

2002

# Mervyn's California, Petitioner/Appellant vs. Utah Labor Commission and Marion E. App, Respondents/Appellee : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MERVYN'S CALIFORNIA,	)	
	)	
Petitioner / Appellant ,	)	
	)	Court of Appeals Case No.
vs.	)	20020583
	)	
UTAH LABOR COMMISSION and	)	
MARION E. APP,	)	
	)	Judge:
Respondents / Appellee.	)	

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BRIEF OF RESPONDENT UTAH LABOR COMMISSION

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## JURISDICTION

The Utah Court of Appeals has jurisdiction to review the final order of the Utah Labor Commission<sup>1</sup> in this matter pursuant to Utah Code Ann. §78-2a-3(2)(a), Utah Code Ann. §34A-5-107(12) and Utah Code Ann. §63-46b-16.

## ISSUES AND STANDARDS OF REVIEW

**1. Due Process.** Was Mervyn's denied due process under Article I, section 7, of the Utah Constitution, as a result of an alleged lack of notice of proceedings before the Commission?

Preservation of issue. Section 63-46b-14(2) of the Utah Administrative Procedures Act provides: "A party may seek judicial review only after exhausting all administrative remedies available . . . ." Likewise, Rule 24(a)(5), Utah Rules of Appellate Procedure, requires an appellant's brief to include a "(c)itation to the record showing that the issue was preserved in the trial court . . . ." Mervyn's brief contains no citation to the record demonstrating that the issue of due process was raised at the Labor Commission, nor does the Commission believe that the issue was raised below. Consequently, Mervyn's due process arguments may not be raised for the first time on appeal. Brown & Root Industrial Services v. Industrial Commission, 947 P.2d 671, 677 (Utah 1997).

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<sup>1</sup>

Mervyn's elected to submit its request for final agency review to the Commission's Appeals Board, pursuant to §34A-1-303(3) of the Utah Labor Commission Act. Consequently, the Appeals Board's decision constitutes the Commission's "final agency action" in this matter.

Standard of review. As noted above, Mervyn's has failed to preserve its due process argument for appellate review. However, if it is assumed that the issue was preserved for review and is now properly before this Court, §63-46b-16(4)(e) of UAPA authorizes this Court to grant relief if Mervyn's has been "substantially prejudiced" by the Commission's "unlawful procedure or decision making process, or (failure) to follow prescribed procedure." Mervyn's due process argument presents a question of law which this Court will review for correctness. Lander v. Industrial Commission, 850 P.2d at 552, 554 (Utah App. 1995); State v. Pena, 869 P.2d 932, 936 (Utah 1994).

**2. Relief from judgment pursuant to 60(b)(1).** Mervyn's argues the Appeals Board erred in denying Mervyn's request for relief from judgment pursuant to Rule 60(b)(1), Utah Rules of Civil Procedure.

Preservation of issue. Mervyn's raised this issue before the Appeals Board, thereby preserving the issue for appellate review. (Record at pages 102 through 116.)

Standard of review: In Osequera v. Farmers Insurance Exchange, 467 Utah Adv. Rep. 29 (Utah App. 2003) this Court observed that "(a) trial court has discretion in determining whether a movant has shown [rule 60(b) grounds], and this Court will reverse the trial court's ruling only when there has been an abuse of discretion." (Internal citations and quotation marks omitted.) In Black's Title, Inc. et al. v. Utah State Insurance Department, 991 P.2d 607, 610 (Utah App. 1999) (Judge Greenwood dissenting), this Court addressed in detail the standard of appellate review to be applied

to an administrative agency's refusal to set aside a default judgment pursuant to Rule 60(b):

It is true that the law disfavors default judgments and the Commissioner should be generally indulgent toward setting a judgment aside where there is reasonable justification or excuse . . . . Nonetheless, the Commissioner has considerable discretion under Rule 60(b) in granting or denying a motion to set aside a default judgment and for this court to interfere, abuse of that discretion must be clearly shown. That is, although some basis may exist to set aside the default, we will not conclude the Commissioner abused his discretion in refusing to do so when facts and circumstances support the refusal. Further, we will not upset the Commissioner's factual findings when challenged as unsupported by sufficient evidence unless clearly erroneous. (Internal citations and quotation marks omitted.)

## **DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

### Article I, Section 7, Utah Constitution.

No person shall be deprived of life, liberty or property, without due process of law.

### Section 63-46b-11, Utah Administrative Procedures Act.

- (1) The presiding officer may enter an order of default against a party if:
  - (a) a party in an informal adjudicative proceeding fails to participate in the adjudicative proceeding;
  - (b) a party to a formal adjudicative proceeding fails to attend or participate in a properly scheduled hearing after receiving proper notice; or
  - (c) a respondent in a formal adjudicative proceeding fails to file a response under Section 63-46b-6.
- (2) An order of default shall include a statement of the grounds for default and shall be mailed to all parties.
- (3) (a) A defaulted party may seek to have the agency set aside the default order, and any order in the adjudicative proceeding issued subsequent to the default order, by following the procedures outlined in the Utah Rules of Civil Procedure.

(b) A motion to set aside a default and any subsequent order shall be made to the presiding officer.

(c) A defaulted party may seek agency review under Section 63-46b-12, or reconsideration under Section 63-46b-13, only on the decision of the presiding officer on the motion to set aside the default.

(4) (a) In an adjudicative proceeding begun by the agency, or in an adjudicative proceeding begun by a party that has other parties besides the party in default, the presiding officer shall, after issuing the order of default, conduct any further proceedings necessary to complete the adjudicative proceeding without the participation of the party in default and shall determine all issues in the adjudicative proceeding, including those affecting the defaulting party.

(b) In an adjudicative proceeding that has no parties other than the agency and the party in default, the presiding officer shall, after issuing the order of default, dismiss the proceeding.

Rule 60(b), Utah Rules of Civil Procedure.

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason justifying relief from the operation of the judgment. . . .

**STATEMENT OF THE CASE**

Nature of the Case: Mervyn's seeks to overturn the Appeals Board's determination that Mervyn's failed to show sufficient cause under Rule 60(b)(1), U.R.C.P., to set aside judgment in favor of Marion App in her employment discrimination complaint against Mervyn's.

Course of Proceedings: On September 3, 1998, Mrs. App filed a complaint of disability-based employment discrimination against Mervyn's. (R. 1) The Utah Antidiscrimination and Labor Division ("UALD"; a subdivision of the Labor

Commission) found no cause to believe the alleged discrimination had occurred. (R. 13-15) Mrs. App then requested a formal evidentiary hearing on her complaint pursuant to §34A-5-107 of the Utah Antidiscrimination Act.

Mrs. App appeared for the formal evidentiary hearing; Mervyn's did not. (R. 42) Based on the evidence presented by Mrs. App at the hearing, Judge La Jeunesse entered judgment in favor of Mrs. App. (Addendum A; R. 42-49)

Mervyn's petitioned the Appeals Board to set aside LaJeunesse's decision and grant a new hearing on the grounds that Mervyn's had not received notice of the first hearing. (R. 51-52) The Appeals Board referred Mervyn's request to Judge LaJeunesse. (R. 62-63) Judge LaJeunesse conducted a hearing to establish the reasons for Mervyn's failure to attend the first hearing, then denied Mervyn's request for a new hearing. (Addendum B; R. 93-99)

Mervyn's sought Appeals Board review of Judge La Jeunesse's denial of Mervyn's request for a new hearing. (R. 102-116) The Appeals Board affirmed Judge LaJeunesse's decision. (Addendum C; R. 205-208) Mervyn's then filed a petition for review of the Appeals Board's decision with this Court. (R. 210-211)

Statement of Facts: The Commission believes that Mervyn's statement of fact is incomplete. The Commission therefore submits the following statement of fact.

On September 3, 1998, Mrs. App filed a complaint with the Commission's Antidiscrimination and Labor Division alleging that the Mervyn's West Valley store had

violated Utah's Antidiscrimination Act with respect to the terms and conditions of Mrs. App's employment. (R. 3) On September 8, 1998, UALD informed the store manager of Mrs. App's complaint and requested a response within ten business days. (R. 124) The store manager forwarded the complaint to Mervyn's headquarters in Hayward, California. (R. 137) Tracy Kunkle Cote, a "Senior Team Relations Representative" in the Hayward office, contacted UALD and requested additional time to respond. (R. 137) In a letter dated September 17, 1998, UALD granted Ms. Cote's request. UALD's letter was addressed to: Tracy Kunkle Cote, Mervyn's, 22301 Foothill Blvd, Hayward CA 95941. (R. 6)

On October 26, 1998, Ms. Cote submitted Mervyn's response to Mrs. App's complaint with a cover letter that specifically stated: "Please contact me should you need any additional information in your evaluation of this charge." The address Ms. Cote provided for Mervyn's was, once again, 22301 Foothill Blvd, Hayward, CA 94541-2771. (R. 2) This is the same address Mervyn's has listed with the Utah Department of Commerce as its official mailing address. (R. 146)

Ms. Cote resigned from her position with Mervyn's on October 10, 1999. (R. 137) Neither she, nor anyone else from Mervyn's, notified UALD that she was no longer Mervyn's representative. UALD was not instructed to use a different address for mailings to Mervyn's (R. 137)

Ed Smith took over Ms. Cote's position with Mervyn's. At some point, Mervyn's transferred responsibility for handling the App matter to Angelene Bonner, one of Mervyn's staff attorneys. (R. 141)

During December, 2000, an investigator from UALD placed calls to Mervyn's to obtain additional information regarding Mrs. App's complaint. (R. 137) The investigator's inquiry was first routed to Mr. Smith. Mr. Smith then passed the inquiry on to Ms. Bonner. (R. 137) Ms. Bonner provided the requested information to UALD. (R. 137, 138) Ms. Bonner did not enter a formal appearance on behalf of Mervyn's at that time. (R. 110) Ms. Bonner does not claim that she informed UALD that Ms. Cote was no longer representing Mervyn's or that Mervyn's address of record should be changed. (R. 138)

On December 19, 2000, UALD issued an informal determination that Mervyn's had not discriminated against Mrs. App. (R. 13-16) A copy of the determination was mailed to Ms. Cote as Mervyn's representative of record, at Mervyn's correct address. This mailing was never returned to UALD as undeliverable. (R. 142)

As permitted by §34A-5-107(4)(c) of the Utah Antidiscrimination Act, Ms. App requested a formal evidentiary hearing on her complaint against Mervyn's. Mrs. App's complaint was therefore transferred to the Labor Commission's Adjudication Division to conduct the evidentiary hearing. (R. 18)

Judge LaJeunesse, the ALJ assigned to preside over Mrs. App's formal evidentiary hearing, scheduled a prehearing conference for May 24, 2001. Notice was mailed by regular mail, return service requested, to Mervyn's at its correct address of record. Mervyn's notice was never returned to the Commission as undeliverable. (R. 19, 143.)

On June 5, 2001, the Adjudication Division mailed a Notice of Formal Hearing to the parties, advising that an evidentiary hearing would be held on Mrs. App's complaint on July 3, 2001. (R. 20) Mervyn's copy of this notice was again mailed, return service requested, to Mervyn's at its correct address of record. The notice was never returned to the Commission as undeliverable. (R. 143.)

Judge La Jeunesse conducted the evidentiary hearing as scheduled. Mrs. App appeared and testified. Mervyn's did not appear. (R. 42) Judge La Jeunesse entered findings of fact, conclusions of law and order in favor of Mrs. App. (R. 42-49) Mervyn's copy of the decision was mailed to Mervyn's at its correct address of record. (R. 50) This time, the document was returned to the Adjudication Division with the notation "Return to Sender No Longer At This Address." (R. 86) The Adjudication Division remailed the decision to Mervyn's by simply removing Ms. Cote's name, but leaving the remainder of the address unchanged. (R. 171) Mervyn's received this mailing. (R. 139)

Two employees of Mervyn's, Ms. Lachina and Ms. Radcliffe, have submitted affidavits indicating that it is their practice to pick up mail for Mervyn's Employee Relations department and Legal department, respectively, from Mervyn's mail room.

Both Ms. Lachina and Ms. Radcliffe aver that they did not receive correspondence or other documents from the Labor Commission between October 1999 and July 2001. Ms. Lachina and Ms. Radcliffe make other assertions regarding custom and practice within Mervyn's mail room, but fail to explain the basis for such assertions. (R. 176, 177)

#### SUMMARY OF ARGUMENT

As authorized by §34A-5-107 of the Utah Antidiscrimination Act, Mrs. App properly invoked Labor Commission jurisdiction to adjudicate her employment discrimination claim against Mervyn's. At the formal evidentiary hearing on Mrs. App's complaint, Mrs. App participated, but Mervyn's failed to appear. The ALJ entered judgment in favor of Mrs. App. Mervyn's then asked for a new hearing pursuant to Rule 60(b)(1), U.R.C.P., on the grounds that it had not received notice of the first hearing.

In considering Mervyn's request for a new hearing, both the ALJ and the Appeals Board have determined that the Commission properly notified Mervyn's, consistent with Mervyn's own instructions, of the adjudicative proceedings on Mrs. App's complaint. The ALJ and Appeals Board also determined that Mervyn's actually received the notices in question. Because Mervyn's has failed to set forth any factually correct reason for its failure to participate in the first evidentiary hearing, the ALJ and Appeals Board denied Mervyn's request for a new hearing.

Although Mervyn's disagrees with the Appeals Board's findings of fact, Mervyn's has failed to discharge its duty to marshal the evidence relevant to those findings. For

that reason alone, the Appeals Board's findings should be deemed conclusive. Alternatively, the Appeals Board's findings of fact should be affirmed because they are supported by substantial evidence in the record.

Mervyn's also contends it was denied due process in proceedings before the Commission because it did not receive notice of those proceedings. Because this due process argument was not made to the ALJ or Appeals Board, it cannot be raised now, for the first time on appeal. But in any event, Mervyn's due process argument is based on the factual assertion that Mervyn's did not receive the notices in question. As already discussed, the Appeals Board has determined that Mervyn's did receive the notices. Consequently, Mervyn's due process argument lacks factual support and should be dismissed.

Finally, Mervyn's argues that the ALJ and Appeals Board abused their discretion in denying Mervyn's request for new hearing under Rule 60(b)(1), U.R.C.P. Once again, Mervyn's bases its argument on the incorrect factual assertion that it did not receive notices of the adjudicative proceedings on Mrs. App's complaint. As already noted, the ALJ and Appeals Board concluded that Mervyn's did receive the notices. Mervyn's has not presented any other reason which would support a new hearing under Rule 60(b)(1).

In light of the foregoing, the Commission respectfully submits that the ALJ and Appeals Board's decisions denying Mervyn's request for a new hearing were not an abuse of discretion and should be affirmed.

## ARGUMENT

### POINT ONE

#### **THE APPEALS BOARD'S FINDINGS OF FACT HAVE NOT BEEN PROPERLY CHALLENGED AND, IN ANY EVENT, ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.**

##### **A. Mervyn's Has Failed To Marshal The Evidence.**

Mervyn's argument for relief under 60(b)(1) is based entirely on its assertion that it did not receive notice of the prehearing conference and evidentiary hearing held on Ms. App's complaint. Judge LaJeunesse and the Appeals Board have carefully considered this question of fact and have concluded that Mervyn's did receive the notices.

Whether Mervyn's did, or did not, receive the notice of conference and notice of hearing is a question of fact. On review, this Court applies a "substantial evidence" standard to such factual issues, Drake v. Industrial Commission, 939 P.2d 177 (Utah 1997). Furthermore, the party challenging the Commission's findings of fact "must marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." Grace Drilling Co. v. Board of Review, 776 P.2d 63, 67 (Utah App. 1989.) If a party fails to discharge its burden of marshaling the evidence, this Court accepts the Commission's findings as conclusive. Merriam v. Board of Review, 812 P.2d 447, 459 (Utah App. 1991).

In this case, Mervyn's disputes the findings of the Judge and Appeals Board, not by confronting the evidence supporting those finding, but merely by substituting its own version of fact. For example, at page one of its brief, Mervyn's asserts ". . . it is undisputed that Mervyn's . . . never received notice . . . ." Likewise, at page 3 of Mervyn's brief, in its "statement of facts," Mervyn's represents that it ". . . did not receive the Notice of Conference or the Notice of Formal Hearing . . . ." Similar statements are found throughout Mervyn's brief. However, Judge LaJeunesse and the Appeals Board determined that exactly the opposite was true: Mervyn's did receive the notices.

By ignoring the Judge and Appeals Board's findings of fact and turning a blind eye to all evidence contrary to its own position, Mervyn's has failed to discharge its burden of marshaling the evidence. Consequently, the Appeals Board's findings should be considered conclusive.

**B. The Appeals Board's Findings Are Supported By Substantial Evidence.**

As discussed above, the Commission believes the Appeals Board's findings that Mervyn's received the notices in question should be deemed conclusive in light of Mervyn's failure to properly marshal the evidence. Furthermore, the evidentiary record includes substantial evidence supporting the Appeals Board's findings.

Mervyn's itself provided the Commission with the address to be used for communication with Mervyn's. In a letter dated October 26, 1998, Ms. Cote, as

Mervyn's "Senior Team Relations Representative" submitted Mervyn's response to Mrs. App's complaint and advised UALD to contact her (Ms. Cote) if further information was required. (R. 2) Furthermore, the address Ms. Cote provided to the Commission was the same address Mervyn's listed as its official address of record with the Utah Department of Commerce. (R. 146)

The notice of conference and notice of hearing in Mrs. App's case were properly addressed and mailed to Mervyn's in accordance with Mervyn's instructions. (R. 143) As noted in Judge LaJeunesse's decision, when mail is properly addressed and deposited with the postal service, a presumption exists that the mail reaches its destination. Brown v. Fraternal Accident Assoc. of America, 55 P.2d 63 (Utah 1998). Although Mervyn's attempts to rebut this presumption of delivery, Mervyn's does not dispute the existence of the presumption itself. (See Mervyn's brief at page 10.)

Mervyn's effort to rebut the presumption that it received the notice of conference and notice of hearing rests primarily on the affidavits submitted by Ms. Lachina (R. 176) and Ms. Radcliffe. (R. 177) These affidavits, which are essentially identical, are of limited value. While Ms. Lachina and Ms. Radcliffe undoubtedly are familiar with their own practice and pattern in handling the mail for their respective departments at Mervyn's, no foundation exists to accept their representations regarding the practice and procedure of Mervyn's central mail room. The following evidence indicates that

Mervyn's central mail room does not process mail in the manner described by Ms. Lachina and Ms. Radcliffe.

Ms. Lachina and Ms. Radcliffe state that Mervyn's mail room employees place any mail addressed to their departments, or to an individual in their departments, in their departments' respective mail slots. (R. 176, 177) Ms. Radcliffe additionally states that mail of a "legal nature," as determined by the "return addressor's information" is placed in the Legal department's mail slot. When Judge LaJeunesse issued his initial decision, Mervyn's copy was mailed to Ms. Cote, as Mervyn's representative of record, at Mervyn's headquarters address. Despite the fact that Ms. Cote had been in the Employee Relations department, Mervyn's mail room did not route Judge LaJeunesse's decision to Ms. Lachina. Likewise, despite the fact that the decision was quite clearly "of a legal nature", Mervyn's mail room did not route the decision to Ms. Radcliffe. Instead, the mail room chose to return the envelope containing the decision to the U.S. Postal Service, marked with the notation "Return to Sender No Longer At This Address." (R. 86) This action on the part of Mervyn's mail room is inconsistent with the purported process described in the Lachina and Radcliffe affidavits and undermines the persuasive effect of those affidavits.

In summary, it was proper for Judge LaJeunesse and the Appeals Board to begin with the presumption that Mervyn's received the notice of conference and notice of hearing. Although Mervyn's attempted to rebut that presumption and establish that the

notices were not received, the evidence presented by Mervyn's was internally inadequate and objectively inconsistent with Mervyn's actual practices. Finally, Judge LaJeunesse and the Appeals Board were aware of instances in which mailings to Mervyn's, addressed in the same manner as the notices, had been received by Mervyn's. All of these considerations, taken together, constitute substantial evidence that Mervyn's received the notice of conference and notice of hearing.

## **POINT TWO:**

**MERVYN'S HAS FAILED TO PRESERVE ITS DUE PROCESS ARGUMENTS, BUT EVEN IF THOSE ARGUMENTS ARE CONSIDERED ON THEIR MERITS, MERVYN'S RECEIVED APPROPRIATE NOTICE AND WAS NOT DEPRIVED OF DUE PROCESS.**

### **A. Mervyn's Failed To Preserve Its Due Process Arguments.**

Section 63-46b-14(2) of the Utah Administrative Procedures Act provides: "A party may seek judicial review only after exhausting all administrative remedies available . . . ." <sup>2</sup> Consistent with the Administrative Procedures Act's limitation on judicial review, Rule 24(a)(5) of the Utah Rules of Appellate Procedure requires an appellant's brief to include a "(c)itation to the record showing that the issue was preserved in the trial court . . . ."

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<sup>2</sup>

Section 63-46b-14(2) also lists certain exceptions to this requirement of exhaustion of administrative remedies. Specifically, exhaustion is not required: 1) if waived by some other statute; 2) administrative remedies are inadequate; or 3) exhaustion would result in irreparable harm. None of the exceptions apply here.

Despite the requirement of Rule 24(a)(5), Mervyn's brief contains no citation to the record demonstrating that the issue of due process was raised in proceedings before the Commission. Consequently, the Commission has itself reviewed the record to determine whether due process was raised before the Commission so as to preserve the issue for appellate review.

Clearly, Mervyn's did not raise the issue of due process in the course of proceedings conducted by Judge LaJeunesse on Mervyn's request for relief from judgment. (R. 136-148) Later, Mervyn's motion for Appeals Board review of Judge LaJeunesse's decision contains nothing more than a passing reference to due process, but no significant argument, authority, or reference to Article I, section 7, of the Utah Constitution, the source of Utah's due process clause. (R. 112)

In light of the foregoing, the Commission contends that Mervyn's did not exhaust its administrative remedies with respect to its due process arguments. Because Mervyn's did not exhaust its administrative remedies on the issue, Mervyn's arguments regarding alleged denial of due process are precluded from appellate review. Brown & Root Industrial Services v. Industrial Commission, 947 P.2d 671, 677 (Utah 1997).

Although the Commission does not believe Mervyn's has preserved its due process arguments for appellate review, the Commission will proceed to discuss the merits of those arguments.

## **B. Mervyn's Received Proper Notice Of These Proceedings.**

The Commission acknowledges that Mervyn's, and all other parties to adjudicative proceedings at the Commission, are entitled to due process. This protection is embedded in both the federal and Utah Constitutions. The Commission also acknowledges that procedural fairness is an essential component of due process. Requirements designed to provide procedural fairness are included in the Utah Administrative Procedures Act and the Utah Antidiscrimination Act. Furthermore, it is well established that "(a)t a minimum, 'timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness.' (citations omitted)." In re Worthen, 926 P.2d 853, 876 (Utah 1996). The question now before this Court is whether Mervyn's did, in fact, receive the "timely and adequate notice and an opportunity to be heard" that is required by due process.

It is undisputed that Mervyn's received full notice of Mrs. App's discrimination complaint and responded to that complaint (R. 2-3), thereby subjecting Mervyn's to the Commission's jurisdiction under §34A-2-107 of the Utah Antidiscrimination Act. It cannot be denied that Mervyn's had actual notice of the complaint against it

The fact has previously been established that, after Mrs. App's complaint was transferred to the Commission's Adjudication Division, Mervyn's was given proper notice of the additional adjudicative proceedings that were to be conducted. Although Mervyn's has denied receiving these notices of conference and of hearing, both Judge

LaJeunesse and the Appeals Board have determined that they were, in fact, received by Mervyn's. Thus, Mervyn's had full knowledge of the nature of the claims Mrs. App had raised against it, as well as proper notification of the time, date, place and purpose of the adjudicative proceedings that were to be held on Mrs. App's complaints.

Due process does not require perfect process, nor does due process require a given set of rigid procedures. As the Utah Supreme Court observed in In re Worthen, id. "We have delineated these requirements (of due process) in a variety of contexts, for 'due process is flexible and calls for the procedural protections that the given situation demands.'" (Citations omitted.) Here, Mervyn's had full notice of the claims against it, notice of the adjudicative proceedings to resolve those claims, and an opportunity to participate in those proceedings. The Commission respectfully submits that these factors satisfied the requirements of due process.

### **POINT THREE**

#### **MERVYN'S HAS FAILED TO ESTABLISH A SUFFICIENT BASIS TO JUSTIFY RELIEF FROM JUDGMENT UNDER RULE 60(B)(1).**

Mervyn's failed to attend the prehearing conference or the formal evidentiary hearing in this matter. Mrs. App participated in both. Judgment was entered in her favor based on her persuasive testimony establishing that Mervyn's had discriminated against her because of disability, in violation of the Utah Antidiscrimination Act. Later, Mervyn's asked that the judgment against it be set aside and a new hearing held pursuant

to Rule 60(b)(1), U.R.C.P., because Mervyn's allegedly had not received notice of the prehearing conference and the evidentiary hearing that were held on Mrs. App's complaint.

The Commission recognizes that default judgments are generally disfavored. As the Utah Supreme Court stated in Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986):

The court should be generally indulgent toward setting a judgment aside where there is reasonable justification or excuse for the defendant's failure to answer and when timely application is made. Where there is doubt about whether a default should be set aside, that doubt should be resolved in favor of doing so.

However, in Katz, the Supreme Court went on to say:

But, before we will interfere with the trial court's exercise of discretion, abuse of that discretion must be clearly shown. That some basis may exist to set aside the default does not require the conclusion that the court abused its discretion in refusing to do so when facts and circumstances support the refusal.

In this case, Mervyn's request for relief from judgment was not summarily rejected. Instead, the ALJ held an evidentiary hearing to establish the circumstances of Mervyn's failure to participate in earlier proceedings. (R. 62-63) Thus, Mervyn's was given every reasonable opportunity to explain its default.

At the hearing, Mervyn's put forth the excuse that it had never received the notices in question. However, as discussed in Point I of this brief, both Judge LaJeunesse and the Appeals Board rejected that excuse and determined, as a matter of fact, that Mervyn's

did receive the notices in question. Thus, the decisions by Judge LaJeunesse and the Appeals Board removed the underpinnings of Mervyn's argument for a new hearing.

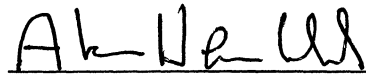
On that basis of the evidence that has been presented in this matter, Judge LaJeunesse and the Appeals Board reasonably concluded that whatever changes occurred among Mervyn's personnel at its headquarters, those changes were never communicated to the Commission. Judge LaJeunesse and the Appeals Board found that all required notices of proceedings on Mrs. App's complaint were properly mailed to Mervyn's at the correct address, i.e., the address Mervyn's itself had designated. Finally, Judge LaJeunesse and the Appeals Board determined that Mervyn's actually received the notices in question. With these facts established, Mervyn's is left with no explanation for its failure to participate, except its own negligence. Under such circumstances, the ALJ and Appeals Board did not abuse their discretion by concluding that Mervyn's was not entitled to a new hearing pursuant to Rule 60(b)(1). See Black's Title, Inc., 991 P.2d at 612.

## **CONCLUSION**

Recognizing the default judgment is disfavored by law, Mervyn's has been given full opportunity to explain the basis for its failure to participate. Mervyn's has put forward a reason that both the ALJ and Appeals Board have determined to be factually unsupported. Consequently, the ALJ and Appeals Board have concluded that Mervyn's has failed to establish a basis for new hearing under Rule 60(b)(1), U.R.C.P.

The Commission respectfully submits that the ALJ and Appeals Board's findings of fact are binding in this matter and should be accepted by this Court. Given those facts, the ALJ and Appeals Board's denial of Mervyn's request for new hearing is not an abuse of discretion and should be affirmed by this Court.

Dated this 31st day of March, 2003.

A handwritten signature in black ink, appearing to read "Alan Hennebold", written over a horizontal line.

Alan Hennebold  
General Counsel  
Utah Labor Commission

CERTIFICATE OF MAILING

I hereby certify that on the 31<sup>st</sup> day of March, 2003, two (2) true and correct copies of the foregoing Brief, were mailed by U.S. Mail, postage prepaid, to:

MARK O MORRIS  
JAMES D GARDNER  
SNELL & WILMER  
15 WEST SOUTH TEMPLE, SUITE 1200  
GATEWAY TOWER WEST  
SALT LAKE CITY UT 84101-1004

MARION APP  
5437 WEST 4505 SOUTH  
SALT LAKE CITY UT 84120

*Al Weller*

# **ADDENDUM    A**

**UTAH LABOR COMMISSION**

**Case No. 8980674**

**MARION E. APP,**

**Petitioner,**

**vs.**

**MERVYN'S CALIFORNIA,**

**Respondent,**

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**FINDINGS OF FACT,**

**CONCLUSIONS OF LAW,**

**AND ORDER**

**Judge: Richard M. La Jeunesse**

\*\*\*\*\*

**HEARING:** Room 334, Labor Commission, 160 East 300 South, Salt Lake City, Utah, on July 3, 2001, at 10:00 A.M. Said Hearing was pursuant to Order and Notice of the Commission.

**BEFORE:** Richard M. La Jeunesse, Administrative Law Judge.

**APPEARANCES:** The petitioner, Marion App, was present and represented herself pro se.

The respondents did not appear at the hearing.

**I. STATEMENT OF THE CASE**

The petitioner, Marion App, filed a "Charge of Discrimination" with the Utah Antidiscrimination and Labor Division (UALD) on September 3, 1998. Ms. App alleged that Mervyn's discriminated against her because of her physical disabilities. On October 28, 1998, Mervyn's filed a response to Ms. App's "charge of Discrimination" and essentially denied the charge.

**II. ISSUES.**

Did Mervyn's failure to provide reasonable accommodations for Marion App's disabilities result in constructive termination of her employment?

**III. COURSE OF PROCEEDINGS.**

On December 18, 2000 UALD issued a "Determination and Order," which found against Ms. App. On January 17, 2001 Ms. App filed a request for a formal evidentiary hearing.

On February 15, 2001 the Division of Adjudication sent a "Notice of Conference" to Ms. App and Mervyn's. The "Notice of Conference" notified the parties of a pre-hearing conference to be held on May 24, 2001 at 8:30 A.M. in Court Room 334 of the Heber Wells Building. Ms. App appeared in person at the May 24, 2001 pre-hearing conference. Mervyn's failed to appear at the pre-hearing conference.

On June 5, 2001 the Division of Adjudication sent a "Notice of Formal Hearing" to Ms. App and Mervyn's. The "Notice of Formal Hearing" notified the parties of a formal evidentiary hearing to be held on July 3, 2001 at 10:00 in Court Room 334 of the Heber Wells Building. Ms. App appeared in person at the July 3, 2001 formal hearing. Mervyn's failed to appear at the formal hearing.

#### **IV. FINDINGS OF FACT**

##### **A. Marion App's Disabilities.**

Marion App provided the only testimony at the hearing on July 3, 2001. Therefore Ms. App's testimony stood as the unrefuted evidence in this matter.

Ms. App suffered from diabetes for 27 years. As a result of her diabetes, Ms. App developed diabetic retinopathy that in turn resulted in progressive blindness. From approximately 1996 Ms. App underwent 17 laser surgeries on her eyes in an attempt to treat multiple, bilateral hemorrhages. Unfortunately, Ms. App's retinopathy ultimately led to legally declared blindness on June 7, 1999.

Ms. App's diabetes also caused her to develop diabetic neuropathy that resulted in nerve damage bilaterally to her legs and arms. The diabetic neuropathy suffered by Ms. App led to a loss of balance and a slowed gait.

Ms. App's combined disabilities impaired her major life functions of vision, walking, standing, and balance.

##### **B. Marion App's Employment With Mervyn's.**

Ms. App commenced employment with Mervyn's on June 30 1982. During the course of her employment with Mervyn's, Ms. App eventually worked in every department.

For the most part Ms. App enjoyed success as a Mervyn's employee. Ms. App served as president of the employees' association. Ms. App received several employee of the month awards, which culminated in employee of the year for 1997.

As Ms. App experienced increased problems with her diabetic neuropathy and retinopathy, she also encountered difficulty with her work on the sales floors of the various departments at Mervyn's. Because of Ms. App's loss of vision and balance she constantly bumped into shelves and displays. Ms. App also fell down several times while she worked in the men's department at Mervyn's.

Ann Madji, the store manager at the Valley Fair Mervyn's, offered Ms. App a position in the office because of safety and health concerns. Ms. App began work in Mervyn's Valley Fair Office on April 8, 1996. Ms. App's duties in the office included gift wrap, account payments, and customer service for credit card problems.

The office at Mervyn's gave Ms. App a safe environment to work in as it allowed Ms. App to sit within a confined space that held few obstacles. Linda Garcia, Ms. App's immediate supervisor, allowed Ms. App a number of additional accommodations while Ms. App worked in the office at Mervyn's which included: (1) time off for laser surgeries; (2) a magnifying glass and felt tip pen for visual enhancement, and; (3) permission for customers to read account numbers to Ms. App.

Eventually Dick Leatham replaced Ann Madji as the manger for the Valley Fair Mervyn's. Ms. App worked with Mr. Leatham on prior occasions, and Mr. Leatham knew of Ms. App's disabilities.

Ms. App asked Mr. Leatham if Diane Brown from the Utah Division of Services for the Blind could perform a workplace assessment for Ms. App's work site. Mr. Leatham informed Ms. App that she needed no assistance to perform her job, but reluctantly approved the workplace assessment by Ms. Brown. Ms. Brown performed the workplace assessment for Ms. App's work site at Mervyn's. Ms. Brown offered Ms. App a screen enhancer and closed circuit T.V. so Ms. App could read her paper work. Ms. Brown stated that the Utah Division of Services for the Blind would provide the screen enhancer and closed circuit T.V. at no cost to Mervyn's.

Two weeks after Ms. Brown performed the workplace assessment at Mervyn's, Mr. Leathemm announced that Ms. App must move out of the office and back onto the sales floor. Mr. Leatham explained that the office employed too many benefitted<sup>1</sup> employees, therefore, Ms. App must be transferred. Mr. Leatham had the discretion to employ benefitted employees wherever he chose and operated under no policy constraint to move Ms. App.

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<sup>1</sup> A benefitted employee constituted an employee provided benefits such as health insurance, vacation, sick leave, life insurance, profit sharing, and 401k plans. Mervyn's employed Ms. App as a benefitted employee at the time Mr. Leatham took over as manager of the Valley Fair Mervyn's.

Ms. App protested to Mr. Leatham that the office afforded her the only safe environment to work under her then current disabilities. Mr. Leatham gave Ms. App three choices: (1) move to the sales floor; (2) stay in the office without benefits, or; (3) terminate employment with Mervyn's. Mr. Leatham then told Ms. App she could choose between the children's department or jewelry.

Ms. App requested that Mr. Leatham give her time to obtain letters from her treating doctors concerning her physical restrictions and needed accommodations. Mr. Leatham denied Ms. App's request for additional time to obtain medical opinions, and ordered her to report to the sales floor in the children's department the following Monday.

Ms. App told Mr. Leatham that she could not safely work on the sales floor of the children's department for various reasons. First, Ms. App stated that the children's department occupied a large area, almost one half of the floor, with a huge stock room. Because of the size of the children's department, and because of her neuropathy, Ms. App experienced difficulty walking around the department forty hours per week. Ms. App also could not see customers more than six feet away due to her progressive retinopathy.

Mervyn's frequently moved the fixtures and merchandise in the children's department which created a moving landscape that Ms. App found difficult to negotiate. Mervyn's also placed merchandise and fixtures so close together that pedestrian isles measured less than 30 inches wide. The narrow, shifting isles and protruding shelves, coupled with Ms. App's visual impairment and lack of balance, created a hazardous work environment for Ms. App.

Ms App also faced a number of problems with the jewelry department. The height of the jewelry cases required Ms. App to bend, stoop, and twist to reach the merchandise. Ms. App found that because of her visual impairment, and lack of balance, she frequently fell when she attempted to bend, stoop, or twist.

The jewelry department also included accessories which required Ms. App to negotiate the main sales floor with the same problems of shifting environment presented by the children's department. The extremely small size of the price tags in jewelry made it difficult for Ms. App to see even with magnification. Ms. App feared that she would misread the price on expensive jewelry and be required to compensate any loss under Mervyn's policy.

When forced to choose by Mr. Leatham, Ms. App chose to work in the children's department because jewelry had no restroom in close proximity. Ms. App required the use of a restroom close at hand because her medications often made her nauseous.

Ms. App returned to the children's department at Mervyn's in August 1998. While in the children's department Ms. App fell three times. Ms. App also hit her arms and legs on shelves multiple times. Ms. App reported each injury she sustained in the children's department to her supervisor Sharon Carter.

After numerous injuries suffered in the children's department Ms. App approached human resources at Mervyn's to discuss reasonable accommodations. When Mervyn's failed to respond to Ms. App she filed the present claim with UALD.

Because of the damage caused to her health by employment on the sales floor Ms. App stopped work on October 6, 1998. Mervyn's formally terminated Ms. App's employment on May 31, 1999 when she failed to return to work in the jewelry department.

The undisputed evidence in this case factually established that Mervyn's knew of Ms. App's disabilities cause by her diabetic neuropathy and retinopathy. The unchallenged evidence in this case further established that Ms. App had the qualifications to perform her job in Mervyn's office. Finally, the undisputed evidence in this case established that Mervyn's constructively discharged Ms. App when it mandated she work under conditions injurious to her health and that exposed her to liability for damage or loss to merchandise.

### **C. Damages.**

On October 6, 1998, the date Ms. App stopped working for Mervyn's, her compensation with Mervyn's equaled \$9.40 per hour for an average of forty hours per week, or \$304.00 per week. Based on an average weekly income of \$304.00 per week, Ms. App's annual expected wages came out to \$15,808.00.

Ms. App introduced into evidence her W-2 forms for the years 1998 and 1999. In the year 1998 Ms. App actually received \$12,810.58 in wages from Mervyn's. [see: Exhibit "P-1"]. Consequently Ms. App lost \$2,997.42 in earnings from Mervyn's due to her constructive discharge. [ $\$15,808.00 - \$12,810.58 = \$2,997.42$  lost wages].

In the year 1999 Ms. App received a combined income of \$3,624.84.<sup>2</sup> [id.]. Accordingly, Ms. App lost \$12,183.65 in earnings from Mervyn's caused by her constructive discharge. [ $\$15,808.00 - \$3,624.84 = \$12,183.65$ ].

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<sup>2</sup> I did not count her 401(k) distributions because no evidence existed concerning whether the money constituted employer or employee contributions. In any event the money constituted deferred income earned in prior years.

On August 1, 2001 Ms. App began to receive Social Security Disability (SSD) benefits of \$700.00 per month. Therefore, Ms. App received \$3,500.00 SSD in the year 2000. Ms. App accordingly lost \$12,308.00 in income for the year 2000 because of her constructive discharge from Mervyn's.<sup>3</sup>[\$15,808.00 - \$3,500.00 = \$12,308.00].

Ms. App's SSD benefits increased to \$720.00 per month on January 1, 2001. Therefore, from January 1, 2001 to July 17, 2001 Ms. App lost \$3,106.56 in income for the year 2001 through July 17, 2001. [ \$8,606.16 (income anticipated earned from Mervyn's through July 17, 2001) - \$5,493.56 (SSD benefits prorated through July 17, 2001) = \$3,106.56.

Ms. App lost a total of \$30,595.63 in lost income from Mervyn's from October 6, 1998, through July 17, 2001.

## V. CONCLUSIONS OF LAW

Utah Code § 34A-5-106(1) states in relevant part that:

It is a discriminatory or prohibited employment practice:

(a)(i) For an employer to refuse to hire, promote, or to discharge, demote, terminate any person, or to retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any persons otherwise qualified, because of ...handicap.<sup>4</sup>

The Utah Court of Appeals held that:

To establish a claim of constructive discharge, the 'employee must demonstrate that {his or her} employer['s] discriminatory conduct produced working conditions that a reasonable person would view as intolerable.' Sheikh v. Dept. of Public Safety, 904 P. 2d 1103, 1007 (Ut. App. 1995).

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<sup>3</sup> The argument could be raised that as soon as Ms. App qualified for Social Security Disability on August 1, 2000, she no longer met the definition of a "qualified" disabled individual who could perform her job with or without accommodation. The medical evidence in Exhibit "P-1" suggested that the severe depression caused by Mervyn's failure to accommodate Ms. App at work led to the condition that qualified Ms. App for SSD. [Exhibit "P-1"]. The medical opinion also suggested that should Mervyn's provide Ms. App a reasonable accommodation she could return to work.

<sup>4</sup> The current version of the statute uses the more acceptable term disability.

At all times relevant to this action, Ms. App was a disabled person as defined by Utah Code § 34A-5-106(1). Ms. App suffered serious visual impairment from diabetic retinopathy. Ms. App also suffered a loss of function in her extremities from diabetic neuropathy. The combination of Ms. App's disabilities further resulted in a loss of balance.

At all times relevant to this action, Ms. App's employer Mervyn's knew of Ms. App's disabilities. In August 1998 Mervyn's removed Ms. App from the safe work environment of the office where Ms. App ably performed her job duties with reasonable accommodation. Mervyn's moved Ms. App to the sales floor despite knowledge that the sales floor presented an unsafe work environment to Ms. App because of her disabilities.

Once removed to the sales floor, Ms. App injured herself numerous times because of the incompatibility of the work environment on the sales floor and her disabilities. Because of the numerous injuries to her health caused by work on the sales floor, and because Mervyn's refused to provide Ms. App a reasonable accommodation that would protect her health, Ms. App stopped her employment at Mervyn's on October 6, 1998.

Mervyn's removal of Ms. App from a suitable, safe work environment to a work environment injurious to her health constituted constructive discharge. Any reasonable person would view as intolerable a work environment demonstratively injurious to their health.

Utah Code § 34A-5-107(9) states that:

If upon all the evidence at 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.

As a result of Mervyn's constructive discharge of Ms. App in violation of Utah Code § 34A-5-106(1), Ms. App lost a total of \$30,595.63 in lost income from Mervyn's from October 6, 1998, through July 17, 2001.

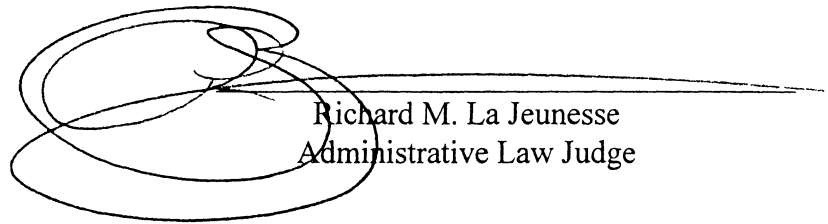
## **VI. ORDER**

IT IS THEREFORE ORDERED that Mervyn's shall cease any and all discriminatory or prohibited employment practices.

IT IS FURTHER ORDERED that Mervyn's shall reinstate Marion App' employment in a suitable, equivalent position that accommodates her disabilities with a restoration of lost benefits.

IT IS FURTHER ORDERED that Mervyn's shall pay Marion App \$30,595.63 in back pay through July 17, 2001 together with interest of \$3,420.59. Back pay and interest shall accrue until paid in full.

Dated this 18<sup>th</sup> day of 2001,



Richard M. La Jeunesse  
Administrative Law Judge

#### **NOTICE OF APPEAL RIGHTS**

A party aggrieved by the decision may file a Motion For Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their Responses to the Motion for Review within 20 days of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its Response. If none of the parties specifically requests review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

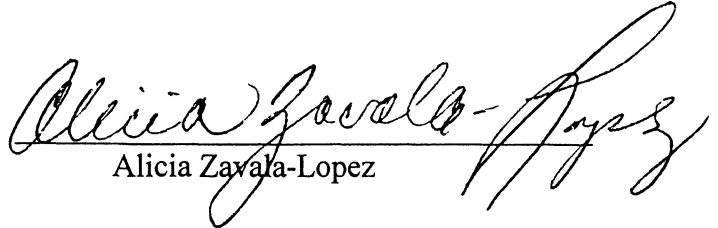
## CERTIFICATE OF MAILING

I, Alicia Zavala-Lopez, certify that I did mail by prepaid first class postage, except as noted below, a copy of the Findings of Fact, Conclusions of Law, And Order in the case of App v. Mervyn's, Case No. 8980674 on the 18<sup>th</sup> day of July 2001, to the following:

MARION APP  
5437 W 4605 S  
SALT LAKE CITY UT 84120

TRACY KUNKLE COTE  
MERVYN'S  
22301 FOOTHILL BLVD  
HAYWARD CA 94541

JOSEPH GALLEGOS  
DIRECTOR UALD  
160 E 300 S THIRD FLOOR  
SALT LAKE CITY UT 84111

  
Alicia Zavala-Lopez

# **ADDENDUM      B**

**UTAH LABOR COMMISSION**

**Case No. 8980674**

**MARION E. APP,**

**Petitioner,**

**vs.**

**MERVYN'S CALIFORNIA,**

**Respondent,**

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**ORDER ON MERVYN'S REQUEST**

**FOR NEW HEARING**

**Judge: Richard M. La Jeunesse**

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**HEARING:** Room 334, Labor Commission, 160 East 300 South, Salt Lake City, Utah, on December 20, 2001, at 8:30 a.m. Said Hearing was pursuant to Order and Notice of the Commission.

**BEFORE:** Richard M. La Jeunesse, Administrative Law Judge.

**APPEARANCES:** The petitioner, Marion App, was present and represented herself pro se.

Attorney Angeline Bonner appeared on behalf of respondent Mervyn's California.

**I. ISSUE.**

Should Mervyn's receive a new evidentiary hearing based on the assertion that Mervyn's failed to receive Notice of the prior proceedings?

**II. FINDINGS OF FACT.**

On September 3, 1998 Marion App filed a Charge of Discrimination with the Utah Antidiscrimination and Labor Division (UALD) against Mervyn's. Ms. App listed Mervyn's California address at 22301 Foothill Blvd. Hayward CA 94541 with no contact person and no mail stop.

On October 28, 1998 Tracy Kunkle Coté Sr. Team Relations Representative for Mervyn's filed with UALD an Answer to Ms. App's Charge of Discrimination. The letterhead of the Answer filed by Ms. Coté listed Mervyn's address as 22301 Foothill Blvd. Hayward CA 94541-2771.

At the hearing on December 20, 2001 attorney Bonner filed a "Chronology of Facts in Support of Respondent's Motion for New Hearing" (Chronology) with certain exhibits. In the Chronology attorney Bonner represented that Tracy Kunkle Coté resigned her employment with Mervyn's. Attorney Bonner provided no evidence that Mervyn's ever informed UALD, or the Labor Commission, of Ms. Coté's resignation.

Attorney Bonner stated that she had several conversations with Joan Carter at UALD. Exhibit "E" attached to the Chronology consisted of a FAX cover sheet from attorney Bonner to Joan Carter with UALD. Exhibit "E" listed Mervyn's address as 22301 Foothill Boulevard, MS 4090 Hayward, CA 94541.

On December 18, 2000 UALD issued a Determination and Order (Determination). The Certificate of Mailing for the Determination certified that the UALD mailed the Determination to: Tracy Kunkle Coté at Mervyn's 22301 Foothill Blvd. Hayward CA 94541. The Labor Commission Adjudication files contained no evidence that the Determination returned in the mail.

On January 17, 2001 Ms. App filed a request for a formal evidentiary hearing. UALD transferred the case file to the Adjudication Division.

On February 15, 2001 Loretta Woodmansee, the Hearing Clerk for the Adjudication Division, sent a Notice of Conference to the parties. The "Notice of Conference" notified the parties of a pre-hearing conference to be held on May 24, 2001 at 8:30 A.M. in Court Room 334 of the Heber Wells Building. The Notice of Conference indicated that Ms. Woodmansee mailed the Notice to Tracy Kunkle Coté Mervyn's 22301 Foothill Blvd. Hayward CA 94541. The files of the Adjudication Division contained no evidence that the Notice of Conference returned in the mail.<sup>1</sup> Ms. App appeared in person at the May 24, 2001 pre-hearing conference. Mervyn's failed to appear at the pre-hearing conference.

On June 5, 2001 the Division of Adjudication sent a "Notice of Formal Hearing" to Ms. App and Mervyn's. The "Notice of Formal Hearing" notified the parties of a formal evidentiary hearing to be held on July 3, 2001 at 10:00 in Court Room 334 of the Heber Wells Building. The Notice of Hearing indicated that Ms. Woodmansee again sent the Notice to Tracy Kunkle Coté Mervyn's 22301 Foothill Blvd. Hayward CA 94541. The files of the Adjudication Division contained no evidence that the Notice of Hearing returned in the mail.

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<sup>1</sup> All envelopes utilized by the Adjudication Division contained the return address of the Adjudication Division with the inscription "RETURN SERVICE REQUESTED."

Ms. App appeared in person at the July 3, 2001 formal hearing. Mervyn's failed to appear at the formal hearing. Attorney Bonner submitted affidavits from Julie Radcliffe and Bonnie Lachina administrative assistants with Mervyn's. Both Ms. Radcliffe and Ms. Lachina averred that they handled mail from the mail room at Mervyn's and never saw the Notice of Conference or the Notice of Hearing.

On July 18, 2001 I issued Findings of Fact, Conclusions of Law, and Order (Order) in the present matter. The Certificate of Mailing for the Order certified that the Alicia Zavala-Lopez of the Adjudication Division mailed the Order to: Tracy Kunkle Coté at Mervyn's 22301 Foothill Blvd. Hayward CA 94541.

On July 27, 2001 the Order returned in the mail with the notation "RETURN TO SENDER NO LONGER AT THIS ADDRESS." On the same date it returned, I removed the name of Tracy Kunkle Coté and remailed the Order to Mervyn's at the same address. The records of the Utah Department of Commerce on July 27, 2001 listed Mervyn's corporate address at: 22301 Foothill Boulevard, Hayward CA 94541.

No dispute existed that Mervyn's received the remailed Order at 22301 Foothill Blvd. Hayward CA 94541. In fact Mervyn's filed a Motion for Review based on the remailed Order.

On November 15, 2001 the Appeals Board issued an Order of Remand wherein the Appeals Board ordered the ALJ to first rule on Mervyn's Motion for New Hearing. On December 20, 2001 I held the hearing as above noted pursuant to the Order of Remand.

In the present case we start with the undisputed fact that Mervyn's received several pieces of mail from the Utah Labor Commission addressed to: 22301 Foothill Boulevard, Hayward CA 94541. At all times relevant Mervyn's listed its business address with the Utah Department of Commerce as 22301 Foothill Boulevard, Hayward CA 94541.

The inclusion of the name of Tracy Kunkle Coté constituted the only significant difference between the pieces of mail that Mervyn's disputed receiving and the pieces of mail Mervyn's acknowledged receiving. However, no evidence existed that Mervyn's ever informed any Division of the Labor Commission that Tracy Kunkle Coté terminated employment with Mervyn's and therefore, Mervyn's no longer accepted mail with her name on it.<sup>2</sup>

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<sup>2</sup> Mervyn's made no claim that its legal department established a system that resulted in refusal or failure to accept mail addressed to former employees.

The unchallenged evidence in this case demonstrated that of the mail sent by the Labor Commission, only the Order returned as undelivered to Mervyn's. The undisputed evidence showed that Mervyn's ultimately received the Order remailed on July 27, 2001 to the same address with the omission of Tracy Kunkle Coté's name. In fact, Mervyn's filed its Motion for Review after Mervyn's received the Order pursuant to the second mailing.

The preponderance of the more persuasive evidence in this case confirmed that Mervyn's received all mailings sent from the Labor Commission except the first mailing of the Order sent July 18, 2001. Accordingly, Mervyn's received Notice of the Conference and evidentiary hearing for which Mervyn's failed to appear. Based on the facts established by the preponderance of the evidence in this matter, Mervyn's lacked any reasonable excuse for its failure to appear at the July 3, 2001 evidentiary hearing.

### III. CONCLUSIONS OF LAW

URCP 60(b) states in pertinent part that:

On Motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud...misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

With respect to the receipt of mail, the Utah Supreme Court cited with approval a United States Supreme Court decision as follows:

In **Rosenthal v. Walker**, 111 U.S. 185, 28 L. Ed. 395, 4 S. Ct. 382, it was said: 'The rule is well settled that if a letter properly directed is proved to have either put into the post office or delivered to the postman, it is presumed, from the course of business in the postoffice department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.' Brown v. The Fraternal Accident Assoc. of America, 18 Utah 265, \_\_\_, 55 P. 63, \_\_\_ (1898).

The Court in Brown went on to hold that:

[t]he presumption of fact raised by the proof that the notice was sent by mail, was a circumstance, when opposed by a denial of the receipt of the letter, to be weighed by the (finder of fact) with all the other evidence in determining the question whether or not the letter was actually received. Id.

Several years later the Utah Supreme Court reiterated this doctrine when it held:

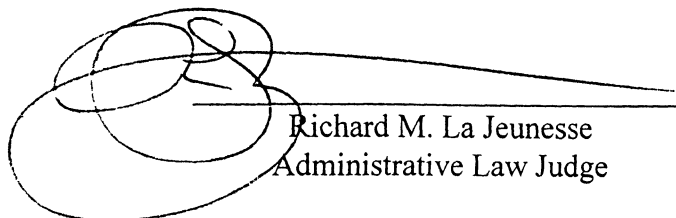
Thus the legal presumption and usage have grown out of convenience and necessity, and have settled into positive law; ...where notice is properly sent by mail, it raises at least a prima facie presumption that the notice was received....  
Cooney v. McKinney, 25 Utah 329, \_\_\_, 71 P. 485, \_\_\_, (1903).

The evidence in this case confirmed that Mervyn's received all mailings and notices sent from the Labor Commission except the first mailing of the Order on July 18, 2001. The Labor Commission addressed and mailed all Notices to Mervyn's actual address and business address of record at 22301 Foothill Boulevard, Hayward CA 94541. Only the Order returned in the mail which Mervyn's later received when mailed to the same address. Accordingly, Mervyn's received notice of the evidentiary hearing for which Mervyn's failed to appear. Because Mervyn's received notice of the evidentiary hearing for which it failed to appear, the Order based on that hearing must stand. Under URCP 60(b), Mervyn's lacked any reasonable factual excuse for its failure to appear at the July 3, 2001 evidentiary hearing, and lacked cause to set aside the Order derived from that hearing.

#### IV. ORDER

IT IS THEREFORE ORDERED that Motion for New Hearing filed by Mervyn's California with respect to the Findings of Fact, Conclusions of Law, and Order entered July 18, 2001 is hereby denied.

Dated this 28<sup>th</sup> day of December 2001,

  
Richard M. La Jeunesse  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS**

A party aggrieved by the decision may file a Motion For Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their Responses to the Motion for Review within 20 days of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its Response. If none of the parties specifically requests review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

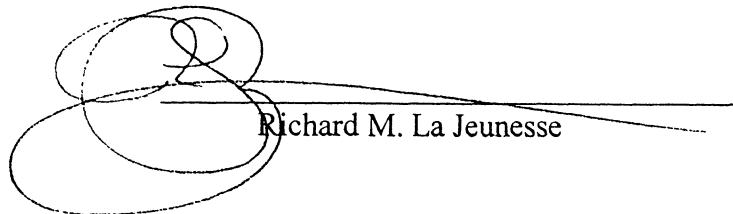
## CERTIFICATE OF MAILING

I, Richard M. La Jeunesse, certify that I did mail by prepaid first class postage, except as noted below, a copy of the Order on Mervyn's Request for New Hearing in the case of App v. Mervyn's, Case No. 8980674 on the \_\_\_\_ day of December 2001, to the following:

MARION APP  
5437 W 4605 S  
SALT LAKE CITY UT 84120

ANGELINE BONNER ESQ  
MERVYN'S  
22301 FOOTHILL BLVD  
MAIL STOP 4090  
HAYWARD CA 94541

JOSEPH GALLEGOS  
DIRECTOR UALD  
160 E 300 S THIRD FLOOR  
SALT LAKE CITY UT 84111



Richard M. La Jeunesse

# **ADDENDUM      C**

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**APPEALS BOARD  
UTAH LABOR COMMISSION**

**MARION APP,**

**Applicant,**

**v.**

**MERVYN'S CALIFORNIA,**

**Defendant.**

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**ORDER DENYING  
MOTION FOR REVIEW**

**Case No. 8-98-0674**

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Mervyn's California asks the Appeals Board of the Utah Labor Commission to set aside the ALJ's prior decision and to order a new hearing on Mrs. App's complaint of unlawful employment discrimination against Mervyn's under the Utah Antidiscrimination Act, Title 34A, Chapter 5, Utah Code Annotated.

The Appeals Board exercises jurisdiction in this matter pursuant to Utah Code Ann. §63-46b-12, and Utah Code Ann. §34A-5-107(11).

**ISSUE PRESENTED**

Does sufficient cause exist to order a new hearing on the merits of Mrs. App's discrimination complaint?

**FINDINGS OF FACT**

The Appeals Board adopts the findings set forth in the ALJ's decision of December 28, 2001. In summary, Mrs. App filed an employment discrimination complaint against Mervyn's with the Utah Antidiscrimination and Labor Division ("UALD"). UALD then received a written response to the complaint from Tracy Kunkle Cote, a "senior team relations representative" at Mervyn's headquarters in Hayward, California. Thereafter, UALD and the Adjudication Division sent all documents pertaining to Mrs. App's complaint to Ms. Kunkle Cote at Mervyn's Hayward offices. Although Ms. Kunkle Cote left her position with the company, Mervyn's did not instruct UALD or the Adjudication Division to send mailings to any other company representative.

After its investigation, UALD concluded that Mervyn's had not discriminated against Mrs. App. Mrs. App then filed a request for a de novo evidentiary hearing. Such hearings are conducted by the ALJs assigned to the Commission's Adjudication Division. The Adjudication Division initially scheduled Mrs. App's complaint for a prehearing conference, followed by a formal evidentiary hearing.

**ORDER DENYING MOTION FOR REVIEW**  
**MARION APP**  
**PAGE 2**

The Adjudication Division mailed notices of both hearings to Ms. Kunkle Cote at Mervyn's correct mailing address. Although two Mervyn's employees who handle mail state they did not see either notice, their knowledge on the subject is necessarily limited to their personal observations and recollections. The Appeals Board finds such statements unpersuasive on the central question of whether Mervyn's actually received the two notices of hearing. In view of the fact that both documents were mailed to the address Mervyn's had previously given the Commission and neither notice was returned to the Adjudication Division as undeliverable, and the reasonable inference from these facts, the Appeals Board finds that the documents were received by Mervyn's.

Mervyn's did not appear at either the conference or the hearing. The ALJ proceeded to conduct the evidentiary hearing without Mervyn's participation and entered an order in favor of Mrs. App. As with previous mailings, this order was mailed to Ms. Kunkle Cote at Mervyn's. However, this document was returned to the Adjudication Division with the notation: "return to sender no longer at this address." The Adjudication Division remailed the order to Mervyn's by simply removing Ms. Kunkle Cote's name. Mervyn's received this second mailing of the ALJ's order. Mervyn's then asked that the order be set aside and a new hearing held on the grounds Mervyn's had not received the earlier notice of hearing.

**DISCUSSION AND CONCLUSION OF LAW**

In its motion for review, Mervyn's contends that the ALJ's order should be set aside because "Mervyn's has not had an opportunity to meet the Petitioner's continuing discrimination claims with evidence and argument." The Appeals Board recognizes that by constitution, statute and regulation, Mervyn's was entitled to reasonable notice of the hearings in this matter. Had the Adjudication Division failed to properly notify Mervyn's of the hearings, the Appeals Board would not hesitate to set aside the ALJ's order and remand this case for another evidentiary hearing.

However, the preponderance of evidence establishes that Mervyn's did receive the two notices in question. The Appeals Board will not speculate on what happened to the notices after they were received at Mervyn's, but the Appeals Board concludes that Mervyn's had reasonable notice of the proceedings in question and failed without sufficient excuse to participate in them.

Under Rule 60b, U.R.C.P., where there has been no showing of excusable neglect, there is no reason to address the movant's showing of a likelihood of success on the merits. Because Mervyn's has not shown excusable neglect in this case, the ALJ did not err in not addressing the second prong of Rule 60b.

In light of the foregoing, the Appeals Board concurs with the reasoning and decision of the ALJ that Mervyn's is not entitled to a new evidentiary hearing in this matter.

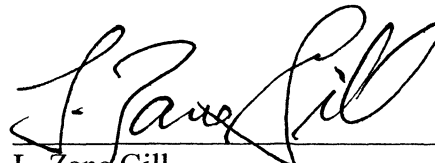
**ORDER DENYING MOTION FOR REVIEW**  
**MARION APP**  
**PAGE 3**

**ORDER**

The Appeals Board affirms the decision of the ALJ and denies Mervyn's motion for review. It is so ordered.

Dated this 28<sup>th</sup> day of June, 2002.

  
Colleen S. Colton, Chair

  
L. Zane Gill

  
Patricia S. Drawe

**NOTICE OF APPEAL RIGHTS**

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

**ORDER DENYING MOTION FOR REVIEW  
MARION APP  
PAGE 4**

**CERTIFICATE OF MAILING**

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Marion App, Case No. 8980674 , was mailed first class postage prepaid this 20<sup>th</sup> day of June, 2002, to the following:

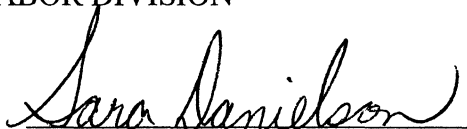
MARION APP  
5437 WEST 4605 SOUTH  
SALT LAKE CITY UT 84120

MERVYN'S CALIFORNIA  
22301 FOOTHILL BLVD  
MAIL STOP 4090  
HAYWARD CA 94541

MARK O MORRIS  
JAMES D GARDNER  
SNELL & WILMER  
15 WEST SOUTH TEMPLE #1200  
SALT LAKE CITY UT 84101-1004

and by Interdepartmental Mail to:

JOE GALLEGOS, DIRECTOR  
UTAH ANTIDISCRIMINATION AND LABOR DIVISION

A handwritten signature in cursive script, reading "Sara Danielson", written over a horizontal line.

Sara Danielson  
Support Specialist  
Utah Labor Commission