

2002

Mervyn's California v. Utah Labor Commission and Marion E. App: Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MERVYN'S CALIFORNIA,

Petitioner/Appellant.

vs.

UTAH LABOR COMMISSION

Respondent/Appellee,

and

MARION E. APP

Respondent/Appellee,

Court of Appeals Case No. 20020583

Priority No. ____

BRIEF OF APPELLANT

Appeal from the Ruling of the Appeals Board, Utah Labor Commission

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PARTIES TO THE PROCEEDINGS

The caption of this case identifies all parties to this proceeding.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear and decide this appeal pursuant to section 78-2a-3(2)(a) and 34A-1-303(6) of the Utah Code.

ISSUE PRESENTED AND STANDARD OF REVIEW

Whether the Appeals Board erred when it affirmed a default judgment against Mervyn's California ("Mervyn's"), when it is undisputed that Mervyn's intended to dispute the charges against it and never received notice of the evidentiary hearing at which it was found liable. No full evidentiary hearing on the merits was conducted with Mervyn's knowledge or participation, and thus without due process accorded it. Since the Utah Antidiscrimination and Labor Division's December 18, 2000 Order and Determination that Mervyn's California had not Discriminated against the Petitioner, Mervyn's California has not had an opportunity to meet the Petitioner's continuing discrimination claims with evidence and argument.

Mervyn's California's failure to receive timely and adequate notice and the opportunity to be heard violated its right to due process. Constitutional issues, including that of due process, are questions of law which are reviewed for correctness. *See In re K.M.*, 965 P.2d 576, 578 (Utah Ct. App. 1998). The Utah Labor Commission's decision to deny a new hearing is reviewed for abuse of discretion. *See Osman Home Improvement v. Industrial Commission*, 958 P.2d 240, 242-43 (Utah App.1998).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, RULES, AND REGULATIONS**

Article I, section 7 of the Utah Constitution provides:

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

Rule 60(b) of the Utah Rules of Civil Procedure provides in pertinent part as follows:

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 . . . or (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition Below

Mervyn's appeals from a default judgment entered against it. In September of 1998, Marion App filed a Charge of Discrimination with the Utah Antidiscrimination and Labor Division ("UALD") against Mervyn's. (R. 1) On December 18, 2000, UALD issued an Order and Determination in favor of Mervyn's, denying agency action for Ms. App. (R. 13-16) The UALD sent a copy of the Order and Determination to Mervyn's, addressed to Tracy Kunkle Coté, a former Mervyn's employee. (R. 16) It is undisputed that Mervyn's never received the UALD's Order and Determination. (R. 138, 176-77) Ms. App decided to Appeal the UALD's decision and the matter was transferred to the Adjudicative Division. (R. 17-18)

In February of 2001, the Adjudication Division sent a Notice of Conference to Mervyn's, again addressed to Ms. Coté informing Mervyn's of a pre-hearing conference to be held on May 24, 2001. (R. 19) In June of 2001, the Adjudication Division sent a Notice of Formal Hearing to Mervyn's, addressed again to Ms. Coté, informing Mervyn's of a formal evidentiary hearing to be held on July 3, 2001. (R. 20) Mervyn's did not receive the Notice of Conference or the Notice of Formal Hearing and, thus, did not attend either hearing. (R. 94-95, 138, 146-47, 176-77) Because Mervyn's failed to attend the hearing, Ms. App's testimony stood unrefuted and Judge Richard M. La Jeunesse entered a default judgment ("**Default Order**") against Mervyn's on July 18, 2001. (R. 42-50)

In August, 2001, after receiving the Default Order, Mervyn's filed a Motion for Review seeking to set aside the Default Order and requesting a new evidentiary hearing. (R. 51-59) In November, 2001, the Utah Labor Commission Appeals Board remanded Mervyn's request to set aside the Default Order and for a new hearing to Judge La Jeunesse for his review. (R. 62-64) In December, 2001, Judge La Jeunesse held that Mervyn's request to set aside the Default Order and for a new hearing did not meet the standard of Rule 60(b) of the Utah Rules of Civil Procedure. (R. 93-99) In January, 2002, Mervyn's filed with the Utah Labor Commission Appeals Board a Motion for Review again seeking to set aside the Default Order and requesting a new evidentiary hearing. (R. 102-99) In June, 2002, the Utah Labor Commission Appeals Board denied

Mervyn's Motion for Review. (R. 205-08) In July, 2002, Mervyn's filed a petition for review with this court. (R. 210-11)

Statement Of Facts

On September 3, 1998, Marion App filed a Charge of Discrimination with the UALD against Mervyn's alleging that she had been discriminated against on the basis of a disability. (R. 1) Tracy Kunkle Côté, a Senior Team Relations Representative for Mervyn's, promptly filed an answer refuting Ms. App's claims. (R. 2-3) During the year of 1999, there was no communication between UALD and Mervyn's. (R. 137) In October of 1999, while the UALD was in the midst of their investigation, Ms. Côté resigned her employment from Mervyn's. (R. 94, 137, 152) Mervyn's received no further contact from UALD until December 5, 2000, at which time Joan Carter, an investigator with UALD, called and left a message with Mervyn's. (R. 137, 141) That phone message was forwarded by Ed Smith, who had taken Ms. Côté position, to Ms. Bonner, who had taken over management of the App matter. (R. 137, 141) Ms. Bonner returned Ms. Carter's call and engaged in a series of conversations and exchanged information with Ms. Carter on December 5-7, 2000. (R. 94, 137-38, 153-60).

After years of review, on December 18, 2000, UALD issued an Order and Determination in favor of Mervyn's denying agency action for Ms. App. (R. 13-16) The Order and Determination dismissed Ms. App's request for agency action, finding that there was "**NO REASONABLE CAUSE** to believe it was more likely than not that the

Charging Party was subjected to discriminatory practices alleged.” (R. 14) Although UALD had not had contact with Ms. Côté for over two years, and had spoken with Ms. Bonner that same month regarding the App case, UALD mailed the Order and Determination to Ms. Côté. (R. 16, 94, 138) Mervyn’s never received the UALD’s Order and Determination. (R. 138, 176-77)

On January 17, 2001, Ms. App filed a request for a formal evidentiary hearing. (R. 17) No evidence was ever presented that either Ms. App or UALD sent Mervyn’s a copy of this request. (R. 93-99) After Ms. App filed a request for a formal evidentiary hearing, UALD transferred Ms. App’s case to the Adjudication Division. (R. 18) On February 15, 2001, the Adjudication Division sent a Notice of Conference to Mervyn’s, again addressed to Ms. Côté, informing Mervyn’s of a pre-hearing conference to be held on May 24, 2001. (R. 19) Mervyn’s did not receive the Notice of Conference. (R. 138, 176-77) Although Mervyn’s had actively participated in all of the proceedings and responded in a timely fashion to all correspondences, Mervyn’s failed to attend the pre-hearing conference for the simple reason it did not receive the Notice of Conference. (R. 94, 138, 146-47) No one from the Adjudicative Division attempted to contact Mervyn’s to determine why they had failed to make an appearance or respond to the Notice of Conference. (R. 93-99, 137-38)

On June 5, 2001, the Adjudication Division sent a Notice of Formal Hearing to Mervyn’s, addressed again to Ms. Côté, informing Mervyn’s of a formal evidentiary

hearing to be held on July 3, 2001. (R. 20) Mervyn's did not receive the Notice of Formal Hearing and, thus, did not attend the formal evidentiary hearing because it did not know of it. (R. 95, 138, 146-47) No one from the Adjudicative Division attempted to contact Mervyn's to determine why they had failed to make an appearance or respond to the Notice of Formal Hearing. (R. 93-99, 137-38) In sworn and undisputed affidavit testimony, Bonnie Lachina, the administrative assistant who retrieved the mail for Ed Smith, Ms. Coté's replacement, testified that she never saw the Notice of Conference or Notice of Formal Hearing. (R. 176) In sworn affidavit testimony, Julie Radcliffe, the administrative assistant who retrieved mail for Ms. Bonner, who took over supervision of the App matter, testified that she never saw the Notice of Conference or Notice of Formal Hearing. (R. 177)

On July 18, 2001, Judge La Jeunesse entered a Default Order against Mervyn's finding that "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." (R. 43) Judge La Jeunesse's Default Order ignored UALD's Order and Determination. (R. 42-50) The Default Order was again mailed to Ms. Coté at Mervyn's. This time, and for the first time, the Default Order was returned with the notation "RETURN TO SENDER NO LONGER AT THIS ADDRESS." (R. 95) On July 27, 2001, the Adjudicative Division removed Ms. Coté's name and the Default Order was remailed to Mervyn's and was ultimately received by Ms. Bonner. (R. 95)

On August 10, 2001, after receiving the Default Order, Mervyn's filed a Motion for Review seeking to set aside the Default Order and requesting a new evidentiary hearing. (R. 51-59) Mervyn's made known in its Motion for Review that it had received no contact regarding the App case since December 7, 2000 and reminded the Appeals Board that, if allowed the opportunity, it could bring forth facts and documents which support the UALD's favorable Determination and Order, and would rebut Ms. App's claims. (R. 51-52). On November 15, 2001, the Utah Labor Commission Appeals Board remanded Mervyn's request to set aside the Default Order and for a new hearing to Judge La Jeunesse for his review. (R. 62-64)

On December 28, 2001, Judge La Jeunesse held that Mervyn's request to set aside the Default Order and for a new hearing did not meet the standard of Rule 60(b) of the Utah Rules of Civil Procedure. (R. 93-99) On January 28, 2002, Mervyn's filed with the Utah Labor Commission Appeals Board a Motion for Review again seeking to set aside the Default Order and requesting a hearing on the merits of the case. (R. 102-99) On June 28, 2002, the Utah Labor Commission Appeals Board denied Mervyn's Motion for Review. (R. 205-08) On July 25, 2002, Mervyn's filed a petition for review with this court. (R. 210-11)

SUMMARY OF ARGUMENT

Mervyn's does not seek here a disposition of Ms. App's claims against it. It seeks only its legal right to defend itself. This court should set aside the Default Order entered

against Mervyn's and remand to permit a new hearing under the due process clause of the Utah Constitution. Mervyn's was not provided fair notice and the right to be heard on the merits of the claims brought against it. Due process here requires flexible procedural protections. In this case, Judge La Jeunesse and the Utah Labor Commission Appeals Board failed to provide Mervyn's the procedural protections to which it is entitled, and instead upheld the default judgment and refused to grant a new hearing based solely on the conclusion that the notice of the evidentiary hearing was properly addressed and mailed, and thus was "received." The Default Order was entered in violation of Mervyn's due process rights, and this court should set it aside to permit a new hearing.

Alternatively, this court should set aside the Default Order entered against Mervyn's and grant Mervyn's a new hearing under Rule 60(b) of the Utah Rules of Civil Procedure. Mervyn's failure to attend the formal evidentiary hearing arose from "mistake, inadvertence, surprise or excusable neglect," and because of a clerical error in the UALD that failed to change Mervyn's contact person from Ms. Côté to Ms. Bonner. Furthermore, Mervyn's has already demonstrated it is able to show it has more than a meritorious defense to Ms. App's underlying discrimination allegations. In providing similar relief, Utah courts have consistently held that default judgments are extreme sanctions and are thus disfavored. Because Mervyn's can meet the appropriate standard, Mervyn's should be given the opportunity to appear and be heard on the merits of its case.

ARGUMENT

I. Under The Due Process Clause Of The Utah Constitution The Default Judgment Against Mervyn's Should Be Set Aside And Mervyn's Request For A New Hearing Should Be Granted.

Article I, section 7 of the Utah Constitution provides that “[n]o person shall be deprived of life, liberty or property, without due process of law.”¹ Utah Const. art. I, § 7. “At a minimum, ‘[t]imely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness.’” *In re Worthen*, 926 P.2d 853, 876 (Utah 1996) (quoting *Nelson v. Jacobsen*, 669 P.2d 1207, 1211 (Utah 1983)). The Utah Supreme Court has recognized that “every person who brings a claim in a court or at a hearing held before an administrative agency has a due process right to receive a fair trial in front of a fair tribunal.” *Id.* (quoting *Bunnell v. Industrial Comm’n*, 740 P.2d 1331, 1333 (Utah 1987)).

The Utah Supreme Court has recognized that “[d]ue process is flexible and calls for the procedural protections that the given situation demands.” *In re Worthen*, 926 P.2d at 876 (Utah 1996) (internal quotations omitted) (quoting *Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 911 (Utah 1993)); *see also V-1 Oil Co. v. Department of Environmental Quality*, 939 P.2d 1192 (Utah 1997) (“The requirements of due process depend upon the specific context in which they are applied because unlike some legal

¹ The Utah Supreme Court has recognized that Utah’s constitutional guarantee of due process is substantially the same as the due process guarantees contained in the Fifth and Fourteenth amendments to the United States Constitution. *See Untermeyer v. State Tax Commission*, 129 P.2d 881, 885 (1942).

rules due process is not a technical conception with a fixed content unrelated to time, place, and circumstances.” (internal quotation and citation omitted).

Judge La Jeunesse and the Utah Labor Commission Appeals Board failed to provide the procedure protections that this situation demanded, and to provide Mervyn’s fair notice and the right to be heard on the merits of the claims asserted against it. Instead, based solely on case law that a letter properly addressed and mailed is prima facie evidence that it was received, Judge La Jeunesse and the Utah Labor Commission Appeals Board ignored the actual evidence overcoming that prima facie presumption, and denied Mervyn’s request to set aside the Default Order and provide a new hearing. (R. 96-97) (citing *Brown v. The Fraternal Accident Assoc. of America*, 55 P. 63 (Utah 1898) and *Cooney v. McKinney*, 71 P. 485 (Utah 1903)).

First of all, properly addressed and mailed letters only create a rebuttable presumption that they were received. *See Brown*, 55 P. at 65. Mervyn’s has more than adequately rebutted this presumption with affidavit testimony by the office personnel who would have received any communications from the Adjunctive Division. (R. 138) Mervyn’s has substantiated this position by sworn affidavit testimony of Bonnie Lachina, the administrative assistant who retrieved the mail for Ed Smith, Ms. Côté’s replacement, and Julie Radcliffe, the administrative assistant who retrieved mail for Ms. Bonner, who

took over supervision of the App matter. Ms. Lachina and Ms. Radcliffe testified that they never saw the Notice of Conference or Notice of Formal Hearing.² (R. 176-77)

Another error of Judge La Jeunesse and the Utah Labor Commission Appeals Board is their application of evidentiary concepts to what is at heart a procedural issue involving due process. *Brown* and *Cooney* do not support the harsh remedy of a default judgment. *Brown* and *Cooney* each address evidentiary rules concerning the importance of receiving or not receiving a particular letter or correspondence. *See Brown*, 55 P. at 64-65 (issue is whether or not a letter can be used to show compliance with the terms of an insurance policy); *Cooney*, 71 P. 486 (defendant objected to the introduction of a letter into evidence because it was “incompetent, irrelevant, and immaterial,” but did not deny that he had received it from the plaintiffs).

The issue here is qualitatively and legally very different. Of concern is not whether the letter bearing upon the merits of the case was ever received. Here, the issue is whether Mervyn’s was ever properly notified that Ms. App had challenged the Order and Determination that Mervyn’s was innocent of any wrongdoing. A determination of whether Mervyn’s had notice of Ms. App’s challenge should instead be more akin to a

² As noted by Ms. App herself, “certified mail would have probably cleared up this whole thing” (R. 148) There simply is no conclusive proof that Mervyn’s received notice of the hearing to deny Mervyn’s its due process rights. Furthermore, a simple phone call to Mervyn’s at any time before the formal evidentiary hearing would have resolved this situation. While Mervyn’s does not contend that the Utah Labor Commission is required to attempt to track down defendants, in this case, where Mervyn’s did not attend the pre-hearing conference and failed for the first time to make an appearance or respond to a correspondence, a simple phone call could have avoided this entire appeal and was

determination under Rule 4 of the Utah Rules of Procedure to inquire whether or not a defendant was served with process. *See Locke v. Peterson*, 285 P.2d 1111, 1111-13 (Utah 1955) (Proof of service is required to safeguard against default judgments.). Thus, all safeguards to ensure notice under Rule 4 of the Utah Rules of Civil Procedure were neither met nor sought for here. This is and was a deprivation of due process.

Contrary to the implication of Judge La Jeunesse and the Utah Labor Commission Appeals Board's ruling, at least *Brown* stands for the proposition that all opportunities to present evidence should be exhausted, rather than for the proposition that simply placing something in the mail irrevocably satisfies notice and due process requirements. In fact, in *Brown* the court allowed evidence of the letter to be presented to the jury, among other reasons, because without evidence that the letter was received by the insurance company, plaintiffs would have been in forfeit and the Utah Supreme Court recognized that "forfeitures are not favorable under the law." 55 P. at 64. Thus, neither of these cases override Mervyn's due process right of notice and opportunity to present evidence and argument on a claim brought against it. *State v. Rawlings*, 893 P.2d 1063 (Utah Ct. App. 1995) (quoting *Plumb v. State*, 809 P.2d 734, 743 (Utah 1990) ("All parties are entitled to notice that a particular issue is being considered by a court and to an opportunity to present evidence and argument on that issue before decision"))).

Because the requirements of due process have not been met in this case, this court should set aside Judge La Jeunesse's Default Order and grant Mervyn's request for a new

certainly justified under the circumstances.

hearing on the merits.

II. Under Rule 60(b) Of The Utah Rules Of Civil Procedure The Default Judgment Against Mervyn's Should Be Set Aside And Mervyn's Request For A New Hearing Should Be Granted.

As recognized by Judge La Jeunesse, Rule 60(b) of the Utah Rules of Civil Procedure allows relief for a party from a default judgment, order or decree if certain grounds are established. (R. 96) Some of those grounds are that the judgment was obtained by reason of “mistake, inadvertence, surprise or excusable neglect,” or “any other reason justifying relief from the operation of the judgment.” Utah R. Civ. P. 60(b)(1) & (6). In addition, to prevail under Rule 60(b), a party must show that it has a meritorious defense in the case. *See, e.g., State v. Musselman*, 667 P.2d 1053, 1055-56 (Utah 1983). Mervyn's satisfied each of these elements.

This court should vacate the Default Order entered against Mervyn's, and Mervyn's should be granted a hearing because its failure to attend the formal evidentiary hearing is based on “mistake, inadvertence, surprise or excusable neglect.” Furthermore, Mervyn's has more than a meritorious defense to Ms. App's underlying discrimination allegations. In providing relief under Rule 60(b), Utah courts have consistently held that default judgments are extreme sanctions that should be meted out with caution and that the courts, in the interest of justice and fair play, should strive to permit a full and complete opportunity for a hearing on the merits of every case. *See Wright v. Wright*, 941 P.2d 646, 649 (Utah 1997). The tribunals below ignored or rejected this tenet.

A. Mervyns' Failure to Attend the Formal Evidentiary Hearing was Based on Mistake, Inadvertence, Surprise or Excusable Neglect.

Utah Rule of Civil Procedure 60(b) provides 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 . . . or (6) any other reason justifying relief from the operation of justice.” Utah R. Civ. P. 60(b). The Utah Supreme Court has noted that “[t]he court should be generally indulgent toward setting a judgment aside where there is reasonable justification or excuse.” *Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986) (emphasis added). Mervyn’s can provide more than a reasonable excuse for its failure to attend the formal evidentiary hearing that resulted in Judge La Jeunesse’s Default Order. It never knew of it.

As detailed in the facts section above, Ms. App originally filed a Charge of Discrimination in this case on September 3, 1998. (R. 1) Ms. Coté, a Senior Team Relations Representative for Mervyn’s, filed Mervyn’s original answer. (R. 2-3) Ms. Coté never made a formal appearance as Mervyn’s appointed representative, although from this point on all correspondences were directed to Ms. Coté. During the year of 1999, there was no communication between UALD and Mervyn’s. (R. 137) In October, 1999, Ms. Coté left Mervyn’s employment. (R. 137, 152) Over one year later, on December 5, 2000, Joan Carter, an investigator from the UALD called Mervyn’s. (R. 137, 141) Ed Smith, Ms. Coté’s replacement, forwarded Ms. Carter’s voice mail to Ms.

Bonner, who had taken over management of the App matter. (R. 137, 141) Ms. Bonner proceeded to return Ms. Carter's call and engaged in a series of conversations with Ms. Carter from December 5 to December 7, 2000. (R. 94, 137-38, 153-60) While Ms. Bonner did not enter a formal appearance, for all intents and purposes it was made clear to the UALD that she was now handling the App matter. Indeed, she was the UALD's only contact at Mervyn's.

Subsequent to Ms. Bonner's conversations with Ms. Cater, Mervyn's had no further contact from the UALD or the Adjudicative Division until notice of the Default Order was finally mailed, simply, to "Mervyn's," rather than to an employee who had left years before. (R. 95) People change jobs, and mail is sometimes misdirected. The circumstances provide a very reasonable explanation for Mervyn's failure to receive notice of the hearings, and are a far cry from cases in which courts have found that a party's failure to be diligent means the particular default judgment is justified. *See, e.g., Utah Dep't of Trans. v. Osguthorpe*, 892 P.2d 4 (1995) (refusing to set aside default judgment because defendant failed to respond to discovery requests and resulting motion to compel for more than eighteen months); *Russell v. Martell*, 681 P.2d 1193, 1194 (Utah 1984) (refusing to set aside default judgment because defendant stated "that he felt no legal obligation to [plaintiff] and did not feel motivated by the lawsuit to address [plaintiff's] claims"). These knowing defaults contrast greatly to Mervyn's unknowing failure to attend a hearing.

Default is a harsh remedy and courts should be liberal in granting relief against default judgments so that cases may be tried on the merits. *See Erickson v. Schenkers Int'l Forwarders, Inc.*, 882 P.2d 1147, 1149 (Utah 1994). Indeed, “the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them.” *Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc.*, 544 P.2d 876, 879 (Utah 1975). The Utah Supreme Court has held that “courts generally tend to favor granting relief from default judgments where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party.” *Westinghouse*, 544 P.2d at 879 (emphasis added). Mervyn’s has presented more than a reasonable excuse, and Ms. App cannot legitimately claim that she will be prejudiced by this Appeals Boards’ granting a rehearing to address this case on the merits. The result of granting Mervyn’s the relief it seeks here will be Ms. App getting her day in court, along with Mervyn’s.

B. Mervyn’s has a Meritorious Defense that it Should be Allowed to Present.

The Utah Supreme Court has recognized that “[i]n order for defendant to be relieved from the default judgment, he must not only show that the judgment was entered against him through excusable neglect (or any other reason specified in Rule 60(b)), but he must also show . . . that he has a meritorious defense to the action.” *Musselman*, 667 P.2d at 1055-56. “A defense is sufficiently meritorious to have a default judgment set aside if it is entitled to be tried.” *Erickson*, 882 P.2d at 1149. Thus, “[o]ne who seeks to

vacate a default judgment must proffer some defense of at least sufficient ostensible merit as would justify a trial of the issue thus raised.” *Id.* (citation omitted). Mervyn’s easily satisfies, and satisfied, this standard.

In July 1998, Ms. App was informed that she was being transferred from the Guest Services Department to the Kids’ Department in order to meet a business need and have one less employee receiving benefits in the Guest Services Department, and more employees receiving benefits on the sales floor. (R. 3) At that time, Ms. App informed Mervyn’s of her alleged disability and presented a doctor’s note which advised her against “prolonged walking” and another that noted her vision problems. (R. 3) To accommodate Ms. App’s alleged disabilities, Mervyn’s gave Ms. App the option of working in the Jewelry Department. (R. 4) Ms. App declined this accommodation. (R. 4) In her Charge of Discrimination, filed on September 3, 1998, Ms. App claimed discrimination based on disability. (R. 1)

After over two years of investigation, on December 18, 2000, UALD issued an Order and Determination that dismissed Ms. App’s request for agency action, finding that there was “**NO REASONABLE CAUSE** to believe it was more likely than not that the Charging Party was subjected to discriminatory practices alleged.” (R. 13) The Order and Determination specifically rejected Ms. App’s claim that her reduced vision was an actionable disability because “[Ms. App] acknowledge[d] that at the time of this action, she was able to see with glasses [Ms. App’s] use of mitigating measures (glasses)

rendered her vision impairment non-substantially limiting when compared to a person in the general population.” (R. 14)

While the Order and Determination recognized that “there were no mitigating measures used by [Ms. App] with regards to the neuropathy . . . [Mervyn’s] did offer [Ms. App] reasonable accommodations of working in the fine jewelry department which is a small department. Further, [Mervyn’s] offered a stool for [Ms. App.] to sit on as well as a magnify [sic] glass in case she needed it. [Ms. App] acknowledged that she refused the reasonable accommodation” (R. 14) The UALD held that Ms. App’s “transfer to the Kid’s Department was not a demotion because there was no loss in pay, hours or status. Further, there is no causal link between [Ms. App’s] transfer and [Ms. App] being an individual with a disability.” (R. 14)

Mervyn’s has a meritorious defense to Ms. App’s charge of discrimination. Judge La Jeunesse did not entertain or consider Mervyn’s meritorious defense when he entered a default judgment against Mervyn’s. (R. 43) (finding that “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”). This was contrary to law. “The courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merits of every case.” *Heathman v. Fabian & Clendenin*, 14 Utah 2d 60, 62, 377 P.2d 189, 190 (1962) (footnote omitted); *see also Carman v. Slavens*, 546 P.2d 601, 603 (Utah 1976). It is well established that default judgments are not favored, and

that courts “should be generally indulgent toward permitting full inquiry and knowledge of disputes so that they can be settled advisedly and in conformity with law and justice.” *E.J. Mayhew v. Standard Gilsonite Co.*, 376 P.2d 951, 951 (Utah 1962). All Mervyn’s is seeking is simple justice — to have the opportunity to present its defense to Ms. App’s claims and to receive a decision that is based upon the merits of this case.

CONCLUSION

For the reasons expressed herein, Mervyn’s requests that this court set aside the default judgment entered against Mervyn’s and remand for a new evidentiary hearing on all factual issues arising in this matter.

DATED this 27th day of January, 2003.

Snell & Wilmer L.L.P.

A handwritten signature in black ink, appearing to read "Mark O. Morris", is written over a horizontal line.

Mark O. Morris
James D. Gardner
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California

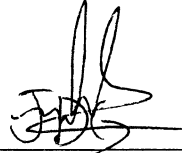
CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed two true and accurate copies of the foregoing, postage prepaid, on the 27th day of January, 2003:

Marion App
5437 West 4505 South
Salt Lake City, Utah 84120

Joseph Gallegos
Director UALD
160 East 300 South Third Floor
Salt Lake City, Utah 84111

Utah Labor Commission
P.O. Box 146615,
160 East 300 South, 3rd Floor,
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read 'J.D. Gardner', is positioned above a horizontal line.

James D. Gardner