

1994

Jennie Federico v. Industrial Commission of Utah : Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO.

940197-CA

JENNIE FEDERICO,

Charging Party and Petitioner,

vs.

INDUSTRIAL COMMISSION OF UTAH,

Respondent.

Case No. 940197-CA

ARGUMENT PRIORITY CLASSIFICATION 7

BRIEF OF PETITIONER

PETITION FOR REVIEW

OF THE FINAL DECISION

OF THE INDUSTRIAL COMMISSION OF UTAH

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Utah Court of Appeals

JUN 30 1994

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LIST OF PARTIES

The above caption of this case before the Utah Court of Appeals contains the names of all parties to the most recent proceeding before the agency whose order is sought to be reviewed.

This said proceeding was initiated by means of a request directed to the Utah Anti-Discrimination Division (UADD) on behalf of petitioner that UADD reopen two matters and continue administrative proceedings based on petitioner's charges against Sears, Roebuck and Company, and its personnel director, Pat Muir.

This request was denied, and Sears has not been held to answer. However, a copy of that request and copies of subsequent pertinent documents have been mailed to Sears' attorney, Roger H. Bullock, 6th Floor Boston Building, 9 Exchange Place, Salt Lake City, Utah 84111.

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JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to Subsection 78-2a-3(2)(a) of the Utah Code, since it involves a review a final order from formal adjudicative proceedings of a state agency other than an agency excepted.

Jurisdiction was invoked by means of a Petition for Writ of Review filed in compliance with Rule 14 of the Rules of Appellate Procedure, namely, the Petition for Writ of Review dated and filed April 4, 1994, seeking review of the respondent's Order Denying Motion for Review dated March 10, 1994, which Order included an affirmance of respondent's Administrative Law Judge's Order of Dismissal dated June 10, 1993, which in turn denied an evidentiary hearing to review the Utah Anti-Discrimination Division's decision dated May 7, 1993 refusing to resume administrative action despite Petitioner's request dated March 4, 1993.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The petitioner asserts that the pertinent issues are as follows:

1. Where a charge of discrimination is timely filed with the Utah Anti-Discrimination Division (UADD), and UADD subsequently discontinues its administrative process at the request of the charging party, and a lawsuit based on the charges is timely brought and then dismissed without prejudice to administrative action, is UADD without jurisdiction to resume the

administrative process on the basis that the request to resume is made more than 180 days after the original discriminatory acts?

2. Where a charge of discrimination is timely filed with UADD, and UADD subsequently discontinues its administrative process at the request of the charging party so that federal remedies can be pursued, and a lawsuit based on the charges is timely brought but federal remedies are not pursued, and the suit is dismissed without prejudice to administrative action, is UADD without jurisdiction to resume the administrative process on the basis that an action under federal law has been commenced?

Both of these issues involve questions of correct statutory interpretation for which there is no need to give deference to the discretion of the agency. King v. Industrial Commission, 850 P.2d 1281 (Utah App. 1993). The statutes give no explicit nor implicit grant of discretion to the respondent to interpret the extent of these limits to its jurisdiction.

DETERMINATIVE LAW

The interpretation of the following subsections of Section 34-35-7.1 of the Utah Code is determinative of the issues in this appeal:

(1)(c) A request for agency action made under this section shall be filed within 180 days after the alleged discriminatory or prohibited employment practice occurred.

(16) The commencement of an action under federal law for relief based upon any act prohibited by this chapter bars the commencement or continuation of any adjudicative proceeding before the Utah Antidiscrimination Division in connection with the same claims under this chapter. ...

The interpretation of Section 78-12-40 of the Utah Code may also govern:

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

STATEMENT OF THE CASE

The Petition for Review in this matter was filed because the Utah Anti-Discrimination Division (UADD) refused to resume consideration of petitioner Federico's claims of harassment and discrimination against Sears, Roebuck and Company.

About a year after Federico originally filed her first charge against Sears, there still having been no determination and order, Federico had UADD discontinue its proceedings so she could pursue the matter in court. She then obtained an attorney who filed an action against Sears in state court. Sears moved to dismiss on the basis that the exclusive forum for pursuing claims under state law was UADD. The judge agreed and dismissed the action without prejudice to further agency action.

At that point, Federico could not pursue any rights under federal law, either. She therefore requested UADD resume consideration of her charges against Sears.

Two reasons have been supplied by respondent for UADD's denial of Federico's request. First, the request to reopen was submitted more than 180 days after the acts of harassment and

discrimination. Second, Federico had invoked federal law by requesting UADD to discontinue its proceedings, and so there never again could be any continuation of agency action.

The facts in more detail are as follows, with citations to the Record from the Agency (R.):

1. Petitioner Federico filed two charges of discrimination against Sears, the first one dated April 9, 1990 and the second dated September 21, 1990, with the UADD and the federal Equal Employment Opportunity Commission (EEOC). R. 1-2.

2. When there had been no resolution by March of 1991, Federico asked if there was a way she could move the case along. It was suggested that she could get a right-to-sue letter, and an attorney could then pursue the matter in court. R. 9.

3. She followed that suggested procedure, obtaining a letter dated March 21, 1991 from UADD stating that no further action would be taken by that agency, and a Notice of Right to Sue dated April 18, 1991 from EEOC. R. 3-7.

4. Federico contacted an attorney who on or about July 16, 1991, filed an employment discrimination complaint in state, rather than federal, district court. There was never any specific reference to federal law in that action. R. 16-20.

5. After several months of discovery, Sears moved to dismiss that action on the basis that the Utah Anti-Discrimination Act did not give jurisdiction to the district court. The case was accordingly dismissed without prejudice to further agency action on October 19, 1992. R. 9, 21-23.

6. A copy of the documents referred to hereafter were generally contemporaneously mailed to the attorney Sears had employed, Roger H. Bullock, 6th Floor Boston Building, 9 Exchange Place, Salt Lake City, Utah 84111. R. 11, 26, 34, 38, 40. That attorney opposed Federico's pursuit of this matter. R. 28.

7. By letter dated March 4, 1993, Federico requested UADD to resume consideration of her charges against Sears. R. 9-23, 8. By letter dated May 7, 1993, UADD declined the request, stating, "The time for filing has passed." R. 24.

8. On May 21, 1993, Federico requested an evidentiary hearing before an Administrative Law Judge (ALJ). R. 25-26. The ALJ, Timothy C. Allen, denied this request on the basis that the respondent Industrial Commission lacked jurisdiction. He reasoned that since Federico had caused UADD to cease consideration of her charges, her request to reopen those claims had to be treated as new claims, and as such were filed after the 180-day limitation period. Furthermore, the ALJ ruled that federal action had been initiated, barring consideration of the claims. R. 29-30.

9. Federico filed a timely Motion for Review, dated July 8, 1993. R. 32-34. This was followed by an Order Denying Motion for Review dated March 10, 1994, affirming the Order of Dismissal on the grounds set forth by the ALJ. R. 35-37.

SUMMARY OF ARGUMENTS

1. The legislature has enacted a law to remedy problems found in the work place. This law should be liberally construed

to effectuate its purpose. There are constraints to avoid duplicate action, but these constraints must not be interpreted to bar any remedy.

2. A request for an agency to resume action regarding a prohibited employment practice need not be made within 180 days of the occurrence of that practice. The 180 day limitation only applies to the request for the agency to initiate action in the first instance. The saving statute and the principles evidenced in that statute and in the rule pertaining to amending pleadings demonstrate that a subsequent request for agency action need not be filed as soon as an initial request.

3. The bar against agency action upon commencement of an action under federal law does not apply merely because an aggrieved party has a right to file such an action. Even the filing of such an action does not prohibit resumption of agency action where no decision under federal law has been nor can be made. Resumption of agency action would not then duplicate court action. Rather, it would provide the only possible remedy for the prohibited employment practices.

ARGUMENT

1. THE ANTIDISCRIMINATION ACT SHOULD BE LIBERALLY CONSTRUED TO ACCOMPLISH ITS REMEDIAL PURPOSES.

It is a remedial statute.

The language of the Antidiscrimination Act, Chapter 35 of Title 34 of the Utah Code, demonstrates a clear intent on the part of the legislature to root out discrimination by employers.

For example, Section 34-35-5 of the Code contains numerous subsections granting various powers to the Utah Antidiscrimination Division (UADD), enabling it to remedy wrongful acts against employees and prevent their recurrence. It is clear that these powers are expansive to fully allow the UADD to accomplish those purposes. The UADD can appoint investigators, publish rules, pass upon complaints, hold hearings and subpoena witnesses, issue publications, recommend policies and legislation, conduct educational programs, and so on.

In Section 34-35-7 of the Utah Code, the Industrial Commission is given the responsibility to act when a person claims to be aggrieved by a discriminatory and prohibited employment practice. But it is not granted the power to redefine a "prohibited employment practice" nor to limit the extent of its own jurisdiction.

In Salt Lake City v. Industrial Commission, 104 Utah 436, 441, 140 P.2d 644 (1943), the Supreme Court stated, "We have held that the Industrial Act must be liberally construed and that by such construction we should attempt to effectuate its beneficent and humane objects."

Likewise the employment act seeking to remedy discrimination problems must be liberally construed to effectuate its purposes.

This in accordance with the general principle found in the statement, "This Court's primary responsibility in construing legislation is to give effect to the intent of the legislature."

American Coal Co. v. Sandstrom, 689 P.2d 1 (Utah 1984).

The Act has three purposes.

The Utah Anti-Discriminatory Act evidences three legislative intentions pertinent to this case.

As mentioned above, the first and major legislative intent is to give employees a remedy for wrongful acts committed against employees, and to prevent the recurrence of such acts. That is shown in the sections cited above.

Secondly, the legislature evidenced an intent to quickly make the offending party aware of the claims against it by requiring the charging party to request agency action within 180 days after the wrongful acts. Subsection 34-35-7.1(1)(c).

Thirdly, the legislature has intended to avoid a duplicate adjudication in the pursuit of a remedy for wrongful acts. This is shown in subsections 34-35-7.1(15) and (16). In subsection (15), agency procedures are made the exclusive remedy under state law. Subsection (16) follows, prohibiting the simultaneous pursuit of federal and state remedies.

However, the first purpose is thwarted, and the second and third purposes are not advanced, if the Act is construed to deny UADD jurisdiction to resume agency consideration of a claim, no matter what, where either (1) the request to resume action is made more than 180 days after the occurrence giving rise to the claim, or (2) agency action has once been discontinued to permit pursuit of federal claims.

2. A REQUEST TO RESUME AGENCY ACTION NEED NOT BE MADE WITHIN THE 180 DAYS APPLICABLE TO AN INITIAL REQUEST.

A request to resume action is not "a request for agency action."

Subsection 34-35-7.1(1)(c) of the Utah Code states:

A request for agency action made under this section shall be filed within 180 days after the alleged discriminatory or prohibited employment practice occurred.

An issue has arisen as to the meaning of "a request for agency action made under this section."

The Industrial Commission has determined that Federico's request of the UADD to resume consideration of her claims is "a request for agency action made under this section." However, a request to resume consideration of claims is not identified in Section 34-35-7.1.

The requests identified in Section 34-35-7.1 include the initial request referred to in subsection (1), a request by an employer for assistance as specified in subsection (2), a request for an evidentiary hearing described in subsections (4) and (5), and a request for review allowed in subsection (11). It is unreasonable to construe "a request for agency action made under this section" to mean any one of these requests, and to thus require that they all be made "within 180 days after the alleged discriminatory or prohibited employment practice occurred."

Furthermore, the language of subsection (7) would indicate that "a request for agency action" refers only to the initial request:

Prior to commencement of an evidentiary

hearing, the party filing the request for agency action may reasonably and fairly amend any allegation, and the respondent may amend its answer. Those amendments may be made during or after a hearing but only with permission of the presiding officer. [Emphasis added.]

Thus, although an amendment may request additional agency action, it would appear to fall outside of the definition of "a request for agency action" that would have to be made "within 180 days after the alleged discriminatory or prohibited employment practice occurred."

This was the result in the case of Simmons v. Mountain Bell, 806 P.2d 6 (Mont. 1990).

In that case, Simmons filed a complaint with the Montana Human Rights Commission (HRC) on January 21, 1981 for Mountain Bell's discrimination against her based on her physical handicap. Mountain Bell terminated her employment on June 10, 1981. So she filed an amended complaint with HRC on January 19, 1982 alleging retaliation.

Mountain Bell argued that this amendment was barred, being filed more than 180 days after the termination. The Montana Supreme Court found that it was not barred, since Rule 15(c) of the Montana Rules of Civil Procedure provides that an amendment relates back to the initial filing.

So the statutory reference to "a request for agency action made under this section" that must be made "within 180 days after the alleged discriminatory or prohibited employment practice occurred" would seem to be restricted to the initial

request for the agency to take action concerning a matter or related matters.

This idea of "a request for agency action" being different from its ordinary meaning, and having aspects of a term of art, is bolstered by its use in the Administrative Procedures Act. Subsection 63-46b-3(1) states that adjudicative proceedings are commenced by (a) an agency itself giving notice of agency action or by "(b) a request for agency action, if proceedings are commenced by persons other than the agency."

It also appears that it is appropriate to refer to rules and statutes governing civil actions in general when deciding questions pertaining to actions before an agency. Subsection 63-46b-7(1) provides for discovery, referring as needed to the Utah Rules of Civil Procedure. Then subsection 63-46b-7(2) grants subpoena and other powers, with such powers evidently governed by statutes applicable in civil cases.

Thus "a request for agency action" would appear to be analogous to a complaint in a civil action.

Action by UADD was stayed.

Federico's request that the agency discontinue its processes should be construed as analogous to a request for a stay before a court.

This would seem particularly true in light of the fact that Federico, like many others in her position before an agency, was not represented by legal counsel. Actions before agencies are generally not governed by evidence and other rules as strict

as those governing court actions where legal counsel are the norm. See subsection 63-46b-8(1)(c). An agency order must give notice of the right and time limits for requesting further review. Subsection 63-46b-10(1)(g). Construing the agency action to have been stayed, rather than dismissed, would comport better with the tenor of agency actions.

As it is, the Industrial Commission has taken the position that though unrepresented, Federico forever and unalterably forfeited all rights she had against Sears under Utah law when she obtained a letter from the UADD discontinuing its administrative process. Federico was not clearly informed beforehand that the Commission would take such a rigid posture.

Furthermore, a stay would have accomplished the purpose of allowing the pursuit of federal remedies.

For example, in the case of National Cash Register v. Riner, 413 A.2d 890 (Del. Super. 1979), the court found that the ADEA did not require that state action be dismissed, but merely stayed. Likewise, under federal and Utah law, there could be a simultaneous staying of the state action and initiation of an action under the Civil Rights Act.

The saving statute preserves jurisdiction.

Even if UADD's discontinuance of administrative proceedings is deemed analogous to a dismissal, that dismissal must be without prejudice. Although Federico obtained no relief from UADD, it was not based on any failure on the merits. As acknowledged by the Commission's Administrative Law Judge in the

Order of Dismissal dated June 10, 1993, "presumably a new request for agency action could be made and could be acted upon, if timely." R. 29.

However, if the discontinuance of agency action is deemed a dismissal, and the request to resume such action deemed a refiling, then that request has indeed been timely made, based on Section 78-12-40 of the Utah Code:

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

This Utah saving statute is not superseded, preempted, or contravened by any other statute dealing with actions before state agencies in general, or dealing with the specific subject and the specific agencies involved in the instant matter.

Section 78-12-5.3 of the Utah Code defines "action" as a "civil action wherein affirmative relief is sought." So it does not apply to a criminal action. But there is no reason to believe that in the nineteenth century, when the legislature enacted substantially this same statute, the legislative intent was to exclude all actions before an agency. Section 2893, Rev. St. 1898.

So it is entirely appropriate that the statute apply in the instant matter, if there has been a deemed dismissal.

The saving statute should be liberally construed.

The saving statute is remedial and should receive a liberal construction.

A statute extending the time for the institution of a new action on failure of the original action for reasons other than on the merits should be liberally construed in furtherance of its purpose. 54
C.J.S. Limitations of Actions, Sec. 240 at 320.

Utah courts historically have followed this principle in giving a liberal construction to the saving statute.

In the case of Standard Fed. Sav. & Loan v. Kirkbride, 821 P.2d 1136 (Utah 1991), Standard Federal filed a timely complaint seeking a deficiency judgment following a sale under a trust deed. Summons were not timely served within 120 days after this filing, and the case was dismissed.

Kirkbride first argued that the following language of section 5-1-32 of the Utah Code barred any refiling if the initial three months had expired:

At any time within three months after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security

The Utah Supreme Court did not interpret that statute to provide such an unalterable deadline for a refiling:

Kirkbride and Soule contend that the language indicates a purpose to bar any action not initiated within three months and then resolved on the merits for the plaintiff. There is nothing in the language of the statute suggesting an intent to reach such a draconian result. Standard, supra, 821 P.2d at 1138.

Likewise, there is nothing in the language of subsection 34-35-7.1(1)(c) of the Utah Code, the statute pertaining to a request for agency action in the instant matter, that would show the intent to reach such a draconian result:

A request for agency action made under this section shall be filed within 180 days after the alleged discriminatory or prohibited employment practice occurred.

Kirkbride also argued that the saving statute should extend general limitations only, not the specific three-month limitation for filing a deficiency action after a trustee's sale on a trust deed. The Utah Supreme Court was unpersuaded.

The relevant inquiry is whether the legislature made plain an intention to bar forever claims of those who are guilty of a procedural misstep. [Citations] As previously noted, we find no such indication here. Id. at 1138.

Likewise, the relevant inquiry in the instant matter is whether the legislature made plain an intention to give one year for refileing to those who are guilty of a procedural misstep in a district court where they would be expected to have counsel, but not one day to those who are guilty of a procedural misstep before an agency where the rules are relaxed and attorneys are less common. To find such an intention would be to construe a remedial statute much too strictly.

Sears has not been prejudiced.

The Supreme Court then examined the purpose for the comparatively short three month period. In exchange for a speedy remedy of foreclosure and sale, the creditor had the obligation to promptly put the debtor on notice it was seeking a deficiency

by commencing an action. The Court found that purpose was accomplished, even though Kirkbride managed to have the first action dismissed.

Likewise, in exchange for a simplified agency procedure, an employee has the obligation to promptly put the employer on notice he or she is alleging a prohibited employment practice by promptly requesting agency action. The employer received that notice in the instant matter.

Not only did Federico give notice of her allegations against Sears by means of the request for agency action, but her actions thereafter fully showed her intent to continue pursuit of this matter. She did nothing to lull Sears into feeling that she would not pursue the matter or to leave Sears in a lengthy period of uncertainty. As shown in the chronology appearing above, Federico's longest period of inaction was less than 6 months, the period after her state action was dismissed without prejudice to agency action, and before the filing of her request that the agency resume action. This was much less than the statutory period of one year.

3. TAKING THE FIRST STEP TO ASSERT FEDERAL RIGHTS DOES NOT FOREVER PRECLUDE ASSERTION OF STATE RIGHTS.

Federico did not commence a federal action.

Subsection 34-35-7.1(16) of the Utah Code states:

(16) The commencement of an action under federal law for relief based upon any act prohibited by this chapter bars the commencement or continuation of any adjudicative proceeding before the Utah Antidiscrimination Division in connection with

the same claims under this chapter. ...

An issue has arisen as to the meaning of "the commencement of an action under federal law."

On page two of its Order Denying Motion for Review, the Industrial Commission stated:

The record is clear that Ms. Federico withdrew her claim of discrimination from the Anti-Discrimination Division and then filed a court action to enforce her claim under federal law. R. 36.

The record is indeed clear that Federico took steps to assert her rights in court. It is not clear that she "filed a court action to enforce her claim under federal law."

There was reference in the Complaint filed in state court to the EEOC, but no other reference to federal law. R. 18. It was dismissed for lack of subject matter jurisdiction. R. 22. This dismissal was based on a motion citing Utah law, not federal law. R. 9. So Federico apparently did not file "a court action to enforce her claim under federal law."

The state court may have lacked federal jurisdiction.

Furthermore, the state court in which Federico filed her complaint may not have had jurisdiction to enforce discrimination claims under the federal law. There has been a split of authority as to whether state courts can exercise jurisdiction over Title VII of the Civil Rights Act.

In Donnelly v. Yellow Freight System, Inc., 874 F.2d 402 (7th Cir. 1989), the Seventh Circuit found that the state courts had concurrent jurisdiction. In so doing, it acknowledged that

the opposite result had been reached by the Ninth Circuit in Valenzuela v. Kraft, Inc., 739 F.2d 434 (9th Cir. 1984), which in turn had relied on dictum from the Supreme Court's decision in Lehman v. Nakshian, 453 U.S. 156, 164 n. 12, 101 S.Ct. 2698, 2703 n. 12, 69 L.Ed.2d 548 (1981). It also acknowledged the opposite result in the case of Bradshaw v. General Motors Corp., 805 F.2d 110, 112 (3rd Cir. 1986), and overruled its decision in Brown v Reliable Sheet Metal Works, Inc., 852 F.2d 932 (7th Cir. 1988) which had assumed that Title VII jurisdiction was exclusively federal.

So when Federico filed an action in state court, there may well have been no "commencement of an action under federal law" even possible in that forum.
Federico lost all federal rights.

Furthermore, by the time the state court action had been dismissed, there was definitely no possibility of a "commencement of an action under federal law."

The Tenth Circuit, which governs the United States District Court for the District of Utah, has ruled that if an action under Title VII is dismissed without prejudice, the filing period is not tolled by that dismissed action, nor is the action saved by a state saving statute. Brown v. Hartshorne Public School Dist. No. 1, 926 F.2d 959, 961 (10th Cir. 1991). There is no federal saving statute, and the existence of a federal statute of limitations renders a state saving statute inapplicable.

Thus in her state action, Federico did not specifically

assert her rights to relief under federal law, and perhaps could not have asserted such rights; and ever since dismissal of that action, she clearly was barred from asserting those rights.

So the record is not "clear that Ms. Federico withdrew her claim of discrimination from the Anti-Discrimination Division and then filed a court action to enforce her claim under federal law." R. 36. And it is not clear that there has been a "commencement of an action under federal law." Subsection 34-35-7.1(16) of the Utah Code.

A preparatory step is not the same as commencing.

Now it is clear that Federico took action that made possible the "commencement of an action under federal law," but making it possible is not the same as doing it.

A "commencement of an action under federal law" must be defined as an overt filing. It cannot be defined as taking a preparatory step. To define commencement as taking a preparatory step would result in discontinuing every "adjudicative proceeding before the Utah Antidiscrimination Division" that has been filed, since every filing includes a filing with the federal EEOC, a necessary predicate to enforcement under federal law. R. 1, 2. 42 U.S.C. Sec. 2000e-5(f)(1).

Continuance of agency action is only temporarily barred.

As a further matter of statutory construction, in reaching its ruling, the Industrial Commission has necessarily construed subsection 34-35-7.1(16) of the Utah Code to include the words "forever and unalterably":

(16) The commencement of an action under federal law for relief based upon any act prohibited by this chapter [forever and unalterably] bars the commencement or continuation of any adjudicative proceeding before the Utah Antidiscrimination Division in connection with the same claims under this chapter. ... [Bracketed words added.]

There appears to be no legislative intent that would be furthered by thus augmenting the effect of this exception to the availability of a remedy under the act.

It seems more compatible with the purpose of the act to construe this exception to bar any adjudicative proceeding before the UADD from the time an action under federal law is commenced, and continuing thereafter unless and until a decision on the merits has not and cannot be rendered under federal law.

In the case of Corrente v. St. Joseph's Hosp. and Health Center, 730 F. Supp. 493 (N.D.N.Y. 1990), the court examined the relationship between state and federal discrimination actions and the purposes behind the interrelating procedures. Specifically, the court examined the purposes behind the ADEA provision that a federal action would supersede (construed to mean "stay," Id. at 497) any state action.

The result reached in the Corrente opinion was that it was most likely that the purpose was to conserve judicial resources, while giving some primacy to the federal action. Id. at 499.

That would also be the most logical purpose of the bar in subsection 34-35-7.1(16) against beginning or continuing action before UADD once an action under federal law has been

commenced.

Only a decision on the merits is a complete bar.

It is illogical to attribute to the legislature a desire to withhold from a wronged employee any possibility of any relief merely because he or she has attempted to enforce perceived federal rights. This is contrary to the intent of the legislature to ensure the availability of a remedy.

As indicated above, if the UADD proceeds to adjudicate this matter, there will be no duplication, and there will be no lack of deference to any decision on the merits. There will only be, finally, a forum in which the validity of Federico's charges can be determined.

CONCLUSION

In conclusion, this Court should decide that UADD has jurisdiction to consider on the merits Federico's two charges of discrimination against Sears, the first one dated April 9, 1990 and the second dated September 21, 1990, filed with UADD under its numbers 90-0262 and 91-0008, respectively.

This decision would be based upon a liberal construction of remedial statutes to further their purposes.


Federico's request for UADD to continue its administrative proceedings would either not be construed as an initial request for agency action required to be filed within 180 days after the offending occurrences, or it would be deemed saved by the saving statute.

Also, her actions in originally discontinuing agency

action would either not be deemed the commencement of an action under federal law, or the bar against continuation of state action would not be deemed to extend past the point in time when a decision on the merits has not and cannot be rendered under federal law.


Thus there is no impediment for this Court to decide that UADD can proceed to consider Federico's two charges of discrimination against Sears.

DATED this 30th day of June, 1994.


LYNN P. HEWARD
Attorney for Charging Party
and Petitioner

MAILING CERTIFICATE

I hereby certify that two copies each of the foregoing Brief was mailed to Alan L. Hennebold, General Counsel, Industrial Commission of Utah, P.O. Box 146600, Salt Lake City, UT 84114 and Roger H. Bullock, 6th Floor Boston Building, 9 Exchange Place, Salt Lake City, UT 84111 on this 30th day of June, 1994, with postage attached thereon.



ADDENDUM



Michael O. Leavitt
Governor

State of Utah
INDUSTRIAL COMMISSION OF UTAH

Stephen M. Hadley
Chairman
Thomas R. Carlson
Commissioner
Colleen S. Colton
Commissioner

Anna R. Jensen, Director
Anti-Discrimination Division

160 East 300 South, 3rd Floor
PO Box 146640
Salt Lake City, Utah 84114-6640
(801) 530-6801
(801) 530-7609 (FAX)
(801) 530-7685 (TDD)

May 7, 1993

Lynn P. Heward, Attorney
923 East 5350 South, #E
Salt Lake City, Utah 84117

Re: Jennie Federico v. Sears, Roebuck & Company
UADD Nos. 90-0262 and 91-0008

Dear Mr. Heward:

Regretfully I must decline your request to refile an action in the above case. The time for filing has passed, and our documents show that Ms. Federico clearly requested that we discontinue our administrative processes. We do not issue right to sue letters for state court, and our letter cannot be construed to be one. Only the EEOC (a federal agency) issues right to sue letters for federal court. Apparently your client's previous attorney did not review the law in this area.

Sincerely,

A handwritten signature in cursive script, appearing to read "Anna R. Jensen".
Anna R. Jensen
Director

ARJ/ms

THE INDUSTRIAL COMMISSION OF UTAH
SALT LAKE CITY UT 84114-6615

JENNIE FEDERICO,

Charging Party,

vs.

SEARS,

Respondent.

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ORDER OF
DISMISSAL

UADD Nos. 90-0262 &
91-0008

The request for an evidentiary hearing in the above entitled matter to review de novo the denial by the Utah Anti-Discrimination Division dated May 7, 1993 having been duly considered, and it having been determined that the charging party has failed to overcome the jurisdictional problems with this case, the request must be dismissed for the following reasons:

By letter dated March 4, 1993, the charging party requested that the Anti-Discrimination Division reopen her files in the above captioned matters and continue its investigation. This request was denied by letter dated May 7, 1993. On May 21, 1993 the charging party requested an evidentiary hearing or review. I will treat the UADD Director's letter of May 7, 1992 as a denial of the charging party's request for agency action pursuant to U.C.A. § 63-46b-3(3)(d)(ii). The charging party's letter of May 21, 1993 will be treated as a request for an evidentiary hearing under U.C.A. § 63-46b-3(3)(d)(ii).

The charging party filed a charge of discrimination with the Utah Anti-Discrimination Division on April 9, 1990. She later requested on March 11, 1991 that her charge be withdrawn. Her request to withdraw her charge was approved by the Director on March 21, 1991. Examination of the record indicates that the charging party intended to request a right to sue letter from EEOC and pursue the matter in federal court. Instead of filing an action in federal court, however, the charging party filed an action in state district court. This action was dismissed by the state district court on October 19, 1992, for lack of subject matter jurisdiction. Although the district court dismissed the matter without prejudice, the Industrial Commission cannot now reassume jurisdiction because it too lacks jurisdiction.

Under the statute in effect at the time of the charging party's withdrawal of her charge and at the time of the withdrawal's approval and the issuance of the "Notice of Right to Sue", presumably a new request for agency action could be made and could be acted upon, if timely (the 180 day state filing provision has been in effect since legislative change in 1985). However, the charging party's letters of March 4, 1993, and May 21, 1993, are both well beyond the 180 day mandate of the statute. Further, if

JENNIE FEDERICO
ORDER
PAGE TWO

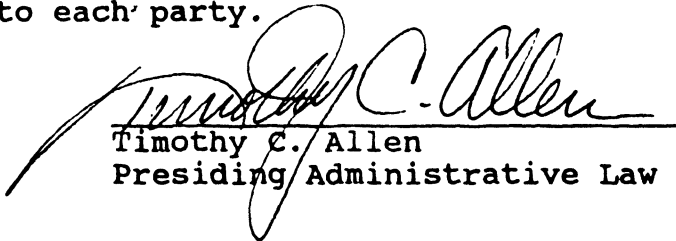
the current statutory version as found in Section 34-35-7.1(16) is considered, as may be procedurally appropriate, the requests made by the charging party's letters of March 4, 1993, and May 21, 1993, could not be accepted because the Industrial Commission's Anti-Discrimination Division is prohibited from "commencement or continuation of any adjudicative proceeding" once any action under federal law is initiated.

It is clear that the charging party's renewed request for agency action is well beyond the 180 day period for filing a charge of discrimination under U.C.A. § 34-35-7.1(1)(c). Therefore, we have no other option but to deny her request as untimely filed.

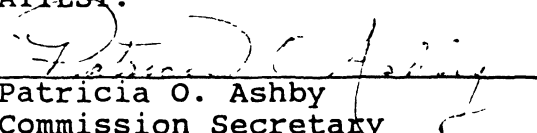
ORDER:

IT IS THEREFORE ORDERED that the charging party's request for an evidentiary hearing to reopen her charges of discrimination before the Industrial Commission is HEREBY DENIED WITH PREJUDICE.

IT IS FURTHER ORDERED that any Motion for Review or specific written objection hereto must be filed with the Commission within thirty (30) days from the date of this Order, or it shall be the final Order of the Commission, not subject to further review or appeal. A Motion for Review must be signed by the party seeking review; state the grounds for review and the relief requested; state the date upon which it was mailed; be filed with the undersigned, and be sent to each party.


Timothy C. Allen
Presiding Administrative Law Judge

Certified this 10th day of June 1993.
ATTEST:


Patricia O. Ashby
Commission Secretary



THE INDUSTRIAL COMMISSION OF UTAH

CASE NO. 90-0262 & 91-0008

JENNIE FEDERICO,

Applicant,

vs.

SEARS, ROEBUCK & COMPANY,

Defendants.

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ORDER DENYING

MOTION FOR REVIEW

Jennie Federico seeks review of an Administrative Law Judge's Order which dismissed, on jurisdictional grounds, her claims that Sears unlawfully discriminated against her.

The Industrial Commission of Utah exercises jurisdiction over this matter pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34-35-7.1(11) and Utah Administrative Code R560-1-4.5.

FINDINGS OF FACT

The pertinent facts are not disputed:

1. During 1990, Ms. Federico filed discrimination charge against Sears with UADD and the federal Equal Employment Opportunity Commission ("EEOC").

2. In March 1991, Ms. Federico advised UADD and EEOC that she intended to file a discrimination action against Sears in federal court. She asked both agencies to stop their administrative actions and requested a "Right To Sue" letter from EEOC.

3. UADD acknowledged receipt of Ms. Federico's request and asked her to confirm her request. On March 12, 1991, she provided such confirmation, stating:

I request the withdrawal of my charge because I have exhausted the administrative remedies and intend to file in federal court.

4. On March 21, 1991, the UADD Director sent a letter to Ms. Federico acknowledging her request and officially closing the file for UADD and forwarding it to EEOC. On April 18, 1991, EEOC issued a Right To Sue letter. EEOC then closed Ms. Federico's discrimination claims.

Order Denying Motion For Review
Page Two

5. Ms. Federico then filed an employment discrimination complaint against Sears in state, rather than federal, district court. On October 19, 1992, the state court dismissed the complaint for lack of subject matter jurisdiction.

6. On March 4, 1993, Ms. Federico asked UADD to reopen her prior claims against Sears. By letter dated May 7, 1993, UADD declined to reopen the claims on the grounds "(t)he time for filing has passed."

7. Ms. Federico then requested an evidentiary hearing before an Administrative Law Judge on the issue of her right to reopen her claims. The ALJ dismissed Ms. Federico's request, reasoning that because Ms. Federico had withdrawn her original charges of discrimination, her request to reopen such claims must be treated as new claims that were outside the 180 day limitation for filing such claims.

8. The ALJ also concluded that under Utah Code Ann. §34-35-7.1(16), "the Industrial Commission's Anti-Discrimination Division is prohibited from 'commencement or continuation of any adjudicative proceeding' once any action under federal law is initiated."

9. Ms. Federico then filed a timely Motion For Review with the Industrial Commission.

DISCUSSION AND CONCLUSIONS OF LAW

As noted in the ALJ's decision, Utah Code Ann. §34-35-7.1(16) prevents the Anti-Discrimination Division from pursuing any further action in this matter once any action under federal law is initiated.

The record is clear that Ms. Federico withdrew her claim of discrimination from the Anti-Discrimination Division and then filed a court action to enforce her claim under federal law. Under the plain language of §34-35-7.1(16), the Anti-Discrimination Division is barred from further action on Ms. Federico's claims.

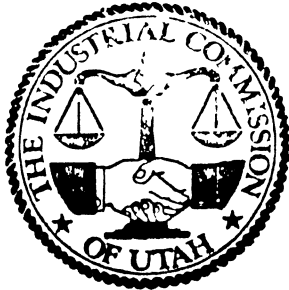
Additionally, for the reasons given in the ALJ's decision, the Commission finds that Ms. Federico's request for agency action is barred by the 180 day filing requirement of Utah Code Ann. §34-35-7.1(1)

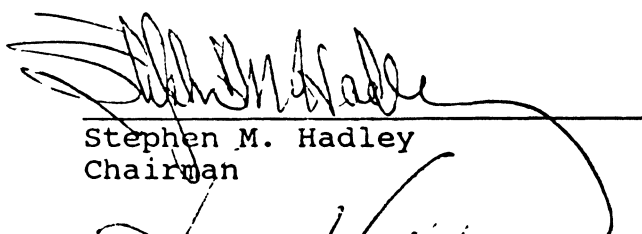
Based on the foregoing, the Commission concludes that the UADD has no jurisdiction to consider Ms. Federico's claims further, and that the ALJ was correct in dismissing her request for an evidentiary hearing.


DECISION


The Industrial Commission of Utah hereby affirms the ALJ's Order of Dismissal in this matter. It is so ordered.

DATED this 16th day of ^{March}~~February~~, 1994.




Stephen M. Hadley
Chairman


Thomas R. Carlson
Commissioner


Colleen S. Colton
Commissioner

NOTIFICATION OF APPEAL RIGHTS

Any party may ask the Commission to reconsider this Order by filing a Request for Reconsideration with the Commission within 20 days of the date of this Order. Alternatively, any party may appeal this Order to the Utah Court of Appeals by filing a Petition For Review with that Court within 30 days of the date of this Order.