

1994

Jennie Federico v. Sears, Roebuck and Company, and Industrial Commission of Utah : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Roger H. Bullock; Strong & Hanni; Alan L. Hennebold; General Counsel for Respondent.

Lynn P. Howard; Attorney for Charging Party and Petitioner.

Recommended Citation

Reply Brief, *Federico v. Industrial Commission of Utah*, No. 940197 (Utah Court of Appeals, 1994).
https://digitalcommons.law.byu.edu/byu_ca1/5884

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

U
D
K
50

IN THE UTAH COURT OF APPEALS

CLERK NO.

940197-CA

JENNIE FEDERICO,

Charging Party and Petitioner,

vs.

SEARS, ROEBUCK AND COMPANY, and
INDUSTRIAL COMMISSION OF UTAH,

Respondents.

Case No. 940197-CA

ARGUMENT PRIORITY CLASSIFICATION 7

REPLY BRIEF OF PETITIONER

PETITION FOR REVIEW

OF THE FINAL DECISION

OF THE INDUSTRIAL COMMISSION OF UTAH

ROGER H. BULLOCK #485
STRONG & HANNI
Attorneys for Respondent
Sears, Roebuck and Company
600 Boston Building
Salt Lake City, Utah 84111
Telephone: 532-7080

LYNN P. HEWARD #1479
Attorney for Charging
Party and Petitioner
923 East 5350 South #E
Salt Lake City, UT 84117
Telephone: 264-8040

ALAN L. HENNEBOLD #4740
General Counsel for Respondent
Industrial Commission of Utah
160 East 300 South, 3rd Floor
P.O. Box 14660
Salt Lake City, Utah 84114
Telephone: 530-6937

FILED
Utah Court of Appeals

SEP 26 1994

Marilyn M. Branch
Clerk of the Court

JENNIE FEDERICO,
Charging Party and Petitioner,
vs.
SEARS, ROEBUCK AND COMPANY, and
INDUSTRIAL COMMISSION OF UTAH,
Respondents.

REPLY BRIEF OF PETITIONER

OF THE FINAL DECISION

ROGER H. BULLOCK #485
STRONG & HANNI
Attorneys for Respondent
Sears, Roebuck and Company
600 Boston Building
Salt Lake City, Utah 84111
Telephone: 532-7080

LYNN P. HEWARD #1479
Attorney for Charging
Party and Petitioner
923 East 5350 South #E
Salt Lake City, UT 84117
Telephone: 264-8040

ALAN L. HENNEBOLD #4740
General Counsel for Respondent
Industrial Commission of Utah
160 East 300 South, 3rd Floor
P.O. Box 14660
Salt Lake City, Utah 84114
Telephone: 530-6937

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
DETERMINATIVE LAW	1
SUMMARY OF ARGUMENTS	1
ARGUMENT	2
1. The arguments showing that the Antidiscrimination Act should be liberally construed to accomplish its remedial purposes, and that taking the first step to assert federal rights does not forever preclude assertion of state rights, have not been addressed.	2
2. Jurisdiction existed and should have been exercised to reopen Federico's case.	3
Federico requested the case be reopened.	3
A request to reopen is permissible.	4
UADD has jurisdiction as a matter of law.	5
The 180-day limit does not apply to a request to reopen.	7
Equitable considerations balance in favor of Federico.	8
3. Jurisdiction existed and should have been exercised based on a refiling.	10
Equitable tolling gave Federico 180 days to refile.	10
The saving statute gave Federico a year to refile.	11
CONCLUSION	13

ADDENDUM

Sears' Attorney Letter dated July 27, 1994,

TABLE OF AUTHORITIES

CASES

<u>Fox v. Eaton Corp.</u> , 615 F.2d 716 (6th Cir. 1980) . . .	11
<u>Johnson v. Railway Express Agency, Inc.</u> , 489 F.2d 525 (6th Cir. 1973)	10-12
<u>King v. Industrial Com'n of Utah</u> , 850 P.2d 1281 (Utah App. 1993)	5
<u>McClendon v. North American Rockwell Corp.</u> , 2 CCH Emp. Prac. Dec., par. 10,243 (C.D. Cal. 1970) . . .	10-12
<u>Mt. Olympus Waters v. Utah State Tax Com'n</u> , 243 Utah Adv. Rep. 10 (Utah App. 1994) . . .	6
<u>Nielsen v. Division of P.O.S.T.</u> , 851 P.2d 1201 (Utah App. 1993)	6
<u>Simmons v. Mountain Bell</u> , 806 P.2d 6 (Mont. 1990) . . .	13
<u>Standard Fed. Sav. & Loan v. Kirkbride</u> , 821 P.2d 1136 (Utah 1991)	8, 12
<u>Valenzuela v. Kraft, Inc.</u> , 801 F.2d 1170 (9th Cir. 1986), <u>modified</u> 815 F.2d 570 (1987) . .	11
<u>Yellow Freight System, Inc. v. Donnelly</u> , 494 U.S. 820, 110 S.Ct. 1566, 108 L.Ed.2d 834 (1990) . . .	9

STATUTES

11 U.S.C. Section 350	4-5
Section 34-35-1 et seq. of the Utah Code . . .	1-2, 5, 7
63-64a-12.1(4)(a)(i) of the Utah Code . . .	6
Section 63-46b-1 et seq. of the Utah Code . . .	4, 7
Section 78-12-40 of the Utah Code	1, 12
Rule 24(c) of the Utah Rules of Appellate Procedure . .	3
Rule R560-1-3F of the Utah Administrative Code . . .	5

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.

SUMMARY OF ARGUMENTS

4. This Reply Brief does not deal with the first and third points contained in petitioner's opening Brief, namely that the Utah Anti-Discrimination Act ("UADA") should be construed liberally and that petitioner Federico should not be barred for taking the initial steps in pursuit of her federal remedies, since they were not addressed in the Joint Brief of Respondents.

5. Jurisdiction existed for Federico's case to have been reopened, there being no 180-day bar to a reopening. The case should have been reopened based on equitable considerations.

6. A refiling was timely since equitable tolling was appropriate, and the saving statute would apply in any event.

ARGUMENT

1. THE ARGUMENTS SHOWING THAT THE ANTIDISCRIMINATION ACT SHOULD BE LIBERALLY CONSTRUED TO ACCOMPLISH ITS REMEDIAL PURPOSES, AND THAT TAKING THE FIRST STEP TO ASSERT FEDERAL RIGHTS DOES NOT FOREVER PRECLUDE ASSERTION OF STATE RIGHTS, HAVE NOT BEEN ADDRESSED.

In opening Brief of Petitioner, the first and third arguments supported the following respective statements:

"1. The Antidiscrimination Act should be liberally construed to accomplish its remedial purposes."

"3. Taking the first step to assert federal rights does not forever preclude assertion of state rights."

The Joint Brief of Respondents does not appear to address either of these points.

As to the matter of a liberal construction, that Brief does state on page 5 that a statute must be given its plain meaning. Federico does not disagree with that principle.

Respondents then make the bald statement on page 6 that there are no unclear or ambiguous terms in Section 34-35-7.1. But that does not address how terms that might be found ambiguous should be construed.

With respect to Federico's continued ability to assert her state rights despite having taken the first step to assert federal rights, this question was not included by respondents in their statement of issues or otherwise addressed in any manner.

Therefore, since Rule 24(c) of the Utah Rules of Appellate Procedure limits reply briefs to answering any new matter set forth in the opposing brief, the arguments set forth in Federico's opening brief will have to suffice on these points.

2. JURISDICTION EXISTED AND SHOULD HAVE BEEN EXERCISED TO REOPEN FEDERICO'S CASE.

Federico requested the case be reopened.

By letter dated March 4, 1993, Federico requested the Utah Anti-Discrimination Division ("UADD") to resume consideration of her charges against Sears. R. 9-23, 8.

Specifically, the request was "that you reopen the referenced matters [UADD Nos. 90-0262 & 91-0008] and continue administrative proceedings based upon the charges filed by Ms. Federico, and dated 4-9-90 and 9-21-90, respectively." R. 9.

Federico's request not only employed the term "reopen," but Sears and UADD have treated this matter as a continuation of the agency action Federico originally initiated.

Although never held to respond to Federico's request to reopen, Sears and UADD have proceeded on the basis that Sears is a respondent, being one of the parties to the most recent proceeding. A letter from Sears' attorney, dated July 27, 1994, a copy of which is included in the addendum hereto, emphasizes

this point.

In addition, all of the Industrial Commission's Order of Dismissal and other documents bear the UADD numbers assigned when Federico initially filed her charges against Sears.

A request to reopen is permissible.

Respondents argued on page 9 of their Brief that if Federico is permitted to resume her claim "UADD will never be able to close a file."

Perhaps the use of this term "close" correlates to the use of that same term in the following sentence in UADD's March 8, 1991 letter to Federico, "We will then move to close your charges with both the Utah Anti-Discrimination Division (UADD) and with the Equal Employment Opportunity Commission (EEOC)."

The term "close" does not appear to have been taken from any applicable statute.

Subsection 63-46b-5(1)(i) of the Utah Code requires a decision within a reasonable time after the "close" of an informal adjudicative proceeding. This would not appear to correlate to the "close" of a file.

However, the "close" of a file would appear to be analogous to the "close" of a case in bankruptcy.

11 U.S.C. Subsection 350(a) provides: "After an estate is fully administered and the court has discharged the trustee, the court shall close the case."

Sears would have this Court believe that for a matter to be closed, there must not be any possible subsequent reopening.

Bankruptcy law has provided for a case to be closed while not imposing such an onerous restriction.

11 U.S.C. Subsection 350(b) explicitly provides for such a reopening: "A case may be reopened in the court in which such case was closed to administer assets, to adjust the rights of the debtor, or for other cause."

Before Federalist requested the UADD to reopen the matters concerning her, she had followed the procedures specified in Subsections 34-35-71(1) through (3). Rule R560-1-3F of the Utah Administrative Code states that these procedures are an informal process.

There would seem to be no reason to withhold from the UADD, especially in an informal proceeding, the flexibility of reopening a case.

This flexibility is not only possessed by the bankruptcy courts in their formal setting, but the courts have also made provision for a similar later resumption of adjudication. Divorce courts form an obvious example. The filing of a complaint is not necessarily sufficient to bring a matter before the divorce court concerning a case, even where there has been a decision following a plenary evidentiary trial and an appeal. UADD has jurisdiction as a matter of law.

As acknowledged by respondents, this case involves only correct statutory interpretation for which there is no need to give deference to the discretion of the agency. King v. Industrial Com'n of Utah, 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.

In the case of Nielsen v. Division of P.O.S.T., 851 P.2d 1201 (Utah App. 1993), the Court found it had been urged to require the agency to adjudicate matters over which the agency had not be statutorily granted jurisdiction. This it declined to do.

The Nielsen Court explained, citing several cases in support, that agencies have no more power than that which is expressly or impliedly granted by statute. Thus an agency cannot adopt rules, and thereby gain power and jurisdiction.

The case of Mt. Olympus Waters v. Utah State Tax Com'n, 243 Utah Adv. Rep. 10 (Utah App. 1994) likewise cites several cases in support of the proposition that an agency's rules must be in harmony with its governing statute.

Subsection 63-64a-12.1(4)(a)(i) of the Utah Code specifically empowers the district court to invalidate a rule made without legal authority.

For UADD to be without jurisdiction to reopen a matter, it must likewise be unable to provide for such a reopening by rule. This Court would be in the position of having to strike down such a rule. However, that is not the case.

It is within the jurisdiction and grant of power, especially considering the remedial nature of the Utah Anti-Discrimination Act ("UADA"), for the UADD to promulgate the

following rule:

"If the Division discontinues its procedure at the request of the charging party, and a lawsuit based on the charges is timely brought, the merits of the charges are not reached, and the lawsuit is dismissed without prejudice to administrative action, UADD may reopen the matter upon request of the charging party made within 180 days after that dismissal."

This rule would be eminently fair and in accordance with the purposes and implications of the UADA. Since such a rule would not give the UADD greater power than provided by statute, UADD now has jurisdiction to reopen the matters concerning Federico. Federico is entitled to have that jurisdiction exercised.

The 180-day limit does not apply to a request to reopen.

Subsection 63-46b-3(1) of the Utah Code states that adjudicative proceedings in an agency 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."

Thus a "request for agency action" is a term of art, referring to how a person other than an agency commences agency proceedings. It is to an agency what a complaint is to a civil court.

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.

Since a "request for agency action" is a term of art, referring only to the commencing of agency proceedings, the limit of 180 days would not apply to any subsequent request. It would not apply to a request for an evidentiary hearing, nor a request for review, nor a request to reopen.

Respondents have phrased their only issue in terms of whether the 180-day limitations period had expired. That limitation period is not even applicable to a request to reopen. Equitable considerations balance in favor of Federico.

There is no statutory limit for the time in which a person may request a bankruptcy case be reopened. However, laches may constitute a bar if the request is delayed too long.

Laches would certainly not be applicable to bar Federico's request to reopen. It was filed well within the 180 days the legislature found to be reasonable for the initial filing. The saving statute allows an action to be filed within one year after a dismissal without prejudice, even if the initial action had to be filed within three months. Standard Fed. Sav. & Loan v. Kirkbride, 821 P.2d 1136 (Utah 1991).

Federico is likewise not barred on the basis of estoppel from having her claims adjudicated. Federico's request that UADD discontinue its administrative process so that she could pursue court remedies is not inconsistent with her later request that UADD resume such consideration since despite a timely filing, no court had or would reach the merits of her charges.

Claiming that Federico's request is inconsistent with

her initial request for withdrawal is like claiming that UADD's denial of jurisdiction is inconsistent with its statement on the Request for Withdrawal form (R. 5-6), "Please note that both agencies are still prepared to proceed with your charge if you so desire." Circumstances subsequently changed.

Federico certainly does not seek equity with unclean hands. She has pursued her claims in good faith and has not sat on her rights.

Federico has certainly done nothing amiss in "forum shopping." As respondents have indicated, she had a choice of federal or state court. This whole matter could have been resolved on the merits in the first and only court chosen by Federico had Sears so desired. Sears apparently knew Federico could amend her complaint to include federal causes of action and the state court could exercise concurrent jurisdiction under Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820, 110 S.Ct. 1566, 108 L.Ed.2d 834 (1990). However, Sears successfully pursued dismissal of the entire state court action on the basis of a lack of jurisdiction over claims based on state law.

Obviously Sears had no duty to explain to Federico that she needed to amend her complaint to add federal claims. It had a right to keep to itself its superior knowledge of procedure and jurisdiction. But it does seem inappropriate for Sears to condemn Federico for moving on to a different forum because she believed there was no defense to Sears' motion to dismiss.

Sears claims reasonable inaction on the basis of

Federico's actions. On page 14 of its brief it states it did not pursue an extensive investigation because it recognized the state court lacked subject matter jurisdiction. Sears does not explain how it recognized that Federico would not amend her complaint in state court to add claims based on federal law.

Thus Sears claims detriment on the basis that it has postponed investigation in light of its belief that the matters could not be reopened before UADD. This must be balanced against the potential harm to Federico. Not only has she also suffered by the delay in investigation, but if UADD actually does not have jurisdiction, then there is no way for the matters between her and Sears to be made right.

3. JURISDICTION EXISTED AND SHOULD HAVE BEEN EXERCISED BASED ON A REFILING.

Equitable tolling gave Federico 180 days to refile.

On pages 8-9 of their brief, respondents argue that under the cases of Johnson v. Railway Express Agency, Inc., 489 F.2d 525 (6th Cir. 1973) and McClendon v. North American Rockwell Corp., 2 CCH Emp. Prac. Dec., par. 10,243 (C.D. Cal. 1970), Federico would have had no more than an additional 90 days to file suit in another forum after the state court dismissal. However, respondents misread these cases.

In each of those cases, there was a limit of 30 days within which the action had to be filed in court. In each case, the action was filed in the wrong court and there was a dismissal without prejudice. And in each case, the decision indicated that

at the most there were only an additional 30 days within which the action had to be refiled in the appropriate court.

In the instant matter, Federico had 180 days to file with UADD. Applying the Johnson and McClendon cases by analogy, Federico had at the most 180 days within which to file with the UADD once her court action had been dismissed without prejudice to further agency action. She did so within that 180 days.

Although there is no federal saving statute, federal courts have allowed equitable tolling of time limits within which filings must be made. Fox v. Eaton Corp., 615 F.2d 716 (6th Cir. 1980) and Valenzuela v. Kraft, Inc., 801 F.2d 1170 (9th Cir. 1986), modified 815 F.2d 570 (1987), are two such cases. In each of these cases, there was equitable tolling of the ninety-day period within which the plaintiffs had to file their Title VII actions in court after receiving their right-to-sue letters. The saving statute gave Federico a year to refile.

There is no federal saving statute, allowing a certain length of time to refile an action after the first has been dismissed without prejudice.

Therefore, the federal courts making the decisions cited in the previous section could only extend the time within which to file an action after a dismissal without prejudice on the basis of equitable tolling.

Furthermore, they could not refer to the amount of time set forth in a saving statute as a benchmark in determining the extent of equitable tolling.

Utah law has no such deficiency.

In the McClendon case, as was mentioned above, the filing took place more than thirty days after the dismissal without prejudice. The court wrestled with the fact that more than thirty days had passed, and there was no federal saving statute.

The only tolling principle conceivably applicable is that filing of a suit within the thirty days, even though dismissed later pursuant to plaintiff's motion, serves to stay indefinitely the operation of the thirty day requirement of Section 706(e). McClendon, supra, 2 CCH Emp. Prac. Dec., par. 10,243 at 973.

The Johnson court faced the same dilemma, where the 30 days had passed and there was no saving statute to impose another subsequent limit.

We are of the opinion that the District Court was clearly correct in holding that at a minimum Johnson had to file the new case within thirty days from the date of dismissal without prejudice.

Any other holding would result in plaintiff's having no time limitation to refile in this type of an action after the action had been dismissed without prejudice. Johnson, supra, 489 F.2d at 529.

On the other hand, Utah has a saving statute, Section 78-12-40 of the Utah Code. Equitable tolling need not be limited to another period identical to the initial period. As indicated above, the saving statute allows an action to be filed within one year after a dismissal without prejudice, even if the initial action had to be filed within three months. Standard Fed. Sav. & Loan v. Kirkbride, 821 P.2d 1136 (Utah 1991).

Furthermore, there is no restriction to equitable tolling in light of the additional time statutorily conferred by means of the saving statute.

The case of Simmons v. Mountain Bell, 806 P.2d 6 (Mont. 1990) referred to in Federico's opening brief is an example of how a rule of law generally applied to courts may also be applied to an agency, especially where such an application leads to greater flexibility and equity.

There is nothing in the saving statute that prohibits its application to agency actions, nor is there any case law to that effect.

CONCLUSION

This court should remand these matters to UADD on the basis that UADD has jurisdiction to adjudicate them.

Respondents have not argued that UADD lacks jurisdiction by reason of any action by Federico to pursue rights under federal law. Nor have they argued against a liberal construction of any ambiguity in the UADA.

The question of UADD's jurisdiction is strictly a question of law, and cannot be expanded by the UADD itself. Yet a rule providing for the reopening of its proceedings under the facts of this case would not be invalidated. This would be analogous to bankruptcy and divorce actions.

Equitable tolling and the saving statute provide ample basis for UADD to honor a second request for agency action under the facts of this case.

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 26th day of September, 1994.

Lynn P. Heward

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 Roger H. Bullock, 600 Boston Building, 9 Exchange Place, Salt Lake City, UT 84111 and Alan L. Hennebold, General Counsel, Industrial Commission of Utah, P.O. Box 146600, Salt Lake City, UT 84114 on this 26th day of September, 1994, with postage attached thereon.

Lynn P. Heward

ADDENDUM

LAW OFFICES

STRONG & HANNI

A PROFESSIONAL CORPORATION

SIXTH FLOOR BOSTON BUILDING

NINE EXCHANGE PLACE

SALT LAKE CITY, UTAH 84111

TELEPHONE (801) 532-7080

TELEFAX (801) 596-1508

July 27, 1994

ESTABLISHED 888

GORDON R. STRONG

(1909-1969)

F. LARSEN CHRISTENSEN¹
OF COUNSEL

GLENN C. HANNI, P.C.
HENRY E. HEATH
PHILIP R. FISHLER
ROGER H. BULLOCK
ROBERTA BURTON
R. SCOTT WILLIAMS
DENNIS M. ASTILL
S. BAIRD MORGAN
STUART H. SCHULTZ
PAUL M. BELNAP
STEPHEN J. TRAYNER

JOSEPH J. JOYCE
BRADLEY W. BOWEN
VICTORIA K. KIDMAN
ROBERT L. JANICKI
ELIZABETH L. WILLEY³
PETER H. CHRISTENSEN²
H. BURT RINGWOOD
DAVID R. NIELSON
ADAM F. TRUPP
CATHERINE M. LARSON

ALSO MEMBER CALIFORNIA BAR
2 ALSO MEMBER OREGON BAR
3 ALSO MEMBER WASHINGTON D.C. BAR

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

RE: Jennie Federico v. Sears, Roebuck & Company, Inc.
Case No. 940197-CA

Dear Lynn:

I note that your brief shows the Industrial Commission of Utah as Respondent but does not show Sears, Roebuck & Company, Inc. as a Respondent. To avoid any confusion about the parties, please in the future list both the Industrial Commission and Sears as Respondents.

Section 63-46b-2 defines "party" and "respondent" to include Sears. Section 63-46b-14 provides that a petition for judicial review shall name the agency and all other appropriate parties as respondents.

Thank you for your attention to this matter.

Yours very truly,

STRONG & HANNI



Roger H. Bullock

RHB:db

cc: Sharon Eblen
Alan L. Hennebold
Industrial Commission of Utah