

1992

Maverik Country Stores, Inc. v. Industrial Commission of Utah : Brief of Respondent

Utah Court of Appeals

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BRIEF

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DOCKET NO. 920206CA UTAH COURT OF APPEALS

MAVERIK COUNTRY STORES, INC.,

Petitioner/Appellant,

vs.

INDUSTRIAL COMMISSION
OF UTAH,

Respondent,

VICKY ANN MCCORD,

Complainant/Respondent

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Priority No. 7

Docket Number: 920206-CA

Case Number: UADD 89-0031

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STATUTES AND RULES

Statutes

Section 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).

Section 63-46b-1 Scope and applicability of chapter.

(1) Except as set forth in Subsection (2), and except as otherwise provided by a statute superseding provisions of this chapter by explicit reference to this chapter, the provisions of this chapter apply to every agency of the state of Utah and govern:

(a) all state agency actions that determine the legal rights, duties, privileges, immunities, or other legal interests of one or more identifiable persons, including all agency actions to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license; and

(b) judicial review of all such actions.

(2) The provisions of this chapter do not govern:

(a) the procedures for promulgation of agency rules, or the judicial review of those procedures or rules;

(b) the issuance of any notice of a deficiency in the payment of a tax, the decision to waive penalties or interest on taxes, the imposition of, and penalties or interest on, taxes, or the issuance of any tax assessment, except that the provisions of this chapter govern any agency action commenced by a taxpayer or by another person authorized by law to contest the validity or correctness of those actions;

(c) state agency actions relating to extradition, to the granting of pardons or parole, commutations or terminations of sentences, or to the rescission, termination, or revocation of parole or probation, to actions and decisions of the Psychiatric Security Review Board relating to discharge, conditional release, or retention of persons under its jurisdiction, to the discipline of, resolution of grievances of, supervision of, confinement of, or the treatment of inmates or residents of any correctional facility, the Utah State Hospital, the Utah State Developmental Center, or persons in the custody or jurisdiction of the Division of Mental Health, or persons on probation or parole, or judicial review of those actions;

(d) state agency actions to evaluate, discipline, employ, transfer, reassign, or promote students or teachers in any school or educational institution, or judicial review of those actions;

(e) applications for employment and internal personnel actions within an agency concerning its own employees, or judicial review of those actions;

(f) the issuance of any citation or assessment under Title 35, Chapter 9, Utah Occupational Safety and Health Act of 1973, and Title 58, Chapter 55, Utah Construction Trades Licensing Act, except that the provisions of this chapter govern any agency action commenced by the employer, licensee, or other person authorized by law to contest the validity or correctness of such a citation or assessment;

(g) state agency actions relating to management of state funds, and contracts for the purchase or sale of products, real property, supplies, goods, or services by or for the state, or by or for an agency of the state, except as provided in such contracts, or judicial review of those actions;

(h) state agency actions under Title 7, Chapter 1, Article 3, Powers and Duties of Commissioner of Financial Institutions, and

Title 7, Chapter 2, Possession of Depository Institution by Commissioner, Title 7, Chapter 8a, Utah Industrial Loan Corporation Guaranty Act, Title 7, Chapter 19, Acquisition of Failing Depository Institutions or Holding Companies, and Title 63, Chapter 30, Governmental Immunity Act, or judicial review of those actions;

(i) the initial determination of any person's eligibility for unemployment benefits, the initial determination of any person's eligibility for benefits under Title 35, Chapter 1, Worker's Compensation, and Title 35, Chapter 2, Utah Occupational Disease Disability Law, or the initial determination of a person's unemployment tax liability;

(j) state agency actions relating to the distribution or award of monetary grants to or between governmental units, or for research, development, or the arts, or judicial review of those actions;

(k) the issuance of any notice of violation or order under Title 26, Chapter 8, Utah Emergency Medical Services System Act, Title 19, Chapter 5, Water Quality Act, Title 19, Chapter 4, Safe Drinking Water Act, Title 19, Chapter 2, Air Conservation Act, or Title 19, Chapter 6, Part 1, Solid and Hazardous Waste Act, except that the provisions of this chapter govern any agency action commenced by any person authorized by law to contest the validity or correctness of any such notice or order;

(l) state agency actions, to the extent required by federal statute or regulation to be conducted according to federal procedures;

(m) the initial determination of any person's eligibility for government or public assistance benefits;

(n) state agency actions relating to wildlife licenses, permits, tags, and certificates of registration;

(o) licenses for use of state recreational facilities; and

(p) state agency actions under Title 63, Chapter 2, Government Records Access and Management Act, except as provided in Section 63-2-603.

(3) The provisions of this chapter do not affect any legal remedies otherwise available to:

(a) compel an agency to take action; or

(b) challenge an agency's rule.

(4) This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from:

(a) requesting or ordering conferences with parties and interested persons to:

(i) encourage settlement;

(ii) clarify the issues;

(iii) simplify the evidence;

(iv) facilitate discovery; or

(v) expedite the proceedings; or

(b) granting a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56, respectively, of the Utah Rules of Civil Procedure are met by the moving party, except to the extent that the requirements of those

rules are modified by this chapter.

(5) (a) Declaratory proceedings authorized by Section 63-46b-21 are not governed by this chapter, except as explicitly provided in that section.

(b) Judicial review of declaratory proceedings authorized by Section 63-46b-21 are governed by this chapter.

(6) This chapter does not preclude an agency from enacting rules affecting or governing adjudicative proceedings or from following any of those rules, if the rules are enacted according to the procedures outlined in Title 63, Chapter 46a, Utah Administrative Rulemaking Act, and if the rules conform to the requirements of this chapter.

(7) If the attorney general issues a written determination that any provision of this chapter would result in the denial of funds or services to an agency of the state from the federal government, the applicability of those provisions to that agency shall be suspended to the extent necessary to prevent the denial. The attorney general shall report the suspension to the Legislature at its next session.

(8) Nothing in this chapter may be interpreted to provide an independent basis for jurisdiction to review final agency action.

(9) 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.

Section 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;

(vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parties; and

(viii) the time limits applicable to any appeal or review.

Section 63-46b-13 Agency review - Reconsideration.

(1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

(b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.

(2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.

(3) (a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

Section 63-46b-14 Judicial review - Exhaustion of administrative remedies.

(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

(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 or is considered to have been issued under Subsection 63-46b-13(3)(b).

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter.

Section 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.

Section 63-46b-18 Judicial review - Stay and other temporary remedies pending final disposition.

(1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules.

(2) Parties shall petition the agency for a stay or other temporary remedies unless extraordinary circumstances require immediate judicial intervention.

(3) If the agency denies a stay or denies other temporary remedies requested by a party, the agency's order of denial shall be mailed to all parties and shall specify the reasons why the stay or other temporary remedy was not granted.

(4) If the agency has denied a stay or other temporary remedy to protect the public health, safety, or welfare against a substantial threat, the court may not grant a stay or other temporary remedy unless it finds that:

(a) the agency violated its own rules in denying the stay; or

(b) (i) the party seeking judicial review is likely to prevail on the merits when the court finally disposes of the matter;

(ii) the party seeking judicial review will suffer irreparable injury without immediate relief;

(iii) granting relief to the party seeking review will not substantially harm other parties to the proceedings; and

(iv) the threat to the public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action under the circumstances.

Rules

R560-1-5 Classification of Proceeding for Purpose of Utah Administrative Procedures Act.

The adjudicative proceeding referred to in Section 34-35-7.1(6)-(10), U.C.A., is a formal adjudicative hearing which shall occur following the investigation process referred to in Section 34-35-7.1(1)-(5), U.C.A. The formal hearing shall be held after the Director sends the request for an evidentiary hearing to the Legal Counsel, who will ensure that the requirements imposed by Rule R560-1-4.A.3 and 4 have been satisfied and that a formal hearing is necessary to finally resolve the matter and when it is appropriate pursuant to Section 63-46b-4(3), U.C.A.

R568-1-5 Allowance for Mailing.

A. Whenever a notice or other paper requiring or permitting some action on behalf of a party is served on a party by mail, three days shall be added to the prescribed period as allowed under Rule 6 of the Utah Rules of Civil Procedure. This three day extension does not apply to notices sent by registered mail as required by Sections 35-1-46(3) and 35-1-46.30(2), U.C.A.

URAP 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.

URAP 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.

URAP 8 Stay or injunction pending appeal.

(a) Stay must ordinarily be sought in the first instance in trial court; motion for stay in appellate court. Application for a stay of the judgment or order of a trial court pending appeal, or disposition of a petition under Rule 5, 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 trial court. A motion for such relief may be made to the appellate court, but the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be considered by a single justice or judge of the court.

(b) Stay may be conditioned upon giving of bond. Relief available in the appellate court under this rule may be conditioned upon the filing of a bond or other appropriate security in the trial court.

(c) Stays in criminal cases. Stays in criminal cases pending appeal are governed by Rule 27, U.R.Crim.P.

URAP 24 Briefs.

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review and the standard of appellate review for each issue with supporting authority for each issue.

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and in that event, the provision shall be set forth as provided in paragraph (f) of this rule.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record (see paragraph (e)).

(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on.

(10) A short conclusion stating the precise relief sought.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to

parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall include exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

(f) Reproduction of opinions, statutes, rules, regulations, documents, etc.

(1) Any opinion, memorandum of decision, findings of fact, conclusions of law, or order pertaining to the issues on appeal and any jury instructions or other part of the record of central importance to the determination of the appeal shall be reproduced in the brief or in an addendum to the brief.

(2) If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, to the extent not set forth under subparagraph (a)(6) of this rule, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.

(g) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (f) of this rule.

(h) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a

point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

(l) Brief covers. The covers of all briefs shall be of heavy cover stock and shall comply with Rule 27.

URCP 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 plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may upon motion of a party or on its own initiative order that depositions, interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

(e) Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk, if any.

URCP 6 Time.

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b) and 73(a) and (g), except to the extent and under the conditions stated in them.

(c) Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not

affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) For motions - Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

STATEMENT OF APPELLATE JURISDICTION

The Industrial Commission of Utah (Commission) concurs with Maverik Country Stores, Inc. that if its appeals and motions for review were timely filed that jurisdiction exists under the statutes cited. Rules 3 and 4 (Utah Rules of Appellate Procedure) relate to trial courts, and therefore do not seem to be appropriate.

STATEMENT OF ISSUES FOR REVIEW ON APPEAL

Maverik has stated four issues which largely relate to jurisdiction of the Commission, exhaustion of administrative remedies, and finality of its orders. The Commission will restate them.

I. Was the June 26, 1991 order of the administrative law judge (ALJ) a final order allowing Maverik to appeal to this Court without requesting review of the ALJ's order by the full

Commission, and even though some matters had been reserved for further briefing and resolution by the ALJ? This is an issue of law requiring a correction of error standard. Cross v. Ind. Comm'n et al., 179 Utah Adv. Rep. 18 (Utah App. Jan. 29, 1992).

II. Assuming the Commission had jurisdiction, was the "filing" of a request for review complete upon mailing? This is an issue of law requiring a correction of error standard. Id.

III. Assuming that the Commission had jurisdiction, that mailing the request was insufficient, and that the Commission abused its discretion in failing to grant a one business day extension to file Maverik's request for review, did the Commission's action in reviewing all of Maverik's claims render this error harmless? The Commission concurs with Maverik that the Commission should be deferred to unless it abused its discretion. Nucor Corp. v. Utah Tax Comm'n, 187 Utah Adv. Rep. 17, 18 (Utah Sup. Ct. May 18, 1992).

IV. Were any of the subsequent orders of the Commission final within the meaning of U.C.A. Section 63-46b-14 (1953 as amended 1988)? This is an issue of law requiring a correction of error standard. Cross, supra.

STATEMENT OF THE CASE

a. The first case of the cases consolidated for this argument involve a situation where the Petitioner/Appellant Maverik Country Stores, Incorporated (Maverik) appealed to this Court on July 26, 1991 while the case had not been completed, matters were still pending before an administrative law judge (ALJ) of the Commission,

and before Maverik had exhausted its administrative remedies within the Commission. The second case involves Maverik's request for review on October 10, 1991, and its two requests for reconsideration which were filed on March 19, 1992, and April 6, 1992, respectively.

b. 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 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. Appendix A. On September 10, 1991 the ALJ issued a supplemental order dealing with attorney fees. Appendix B. On October 11, 1991, the respondent requested review by the Industrial Commission of the ALJ's orders of June 26, 1991, and September 10, 1991. Appendix C.

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 Commission 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. TR. 38, 54. 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. TR. 54-55; Exhibit A-17. She performed cashiering, bookkeeping, customer service, and stocking shelves. TR. 56.

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 which may limit your ability to perform the job for which you are applying?" TR. 34. 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. TR. 31-32. Ms. McCord related that her doctor had informed her that the condition required no changes in lifestyle or employment. TR. 34. She was prescribed a "beta blocker," and she had no further difficulties. TR. 35-38.

Both parties stipulated that, among others, "mitral valve prolapse is a common and usually benign heart condition...." TR. 5; R. 30.

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, TR. 103-108.

While working on October 14, 1988, Ms. McCord experienced some tightness in her chest and grew increasingly uncomfortable. TR.

64-66. She asked her supervisor, Ms. Jones, if she could go to the hospital to get her heart checked. TR. 67. Ms. McCord disclosed her mitral valve prolapse condition to Ms. Jones in response to questions. TR. 67.

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. TR. 70-71. Although Ms. McCord called about two hours later, and offered to complete the shift, Ms. McCord was told to stay home and rest. TR. 72.

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. TR. 145-146. 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. TR. 73. 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. TR. 74-75. Ms. Jones responded that she (Ms. Jones) would be afraid to leave Ms. McCord in the store alone.

TR. 79. She then terminated Ms. McCord's employment. TR. 82.

A Record of Employee Counseling form was completed by Ms. Jones which describes the circumstances of Ms. McCord's termination in a typewritten attachment. R. 11. Exhibit A-4. This form and attachment show that Ms. Jones was greatly concerned about Ms. 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...." R. 12-14; 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; TR. 231. and, 2) allegations that customers and employees had complained about smelling alcohol on Ms. McCord's breath during work. TR. 281, 285. Ms. McCord denied using alcohol before working (TR. 154), and an employee testified that Ms. McCord's cash register till was accurate. TR. 231. Significantly, none of these allegations were discussed during the termination interview, or were written on the termination form or attachment. TR. 90-95, 162-163; Exhibit A-4.

There is no question that Ms. Jones had the authority from Maverik to hire and fire Ms. McCord. TR. 186.

Ms. McCord testified that she had sought to find work at "ninety to a hundred" entities and places (TR. 110), and introduced evidence that after her termination she attempted to find employment at 26 employment locations during 1989-1991. R. 27; Exhibit A-8. She worked for a short time as a janitor at an elementary school from November 1988 through January 1989. TR. 114. Although there was some testimony that Maverik employees had made unfavorable statements about Ms. McCord to other persons in the Vernal area (TR. 122-123), the ALJ found no direct evidence that Maverik or its employees had ever interfered with Ms. McCord's ability to seek other employment. R. 135; Appendix A, at 5.

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." R. 136; Appendix A, at 6. The ALJ based this conclusion on Maverik's perception of Ms. McCord as handicapped. R. 136.

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....'

R. 136; Order, ALJ at 6 (June 26, 1991), citations omitted.

The ALJ further stated in her application of facts to her conclusions of law that Ms. McCord was otherwise qualified to perform the work. R. 137; Appendix A, at 6.

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. R. 139-140; Appendix A, at 9-10.

SUMMARY OF THE ARGUMENTS

I

Maverik should not be allowed to petition this Court in Docket Number 910413-CA because at the time of the petition the order of the ALJ dated June 26, 1991 was not final and Maverik had not exhausted its administrative remedies within the Commission.

II

Maverik claims that the orders of the Commission issued after Maverik had filed its petition in Docket Number 910413-CA were not valid. Maverik never asked for a stay of proceedings or for a stay of the Commission's order. Maverik continued to complete discovery, file motions and requests for reconsideration, and to otherwise use the administrative process. The doctrine of waiver may be invoked against Maverik.

III

Although Maverik claims that the Commission has created a "convoluted mess," Maverik certainly does not have clean hands in these two cases. Maverik raised a number of claims in this argument without specifying support in the record for them. These claims should therefore be dismissed.

IV

Maverik claims that it was required to mail its filing to the Commission, and that it was allowed an additional three days for mailing. Mailing is allowed by the Commission, but documents not received within the required time are not considered filed within the meaning of that term.

V

Maverik claims that the Commission abused its discretion in not granting it a one day extension in which to file a request for review. The Commission nevertheless considered all of Maverik's claims. Maverik did not raise any good cause defense in its next request for reconsideration even though the Commission informed it that good cause was authorized as a defense to late filing. Maverik finally raised this defense in its "Limited Request for Reconsideration" which was denied as a matter of law under U.C.A. Section 63-46b-13(3)(b)(1953 as amended'1988).

VI

Maverik claims that it cannot determine damages owed to McCord. The ALJ clearly spelled out the damages which were relatively simple, i.e. providing only for back pay, attorneys' fees and costs along with other injunctive relief allowed to be imposed by the Commission. Although Maverik alleges that it cannot even compute the damages to make an estimate, Maverik was able to claim before the ALJ that the attorneys' fees were vastly in excess of McCord's damages which it estimated to be in the range of \$8,000.

VII

Maverik claims that it has been deprived of its due process rights under the Utah Constitution, but has shown no prejudice other than vague claims. This is insufficient to show a denial of due process.

ARGUMENTS

The following issues are responses to those framed by Maverik. This Court should note that Maverik has raised more issues and some different issues than those which it framed in the issue section.

I

THE COMMISSION DID NOT LOSE JURISDICTION TO ACT
IN THIS CASE BECAUSE THE ORDER OF JUNE 26, 1991
WAS NOT FINAL AND BECAUSE MAVERIK DID NOT EXHAUST
ITS ADMINISTRATIVE REMEDIES PRIOR TO APPEALING TO THIS COURT

This Court should dismiss the Maverik's Petition for Review dated July 26, 1991 since the ALJ's order of June 26, 1991 was not final within the requirements of U.C.A. Section 63-46b-14(1)(1953 as amended 1988), and based on Maverik's failure to exhaust its administrative remedies in accordance with Section 14(2) of the same statute.

This Court has recently spoken concerning the requirements for finality in the order of the agency involved.

In Sloan v. Board of Review, 781 P.2d 463 (Utah App. 1989) (per curiam), the court concluded that 'an order of [an] agency is not final so long as it reserves something for the agency for further decision.' Id. at 464 ... The argument does not have merit. Petitioner confuses the requirement for exhaustion of administrative remedies with the requirement for finality. The order in Heinecke revoking petitioner's license was clearly final because it reflected the determination on all issues before

the agency, and the issue before this court was whether all levels of agency review were complete at the time judicial review was sought. In contrast, as noted in Sloan, the requirement of finality contemplates that the agency proceedings have been brought to their conclusion by disposition of all issues before the agency. The denial of a motion to dismiss allows the proceeding to continue in the agency and is not a final order for purposes of judicial review.

Barney v. Div. of Occ. & Pro. Licensing, 828 P.2d 542, 544 (Utah App. 1992).

It was clear to Maverik that there were other issues which remained unresolved when the ALJ issued her first order on June 26, 1991. R. 312-313. Both Maverik and the adverse party Vicky McCord reserved the question of appropriate attorney's fees, and agreed to address that issue in supplemental briefs to the Commission. Order, ALJ (June 26, 1991) at 9. In addition, McCord's counsel was ordered by the ALJ to "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 or before twenty days thereafter." Id. at 10. This certainly shows no finality since there was a significant issue remaining for resolution.

With regard to exhaustion of administrative remedies, the Commission respectfully requests this Court to revisit its decision in Heinecke v. Dept. of Commerce, 810 P.2d 459 (Utah App. 1991). Heinecke determined that the Utah Administrative Procedures Act

(U.C.A. Sections 63-46b-1 et seq.) did not require a party to request administrative review of an order if the pertinent agency statute did not contain language mandating such request. Heinecke was determined without the benefit of briefing by the parties. Heinecke, supra, at 463.

Heinecke relied on the Utah Supreme Court case of Hi-Country Homeowners v. Public Serv. Comm'n, 779 P.2d 682 (Utah 1989) to impliedly and expressly conclude that a party does not have to request review within an agency unless there is mandatory language in the agency's statutes requiring a party to request review where such review is available.

Such a reading of Hi-Country is not required. There is no language in Hi-Country requiring the plain language of the Utah Administrative Procedures Act (hereafter Act) to be ignored. The pertinent language from the Act states:

...[A] party may seek judicial review only after exhausting all administrative remedies available

U.C.A. Section 63-46b-14(2) (1953 as amended 1988) (emphasis added).

The current law also provides that:

If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the 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.

U.C.A. Section 63-46b-12(1)(a)(1953 as amended 1988).

Both of these two sections are substantially unchanged from the versions relied upon by the Utah Supreme Court. There is no reason for this Court to conclude from Hi-Country that U.C.A. Sections 63-46b-12(1)(a) and 14(2) cannot be read together to require Maverik to exhaust its administrative remedies prior to filing a judicial appeal.

There is no language in the organic statutes for the Commission which provide that exhaustion is not required. In the absence of such language, exhaustion of administrative remedies is required. U.C.A. Section 63-46b-14(2)(a).

There is absolutely no language in the ALJ's order which can be construed to state that Maverik is entitled to judicial review and that the order is a final order. In fact, the order shows that it is an order which was subject to becoming final and "not subject to review or appeal" only if Maverik did not exercise its right to request a Motion for Review by the Commission. R. 140. Maverik mistakenly or intentionally filed its request with this Court in violation of the requirements of U.C.A. Section 63-46b-12(1)(a)(1953 as amended 1988) which allowed review by the full Commission.

The rules promulgated by the Commission clearly state that orders "are not final Commission Orders ... until the Order is

affirmed in a Commission Order on review per Section 63-46b-12, U.C.A." This rule and others were made by the Commission under the authority of U.C.A. Section 34-35-7.1(13) (1953 as amended 1991).

U.C.A. Section 34-35-7.1(11)(a) relates that "[e]ither party may file a written request for review of the order issued by the presiding officer in accordance with Section 63-46b-12. Section 7.1(11)(a) immediately follows Sections 34-35-7.1(6)-(10) which sections all refer to formal adjudication hearings. R560-1-5 (Utah Admin. Code). Thus, it is clear that the written request referred to in Section 34-35-7.1(11)(a) relates to a request for review of the ALJ's decision concerning the formal proceeding or hearing.

Since the June 26, 1991 order was not final at the time Maverik filed its petition for review with this Court, and since Maverik did not exhaust its administrative remedies, there was no jurisdiction on which this Court could entertain Maverik's appeal of July 26, 1991.

Assuming without conceding that the June 26, 1991 order was a final order, Maverik was required to exhaust its administrative remedies by filing for a Motion for Review to the full Commission under U.C.A. Section 63-46b-12 (1953 as amended 1988).

For all the above reasons, this Court should therefore dismiss the appeal in Docket Number 910413-CA.

II

THE COMMISSION'S POWER TO ENTER
ORDERS IN THIS CASE WERE NOT
TERMINATED DUE TO LACK OF FINALITY,
FAILURE OF MAVERIK TO EXHAUST ADMINISTRATIVE
REMEDIES, AND MAVERIK'S FAILURE TO ASK
FOR A STAY OR OTHER TEMPORARY REMEDY
PENDING JUDICIAL REVIEW

Maverik alleges that it "chose to appeal, and the Commission's power to enter to (sic) orders or reconsider terminated." The Commission will not rehash the lack of finality or exhaustion of administrative remedies arguments which it made in Argument I. The Commission will merely refer this Court to that Argument.

Maverik argues that when the "issues in a main judgment are appealed, "the district court is indeed without jurisdiction as to them." It then cited Peters v. Peters, 394 P.2d 71, 73 (Utah 1964) as support for this argument. The Commission would point out that there was no question that the district court's order in Peters was final. Of course, since the forum in Peters was a district court there was no requirement that administrative remedies be exhausted prior to appeal.

The administrative agency is not equivalent to the district court, and, for example, because the Commission is involved in matters to protect the public health, safety, or welfare, the Act limits a Court's authority to issue a stay where the agency has declined to do so. This case does not appear to involve a

substantial threat in one of the mentioned three areas, and there would have been no reason for the agency not to issue such a stay upon motion of one of the parties. U.C.A. Section 63-46b-18(3) and (4) (1953 as amended 1988).

Maverik never requested the agency to stay its orders or proceedings before or after its initial appeal to this Court on July 26, 1992. The Act specifically discusses allowing the agency to grant a stay during the pendency of judicial review.

(1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules.

(2) Parties shall petition the agency for a stay or other temporary remedies unless extraordinary circumstances require immediate judicial intervention.

U.C.A. Section 63-46b-18(1) (1953 as amended 1988); See also Rule 8, Utah Rules of Appellate Procedure (1992).

Not only did Maverik not request a stay, but it went on with its case by also requesting discovery on August 10, 1991 on the reasonableness of attorney fees and costs sought by McCord. Maverik Brief at 4. In addition, Maverik requested the Commission to review the ALJ's June 26, 1991 order as well as her supplemental order of September 10, 1991. Id. Subsequently, Maverik asked for reconsideration of Commission orders on March 19, 1992 and April 3, 1992. Id. at 5. Maverik has never asked this Court or the Commission to stay the Commission's proceedings or orders. It

should not now be allowed to complain that the Commission had no authority to entertain its motions and requests.

It can be argued that Maverik has waived its right to argue that the Commission has no jurisdiction to hear its motions and requests for reconsideration based on the doctrine of waiver. Waiver is 'the voluntary and intentional relinquishment of a known right.' Id.; see Rees v. Intermountain Health Care, Inc., 808 P.2d 1069, 1073 (Utah 1991); B.R. Woodward v. Collins Food Serv., 754 P.2d 99, 101 (Utah App. 1988). To waive a right, there must be an existing right, knowledge of its existence, and an intent to relinquish it. Hunter v. Hunter, 669 P.2d 430, 432 (Utah 1983); B.R. Woodward, supra. at 101. The intent to relinquish a right can be implied from conduct, if the party's conduct 'unequivocally evinces an intent to waive or [is] at least . . . inconsistent with any other intent.' Id. See Hunter, supra. at 432.

For these reasons, the petitions of Maverik should be denied.

III

MAVERIK HAS CREATED THE DILEMMA IN WHICH IT FINDS ITSELF BY NOT PROPERLY FOLLOWING THE STATUTES AND ADMINISTRATIVE PROCEDURES ACT

Maverik alleges that the Commission "has created a convoluted mess." Maverik Brief at 12. The Commission assumes that a "convoluted mess" is much worse than a "mess." The Commission agrees that the posture of these cases are troublesome, but that

the blame must lie with Maverik, and its failure to understand and apply the procedural principles, statutes, and rules applying to administrative law and these cases.

The Commission will address procedural issues in this brief, without conceding those areas not addressed by the Commission, but discussed by McCord. McCord will address both procedural issues and well as issues on the merits.

It is clear by reading the hyperbolic remarks pertaining to this issue by Maverik on pages 12 - 15 of its brief that Maverik misrepresents much of what the Commission has done, and more importantly shows that Maverik does not understand much of the administrative law in this area.

Significantly, Maverik has failed to reference us to documentary citations to support most of their allegations on pages 12 - 15 of their brief, and the brief fails to minimally meet the requirements of Rule 24(9) (Utah Rules of Appellate Procedure (1992) which requires "citations to the authorities, statutes, and parts of the record relied on." The Commission therefore requests the Court to disregard Maverik's unsupported and unreferenced assertions in this section.

Although it is not clear to the Commission wherein Maverik finds support for all of its claims against the Commission, the Commission will attempt to address those issues which Maverik

asserts. The following Maverik claims on page 13 - 14 of its brief will be discussed.

"[F]irst 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." Maverik Brief at 13. Several of its claims are related to this issue.

The gravamen of this claim appears to be that Requests for Review can be filed at any time, and that the Commission has no rules, statutes, or caselaw which would prevent it from reviewing the request. U.C.A. Section 63-46b-12 (1953 as amended 1988) sets forth some requirements for filing which are jurisdictional, and can only be avoided upon good cause shown. U.C.A. Section 63-46b-1(9) (1953 as amended 1988).

The first request for review of the June 26, 1991 order was made by Maverik on October 11, 1991 which was outside the 30 day requirement of U.C.A. Section 63-46b-12, supra. R. 310-319; Appendix C. Although the Commission determined initially that Maverik's filing was untimely as to the June 26, 1991 order, the Commission did consider and respond to all of Maverik's contentions which Maverik raised in its October 10, 1991 request. Appendix D & F. Therefore, if the Commission did commit error as to whether the October 11, 1991 request for review was timely, it was

harmless. See Commission Order, Feb. 28, 1992; Appendix F. Maverik gives the false impression that its claims were ignored and not responded to.

Significantly, the Commission did determine upon the request of Maverik on March 19, 1992 for reconsideration of its February 28, 1992 order, that the June 26, 1991 order of the ALJ was not final because the issue of attorney fees was reserved. Appendix F, at 2. Maverik did not show any good cause for delay in either its request for review of October 11, 1991 or its request for reconsideration of March 19, 1992. Appendix C & E, but see Appendix G. However, as previously mentioned, the Commission did consider and discuss in its orders, all of Maverik's contentions.

Much of the remainder of Maverik's claims relate to whether the Commission erred in considering its requests for review to be untimely. This issue will be considered later since Maverik raised it in several other issues in its arguments.

For these reasons the appeals of Maverik should be dismissed.

IV

THE REQUEST FOR REVIEW WAS
UNTIMELY FILED, BUT IF THIS
HONORABLE COURT FINDS THAT THE
REQUEST FOR REVIEW WAS TIMELY
FILED, THE COMMISSION HAS
CONSIDERED ALL OF MAVERIK'S
CONTENTIONS, AND THIS ALLEGED ERROR
IS HARMLESS

If this Court determines that Maverik could legally file its

appeal of the ALJ order of June 26, 1991 to this Court without requesting review by the full Commission then this issue is not relevant. However, the Commission believes that this issue should be resolved against Maverik.

U.C.A. Section 63-46b-12(1)(a) (1953 as amended 1988) requires that parties request review "within 30 days after the issuance of the order with the person or entity designated for that purpose...." Issuance of the order has been determined by the Utah Supreme Court to be synonymous with the date of the order. Dusty's v. Utah State Tax Comm'n, 199 Utah Adv. Rep. 7, 9 (Utah Sup. Ct. Oct. 30, 1992).

Section 12(1)(a), supra., in clear and unambiguous terms requires an aggrieved party to "file" its request for review within the required time limit. Courts distinguish between filing and mailing. Carter v. Utah Power and Light Co., 800 P.2d 1095, 1096 fn. 2 (Utah 1990). Thus, the Commission has generally treated a document as filed when it is received by the Commission. See generally Rule 5, Utah Rules of Civil Procedure. Mailing is therefore not the equivalent.

The language asserted by Maverik to require parties to mail filings to the Commission has been conveniently misunderstood by Maverik. Maverik Brief at 18.

Since the Commission informs the parties that they must file

their documents with the Commission within 30 days of the date of the order, this clear and unambiguous notice should not be misunderstood. Appendix A, at 10; Appendix B, at 4-5.

U.C.A. Section 63-46b-12(1)(a) (1953 as amended 1988) provides, in pertinent part, "...the aggrieved party may file a written request for review within 30 days after the issuance of the order...."

Rule 568-1-5 (Utah Admin. Code 1992) which applies in workers' compensation cases, but not in handicap discrimination cases, provides in pertinent part: "Whenever a notice or other paper requiring or permitting some action on behalf of a party is served on a party by mail, three days shall be added to the prescribed period as allowed under Rule 6 of the Utah Rules of Civil Procedure...." There is no comparable provision in the rules relating to discrimination. This shows an intent of the Commission not to apply Rule 6 to discrimination cases.

Rule 6(e) of the Utah Rules of Civil Procedure provides: "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

Utah Adv. Rep. 79 (Utah Ct. App. Dec. 4, 1992), held that agency orders are "issued" on the date the document bears on its face, not the date they are mailed.

To put all of these together, under Rule 6, a party gets three days for mailing if the time for him to take some action runs from the date of service. Under UAPA, the time to move for review runs from the date of issuance of the order, not service of the order on the parties. Thus, Rule 6 does not apply, and parties who would move for review of an ALJ's order do not get an additional three days for mailing.

In this case, if this Court finds that Maverik was entitled to an additional three days under Rule 6(e) (Utah Rules of Civil Procedure), then the Commission would argue that it has considered all of Maverik's arguments which it set forth in its untimely filing, and there was therefore no harm to Maverik.

For the above reasons, this Court should dismiss Maverik's appeals.

V

THE COMMISSION DID NOT ABUSE
ITS DISCRETION IN REFUSING TO
GRANT MAVERIK'S REQUESTED ONE DAY
EXTENSION

The Commission concedes that Maverik has belatedly made out a

good case in its second request for reconsideration based on good cause. Appendix G. However, Maverik did not do so in its first request for reconsideration which it submitted on March 19, 1992 in response to the Commission's order of February 28, 1992. Appendix E. Maverik was informed in that order of the grounds of the Commission's assertion of lateness, and the requirement to show good cause, but for some reason Maverik chose not to show good cause in its first request for reconsideration.

It was not until the Commission issued its order upon reconsideration on March 30, 1992, that Maverik subsequently stated in a "Limited Request for Reconsideration" the grounds for good cause. Appendix G. Since the Commission considered that Maverik had waived good cause, and had already addressed the alleged errors asserted by Maverik notwithstanding the lateness of Maverik's October 11, 1991 filing, the Commission did not respond, and allowed the "Limited Request for Reconsideration" to be denied as a matter of law. U.C.A. Section 63-46b-13(3)(b) (1953 as amended 1988). By law, that request was deemed denied on April 23, 1992. Maverik's claim that this "Limited Request for Reconsideration" remains pending before the Commission is in error because of the action of the law in denying Maverik's request.

For the reasons discussed, the appeals of Maverik should be dismissed.

THE ALJ'S ORDER OF JUNE 26, 1991
AND SUPPLEMENTAL ORDER OF SEPTEMBER 10,
1991 WERE SUFFICIENTLY SPECIFIC TO
ADVISE THE PARTIES OF THE JUDGMENT
AMOUNT

Maverik asserts that the orders of the ALJ are not specific enough to determine the judgment amount. Maverik reasons that since no sum certain has been rendered that the remaining orders of the Commission are not valid. Maverik Brief at 20.

Again, this issue was addressed by the ALJ in her orders, as well as by the Commission in its order of February 28, 1992. The orders of the ALJ are specific enough for the parties to be able to determine damages. The ALJ determined among other injunctive provisions that Maverik was to:

1. Pay McCord back pay at a rate of \$3.35 per hour for 24 hours per week, or \$80.40 per week from the date of termination through the date of the order which was June 26, 1991. Appendix A, Order, ALJ, June 26, 1991 at 8-9. McCord was to be credited 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. R. 138.

2. McCord's back pay was to be reduced by all earnings of interim employment including Ashley Elementary School. R. 138.

3. The ALJ awarded McCord attorney fees of \$19,731, and

costs of \$1,536.26. R. 323.

Thus, the damages appear to be not difficult to compute for Maverik, and, in fact, Maverik has apparently estimated the entire amount of damages for McCord to be in the range of \$8,000. See Appendix B, Supplemental Order, ALJ at 1; see also, TR. 254. Thus, Maverik's claim that it cannot even estimate the damages belies the facts.

For these reasons, the appeals of Maverik should be dismissed.

VII

MAVERIK HAS NOT BEEN DEPRIVED OF ANY OF ITS DUE PROCESS RIGHTS

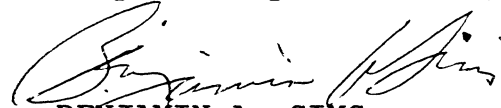
Maverik makes a vague and unsupported argument that it has been deprived of its constitutional rights. However, Maverik has given us no particulars on which to consider its allegations. Except for its assertion that it received no jury trial, Maverik has not shown how it was prejudiced. It claims that discovery is limited, but it has not shown how its case has been injured. It claims that the evidentiary rules are relaxed, but it again fails to show any harm. Maverik has failed to show why the hearing deprived it of due process. Lopez v. Career Serv. Rev. Bd., 188 Utah Adv. Rep. 19, 21 (Utah App. May 27, 1992).

For the above reasons, the appeals of Maverik should be dismissed.

CONCLUSION

The petition for review of Maverik in Docket Number 910413-CA should be dismissed due to lack of finality of the order of June 26, 1991, and failure to exhaust its administrative remedies. The petition in Docket Number 920206-CA should be dismissed based upon either failure to timely file, or lack of meritorious claims. Alternatively, if the petition in Docket Number 910413-CA is allowed, then the petition for review in Docket Number 920206-CA should be dismissed.

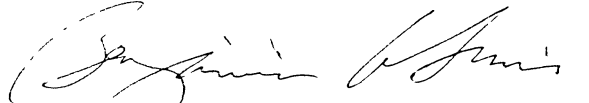
Respectfully submitted,



BENJAMIN A. SIMS
Attorney for Respondent
Industrial Commission of Utah

CERTIFICATE OF SERVICE

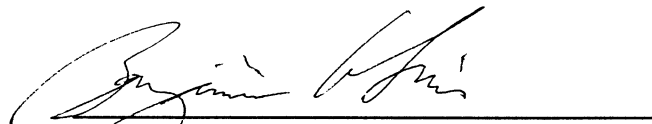
I, Benjamin A. Sims, certify that I lodged a draft of this brief with the Court of Appeals by hand delivery on 8 day of February, 1993.


Benjamin A. Sims

I, also certify that I did mail by prepaid first class postage, except as noted below, a copy of the Brief of Respondent in the case of MAVERIK COUNTRY STORES, INC., Case Number 920206-CA, on 16 day of February, 1993 to the following:

Ronald C. Barker
Mitchell R. Barker
David C. Cundick
2870 South State Street
Salt Lake City, Utah 84115-3692

James W. Stewart
Lisa A. Jones
JONES, WALDO, HOLBROOK & MCDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101


BENJAMIN A. SIMS

APPENDIX A

Administrative Law Judge's Decision of 6/26/91

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

VICKY MC CORD
ORDER
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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

VICKY MC CORD
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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,

VICKY MC CORD
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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,

VICKY MC CORD
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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.

VICKY MC CORD
ORDER
PAGE SEVEN

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.

VICKY MC CORD
ORDER
PAGE EIGHT

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
ORDER
PAGE NINE

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

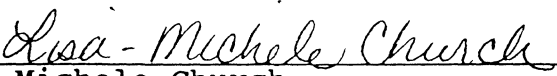
VICKY MC CORD
ORDER
PAGE TEN

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.

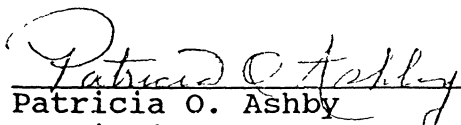
INDUSTRIAL COMMISSION OF UTAH



Lisa-Michele Church
Administrative Law Judge

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

ATTEST:



Patricia O. Ashby
Commission Secretary

APPENDIX B

Administrative Law Judge's Decision of 9/10/91

INDUSTRIAL COMMISSION OF UTAH

Case No. UADD 89-0031

VICKY ANN MCCORD,	★	
	★	
Charging Party,	★	
	★	
vs.	★	
	★	SUPPLEMENTAL
MAVERIK COUNTRY STORE,	★	ORDER
	★	
Respondent.	★	
	★	
★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★		

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

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,

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
PAGE FOUR

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 11th day of September, 1991, the attached Supplemental Order in the case of Vicki 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 Kelstrom, Paralegal
Adjudication Division

/jsk

APPENDIX C

Maverik's Request for Review of 10/11/91

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11.11.91

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

THE INDUSTRIAL COMMISSION OF UTAH
HEARING ROOM, 160 EAST 300 SOUTH
P. O. BOX 510910
SALT LAKE CITY, UTAH 84151-0910

UADD # 89-0031

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      )
VICKY ANN MCCORD      )
      )
      Charging Party   ) REQUEST FOR REVIEW
      )
vs.                   )
      )
MAVERIK COUNTRY STORE )
      )
      Respondent       )
      )
      --- ooOoo ---

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Respondent Maverik Country Stores, Inc. hereby requests a review by the full Commission of the "SUPPLIMENTAL ORDER" and the earlier findings, conclusions and order, issued on September 10, 1991 and June 26, 1991 respectively.

The errors in the September 10, 1991 order include whether the amount of attorney fees awarded is erroneously high, and whether it should bear some relation to the damages sought.

As to both order, did the ALJ err in failing to determine the amount of damages?

The errors in the June 26 Order, phrased as issues for

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review, are as follows:

I. Did the ALJ abuse her discretion in awarding McCord lost wages for time periods after she acquired a better paying job, which she later quit? {Arbitrary and capricious or oppressive and unreasonable. Petty v. Utah State Bd. of Regents, 595 P.2d 481 (Utah 1979)}.

II. Did the ALJ err in finding that Maverik treated McCord "as if" she were handicapped? {Substantial evidence test. Grace Drilling Co. v. Board of Review of Indust. Com., 776 P.2d 63 (Utah App. 1989)}. Alternatively, was that finding arbitrary and capricious? {Hurst v. Board of the Indust. Com., 723 P.2d 416 (Utah 1986)}.

III. Did the ALJ incorrectly find that any perceived abnormality constitutes a perceived "handicap". {Correction of error standard -- review for correctness of statutory interpretation. Hurley v. Board of Review of Indust. Com., 767 P.2d 524 (Utah 1988)}.

IV. Did the ALJ err in finding that clerking at a convenience store is a "major life activity" under the facts of the case? {Rational basis and reasonableness, applying law to facts, Dept. of Air Force v. Dept. of Emplmt. Sec., 786 P.2d 1361 (Utah App. 1990)}.

V. Was it error to find handicapped discrimination when no medical expert was called to testify? {Substantial evidence test. Grace Drilling Co. v. Board of Review of Indust. Com., 776 P.2d 63 (Utah App. 1989)}.

VI. Did the ALJ err in not ruling that McCord cannot prevail, since she has not produced substantial evidence that she was "otherwise qualified" to act in the job. {Substantial evidence test. Grace Drilling Co. v. Board of Review of Indust. Com., 776 P.2d 63 (Utah App. 1989)}.

Authorities respecting issues on review.

R486-1-3(F)(1),(3),(4) and (6), Utah Admin. Code.

§ 34-4-2(9), Utah Code

§ 34-35-1, et seq., Utah Code.

§ 34-35-6(a)(i), Utah Code.

Salt Lake City Corp. v. Confer, 674 P.2d 632, 637 (Utah
1983).

Maverik's Trial Brief is attached, and its arguments are
all incorporated by reference.

Respectively Submitted this 10th day of October, 1991.



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

Certificate of Mailing

I hereby certify that I mailed a copy of the foregoing to
Benjamin Sims of the Commission, and to James W. Stewart,
counsel for claimant McCord, on the 10th day of October, 1991,
at 1500 First Interstate Plaza, 170 South Main Street, Salt Lake
City, Utah 84101.


Mitchell R. Barker

APPENDIX D

Industrial Commission's Order of 2/28/92

THE INDUSTRIAL COMMISSION OF UTAH

UADD CASE NO. 89-0031

VICKY ANN MCCORD,

Applicant,

vs.

MAVERIK COUNTRY STORE,

Defendants.

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ORDER DENYING
REVIEW

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

VICKY MCCORD
ORDER
PAGE TWO

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
ORDER
PAGE THREE

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.

VICKY MCCORD
ORDER
PAGE FOUR

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.

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
ORDER
PAGE SIX

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
ORDER
PAGE SEVEN

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

VICKI MCCORD
ORDER
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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

VICKI MCCORD
ORDER
PAGE NINE

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).

VICKI MCCORD
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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
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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.

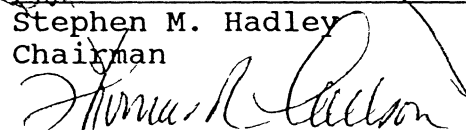
ORDER:

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

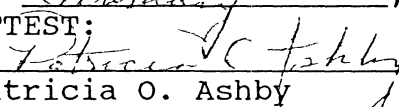
VICKI MCCORD
ORDER
PAGE TWELVE

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.

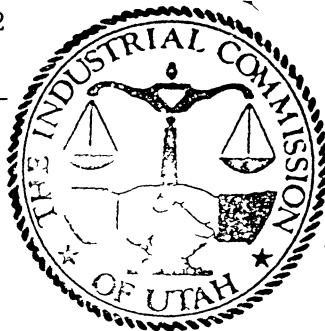


Stephen M. Hadley
Chairman


Thomas R. Carlson
Commissioner

Certified this 28th day
of February, 1992
ATTEST:


Patricia O. Ashby
Commission Secretary



CERTIFICATE OF MAILING

I certify that on February 25th, 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:

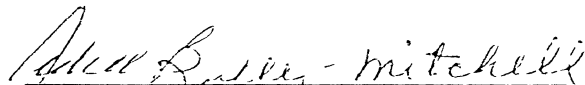
Vicky McCord
c/o Attorney James E. Stewart
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101

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 E

Maverik's Request for Reconsideration

RECEIVED

MAR 15 1992

INDUSTRIAL COMMISSION
ANTI-DISCRIMINATION DIVISION

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

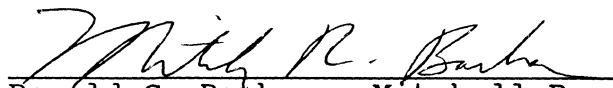
can it be calculated based on the any order the Commission has entered to date.

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

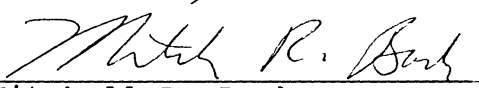
CERTIFICATE OF SERVICE

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 F

Industrial Commission's Order on Reconsideration

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

VICKY ANN MCCORD,	*	
	*	
Applicant,	*	ORDER DENYING
vs.	*	REQUEST FOR RE-
	*	CONSIDERATION
	*	
MAVERIK COUNTRY STORES,	*	
	*	UADD No. 89-0031
	*	
Respondent.	*	

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

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

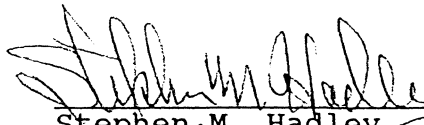
listed on page eight of the order, and the date of termination, among other findings of fact, are shown on pages two through five. The monetary damages can thus be reasonably calculated.

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.

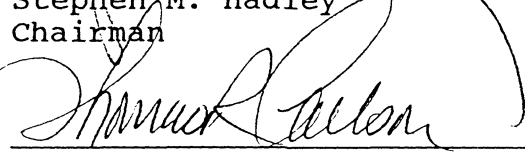
ORDER:

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.



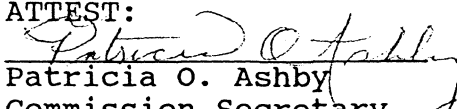
Stephen M. Hadley
Chairman



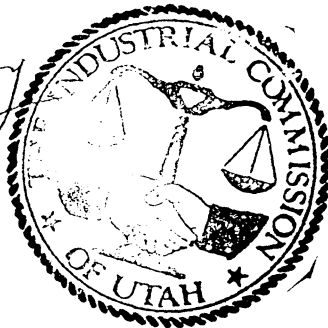
Thomas R. Carlson
Commissioner

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 G

Maverik's "Limited Request for Reconsideration

RECEIVED

APR 6 1992

INDUSTRIAL COMMISSION
OF UTAH

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.

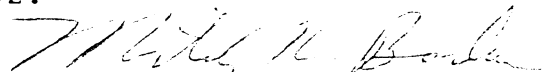
h. On the due date for the Petition, it was not ready and hand delivered to the Industrial Commission before 5:00 because virtually the entire day was spent researching and arguing before Judge Mower of the Sixth Circuit Court in Kane County, on the issue of Cartisano's successful Motion to Change Venue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

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Mitchell R. Barker