

1992

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

Utah Court of Appeals

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BRIEF

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DOCKET NO. 920206CA

UTAH COURT OF APPEALS

MAVERIK COUNTRY STORES, INC., :

Petitioner/Appellant, :

vs. :

Priority No. 7

INDUSTRIAL COMMISSION OF UTAH, :

Appellee. :

Docket Number: 920206-CA

VICKY ANN MCCORD, :

Complainant/Appellee. :

Case Number: UADD 89-0031

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UTAH COURT OF APPEALS

MAVERIK COUNTRY STORES, INC., :

Petitioner/Appellant, :

vs. :

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INDUSTRIAL COMMISSION OF UTAH, :

Appellee. :

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STATEMENT OF APPELLATE JURISDICTION

The Complainant/Appellee, Vicky Ann McCord ("McCord"), pursuant to Rule 24(b) of the Utah Rules of Appellate Procedure, submits the following brief. McCord concurs that if this Court finds that Appellant Maverik Country Stores, Inc.'s ("Maverik") requests for review were timely filed, jurisdiction exists under the statutes cited by Maverik for this appeal (Docket No. 920206-CA) only. Note, however, that this acknowledgement does not in any way waive McCord's argument that the appeal docketed as No. 910413-CA should be dismissed because, at the time of the initial Petition for Review of the Administrative Order, the Administrative Law Judge's ("ALJ") June 26, 1991 Order was not final and Maverik had not exhausted its administrative remedies.

STANDARD OF REVIEW

It is important to focus on the applicable standard of review because Maverik, in its four initial issues presented for review, has apparently tried to frame some of its arguments as alleged legal questions as opposed to factual questions. The court will note that Maverik, while only listing four arguments in its issues section, strays far from the original issues presented for review and focuses on factual questions as well.

Because these proceedings were commenced after January 1, 1988, the Utah Administrative Procedures Act ("UAPA"), Utah Code Ann. § 63-46b-16 (1989) governs. This Court has repeatedly set forth the standards of review under UAPA. "[F]indings of fact

will be affirmed if they are supported by substantial evidence when viewed in the light of the whole record before the court.’” Stewart v. Board of Review, 831 P.2d 134, 137 (Utah Ct. App. 1992) (quoting Merriam v. Board of Review, 812 P.2d 447, 450 (Utah Ct. App. 1991)). This Court has defined "substantial evidence" as that which a reasonable person "might accept as adequate to support a conclusion." Merriam, 812 P.2d at 450. Questions concerning the applications of facts to the statutes in circumstances where the agency is given discretion because of legislative intent or because of the Agency’s expertise will not be overturned unless it is unreasonable; and only interpretation of statutes for pure questions of law in situations where the Agency has not been given discretion are reviewed using the correction-of-error standard. Morton Int’l, Inc. v. Auditing Div. of Utah State Tax Comm’n, 814 P.2d 581, 588-89 (Utah 1991); Tasters Ltd. v. Department of Employment Sec., 819 P.2d 361, 364-65 (Utah Ct. App. 1991); Wurst v. Department of Employment Sec., 818 P.2d 1036, 1038 (Utah Ct. App. 1991).

STATEMENT OF ISSUES FOR REVIEW

Maverik has stated four issues for review which largely relate to jurisdiction of the Commission, exhaustion of remedies, and the finality of the Commission’s orders. Those issues are as follows:

1. Was the June 26, 1991 order of the ALJ a final order allowing Maverik to appeal to this Court without requesting review of the ALJ’s order by the full commission

even though the issue of attorneys' fees has been reserved for further briefing and resolution by the ALJ?

2. Assuming arguendo that this Court did not have jurisdiction and that the Commission retained jurisdiction, was the "filing" of a request for review complete upon mailing?

3. Even assuming once again that the Commission had jurisdiction, and assuming that the mailing of the request was insufficient, but that the Commission abused its discretion in failing to grant an extension to Maverik to file its request for review, was the error harmless?

4. Were the subsequent orders of the Commission final within the meaning of Utah Code Ann. § 63-46b-14 (1989)?

STATEMENT OF THE CASE

While Maverik contends that the Industrial Commission has made a convoluted mess of these proceedings, the facts of this case are relatively easy to understand. As outlined in the June 26th Order of the ALJ and supported by the facts, Maverik's Statement of Relevant Facts substantially followed the Order's facts; however, Maverik once again tries to improperly slant the facts in its favor. Therefore, in the interest of judicial economy, McCord concurs with the facts as laid out in the Industrial Commission of Utah's ("Commission") brief and notes only a brief summary of the facts, in addition to those facts stated by Maverik that McCord finds incorrect.

The basic facts are that McCord was terminated within hours of her request to leave work to have her heart examined. Maverik's manager perceived McCord as having a serious heart condition and fired her on that basis. This action was clearly illegal discrimination by Maverik against a person perceived to have a serious handicap.

In the "Course of Proceedings and Disposition at Agency Level" section in Maverik's Brief, pp. 2-5, McCord disputes the following assertions and implications:

1. "1990-1991 - For some unexplained reason, the proceedings languish and are not actively prosecuted." McCord disagrees with this self-serving conclusion.

2. "February 12, 1991 - 'No cause determination' is written on an official file document, after the Division loses contact with McCord for a considerable while." McCord denies any implication that there was ever a "no cause" finding. There is no evidence in the record that the handwritten words "no cause" came from the Commission or any evidence on when it was written on the document. There is evidence that the official determination that Maverik discriminated against McCord.

SUMMARY OF THE ARGUMENT

First, Maverik does not marshal the evidence to challenge any factual errors it asserts nor does it cite to the record for many of its allegations and assertions as required by Rule 24(9) of the Utah Rules of Appellate Procedure. Therefore, these factually-based disputes and allegations should be dismissed.

Second, Maverik's initial Petition for Review from this Court (Docket No. 910413-CA) did not transfer jurisdiction from the Commission to this Court because it requested review of an order that was not final and Maverik had not exhausted its administrative remedies.

Third, Maverik did not timely file its requests for review of the ALJ's orders to the Commission, and even if those requests were found timely, the Commission addressed those review issues and thus any error was harmless.

Fourth, the ALJ's orders were sufficiently clear as to set forth the relief and damages ordered.

Fifth, Maverik's due process rights were not violated and it is not entitled to a trial de novo.

ARGUMENT

While Maverik lays out four issues in the "Issues Presented for Review" section of its brief (Maverik's Brief, p. 1), in fact Maverik argues nine issues in the brief. McCord concurs with the arguments in the Commission's brief concerning the procedural arguments raised by Maverik and will not waste the Court's time by detailing those arguments. Instead, McCord will only make brief mention of some of those issues and concentrate on the substantive merits of Maverik's arguments and its dispute of factual allegations. McCord also notes that Maverik makes arguments of law and fact by referring to the initial Petition to this Court. While all these arguments can be confusing, McCord attempts to cut through this

confusion and demonstrates that this Petition, standing alone or with the other Petition, should be dismissed.

I. MAVERIK FAILS TO MARSHAL THE EVIDENCE TO ADEQUATELY DISPUTE THE COMMISSION'S AND ALJ'S DETERMINATIONS.

As noted above, this Court will not disturb the findings of the Commission unless Maverik can demonstrate that they are not supported by substantial evidence. Stewart v. Board of Review, 831 P.2d 134, 137 (Utah Ct. App. 1992); Merriam v. Board of Review, 812 P.2d 447, 450 (Utah Ct. App. 1991). Maverik's briefs in both petitions are woefully inadequate in challenging the findings of the Commission. Maverik confuses the issues when it protests the procedure of the Commission and asserts constitutional violations. Maverik obviously disagrees with the Commission's findings and conclusions, but fails to adequately challenge them. Maverik requests a trial de novo upon vague assertions of error in law and fact.

Maverik alludes to evidence in the record upon which the ALJ relied in making her findings and thus acknowledges there is evidence to support of the findings it contests. However, Maverik's briefs do not marshal the evidence to display either any support for the findings or any flaw in the evidence upon which the ALJ relied. In reality, all Maverik does is show there was a dispute in the evidence (as is almost always the case) or that Maverik had no contrary evidence and that the ALJ chose McCord's evidence upon which to rely. Maverik does not satisfy its burden. Accordingly, because of this failure to marshal the

evidence and demonstrate that the findings are unsupported by substantial evidence, this Court should accept as conclusive the ALJ's findings. Stewart, 831 P.2d at 137-38; Merriam, 812 P.2d at 450.

In addition, Maverik has failed to reference this Court to documentary citations to support its allegations on pages 12 - 15 of its brief and thus fails to meet the requirements of Rule 24(9) of the Utah Rules of Appellate Procedure which requires "citations to the authorities, statutes, and parts of the record relied on." Maverik's bold assertions should be dismissed.

II. JURISDICTION TO ACT BECAUSE MAVERIK'S INITIAL PETITION FOR REVIEW WAS INEFFECTIVE TO CONFER JURISDICTION TO THIS COURT.

Maverik argues that merely because it filed an appeal, the Commission was without jurisdiction to continue to make determinations in this case. This argument ignores the fact that an appeal filed without regard to the finality of the order appealed from, exhaustion of administrative remedies and other review and appellate rules does not automatically confer jurisdiction upon the Court of Appeals or strip the Commission of its jurisdiction.

The ALJ's June 26, 1991 Order was not final within the requirements of UAPA, Utah Code Ann. § 63-46b-14(1) (1989), nor had Maverik exhausted its administrative remedies in accordance with Utah Code Ann. § 63-46b-14(2) (1989).

McCord concurs with the Commission's argument in Sections I and II of its brief, Commission Brief, pp. 28-35, that it was clear that the June 26, 1991 Order was not final

and that Maverik should be required to exhaust the administrative remedies before filing an appeal and that the Commission had the power to enter its orders and deny review. In the interest of judicial economy, McCord will not repeat those arguments here and refers the Court to the Commission's brief.

III. MAVERIK DID NOT COMPLY WITH THE RULES IN FILING ITS REQUESTS FOR REVIEW AND EVEN THOUGH THE COMMISSION DENIED REVIEW, ITS ORDER INCLUDED A REVIEW OF THE DISPUTED ISSUES, THUS ANY ALLEGED ERROR WAS HARMLESS.

Maverik argues that not only did the Commission rule against it, but that the Commission ignored its subsequent requests for review and it alleged bases for a good cause extension. This is simply not true.

As noted in the Commission's Brief at pp. 37 - 42, Maverik did not timely file its request for review of the June 26, 1991 Order. Maverik first requested review of the June 26, 1991 Order on October 11, 1991, well outside the 30-day requirement of Utah Code Ann. §63-46b-12 (1989). Appendix A, Request for Review; R. 310-319.

Further, the Commission did not abuse its discretion in refusing to grant an extension. Maverik failed to set out its argument regarding good cause for delay when it submitted either its request for review (Appendix A) or request for reconsideration (Appendix B) even though the Commission had informed Maverik in its February 28, 1992 Order Denying Review of requirement to show good cause for an untimely motion (Appendix C). Maverik waited until submitting its Limited Request for Reconsideration to make out grounds for good

cause (Appendix D). The Commission is correct in its determination that Maverik waived good cause grounds for its belated request.

Although there was some question as to the finality of the June 26, 1991 order and the Commission determined initially that Maverik's filing was untimely, the Commission clearly considered and responded to all of Maverik's contentions in its orders denying review and reconsideration nonetheless. (Appendix C; Appendix E). Therefore, the alleged error was harmless.

IV. THE ORDERS OF THE ALJ ARE FINAL AND MORE THAN ADEQUATELY SET FORTH THE RELIEF AND THE DAMAGES.

The ALJ's Orders of June 26, 1991 regarding damages (Exhibit F) and the Supplemental Order of September 10, 1991 regarding attorneys' fees (Exhibit G) were clear and set forth an award of damages and attorneys' fees that can clearly be determined. Maverik argues that because the Order of June 26, 1991 does not set forth a specific number in terms of damages, that Order lacks specificity and the damages cannot be determined. This argument is patently false.

The Order sets forth the following damages (in addition to injunctive relief not at issue here):

1. Pay McCord back pay at a rate of \$3.35 per hour for 24 hours per week, or \$80.40 per week from the date of termination through the date of the Order (June 26, 1991). Appendix F, pp. 8-9. Further, that McCord was to be credited with two subsequent

increases in the federal minimum wage, the first, effective April 1, 1990 to \$3.80 per hour, and the second effective April 1, 1991 to \$4.25 per hour. R. 138.

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

3. The ALJ awarded McCord attorneys' fees of \$19,731.00 and costs of \$1,536.26. Appendix G; R. 323.

These Orders set forth a specific formula upon which to determine an award of damages, costs and attorneys' fees. That Maverik would assert that damages could not be determined because the ALJ did not add up those figures is meritless and harmless.

The disingenuousness of Maverik's argument becomes apparent when it is noted that Maverik's dispute of McCord's attorneys' fees includes assertions regarding the computation of damages awarded to McCord. See Appendix E, p. 1; R. 254.

For the foregoing reasons, Maverik's Petition for review of the Orders should be dismissed.

V. MAVERIK IS NOT ENTITLED TO A TRIAL DE NOVO BECAUSE OF ITS VAGUE CONSTITUTIONALITY CLAIMS.

As described above, the ALJ and the Commission has completely addressed Maverik's claims of error and has correctly applied the UAPA and other statutes in denying Maverik's subsequent requests for review. Even when denying review, the Commission has reviewed Maverik's contentions. Therefore, any error now claimed by Maverik is harmless.

In its final argument, Maverik makes a vague and unsubstantiated claim that it has been denied its due process rights and is entitled to a trial de novo. Clearly, this request implies that the factual findings made by the ALJ are in error because of a deficiency in the hearing. But Maverik does not state any particulars. Maverik notes that a trial de novo used to be the procedure and then appears to make the argument that because it is no longer the procedure, it is unconstitutional. It is unclear whether Maverik is arguing that the administrative procedure is unconstitutional on its face or whether the procedure as applied to Maverik has deprived it of its constitutional rights to access to the courts under the Utah Constitution, Art. I, Sec. 11.

Maverik's vague arguments cannot support a claim as to the constitutionality of the Utah's administrative agency procedure. Utah courts have found in a workman's compensation setting that the delegation of power to the Industrial Commission does not violate the open courts provision of the Utah Constitution. Industrial Comm'n v. Evans, 52 Utah 394, 174 P. 825 (1918). More is needed to contest constitutionality.

Neither can those claims support a deprivation of due process argument. Maverik does not give particulars as to how it was prejudiced by the hearing or the process or even how the procedure was unfair. When determining whether due process has been violated and a new trial is warranted, this Court has ruled that "due process demands a new trial when the appearance of unfairness is so plain that [the appellate court is] left with the abiding impression that a reasonable person would find the hearing unfair." Tolman v. Salt Lake

County Attorney, 828 P.2d 23, 28 (Utah Ct. App. 1991) (quoting Bunnell v. Industrial Comm'n, 740 P.2d 1331, 1333 n.1 (Utah 1987)).

Clearly, the ALJ and the Commission did not engage in conduct so unfair that it would not meet the standard. Maverik did not comply with the procedural rules and cannot now claim that its constitutional rights have been violated.

CONCLUSION

Maverik's petition in this Petition, Docket No. 920296-CA, should be dismissed because it is meritless and because Maverik failed to marshal the evidence in support of its claims of error. Further, Maverik's petition for review in Docket No. 910413-CA should be dismissed due to lack of finality of the order from which it seeks review and Maverik's failure to exhaust administrative remedies.

DATED this 24th day of February, 1993.

JONES, WALDO, HOLBROOK &
McDONOUGH

By Lisa A Jones
James W. Stewart
Lisa A. Jones
Attorneys for Complainant Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 1993, I caused to be hand delivered and lodged a draft of this BRIEF OF APPELLEE McCORD with the Utah Court of Appeals.

Lisa A Jones

I hereby certify that on the 24th day of February, 1993, I caused to be mailed, postage prepaid, the required number of the foregoing BRIEF OF APPELLEE McCORD, to the following:

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APPENDIX A

October 11, 1991, Request for Review

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UADD # 89-0031

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      )
VICKY ANN MCCORD      )
      )
      Charging Party  ) REQUEST FOR REVIEW
      )
vs.                   )
      )
MAVERIK COUNTRY STORE )
      )
      Respondent      )
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Respondent Maverik Country Stores, Inc. hereby requests a review by the full Commission of the "SUPPLIMENTAL ORDER" and the earlier findings, conclusions and order, issued on September 10, 1991 and June 26, 1991 respectively.

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

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

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

review, are as follows:

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

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

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

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

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

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

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Authorities respecting issues on review.

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

§ 34-4-2(9), Utah Code

§ 34-35-1, et seq., Utah Code.

§ 34-35-6(a)(i), Utah Code.

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

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


Respectively Submitted this 10th day of October, 1991.



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

Certificate of Mailing

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



Mitchell R. Barker

APPENDIX B

March 19, 1992, Request for Reconsideration

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INDUSTRIAL COMMISSION
ANTI-DISCRIMINATION DIVISION

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IN THE INDUSTRIAL COMMISSION OF UTAH

VICKY ANN MCCORD,

Applicant,

vs.

MAVERIK COUNTRY STORE (sic),

Defendant.

REQUEST FOR RECONSIDERATION

UADD Case No. 89-0031

TO THE INDUSTRIAL COMMISSION OF UTAH:

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

The grounds for relief from the order are as follows:

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

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

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

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

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

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

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

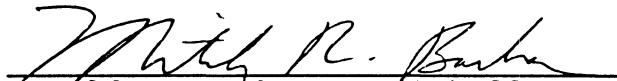
can it be calculated based on the any order the Commission has entered to date.

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

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

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

Respectfully submitted this 19th day of March, 1992.



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

CERTIFICATE OF SERVICE

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

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

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

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



Mitchell R. Barker

APPENDIX C

February 28, 1992, Order Denying Review

THE INDUSTRIAL COMMISSION OF UTAH

UADD CASE NO. 89-0031

VICKY ANN MCCORD,

Applicant,

vs.

MAVERIK COUNTRY STORE,

Defendants.

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ORDER DENYING
REVIEW

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

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

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

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

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

VICKY MCCORD
ORDER
PAGE TWO

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

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

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

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

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

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

VICKY MCCORD
ORDER
PAGE THREE

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

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

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

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

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

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

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

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

VICKY MCCORD
ORDER
PAGE FOUR

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

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

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

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

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

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

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

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

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

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

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

VICKY MCCORD
ORDER
PAGE FIVE

ISSUE ONE

WHETHER MAVERIK COUNTRY STORES TIMELY FILED ITS MOTIONS FOR REVIEW?

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

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

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

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

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

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

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

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

VICKY MCCORD
ORDER
PAGE SIX

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

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

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

ISSUE TWO

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

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

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

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

VICKI MCCORD
ORDER
PAGE SEVEN

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

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

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

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

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

ISSUE THREE

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

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

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

VICKI MCCORD
ORDER
PAGE EIGHT

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

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

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

ISSUE FOUR

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

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

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

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

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

VICKI MCCORD
ORDER
PAGE NINE

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

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

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

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

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

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

ISSUE FIVE

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

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

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

VICKI MCCORD
ORDER
PAGE TEN

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

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

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

ISSUE SIX

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

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

No medical expert was required.

VICKI MCCORD
ORDER
PAGE ELEVEN

ISSUE SEVEN

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

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

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

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

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

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

CONCLUSION

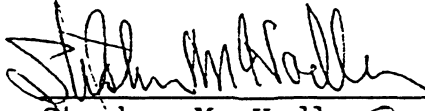
For all the previous reasons, we find that the Findings of Fact, Conclusions of Law, and Order of the Administrative Law Judge were correct in law and fact in view of substantial evidence in the whole record.

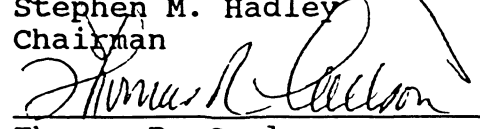
ORDER:

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

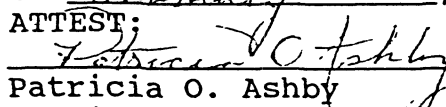
VICKI MCCORD
ORDER
PAGE TWELVE

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

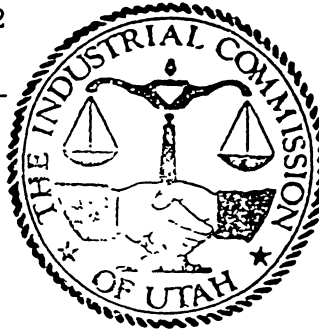


Stephen M. Hadley
Chairman


Thomas R. Carlson
Commissioner

Certified this 28th day
of February, 1992
ATTEST:


Patricia O. Ashby
Commission Secretary



CERTIFICATE OF MAILING

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

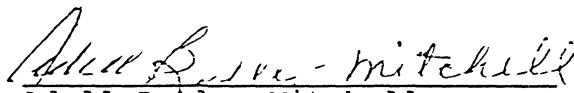
Vicky McCord
c/o Attorney James E. Stewart
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101

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

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

Lisa-Michele Church
Administrative Law Judge.

INDUSTRIAL COMMISSION OF UTAH


Adell Butler-Mitchell

APPENDIX D

April 3, 1992, Limited Request for Reconsideration

RECEIVED

APR 6 1992

INDUSTRIAL COMMISSION
OF UTAH

Ronald C. Barker, #0208
Mitchell R. Barker, #4530
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2870 South State Street
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THE INDUSTRIAL COMMISSION OF UTAH
SALT LAKE CITY, UTAH 84114-6600

VICKY ANN MCCORD,

Applicant,

vs.

MAVERIK COUNTY STORES,

Respondent,

LIMITED REQUEST
FOR RECONSIDERATION

Case Number: UADD 89-0031

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

The grounds for relief from the Order are:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

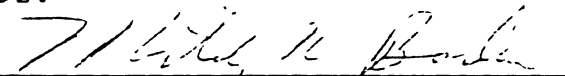
h. On the due date for the Petition, it was not ready and hand delivered to the Industrial Commission before 5:00 because virtually the entire day was spent researching and arguing before Judge Mower of the Sixth Circuit Court in Kane County, on the issue of Cartisano's successful Motion to Change Venue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

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

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

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

DATED this 3rd day of April, 1992.



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

CERTIFICATE OF SERVICE

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

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

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



Mitchell R. Barker

APPENDIX E

March 30, 1992, Order Denying Request for Reconsideration

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

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

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

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

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

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

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

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

(Emphasis added).

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

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

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

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

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

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

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

VICKY ANN MCCORD
ORDER UPON RECONSIDERATION
PAGE THREE


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

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

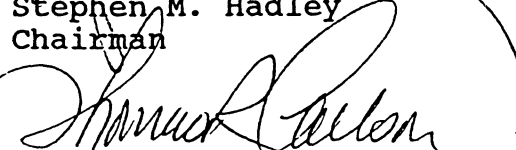
ORDER:

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

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



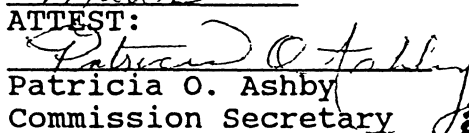
Stephen M. Hadley
Chairman



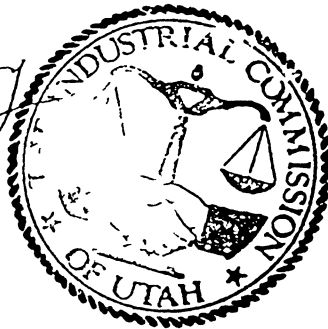
Thomas R. Carlson
Commissioner

Certified this 30th day of
March 1992.

ATTEST:



Patricia O. Ashby
Commission Secretary




CERTIFICATE OF SERVICE

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

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

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

Utah Court of Appeals
Case No. 910413-CA



BENJAMIN A. SIMS

APPENDIX F

June 26, 1991, Findings of Fact, Conclusions of Law and Order

INDUSTRIAL COMMISSION OF UTAH

UADD Case No. 89-0031

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

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

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

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

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

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

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

VICKY MC CORD
ORDER
PAGE TWO

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

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

FINDINGS OF FACT:

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

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

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

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

VICKY MC CORD
ORDER
PAGE THREE

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

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

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

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

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

VICKY MC CORD
ORDER
PAGE FOUR

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

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

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

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

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

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

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

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

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

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

VICKY MC CORD
ORDER
PAGE FIVE

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

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

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

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

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

CONCLUSIONS OF LAW:

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

VICKY MC CORD
ORDER
PAGE SIX

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

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

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

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

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

VICKY MC CORD
ORDER
PAGE SEVEN

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

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

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

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

VICKY MC CORD
ORDER
PAGE EIGHT

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

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

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

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

VICKY MC CORD
ORDER
PAGE NINE

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

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

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

ORDER:

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

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

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

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

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

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

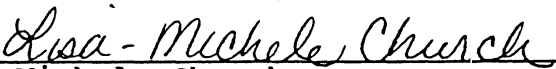
VICKY MC CORD
ORDER
PAGE TEN

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

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

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

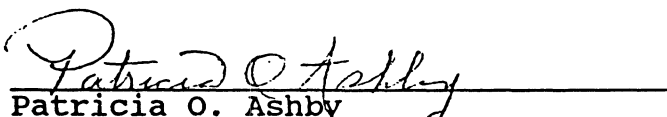
INDUSTRIAL COMMISSION OF UTAH



Lisa-Michele Church
Administrative Law Judge

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

ATTEST:



Patricia O. Ashby
Commission Secretary

APPENDIX G

September 10, 1991, Supplemental Order

INDUSTRIAL COMMISSION OF UTAH

Case No. UADD 89-0031

VICKY ANN MCCORD,

Charging Party,

vs.

MAVERIK COUNTRY STORE,

Respondent.

SUPPLEMENTAL
ORDER

* * * * *

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

FINDINGS OF FACT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW:

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

ORDER:

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

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

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

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

INDUSTRIAL COMMISSION OF UTAH

Lisa-Michele Church
Lisa-Michele Church
Administrative Law Judge

Certified on this 10th day of September, 1991.

ATTEST:

Patricia O. Ashby
Patricia O. Ashby
Commission Secretary

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of September, 1991, the attached Supplemental Order in the case of Vicky McCord was mailed, postage pre-paid to the following persons at the following addresses:

Vicki McCord
c/o Attorney James W. Stewart

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

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

INDUSTRIAL COMMISSION OF UTAH


June Kelstrom, Paralegal
Adjudication Division

/jsk

APPENDIX H

Utah Administrative Procedure Act Provision

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 1968

63-46b-12. Agency review — Procedure.

- (1) (a) If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule

(b) The request shall

- (i) be signed by the party seeking review,
- (ii) state the grounds for review and the relief requested,
- (iii) state the date upon which it was mailed and

(iv) be sent by mail to the presiding officer and to each party

- (2) Within 15 days of the mailing date of the request for review, or within the time period provided by agency rule whichever is longer any party may file a response with the person designated by statute or rule to receive the response. One copy of the response shall be sent by mail to each of the parties and to the presiding officer

(3) If a statute or the agency's rules require review of an order by the agency or a superior agency, the agency or superior agency shall review the order within a reasonable time or within the time required by statute or the agency's rules

(4) To assist in review, the agency or superior agency may by order or rule permit the parties to file briefs or other papers, or to conduct oral argument

(5) Notice of hearings on review shall be mailed to all parties

- (6) (a) Within a reasonable time after the filing of any response, other filings, or oral argument, or within the time required by statute or applicable rules, the agency or superior agency shall issue a written order on review

(b) The order on review shall be signed by the agency head or by a person designated by the agency for that purpose and shall be mailed to each party

(c) The order on review shall contain

- (i) a designation of the statute or rule permitting or requiring review,
- (ii) a statement of the issues reviewed,
- (iii) findings of fact as to each of the issues reviewed,
- (iv) conclusions of law as to each of the issues reviewed,

(v) the reasons for the disposition,

(vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion

of the adjudicative proceeding is to be remanded,

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

(viii) the time limits applicable to any appeal or review 1968

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

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

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

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

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

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request the request for reconsideration shall be considered to be denied 1968

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

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

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

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

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

(i) the administrative remedies are inadequate, or

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

- (3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b 13(3)(b)

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter 1968

63-46b-15. Judicial review — Informal adjudicative proceedings.

- (1) (a) The district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings, except that the juvenile court shall have jurisdiction over all state agency actions relating to removal or placement decisions regarding children in state custody

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 1966

63-46b-12. Agency review — Procedure.

- (1) (a) If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule

(b) The request shall

- (i) be signed by the party seeking review,
- (ii) state the grounds for review and the relief requested,
- (iii) state the date upon which it was mailed, and
- (iv) be sent by mail to the presiding officer and to each party

(2) Within 15 days of the mailing date of the request for review, or within the time period provided by agency rule, whichever is longer, any party may file a response with the person designated by statute or rule to receive the response. One copy of the response shall be sent by mail to each of the parties and to the presiding officer

(3) If a statute or the agency's rules require review of an order by the agency or a superior agency, the agency or superior agency shall review the order within a reasonable time or within the time required by statute or the agency's rules

(4) To assist in review, the agency or superior agency may by order or rule permit the parties to file briefs or other papers, or to conduct oral argument

(5) Notice of hearings on review shall be mailed to all parties

(6) (a) Within a reasonable time after the filing of any response, other filings, or oral argument, or within the time required by statute or applicable rules, the agency or superior agency shall issue a written order on review

(b) The order on review shall be signed by the agency head or by a person designated by the agency for that purpose and shall be mailed to each party

(c) The order on review shall contain

- (i) a designation of the statute or rule permitting or requiring review,
- (ii) a statement of the issues reviewed,
- (iii) findings of fact as to each of the issues reviewed,
- (iv) conclusions of law as to each of the issues reviewed,
- (v) the reasons for the disposition,
- (vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion

of the adjudicative proceeding is to be remanded,

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

(viii) the time limits applicable to any appeal or review. 1966

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

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

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

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

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

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request the request for reconsideration shall be considered to be denied 1966

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

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

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

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

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

(i) the administrative remedies are inadequate, or

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

(3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b)

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter 1966

63-46b-15. Judicial review — Informal adjudicative proceedings.

- (1) (a) The district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings, except that the juvenile court shall have jurisdiction over all state agency actions relating to removal or placement decisions regarding children in state custody

(b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains his principal place of business

(2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include

(i) the name and mailing address of the party seeking judicial review,

(ii) the name and mailing address of the respondent agency,

(iii) the title and date of the final agency action to be reviewed together with a duplicate copy, summary, or brief description of the agency action,

(iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action,

(v) a copy of the written agency order from the informal proceeding,

(vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review

(vii) a request for relief, specifying the type and extent of relief requested,

(viii) a statement of the reasons why the petitioner is entitled to relief

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure

(3) (a) The district court without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings

(b) The Utah Rules of Evidence apply in judicial proceedings under this section 1990

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

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

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

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

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

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

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

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

(ii) according to any other provision of law

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

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

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

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

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

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

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification,

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court,

(h) the agency action is

(i) an abuse of the discretion delegated to the agency by statute

(ii) contrary to a rule of the agency,

(iii) contrary to the agency's prior practice unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency, or

(iv) otherwise arbitrary or capricious 1998

63-46b-17. Judicial review — Type of relief.

(1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute

(b) In granting relief, the court may

(i) order agency action required by law

(ii) order the agency to exercise its discretion as required by law

(iii) set aside or modify agency action,

(iv) enjoin or stay the effective date of agency action, or

(v) remand the matter to the agency for further proceedings

(2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute 1997

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

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

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

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

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

APPENDIX I

Rule 24, Utah Rules of Appellate Procedure

counsel of record or by a party who is not represented by counsel

Rule 22. Computation and enlargement of time.

(a) **Computation of time.** In computing any period of time prescribed by these rules, by an order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes days designated as holidays by the state or federal governments.

(b) **Enlargement of time.** The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time, but the court may not enlarge the time for filing a notice of appeal or a petition for review from an order of an administrative agency, except as specifically authorized by law. A motion for an enlargement of time shall be filed prior to the expiration of the time for which the enlargement is sought. A motion for enlargement of time shall

(1) State with particularity the reasons for granting the motion,

(2) State whether the movant has previously been granted an enlargement of time and, if so, the number and duration of such enlargements,

(3) State when the time will expire for doing the act for which the enlargement of time is sought, and

(4) State the date on which the act for which the enlargement of time is sought will be completed.

(c) **Ex parte motion.** Except as to enlargements of time for filing and service of briefs under Rule 26(a), a party may file one ex parte motion for enlargement of time not to exceed 14 days if no enlargement of time has been previously granted, if the time has not already expired for doing the act for which the enlargement is sought, and if the motion otherwise complies with the requirements and limitations of paragraph (b) of this rule.

(d) **Additional time after service by mail.** Whenever a party is required or permitted to do an act within a prescribed period after service of a paper and the paper is served by mail, 3 days shall be added to the prescribed period.

Rule 23. Motions.

(a) **Content of motion; response; reply.** Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by the following:

(1) A specific and clear statement of the relief sought,

(2) A particular statement of the factual grounds,

(3) If the motion is for other than an enlargement of time, a memorandum of points and authorities in support, and

(4) Affidavits and papers, where appropriate.

Any party may file a response in opposition to a motion within 10 days after service of the motion, however, the court may, for good cause shown, dispense with, shorten or extend the time for responding to any motion.

(b) **Determination of motions for procedural orders.** Notwithstanding the provisions of paragraph (a) of this rule as to motions generally, motions for procedural orders which do not substantially affect the rights of the parties or the ultimate disposition of the appeal, including any motion under Rule 22(b), may be acted upon at any time, without awaiting a response. Pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. The court may review a disposition by the clerk upon motion of a party or upon its own motion.

(c) **Power of a single justice or judge to entertain motions.** In addition to the authority expressly conferred by these rules or by law, a single justice or judge of the court may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single justice or judge may not dismiss or otherwise determine an appeal or other proceeding, and except that the court may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single justice or judge may be reviewed by the court.

(d) **Form of papers; number of copies.**

(1) Except for motions to enlarge time, five copies shall be filed with the original in the Supreme Court, and four copies shall be filed with the original in the Court of Appeals, but the court may require that additional copies be furnished. Only the original of a motion to enlarge time shall be filed.

(2) Motions and other papers shall be typewritten on opaque, unglazed paper 8½ by 11 inches in size. The text shall be in type not smaller than ten characters per inch. Lines of text shall be double spaced and shall be upon one side of the paper only. Consecutive sheets shall be attached at the upper left margin.

(3) A motion or other paper shall contain a caption setting forth the name of the court, the title of the case, the docket number, and a brief descriptive title indicating the purpose of the paper. The attorney shall sign all papers filed with the court with his or her individual name. The attorney shall give his or her business address, telephone number, and Utah State Bar number in the upper left hand corner of the first page of every paper filed with the court except briefs. A party who is not represented by an attorney shall sign any paper filed with the court and state the party's address and telephone number.

Rule 24. Briefs.

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

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

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

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules,

statutes and other authorities cited, with references to the pages of the brief where they are cited

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

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

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

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

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

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

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

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

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

(d) **References in briefs to parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

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

(f) **Reproduction of opinions, statutes, rules,**

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

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

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

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

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

(j) **Citation of supplemental authorities.** When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

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

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

Rule 25. Brief of an amicus curiae or guardian ad litem.

A brief of an amicus curiae or of a guardian ad litem representing a minor who is not a party to the appeal may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae or the guardian ad litem is desirable. Except