

1992

# Maverik Country Stores, Inc. v. The Industrial Commission of Utah : Brief of Appellant

Utah Court of Appeals

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James W. Stewart; Jones, Waldo, Holbrook and McDonough; Benjamin A. Sims; Attorneys for Appellees.

Ronald C. Barker; Mitchell R. Barker; David C. Cundick; Attorneys for Respondent/Appellant.

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**IN THE COURT OF APPEALS  
FOR THE STATE OF UTAH**

MAVERIK COUNTRY STORES, INC.,

Petitioner/Appellant,

vs.

THE INDUSTRIAL COMMISSION  
OF UTAH,

Respondent,

VICKY ANN MCCORD,

Complainant/Respondent.

**OPENING BRIEF OF  
APPELLANT MAVERIK**

**Docket Number: 920206-CA**

**Case Number: UADD 89-0031**

**Priority No. 7**

\* \* \* \*

**PETITION FOR REVIEW OF THE RULING OF THE  
UTAH INDUSTRIAL COMMISSION,  
SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE LISA-MICHELLE CHURCH PRESIDING  
UTAH COURT OF APPEALS  
BRIEF**

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DOCKET NO. 920206 CA

**Ronald C. Barker, # 0208  
Mitchell R. Barker, # 4530  
David C. Cundick, # 4817**  
Attorneys for Respondent/Appellant  
2870 South State Street  
Salt Lake City, Utah 84115-3692  
Telephone: (801) 486-9636

**James W. Stewart**  
JONES, WALDO, HOLBROOK & McDONOUGH  
Attorney for Complainant/Respondent  
1500 First Interstate Plaza  
170 South Main Street  
Salt Lake City, Utah 84101

**Benjamin A. Sims**  
Attorney for Industrial Commission of Utah  
P.O. Box 44580  
Salt Lake City, Utah 84145-0580

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**Ronald C. Barker, # 0208  
Mitchell R. Barker, # 4530  
David C. Cundick, # 4817**

**Attorneys for Respondent/Appellant  
2870 South State Street  
Salt Lake City, Utah 84115-3692  
Telephone: (801) 486-9636**

**James W. Stewart  
JONES, WALDO, HOLBROOK & McDONOUGH  
Attorney for Complainant/Respondent  
1500 First Interstate Plaza  
170 South Main Street  
Salt Lake City, Utah 84101**

**Benjamin A. Sims  
Attorney for Industrial Commission of Utah  
P.O. Box 44580  
Salt Lake City, Utah 84145-0580**

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## JURISDICTION

This is a Petition for Review of agency action, and the Court has jurisdiction for appellate review of the agency action pursuant to Section 63-46b-16(1), Utah Code, together with Section 78-2a-3(2)(a), Utah Code. See also, Rules 3, 4 and 14, Utah Rules of Appellate Procedure.

## ISSUES PRESENTED FOR REVIEW

I. Did the Industrial Commission have jurisdiction to enter any orders while the case was already on appeal? Correction of error standard, no deference. *Hurley v. Board of Review of the Industrial Commission of Utah Department of Employment Security*, 767 P.2d 41 (Utah 1988).

II. Assuming the Commission had jurisdiction, was the "filing" of a Request for Reconsideration complete upon mailing? Correction of error (pure question of law), *Hurley, supra*; *State v. Dickey*, 199 Utah Adv. Rep. 21, 22 (Utah App. Nov. 3, 1992).

III. Assuming it had jurisdiction, and further assuming that mailing the request was insufficient, did the Commission abuse its discretion in failing to grant a one business day extension to file Maverik's Request for Reconsideration? Abuse of discretion standard.

IV. Has there ever been a final order from the Commission? Correction of error (pure question of law), *Hurley, supra*; *Dickey, supra*.

## DETERMINATIVE AUTHORITIES

All of these authorities, as well as certain key cases, are included in the Appendices (and are therefore not set forth verbatim here). Of particular help in determining this appeal are the Utah Administrative Procedures Act, relevant portions of which are included in the Appendix.

Key authorities include *Peters v. Peters*, 394 P.2d 71 (Utah 1964) (except in limited divorce situations, once a matter is appealed the lower tribunal loses jurisdiction to enter further orders).

## STATEMENT OF THE CASE

a. **Nature of Case.** This appeal is a Request for Review of the orders of the Industrial Commission, and specifically the Order Denying Review issued on March 30, 1992. It is closely tied to a prior and still pending appeal of the same Industrial Commission case, Court of Appeals Docket Number 910413-CA. That other appeal has been fully briefed and is awaiting oral argument, to be held simultaneously with argument on this appeal.

b. **Course of Proceedings and Disposition at Agency Level.** The procedural history is as follows:

- \* February 6, 1989 or earlier - McCord filed her claim with

the Division. Tr. 41, 42. Trial exhibit 3.

\* 1990-1991 - For some unexplained reason, the proceedings languish and are not actively prosecuted.

\* February 12, 1991 - "No cause determination" is written on an official file document, after the Division loses contact with McCord for a considerable while.<sup>1</sup>

\* February-March, 1991 - The Division's investigation ends with an opinion that Maverik engaged in handicap discrimination.

\* March, 1991 - Maverik requests a *de novo* hearing.

\* May 15, 1991 - Formal hearing is held. Afterward, the parties submitted written closing arguments.

\* June 26, 1991 - Findings of Fact, Conclusions of Law and Order issued by Antidiscrimination Division Administrative Law Judge Lisa Michelle-Church. Attached as Appendix A. Although the decision called itself "final", the ALJ requested that the parties submit evidence and arguments on attorney fees to aid her in a later determination of attorney fees. No dollar amount of back pay or other damage was stated. Appendix A.

\* July 26, 1991 - Maverik files in this Court its first Petition for Review, assigning error to those Findings, Conclusions

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<sup>1</sup> In *Gregerson v. Board of Review*, 199 Utah Adv. Rep. 20, 21 (Utah App. Oct. 28, 1992), a five year delay was reason for reversal and remand for a new hearing, where the agency delay deprived the appeals court of a reviewable transcript. Here the matter has dragged on and on. Three years were consumed for the "investigation" alone. This, combined with the "no cause determination" reflected in the Commission file, should result in dismissal or reversal. Section 34-35-7.1(3)(b), Utah Code requires, "If no settlement is reached, the investigatory shall make a **prompt** impartial investigation of all allegations made in the request for agency action." Emphasis added.

and Order. See Docket Number 910413-CA. That appeal is ready for oral argument.<sup>2</sup>

All of **the events below occurred after the Appeal** (Request for Review) was filed and this Court took jurisdiction.

\* August 10, 1991 - Since the agency continues to assume and act as if it had jurisdiction, Maverik requested an opportunity for discovery on reasonableness of the attorney fees and costs (totalling about \$27,000) sought by McCord.

\* September 10, 1991 - ALJ issues Supplemental Order relating to attorney fees and costs. Appendix B. This order also claims to be "final", but **still no amount of damages is determined or awarded.**

\* October 10, 1991 - Maverik seeks Commission review of the Findings of Fact, Conclusions of Law and Order, and of the Supplemental Order.

\* February 28, 1992 - The Division issues its Order Denying Review, attached as Appendix C. In that order the Commission refused to examine its earlier orders, ruling that Maverik was one day tardy in its request for Commission reconsideration. Even though the first order asked for more information on attorney fees, the Commission treated the initial order (Appendix A) and the supplemental order regarding attorney fees (Appendix B) as two completely separate matters, each being a "final" order.

The Commission held that because no request for agency review

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<sup>2</sup> However, the Court has properly determined that these matters should be argued together after this one is ripe.

was filed within 30 days of the **first** order (an appeal to this Court was filed instead), it would not entertain reconsideration. It also refused to reconsider the **second** order, this time because Maverik mailed its request for agency review to the Commission on the 30th day (October 10, 1991) and it was not received by the Commission until the next business day (October 15, 1991).

\* March 19, 1992 - Maverik files its Request for Reconsideration of the February 26th Order Denying Review. Appendix D. Maverik pointed out that neither of the orders under consideration was final. Page 2. As a part of the request, Maverik moved for the one business day extension necessary to take away any question of timeliness.

**c. Disposition at Agency Level.**

\* March 30, 1992 - Commission issues its *Order Denying Request for Reconsideration*. Appendix E. **This is primarily the order appealed from here.** For the first time, the Commission **reverses itself on the issue of finality:** "Upon further review, we agree that the June 26, 1991 order **was not final** because the issue of attorney fees was reserved. . . ." Page 2 (emphasis supplied). This is the order appealed from here.

**Despite this flip flop on finality, the agency still denied reconsideration** because of alleged tardiness in requesting review of those two orders.

\* April 3, 1992 - Maverik files with the Commission its *Limited Request for Reconsideration*, setting forth the agency's

misunderstanding of law and procedure. Appendix F. This request explains Maverik's "good cause" for the one day extension. This request has not been ruled upon by the Commission.

\* April 6, 1992 - **Maverik** files its *Petition for Writ of Review* with this Court, which is **this appeal**. Appendix G. Maverik felt compelled to appeal the March 30th order, since the Commission called it (like every prior order) "final", and because that agency has been inconsistent in its holdings and treatment of finality of orders and time limitations.

d **Statement of Relevant Facts.**<sup>3</sup>

1. **Background.** Claimant Vickie McCord was employed for the first two weeks of October, 1988, as a part-time (three six-hour shifts per week) convenience store cashier. Tr. 38, 52, 55. She states that she has a "mitral valve prolapse" ("MPV"), a very common and usually symptom-free heart irregularity. Tr. 32, 34. However, there is no medical testimony in the record that she indeed has that condition. See, e.g., Tr. 33. McCord was "fine", and had no appreciable problems with the alleged MPV. Tr. 36, 47, 48, 104, 108.

Maverik manager Connie Jones interviewed and hired McCord. Tr. 38, 54. On the job application McCord indicated she had no heart

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<sup>3</sup> The facts in this particular appeal are important mostly just for background, with the possible exception of those having to do with the alleged tardiness of a reconsideration request.



condition or life-threatening problem. Exhibit<sup>4</sup> 1, tr. 39, tr. 146-147.

There was evidence that McCord had trouble reading gas pumps and often smelled of alcohol on the job, but also that she did well at the till. Tr. 44, 45, 58, 62, Exhibit 3, 135-136. Maverik's employees testified that termination was not the result of a handicap or perceived handicap.

McCord's duties included cashier, stocker, janitorial, public contact and record-keeping, and sometimes she would be required to work alone in the store. Tr. 53, 64.

On October 14, 1988 McCord was waiting on customers when she experienced agitation and chest discomfort while working a shift alone. Tr. 66-67. She told Jones for the first time about her MPV, and said that it frightened her. Tr. 68. McCord left for the emergency room, where she was checked and released. Tr. 68-71. The doctor released her to return to work. Tr. 71.

Although the details and reasons are disputed, Jones terminated McCord later that day. Tr. 72-82. Jones indicated she had heart problems in her family. Id. She terminated McCord because, among other things, she said she felt uncomfortable leaving McCord alone to work such a stressful job, both physically and mentally. Tr. 79-82, 94, 95. Exhibit 4. The ALJ found that termination was because McCord had a handicap or perceived handicap.

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<sup>4</sup> References to "Exhibits" are to those introduced at the formal agency hearing of this matter.

McCord made some effort to look for work, Tr. 110-113, Exhibit 8, but failed in several instances to follow up on jobs. Tr. 132-133. She got a janitorial job at Ashley Elementary School a couple of weeks after she was fired by Maverik, where she worked for two months. Tr. 111. **She earned more per hour and worked more hours per week than she had at Maverik.** Tr. 111. Eventually she quit her new job because of an unspecified illness. Tr. 112.

McCord has no goal of being a convenience store clerk as a career. Tr. 132. At trial, she did not know the difference between full time and part time employment, tr. 157, and had no idea what she earned during the years for which she claims Maverik owes her wages (late 1988 through 1991). Tr. 258. McCord attended school, and testified that she expected to begin working for the Forest Service. Tr. 158-159.

**2. Facts relating to timeliness.** The Commission's *Findings of Fact, Conclusions of Law and Order*<sup>5</sup> on June 26, 1991, and its Supplemental Order on September 10, 1991.

Maverik mailed its request that the Commission review its orders on October 30, 1992, and the document was date stamped at the Commission on the next business day. The Commission found this request to be late, and refused in its *Order Denying Reconsideration* (Appendix E) to grant an extension.

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<sup>5</sup> This document was timely appealed from in Docket # 910413-CA, which appeal remains outstanding and was pending when each of the Commission's subsequent orders was purportedly entered.

Maverik had requested the one business day extension in its *Request for Reconsideration*. But its "good cause" for an extension was best set forth in its April 3, 1992 *Limited Request for Reconsideration*. Appendix F. The good cause includes:

- \* the arbitrariness of the Commission's conduct,
- \* shortness of the extension sought,
- \* the fact the case was already on appeal,
- \* the vague and undefined nature of the term "issuance"<sup>6</sup>,
- \* the equally vague nature of the term "filing",
- \* the fact the days of "lateness" included a Saturday, a Sunday and Columbus Day, October 14th,
- \* The Supplemental Order was received by Maverik's counsel by mail, and the reconsideration request was actually received by the Commission about 28 days after its receipt by mail,
- \* the fact that at the time the ALJ issued her *Supplemental Order*, Maverik's counsel were employed on an emergency basis to defend a criminal defendant in a jury trial which began on September 16, 1992 and lasted for several days (ending in mistrial after six days). *State of Utah v. Stephen Cartisano & Challenger Foundation II*, 90-CR-47, Sixth Circ., Kane County.
- \* Maverik's counsel had another trial on October 3, 1991 before Judge Daniels of the Third District Court, along with several other court matters during the time period of September 18 through October 10 (the due date for filing the reconsideration request).

The Commission has never ruled on the *Limited Request for Reconsideration*.

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<sup>6</sup> However, an agency decision is considered "issued" for judicial review purposes on the date stamped on its face, here September 10th. *Dusty's v. Utah State Tax Commission*, 199 Utah Adv. Rep. 7, 9 (Utah App. Oct. 30, 1992). This new ruling does not prevent the previous vagueness of the agency's handling of the question from being a reason for agency extension of its own internal review.

## SUMMARY OF ARGUMENT

The Commission has entered various orders, all while their case was already on appeal. Its orders are void for lack of jurisdiction. In the alternative, the *Request for Review* was timely filed. Finally, Maverik showed "good cause" for its one day extension, and failure to extend the time constitute an abuse of discretion.

The ALJ has still never ruled on several issues, and to this day has still never specified the judgment amount. See argument in briefings of companion appeal, Docket # 910413-CA.

## ARGUMENT

1. Because the matter was on appeal the Commission lost jurisdiction to act. None of its orders or denials have any validity. After the Commission is reversed on the related appeal<sup>7</sup>, the matter can be remanded for appropriate action at that time.

Although Maverik filed a Request for Review and two Requests for Reconsideration (see appendices) with the Commission, the agency's lack of jurisdiction cannot be waived. Maverik filed those documents in an effort to protect itself from a "Catch-22",

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<sup>7</sup> Docket Number 910413-CA

following the Commission's procedure of necessity to avoid losing its rights.

In June, 1991 the Commission issued its ruling, purporting it to be final. When Maverik filed its timely appeal in July, the case was moved to this Court and remains here until remanded. See, Rules 3(g) and 14(a), Utah R. App. P., and compare with Rule 36, Utah R. App. P. (Issuance of Remittitur). An agency cannot exceed its jurisdiction.<sup>8</sup>

While a judicial appeal of agency action is pending, there can be no review or further action on the original award. *Farmer Motor Co. v. Smith*, 249 Ky. 445, 60 SW2d 929 (Ky 1933); *Feid v. Department of Labor & Industries*, 1 Wash.2d 430, 96 P.2d 492 (1939).<sup>9</sup>

**2. The time for reconsideration or appeal of the first order has passed.** Maverik chose to appeal, and the Commission's power to enter to orders or reconsider terminated. See 2 AmJur2d *Administrative Law* Sec. 530, including notes 18 and 19, and cases there cited.

The non-agency corollary of this rule has been affirmed in Utah. When the issues in a main judgment are appealed, "the

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<sup>8</sup> See, *Bosquet v. Howe Scale Co.*, 120 A. 171, 172 (Vt. 1923).

<sup>9</sup> See also, *Traders & Gen. Ins. Co. v. Durbin*, 119 SW2d 595 (Tex. Civ. App. 1938) and other Texas and Florida cases cited at 165 ALR 26 III(e). See also contra cases from Connecticut, Georgia, New Mexico and New Jersey at same location.

district court is indeed without jurisdiction as to them." *Peters v. Peters*, 394 P.2d 71, 73 (Utah 1964). "In this respect the divorce judgment is like other judgments." *Id.*

*Peters* was a divorce case. While the decree was on appeal, the trial court adjusted the rights of the parties based on changed circumstances. The Supreme Court held that this was proper only because of the unique nature of family law, and because there had been a change of the family circumstances. A copy of *Peters* is attached as Appendix H. It clearly operates on the assumption that filing an appeal robs the trial court of jurisdiction until it is remanded.

Outside the divorce arena, once a case is appealed the trial court has no jurisdiction to modify the judgment, vacate it or enter another. *Davidson Chevrolet v. City and County of Denver*, 330 P.2d 1116, 1118 (Colo. 1958). The *Davidson* trial court was held to be in error for trying to reconsider its judgment after the appeal was already taken. In this matter, the Industrial Commission entered a supplemental judgment, denied review, denied reconsideration and changed its mind about the first judgment's finality, all after that judgment was taken up on appeal.

**3. The Commission has created a convoluted mess.** It should have abstained from all action once the appeal was filed. Having failed to abstain, the agency should have granted review, and later reconsideration.

The agency has acted in a way that is inconsistent and

confusing at best, and an irrational pattern of conduct at worst.  
The Commission has:

With regard to the first appeal,

- \* found handicap discrimination without properly considering what a "handicap" is,

- \* entered a "final" order that sets forth no damage amount (which it still has not calculated), and which reserves the attorney fee issue for further determination,

- \* awarded an attorney fee amount that bears no relationship to any possible damage award (if one is ever set).

With regard to this appeal,

- \* first argued that no Request for Review by that agency was timely filed, refusing to consider that which was filed, even though the time limit for such a request is not jurisdictional,

- \* argued that the initial order was final and unappealable, so this Court had no jurisdiction over the first appeal,

- \* then entered a supplemental order awarding attorney fees (query: "supplemental" to a final order?), still stubbornly asserting that the original order was final,

- \* then refused to review that order because Maverik's request was mailed on the due date rather than received,

- \* implied that the reason it could not extend the time was because of Section 34-35-7.1( 11)(b) Utah Code does not permit it, Appendix C, page five.

- \* later acknowledged that the above section only prohibits the agency from extending the time for **judicial** review, Appendix E,

page two,

\* then failed to find good cause for the one business day extension of time Maverik sought, Id.,

\* at the same time (in its fourth formal and again "final" order) reversed itself, holding, "Upon further review, we agree that **the June 26, 1991 order was not final** because the issue of attorney fees was reserved . . . ." Appendix E, page two, emphasis added,

\* gone on in the same order to hold that notwithstanding this "concession" as to finality of the very first order, Maverik was without a remedy for alleged late filing of a request to reconsider that very order, and its "supplemental" order,

\* never yet explained away or reconciled how its decisions can be final or valid without ever determining a damage amount,

\* never once distinguished or even dealt with the landmark case on handicap discrimination,<sup>10</sup> nor even mentioned it.<sup>11</sup>

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<sup>10</sup> McCord also entirely ignores *Salt Lake City Corp. v. Confer*, 674 P.2d 632 (Utah 1983). *Confer* (Appendix H) holds that handicap discrimination cannot exist unless the job is a "major life activity." The privilege of worker at a particular kind of job or for one employer is not a "major life activity." Id. at 635. By requiring a "major life activity" the legislature avoided making a discrimination lawsuit out of every termination based on a physical characteristic. *Confer*, 674 P.2d at 636. McCord denied that her goal or chosen occupation is convenience store clerking. Tr. 132. Without mentioning *Confer*, the ALJ ruled that working is a major life activity, so each job loss constitutes interference with a major life activity. This is directly against *Confer's* holding.

<sup>11</sup> *Confer* observes:  
Most or all persons have some physical or mental deviations from a norm or from personal or employer aspirations. Considerations of height, weight, sensory



The Commission has Maverik in a "catch 22". To issue an order, repeatedly say it is final, and then months later decide that it was not final after all, has created minor chaos in this case. Yet the agency and McCord would both have the Court dismiss both of these appeals. To allow such agency error to deny Maverik its well-asserted appeal rights would violate the open courts provision of Article I Sec. 11 of the Utah Constitution, as well as the due process clause of United States Constitution, Amendment XIV.

Maverik has filed two appeals to this Court, both of which were timely. Maverik has moved to consolidate them, and the Commission has requested the same. How can either appeal be dismissed?

#### **4. The Request for Review was timely submitted.**

This issue is not determinative of the appeal, since the Commission had no jurisdiction to enter orders once the appeal was filed. See arguments one and two above. However, it is set forth in the event

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abilities, speech, pulse rate, blood pressure, and a whole variety of measures of mental ability are only a few characteristics whose variations can be deemed 'impairments' . . . . If the Legislature had intended that all employer decisions based on any such impairments would be forbidden as discrimination against the handicapped . . . the statutory definition should have stopped with the word 'impairment'. Instead, the definition was limited to those impairments that 'substantially' limit a 'major life activity'.  
*Confer, supra, 674 P.2d at 636.*

the Court finds to the contrary.

It is necessary to again note the specific event dates involved here.

\* June 26, 1991 - ALJ Findings, Conclusions and Order, calling itself "final" but asking for attorney fee evidence. Appendix A.

\* July 26, 1991 - Maverik files first appeal (910413-CA).

\* **September 10, 1991 - ALJ's Supplemental Order** (adding attorney fees and costs) **mailed** to Maverik counsel. Appendix B. This order also calls itself "final".

\* **October 10, 1991 - Maverik requests review**, filed and served **by mail**, and was received by the Commission on October 11.

\* February 28, 1992 - Commission's Order Denying Review, Appendix C, ruled Maverik tardy, and affirmed the initial July 26, 1991 order and its September 10, 1991 supplemental order.

\* March 19, 1992 - Maverik files its Request for Reconsideration of that order. Appendix D.

\* March 30, 1992 - Commission's *Order Denying Request for Reconsideration*. Appendix E. (Appealed from here).<sup>12</sup>

\* April 3, 1992 - Maverik files its *Limited Request for Reconsideration*, explaining "good cause" for an extension.<sup>13</sup>

\* April 6, 1992 - Maverik files this *Petition for Writ of Review*. Appendix G.

Rule 6(e), URCP provides for an extra three days to respond to a mailed document. The Supplemental Order was mailed to Maverik's counsel. The Utah Rules of Civil Procedure apply in "all special

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<sup>12</sup> This is the order in which the Commission suddenly, after months of behaving and announcing to the contrary, reverses itself on finality: "Upon further review, we agree that the June 26, 1991 order was not final because the issue of attorney fees was reserved. . . ." Appendix E, Page 2. Despite this flip flop on finality (or, as the agency refers to it, this "concession"), the agency still denied reconsideration because of tardiness.

<sup>13</sup> This request is still pending before the Commission, despite passage of eight months.

statutory proceedings" unless specifically excluded by the applicable statutory scheme. Rule 1(a), URCP.<sup>14</sup>

"Filing" must occur before or within a "reasonable time" **after** service. Rule 5(d), URCP. This does not apply to jurisdictional acts, such as filing a complaint or notice of appeal. See, Rule 4 and 5(a), URCP, and Rules 4 and 14, Utah R. App. P.; *Isaacson v. Dorius*, 669 P.2d 849 (Utah 1983); *Silva v. Department of Emp. Sec.*, 786 P.2d 246 (Utah App. 1990). **"Service by mail is complete upon mailing."** Rule 5(b)(1), URCP.<sup>15</sup> See general discussion in Fed. Proc. L. Ed. Section 65:138-139.<sup>16</sup>

Since service is complete if made by mail, and filing must occur within a reasonable time thereafter, the request for reconsideration served on McCord's counsel by mail on the 30th day, and arrived at the Commission for filing on the very next business day.

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<sup>14</sup> But see *Entre Nous Club v. Toronto*, 4 Utah 2d 98, 287 P.2d 670 (Utah 1955), holding that the Rules do not apply to a proceeding before an administrative body seeking to regulate activities burdened with a public interest. Here the rights litigated were private.

<sup>15</sup> The Commission's only argument for not applying the Rules of Civil Procedure to help define "filing" a request in an ongoing case, is that "Section 63-46b-12(1)(a), clearly establishes the timing standard for this administrative process." Appendix E, page 6. However, that statute merely states that an aggrieved party may "file" its "written request for review within 30 days after the issuance of the order . . ." It begs the question of what it means to "issue" an order or "file" a request.

<sup>16</sup> "Appellants' failure to **file** the motion within this period thus did not affect its timeliness" so long as it was filed within a reasonable time after **service**. *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 887 (D.C. Cir. 1987), notes 51 to 55.

Mailing of a request must be sufficient, since the statute actually requires that it "be sent by mail to the presiding officer and to each party". Section 63-46b-12(1)(b)(iv), Utah Code. There is no language even allowing for filing in person. If filing is expressly offered only by mail, Maverik's service and filing is adequate. In a analogous situation, the Commission has ruled that even an initial formal charge of handicap discrimination may be filed by regular mail, and "[t]he charge shall be deemed filed as of the date of the postmark, if filed by regular mail . . . ." R486-1-2(f) and (g), Utah Administrative Code. The statute merely states that the opening request for agency action must be "filed" within 180 days after the alleged discriminatory practice. Section 34-35-7.1(1)(a), Utah Code.

This Court has recently considered a timeliness issue very similar to this one, and yet different in a most significant way. *Dusty's v. Utah State Tax Commission*, 199 Utah Adv. Rep. 7 (Utah App. Oct. 30, 1992). In *Dusty's* the Court was faced with a Petition for Review by this Court that was mailed<sup>17</sup> on the 30th day after an agency ruling, rather than a Request for Review by the agency itself, as we have here.

*Dusty's* pointed out that the petitioner there could not have its time extended, because Section 63-45b-22, Utah Code provides that the Commissioner may extend all time limits "except those time periods established for judicial review," cited in 199 Utah Adv. Rep. at 8-9. Emphasis altered from citation. *Dusty's* pointed out

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<sup>17</sup> It was received by the Court on the 33rd day.

that there may be a different standard in determining timeliness of a request for agency action, as opposed to judicial reviews. 199 Utah Adv. Rep. at 9.

6. The Commission abused its discretion in refusing to grant Maverik's requested one day extension. Even if the statute and rules make the request a day late, clearly the agency abused its discretion by failure to grant Maverik's request for a one day extension. The Commission has not adequately dealt with the series of reasons which Maverik believes constitute "good cause."<sup>18</sup>

7. The judgment amount is still unknown. As stated in Maverik's briefs, in the related appeal, no dollar amount has been set. How, can the Commission possibly be upheld? How can the Commission rule that Maverik has failed to take some post-order step in a timely manner?

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<sup>18</sup> See Appendix F. The good cause includes the arbitrariness of the Commission's conduct, shortness of the extension sought, the fact the case was already on appeal, the vague and undefined nature of the term "issuance", the equally vague nature of the term "filing", the fact the days of "lateness" included a Saturday, a Sunday and Columbus Day, October 14th, The Supplemental Order was received by Maverik's counsel by mail, and the reconsideration request was actually received by the Commission about 28 days after its receipt by mail, the fact that at the time the ALJ issued her *Supplemental Order*, Maverik's counsel's heavy workload, including emergency involvement in a high profile criminal defense in Kane County,

Further, since the first appeal was filed (and in the midst of briefing) **the Commission reversed itself**. "Upon further review, we agree that the June 26, 1991 order was not final because the issue of attorney fees was reserved. . . ." *Order Denying Request for Reconsideration*, March 30, 1992, page 2, Appendix E.

Under precisely the same rational, failure to calculate or otherwise establish a damage amount (or to even make findings which would permit an educated guess as to damages) prevents each of the Commission's orders from being valid even now. "If the findings of fact in a case are incomplete, the court may order the trial court or agency to supplement, modify, or complete the findings . . . The court may also order a new trial or further proceedings to be conducted." Rule 30(a), Utah R. App. P.

**8. The Agency's errors are substantial and harmful.**

The Court has made clear what the standard of review is, as is summarized in Section 63-46b-16, Utah Code (Utah Administrative Procedures Act). Evidence in the record favorable to both sides of the case is looked to. *Stewart v. Board of Review*, 185 Utah Adv. Rep. 30, 32 (April, 1992). The requirement of showing that an error prejudiced a claimant does not mean any deference is afforded to the agency. Official Comments, Sec. 63-46b-16(4).

Indeed, the Court may decide the agency has erroneously interpreted the law if the Court merely disagrees with the agency's interpretation. *Id.*, cited with approval, *Morton International, Inc. v. Auditing Div.*, 814 P.2d 581, 584 (Utah 1991), note 3. On

basic issues of statutory interpretation like defining a "substantial" impairment of a "major life activity", no deference is given to the agency's legal conclusions. *Savage Industries v. State Tax Com'n.i*, 811 P.2d 664, 668, 670 (Utah 1991). An error is harmless only if it so inconsequential that there is "no reasonable likelihood that the error affected the outcome of the proceedings." *Morton*, *supra*, 814 P.2d at 584.

9. **McCord is entitled to a trial *de novo*.** This used to be the procedure. Sec. 34-35-8, Utah Code (Repealed, 1990)<sup>2</sup>, construed in *Univ. of Utah v. Industrial Com'n.*, 736 P.2d 630, 632 (Utah 1987). Since evidentiary rules are relaxed, discovery is limited, no jury right is afforded and procedure is very relaxed, due process requires a new trial before a real court. See, e.g. Art. I Sec. 11, Utah Constitution (open courts provision).

Maverik is entitled to have its remedy "in due course of law, which shall be administered without denial . . . and no person shall be barred from . . . defending before any tribunal in this State, . . . any civil cause to which he is a party." *Id.* See also, Art. I Sec. 10, Utah Constitution (trial by jury). The appeal procedure used here, though arguably supported by statute, is unconstitutional.

The process afforded to Maverik did not protect its due process rights. Questions regarding whether the Commission has

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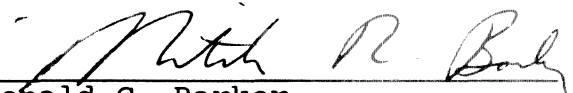
<sup>2</sup> The termination claimed to be discriminatory occurred in **October, 1988.**

afforded a petitioner due process are questions of law. The determinations are entitled to no deference. *Lopez v. Career Service Review Board (Indus. Com'n.)*, 188 Utah Adv. Rep. 19, 20 (Utah App., May 27, 1992).

## CONCLUSION

The law and facts require reversal. The Commission had no jurisdiction to do what it has done. Wherefore, Maverik requests that the award to McCord be vacated, and/or that the matter be remanded for a new trial. Further, attorney fees and costs should be awarded to Maverik pursuant to Sec. 34-35-7.1(9), Utah Code.

DATED the <sup>3rd</sup> day of December, 1992.

  
Ronald C. Barker  
Mitchell R. Barker  
David C. Cundick

## CERTIFICATE OF SERVICE

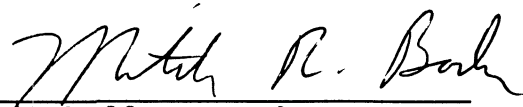
I hereby certify that on the <sup>8th</sup> day of December, 1992, I caused a true and correct copy of the foregoing to be mailed, postage prepaid, or hand delivered, to:

James W. Stewart, Esq.  
JONES, WALDO, HOLBROOK & McDONOUGH  
1500 First Interstate Plaza  
170 South Main Street  
Salt Lake City, Utah 84101

Benjamin Sims, Esq.  
INDUSTRIAL COMMISSION OF UTAH  
160 East 300 South #300  
Salt Lake City, Utah 84111



I further certify that I lodged a prior draft of this brief with the Court of Appeals by postage prepaid mail on December 3, 1992.

  
\_\_\_\_\_  
Mitchell R. Barker

## APPENDIX A

*Findings of Fact, Conclusions of Law and Order*

INDUSTRIAL COMMISSION OF UTAH

UADD Case No. 89-0031

VICKY ANN MCCORD,	*	
	*	FINDINGS OF FACT,
Charging Party,	*	
	*	CONCLUSIONS OF LAW
vs.	*	
	*	
MAVERIK COUNTRY STORES,	*	AND ORDER
	*	
Respondent.	*	
	*	
* * * * *	*	

HEARING: Hearing Room 334, Industrial Commission of Utah,  
160 East 300 South, Salt Lake City, Utah on May 15,  
1991, at 8:30 o'clock a.m. Said hearing pursuant  
to Order and Notice of the Commission.

BEFORE: The Honorable Lisa-Michele Church, Administrative  
Law Judge.

APPEARANCES: The Charging Party was present and represented by  
James W. Stewart, Attorney at Law.

The Respondent was present and represented by  
Mitchell Barker, Attorney at Law.

This is a claim of discrimination based on handicapped status brought by Vicky McCord against Maverik Country Stores in connection with her termination of employment. The Charge was filed with the Utah Anti-Discrimination Division on October 24, 1988. The Division issued its Determination on January 24, 1991 finding that Respondent had violated the Utah Anti-Discrimination Act of 1965, as amended, and issued an Order on the same date requiring Respondent to conciliate the issue. On February 15, 1991, Respondent requested a formal hearing before the Commission on the Charge, and the request was granted.

A de novo evidentiary hearing was held, during which sworn testimony and exhibits were presented. During the hearing, several rulings were made from the bench, including a denial of Respondent's oral Motion for Summary Judgment at the close of Charging Party's case. The Administrative Law Judge also found that Respondent's corporate officials received adequate notice of the Charge and subsequent investigation through copies to the

EXHIBIT

VICKY MC CORD  
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corporate office. Respondent argued that a handwritten notation by an unidentified person of "no cause determination" on a letter dated February 6, 1991 constituted a finding of no cause by UADD (Exhibit A-16), but the Administrative Law Judge ruled that the UADD's actual Determination, dated January 24, 1991, was the only binding agency action on the merits. The parties expressly reserved the right to brief the question of attorney's fees following the issuance of an Order on the merits.

At the conclusion of the evidentiary hearing, the matter was taken under advisement by the Administrative Law Judge and the parties were given time to submit simultaneous closing briefs. Having received said briefs, and having been fully advised in the premises, the Administrative Law Judge now enters the following Findings of Fact, Conclusions of Law, and Order.

#### FINDINGS OF FACT:

Vicky Ann McCord (McCord) was hired as a clerk by Maverik Country Store on September 30, 1988. She was interviewed and hired by Maverik's Store Manager, Connie Jones (Jones.) Jones had the authority to hire and fire employees on behalf of Maverik, based on her testimony and that of her supervisors. McCord's position was part-time, working six hour shifts, four days per week at \$3.35 per hour. She worked eight shifts during her two weeks of employment, Exhibit A-17. She was trained by Jones and another employee, Suzie Jenkins (Jenkins.) Her duties including cashiering, stocking shelves, some bookkeeping and customer service.

At the time of hiring, McCord filled out an employment application (Exhibit A-1), which included a question concerning physical abilities: "Do you have any respiratory, circulatory ailments or heart trouble or other physical condition or handicap which may limit your ability to perform the job for which you are applying?" McCord checked the box marked "no."

The evidence demonstrates that McCord had been diagnosed with a heart condition known as "mitral valve prolapse" during January, 1988, while living in California. This diagnosis followed an episode of tightness in her chest and a racing heartbeat. She consulted a Dr. Watkins, whose opinion is not contained in the evidence. McCord's recollection of that consultation was that the condition did not present any restrictions on her lifestyle or employment. She was given a "beta blocker" medication and experienced no further problems.

The Administrative Law Judge takes judicial notice of the generic information on mitral valve prolapse which was placed into the record by stipulation of the parties as Exhibit A-11. Said information states, in part, that "mitral valve prolapse is a

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ORDER  
PAGE THREE

common and usually benign heart condition... An estimated 4 percent to 7 percent of the population has MVP... Because MVP is so common, some authorities believe that the condition is simply a normal variant in heart structure, rather than a disease as such." Evidence was also submitted from Dr. Ace Madsen, who examined McCord after her termination, stating that McCord "is not at risk because of her heart problems in regard to her working at her job." (Exhibit A-7) Dr. Madsen further stated that the mitral valve prolapse problem, "should not interfere with any athletic or work related endeavors."

On October 14, 1988, McCord reported for her shift at noon. Jones was working in the store office. McCord began working but felt some tightness in her chest and grew increasingly uncomfortable. She asked Jones if she could leave the store and go to the hospital to get her heart checked. In response to Jones' questions, she disclosed the mitral valve prolapse condition. Jones agreed to allow her time off to seek medical attention.

At the hospital, McCord was examined and her heart was monitored (Exhibit A-18.) McCord testified that the emergency room doctor indicated her heart was fine, and suggested a change of her "beta blocker" medication. After giving her a new prescription, he released her to return to work.

While McCord was at the hospital, Jones referred to McCord's application and noted that no heart condition had been disclosed. Jones later called the hospital to check on McCord, and could not obtain any information. McCord called Jones approximately two hours later and offered to resume her shift. Jones told her to stay home and rest. Jones then called McCord back and told her she needed to come in to the store and discuss the situation with Jones. McCord grew apprehensive and asked why. Jones stated that she would prefer not to discuss the matter on the telephone, but she went on to say that Jones' mother had died from heart problems, and her son had recently had heart surgery. Jones commented that she was concerned about the seriousness of McCord's heart problem.

The parties dispute whether or not McCord then came into the store for a subsequent discussion with Jones, or whether the termination of employment took place by telephone. In either event, a discussion was had between Jones and McCord later that day concerning McCord's heart condition. Jones asked McCord why she did not disclose the heart condition on her application. McCord responded that she did not believe it presented any restrictions on her performance of the job, and she did not consider it life-threatening. Jones then reiterated her statements about Jones' mother and son having heart problems, and stated she would be afraid to leave McCord in the store alone. McCord stated that she

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did not perceive her condition to be as serious as that of Jones' mother or son. Jones then terminated McCord's employment with Maverik, stating that she would "do better somewhere else."

On the same day, Jones prepared a Record of Employee Counseling form as required by Maverik policy (Exhibit A-4) which states that McCord was terminated, and described the circumstances in an attached handwritten letter. That letter states in part:

I told her I would worry about her being on the job alone. She said it would not happen again and I then told her how could she make that guarantee when she had to leave earlier and said she would not remain on the job.

I also told her my sympathies were with her as my son had had open heart surgery (sic) July 1st and my mom had died of heart problems and complications following surgery. At this time I told her she had not mentioned this at the interview when asked if she had medical problems that would interfere with her doing her job.

I then told her it would be best if she looked for other less stressful employment.

Jones testified in the hearing that the reasons she stated in Exhibits A-4 and A-5 were the actual reasons she made the decision to terminate McCord. Exhibit A-5 is Jones' response to the Anti-Discrimination Division investigation. It states in pertinent part:

The day I terminated Vicki it was due to many things, all relating to her inability to handle stress on the job and do her job accurately...

According to Vicki she told me in the office that her heart problem was sometimes brought on by stress. A convenience store clerk is under nothing but stress. Not only is the pace fast, but you are responsible for stocking, cleaning during your shift, dealing with customers and running the cash register...

My opinion at the time I terminated Vicki was that both physically and mentally she would be more comfortable in a job that had a slower pace.

There was some testimony at the hearing concerning McCord's job performance. Both Jones and Jenkins testified that McCord had difficulty reading the gasoline pump meters correctly. McCord admitted this problem but added that Jones and Jenkins reassured her that other employees had the same problem during the first few weeks. Jenkins and Jones testified that each had customers complain about the smell of liquor on McCord's breath during work,

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ORDER  
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and they smelled it also. Jones stated that she asked McCord on one occasion if she had been drinking and she denied it. McCord denied under oath the use of alcohol before working. Jones and Jenkins testified that McCord was accurate in her cash register till, and McCord recalled having been complimented on her accuracy.

Despite the above comments, Jones did not mention any claimed job performance problems with McCord during the termination discussion. That discussion centered around Jones' perception of a heart problem. The Record of Employee Counseling which documented the termination did not state any other reason for counseling, although it contained blanks for such reasons as "intoxication," "personal conduct," "unsatisfactory work performance," and "violation of company rules." (Exhibit A-4) It also contains a statement that McCord's performance was "average." There is no documentation that Jones ever counseled or disciplined McCord concerning the performance issues described above.

Substantial testimony was taken on such issues as the other handicapped employees working for Maverik, and the employment history of McCord prior to this job, but such matters are deemed not relevant to the claim of handicapped discrimination. Respondent's witnesses Robert Child and Dana Dean, both senior Maverik employees to Jones, testified that Jones did have authority to hire and fire employees, and that she acted within the scope of her authority with regard to McCord.

After being terminated by Maverik, McCord pursued other employment. She testified and introduced evidence showing that she made application at twenty-six places of employment during 1989-1991 (Exhibit A-8). She did briefly work at Ashley Elementary School as a janitor from November, 1988 through January, 1989. She anticipates working for the Forest Service this year. There was also some attenuated testimony at the hearing concerning the allegation that Maverik employees had made unfavorable statements of a personal nature about McCord to third persons in the Vernal, Utah area. There is, however, no direct evidence that Maverik or its employees ever interfered in McCord's ability to seek other employment.

Based on the testimony of Jones, it is apparent that Jones retains some hostile feelings toward McCord. She testified to making a derogatory personal comment about McCord while waiting to testify in the hearing. She also admitted during testimony that she did not consider McCord to be honest nor "a good person."

#### CONCLUSIONS OF LAW:

Utah law provides that it is a discriminatory or prohibited employment practice for an employer to terminate any person,

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ORDER  
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otherwise qualified, because of handicap, U.C.A. 34-35-6. "Handicap" is defined in the rules promulgated thereunder as "a physical or mental impairment which substantially limits one of more of an individual's major life activities. Being regarded as having a handicap is equivalent to being handicapped or having a handicap," R486-1-2(F)(1).

"Major life activity" is defined to include experiencing difficulty in "securing, retaining, or advancing in employment because of a handicap," R486-1-2(F)(3). "'Is regarded as having an impairment' means (a) has a physical or mental impairment that does not substantially limit major life activities but is treated as constituting such a limitation; (b) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such an impairment; or (c) has none of the impairments listed in the definition of physical or mental impairment above but is treated as having such an impairment," R486-1-2(F)(6).

The statute and regulations further provide that "An employer shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program," R486-1-2(J)(1).

Applying the above law to the facts, the Administrative Law Judge finds that Maverik Country Stores engaged in a prohibited employment practice under Utah law when it terminated Vicky McCord. Maverik's termination of McCord rested on its perception of McCord as handicapped. There was no evidence that McCord's actual physical condition of mitral valve prolapse constituted a physical or mental impairment, but it was "treated as constituting such a limitation," R486-1-2(F)(6)(a) and further, did "substantially limit major life activities only as a result of the attitudes of others toward such an impairment," R486-1-2(F)(6)(c).

Specifically, Jones' attitude toward persons with heart conditions was shown to be discriminatory. McCord has met her burden of proof by showing that she was terminated from employment, the termination was due to her employer's perception of her as handicapped, she was otherwise qualified to perform the work (since no other reason was given for termination at the time it became effective), and her employer made no attempt or inquiry regarding possible accommodations. Her employer did not even seek to obtain medical advice about the perceived handicap -- its symptoms, treatment or how it would affect McCord's job performance -- before making the immediate decision to terminate.



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Maverik asserts that McCord failed to meet her burden because she is not handicapped, and argues the very limited medical evidence in support of this position. The Administrative Law Judge concedes that McCord's condition of mitral valve prolapse in this instance does not appear to present any impairment to McCord's ability to perform her job. Nevertheless, the law is clearly aimed at both actual and perceived handicaps. This is a case where Manager Jones' perception of handicap (based on Jones' emotional and unsubstantiated analogy to her own family situation -- not on any medical evidence) was discriminatory in itself.

Maverik also urges the Commission to find that "convenience store clerking is not a substantial life activity," Respondent's Closing Brief, p. 6, and therefore, discrimination cannot be found. Maverik's counsel misses the point of the anti-discrimination laws and regulations. Mc Cord testified that she pursued permanent employment with Maverik as a means of supporting herself and her son. It would be absurd for the Commission to engage in an analysis of which types of employment are "career" or "non-career," as Respondent argues. "Employment" is clearly listed as a category in the litany of "major life activities" set forth by Rule, and McCord's employment was terminated.

Maverik asserts that McCord's performance problems were the actual reason for termination. This is not supported by the evidence. Manager Jones alone made the decision to terminate McCord's employment. The best evidence of her basis for this decision is the contemporaneous document she prepared at the time, Exhibit A-4, Record of Employee Counseling, and the reasons she gave McCord in the termination discussion. Both state the reason as McCord's heart problem, and Jones' non-medical perception that it was related to job stress. Subsequently, Jones has stated that factors such as pump reading problems, general nervousness, and possible drinking contributed to the decision to terminate. Since none of these was discussed with McCord or documented by Jones prior to termination and this claim being filed, such suggestions lack credibility. Further, McCord had only worked at Maverik for two weeks prior to termination, and there is no indication that these factors had led Jones to consider termination or even discipline, until the heart condition became known.

Finally, Maverik claims that McCord is not otherwise qualified to perform the job. McCord was presumably performing the job up until the moment she asked for the time to go to the hospital, and her qualifications had not been questioned at that point. At termination her performance was rated by Jones as "average." For Maverik to suggest in hindsight that McCord's qualifications were lacking begs the question.

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McCord has suffered damages as a result of Maverik's prohibited employment practice, in that she has been deprived of wages and benefits of employment. Utah law states that if an employer is found to have engaged in a prohibited discriminatory practice, the Commission shall "issue an order requiring the respondent to cease any discrimination or prohibited employment practice and to provide relief to the complaining party, including reinstatement, back pay and benefits, and attorney's fees," U.C.A. 34-35-7.1(9).

Awards of back pay are governed by federal law, 42 U.S.C. 2000e-5, and the purpose thereof is to make the party whole for injuries suffered through discrimination. In this case, back pay is calculated at a rate of \$3.35 per hour for 24 hours per week, or \$80.40 per week. The period of back pay runs from the date of termination through the date of this Order. While McCord argues for the use of incremental raises, based on those received by another employee, the Administrative Law Judge does not find that probative in McCord's case. The evidence is too speculative to establish that McCord would have, in fact, qualified for these incremental raises by passing the tests required. The Administrative Law Judge does incorporate by reference the increases in federal minimum wage, effective April 1, 1990 to \$3.80 per hour, and effective April 1, 1991 to \$4.25 per hour, for purposes of calculating the back pay award (Exhibit A-12.)

Respondent asks the Commission to terminate McCord's back pay award as of the date she secured employment as a janitor for Ashley Elementary School in November, 1988. This employment lasted only two months. A review of pertinent case law demonstrates that victims of discrimination do have a duty to mitigate their back pay damages by actively seeking other suitable employment, and "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable," 42 U.S.C. 2000e-5(g). Therefore, McCord's back pay award must be reduced by all earnings from interim employment, including Ashley Elementary School.

However, the Ashley Elementary employment does not toll the period of back pay since McCord's employment there was not terminated voluntarily. Consistent with case law enunciated in Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269 (1985), "the [back pay] period is tolled when the quit is motivated by personal reasons unrelated to the job or as a matter of personal convenience," Id. at 1278. Since McCord was required to quit Ashley Elementary due to illness beyond her control, that period of employment should operate as an offset only against the back pay award.

VICKY MC CORD  
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McCord argues that front pay ought to be awarded in lieu of reinstatement with Maverik Country Stores, due to the hostility shown McCord by Jones and other employees during the pendency of these proceedings. The Administrative Law Judge finds that reinstatement is still an appropriate remedy, given the fact that Jones no longer works for Maverik, substantial time has passed since these incidents and presumably, reinstatement could be arranged in another Maverik location or capacity.

McCord is entitled to the value of employment benefits she has lost as a result of the discriminatory termination. No proof was introduced of the specific Maverik benefit programs to which McCord could have been entitled, and therefore, none can be awarded based on the evidence in the record.

The parties reserved the question of an appropriate attorney's fees award, pending this Order, and shall address that in supplemental briefs to the Commission.

ORDER:

IT IS HEREBY ORDERED that Maverik Country Stores is found liable of a discriminatory or prohibited employment practice in the nature of handicap discrimination against Vicky Ann McCord, and that Maverik Country Stores cease any discriminatory or prohibited employment practices immediately;

IT IS FURTHER ORDERED that Maverik Country Stores provide full relief to Vicky Ann McCord, including reinstatement to employment in a position commensurate with her qualifications, with full rights, privileges and protections of employment;

IT IS FURTHER ORDERED that Maverik Country Stores pay to Vicky Ann McCord back pay, at the rates specified above, from the date of unlawful termination until the date of this Order, subject to all lawful offsets due to interim employment;

IT IS FURTHER ORDERED that Maverik Country Stores take such affirmative action as may be necessary to eliminate and keep from its environment any employment discrimination prohibited by law;

IT IS FURTHER ORDERED that Maverik Country Stores not retaliate against Vicky Ann McCord for having exercised her right to file this action;

IT IS FURTHER ORDERED that Maverik Country Stores pay a reasonable attorney's fee to counsel for Vicky Ann McCord, subject to both parties submitting written legal briefs on this question to

VICKY MC CORD  
ORDER  
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the Commission; McCord's counsel shall submit his brief on attorney's fees on or before twenty days from the date of this Order; Maverik's counsel shall submit a response brief, if any, on attorney's fees on or before twenty days thereafter.

IT IS FURTHER ORDERED that Maverik Country Stores take any other applicable and reasonable relief as may be necessary to restore Vicky Ann McCord to her rightful position.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

INDUSTRIAL COMMISSION OF UTAH

Lisa-Michele Church  
Lisa-Michele Church  
Administrative Law Judge

Passed by the Industrial Commission  
of Utah, Salt Lake City, Utah, this  
26<sup>th</sup> day of June, 1991.

ATTEST:

Patricia O. Ashby  
Patricia O. Ashby  
Commission Secretary

## **APPENDIX B**

*Supplemental Order*

INDUSTRIAL COMMISSION OF UTAH

Case No. UADD 89-0031

VICKY ANN MCCORD,

Charging Party,

vs.

MAVERIK COUNTRY STORE,

Respondent.

SUPPLEMENTAL  
ORDER

\* \* \* \* \*

On June 26, 1991, an Order was issued in the above case, finding that Maverik Country Store illegally discriminated against Vicky Ann McCord on the basis of a perceived handicap. The parties were granted additional time to submit legal briefs on the amount of legal fees to be awarded to the prevailing party, pursuant to U.C.A. 34-35-7.1(9). Said briefs and supporting affidavits have been received and reviewed by the Administrative Law Judge, who now enters the following Supplemental Order on the sole issue of attorney's fees.

FINDINGS OF FACT:

Charging Party's counsel has made application for \$25,400.50 in attorney's fees and \$1,536.26 in costs in connection with the prosecution of this claim. The attorney's fees represent the work of three attorneys, James Stewart, Kay Krivanec and Diane Abbeglen, at the hourly rates of \$125, \$80 and \$80, respectively. The costs involve mailing, transcribing, witness costs, phone calls, computer time and copying.

Respondent opposes the award of the attorney's fees as claimed, and alleges that the fees are overstated and unconscionable. They note that the entire damage award to Ms. McCord was only in the range of \$8,000, and the fee claimed far exceeds that amount.

The Administrative Law Judge has carefully reviewed the pleadings on this issue, and has considered the circumstances of the case itself, which she heard on behalf of the Commission. She has also reviewed Utah cases which provide guidance on the award of attorney's fees, including Trayner v. Cushing, 688 P.2d 856 (Utah 1984); Cabrera v. Cottrell, 694 P.2d 622 (Utah 1985) and Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988). The attorney's fees in this case are awarded on the basis of U.C.A. 34-35-7.1(9). Case law identifies the following key factors to consider in awarding attorney's fees: relationship of the fee to the amount

EXHIBIT

recovered, novelty and difficulty of the issues, overall result achieved, necessity of initiating a lawsuit to vindicate rights, Trayner, supra, efficiency of the attorneys in presenting the case, reasonableness of the number of hours spent on the case, customary fee in the locality, and the expertise and experience of the attorneys involved, Cabrera, supra. "The total amount of attorneys fees awarded in [a] case cannot be said to be unreasonable just because it is greater than the amount recovered on the contract," Cabrera at 625.

This was a relatively straightforward claim of handicap discrimination, which required a one-day administrative hearing. No pre-trial proceedings or pleadings were required. Very limited discovery was conducted, and the majority of the work for the attorneys on both sides consisted of preparation for, and attendance at, the actual hearing. It was necessary for Charging Party to initiate a formal proceeding to vindicate her rights, since the Respondent had not acknowledged its liability under the "cause" finding of the Utah Anti-Discrimination Division. The overall result obtained by Charging Party's counsel was successful, and the hourly rate billed by counsel was within the customary range for the Salt Lake City legal community. Charging Party's counsel was knowledgeable and competent in the area of employment discrimination law.

However, the Administrative Law Judge finds there was a lack of efficiency in presenting the case, and the number of hours spent on particular pleadings was excessive. A disproportionately large block of Charging Party's attorneys' time was spent preparing written closing arguments, and later, preparing the brief on attorney's fees.

This is regrettable, due to the fact that the Administrative Law Judge customarily hears only oral closing arguments, but herein made an accommodation to the parties' request and allowed written closing arguments. Parties in an administrative hearing are expected to come to the hearing prepared to make both opening and closing statements orally at the hearing. Certainly it was not envisioned that allowing a written, instead of oral, presentation would increase the Charging Party's total legal costs by a factor of nearly one-third. Moreover, such charges defeat the purpose of handling discrimination claims in an administrative forum, where judicial economy is a priority.

The Administrative Law Judge suspects that both parties could not resist the urge to relitigate the hearing itself by submitting extensive written closing arguments. This is very understandable in light of both attorneys' conduct during the eight-hour hearing,

VICKY ANN MC CORD  
SUPPLEMENTAL ORDER  
PAGE THREE

in which objections and arguments continually interrupted the flow of testimony, and there was a notable lack of cooperation between counsel on even the smallest evidentiary matters. The Administrative Law Judge acknowledges that those circumstances left the impression that perhaps the hearing testimony needed to be re-presented in written, summary form, and then re-argued as part of closing arguments. Unfortunately, this process required 34.10 hours of Mr. Stewart's time, and 36.75 hours of Ms. Krivanec's time, according to the fee affidavits submitted. That expenditure of time approaches the amount of hours spent in hearing preparation itself, and is found to be excessive.

Therefore, the attorney's fees claimed by Charging Party's counsel in connection with the written closing arguments are partially disallowed as follows: of the 34.10 hours spent by Mr. Stewart on closing arguments, two-thirds (23 hours) are disallowed; of the 36.75 hours spent by Ms. Krivanec on closing arguments, two-thirds (24 hours) are disallowed. This leaves Mr. Stewart with 106.10 total compensable hours and Ms. Krivanec with 64.40 total compensable hours.

The balance of the attorney's fees claimed include substantial time for preparation of the pleadings on the attorney's fee issue itself: 37.05 hours of Ms. Abbeglen's time at \$80.00/hour = \$2,960.00. As can be seen from the hearing transcript, the Administrative Law Judge was very interested in handling the attorney's fees issue in the simplest and least costly manner. She asked the parties if they could stipulate to merely submitting attorney's fees affidavits following her ruling, and not requiring a further hearing on that single issue. The parties so agreed, and again, it was not envisioned that by doing so, nearly \$3,000 would be spent on the preparation of those affidavits. (Respondent's counsel matched this lack of restraint by filing two separate legal briefs contesting the award.) Claims of attorney's fees are routine and commonly done by large firms such as Charging Party's counsel. It should not require more than a few hours of organizing and tabulating bills. The affidavits from other attorneys in similar practices are superfluous in an administrative forum, and are not necessary unless specifically requested by the ALJ.

Therefore, the attorney's fees claimed by Charging Party's counsel in connection with the legal fees claim are partially disallowed as follows: of the 37.05 hours spent by Ms. Abbeglen on the legal fees claim, two-thirds (25 hours) are disallowed, leaving 16.45 total compensable hours.



VICKY ANN MC CORD  
SUPPLEMENTAL ORDER  
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The remainder of Charging Party's legal fees are specifically found to be reasonable and supported by the evidence, and are awarded to Charging Party as a matter of statutory legal right. The costs have been examined closely and all appear to be related to the prosecution of this claim. They are not excessive and were reasonably necessary for case preparation; therefore, they will be awarded as claimed.

Finally, the Administrative Law Judge rejects the argument that Charging Party's fee is unreasonable because it far exceeds the damage award. Damage awards in employment cases are strictly limited to lost wages/benefits, and it is not reasonable to expect that Charging Party's counsel could have prepared and litigated this case for some fraction of a few thousand dollars. This is especially true in this case, where Respondent's counsel asserted many frivolous arguments unsupported by tenets of discrimination law. The principles at stake in a discrimination case render it more valuable to a Charging Party than a mere dollar figure, and attorneys' fees may exceed the actual damages in many employment cases.

CONCLUSIONS OF LAW:

The attorney's fees claim submitted by Charging Party's counsel is reasonable and supported by the evidence, with the exception of two-thirds of the hours spent on written closing arguments and two-thirds of the hours spent on legal fees affidavits and briefs. Following such deductions, Respondent shall be liable for Charging Party's attorney's fees and costs, pursuant to U.C.A. 35-34-7.1(9).

ORDER:

IT IS HEREBY ORDERED that Respondent, Maverik Country Store, pay the legal fees of Charging Party, Vicky Ann McCord, in connection with the handicap discrimination claim before this Commission, in the amount of \$19,731.00.

IT IS FURTHER ORDERED that Respondent, Maverik Country Store, pay the legal costs of Charging Party, Vicky Ann McCord, in connection with the handicap discrimination claim before this Commission, in the amount of \$1,536.26.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the

VICKY MC CORD  
SUPPLEMENTAL ORDER  
PAGE FIVE

date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

INDUSTRIAL COMMISSION OF UTAH

Lisa-Michele Church  
Lisa-Michele Church  
Administrative Law Judge

Certified on this 10th day of September, 1991.

ATTEST:

Patricia O. Ashby  
Patricia O. Ashby  
Commission Secretary

CERTIFICATE OF MAILING

I hereby certify that on the 11<sup>th</sup> day of September, 1991, the attached Supplemental Order in the case of Vicky McCord was mailed, postage pre-paid to the following persons at the following addresses:

Vicki McCord  
c/o Attorney James W. Stewart

Attorney James W. Stewart  
1500 First Interstate Plaza  
170 S. Main Street  
Salt Lake City UT 84101

Ronald C. Barker  
Attorney  
2870 S State St  
Salt Lake City UT 84115

INDUSTRIAL COMMISSION OF UTAH

  
June Kjelstrom, Paralegal  
Adjudication Division

/jsk

## **APPENDIX C**

*Order Denying Review*

cc Mm

THE INDUSTRIAL COMMISSION OF UTAH

UADD CASE NO. 89-0031

VICKY ANN MCCORD,	★	
	★	
Applicant,	★	
	★	ORDER DENYING
vs.	★	REVIEW
	★	
MAVERIK COUNTRY STORE,	★	
	★	
Defendants.	★	
	★	

The Industrial Commission of Utah (IC) reviews the Motion for Review of the administrative law judge's Order dated June 26, 1991 which was submitted by respondents. The authority for review is conferred by U.C.A. Section 34-35-7.1(11), and Section 63-46b-12.

This case involves a claim of discrimination based on handicapped status brought by Vicki Ann McCord against the respondent Maverik Country Stores (Maverik). The charge was filed with the Utah Anti-Discrimination Division (UADD) on October 24, 1988, and claimed a violation of the Utah Anti-Discrimination Act of 1965 by illegal termination of employment. The UADD confirmed the discrimination against Ms. McCord by its Order on January 24, 1991. Respondent requested a formal hearing before an administrative law judge (ALJ), and the request was granted. As a result of the hearing, Findings of Fact, Conclusions of Law, and an Order were issued by the ALJ on June 26, 1991. On September 10, 1991 the ALJ issued a supplemental order dealing with attorney fees. On October 15, 1991, the respondent requested review by the Industrial Commission of the ALJ's orders of June 26, 1991, and September 10, 1991.

On October 25, 1991, Ms. McCord filed a Memorandum in Opposition to Respondent's Request for Review of the June 26, 1991 Order stating that the respondent had not timely filed his Motion for Review with the IC in connection with the June 26, 1991 Order, and could not therefore contest its provisions.

The relevant facts are as follows. Ms. McCord was hired as a clerk by the Maverik Country Stores on September 30, 1988. She was interviewed and hired by Ms. Connie Jones, the store manager. Ms. McCord worked eight six hour shifts, four days per week at \$3.35 per hour during her two weeks of part-time employment. (Exhibit A-17). She performed cashiering, bookkeeping, customer service, and stocking shelves.

She had answered "no" to respondent's employment application question which asked her "Do you have any respiratory, circulatory ailments or heart trouble or other physical condition or handicap

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which may limit your ability to perform the job for which you are applying?" However, Ms. McCord had been diagnosed with a heart condition called "mitral valve prolapse" while living in California in January 1988 after she had tightness in her chest and a racing heartbeat. Ms. McCord related that her doctor had informed her that the condition required no changes in lifestyle or employment. She was prescribed a "beta blocker," and she had no further difficulties.

Both parties stipulated that, among others, "mitral valve prolapse is a common and usually benign heart condition...." Dr. Ace Madsen examined Ms. McCord after her termination, and determined that she was "not at risk because of her heart problems in regard to her working at her job." Exhibits A-11, A-7.

While working on October 14, 1988, Ms. McCord experienced some tightness in her chest and grew increasingly uncomfortable. She asked her supervisor, Ms. Jones, if she could go to the hospital to get her heart checked. Ms. McCord disclosed her mitral valve prolapse condition to Ms. Jones in response to questions.

While Ms. McCord was at the hospital, Ms. Jones checked Ms. McCord's application for employment. No heart condition had been noted by Ms. McCord. The doctor at the hospital indicated that Ms. McCord's heart was fine, but gave her a prescription for a change of beta blocker. Although Ms. McCord called about two hours later, and offered to complete the shift, Ms. McCord was told to stay home and rest.

It is not clear where the termination of employment took place. There is some dispute about whether the termination took place over the telephone or at the store, but Ms. McCord was apparently called or summoned to the store by Ms. Jones on the same day as the hospital episode. During several of the discussions between Ms. Jones and Ms. McCord which took place on that day, Ms. Jones stated that her mother had died from heart problems, and her son had recently had open heart surgery. During the termination discussion, Ms. Jones expressed concern about the seriousness of Ms. McCord's heart problems. Ms. Jones then asked Ms. McCord why she did not disclose the heart condition on her application. Ms. McCord replied that she believed that it presented no restrictions on her, and that she did not consider it to be life threatening. Ms. Jones responded that she (Ms. Jones) would be afraid to leave Ms. McCord in the store alone. She then terminated Ms. McCord's employment.

A Record of Employee Counseling form was completed by Ms. Jones which describes the circumstances of Ms. McCord's termination in a typewritten attachment. Exhibit A-4. This form and attachment show that Ms. Jones was greatly concerned about Ms.

VICKY MCCORD  
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McCord's heart problem, and the potential that Ms. McCord would have another medical episode under the stress created if she continued employment at Maverik. Ms. Jones wrote that "I then told her it would be best if she looked for other less stressful employment." Id.

Ms. Jones stated in response to an inquiry from the UADD during its investigation that "The day I terminated Vicki it was due to many things, all relating to her inability to handle stress on the job and do her job accurately...." Exhibit A-5. Again, it appears that Ms. Jones was focusing in on the stress factor.

At the hearing, some additional factors for termination were discussed: 1) Ms. McCord's difficulty in reading the gas pump meters; and, 2) allegations that customers and employees had complained about smelling alcohol on Ms. McCord's breath during work. Ms. McCord denied using alcohol before working, and Ms. Jones and another employee testified that Ms. McCord's cash register till was accurate. Significantly, none of these allegations were discussed during the termination interview, or were written on the termination form or attachment.

There is no question that Ms. Jones had the authority from Maverik to hire and fire Ms. McCord.

Ms. McCord testified and introduced evidence that after her termination she attempted to find employment at 26 employment locations during 1989-1991. Exhibit A-8. She worked for a short time as a janitor at an elementary school from November 1988 through January 1989. Although there was some testimony that Maverik employees had made unfavorable statements about Ms. McCord to other persons in the Vernal area, the ALJ found no direct evidence that Maverik or its employees had ever interfered with Ms. McCord's ability to seek other employment.

The ALJ then concluded as a matter of law that "Maverik Country Stores engaged in a prohibited employment practice under Utah law when it terminated Vicky McCord." The ALJ based this conclusion on Maverik's perception of Ms. McCord as handicapped.

There was no evidence that McCord's actual physical condition of mitral valve prolapse constituted a physical or mental impairment, but it was 'treated as constituting such a limitation,' ... and further, did 'substantially limit major life activities only as a result of the attitudes of others toward such an impairment....'

Order, ALJ at 6 (June 26, 1991), citations omitted.

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The ALJ further stated in her application of facts to her conclusions of law that Ms. McCord was otherwise qualified to perform the work.

The ALJ then ordered the following in favor of Vicky Ann McCord and against Maverik Country Stores:

1. Liability for a discriminatory or prohibited employment practice in the nature of handicap discrimination.

2. An order to Maverik to cease any discriminatory or prohibited employment practices.

3. Full relief to Ms. McCord including reinstatement to employment in a position commensurate with her qualifications, with full rights, privileges and protections of employment.

4. Payment of back pay calculated at \$80.40 per week for 24 hours per week with the period of back pay running from the date of termination through June 26, 1991 with increases in pay commensurate with increases in the federal minimum wage effective April 1, 1990 to \$3.80 per hour, and effective April 1, 1991 to \$4.25 per hour, subject to all lawful offsets due to interim employment.

5. An order to Maverik to take such affirmative action as may be necessary to eliminate and keep from its environment any employment discrimination prohibited by law.

6. No retaliation by Maverik against Ms. McCord for having exercised her right to file this action.

7. Payment of a reasonable attorney's fee by Maverik to counsel for Ms. McCord.

8. Maverik was to take any other applicable and reasonable relief as may be necessary to restore Ms. McCord to her rightful position.

9. And, finally, a notice that any Motion for Review of the foregoing shall be filed in writing within 30 days of June 26, 1991, specifying in detail the particular errors and objections, and that the order would be final and not subject to review or appeal unless such a filing were made.



VICKY MCCORD  
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## ISSUE ONE

### WHETHER MAVERIK COUNTRY STORES TIMELY FILED ITS MOTIONS FOR REVIEW?

The ALJ issued her initial Order on June 26, 1991. She then issued a supplemental order dealing only with attorney's fees on September 10, 1991. The Request for Review by Maverik was received by the IC on October 11, 1991. This request was not received within the 30 days after issuance of the initial order on June 26, 1991, as required by U.C.A. Section 63-46b-12(1)(a), and good cause for the delay has not been shown by Maverik under U.C.A. Section 63-46b-1(9). The latter statute states:

Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter, except those time periods established for judicial review.

Thus, the order of June 26, 1991 cannot be reviewed by the IC, and therefore becomes the final order of the IC with regard to the issues addressed within it. U.C.A. Section 34-35-7.1(11)(b).

With regard to the order of September 10, 1991 which related to attorney's fees, the filing by Maverik of its Request for Review was mailed by it on October 10, 1991, and was received by the IC on October 11, 1991. R486-1-4-5 (Utah Admin. Code) requires that a request for review be submitted in accordance with U.C.A. Section 63-46b-12.

Section 63-46b-12(1)(a) requires an aggrieved party to:

File a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule.

The operative portions of the statute above are "file a written request for review within 30 days...with the person..." and "after issuance of the order...." Since issuance of the order is the first in the sequence of events which triggers the 30 day period, the nature of issuance must be determined.

There is little case law construing the meaning of issuance, but what little there is indicates that issuance of an order is

VICKY MCCORD  
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synonymous with delivery or mailing. Sunnyside Nurseries, Inc. v. Agri. Labor Relations Bd., 156 Cal. Rptr. 152, 155, 93 C.A.3d 922. The Order of the ALJ shows that it was mailed on September 10, 1991. Therefore, the issuance took place on that date.

It has been suggested that Utah Rules of Civil Procedure (URCP), Rule 6(e) gives the aggrieved party an extra three days to file. This reliance is misplaced since Section 63-46b-12(1)(a) clearly establishes the timing standard for this administrative process.

Since Maverik's Request for Review was received on October 11, 1991, that is the date of filing. That date was on the 31st day after issuance, and was not timely. However, the IC will discuss the remaining issues as raised by Maverik for the benefit of the parties.

## ISSUE TWO

### WHETHER THE AMOUNT OF ATTORNEY'S FEES IS "ERRONEOUSLY HIGH, AND SHOULD BEAR SOME RELATION TO THE DAMAGES SOUGHT?"

U.C.A. Section 34-35-7.1(9) allows the ALJ to, among other actions, award attorneys' fees and costs. The ALJ awarded Ms. McCord's counsel legal fees of \$19,731, and awarded Ms. McCord \$1,536.26 for costs in connection with her claim before the IC.

Maverik asserted the issue of whether the fees were "erroneously high, and should bear some relation to the damages sought" in its Revised Memorandum Opposing Attorney Fee Award which was received by the ALJ on August 13, 1991. Ms. McCord's legal counsel had sought \$25,400.50 which was claimed to represent the work of three attorneys, James Stewart, Kay Krivanec, and Diane Abbeglen, at the hourly rates of \$125, \$80, and \$80, respectively. The ALJ reduced the fees to the amount noted in the immediately preceding paragraph.

The ALJ correctly used the factors to both award and to reduce the award based on case law which identified the following key factors to consider in awarding attorney's fees: relationship of the fee to the amount recovered, novelty and difficulty of the issues, overall result achieved, necessity of initiating a lawsuit to vindicate rights, efficiency of the attorneys in presenting the case, reasonableness of the number of hours spent on the case, customary fee in the locality, and the expertise and experience of

VICKI MCCORD  
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the attorneys involved. Supplemental Order of the ALJ, at 2 (Sep. 10, 1991).

Maverik asserts that Ms. McCord will recover approximately \$8,000, and that the attorney's fees are excessive when that recovery is considered. The amount in controversy is a factor only, and it generally takes as much time to try a discrimination case for an employee making a minimum wage as it does to try one for a supervisor receiving much more compensation. Cf. Dixie State Bank v. Bracken, 764 P.2d 985, 990 (Utah 1988); Cabrera v. Cottrell, 694 P.2d 622 (Utah 1985).

Considering all relevant factors, we cannot say that the amount awarded was excessive based on the ALJ's reasoning to the effect that this hearing required one full day; that the attorneys for Ms. McCord carefully documented their hourly charges; that Ms. McCord had to initiate the hearing to vindicate her rights since Maverik did not acknowledge its liability notwithstanding the cause finding issued by the UADD; that the result obtained by Ms. McCord's counsel who were knowledgeable and competent in employment discrimination law was successful, and that the fees charged were within the customary range for the Salt Lake City legal community.

Since Ms. McCord's counsel have not challenged the reduction of their fees, we will not discuss the reduction except to note that we find the reduction to be reasonable and appropriate.

For the above reasons, we find the attorney's fees awarded to Ms. McCord's attorneys to be appropriate in light of the documentation, expertise and work required in her case.

### ISSUE THREE

#### WHETHER THE ALJ ERRED IN FAILING TO DETERMINE THE AMOUNT OF DAMAGES?

Maverik styled its issue as stated in the heading above, but more specifically at page 2 of its request asked whether the ALJ abused her discretion in awarding Ms. McCord lost wages for time periods "after she acquired a better paying job, which she later quit?"

It is appropriate to award back pay from the date of the discrimination until the date of judgement or the date of trial. Gathercole v. Global Associates, 560 F.Supp. 642, 647 (1983), rev'd on other grounds, 727 F.2d 1485 (9th Cir. 1984); Wells v. North

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Carolina Bd of Alcoholic Control, 714 F.2d 340, 342 (4th Cir. 1983) cert. den. 464 U.S. 1044, 79 L.ed 2d 176, 14 S.Ct. 712. The ALJ awarded back pay in this instance from the date of termination until the date of her order.

Federal law governs the award of back pay in other types of discrimination cases, but is instructive in this case. 42 U.S.C. Section 2000e-5. The purpose of an award of back pay is to make the party whole for injuries suffered through discrimination. The employer is not responsible for losses willingly incurred by Ms. McCord. Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269, 1278 (4th Cir. 1985). We can find nothing in the file which shows that Ms. McCord willingly incurred any loss. When she left her employment at the elementary school, she did so due to illness beyond her control. The ALJ correctly required only an offset by reducing Ms. McCord's award by all earnings from interim employment, including her elementary school job.

We therefore find that the ALJ was correct in law and fact in light of the entire record.

#### ISSUE FOUR

DID THE ALJ ERR WHEN SHE  
FOUND THAT MAVERIK HAD TREATED  
MS. MCCORD AS IF SHE WERE HANDICAPPED?

Maverik asserts that the ALJ erred when she found that Maverik had treated Ms. McCord as if she were handicapped. The ALJ found that "Maverik's termination of McCord rested on its perception of McCord as handicapped." Order of the ALJ, at 6 (June 26, 1991). Maverik now claims that Ms. McCord is not handicapped since mitral valve prolapse is a common condition usually accompanied by no symptoms at all. Trial Brief as incorporated into the Request for Review, Maverik Country Stores, at 5 (Oct. 11, 1991).

This issue is relevant as it relates to U.C.A. Section 34-35-6(1)(a)(i) which states in pertinent part:

It is a discriminatory or prohibited employment practice:  
for an employer to refuse to hire, or promote, or  
to discharge, demote, terminate any person, ...  
because of ... handicap ....

The Utah statutes do not discuss the concept of perceived handicap. However, R486-1-2 (Utah Admin. Code) was promulgated by the UADD under the authority of U.C.A. 34-35-5(b), and provides

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that the subject individual will be treated as if he or she has a handicap where the individual:

Has a record of such an impairment ... or has  
been regarded as having, a mental or physical  
impairment ....

R486-1-2F5 (Utah Admin. Code).

The Utah Administrative Code further provides that the individual may be regarded as having a handicap if others think that he or she has such a disability, or is considered by others to have a limitation on a major life activity. R486-1-2F6a,b,c (Utah Admin. Code). A person who has no disability or handicap, but who is treated by others as if he or she is impaired (perception of impairment), may be just as impaired by virtue of treatment by others as one who is actually impaired.

The ALJ correctly found that the termination was due to Ms. McCord's employer's perception of her as handicapped, and that she was otherwise qualified to perform the work. Finally, her employer made no attempt to obtain medical advice as to the perceived handicap, or whether she could reasonably accommodate Ms. McCord's perceived medical condition.

We therefore conclude that this asserted issue by Maverik is without merit, and that the ALJ was correct.

#### ISSUE FIVE

WHETHER THE ALJ INCORRECTLY  
FOUND THAT ANY PERCEIVED  
ABNORMALITY CONSTITUTES  
A PERCEIVED HANDICAP?

It is clear to us that the ALJ did not find that any perceived abnormality constitutes a perceived handicap. Maverik misstates the findings of the ALJ. A finding of abnormality is not required. Whatever impairment exists must be either a physical or mental impairment which substantially limits one or more of a person's major life activities, U.C.A. Section 34-35-3(9), and where the impairment does not actually exist either in part or in whole, the perception must also rise to the level of substantially limiting one or more of a person's major life activities.

Major life activity is defined as including experiencing difficulty in "securing, retaining, or advancing in employment because of a handicap...." R486-1-2F3 (Utah Admin. Code).

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A person is regarded as having an impairment when he or she (a) has a physical or mental impairment that does not substantially limit major life activities, but is treated as constituting such a limitation; (b) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such an impairment; or (c) has none of the impairments listed in the definition of physical or mental impairment above, but is treated as having such an impairment. R486-1-2F6 (Utah Admin. Code).

Here, Maverik terminated Ms. McCord based on its perception of the severity of Ms. McCord's medical condition. Ms. McCord's condition was probably not an impairment, but her condition was treated as a serious one by Maverik. A job is a major life activity, including clerking at a convenience store, and there is a legal requirement to reasonably accommodate such employees unless undue hardship can be shown.

For the above reasons, we conclude that the ALJ met the requirements of law in light of the whole record.

#### ISSUE SIX

#### WHETHER A MEDICAL EXPERT IS REQUIRED TO TESTIFY BEFORE A FINDING OF HANDICAP DISCRIMINATION CAN BE MADE?

Both parties stipulated before the hearing that mitral valve prolapse is usually a benign condition, and that Exhibit A-11 would be "authoritative on the condition of Mitral Valve Prolapse...." Exhibit A-11. Having stipulated that this exhibit would be authoritative as to Ms. McCord's condition, there appears to be no good reason why a medical expert is required. The question before the ALJ was not whether Ms. McCord was actually handicapped, but whether Maverik treated her as if she was disabled. The evidence is clear that even though Ms. McCord was capable of performing her job, Maverik's manager perceived her to have a serious heart problem, and as a result fired her.

No medical expert was required.

VICKI MCCORD  
ORDER  
PAGE ELEVEN

#### ISSUE SEVEN

#### WHETHER MS. MCCORD SHOWED THAT SHE WAS QUALIFIED TO ACT IN THE JOB?

Maverik contends that Ms. McCord never showed that she was qualified for the job from which she was terminated. At the time of Ms. McCord's termination she was told that she was terminated because of her heart condition. It was only after the termination, and after an investigation was requested by the UADD, that Maverik gave any other reasons for Ms. McCord's termination.

While working at Maverik, Ms. McCord's supervisor was confident enough in her abilities to leave her alone to perform her duties in the store after only three days of training. Ms. Jones, her supervisor, had never confronted Ms. McCord with any of the allegations which were subsequently lodged against her after the termination. In fact, Ms. McCord was scheduled to work on the day of her termination alone for most of her shift.

At the hearing, Maverik alleged that Ms. McCord was not otherwise qualified because of problems she had reading the gas pumps. However, a witness who worked for Maverik testified that everyone had problems reading the pump meters. Ms. McCord testified that prior to her termination she had learned to read the meters, and that she had been complimented on her accuracy on the till.

It is significant that Ms. McCord was apparently performing her job duties properly until the time that she asked to go to the hospital, and that her qualifications had not been questioned up to that point.

This alleged error is therefore without merit, and we find that the ALJ determinations and conclusions were correct.

#### CONCLUSION


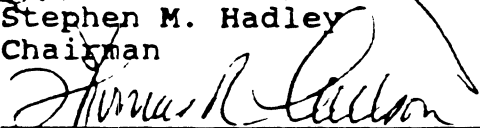
For all the previous reasons, we find that the Findings of Fact, Conclusions of Law, and Order of the Administrative Law Judge were correct in law and fact in view of substantial evidence in the whole record.

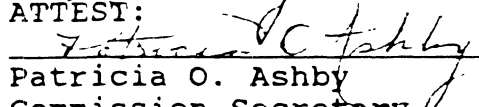
ORDER:

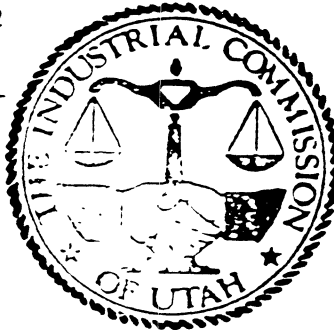
IT IS ORDERED that the orders of the administrative law judge dated June 26, 1991, and September 10, 1991 are affirmed.

VICKI MCCORD  
ORDER  
PAGE TWELVE

IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date hereof, pursuant to Utah Code Annotated, Section 63-46b-16. The requesting party shall bear all costs to prepare a transcript of the hearing for appeals purposes.

  
\_\_\_\_\_  
Stephen M. Hadley  
Chairman  
  
\_\_\_\_\_  
Thomas R. Carlson  
Commissioner

Certified this 28<sup>TH</sup> day  
of February, 1992  
ATTEST:  
  
\_\_\_\_\_  
Patricia O. Ashby  
Commission Secretary





CERTIFICATE OF MAILING

I certify that on February 25<sup>th</sup>, 1992, a copy of the attached ORDER DENYING REVIEW in the case of VICKY MCCORD was mailed to the following persons at the following addresses, postage paid:

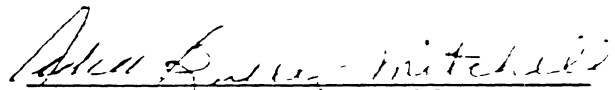
Vicky McCord  
c/o Attorney James E. Stewart  
1500 First Interstate Plaza  
170 South Main Street  
Salt Lake City, Utah 84101

James E. Stewart  
1500 First Interstate Plaza  
170 South Main Street  
Salt Lake City, Utah 84101

Ronald C. Barker  
Attorney at Law  
2870 South State Street  
Salt Lake City, Utah 84115

Lisa-Michele Church  
Administrative Law Judge.

INDUSTRIAL COMMISSION OF UTAH

  
Adell Butler-Mitchell

## **APPENDIX D**

*Request for Reconsideration*

Ronald C. Barker, #0208  
Mitchell R. Barker, #4530  
David C. Cundick, #4817  
Attorneys for Respondent  
2870 South State Street  
Salt Lake City, Utah 84115-3692  
Telephone (801) 486-9638

IN THE INDUSTRIAL COMMISSION OF UTAH

---

VICKY ANN MCCORD,

Applicant,

vs.

MAVERIK COUNTRY STORE (sic),

Defendant.

---

REQUEST FOR RECONSIDERATION

UADD Case No. 89-0031

TO THE INDUSTRIAL COMMISSION OF UTAH:

Responding defendant Maverik Country Stores, Inc., through counsel, comes now and respectfully requests that the Commission reconsider its "Order Denying Review", issued on February 28, 1992. This Request is made pursuant to Section 63-46b-13, Utah Code.

The grounds for relief from the order are as follows:

1. The Commission has erroneously interpreted section 63-46b-1(9) to make the filing of Maverik's Petition for Review untimely, and to avoid exercise of the Commission's discretion in extending any such deadline. The statute expressly applies only to time

periods "established for judicial review." It does not apply to agency review.

2. To the extent necessary, Maverik hereby moves for a **one day extension** to petition for review by the Commission.

3. The Commission has misperceived the law, in holding that the June 26, 1991 order of the ALJ was final. Issues were specifically and expressly reserved in that order (including attorney fees), and damages were not even calculated. The order was comparable to a partial summary judgment, which cannot be appealed to the next judicial level so long as issues remain undetermined. So long as the agency's order reserves **anything** to the agency for further decision, **it is not a final order**. *Sloan v. Board of Review*, 781 P.2d 463 (Utah Ct. App. 1989).

4. Not being a final order, the petition for the Commission to review it could not have been tardy.

5. While the commission acknowledges that the amount of recovery is a factor in determining attorney fee reasonableness, its Order Denying Review fails to expressly consider what effect the amount of recovery had in this case. See Order Denying Review, page seven.

6. Attorney fees could not have been awarded and cannot be evaluated for reasonableness with the case in its current posture, since the **amount of principal recovery has not been calculated**, nor


can it be calculated based on the any order the Commission has entered to date.

7. The Commission erred (Order Denying Review, page eight) in announcing how the damages could be calculated. It did so based on assumptions about voluntariness of McCord's losses, without basing the observation on any finding by the ALJ to that effect. Damages simply cannot be calculated without further hearing and supplemental findings.

5. The Commission failed to consider the leading cases on the issues involved, particularly whether McCord can be said to have been treated "as if" she were "handicapped." See, e.g. *Salt Lake City v. Confer*, 674 P.2d 632 (Utah 1983); *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah App. 1989) and *Hurley v. Board of Review*, 767 P.2d 524 (Utah 1988).

For all of the above reasons, Maverik requests that the Commission reconsider in full its Order Denying Review.

Respectfully submitted this 19th day of March, 1992.

  
\_\_\_\_\_  
Ronald C. Barker, Mitchell R.  
Barker and David C. Cundick  
Attorneys for Defendant Maverik

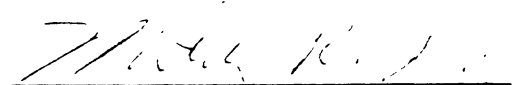
**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of March, 1992, I caused a true and correct copy of the foregoing to be mailed, postage prepaid to:

James E. Stewart  
1500 First Interstate Plaza  
170 South Main Street  
Salt Lake City, Utah 84101

Industrial Commission of Utah  
P.O. Box 44580  
Salt Lake City, Utah 84145-0580

Benjamin A. Sims  
P.O. Box 510250  
Salt Lake City, Utah 84151-0250

  
\_\_\_\_\_  
Mitchell R. Barker

## **APPENDIX E**

*Order Denying Request for Reconsideration*

THE INDUSTRIAL COMMISSION OF UTAH  
SALT LAKE CITY, UT 84114-6600

VICKY ANN MCCORD,

Applicant,

vs.

MAVERIK COUNTRY STORES,

Respondent.

★  
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ORDER DENYING  
REQUEST FOR RE-  
CONSIDERATION

UADD No. 89-0031

\*\*\*\*\*

The request for reconsideration by the respondent in the above entitled matter to review its Order Denying Review, issued on February 28, 1992, having been duly considered under the authority of U.C.A. Section 63-46b-13 (1953 as amended), the request for reconsideration is denied for the following reasons:

This case involves a claim of discrimination based on handicapped status brought by Vicki Ann McCord against the respondent Maverik Country Stores (Maverik). The charge was filed with the Utah Anti-Discrimination Division (UADD) on October 24, 1988, and claimed a violation of the Utah Anti-Discrimination Act of 1965 by illegal termination of employment. The UADD confirmed the discrimination against Ms. McCord by its Order on January 24, 1991. Respondent requested a formal hearing before an administrative law judge (ALJ), and the request was granted. As a result of the hearing, Findings of Fact, Conclusions of Law, and an Order were issued by the ALJ on June 26, 1991. On September 10, 1991 the ALJ issued a supplemental order dealing with attorney fees. On October 15, 1991, the respondent requested review by the Industrial Commission of the ALJ's orders of June 26, 1991, and September 10, 1991.

On October 25, 1991, Ms. McCord filed a Memorandum in Opposition to Respondent's Request for Review of the June 26, 1991 Order stating that the respondent had not timely filed his Motion for Review with the IC in connection with the June 26, 1991 Order, and could not therefore contest its provisions.

Maverik Country Stores first contends that the Commission has erroneously interpreted section 63-46b-1(9) to make the filing of Maverik's Petition for Review untimely, and to avoid exercise of the Commission's discretion in extending any such deadline. This section states:

Nothing in this chapter may be interpreted to  
restrict a presiding officer, for good cause

EXHIBIT

E



VICKY ANN MCCORD  
ORDER UPON RECONSIDERATION  
PAGE TWO

shown, from lengthening or shortening any time period prescribed in this chapter, except those time periods established for judicial review.

(Emphasis added).

This statute allows a presiding officer to lengthen or shorten a time period based upon good cause shown. Maverik did not ask the Commission to lengthen its time period based on good cause shown, nor did it show any good cause for doing so. As can be seen by its clear strictures, it applies only to agency review, and not to judicial review as asserted by Maverik. We therefore reject Maverik's first issue.

Next, Maverik asks for a one day extension to petition for review by the Commission. Again, this request must be rejected based on failure of Maverik to show good cause.

Third, Maverik states that the ALJ order of June 26, 1991 was not final since issues were specifically reserved in the order and damages were not calculated. Upon further review, we agree that the June 26, 1991 order was not final because the issue of attorney fees was reserved by the following language:

The parties reserved the question of an appropriate attorney's fees award, pending this Order, and shall address that in supplemental briefs to the Commission.

Order, ALJ at 9 (June 26, 1991).

Notwithstanding this concession, Maverik did not meet the statutory deadline for filing a request for review of the final order which addressed attorney fees issued on September 10, 1991 by the ALJ. Again, Maverik has shown no good cause as to why the Commission should extend the filing time.

Maverik also contends that the order could not have been final because damages were not calculated. It cites Sloan v. Board of Review, 781 P.2d 463 (Ct. App. 1989) for this proposition. We find that the order of the ALJ was explicit enough to calculate damages since Ms. McCord was awarded, among other provisions, reinstatement to employment, and back pay, at the rates specified on page eight of the ALJ order, from the date of unlawful termination until the date of the ALJ order, subject to all lawful offsets due to interim employment. Order, ALJ at 9 (June 26, 1991). The offsets are

VICKY ANN MCCORD  
ORDER UPON RECONSIDERATION  
PAGE THREE

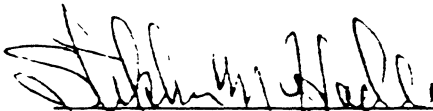

listed on page eight of the order, and the date of termination, among other findings of fact, are shown on pages two through five. The monetary damages can thus be reasonably calculated.

The remaining allegations of error were addressed in the Motion of Review of defendant dated October 15, 1991, and the Commission again finds them nonmeritorious.

ORDER:


IT IS ORDERED that the Request for Reconsideration of defendant is dismissed.

IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date hereof, pursuant to Utah Code Annotated, Section 63-46b-16. The requesting party shall bear all costs to prepare a transcript of the hearing for appeals purposes.

  
Stephen M. Hadley  
Chairman  
  
Thomas R. Carlson  
Commissioner

Certified this 30th day of  
March 1992.

ATTEST:

  
Patricia O. Ashby  
Commission Secretary



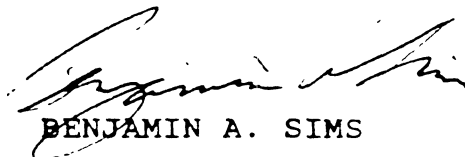
CERTIFICATE OF SERVICE

I certify that I did mail by prepaid first class postage the Order Denying Request for Reconsideration on Vicky Ann McCord, Case No. 89-0031 on 30 March 1992 to the following:

Mitchell R. Barker  
2870 South State Street  
Salt Lake City, UT 84115-3692

James E. Stewart  
1500 First Interstate Plaza  
170 South Main Street  
Salt Lake City, UT 84101

Utah Court of Appeals  
Case No. 910413-CA



BENJAMIN A. SIMS

## **APPENDIX F**

*Limited Request for Reconsideration*

Ronald C. Barker, #0208  
Mitchell R. Barker, #4530  
David C. Cundick, #4817  
Attorneys for Appellant  
2870 South State Street  
Salt Lake City, Utah 84115  
Telephone (801) 486-9638

**THE INDUSTRIAL COMMISSION OF UTAH  
SALT LAKE CITY, UTAH 84114-6600**

---

VICKY ANN MCCORD,

Applicant,

vs.

MAVERIK COUNTY STORES,

Respondent,

---

**LIMITED REQUEST  
FOR RECONSIDERATION**

Case Number: UADD 89-0031

Responding defendant Maverik Country Stores, Inc., through counsel, comes now and respectfully requests that the Commission reconsider its denial of Maverik's request that the Commission lengthen its time within which to file any motion for review by the Commission of the Supplemental Order of the Administrative Law Judge, which was issued on or about September 10, 1991. This request is made pursuant to Section 63-46b-13, Utah Code, and is limited to a request for review of the denial of an extension of time.

The grounds for relief from the Order are:

1. The procedural events in this matter to date are as follows:

a. Findings of Fact, Conclusions of Law and Order was issued, reserving attorney fee issue for later determination, June 26, 1991.

b. Supplemental Order awarding approximately \$20,000 in attorney fees and costs issued by the Administrative Law Judge, September 10, 1991.

c. Request for Review prepared and mailed October 10, 1991 but not received by the Commission until October 15, 1991 (the day after Columbus Day).

d. Industrial Commission issues Order Denying Review, finding in part that Maverik's Motion for Review was untimely, February 28, 1992.

e. Maverik files Request for Reconsideration, March 19, 1992, including therein a Motion for an Extension of Time through August 15, 1992 for filing a Petition for Review.

f. Commission issues Order Denying Request for Reconsideration, including denial of Maverik's request that the time period with in which to Request Review be extended, March 30, 1992.

2. Good cause has been shown and is further shown herein (see below). The good cause previously shown was the fact that the document was prepared, executed and mailed on October 10, 1991, which is the due date by statute.

3. Section 63-46b-1(9), Utah Code, permits lengthening of any time period for action by the Commission "for good cause shown".

4. The Commission has, for the first time in its Order Denying Reconsideration, properly found that the original Order of the Administrative Law Judge Church was not a final order. See, Order Denying Reconsideration, March 30, 1992, page 2. This changes the entire face of this case and justifies appropriate review of all the matters at issue. The Commission having determined the initial order to be non-final, procedural matters should be set aside for an initial determination on the merits of the ALJ's original order.

5. Further good cause for the extremely short extension request that is shown as follows:

a. Most of the "tardy" days are not chargeable to Maverik under law. They include October 12 and 13, weekends, as well as October 14, Columbus Day.

b. As pointed out in the Commission's Order Denying Review, page 5 and 6, there is little case authority construing what constitutes "issuance" by the Commission. It is also far from

clear what constitutes "filing" with the Commission. Because of these ambiguities and because of the policy of the Commission of avoiding hyper-formality, extensions should be freely granted when requested in good faith.

c. The Supplemental Order for which review was sought by Maverik was received by counsel for Maverik on September 11 or 12, 1991, 28 or 29 days prior to the preparation and mailing of the Petition for Review.

d. At about the time the ALJ issued her Supplemental Order, and just prior to Maverik's counsel receiving the same, the undersigned, Mitchell R. Barker, was employed on an emergency basis to defend a criminal defendant in a jury trial set to start (and which did start) on September 16, 1991. The case was *State of Utah vs. Stephen Cartisano and Challenger Foundation II*, 90-CR-47, Sixth Circuit Court, Kane County.

e. From prior to receipt of the Supplemental Order until September 17, 1991, Mitchell R. Barker and David C. Cundick, who is the other attorney who is handling this case and who appeared at the formal hearing in this matter with Mr. Barker, were both involved day and night in defense of Stephen Cartisano in that well publicized trial which was held in Kanab, Utah. Little time was taken to eat or sleep, and there was no time to consider items received in the mail.



f. September 18, 1991, was the first day that Maverik's counsel were back in the office, after the Cartisano trial ended in a mistrial. The Cartisano matter is scheduled to be heard again in May 1992 after a change of venue to West Valley City.

g. The undersigned had another trial on October 3, 1991 before Judge Daniels in Third District Court, along with several other in Court and out of Court matters during the period from September 17, 1991 through October 10, 1991, the date Maverik's Petition was due and the date it was prepared and mailed. Those included several days trying to catch up on office work after the Cartisano.

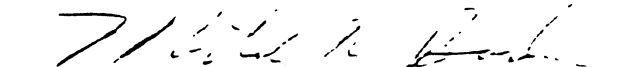
h. On the due date for the Petition, it was not ready and hand delivered to the Industrial Commission before 5:00 because virtually the entire day was spent researching and arguing before Judge Mower of the Sixth Circuit Court in Kane County, on the issue of Cartisano's successful Motion to Change Venue from Kane County to Salt Lake County.

6. Under Section 63-46b-12, Utah Code, it appears that on the due date for intra-agency review a request may be mailed rather than hand filed. That section states that the request shall "state the date upon which it was mailed" and "be sent by mail to the presiding officer and to each party". See also Section 63-46b-1(9), Utah Code.

7. This is not a repeat of the prior motion to reconsider, or a motion to reconsider the denial of the motion to reconsider. An enlargement of time was first requested on March 19 of this year, and was denied for the only time on March 30, 1992.

Wherefore, good cause has previously been shown and is here further shown for the very short extension sought by Maverik to make its Petition for Review of the Supplemental Order timely, despite the fact that it was mailed on the due date and received shortly thereafter by the Commission.

DATED this 3rd day of April, 1992.

  
\_\_\_\_\_  
Mitchell R. Barker  
Ronald C. Barker  
David C. Cundick

**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of April, 1992, I caused a true and correct copy of the foregoing to be mailed, postage prepaid to:

James W. Stewart  
Kay C. Krivanec  
JONES, WALDO, HOLBROOK & McDONOUGH  
1500 First Interstate Plaza  
170 South Main Street  
Salt Lake City, Utah 84101

Benjamin Sims  
INDUSTRIAL COMMISSION OF UTAH  
160 East 300 South #300  
Salt Lake City, Utah 84111

  
\_\_\_\_\_  
Mitchell R. Barker

## APPENDIX G

*Peters v. Peters*

15 Utah 2d 413

**Morris L. PETERS, Plaintiff and Appellant,**  
**v.****Virginia S. PETERS, Defendant and**  
**Respondent.****No. 10059.**

Supreme Court of Utah.

July 20, 1964.

Divorce action. The Second District Court, Weber County, Parley E. Norseth, J., granted divorce to wife, and husband appealed. The Supreme Court, Crockett, J., held that divorce court, which had granted divorce to wife with lump sum award in lieu of alimony, had jurisdiction, notwithstanding husband's appeal, to grant temporary alimony and counsel fees to defend appeal, provided that alimony payments were credited upon lump sum award

Affirmed.

**1. Divorce ⇨130**

Evidence in divorce action, including evidence of husband's conduct tending to cause wife great mental anguish and distress, justified award of divorce to wife rather than to husband.

**2. Divorce ⇨241**

Award to divorced wife of \$2,500 in lieu of alimony was not excessive, where husband was permitted to retain home and securities and wife had worked and contributed toward maintenance of home and paid her own medical and dental bills.

**3. Divorce ⇨182**

District court is without further jurisdiction as to questions of divorce, child custody, support money, alimony or property rights when they are once adjudicated and appeal is taken, but has continuing jurisdiction to enforce rights of parties to meet needs of spouses and children.

**4. Divorce ⇨309**

Subsequent changes or new orders in support money order must be based on changed circumstances.

**5. Divorce ⇨182**

Divorce court, which had granted divorce to wife with lump sum award in lieu of alimony, had jurisdiction, notwithstanding husband's appeal, to grant temporary alimony and counsel fees to defend appeal, provided that alimony payments were credited upon lump sum award. U.C.A.1953, 30-3-5.

Ronald N. Boyce, Salt Lake City, Clayton & Gould, Ogden, for appellant.

LaMar Duncan, Salt Lake City, for respondent.

CROCKETT, Justice:

After a trial, the lower court dismissed the complaint of plaintiff Morris L. Peters and granted a divorce to defendant Virginia S. Peters on her counterclaim; gave her a lump sum award of \$2,500 in lieu of alimony and \$350 counsel fees. After plaintiff filed notice of appeal, upon supplemental proceeding, the court awarded defendant \$50 per month temporary alimony and \$300 counsel fees to defend the appeal. Plaintiff appeals from both the judgment and the supplemental order.

The parties were married on November 6, 1961, in Preston, Idaho, and have since lived in Ogden, Utah. It was a second marriage for both. Plaintiff Morris was 54 and defendant Virginia 40 years old. Virginia had a teenage son, Eddie, by her prior marriage, and Morris had custody of a teenage girl, Jacklyn Peters, whom he and his former wife had reared. At first both children lived with these parties, but soon thereafter it proved that Eddie was not welcome in the plaintiff's home, and he went to live with his own father.

Both plaintiff and defendant were employed. Morris worked for the Ogden Railroad Company and received about \$10,000 per year gross, \$6,000 net. Virginia had worked most of the time during the marriage and was earning \$325 per month at the time of the divorce.

Before their marriage the parties had entered into an antenuptial agreement. In it defendant Virginia had agreed to relinquish any rights she would acquire by the marriage in plaintiff's home, and to proceeds therefrom if Morris sold it to Weber College, which had an option to purchase it. The agreement further provided that all other property, including a boat and trailer, an automobile, a bank account of \$3,500, and household furniture belonging to the plaintiff; and an automobile and household furniture belonging to the defendant, would be held in joint tenancy. Plaintiff sold his home for \$25,000 and on March 8, 1962, put about half that amount into another home in Ogden. He took title to the new home and to certain stocks and bonds in joint tenancy with Virginia.

About 15 months after the marriage Morris brought an action for divorce, and on February 13, 1963, obtained a decree by default. It appears that the difficulty underlying that action was Morris's concern about his property and his concern over the effect of having it in joint tenancy. He apparently had been under the impression that the antenuptial agreement would preserve his sole ownership in spite of the fact that titles were later taken in joint tenancy. However, this difficulty appears to have been overcome, temporarily at least, by the defendant's transferring to him all of her interest in the property mentioned and thereafter on May 14, 1963, that decree was set aside.

The reconciliation lasted but briefly. On October 28, 1963, Morris commenced this action for divorce on the ground of mental cruelty and procured an order to show cause and restraining order commanding Virginia to remove from the home, from which order, incidentally, he relented and permitted her to remain there up to and including the time of the trial.

1. See *Lawlor v. Lawlor*, 121 Utah 231, 240 P.2d 271.

[1] We are not impressed with the plaintiff's argument that the court erred in denying him a divorce and granting it to the defendant on her counterclaim. It would serve no useful purpose to detail the accusations of fault against each other. It is sufficient to note that on the basis of the evidence that the plaintiff had been extremely penurious about paying necessary bills; that in remonstrating about them had repeatedly threatened to get a divorce, resulting in continual strife; including some evidence that he had resorted to actual physical violence, there was ample basis to support the court's finding that his conduct had caused defendant great mental anguish and distress. Allowing the traditional indulgence to the trial court because of his advantaged position, we cannot say that the evidence so clearly preponderates against his finding as to require overturning it.<sup>1</sup>

[2] We likewise fail to see merit in plaintiff's attack upon the lump sum award of \$2,500 in lieu of alimony. He has his home and the stocks and bonds which defendant signed over to him after the first divorce. She had worked and contributed toward the maintenance of the home; and had paid her own medical and dental bills. Considering those facts, and the various circumstances of the parties in the light of the principles set forth in *Wilson v. Wilson*,<sup>2</sup> the decree impresses us as well within the limits of the discretion of the trial court. As a matter of fact, we perceive nothing in this record to suggest that it was anything other than a wise and equitable adjudication of their rights.

The problem of more serious interest and concern is the plaintiff's contention that after his notice of appeal was filed, the trial court was without jurisdiction to make the award of \$50 per month temporary alimony pending the appeal and \$300 attorneys' fees to defend against it. It is true, as plaintiff contends, that in some instances the

2. 5 Utah 2d 79, 296 P.2d 977; see also *MacDonald v. MacDonald*, 120 Utah 573, 236 P.2d 1006, and *Pinion v. Pinion*, 92 Utah 255, 67 P.2d 265.

Supreme Court has, under special circumstances, awarded counsel fees because that is a matter peculiarly within the knowledge of the court.<sup>3</sup> But it has neither said, nor intended to imply, that the trial court could not make such an award. It is to be noted that the situation with respect to alimony or support money is different. The complexities, actual and potential, upon which such awards must necessarily be based require the taking and consideration of evidence, which this court is neither equipped nor disposed to do.

[3] Plaintiff's contention that the trial court was without jurisdiction to make the order complained of rests upon a misconception as to the judgments appealed from. It fails to distinguish between the main judgment in the divorce action and the subsequent order made in the supplemental proceedings. It is true that the main judgment is a final and appealable judgment as to the issues therein dealt with. When those questions as to divorce, custody of children, support money, alimony and/or property rights are therein adjudicated and an appeal is taken, the district court is indeed without further jurisdiction as to them. In this respect the divorce judgment is like other judgments. But there is another aspect of a divorce proceeding which is entirely different. After the main judgment is entered life goes on, and the needs of the spouses and the children and the duties to fulfill them continue day after day. In order to take care of these needs, it is essential that the trial court have continuing jurisdiction to enforce the rights of the parties.

It requires but a moment's reflection to see what a mischievous situation would exist if, for example, a husband misbehaving in failing to provide, and perhaps in abusing his wife and/or children, could appeal a judgment and continue the neglect

and abuse during the appeal. The difficulty could be magnified in various ways depending upon circumstances, including such facts as that a destitute family, living a long distance from the state capitol, may be required to suffer undue delay and hardship, or even left entirely without remedy, unless the district court could act.

There is no good reason why not, and every reason why, that court should and does have continuing jurisdiction in the action over the family's continuing problems to protect the rights and interests of the parties. That this is true and was so recognized by the legislature is indicated in Section 30-3-5, U.C.A 1953:

"When a decree of divorce is made the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable; \* \* \*. *Such subsequent changes or new orders* may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper." (Emphasis added.)

[4,5] Subsequent changes or new orders, which must be based on changed circumstances,<sup>4</sup> obviously could only be made by the court in supplemental proceedings as was done here. Until the plaintiff refused to pay the \$2,500 and took the appeal, the defendant could not have petitioned for the allowances of which the plaintiff complains upon the basis set forth because the circumstances giving rise to the need did not exist until then. Her petition stating those facts invoked the jurisdiction of the court in a new and supplemental proceeding in which it was authorized to make such further orders as it deemed reasonable, equitable and just under the circumstances.<sup>5</sup>

3. See *Cast v. Cast*, 1 Utah 128; *Hendricks v. Hendricks*, 91 Utah 564, 65 P.2d 642; *Peterson v. Peterson*, 112 Utah 542, 189 P.2d 961.

4. See *Chaffee v. Chaffee*, 63 Utah 261, 225 P. 76.

5. See *Cody v. Cody*, 47 Utah 456, 154 P. 952, and *Oldham v. Oldham*, 28 N.M. 163, 208 P. 886, and also 19 A.L.R.2d 703.

The main judgment and the order in supplemental proceedings are both affirmed, provided that the alimony payments of \$50 per month are credited upon the \$2,500 lump sum alimony award. Costs to defendant (respondent).

HENRIOD, C. J., and McDONOUGH, CALLISTER and WADE, JJ., concur.



15 Utah 2d 418

**Vickie J. PIERCE, Plaintiff and Respondent,**  
v.

**George ANAGNOSTAKIS d/b/a The Shah,  
and Shah, Inc., Defendant and Appellant.**

No. 10081.

Supreme Court of Utah.

July 14, 1964.

Waitress' action against restaurant owner to recover minimum wages and value of meals not furnished to her. The Third District Court, Salt Lake County, Joseph G. Jeppson, J., entered a judgment for waitress, and the restaurant owner appealed. The Supreme Court, Wade, J., held that claim that waitress agreed to be compensated by tips only to conceal her income from Bureau of Internal Revenue and that restaurant owner did not know of minimum wage or her intention to conceal her income would not defeat waitress' right to collect minimum wage for women as provided by schedule promulgated pursuant to statute.

Affirmed.

#### 1. Labor Relations ⇌ 1278

Statute providing for payment of minimum wages and schedule promulgated thereunder by Industrial Commission relating to minimum wage for women and children shows intention to allow collection of minimum wage even in face of express

agreement to work for less money. U.C.A. 1953, 34-4-9, 34-4-17.

#### 2. Labor Relations ⇌ 1262, 1293

Minimum wage provision for women cannot be satisfied either by tips or by express agreement to effect that employee will accept tips or other gratuities in full satisfaction of wages. U.C.A. 1953, 34-4-9, 34-4-17.

#### 3. Labor Relations ⇌ 1262, 1475

Claim that waitress agreed to be compensated by tips only to conceal her income from Bureau of Internal Revenue and that restaurant owner did not know of minimum wage or her intention to conceal her income would not defeat waitress' right to collect minimum wage for women as provided by schedule promulgated pursuant to statute. U.C.A. 1953, 34-4-9, 34-4-17.

#### 4. Labor Relations ⇌ 1535

Evidence supported allowance of \$82.50 against restaurant owner for meals not furnished to waitress suing to collect minimum wage due her under regulation requiring that in restaurant occupations one substantial meal per shift must be furnished by employer at no cost to employee. U.C.A. 1953, 34-4-9, 34-4-17.

#### 5. Labor Relations ⇌ 1570

Where waitress bringing suit against employer for minimum wages did not comply with statute providing that person must have made a demand in writing for sum not to exceed money found due before court may award attorneys' fees, the court properly refused to award attorneys' fees to waitress whose demand substantially exceeded amount awarded by court. U.C.A. 1953, 34-4-1 et seq., 34-9-1.

Richards, Bird & Hart, Salt Lake City, for appellant.

James A. McIntosh, Salt Lake City, for respondent.

WADE, Justice:

Plaintiff, respondent here, Mrs. Vickie J. Pierce, brought this action to recover from

## **APPENDIX H**

*Dusty's v. Utah State Commission*



plaintiff was not working at the time of the accident. Furthermore, there is no evidence that plaintiff had a reasonably certain prospect of employment that she would have accepted had the accident not occurred.

When construing a statute, we must give effect to legislative intent, *West Jordan v. Morrison*, 656 P.2d 445, 446 (Utah 1982). To that end, we presume that the Legislature used each term advisedly, and we give effect to each term according to its ordinary and accepted meaning. *Id.* For assistance in ascertaining the meaning of statutory language, we look to the background and general purpose of the statute. *Jamison v. Utah Home Fire Ins. Co.*, 559 P.2d 958, 959 (Utah 1977).

The No-fault Automobile Insurance Act was enacted "[t]o effectuate a more efficient, equitable method of handling the greater bulk of the personal injury claims that arise out of automobile accidents." Utah Code Ann. §31-41-2 (1974). PIP benefits are intended to provide immediate compensation for out-of-pocket expenses and actual loss of earnings incurred as a result of an accident without having to bring a lawsuit. *See Jamison*, 559 P.2d at 959. Unlike an award of damages based on negligence, PIP disability benefits are paid monthly so that claimants can continue to meet basic living expenses. Utah Code Ann. §31A-22-309(5). PIP benefits were not intended "to provide an automatic reward or a 'windfall,' for being involved in an accident by requiring payment when there was no loss actually suffered . . . ." *Jamison*, 559 P.2d at 960. Although *Jamison* dealt with PIP benefits for loss of household services, the basic policy referred to there applies equally to disability benefits.

In providing limited compensation for "any loss of gross income and the loss of earning capacity per person from inability to work . . .," we conclude that the Legislature did not intend to provide compensation for "loss of earning capacity" unless a claimant has suffered a direct and specific monetary loss. Although the term "loss of earning capacity" may well have a broader meaning than "loss of gross income" with respect to damages recoverable in a tort action for personal injuries, we believe that in the context of PIP benefits, the Legislature intended that "earning capacity," insofar as it means something more than loss of "gross income," means income that a claimant, if unemployed, was reasonably certain to receive. Thus, if a claimant is unemployed at the time of the accident, that claimant may have a right to disability benefits for a job that he or she would have commenced after the accident, had the accident not occurred. But to qualify for such benefits, a claimant would have to show that a job was available for which the claimant was qualified and that the claimant would have taken that job.

In the instant case, plaintiff was not working at the time of the accident, nor did the evidence

indicate a reasonable probability that she would have commenced working after the accident.

In short, plaintiff's contention that section 31A-22-307(1)(b)(i) permits a claimant to collect benefits merely by showing loss of earning capacity and nothing more is not consistent with either the statutory language or the policy of the Act.

Affirmed.

WE CONCUR:

Gordon R. Hall, Chief Justice

Richard C. Howe, Associate Chief Justice

Christine M. Durham, Justice

Michael D. Zimmerman, Justice

Cite as

199 Utah Adv. Rep. 7

IN THE SUPREME COURT  
OF THE STATE OF UTAH

DUSTY'S, INC.,  
Petitioner,

v.

Auditing Division of the UTAH STATE  
TAX COMMISSION,  
Respondent.

No. 920215

FILED: October 30, 1992

Original Proceeding in this Court

ATTORNEYS:

Mark K. Buchi, R. Bruce Johnson, William

Kelly Nash, Salt Lake City, for Dusty's

R. Paul Van Dam, Susan L. Barnum, Salt Lake  
City, for Tax Commission

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

PER CURIAM:

Dusty's, Inc., brought an original proceeding in this court seeking judicial review from a final Tax Commission order that imposed a sales tax on Dusty's sale of warranties. The Commission moved for summary disposition on the ground that Dusty's petition was untimely. This court granted the Commission's motion by minute entry. Before us now is Dusty's motion to reinstate the petition for judicial review. We deny that motion.

A brief sketch of the procedural facts is in order. On March 25, 1992, the chairman and three commissioners of the Commission signed a document entitled "Findings of Facts, Conclusions of Law, and Final Decision." Below the signatures appeared the Commission's seal and the following paragraph:

NOTICE: You have thirty (30) days after the date of this order to file in Supreme Court a petition for judicial review. Utah Code Ann. § 63-46b-13(1), 63-46b-14(2)(a).

On Monday, April 27, thirty-three days after the date of the order, Dusty's filed in this court its "Petition for Review of Final Decision of State Tax Commission." In invoking this court's jurisdiction, Dusty's stated, "This Petition is timely made as it is filed within thirty (30) days of the final decision of the Commission." Review by this court was granted, and Dusty's filed its docketing statement. This time, the jurisdictional invocation claimed that the petition "was timely filed within thirty days after receipt of notice of the Final Decision of the Commission pursuant to Utah Admin. R. R861-1-8a [sic] (1992)."

The Commission moved for summary disposition on the ground that the petition had been filed three days late. Dusty's opposed the motion. This court granted the motion to dismiss.

Dusty's motion to reinstate the appeal is grounded in the same arguments as was its opposition to summary dismissal, and the Commission's opposition to reinstatement repeats what it argued in the memorandum supporting its motion to dismiss. We first state the position each side has taken on this jurisdictional issue and then proceed to address the merit or lack of merit of each.

Dusty's concedes that this court has jurisdiction to review all final agency actions resulting from formal adjudicative proceedings under the Utah Administrative Procedures Act (UAPA), Utah Code Ann. §§63-46b-1 to -22 (1989 & Supp. 1992). Dusty's believes, however, that its petition was nonetheless timely under section 59-1-504 of the Code. Under that section, says Dusty's, Commission actions become final thirty days *after the date of mailing* of the Commission's notice of agency action.

Dusty's goes on to say that the Commission has interpreted section 59-1-504 under rule R861-1-8A of the Utah Administrative Code to mean that a party adversely affected by the action may appeal within thirty days *after receipt of notice*. Dusty's points out that rule 14(a) of the Utah Rules of Appellate Procedure requires a petition for judicial review to be filed within the time prescribed by statute and argues that the prescribing statute here is section 59-1-504, as construed by the Commission in rule R861-1-8A.

Dusty's admits that the final Commission order was dated March 25, was mailed March 26, and was received by Dusty's on March 30. Therefore, says Dusty's, pursuant to section 59-1-504, the order became final thirty days after mailing, or on April 25, a Saturday. But, says Dusty's, because the Commission has specifically interpreted the statute as establishing the time for appeal to be within thirty days of *receipt* of notice, Dusty's petition was not due

until April 29. Ergo, says Dusty's, its filing on April 27 was timely, irrespective of whether the statute or the rule is applied.

Dusty's then proceeds to interpret section 63-46b-14(3)(a), which requires a petitioner to "file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is *issued*." (Emphasis added.) Under that language, says Dusty's, the order was not *issued* until Saturday, April 25, and the petition for review was therefore not due until May 25. According to Dusty's, the crux of the statutory language is the word "*issued*," which is nowhere defined in the UAPA.

The Commission takes the traditional approach. It argues that the procedures for agency action, agency review, and judicial review are all established by the UAPA. Section 63-46b-14(3)(a) requires that judicial review be requested within thirty days after the order on final agency action is issued. That date was March 25, and Dusty's petition was therefore due on Friday, April 24. Its April 27 filing was three days late. The Commission believes that this court was therefore correct in dismissing Dusty's petition for lack of jurisdiction. And, it adds, the statutory time frame is the same as that required by rule 14(a) of the Utah Rules of Appellate Procedure.

The Commission refers this court to *Silva v. Department of Employment Security*, 786 P.2d 246 (Utah Ct. App. 1990), where a petition for writ of review was mailed before, but received by the clerk of the court of appeals later than, thirty days after the date of the agency order. The court of appeals dismissed that petition as untimely.

Finally, the Commission argues that Dusty's reliance on section 59-1-504 and rule R861-1-8A is misplaced. Both of those provisions have been superseded by the enactment of the UAPA, as set out in section 63-46b-22, which governs judicial review. The Commission believes that Dusty's fails to distinguish section 59-1-504, which the Commission says deals with notices to taxpayers regarding the date taxes, interest, and penalties assessed by the Commission are due.

It appears to this court that the statutory instructions are quite straightforward. In all administrative agency cases initiated after January 1, 1988, this court and the court of appeals have consistently been guided by the provisions of the UAPA in undertaking judicial reviews of final agency actions. Utah Code Ann. §63-46b-22.<sup>1</sup> As the Commission correctly points out, under the UAPA, the time periods established for judicial review are strictly construed:

Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter, *except those time periods established for judicial review.*

Utah Code Ann. §63-46b-1(9) (emphasis added).

Dusty's petition for writ of review is governed by section 63-46b-14(3)(a):

A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is *issued* . . . .

(Emphasis added.)

Dusty's argument that the date of issue is ambiguous and subject to several inconsistent interpretations is not persuasive. The Commission itself defined the date of issue when it postscripted the order with the usual legend found in all Tax Commission orders:

NOTICE: You have thirty (30) days after the date of this order to file in Supreme Court a petition for judicial review. Utah Code Ann. § § 63-46b-13(1), 63-46b-14(2)(a).

The Commission chose the date of the order as the date of issue. It accorded Dusty's notice of the time limitations, and the chosen procedure was well within the bounds of due process notions and the Commission's discretion. Most importantly, it gave Dusty's actual and constructive notice, and Dusty's ignored that notice at its peril.

For Dusty's future guidance and the guidance of all those who petition for judicial review from agency action, we hold that the date the order constituting the final agency action *issues* is the date the order bears on its face. Support for that conclusion is found in the UAPA itself. Section 63-46b-21<sup>2</sup> governs agency action on declaratory orders. After receiving petitions for declaratory orders, agencies may *issue* written orders. Copies of all orders *issued* in response to requests for declaratory proceedings must be *mailed promptly* to petitioners or other parties. Inasmuch as declaratory orders have the same status and binding effect as any other orders *issued* in an adjudicative proceeding, it follows that the differentiation between *issuance* and *mailing* may not be limited to declaratory orders alone.

We now address Dusty's main point, that its petition for judicial review must be governed by section 59-1-504 and rule R861-1-8A in isolation from the UAPA.

Part 5 of chapter 1, title 59, deals with petitions for redetermination of deficiencies before the Commission. Requests for redetermination are for agency action, not for judicial review. §59-1-501. Once the Commission has determined a deficiency, the assessed amount becomes payable within thirty days from the date of mailing of the notice of demand from the Commission. §59-1-503. Section 59-1-504 reads as follows:

The action of the commission on the tax-payer's petition for *redetermination* of deficiency shall be final 30 days after the date of mailing of the commission's notice of agency action. All tax, interest, and penal-ties are due 30 days from the date of mailing, *unless the taxpayer seeks judicial review.*<sup>3</sup>

(Emphasis added.)

The authority to redetermine deficiencies lies with the Commission, which allows taxpayers thirty days after mailing to remit amounts due. If the taxpayer disputes the redetermined amount, payment is suspended, and the taxpayer deposits the disputed amount instead, as set out in section 59-1-505. Section 59-1-504 does not contain time limitations for judicial review. They are dictated by section 63-46b-14(3)(a).

Rule R861-1-8A of the Administrative Code,<sup>4</sup> as written, purports to govern appeals from informal adjudicative proceedings, pursuant to section 59-1-602, and is therefore irrelevant to the case before us.<sup>5</sup> Another rule, not cited by Dusty's, does apply to these proceedings. Rule R861-1-5A of the Utah Administrative Code provides in relevant part:

M. Orders The Commission will issue a written order after adjudicatory proceedings in accordance with Utah Code Ann. Section 63-46b-10.<sup>6</sup>

Section 63-46b-10 dictates procedures required to be taken by the presiding officer in *formal* adjudicative proceedings, which include statements of findings, conclusions, reasoning, relief, notice of right to apply for reconsideration, and notice of right for judicial review as well as the time limitation applicable to that review.

The Commission's notice to Dusty's that its petition for judicial review would have to be perfected within thirty days of the Commission's order was proper under that administrative rule, and the rule is within the scope and authority of the statute to which it refers.

To summarize, Dusty's time to seek judicial review in this court was prescribed by section 63-46b-14(3), requiring it to file its petition for judicial review within thirty days after the order constituting final agency action was issued. The order was issued on the date it bore on its face. Section 59-1-504 does not govern petitions for judicial review, and rule R861-1-8A does not apply.

The motion to reinstate the petition for review is denied

#### 1. 63-46b-22. Transition procedures.

(1) The procedures for agency action, agency review, and judicial review contained in this chapter are applicable to all agency adjudicative proceedings commenced by or before an agency on or after January 1, 1988

(2) Statutes and rules governing agency action, agency review, and judicial review that are in effect on December 31, 1987, govern all agency adjudicative proceedings commenced by or before an agency on or before December 31, 1987, even if those proceedings are still pending before an agency or a court on January 1, 1988

#### 2. 63-46b-21. Declaratory orders.

(6)(a) After receipt of a petition for a declaratory order, the agency may *issue* a written order[ ]

(c) A copy of all orders issued in response to a request for a declaratory proceeding shall be mailed promptly to the petitioner and any other parties

(d) A declaratory order has the same status and binding effect as any other order issued in an adjudicative proceeding

(Emphasis added)

3. Section 59-1-504 was amended in 1987 in conjunction with the enactment of the UAPA, and the italicized language replaced previous language "unless taxpayer files within that period an appeal with the tax division of district court as provided by Part 6, Chapter 1, Title 59 " 1987 Utah Laws ch 161, §213. The Commission infers from this amendment, correctly, we believe, that the legislature was aware of the conflicting time provisions and brought them in line with the UAPA. As it is now written, section 59-1-504 applies only to proceedings before the agency.

**4. R861-1-8A. Appeal Pursuant to Utah Code Ann. Sections 59-1-602, 59-1-505.**

A Time of Appeal Within 30 days after receipt of notice of any order of the Commission, any party adversely affected thereby may appeal the order to the proper judicial authority. If an appeal is not timely filed, the order becomes final at the end of the 30-day period. Copies of such appeal shall be served upon the Commission and upon the Office of the Attorney General.

5. Without ruling on the issue, we agree with Dusty's that the rule does not appear to track any statute insofar as it purports, without statutory authority, to extend the time for appeal to thirty days after receipt of notice of the Commission's order. The authority of administrative agencies to promulgate rules and regulations "is limited to those regulations which are consonant with the statutory framework, and neither contrary to the statute nor beyond its scope." *Crowther v Nationwide Mut Ins Co*, 762 P 2d 1119, 1122 (Utah Ct App 1988) (citing *Lockheed Aircraft v Tax Comm'n*, 566 P 2d 1249 (Utah 1977)).

**6. 63-46b-10. Procedures for formal adjudicative proceedings—Orders.**

In formal adjudicative proceedings:

(1) Within a reasonable time after the hearing, or after the filing of any post-hearing papers permitted by the presiding officer, or within the time required by any applicable statute or rule of the agency, the presiding officer shall sign and issue an order that includes:

(a) a statement of the presiding officer's findings of fact based exclusively on the evidence of record in the adjudicative proceedings or on facts officially noted,

(b) a statement of the presiding officer's conclusions of law,

(c) a statement of the reasons for the presiding officer's decision,

(d) a statement of any relief ordered by the agency,

(e) a notice of the right to apply for reconsideration,

(f) a notice of any right to administrative or judicial review of the order available to aggrieved parties, and

(g) the time limits applicable to any reconsideration or review.

Cite as

199 Utah Adv. Rep. 10

**IN THE SUPREME COURT  
OF THE STATE OF UTAH**

**In the Matter of the Estate of  
Reed Dwane HUNT,  
Deceased.**

**No. 890469**

**FILED: November 5, 1992**

Fifth District, Iron County  
The Honorable J. Phillip Eves

**ATTORNEYS:**

Keith F. Oehler, Cedar City, for the Estate  
and Richard L. Hunt

Lyle R. Drake, St. George, for Dawna B.  
Bool, Charlene Brown, Jefferson D.  
Goulette

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

**HOWE, Associate Chief Justice:**

This is an appeal from an order construing the last will and testament of Reed Dwane Hunt, deceased, and determining his heirs. The trial court concluded that the will failed to dispose of any assets of the deceased and directed that his assets be distributed to his heirs as determined by the intestate succession statutes.

Reed Dwane Hunt died on December 3, 1988, without a surviving wife, children, or parents. He had four stepchildren whom he had not adopted. His nearest heirs are two nieces, Dawna W. Bool and Charlene Brown, and a nephew, Jefferson D. Goulette, appellees herein. One day before his death, the deceased executed a preprinted will form on which he had inserted three typewritten paragraphs.

In the first paragraph, the deceased declared that he was of sound mind and was acting free of any duress and that he revoked all prior wills. The second and third paragraphs of the will provided:

Second: I declare that I am a single man, and that I have four (4) stepchildren. Richard L. Hunt, Delbert Douglas Hunt, Denise Marie Buckley, and Dennis Ray Hunt. If, at any time, any person shall be established by a Court of Law to be a child of mine, then I give and bequeath to each such person the sum of Five Dollars (\$5.00) and no more.

Third: I have intentionally and with full knowledge omitted to provide for any and all of my heirs and next of kin who are not specifically mentioned herein, and I hereby generally and specifically disinherit each, any and all persons whomsoever claiming to be or who may be lawfully determined to be

## **APPENDIX I**

### **Rules**

Rule 486-1-2(f), Utah Admin. Code  
Rule 486-1-2(g), Utah Admin. Code  
Rule 3, Utah Rules of Appellate Code  
Rule 3(g), Utah Rules of Appellate Proc.  
Rule 4, Utah Rules of Appellate Proc.  
Rule 14, Utah Rules of Appellate Proc.  
Rule 14(a), Utah Rules of Appellate Proc.  
Rule 36, Utah Rules of Appellate Proc.  
Rule 30(a), Utah Rules of Appellate Proc.  
Rule 1(a), Utah Rules of Civil Proc.  
Rule 4, Utah Rules of Civil Proc.  
Rule 5(a), Utah Rules of Civil Proc.  
Rule 5(b)(1), Utah Rules of Civil Proc.

**R475-45-5. Base Period Wages**

The wages used for the base period will be those wages earned during the first four of the last five completed quarters prior to the injury, regardless of the effective date of the claim.  
1987 35-4-4.5

**R486. Anti-Discrimination**

**R486-1. Anti-Discrimination Division Regulations Issued Pursuant to Sections 34-35-5(2) and 7-1(4) Utah Anti-Discrimination Act of 1965, as Amended**

**R486-2. Pre-Employment Inquiry Guide**

**R486-3. Nondiscrimination Clause to be used in Contracts Entered into by the State of Utah and its Agencies**

**R486-4. Advertising**

**R486-5. Employment Agencies**

**R486-6. Regulation of Practice and Procedure on Employer Reports and Records**

**R486-1. Anti-Discrimination Division Regulations Issued Pursuant to Sections 34-35-5(2) and 7-1(4) Utah Anti-Discrimination Act of 1965, as Amended**

**R486-1-1. Definitions**

**R486-1-2. Procedures-Charges and Investigatory File**

**R486-1-3. Procedures - Initial Decisionmaking and Review**

**R486-1-4. Procedures-Hearings**

**R486-1-1. Definitions**

The Following Definitions are in addition to the statutory definitions specified in U.C.A. 34-35-2.

(a) "Law" means the Utah Anti-Discrimination Act of 1965, prohibiting discriminatory or unlawful employment practices.

(b) "Investigator" shall mean the individual designated by the Commission, or Director to investigate complaints alleging discriminatory or prohibited employment practices.

(c) He, His, Him or Himself" shall refer to either sex.

(d) "Handicap" means a physical or mental impairment which substantially limits one or more of an individual's major life activities.

(1) Being regarded as having a handicap is equivalent to being handicapped or having a handicap.

(2) Having a record of an impairment substantially limiting one or more major life activities is equivalent to being handicapped or having a handicap.

(3) Major life activity means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and employment.

(4) An individual will be considered substantially limited in the major life activity of employment or working if the individual is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap.

(5) Has a record of such an impairment means has a history of, or has been regarded as having, a mental or physical impairment that substantially limits one or more major life activity.

(6) Is regarded as having an impairment means (a) a physical or mental impairment that does not substantially limit major life activities but that is

treated as constituting such a limitation; (b) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such an impairment; or (c) has none of the impairments listed in the definition of physical or mental impairments above but is treated as having such an impairment.

(e) "Qualified handicapped individual" means a handicapped individual who with reasonable accommodation can perform the essential functions of the job in question.

(f) "Reasonable Accommodation" For the purpose of enforcement of these rules and regulations the following criteria will be utilized to determine a reasonable accommodation.

(1) An employer shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(2) Reasonable accommodation for example may include: (a) making facilities used by the employees readily accessible to and usable by handicapped individuals, and (b) job restructuring, modified work schedules, acquisition or modification of equipment or devices, and other similar actions. (This will be handled on a case by case basis)

(3) In determining pursuant to paragraph (1) of this section whether an accommodation would impose an undue hardship on the operation of an employer's, factors to be considered include:

(A) The overall size of the employers program with respect to number of employees, number and type of facilities, and size of budget;

(B) The type of the employers operation, including the composition and structure of the employers workforce; and

(C) The nature and cost of the accommodation needed.

(4) An employer may not deny an employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

(g) With respect to the definition of sexual harassment, the Anti-Discrimination Division adopts the federal EEOC guidelines on sexual harassment as specified in 29 CFR Section 1604.11 (1985) as amended.

**R486-1-2. Procedures-Charges and Investigatory File**

**COMPLAINTS**

The following rules pertain to the procedures specified in U.C.A. 34-35-1.1

(a) Charges shall be filed in writing on forms provided by the Division. The charges shall be signed and verified before a notary public or any other person authorized by law to administer oaths and take acknowledgments.

(b) The charges filed shall contain the following:

(1) The name and address of the party or parties complaining of the discriminatory or prohibited employment practice.

(2) The name (so far as it can be determined) and address of the party or parties alleged to have committed the discriminatory or prohibited employment practice.

(3) A concise statement pertaining to the alleged discriminatory or prohibited employment practice, including the name of the individual who committed

## Rule 2. Suspension of rules.

In the interest of expediting a decision, the appellate court, on its own motion or for extraordinary cause shown, may, except as to the provisions of Rules 4(a), 4(b), 4(e), 5(a), and 48, suspend the requirements or provisions of any of these rules in a particular case and may order proceedings in that case in accordance with its direction.

**Advisory Committee Note.** — Rule 4(b) is added to the list of those rules that the appellate court may not suspend. The former list of rules that the appellate court could not suspend concerned procedures and time limits that confer jurisdiction upon the court. Under Rule 4(b), the post-judgment motions listed must be filed in a timely manner in the trial

court. If the motions are not filed in a timely manner, the appellant may not take advantage of Rule 4(b) that allows 30 days from the disposition of the motion to file the appeal. Both appellate courts treat the failure to file post-judgment motions in a timely manner as a jurisdictional defect. *Burgers v. Meredith*, 652 P.2d 1320 (Utah 1982).

### NOTES TO DECISIONS

**Timely filing.**

When a motion for summary disposition was clearly meritorious, it would support a suspen-

sion of the time limitation contained in Rule 10, Utah R. App. P. *Bailey v. Adams*, 798 P.2d 1142 (Utah Ct. App. 1990).

## TITLE II.

### APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS.

## Rule 3. Appeal as of right: how taken.

(a) **Filing appeal from final orders and judgments.** An appeal may be taken from a district, juvenile, or circuit court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) **Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) **Designation of parties.** The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) **Content of notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) **Service of notice of appeal.** The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at the party's last known address.

(f) **Filing and docketing fees in civil appeals.** At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court such filing fees as are established by law, and also the fee for docketing the appeal in the appellate court. The clerk of the trial court shall not accept a notice of appeal unless the filing and docketing fees are paid.

(g) **Docketing of appeal.** Upon the filing of the notice of appeal and payment of the required fees, the clerk of the trial court shall immediately transmit one copy of the notice of appeal, showing the date of its filing, together with the docketing fee, to the clerk of the appellate court. Upon receipt of the copy of the notice of appeal and the docketing fee, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.

**Advisory Committee Note.** — The designation of parties is changed to conform to the designation of parties in the federal appellate courts.

The rule is amended to make clear that the mere designation of an appeal as a "cross-appeal" does not eliminate liability for payment of the filing and docketing fees. But for the

order of filing, the cross-appellant would have been the appellant and so should be required to pay the established fees.

**Cross-References.** — Circuit courts, appeals from, § 78-4-11.

Justice courts, appeals from, § 78-5-120.

Juvenile courts, appeals from § 78-3a-51.

## NOTES TO DECISIONS

### ANALYSIS

Absence of record.  
Attorney fees.  
Denial of intervention.  
Dismissal by trial court.  
Filing fees.  
Filing of notice.  
Final order or judgment.  
Judgment nunc pro tunc.  
Motion to strike.  
New trial.  
Partial judgment.  
Postjudgment orders.  
Purpose of notice.  
Review in equity cases.  
Summary judgment.  
Unsigned minute entry.  
Cited.

### Absence of record.

There was nothing for the court to review

where the alleged error was not made part of the record. *Powers v. Gene's Bldg. Materials, Inc.*, 567 P.2d 174 (Utah 1977).

### Attorney fees.

Where plaintiff was entitled to attorney fees by law, he was entitled to attorney fees incurred on appeal in defending his judgment without the necessity of having to file a cross appeal. *Coates v. American Economy Ins. Co.*, 627 P.2d 92 (Utah 1981); *Wallis v. Thomas*, 632 P.2d 39 (Utah 1981).

### Denial of intervention.

Order denying with prejudice an application for intervention was appealable. *Tracy v. University of Utah Hosp.*, 619 P.2d 340 (Utah 1980).

### Dismissal by trial court.

Both an order to dismiss with prejudice, on the merits of the issues under Rule 41(b),



commission, or board from which the appeal is taken. The term "appellate court" means the court to which the appeal is taken.

(c) **Procedure established by statute.** If a procedure is provided by state statute as to the appeal or review of an order of an administrative agency, commission, board, or officer of the state which is inconsistent with one or more of these rules, the statute shall govern. In other respects, these rules shall apply to such appeals or reviews.

(d) **Rules not to affect jurisdiction.** These rules shall not be construed to extend or limit the jurisdiction of the Supreme Court or Court of Appeals as established by law.

(e) **Title.** These rules shall be known as the Utah Rules of Appellate Procedure and abbreviated Utah R. App. P.

(Amended effective October 1, 1992.)

**Amendment Notes.** — The 1992 amendment, effective October 1, 1992, substituted "trial court" for "district, juvenile, or circuit court" in Subdivision (a) and "administrative agency, commission, or board" for "tribunal" in Subdivision (b).

## TITLE II.

### APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS.

#### Rule 3. Appeal as of right: how taken.

(a) **Filing appeal from final orders and judgments.** An appeal may be taken from a district, juvenile, or circuit court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) **Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) **Designation of parties.** The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) **Content of notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) **Service of notice of appeal.** The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at the party's last known address.

(f) **Filing and docketing fees in civil appeals.** At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court such filing fees as are established by law, and also the fee for docketing the appeal in the appellate court. The clerk of the trial court shall not accept a notice of appeal unless the filing and docketing fees are paid.

(g) **Docketing of appeal.** Upon the filing of the notice of appeal and payment of the required fees, the clerk of the trial court shall immediately transmit one copy of the notice of appeal, showing the date of its filing, the docketing fee, and a copy of the bond required by Rule 6 or a certification by the clerk that the bond has been filed, to the clerk of the appellate court. Upon receipt of the copy of the notice of appeal and the docketing fee, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.  
(Amended effective October 1, 1992.)

**Amendment Notes.** — The 1992 amendment, effective October 1, 1992, inserted "and a copy of the bond required by Rule 6 or a certification by the clerk that the bond has been filed" and made minor stylistic changes in Subdivision (g).

#### NOTES TO DECISIONS

Cited in *Boggs v. Boggs*, 824 P.2d 478 (Utah Ct. App. 1991).

### Rule 4. Appeal as of right: when taken.

#### NOTES TO DECISIONS

##### ANALYSIS

Extension of time to appeal.  
Post-judgment motions.  
Cited.

##### Extension of time to appeal.

The time for filing an appeal is jurisdictional and ordinarily cannot be enlarged. *State v. Montoya*, 825 P.2d 676 (Utah Ct. App. 1991).

##### Post-judgment motions.

In accord with fourth paragraph in bound volume. *DeBry v. Fidelity Nat'l Title Ins. Co.*, 182 Utah Adv. Rep. 51 (Ct. App. 1992).

Cited in *Wiggins v. Board of Review*, 824 P.2d 1199 (Utah Ct. App. 1992).

**Rule 4. Appeal as of right: when taken.**

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

**NOTES TO DECISIONS**

ANALYSIS	Final order or judgment.
Attorney fees. Cross-appeal. Extension of time to appeal. Filing of notice. Filing with county clerk.	Post-judgment motions. Premature notice. Reconsideration of order. Timeliness of notice. — Date of notice. Cited.

the clerk of the trial court to retain the record or parts thereof subject to the request of the appellate court. The clerk of the trial court shall transmit a copy of the order and of the index and the portion of the record not retained by the trial court to the clerk of the appellate court.

(d) **Record for preliminary hearing in appellate court.** If prior to the time the record is transmitted the record is required in the appellate court, the clerk of the trial court at the request of any party or of the appellate court shall transmit to the appellate court such parts of the original record as designated.

**Advisory Committee Note.** — The amendment keeps the requirement that the court reporter acknowledge the receipt of the request for transcript. Formerly, that acknowledgment was to appear at the foot of the request itself. Rule 12 now treats the acknowledgment as a separate document. The content of the acknowledgment includes a statement regarding the satisfactory arrangement for payment.

Until satisfactory arrangements for payment have been made, the reporter is under no obligation to prepare the transcript.

Rule 12 is amended to impose upon the court reporters the same standard of 'good cause' and the same procedures now applicable to parties in seeking an extension of time for preparation of the transcript.

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 4 Am. Jur. 2d Appeal and Error § 439 et seq.

**C.J.S.** — 4A C.J.S. Appeal and Error §§ 1082 to 1095.

**Key Numbers.** — Appeal and Error ⇐ 619 to 633.

### **Rule 13. Notice of filing by clerk of appellate court.**

Upon receipt of the index transmitted by the clerk of the trial court pursuant to Rule 12(b)(1), or Rule 12(b)(2), or Rule 11(f), the clerk of the appellate court shall file the index and shall immediately give notice to all parties of the date on which it was filed and the date on which the appellant's brief is due pursuant to Rule 26.

## **TITLE III.**

### **REVIEW AND ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES, COMMISSIONS, AND COMMITTEES.**

#### **Rule 14. Review of administrative orders: how obtained; intervention.**

(a) **Petition for review of order; joint petition.** When judicial review by the Supreme Court or the Court of Appeals is provided by statute of an order or decision of an administrative agency, board, commission, committee, or officer (hereinafter the term "agency" shall include agency, board, commission, committee, or officer), a petition for review shall be filed with the clerk of the appellate court within the time prescribed by statute, or if there is no time prescribed, then within 30 days after the date of the written decision or order. The term "petition for review" includes a petition to enjoin, set aside, suspend, modify, or otherwise review a notice of appeal or a writ of certiorari. The

petition shall specify the parties seeking review and shall designate the respondent(s) and the order or decision, or part thereof, to be reviewed. In each case, the agency shall be named respondent. The State of Utah shall be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

(b) **Statutory and docketing fees.** At the time of filing any petition for review, the party obtaining the review shall pay to the clerk of the appellate court such filing fees as are established by law, and also the fee for docketing the appeal. The clerk shall not accept a petition for review unless the filing and docketing fees are paid.

(c) **Service of petition.** A copy of the petition for review shall be served by the petitioner on the named respondent(s), upon all other parties to the proceeding before the agency, and upon the Attorney General of Utah, if the state is a party, in the manner prescribed by Rule 3(e). The petitioner, at the time of filing the petition for review, shall also file with the clerk of the appellate court a certificate reflecting service upon all parties to the agency proceeding who have been served.

(d) **Intervention.** Any person who seeks to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and upon all parties who participated before the agency, and file with the clerk of the appellate court a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene shall be filed within 40 days of the date on which the petition for review is filed.

#### NOTES TO DECISIONS

##### ANALYSIS

Means of filing petition.  
Time for filing.

##### Means of filing petition.

Commencing petitioner's appeal requires filing the petition with the clerk. Filing a document requires that the document be deposited with the court clerk, and not with the post office or other means of delivery. *Silva v. Department of Emp. Sec.*, 786 P.2d 246 (Utah Ct. App. 1990).

Service upon counsel or other parties is required by this rule, and failure to do so may be grounds for appropriate sanctions. However,

service of a petition for review or notice of appeal on an opposing party does not substitute for nor accomplish the act of filing that appeal with the clerk. *Silva v. Department of Emp. Sec.*, 786 P.2d 246 (Utah Ct. App. 1990).

##### Time for filing.

The appeal time commences when the final agency order issues and not when allegedly received by a party.

The 30-day time period for filing an appeal is not extended because the agency's decision was mailed to petitioner and was not received by petitioner until days after its service. *Silva v. Department of Emp. Sec.*, 786 P.2d 246 (Utah Ct. App. 1990).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 2 Am. Jur. 2d Administrative Law § 553 et seq.

**A.L.R.** — Court review of bar examiners' decision on applicant's examination, 39 A.L.R.3d 719.

Standing of civic or property owners' associa-

tion to challenge zoning board decision (as aggrieved party), 8 A.L.R.4th 1087.

Standing of zoning board of appeals or similar body to appeal reversal of its decision, 13 A.L.R.4th 1130.

Judicial review of administrative ruling affecting conduct or outcome of publicly regu-

otherwise ordered by the court. A petition for rehearing will not be granted in the absence of a request for an answer.

(b) **Form of petition; length.** The petition shall be in a form prescribed by Rule 27 and copies shall be served and filed as prescribed by Rule 26. Except by order of the court, a petition for rehearing and any response requested by the court shall not exceed 15 pages.

(c) **Action by court if granted.** If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument, or may restore it to the calendar for reargument or resubmission, or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(d) **Untimely or consecutive petitions.** Petitions for rehearing that are not timely presented under this rule and consecutive petitions for rehearing will not be received by the clerk.

**Advisory Committee Note.** — Rule 33 is substantially redrafted to provide definitions and procedures for assessing penalties for delays and frivolous appeals.

If an appeal is found to be frivolous, the court must award damages. This is in keeping with Rule 11 of the Utah Rules of Civil Procedure. However, the amount of damages — single or double costs or attorney fees or both — is left to the discretion of the court. Rule 33 is amended to make express the authority of the court to

impose sanctions upon the party or upon counsel for the party. This rule does not apply to a first appeal of right in a criminal case to avoid the conflict created for appointed counsel by *Anders v. California*, 386 US 738 (1967) and *State v. Clayton*, 639 P.2d 168 (Utah 1981). Under the law of these cases, appointed counsel must file an appeal and brief if requested by the defendant, and the court must find the appeal to be frivolous in order to dismiss the appeal.

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 5 Am. Jur. 2d Appeal and Error §§ 978 to 984.

**C.J.S.** — 5 C.J.S. Appeal and Error §§ 1408 to 1452.

**Key Numbers.** — Appeal and Error ⇐ 829 to 835.

### Rule 36. Issuance of remittitur.

(a) **Date of issuance.** The remittitur of the court shall issue 15 days after the entry of the judgment. If a petition for rehearing is timely filed, the remittitur of the court shall issue five days after the entry of the order disposing of the petition. The time for issuance of the remittitur may be stayed, enlarged, or shortened by order of the court. A certified copy of the opinion of the court, any direction as to costs, and the record of the proceedings shall constitute the remittitur.

(b) **Stay, supersedeas or injunction pending review.** A stay or supersedeas of the remittitur or an injunction pending application for review may be granted on motion and for good cause. A motion for a stay of the remittitur or for approval of a supersedeas bond or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the court rendering the decision appealed from. A motion for such relief may be made in the reviewing court, but the motion shall show that a motion in the court rendering the decision is not practicable, or that the court rendering the decision has denied such a motion or has failed to afford the relief which the movant requested, with the

reasons given by the court rendering the decision for its action. Reasonable notice of the motion shall be given to all parties. The period of the stay, supersedeas or injunction shall be for such time as ordered by the court up to and including the final disposition of the application for review. If the stay, supersedeas, or injunction is granted until the final disposition of the application for review, the party seeking the review shall, within the time permitted for seeking review, file with the clerk of the court which entered the decision sought to be reviewed, a certified copy of the notice of appeal, petition for writ of certiorari, or other application for review, or shall file a certificate that such application for review has been filed. Upon the filing of a copy of an order of the reviewing court dismissing the appeal or denying the petition for a writ of certiorari, the remittitur shall issue immediately. A bond or other security on such terms as the court deems appropriate may be required as a condition to the grant or continuance of relief under this paragraph.

**Advisory Committee Note.** — Counsel should note that the petition for certiorari alone is not sufficient to stay the judgment of the Court of Appeals. Counsel must also file a motion to stay the remittitur or for an injunction or supersedeas. Although the time for filing the petition for writ of certiorari is 30 days

from the entry of the decision of the Court of Appeals, the motion for the stay must be filed within 14 days of the entry of the decision of the Court of Appeals or within five days of the entry of a decision regarding a motion for rehearing.

#### NOTES TO DECISIONS

**Cited in** *State v. Palmer*, 802 P.2d 748 (Utah App. 1990).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 5 Am. Jur. 2d Appeal and Error § 939 to 945.

**C.J.S.** — 5 C.J.S. Appeal and Error §§ 1869 to 1871

**Key Numbers.** — Appeal and Error ⇐ 1140.

### **Rule 37. Suggestion of mootness; voluntary dismissal.**

(a) **Suggestion of mootness.** It is the duty of each party at all times during the course of an appeal to inform the court of any circumstances which have transpired subsequent to the filing of the appeal which render moot one or more of the issues raised. If a party determines that one or more issues have been rendered moot, the party shall forthwith advise the court by filing a "suggestion of mootness" in the form of a motion under Rule 23. If the parties to the appeal agree as to the mootness of an issue, a stipulation to that effect should be filed, and unless otherwise directed by the court, the appeal will then proceed as to the remaining issues; if all issues in the appeal are mooted and the parties stipulate thereto, the suggestion of mootness shall be presented to the court pursuant to the provisions of paragraph (b) of this rule.

(b) **Voluntary dismissal.** If the parties to an appeal or other proceeding shall sign and file with the clerk an agreement that the proceeding be dismissed, specifying the terms as to payment of costs and shall pay whatever fees are due, the clerk shall enter an order of dismissal, unless otherwise directed by the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.

(d) **Untimely or consecutive petitions.** Petitions for rehearing that are not timely presented under this rule and consecutive petitions for rehearing will not be received by the clerk.  
(Amended effective October 1, 1992.)

**Amendment Notes.** — The 1992 amendment, effective October 1, 1992, in Subdivision (b), deleted “and copies shall be served and filed as prescribed by Rule 26” from the end of the first sentence and added the second and third sentences.

### Rule 36. Issuance of remittitur.

(a) **Date of issuance.**

(1) In the Supreme Court the remittitur of the court shall issue 15 days after the entry of the judgment. If a petition for rehearing is timely filed, the remittitur of the court shall issue five days after the entry of the order disposing of the petition.

(2) In the Court of Appeals the remittitur of the court shall issue immediately after the expiration of the time for filing a petition for writ of certiorari.

(3) The time for issuance of the remittitur may be stayed, enlarged, or shortened by order of the court. A certified copy of the opinion of the court, any direction as to costs, and the record of the proceedings shall constitute the remittitur.

(b) **Stay, supersedeas or injunction pending application for review to the Supreme Court of the United States.** A stay or supersedeas of the remittitur or an injunction pending application for review may be granted on motion and for good cause. A motion for a stay of the remittitur or for approval of a supersedeas bond or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the court rendering the decision appealed from. A motion for such relief may be made in the reviewing court, but the motion shall show that a motion in the court rendering the decision is not practicable, or that the court rendering the decision has denied such a motion or has failed to afford the relief which the movant requested, with the reasons given by the court rendering the decision for its action. Reasonable notice of the motion shall be given to all parties. The period of the stay, supersedeas or injunction shall be for such time as ordered by the court up to and including the final disposition of the application for review. If the stay, supersedeas, or injunction is granted until the final disposition of the application for review, the party seeking the review shall, within the time permitted for seeking the review, file with the clerk of the court which entered the decision sought to be reviewed, a certified copy of the notice of appeal, petition for writ of certiorari, or other application for review, or shall file a certificate that such application for review has been filed. Upon the filing of a copy of an order of the reviewing court dismissing the appeal or denying the petition for a writ of certiorari, the remittitur shall issue immediately. A bond or other security on such terms as the court deems appropriate may be required as a condition to the grant or continuance of relief under this paragraph.  
(Amended effective October 1, 1992.)

**Amendment,** effective  
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### Rule 38/

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### Rule 39.

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wise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

(f) **Non-appearance of parties.** If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present. If neither party appears, the case may be decided on the briefs, or the court may direct that the case be rescheduled for argument.

(g) **Submission on briefs.** By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(h) **Use of physical exhibits at argument; removal.** If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the courtroom before the court convenes on the date of the argument. After the argument, counsel shall remove the exhibits from the courtroom unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

**Advisory Committee Note.** — The former practice was to presume that argument was waived unless requested. The amendments change the practice to presume that argument is requested unless expressly waived.

The rule incorporates the oral argument priority classification formerly found in the administrative orders of the Supreme Court.

#### COLLATERAL REFERENCES

**Utah Law Review.** — Recent Developments in Utah Law — The Utah Court of Appeals, 1988 Utah L. Rev. 150.

**Am. Jur. 2d.** — 5 Am. Jur. 2d Appeal and Error §§ 697 to 699.

**C.J.S.** — 5 C.J.S. Appeal and Error § 1401.

**Key Numbers.** — Appeal and Error ⇐ 824.

### Rule 30. Decision of the court: dismissal; notice of decision.

(a) **Decision in civil cases.** The court may reverse, affirm, modify, or otherwise dispose of any order or judgment appealed from. If the findings of fact in a case are incomplete, the court may order the trial court or agency to supplement, modify, or complete the findings to make them conform to the issues presented and the facts as found from the evidence and may direct the trial court or agency to enter judgment in accordance with the findings as revised. The court may also order a new trial or further proceedings to be conducted. If a new trial is granted, the court may pass upon and determine all questions of law involved in the case presented upon the appeal and necessary to the final determination of the case.

(b) **Decision in criminal cases.** If a judgment of conviction is reversed, a new trial shall be held unless otherwise specified by the court. If a judgment of conviction or other order is affirmed or modified, the judgment or order affirmed or modified shall be executed.

(c) **Decision and opinion in writing; entry of decision.** When a judgment, decree, or order is reversed, modified, or affirmed, the reasons shall be stated concisely in writing and filed with the clerk. Any justice or judge concurring or dissenting may likewise give reasons in writing and file the

ance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing.

(d) **Order and content of argument.** The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records or authorities.

(e) **Cross and separate appeals.** A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a cross-appeal, the plaintiff in the action below shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

(f) **Non-appearance of parties.** If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present. If neither party appears, the case may be decided on the briefs, or the court may direct that the case be rescheduled for argument.

(g) **Submission on briefs.** By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(h) **Use of physical exhibits at argument; removal.** If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the courtroom before the court convenes on the date of the argument. After the argument, counsel shall remove the exhibits from the courtroom unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

(Amended effective October 1, 1992.)

**Amendment Notes.** — The 1992 amendment, effective October 1, 1992, added "with priority to cases in which the defendant is incarcerated" to Subdivision (b)(2), deleted former

Subdivision (b)(10), listing "petitions for review of Public Service Commission orders," and redesignated the following subdivisions accordingly.

### **Rule 30. Decision of the court: dismissal; notice of decision.**

(a) **Decision in civil cases.** The court may reverse, affirm, modify, or otherwise dispose of any order or judgment appealed from. If the findings of fact in a case are incomplete, the court may order the trial court or agency to supplement, modify, or complete the findings to make them conform to the issues presented and the facts as found from the evidence and may direct the trial court or agency to enter judgment in accordance with the findings as revised. The court may also order a new trial or further proceedings to be conducted. If a new trial is granted, the court may pass upon and determine all questions of law involved in the case presented upon the appeal and necessary to the final determination of the case.

(b) **Decision in criminal cases.** If a judgment of conviction is reversed, a new trial shall be held unless otherwise specified by the court. If a judgment of conviction or other order is affirmed or modified, the judgment or order affirmed or modified shall be executed.

## Rule 1

## UTAH RULES OF CIVIL PROCEDURE

### RULE

71A Process in behalf of and against persons  
not parties

71B Proceedings where parties not sum-  
moned

### PART IX APPEALS.

72 through 76 [Repealed]

### PART X DISTRICT COURTS AND CLERKS

77 District courts and clerks

### RULE

78 to 80 [Repealed]

### PART XI GENERAL PROVISIONS

81 Applicability of rules in general

82 Jurisdiction and venue unaffected

83 [Repealed]

84 Forms

85 Title

### APPENDIX OF FORMS

### INDEX TO RULES

## PART I.

## SCOPE OF RULES — ONE FORM OF ACTION.

### Rule 1. General provisions.

(a) **Scope of rules.** These rules shall govern the procedure in the Supreme Court, the district courts, the circuit courts, and the justice courts of the state of Utah in all actions, suits, and proceedings of a civil nature, whether cognizable at law or in equity, and in all special statutory proceedings, except as governed by other rules promulgated by this court or enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action.

(b) **Effective date.** These rules shall take effect on January 1, 1950; and thereafter all laws in conflict therewith shall be of no further force or effect. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

(Amended effective Jan. 1, 1987.)

**Compiler's Notes.** — This rule is substantially similar to Rules 1 and 86(a), F R C P, except that it has been adapted to procedure of this state

**Cross-References.** — Children's cases deemed civil proceedings, § 78-3a-44

Jurisdiction and venue of courts unaffected by rules, Rule 82

Supreme Court, Court of Appeals, district courts, circuit courts, and justice courts, Chapters 2, 2a, 3, 4, 5 of Title 78

Supreme Court's rulemaking power, § 78-2-4

United States, execution of process on land acquired by, §§ 63-8-1, 63-8-3

### NOTES TO DECISIONS

#### ANALYSIS

Applicability

—Administrative body

Federal rules

Noncompliance

Cited

#### Applicability.

—Administrative body.

The Utah Rules of Civil Procedure do not

apply to a proceeding before an administrative body seeking to regulate activities burdened with a public interest *Entre Nous Club v Toronto*, 4 Utah 2d 98, 287 P 2d 670 (1955)

#### Federal rules.

Since these rules were fashioned after the Federal Rules of Civil Procedure, it is proper to examine decisions under the federal rules to determine the meanings thereof *Winegar v Slim Olson, Inc*, 122 Utah 487, 252 P 2d 205 (1953) (construing Rule 41)

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 20 Am. Jur. 2d Courts § 143; 61A Am. Jur. 2d Pleading §§ 350 to 352; 62B Am. Jur. 2d Process §§ 8, 9.

**C.J.S.** — 21 C.J.S. Courts § 54 et seq.; 71 C.J.S. Pleading §§ 408 to 412; 72 C.J.S. Process § 3.

**A.L.R.** — What constitutes doing business

within state for purposes of state "closed-door" statute barring unqualified or unregistered foreign corporation from local courts — modern cases, 88 A.L.R.4th 466.

**Key Numbers.** — Courts ⇐ 21 et seq.; Pleading ⇐ 331; Process ⇐ 4 to 6.

**Rule 4. Process.**

(a) **Signing of summons.** The summons shall be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and served.

(b) **Time of service.** In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative. In any action brought against two or more defendants on which service has been obtained upon one of them within the 120 days or such longer period as may be allowed by the court, the other or others may be served or appear at any time prior to trial.

(c) **Contents of summons.** The summons shall contain the name of the court, the address of the court, the names of the parties to the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It shall state the time within which the defendant is required to answer the complaint in writing, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant. It shall state either that the complaint is on file with the court or that the complaint will be filed with the court within ten days of service. If service is made by publication, the summons shall briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file.

(d) **By whom served.** The summons and complaint may be served in this state or any other state or territory of the United States, by the sheriff or constable, or by the deputy of either, by a United States Marshal or by the marshal's deputy, or by any other person 18 years of age or older at the time of service, and not a party to the action or a party's attorney.

(e) **Personal service.** Personal service shall be made as follows:

(1) Upon any individual other than one covered by subparagraphs (2), (3) or (4) below, by delivering a copy of the summons and/or the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and/or the complaint to an agent authorized by appointment or by law to receive service of process;

(2) Upon an infant (being a person under 14 years) by delivering a copy to the infant and also to the infant's father, mother or guardian or, if none can be found within the state, then to any person having the care and

control of the infant, or with whom the infant resides, or in whose service the infant is employed;

(3) Upon a natural person judicially declared to be of unsound mind or incapable of conducting his own affairs, by delivering a copy to the person and to the person's legal representative if one has been appointed and in the absence of such representative, to the individual, if any, who has care, custody or control of the person;

(4) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering a copy to the person who has the care, custody, or control of the individual to be served, or to that person's designee or to the guardian or conservator of the individual to be served if one has been appointed, who shall, in any case, promptly deliver the process to the individual served;

(5) Upon any corporation, not herein otherwise provided for, upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy thereof to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If no such officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, an office or place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of such office or place of business;

(6) Upon an incorporated city or town, by delivering a copy thereof to the recorder;

(7) Upon a county, by delivering a copy to the county clerk of such county;

(8) Upon a school district or board of education, by delivering a copy to the superintendent or business administrator of the board;

(9) Upon an irrigation or drainage district, by delivering a copy to the president or secretary of its board;

(10) Upon the state of Utah, in such cases as by law are authorized to be brought against the state, by delivering a copy to the attorney general and any other person or agency required by statute to be served; and

(11) Upon a department or agency of the state of Utah, or upon any public board, commission or body, subject to suit, by delivering a copy to any member of its governing board, or to its executive employee or secretary.

**(f) Service and proof of service in a foreign country.** Service in a foreign country shall be made as follows:

(1) In the manner prescribed by the law of the foreign country for service in an action in any of its courts of general jurisdiction; or

(2) Upon an individual, by personal delivery; and upon a corporation, partnership or association, by delivering a copy to an officer or a managing general agent; provided that such service be made by a person who is not a party to the action, not a party's attorney, and is not less than 18 years of age, or who is designated by order of the court or by the foreign court; or

(3) By any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served as ordered by

the court. Proof of service in a foreign country shall be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court. When service is made pursuant to subpart (3) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(g) **Other service.** Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication, by mail, or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties. If the motion is granted, the court shall order service of process by publication, by mail from the clerk of the court, by other means, or by some combination of the above, provided that the means of notice employed shall be reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. A copy of the court's order shall be served upon the defendant with the process specified by the court.

(h) **Manner of proof.** In a case commenced under Rule 3(a)(1), the party serving the process shall file proof of service with the court promptly, and in any event within the time during which the person served must respond to the process, and proof of service must be made within ten days after such service. Failure to file proof of service does not affect the validity of the service. In all cases commenced under Rule 3(a)(1) or Rule 3(a)(2), the proof of service shall be made as follows:

(1) If served by a sheriff, constable, United States Marshal, or the deputy of any of them, by certificate with a statement as to the date, place, and manner of service;

(2) If served by any other person, by affidavit with a statement as to the date, place, and manner of service, together with the affiant's age at the time of service;

(3) If served by publication, by the affidavit of the publisher or printer or that person's designated agent, showing publication, and specifying the date of the first and last publications; and an affidavit by the clerk of the court of a deposit of a copy of the summons and complaint in the United States mail, if such mailing shall be required under this rule or by court order;

(4) If served by United States mail, by the affidavit of the clerk of the court showing a deposit of a copy of the summons and complaint in the United States mail, as may be ordered by the court, together with any proof of receipt;

(5) By the written admission or waiver of service by the person to be served, duly acknowledged, or otherwise proved.

(i) **Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be

amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(j) **Refusal of copy.** If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof.

(k) **Date of service to be endorsed on copy.** At the time of service, the person making such service shall endorse upon the copy of the summons left for the person being served, the date upon which the same was served, and shall sign his or her name thereto, and, if an officer, add his or her official title.

(l) **Designation of newspaper for publication of notice.** In any proceeding where summons or other notice is required to be published, the court shall, upon the request of the party applying for such publication, designate the newspaper and authorize and direct that such publication shall be made therein; provided, that the newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made and shall be published in the English language.

(Amended effective March 1, 1988; April 1, 1990.)

**Advisory Committee Note.** — Rule 4 constitutes a substantial change from prior practice. The rule modernizes and simplifies procedure relating to service of process. Although this rule and Rule 3 retain the ten-day summons procedure for commencement of actions, this rule endeavors to make practice under the ten-day summons provision more consistent with practice in actions commenced by the filing of a complaint. The rule retains portions of prior Rule 4, adopts portions of the present federal Rule 4, and adopts entirely new language in other areas. The rule eliminates the statement (appearing in paragraph (m) of the prior rule) that all writs and process may be served by any constable of the court. In the committee's view, this rule does not properly deal with the question of who may serve types of process other than the summons and complaint. In recommending the elimination of paragraph (m), the committee did not intend to change the law governing eligibility to serve such other process.

**Paragraph (a).** This paragraph eliminates the prior rule's reference to the issuance of summonses. See paragraph (b). Otherwise the paragraph is identical to the former paragraph (a).

**Paragraph (b).** This paragraph, a substantial change from the prior rule, requires that in an action commenced under Rule 3(a)(1), the summons, together with a copy of the complaint, must be served within 120 days of the filing of the complaint. The time period was borrowed from Rule 4(j), Federal Rules of Civil Procedure.

**Paragraph (c).** This paragraph makes minor revisions to the corresponding paragraph of the prior rule. In addition to data historically re-

quired to appear in the summons, the address of the court and information concerning the plaintiff or plaintiff's attorney are also required.

**Paragraph (d).** In prescribing the persons who may serve process, this paragraph eliminates the prior rule's distinction between in-state and out-of-state service. The paragraph is consistent with other changes in the rule designed to simplify and unify practice for in-state and out-of-state service. In order to be eligible to serve a summons or complaint, persons who are not sheriffs or other law enforcement personnel must be at least 18 years of age at the time of service. For eligibility to make service in a foreign country, see paragraph (f).

**Paragraph (e).** This paragraph and paragraphs (f) and (g) simplify, change and reorganize the requirements for methods of service as they appeared in paragraphs (e) and (f) of the former rule. Subparagraph (e)(1) presents the general rule for personal service on individuals who are not infants, incompetent, or incarcerated. Subparagraph (2) deals with service on infants and subparagraph (3) with service on incompetent persons. Subparagraphs (1), (2) and (3) are patterned after Rule 4(e), Federal Rules of Civil Procedure. Subparagraph (4) deals with service on persons who are incarcerated or committed to the custody of a state institution. Subparagraph (5) deals with service on business entities. Subparagraphs (6) through (9) change and modernize service on political subdivisions of the state. Subparagraphs (10) and (11) provide for service on the state and its departments, agencies, boards and commissions with only minor changes from the prior rule.

**Paragraph (f).** This paragraph provides sev-

# UTAH RULES OF CIVIL PROCEDURE

## PART II.

### COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS.

#### Rule 4. Process.

##### NOTES TO DECISIONS

##### Applicability of rule.

##### —Service on state agency.

In an action against the Utah State Department of Transportation, § 63-30-12, requiring

notice both to the attorney general and the Department, is applicable, not Subdivision (e)(11) of this rule. *Lamarr v. State DOT*, 183 Utah Adv. Rep. 53 (Ct. App. 1992).

## PART III.

### PLEADINGS, MOTIONS, AND ORDERS.

#### Rule 8. General rules of pleadings.

##### NOTES TO DECISIONS

##### Effect of failure to deny.

In an action for modification of the custody provision in a divorce decree, it was appropriate for the trial court to rule on appellee's petition, absent any responsive pleading, and to accept the allegations in the petition as true in resolving the threshold requirement of whether appellant's circumstances had materially changed; however, it does not follow that

appellee's petition entitled her to relief. A trial court asked to render a judgment by default must first conclude that the uncontroverted allegations of an applicant's petition are, on their face, legally sufficient to establish a valid claim against the defaulting party. *Stevens v. Collard*, 180 Utah Adv. Rep. 19 (Ct. App. 1992).

#### Rule 12. Defenses and objections.

##### NOTES TO DECISIONS

##### ANALYSIS

Motion to dismiss for failure to state a claim.

—Standard.

Cited.

Motion to dismiss for failure to state a claim.

—Standard.

In ruling on a motion to dismiss for failure to

state a claim, the court must construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor. *Mounteer v. Power & Light Co.*, 823 P.2d 1055 (Utah 1991).

Cited in *Moffitt v. Barr*, 181 Utah Adv. Rep. 71 (Ct. App. 1992).



were performed outside the state, 16 A.L.R.4th 1318.

Forum state's jurisdiction over nonresident defendant in action based on obscene or threatening telephone call from out of state, 37 A.L.R.4th 852.

Necessity and permissibility of raising claim for abuse of process by reply or counterclaim in

same proceeding in which abuse occurred — state cases, 82 A.L.R.4th 1115.

**Key Numbers.** — Corporations ⇨ 507, Counties ⇨ 219, Municipal Corporations ⇨ 1029; Process ⇨ 21, 23, 24, 50 to 58, 63, 64, 82, 84 to 111, 127 to 153, 161 to 165, Schools and School Districts ⇨ 119, States ⇨ 204.

## Rule 5. Service and filing of pleadings and other papers.

(a) **Service: When required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, notice of signing or entry of judgment under Rule 58A(d), and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except as provided in Rule 55(a)(2) (default proceedings) or pleadings asserting new or additional claims for relief against them which shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Service: How made.**

(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(2) A resident attorney, on whom pleadings and other papers may be served, shall be associated as attorney of record with any foreign attorney practicing in any of the courts of this state.

(c) **Service: Numerous defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the

## **APPENDIX J**

### **Statutes**

{All from Utah Code Annotated}

Sec. 63-46b-16(1)  
Sec. 78-2a-3(2)(a)  
Sec. 34-35-7.1(3)(b)  
Sec. 34-35-7.1(11)(b)  
Sec. 34-35-7.1(1)(a)  
Sec. 34-35-7.1(9)  
Sec. 34-35-8  
Sec. 63-46b-12(1)(b)(iv)  
Sec. 63-46b-12(1)(a)  
Sec. 63-45b-22  
Sec. 63-46b-16  
Sec. 63-46b-16(4)

(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

**History:** C. 1953, 63-46b-15, enacted by L. 1987, ch. 161, § 271; 1988, ch. 72, § 25.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, deleted "except that final agency action from informal adjudicative proceedings based on a record shall be reviewed by the district courts on the record

according to the standards of Subsection 63-46b-16(4)" at the end in Subsection (1)(a) and made minor stylistic changes.

**Effective Dates.** — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

#### NOTES TO DECISIONS

##### **Function of district court.**

Section 63-46b-16(1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore,

the district court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to Subsection (1)(a) of this section. In re Topik, 761 P.2d 32 (Utah Ct. App. 1988).

### **63-46b-16. Judicial review — Formal adjudicative proceedings.**

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

X (b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

### **78-2a-2. Number of judges — Terms — Functions — Filing fees.**

(1) The Court of Appeals consists of seven judges. The term of appointment to office as a judge of the Court of Appeals is until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a judge of the Court of Appeals is six years and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation \$1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

- (a) administer the rotation and scheduling of panels;
- (b) act as liaison with the Supreme Court;
- (c) call and preside over the meetings of the Court of Appeals; and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court.

**History:** C. 1953, 78-2a-2, enacted by L. 1986, ch. 47, § 45; 1988, ch. 248, § 7.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, in Subsection (1), divided and rewrote the former third sentence, which read "Thereafter, the term of of-

fice of a judge of the Court of Appeals is 6 years and until a successor is appointed and approved under Section 20-1-7.1," into the present third and fourth sentences and made minor stylistic changes.

### **78-2a-3. Court of Appeals jurisdiction.**

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

- (b) appeals from the district court review of:
    - (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
    - (ii) a challenge to agency action under Section 63-46a-12.1;
  - (c) appeals from the juvenile courts;
  - (d) appeals from the circuit courts, except those from the small claims department of a circuit court;
  - (e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;
  - (f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;
  - (g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;
  - (h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;
  - (i) appeals from the Utah Military Court; and
  - (j) cases transferred to the Court of Appeals from the Supreme Court.
- (3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.
- (4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings.

**History:** C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3; 1991, ch. 268, § 22.

**Amendment Notes.** — The 1988 amendment by ch. 73, effective April 25, 1988, inserted subsection designations (a) and (b) in Subsection (1); inserted "resulting from formal adjudicative proceedings" in Subsection (2)(a); substituted "state agencies" for "state and local agencies" in Subsection (2)(a); substituted "informal adjudicative proceedings of the agencies" for "them" in Subsection (2)(a); deleted "notwithstanding any other provision of law" at the end of Subsection (2)(a); inserted Subsection (b); redesignated former Subsections (2)(b) to (2)(h) as Subsections (2)(c) to (2)(i); added "except those from the small claims department of a circuit court" at the end of Subsection (2)(d); and made minor stylistic changes.

The 1988 amendment by ch. 210, effective April 25, 1988, added Subsection (2)(h) and redesignated former Subsection (2)(h) as Subsection (2)(i).

The 1988 amendment by ch. 248, effective April 25, 1988, in Subsection (2)(a), rewrote the phrase before "except" which had read "the

final orders and decrees of state and local agencies or appeals from the district court review of them"; deleted "notwithstanding any other provision of law" at the end of Subsection (2)(a); inserted present Subsection (2)(b); designated former Subsections (2)(b) to (2)(h) as Subsections (2)(c) to (2)(i); and substituted "first degree or capital felony" for "first or capital degree felony" in present Subsection (2)(f).

The 1990 amendment by ch. 80, effective April 23, 1990, rewrote Subsection (2)(g), which read "appeals from orders on petitions for extraordinary writs involving a criminal conviction, except those involving a first degree or capital felony" and made punctuation changes in Subsections (2)(h) and (3).

The 1990 amendment by ch. 224, effective April 23, 1990, inserted the subdivision designation (i) in Subsection (2)(b) and added Subsection (2)(b)(ii), and made related stylistic changes.

The 1991 amendment, effective January 1, 1992, substituted "a court of record" for "district court" in Subsection (2)(f).

**Cross-References.** — Composition and jurisdiction of military court, §§ 39-6-15, 39-6-16.

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

- (a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;
- (b) election and voting contests;
- (c) reapportionment of election districts;
- (d) retention or removal of public officers; and
- (e) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings.

**History:** C. 1953, 78-2-2, enacted by L. 1986, ch. 47, § 41; 1987, ch. 161, § 303; 1988, ch. 248, § 5; 1989, ch. 67, § 1; 1992, ch. 127, § 11.

**Amendment Notes.** — The 1992 amendment, effective April 27, 1992, in Subsection

(4), deleted former Subsections (e) and (f), which read: "general water adjudication" and "taxation and revenue; and," respectively, making related changes; redesignated former Subsection (g) as Subsection (e); and made stylistic changes in Subsection (e).

#### NOTES TO DECISIONS

Cited in *State v. Humphrey*, 176 Utah Adv. Rep. 8 (1991).

## CHAPTER 2a COURT OF APPEALS

Section

78-2a-3. Court of Appeals jurisdiction.

### 78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;
- (b) appeals from the district court review of:

tion must prove that the stated reasons of an employer for passing her over were merely a pretext and not the real reason, it is the ultimate burden of persuasion which she must carry. She is not required to establish intent as an element of her prima facie case. However, after her employer raises a genuine issue of fact by adducing legitimate reasons for its action, the burden shifts back to the employee, requiring her to prove that a discriminatory reason was the basis for the employer's decision. *University of Utah v. Industrial Comm'n*, 736 P.2d 630 (Utah 1987).

Although a television station employee presented a prima facie case of age discrimination, her employer carried its burden of rebuttal by presenting legitimate reasons for not hiring her: Her unwillingness to follow orders, to follow through, and to meet budget limitations as well as deadlines and her inability to work

well with others. *University of Utah v. Industrial Comm'n*, 736 P.2d 630 (Utah 1987).

#### **Discrimination in rate of pay.**

Discrimination in rate of pay cannot be determined solely on whether a person is doing the same work with the same degree of competence as other employees; classification, seniority and degree of responsibility employee is required to assume must also be considered; police dispatcher who claimed she had been discriminated against on basis of sex in that she received less pay than a regular policeman doing the same work was not entitled to relief in view of the more stringent qualifications and training required of police officers and the varied nature of their duties. *Kopp v. Salt Lake City*, 29 Utah 2d 170, 506 P.2d 809 (1973).

Cited in *Rose v. Allied Dev. Co.*, 719 P.2d 83 (Utah 1986).

#### **COLLATERAL REFERENCES**

**Utah Law Review.** — Sex as a Bona Fide Occupational Qualification, 1968 Utah L. Rev. 395.

**Brigham Young Law Review.** — Accommodation of Conscientious Objection to Abortion: A Case Study of the Nursing Profession, 1982 B.Y.U. L. Rev. 253.

**C.J.S.** — 51B C.J.S. Labor Relations § 866.

**A.L.R.** — Termination of employment because of pregnancy as affecting right to unemployment compensation, 51 A.L.R.3d 254.

Discipline or discharge for sexual conduct as violative of state fair employment laws, 47 A.L.R.4th 863.

When is work environment intimidating, hostile, or offensive, so as to constitute sexual harassment in violation of Title VII of Civil Rights Act of 1964 as amended (42 USCS § 2000e et seq.), 78 A.L.R. Fed. 252.

Actions under Age Discrimination in Em-

ployment Act (29 USCS §§ 621-634) challenging hiring or retirement practices in law enforcement employment, 79 A.L.R. Fed. 373.

Who is "qualified" handicapped person protected from employment discrimination under Rehabilitation Act of 1973 (29 USCS § 701 et seq.) and regulations promulgated thereunder, 80 A.L.R. Fed. 830.

Effect of mixed or dual motives in actions under Title VII (equal employment opportunities subchapter) of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 83 A.L.R. Fed. 268.

Actionability, under federal and state anti-discrimination legislation, of foreign employer's discriminating in favor of foreign workers in hiring and other employment matters, 84 A.L.R. Fed. 114.

**Key Numbers.** — Labor Relations ⇌ 884, 885.

### **34-35-7. Repealed.**

**Repeals.** — Section 34-35-7 (L. 1969, ch. 85, § 166; 1979, ch. 139, § 2; 1981, ch. 1, § 1), re-

lating to violations, complaints and procedure, was repealed by Laws 1985, ch. 189, § 5.

### **34-35-7.1. Procedure for aggrieved person to file claim — Investigations — Adjudicative proceedings — Settlement — Reconsideration — Determination.**

- (1) (a) Any person claiming to be aggrieved by a discriminatory or prohibited employment practice may by himself, his attorney, or his agent, make, sign, and file with the commission a request for agency action.
- (b) Every request shall be verified under oath or affirmation.

- (c) A request shall be filed within 180 days after the alleged discriminatory or prohibited employment practice occurred.
- (2) Any employer, labor organization, joint apprenticeship committee, or vocational school who has employees or members who refuse or threaten to refuse to comply with the provisions of this chapter may file with the commission a written charge asking the commission for assistance to obtain their compliance by conciliation or other remedial action.
- (3) (a) Before an adjudicative proceeding is set or held, the commission shall assign an investigator to the charge to attempt a settlement between the parties by conference, conciliation, or persuasion.
- (b) If no settlement is reached, the investigator shall make a prompt impartial investigation of the allegations made in the charge.
- (c) During the investigation, the members of the commission and its staff may not disclose the information gathered during the investigation or the settlement efforts to any party not involved in the investigation or the charge itself.
- (d) The commission and its staff, agents, and employees shall conduct every investigation in fairness to all parties and agencies involved, and may not attempt a settlement between the parties if it is clear that no prohibited employment practice has occurred.
- (4) (a) If the initial attempts at settlement are unsuccessful, and the investigator uncovers insufficient evidence during his investigation to support the charge of discrimination or prohibited employment practice, the investigator shall formally report these findings to the commission.
- (b) (i) Upon receipt of the investigator's report, the commission may issue an order dismissing the charge for no cause of action.
- (ii) The aggrieved party may petition the commission for reconsideration.
- (5) (a) If the initial attempts at settlement are unsuccessful, and the investigator uncovers sufficient evidence during his investigation to support the charges of discrimination or prohibited employment practice, the investigator shall formally report these findings to the commission.
- (b) Upon receipt of the investigator's report the commission may issue an order adopting the investigator's report.
- (c) The commission may order the parties to meet for conciliation discussions, with a designated employee of the commission present.
- (d) If these final conciliation discussions are unsuccessful, or if a party declines to participate in the conciliation discussions, an aggrieved party may file a request for reconsideration with the commission.
- (e) If the commission receives no timely request for reconsideration from the respondent, the commission may issue an order requiring the respondent to cease any discriminatory or prohibited employment practices and provide relief to the charging party.
- (6) In any adjudicative proceeding, the investigator who investigated the matter may not participate in the hearing except as a witness, nor may he participate in the deliberations of the administrative law judge.
- (7) (a) The administrative law judge may advise either party appearing without representation that obtaining representation to present their case before the administrative law judge is advisable.
- (b) The administrative law judge may postpone the hearing to allow either party to obtain legal representation.



(8) The commission or the charging party may reasonably and fairly amend any charge, and the respondent may amend its answer.

(9) (a) If, upon all the evidence at a hearing, the administrative law judge finds that a respondent has not engaged in a discriminatory or prohibited employment practice, the administrative law judge shall issue an order dismissing the action containing his findings of fact and conclusions of law.

(b) If, the case is dismissed, the administrative law judge may recommend that the respondent be reimbursed for his costs.

(10) The commission may enact rules to govern, expedite, and effectuate these procedures and its own actions that do not violate the provisions of Chapter 46b, Title 63, or this chapter.

(11) The procedures contained in this section and Section 34-35-8 are the exclusive remedy under state law for employment discrimination because of race, color, sex, age, religion, national origin, or handicap.

**History:** C. 1953, 34-35-7.1, enacted by L. 1985, ch. 189, § 4; 1987, ch. 161, § 105.

**Amendment Notes.** — The 1987 amendment, effective January 1, 1988, rewrote Subsections (1), (3), (4) and (5), deleted former Subsections (6), (7), (11) and (12) and redesignated the subsequent subsections accordingly; re-

wrote present Subsection (9); substituted "that do not violate the provisions of Chapter 46b, Title 63, or this chapter" for "subject to the conditions and provisions of this chapter" in present Subsection (10); and made minor changes in phraseology and punctuation.

#### NOTES TO DECISIONS

##### ANALYSIS

Procedure at hearing.  
Remedies of commission.

##### Procedure at hearing.

It is not improper for the complainant's case to be presented by the complainant personally or by counsel instead of an attorney or agent for the commission. *Beehive Medical Elecs., Inc. v. Industrial Comm'n*, 583 P.2d 53 (Utah 1978).

##### Remedies of commission.

Under proper circumstances, payment in lieu of job reinstatement is a permissible affirmative action. *Beehive Medical Elecs., Inc. v. Industrial Comm'n*, 583 P.2d 53 (Utah 1978).

#### COLLATERAL REFERENCES

**A.L.R.** — Damages recoverable for wrongful discharge of at-will employee, 44 A.L.R.4th 1131.

Rights of state and municipal public employees in grievance proceedings, 46 A.L.R.4th 913.

Reinstatement as remedy for discriminatory discharge or demotion under Age Discrimination in Employment Act (29 USCS § 621 et seq.), 78 A.L.R. Fed. 575.

### 34-35-8. Judicial review — Procedure.

(1) Any complainant, or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue an order, may obtain judicial review and the commission may obtain an order of court for its enforcement in a proceeding as provided in this section.

(2) The proceeding shall be brought in the district court of the district in which is located the county in which the alleged discriminatory or unfair employment practice which is the subject of the commission's order was committed, or in which any respondent required in the order to cease or desist from a discriminatory or unfair employment practice, or to take other affirmative action, resides or transacts business.

(3) The judicial review sought by the person or persons claiming to be aggrieved by a final order of the commission shall be initiated by filing in the district court not later than one month after actual service of a copy of the order of the commission on the aggrieved party or parties, a petition for a trial de novo in the district court. Within five days after the filing of the petition in the district court, the petitioner shall cause to be served upon the commission and upon all persons who appeared as adverse parties at any hearing or proceeding before the commission a copy of the petition for trial de novo in the district court. If the addresses of all adverse parties cannot be ascertained by the petition, the petitioner shall serve copies upon those parties in care of the commission.

(4) The filing of the petition in the district court operates as a stay of enforcement of the order of the commission until or unless the district court dismisses the petition or enters a judgment upon a trial de novo in the district court.

(5) The petition for a trial de novo shall specify the date of the order and the parties to the proceeding before the commission. Within 15 days after filing the petition the commission shall file in the district court where the petition has been filed the entire case file before the commission containing the formal complaint, the answer and all other documents and exhibits, together with a transcript of the hearing before the commission if any of the parties so require. The district court upon motion of any party to the proceeding in the district court may order the appearance of new parties and require any of the parties to file new pleadings or allow any amendment to pleadings, or expedite discovery proceedings.

(6) Upon the conclusion of a trial de novo in the district court or other proceedings which appropriately dispose of all issues of fact and of law, the district court shall enter findings of fact, conclusions of law, and judgment and decree, which are subject to enforcement upon the application of the commission or any party to the judgment. The parties may waive findings of fact and conclusions of law. The judgment entered in the district court supersedes any order made by the commission.

(7) The judgment and order of the court are final, subject to review as provided by law.

(8) The commission's copy of the testimony shall be available to all parties for examination at reasonable times, without cost, and for the purpose of judicial review of the commission's orders.

(9) The commission may appear in court by its own attorney.

(10) Proceedings in the district court shall be expedited at all stages to final judgment as far as consistent with justice to all interested parties.

(11) If no proceeding to obtain judicial review is instituted by a complainant or respondent within one month from the service of an order of the commission pursuant to Section 34-35-7 [repealed], the commission may obtain a decree of the court for the enforcement of the order upon showing that respon-

dent is subject to the jurisdiction of the commission and resides or transacts business within the county in which the petition for enforcement is brought.

(12) The provisions of the Utah Rules of Civil Procedure, as applicable and not in conflict with this chapter, apply to proceedings in the courts under the provisions of this chapter.

**History:** C. 1953, 34-35-8, enacted by L. 1969, ch. 85, § 167; 1986, ch. 47, § 15.

**Amendment Notes.** — The 1986 amendment rewrote Subsection (7) and made various stylistic changes in the rest of the section.

**Compiler's Notes.** — Section 34-35-7, referred to in Subsection (11), was repealed by Laws 1985, ch. 189, § 5. For present comparable provisions, see § 34-35-7.1.

#### NOTES TO DECISIONS

##### ANALYSIS

**Jury trial.**  
Remedies of district court.  
Trial de novo.

**Jury trial.**  
There is no right to a jury trial at trial de novo in the district court on appeal from commission's decision on a sex discrimination in employment case. *Beehive Medical Elecs., Inc. v. Industrial Comm'n*, 583 P.2d 53 (Utah 1978).

**Remedies of district court.**  
District court on trial de novo has jurisdiction to impose the same remedies granted by law to the industrial commission. *Beehive*

*Medical Elecs., Inc. v. Industrial Comm'n*, 583 P.2d 53 (Utah 1978).

**Trial de novo.**  
The legislature clearly intended that the court be the fact-finder on review. Thus, the findings of the commission are superseded by the findings of the district court, and no particular deference need be given to the former. *University of Utah v. Industrial Comm'n*, 736 P.2d 630 (Utah 1987).

## CHAPTER 36

### TRANSPORTATION OF WORKERS

Section	Section
34-36-1. Motor vehicles of employers — Safe maintenance and operation.	34-36-3. Carriers and vehicles of United States exempt.
34-36-2. Motor vehicles of employers — Rules and regulations.	34-36-4. Agricultural workers exempt.

#### 34-36-1. Motor vehicles of employers — Safe maintenance and operation.

Every motor vehicle furnished by an employer to be used to transport one or more workers to and from their places of employment shall be maintained in a safe condition and operated in a safe manner at all times, whether or not used on a public highway.

**History:** C. 1953, 34-36-1, enacted by L. 1969, ch. 85, § 168.

**History:** C. 1953, 34-35-6, enacted by L. 1969, ch. 85, § 165; 1971, ch. 73, § 10; 1973, ch. 65, § 1; 1975, ch. 100, § 1; 1979, ch. 136, § 3; 1985, ch. 189, § 3; 1985, ch. 203, § 1; 1987, ch. 206, § 4; 1989, ch. 155, § 1.

**Amendment Notes.** — The 1989 amendment, effective April 24, 1989, inserted "harass" near the beginning of Subsection (1)(a)(i)

and inserted "or harass" near the middle of Subsection (1)(c) and near the beginning of Subsection (1)(f)(ii); inserted "pregnancy, childbirth, or pregnancy-related conditions" in several places throughout the section; deleted a reference to Section 49-7a-39 in Subsection (4); and made minor stylistic changes.

#### NOTES TO DECISIONS

**Cited in** *Howcroft v. Mountain States Tel. & Tel. Co.*, 712 F. Supp. 1514 (D. Utah 1989).

#### COLLATERAL REFERENCES

**A.L.R.** — Accommodation requirement under state legislation forbidding job discrimination on account of handicap, 76 A.L.R.4th 310.

Handicap as job disqualification under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 265.

Discrimination "because of handicap" or "on the basis of handicap" under state statutes prohibiting job discrimination on account of handicap, 81 A.L.R.4th 144.

What constitutes handicap under state legislation forbidding job discrimination on account of handicap, 82 A.L.R.4th 26.

Nature and burden of proof in Title VII action alleging favoritism in promotion or job assignment due to sexual or romantic relation-

ship between supervisor and another, 86 A.L.R. Fed. 230.

Circumstances which warrant finding of constructive discharge in cases under Age Discrimination in Employment Act (29 USCS §§ 621 et seq.), 93 A.L.R. Fed. 10.

When does adverse employment decision based on person's foreign accent constitute national origin discrimination in violation of Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 104 A.L.R. Fed. 816.

Protection of debtor from acts of discrimination by private entity and under § 525(b) of Bankruptcy Code of 1978 (11 USCS § 525(b)), 105 A.L.R. Fed. 555.

### **34-35-7.1. Procedure for aggrieved person to file claim — Investigations — Adjudicative proceedings — Settlement — Reconsideration — Determination.**

(1) (a) Any person claiming to be aggrieved by a discriminatory or prohibited employment practice may by himself, his attorney, or his agent, make, sign, and file with the commission a request for agency action.

(b) Every request for agency action shall be verified under oath or affirmation.

(c) A request for agency action made under this section shall be filed within 180 days after the alleged discriminatory or prohibited employment practice occurred.

(2) Any employer, labor organization, joint apprenticeship committee, or vocational school who has employees or members who refuse or threaten to refuse to comply with the provisions of this chapter may file with the commission a request for agency action asking the commission for assistance to obtain their compliance by conciliation or other remedial action.

(3) (a) Before a hearing is set or held as part of any adjudicative proceeding, the commission shall promptly assign an investigator to attempt a settlement between the parties by conference, conciliation, or persuasion.

(b) If no settlement is reached, the investigator shall make a prompt impartial investigation of all allegations made in the request for agency action.

(c) The commission and its staff, agents, and employees shall conduct every investigation in fairness to all parties and agencies involved, and may not attempt a settlement between the parties if it is clear that no discriminatory or prohibited employment practice has occurred.

(d) If the aggrieved party wishes to withdraw the request for agency action, he must do so prior to the issuance of a final order.

(4) (a) If the initial attempts at settlement are unsuccessful, and the investigator uncovers insufficient evidence during his investigation to support the allegations of a discriminatory or prohibited employment practice set out in the request for agency action, the investigator shall formally report these findings to the director.

(b) Upon receipt of the investigator's report, the director may issue a determination and order for dismissal of the adjudicative proceeding.

(c) A party may make a written request to the director for an evidentiary hearing to review de novo the director's determination and order within 30 days of the date of the determination and order for dismissal.

(d) If the director receives no timely request for a hearing, the determination and order issued by the director becomes the final order of the commission.

(5) (a) If the initial attempts at settlement are unsuccessful and the investigator uncovers sufficient evidence during his investigation to support the allegations of a discriminatory or prohibited employment practice set out in the request for agency action, the investigator shall formally report these findings to the director.

(b) Upon receipt of the investigator's report the director may issue a determination and order based on the investigator's report.

(c) A party may file a written request to the director for an evidentiary hearing to review de novo the director's determination and order within 30 days of the date of the determination and order.

(d) If the director receives no timely request for a hearing, the determination and order issued by the director requiring the respondent to cease any discriminatory or prohibited employment practice and to provide relief to the aggrieved party becomes the final order of the commission.

(6) In any adjudicative proceeding, the investigator who investigated the matter may not participate in a hearing except as a witness, nor may he participate in the deliberations of the presiding officer.

(7) Prior to commencement of an evidentiary hearing, the party filing the request for agency action may reasonably and fairly amend any allegation, and the respondent may amend its answer. Those amendments may be made during or after a hearing but only with permission of the presiding officer.

(8) (a) If, upon all the evidence at a hearing, the presiding officer finds that a respondent has not engaged in a discriminatory or prohibited employment practice, the presiding officer shall issue an order dismissing the request for agency action containing the allegation of a discriminatory or prohibited employment practice.

(b) The presiding officer may order that the respondent be reimbursed by the complaining party for his attorneys' fees and costs.

(9) If upon all the evidence at the hearing, the presiding officer finds that a respondent has engaged in a discriminatory or prohibited employment practice, the presiding officer shall issue an order requiring the respondent to cease any discriminatory or prohibited employment practice and to provide

relief to the complaining party, including reinstatement, back pay and benefits, and attorneys' fees and costs.

(10) Conciliation between the parties is to be urged and facilitated at all stages of the adjudicative process.

(11) (a) Either party may file a written request for review of the order issued by the presiding officer in accordance with Section 63-46b-12.

(b) If there is no timely request for review the order issued by the presiding officer becomes the final order of the commission.

(12) An order of the commission under Subsection (11)(a) is subject to judicial review as provided in Section 63-46b-16.

(13) The commission shall have authority to make rules concerning procedures under this chapter in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(14) The members of the commission and its staff may not divulge or make public any information gained from any investigation, settlement negotiation, or proceeding before the commission except in the following:

(a) Information used by the director in making any determination may be provided to all interested parties for the purpose of preparation for and participation in proceedings before the commission.

(b) General statistical information may be disclosed provided the identities of the individuals or parties are not disclosed.

(c) Information may be disclosed for inspection by the attorney general or other legal representatives of the state or commission.

(d) Information may be disclosed for information and reporting requirements of the federal government.

(15) The procedures contained in this section are the exclusive remedy under state law for employment discrimination based upon race, color, sex, retaliation, pregnancy, childbirth, or pregnancy-related conditions, age, religion, national origin, or handicap.

(16) The commencement of an action under federal law for relief based upon any act prohibited by this chapter bars the commencement or continuation of any adjudicative proceeding before the Utah Antidiscrimination Division in connection with the same claims under this chapter. Nothing in this subsection is intended to alter, amend, modify, or impair the exclusive remedy provision set forth in Subsection (15).

**History:** C. 1953, 34-35-7.1, enacted by L. 1985, ch. 189, § 4; 1987, ch. 161, § 105; 1990, ch. 63, § 2; 1991, ch. 188, § 1.

**Amendment Notes.** — The 1990 amendment, effective April 23, 1990, inserted "for agency action" in Subsection (1)(b) and "for agency action made under this section" in Subsection (1)(c); substituted "request for agency action" for "written charge" in Subsection (2); "a hearing is set or held as part of any adjudicative proceeding, the commission shall promptly assign an investigator" for "an adjudicative proceeding is set or held, the commission shall assign an investigator to the charge" in Subsection (3)(a), and "all allegations made in the request for agency action" for "the allegations made in the charge" in Subsection (3)(b); deleted former Subsection (3)(c), relating

to the disclosure of information or settlement efforts; redesignated former Subsection (3)(d) as Subsection (3)(c); inserted Subsection (3)(d); and rewrote the remainder of the section to the extent that a detailed comparison would be impracticable.

The 1991 amendment, effective April 29, 1991, inserted "discriminatory or" near the end of Subsection (3)(c); added Subsection (4)(d); substituted all of the present language of Subsection (8)(a) beginning with "request" for "director's determination and ending the adjudicative proceeding"; deleted "If a director's determination is dismissed" at the beginning of Subsection (8)(b); added "and costs" at the end of Subsection (9); substituted "issued by the presiding officer" for "by the commission" in Subsection (11)(a); rewrote Subsections (12)

and (13); and made minor changes in punctuation and style throughout the section.

#### NOTES TO DECISIONS

##### ANALYSIS

**Exclusive remedy.**

No independent cause of action found.

**Exclusive remedy.**

Claims that assert a different injury than this statute covers, such as intentional tort claims, and perhaps certain state constitutional claims, are not necessarily foreclosed by the exclusive remedy provision of Subsection (11) if an independent cause of action exists

outside this chapter for such claims. *Sauers v. Salt Lake County*, 735 F. Supp. 381 (D. Utah 1990).

**No independent cause of action found.**

Former county employee's claims of sexual harassment and discrimination were preempted by this chapter, even though they were cast as violations of other statutes or the Utah Constitution. *Sauers v. Salt Lake County*, 735 F. Supp. 381 (D. Utah 1990).

#### COLLATERAL REFERENCES

**A.L.R.** — Award of front pay under state job discrimination statutes, 74 A.L.R.4th 746.

Damages and other relief under state legis-

lation forbidding job discrimination on account of handicap, 78 A.L.R.4th 435.

### 34-35-8. Repealed.

**Repeals.** — Laws 1990, ch. 63, § 3 repeals § 34-35-8, as last amended by Laws 1986, ch. 47, § 15, relating to judicial review, effective

April 23, 1990. For present comparable provisions, see § 34-35-7.1.

## CHAPTER 37

# DECEPTION DETECTION EXAMINERS

### 34-37-1. Citation of act.

#### COLLATERAL REFERENCES

**A.L.R.** — Admissibility of lie detector test results, or of offer or refusal to take test, in

attorney disciplinary proceeding, 79 A.L.R.4th 576.

### 34-37-16. Surreptitious examinations prohibited.

#### NOTES TO DECISIONS

##### ANALYSIS

**Purpose.**

Refusal to submit to polygraph test.

**Purpose.**

Subsection (2) protects employees or potential employees from termination where the employer informs them of the possibility of ongoing or future surreptitious examinations and the applicants or employees refuse consent or

cooperation with such practices. *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033 (Utah 1989).

**Refusal to submit to polygraph test.**

Subsection (2) applies only to surreptitious deception detection examinations. This does not include polygraph examinations. *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033 (Utah 1989).

**History:** C. 1953, 63-46b-11, enacted by L. 1987, ch. 161, § 267; 1988, ch. 72, § 21.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, substituted "properly scheduled hearing after receiving proper notice" for "hearing" in Subsection (1)(b); designated the existing provisions in Subsection (3) as present Subsection (3)(a), inserting "and any order in the adjudicative proceeding issued subsequent to the default or-

der," and added Subsections (b) and (c); designated the existing provision in Subsection (4) as present Subsection (4)(a), adding "In an adjudicative proceeding begun by a party that has other parties besides the party in default," and added Subsection (b); and made minor stylistic changes.

**Effective Dates.** — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

### **63-46b-12. Agency review — Procedure.**

- (1) (a) If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule.
  - (b) The request shall:
    - (i) be signed by the party seeking review;
    - (ii) state the grounds for review and the relief requested;
    - (iii) state the date upon which it was mailed; and
    - (iv) be sent by mail to the presiding officer and to each party.
- (2) Within 15 days of the mailing date of the request for review, or within the time period provided by agency rule, whichever is longer, any party may file a response with the person designated by statute or rule to receive the response. One copy of the response shall be sent by mail to each of the parties and to the presiding officer.
- (3) If a statute or the agency's rules require review of an order by the agency or a superior agency, the agency or superior agency shall review the order within a reasonable time or within the time required by statute or the agency's rules.
- (4) To assist in review, the agency or superior agency may by order or rule permit the parties to file briefs or other papers, or to conduct oral argument.
- (5) Notice of hearings on review shall be mailed to all parties.
- (6) (a) Within a reasonable time after the filing of any response, other filings, or oral argument, or within the time required by statute or applicable rules, the agency or superior agency shall issue a written order on review.
  - (b) The order on review shall be signed by the agency head or by a person designated by the agency for that purpose and shall be mailed to each party.
  - (c) The order on review shall contain:
    - (i) a designation of the statute or rule permitting or requiring review;
    - (ii) a statement of the issues reviewed;
    - (iii) findings of fact as to each of the issues reviewed;
    - (iv) conclusions of law as to each of the issues reviewed;
    - (v) the reasons for the disposition;
    - (vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion of the adjudicative proceeding is to be remanded;



(7) Unless the petitioner and the agency agree in writing to an extension, if an agency has not issued a declaratory order within 60 days after receipt of the petition for a declaratory order, the petition is denied.

**History:** C. 1953, 63-46b-21, enacted by L. 1987, ch. 161, § 277; 1988, ch. 72, § 27.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, substituted "Section 63-46b-9" for "Section 63-46b-10" in Subsection (4)(a) and substituted "petition for

a declaratory order" for "request for a declaratory order" in Subsection (7).

**Effective Dates.** — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

### **63-46b-22. Transition procedures.**

(1) The procedures for agency action, agency review, and judicial review contained in this chapter are applicable to all agency adjudicative proceedings commenced by or before an agency on and after January 1, 1988.

(2) Statutes and rules governing agency action, agency review, and judicial review that are in effect on December 31, 1987, govern all agency adjudicative proceedings commenced by or before an agency on or before December 31, 1987, even if those proceedings are still pending before an agency or a court on January 1, 1988.

**History:** C. 1953, 63-46b-22, enacted by L. 1987 (1st S.S.), ch. 5, § 1.

**Effective Dates.** — Laws 1987 (1st S.S.), ch. 5, § 2 makes the act effective on June 3, 1987.

## **CHAPTER 47**

### **COMMISSION ON STATUS OF WOMEN**

Section	Section
63-47-1. Creation — Purpose.	63-47-6 Administrative assistant — Appointment of personnel.
63-47-2. Members — Appointment — Terms — Vacancies.	63-47-7. Authority to accept funds, gifts, and donations.
63-47-3. Qualifications of members.	63-47-8. Enactment of bylaws and rules.
63-47-4. Election of chairman — Meetings.	
63-47-5. Duties.	

### **63-47-1. Creation — Purpose.**

There is hereby established the Governor's Commission on the Status of Women. The purpose of the commission shall be to advise and confer with the governor and state agencies concerning issues of importance to women and families in Utah and to serve as a contact and co-ordinating group to analyze state and local programs to determine whether they adequately serve women and protect the rights of men, women and families.

**History:** L. 1973, ch. 173, § 1.

(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

**History:** C. 1953, 63-46b-15, enacted by L. 1987, ch. 161, § 271; 1988, ch. 72, § 25.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, deleted "except that final agency action from informal adjudicative proceedings based on a record shall be reviewed by the district courts on the record

according to the standards of Subsection 63-46b-16(4)" at the end in Subsection (1)(a) and made minor stylistic changes.

**Effective Dates.** — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

#### NOTES TO DECISIONS

##### **Function of district court.**

Section 63-46b-16(1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore,

the district court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to Subsection (1)(a) of this section. In re Topik, 761 P.2d 32 (Utah Ct. App. 1988).

### **63-46b-16. Judicial review — Formal adjudicative proceedings.**

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

- (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
- (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
- (h) the agency action is:
  - (i) an abuse of the discretion delegated to the agency by statute;
  - (ii) contrary to a rule of the agency;
  - (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
  - (iv) otherwise arbitrary or capricious.

**History:** C. 1953, 63-46b-16, enacted by L. 1987, ch. 161, § 272; 1988, ch. 72, § 26.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, substituted "As provided by statute, the Supreme Court or the Court of Appeals" for "The Supreme Court or other appellate court designated by statute" in Subsection (1); inserted "with the appropriate

appellate court" in Subsection (2)(a); and substituted "appellate rules of the appropriate appellate court" for "Utah Rules of Appellate Procedure" in Subsections (2)(a) and (2)(b).

**Effective Dates.** — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

#### NOTES TO DECISIONS

##### **Function of district court.**

Subsection (1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore, the dis-

trict court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to § 63-46b-15(1)(a). In re Topik, 761 P.2d 32 (Utah Ct. App. 1988).

#### **63-46b-17. Judicial review — Type of relief.**

- (1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.
- (b) In granting relief, the court may:
  - (i) order agency action required by law;
  - (ii) order the agency to exercise its discretion as required by law;
  - (iii) set aside or modify agency action;
  - (iv) enjoin or stay the effective date of agency action; or
  - (v) remand the matter to the agency for further proceedings.
- (2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute.

**History:** C. 1953, 63-46b-17, enacted by L. 1987, ch. 161, § 273.

**Effective Dates.** — Laws 1987, ch. 161,

§ 315 makes the act effective on January 1, 1988.