. The Order Granting Request for Reconsideration is based solely on the Board of Appeals response to the County's new citation to *Breeden* and its view of the work place. Because those principles were not raised before the ALJ the court should vacate that order and remand this matter to the Labor Commission for a calculation of attorneys' fees before the ALJ, before the Appeals Board, and before this court, along with interest on Darvish's damages.

E. THE ORDER GRANTING THE REQUEST FOR RECONSIDERATION IS VOID BY VIRTUE OF UTAH CODE ANNO. 63G-4-302(3)(B)

As shown above, on October 6, 2010 the County filed its motion for reconsideration arguing, for the first time, that Darvish could not have had a good faith belief that she had been subjected to discrimination. On November 30, 2010 the Appeals Board reversed itself in a two to one decision based on its understanding of the law of retaliation under Title VII. The intervening time was fifty five days.

Utah Code Anno. 63G-4-302 provides, in relevant part;

> (1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63G-4-301 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.
>
> . . .
>
> (3) (a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.
>
> (b) **If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request**

for reconsideration shall be considered to be denied. [Emphasis added]

In its administrative regulations the Labor Commission has, at R602-7-6, incorporated by reference Utah Code Anno. 63G-4-302[1]. In short, Utah Code Anno. 63G-4-302(3)(b) applies to this case.

Here the County's Motion for Reconsideration was filed on October 6, 2010. The Appeals Board's Order was entered on November, 30 2010, 55 days later. Even giving the County the benefit of the doubt on whether a three day mailing rule applies and for the two days it took the Appellant to file an opposition, the Order was more than a month late.

Administrative agencies are statutory creatures that have no more power than that which is granted by statute. *Nielson v. Div. of Peace Officer Stds. & Training, Dep't of Pub. Safety*, 851 P.2d 1201, 1204 (Utah Ct. App. 1993). ". . . regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature." *Service v. Dulles*, 354 U.S. 363, 372 (U.S. 1957). See also *Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245 (Utah 1992).

Both the regulation and the statute use the term "shall" which has been interpreted by

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[1] "A request for reconsideration of an Order on Motion for Review may be allowed and shall be governed by the provision of Utah Code Section 63G-4-302. Any petitioner for judicial review of final agency action shall be governed by the provisions of Utah Code Section 63G-4-401."

the Utah Supreme Court to be mandatory. *Pugh v. Draper City*, 114 P.3d 546, 549 (Utah 2005). Because the Order was not issued within the required time it was deemed denied and should be vacated by this court.

F. DARVISH IS ENTITLED TO INTEREST ON HER UNPAID WAGES

In his Findings of Fact, Conclusions of Law, and Order the ALJ awarded Darvish back wages of $48,550.00 and deposition costs of $2,907.00. (Record at 737). He also made the following finding on Darvish's request for interest; "Ms. Darvish also requested interest on her lost back pay. However, Utah Code Anno. § 34A-5-107(9) makes no provision for payment of interest on any relief provided under the chapter." (Record at 729). The ALJ makes a similar statement under the Relief and Mitigation portion of the Conclusions of Law section of the Ruling. (Record at 736). The back wages awarded were for years 2004 - $13,113.00, 2005 - $12,001.00, and 2006 - $16,640.00. (Record at 735).

Whether at will or otherwise, an employment relationship in Utah is a contractual relationship, *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1002 (Utah 1991), and Darvish is entitled to interest at the statutory rate of ten percent (10%). Utah Code Anno. §15-1-1(2). Darvish's calculation of the interest due on these sums, given the dates the wages were lost, is approximately $25,000.

Year	Principle	Interest at 10%
2004	$13,113.00	$9179.10
2005	$12,001.00	$7206.60
2006	$16,640.00	$8320.00
TOTALS	$41,745.00	$24,705.80

The ALJ's rationale was that interest is not an item of loss listed by the Labor Code and may therefore not be awarded. Utah law on this issue dates from before statehood and has been reaffirmed recently by the Utah Supreme Court. At least by 1890 the Utah Supreme Court rejected the British rule.

> This rule of the common law does not obtain in America, and interest is allowed on debts overdue even if there is no statute providing for interest. *Wood v. Robbins*, 11 Mass. 504. And the question has been settled in this territory in favor of the allowance of interest on debts overdue. *Godbe v. Young*, 1 Utah, 55; 15 Wall 562[2]. *Wasatch Mining Co. v. Crescent Mining Co.*, 7 Utah 8, 16 (Utah 1890).

Wasatch Mining was cited with approval by the Utah Supreme Court in 2004. *Whitney v. Faulkner,* 95 P.3d 270, ¶17 (Utah 2004). Further of interest in this case, given that the Respondent is a governmental entity, the Supreme Court also held that political subdivisions have not been exempted from the rule allowing interest in the absence of statutory authority. *Baker Lumber Co. v. A.A. Clark Co.*, 53 Utah 336, 178 P. 764 (1919); *Wilson v. Salt Lake City*, 52 Utah 506, 174 P. 847 (1918). *Bd. of Educ. v. Salt Lake County,* 659 P.2d 1030, 1036

[2] *Godbe v. Young is an 1872 case.*

(Utah 1983). Utah case law on the issue of interest in the absence of statutory authority is long standing and unquestioned by Utah courts. Darvish is entitled to interest on her back wages.

The Appeals Board did not sustain the ALJ's legal ruling on interest but held, instead, that rights under UADA are the intended to track rights under Title VII. (Record at 852). See also *Viktron/Lika Utah v. Labor Comm'n*, 38 P.3d 993, 995 (Utah Ct. App. 2001) (Utah courts should rely on the substantial body of federal case law in considering actions under the UADA). The Appeals Board declined to award Darvish interest on her motion for review because ". . . the Appeals Board has reviewed the federal system and finds that interest is not payable on awards under Title VII of the Civil Rights Act of 1964." (Record at 852).

There is no tactful way to give deference to the Appeals Board on this issue and to argue against this conclusion. The Board was just plain wrong. "Under Title VII, prejudgment interest "is an element of complete compensation" in back pay awards. *Loeffler v. Frank*, 486 U.S. 549, 558, 108 S. Ct. 1965, 100 L. Ed. 2d 549 (1988)" cited at *Reed v. Mineta*, 438 F.3d 1063, 1066 (10th Cir. 2006). Not surprisingly, every federal circuit court has followed *Loeffler*.

In *Reed* the court sustained the employee's position that interest should be calculated using the state statutory rate. *Id. Reed* also agreed with the rationale expressed by the United States Supreme Court in *Loeffler*, that the purpose of prejudgment interest is to make

employees whole. *Loeffler* at 558.

The ALJ and the Appeals Board were both wrong, but for different reasons, when they responded to Darvish's request for interest. Both Utah law and the law of Title VII require that Darvish be awarded prejudgment interest on her lost wage damages awarded by the ALJ.

G. DARVISH IS ENTITLED TO HER ATTORNEYS' FEES ON APPEAL

The Utah Anti-Discrimination Act (UADA) provides for attorneys fees to be awarded to the prevailing party. Utah Code Anno. § 34A-5-107(9)(b)(iii). As noted in the discussion on interest, the UADA is intended to track the provisions of Title VII. Title VII's discretionary attorneys' fees language has been interpreted to mean that attorneys' fees must be awarded to a prevailing employee in all but the most extraordinary circumstances. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (U.S. 1978). Darvish believes that she will prevail here and the court should remand the matter for the ALJ to determine a proper amount of attorneys' fees from the commencement of this action through the ALJ's consideration of a proper amount of attorneys' fees, including those incurred in this appeal.

XI. CONCLUSION CONTAINING A STATEMENT OF THE RELIEF SOUGHT

Soudi Darvish was a marked woman as soon as she complained to her supervisor about racist comments by her cubicle mate. The evidence at the ALJ's hearing shows that her response to the comment, which rightfully upset her, was to make a complaint to her

supervisor as required by the County's anti-discrimination policy. His response to the complaint was to write her up for failing to get along with the woman who made the racist comment. Fearing that would not be enough to get her fired he then wrote her up for trivial issues which he acknowledged had been resolved. These issues were reiterated, again and again, and formed the basis for her termination.

This court should summarily reverse the order on reconsideration and reinstate Darvish's damage award. It should also rule that Darvish is entitled to statutory interest on her back wages and to her attorneys' fees. The court should then remand the matter to the Labor Commission with instructions that the ALJ hold an evidentiary hearing to determine a proper award of attorneys' fees, including attorneys' fees on appeal, and to determine the current amount of interest on the damages awarded.

DATED this 12th day of May, 2011.

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IN THE UTAH COURT OF APPEALS

SUE DARVISH, Petitioner/Appellant, v. UTAH LABOR COMMISSION APPEALS BOARD & SALT LAKE COUNTY ENVIRONMENTAL HEALTH SERVICES, Respondents/Appellees.	MAILING CERTIFICATE Case No.: 20100981

I hereby certify that I caused true and correct copy of the foregoing BRIEF OF APPELLANT WITH ADDENDUM to be served by United States Postal Service, postage prepaid, to:

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