

1994

Jennie Federico v. Sears, Roebuck and Company, and Industiral commission of Utah : Brief of Respondent

Utah Court of Appeals

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Marilyn M. Branch
Clerk of the Court

JENNIE FEDERICO,)
)
Charging Party)
and Petitioner,)
)
vs.) Case No. 940197-CA
)
SEARS, ROEBUCK AND COMPANY, and)
INDUSTRIAL COMMISSION OF UTAH,)
)
Respondents.)

JOINT BRIEF OF RESPONDENTS

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PARTIES

The caption of this case before the Utah Court of Appeals reflects the names of those parties to the most recent proceeding before the agency whose order is sought to be reviewed. The Industrial Commission of Utah has been added as a party-respondent pursuant to Utah Code Ann. § 63-46b-14(3)(b). Pursuant to Rule 24(i) of the Utah Rules of Appellate Procedure, respondents Sears, Roebuck and Company and Industrial Commission of Utah have consolidated their response for purposes of this appeal and have joined in a single brief.

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION	1
STATEMENT OF ISSUES AND STANDARD OF REVIEW	1
DETERMINATIVE LAW	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENTS	4
ARGUMENT	5
 <u>POINT I</u>	
PETITIONER’S CLAIM IS BARRED FOR FAILURE TO FILE WITHIN 180 DAYS AS REQUIRED BY UTAH CODE ANN. § 34-35-7.1(c)	5
 <u>POINT II</u>	
PETITIONER VOLUNTARILY WITHDREW HER CAUSE OF ACTION FROM THE UADD AND SHOULD BE ESTOPPED FROM REILING HER CLAIM WITH THE UADD	10
 <u>POINT III</u>	
FEDERICO DOES NOT BENEFIT FROM THE SAVING STATUTE, UTAH CODE ANN. §78-12-40	15
CONCLUSION	17

TABLE OF AUTHORITIES

Page

Cases Cited

<u>Baumgart v. Utah Farm Bureau Ins. Co.,</u> 851 P.2d 645 (Ct. App. Utah 1993)	16
<u>Bomer v. Ribicoff,</u> 304 F.2d 427 (6th Cir. 1962)	6
<u>Johnson v. Railway Express Agency, Inc.,</u> 489 F.2d 525 (6th Cir. 1974)	6, 8
<u>King v. Industrial Comm'n,</u> 850 P.2d 1281 (Ct. App. Utah 1993)	1
<u>Kington v. U.S.,</u> 396 F.2d 9 (6th Cir. 1968)	7
<u>Madsen v. Brothick,</u> 769 P.2d 245 (Utah 1988)	16
<u>McClendon v. North American Rockwell Corp.,</u> 2 CCH Emp. Prac. Dec., ¶ 10,243 (C.D. Cal. 1970)	7, 8
<u>Nelson v. Jacobsen,</u> 669 P.2d 1207 (Utah 1983)	12
<u>Orton v. Utah State Tax Comm.,</u> 864 P.2d 904 (Ct. App. Utah 1993)	13
<u>OSI Indus., Inc. v. Utah State Tax Comm.,</u> 860 P.2d 381 (Ct. App. Utah 1993)	5
<u>Retherford v. AT&T Communications,</u> 844 P.2d 949 (Utah 1992)	4
<u>Simmons v. Mountain Bell,</u> 806 P.2d 6 (Mont. 1990)	9
<u>Wurst v. Dept. of Empl. Sec.,</u> 818 P.2d 1036 n.3 (Ct. App. Utah 1991)	12, 13
<u>Yellow Freight System, Inc. v. Donnelly,</u> 494 U.S. 820 (1990)	4

Statutes and Other Authorities Cited

Utah Code Ann. § 34-35-7.1(1)(c)	5
Utah Code Ann. § 34-35-7.1	2, 6
Utah Code Ann. § 63-46b-14(3)(b)	i
Utah Code Ann. § 78-2A-3	1
Utah Code Ann. § 78-12-40	2, 4, 15
Utah Rules of Appellate Procedure, Rule 24(i)	i

JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2A-3. This case involves a review of a final order from a formal adjudicative proceeding before a state agency.

Jurisdiction was invoked by means of a Petition for Writ of Review filed in compliance with Rule 14 of the Rules of Appellate Procedure. The Petition for Writ of Review was dated April 4, 1994, seeking review of the Industrial Commission of Utah's Order Denying Motion for Review dated March 10, 1994. The Administrative Law Judge's Order of Dismissal was dated June 10, 1993.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Respondents agree with the substance of the issues as presented by petitioner. However, respondents disagree with the form and implication of petitioner's recitation of the issues.

Respondents submit the issue in the following form:

Whether the 180-day limitations period for filing an action with the Utah Anti-Discrimination Division (UADD) has expired when a charging party withdraws her charge before the UADD voluntarily and unequivocally, in order to file suit, and two years later requests that the UADD reconsider the same charges?

This issue involves questions of statutory interpretation. No deference is given to the discretion of the Administrative Law Judge or the agency. King v. Industrial Comm'n, 850 P.2d 1281 (Ct. App. Utah 1993).

DETERMINATIVE LAW

The interpretation of the following subsections of Utah Code Ann. § 34-35-7.1 are pertinent to the resolution 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 prohibitive employment practice occurred.

* * *

(11)(a) Either party may file a written request for review of the order issued by the presiding officer in accordance with Section 63-46b-12.

* * *

(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 Anti-Discrimination Division in connection with the same claims under this chapter. Nothing in this subsection is intended to alter, amend, modify, or impair the exclusive remedy provision set forth in Subsection (15).

Utah Code Ann. § 78-12-40 provides:

If any action is commenced within due time and the 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 limit is 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

Respondents agree with the Statement of the Case as presented by Federico, with the following corrections:

1. Federico states that the civil action in state court was dismissed without prejudice to further agency action. (Petitioner's Brief, pp. 3, 4). This implies incorrectly that Judge Rigtrup made some finding that further agency action was available. The Minute Entry stated only that: "The complaint herein shall be dismissed without prejudice to any administrative remedies plaintiff may have." (R. 21). The Order of Dismissal, approved as to form by Federico's attorney, stated only that the dismissal "be and is without prejudice." (R. 22-23).

2. Federico states that upon dismissal of the state law claims, she could not pursue any rights under federal law, either. (Petitioner's Brief, p. 3). This implies incorrectly that the dismissal of the state action somehow worked an unfair hardship on Federico. On the contrary, she arrived at that destination strictly because of her own voluntarily decisions and the decisions of her counsel. Earlier, she could have continued to pursue her claims before the UADD. After demanding and obtaining dismissal of the UADD charge, she could have filed suit in federal court as the UADD invited her to do. Her state court action alleged only violation of state law. She could have alleged Title VII claims in that action, which would have survived a motion to dismiss. Jurisdiction over Title VII claims is vested in both state and

federal courts. Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990). The sole reason that Federico finds herself at this late date without recourse under Utah agency procedure or federal law, is that she has violated every time limitation pertaining to the procedures which otherwise would have provided a forum.

Federico's state court complaint was properly dismissed because it alleged only the claim of wrongful termination in retaliation for filing a charge with the UADD. (R. at 16-20). In Retherford v. AT&T Communications, 844 P.2d 949, 962 (Utah 1992), the Utah Supreme Court held that the UADD is the exclusive forum for a claim of violation of state law by employer retaliation for complaints of employment discrimination.

SUMMARY OF ARGUMENTS

Petitioner Jennie Federico's claim is barred by the 180-day limitations period. Federico voluntarily withdrew her complaint from the UADD. Her request for the UADD to resume reconsideration of her claim some two years later is barred by the limitations period.

Utah's "savings statute" is not applicable. Utah Code Ann. § 78-12-40 does not apply to agency actions. § 78-12-40 applies only to "new" actions "commenced" within one year from a reversal of fortune. Federico's UADD action was dismissed two years prior to her request for the UADD to "resume" her action.

ARGUMENT

POINT I

PETITIONER'S CLAIM IS BARRED FOR FAILURE TO FILE WITHIN 180 DAYS AS REQUIRED BY UTAH CODE ANN. § 34-35-7.1(c)

Utah Code Ann. § 34-35-7.1(1)(c) expressly requires that a claim for agency action be brought within 180 days of the alleged discriminatory event. § 34-35-7.1(1)(c) states:

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

Federico, in her original action filed with the UADD, stated that the date of the most recent alleged discrimination was April 18, 1990. (R. at 2). Her later charge, which gives rise to this appeal, was on March 4, 1993. (R. at 9). Clearly, more than 180 days had passed between the alleged discriminatory act(s) and the attempted second filing of the action in March, 1993. The attempt to file should be barred by the 180-day limitations requirement.

A statute should be interpreted according to its plain meaning. The Court of Appeals set forth the law in OSI Indus., Inc. v. Utah State Tax Comm., 860 P.2d 381 (Ct. App. Utah 1993):

When statutory language is plain and unambiguous, we do not look beyond the same to divine legislative intent. Rather, we construe a statute according to its plain language. **Specifically, we will not interpret unambiguous language in a statute to contradict its plain meaning.** Additionally, in interpreting unambiguous statutes, we assume that each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or

inoperable. Thus, each term should be interpreted and applied according to its usually accepted meaning, where the ordinary meaning of the term results in an application that is neither unreasonable, confused, inoperable, nor in blatant contradiction of the express purpose of the statute.

Id. at 385 (citations omitted) (emphasis added) (quotations omitted).

§ 34-35-7.1 presents no unclear or ambiguous terms. The statutory language that a request for agency action "shall be filed" within 180 days is mandatory language. Federico's argument amounts to a request to alter the clear language of the statute.

Federico cannot support an argument that the limitations period was tolled while she pursued her action in state court. She voluntarily withdrew her complaint from the UADD. (R. at 3-6). A limitations period is not tolled when a case is dismissed or withdrawn. "An action dismissed without prejudice leaves the situation the same as if the suit had never been brought." See Johnson v. Railway Express Agency, Inc., 489 F.2d 525, 528 (6th Cir. 1974); see also Bomer v. Ribicoff, 304 F.2d 427, 428-29 (6th Cir. 1962).

If Federico, who initially filed a timely claim with the UADD, were able to refile her claim outside the 180 day limitations period, then she could presumably bring her claim any time without bar, even years from the alleged conduct. Such reasoning would result in stale claims and claims that are impossible to investigate due to lapse in time. The Johnson court expressly recognized

the danger of permitting a plaintiff to refile a claim without consideration of limitation periods:

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. Such latitude for a plaintiff would create uncertainty, delay in processing his claim, and the possibility of stale claims being pursued.

Id. at 529. See also Kington v. U.S., 396 F.2d 9, 10 (6th Cir. 1968) ("No reason is given why she voluntarily dismissed her action in the District Court of New Mexico. It is conceded that the filing of the prior actions in state and federal courts, which were voluntarily dismissed, did not toll the two-year period of limitations in the Act. An action dismissed without prejudice leaves the situation the same as if the suit had never been brought.")

In McClendon v. North American Rockwell Corp., 2 CCH Emp. Prac. Dec., ¶ 10,243 (C.D. Cal. 1970), a plaintiff received a right to sue letter on January 15, 1968, and filed an action January 19, 1968, which was dismissed without prejudice on September 9, 1969. On October 29, 1969, fifty days later, the plaintiff filed another complaint, identical to the first. The defendant moved for dismissal on the ground that the court lacked subject matter jurisdiction since the complaint was not filed within thirty days following receipt of the right to sue letter.

The McClendon court expressly noted that the effect of a voluntary dismissal without prejudice was to create a situation the same as though the suit had never been brought. The court stated:

Even assuming that the jurisdictional time period should begin to run anew as of the date of voluntary dismissal was entered, such a position would be of no benefit to plaintiff in this case. Dismissal was ordered on September 9, 1969. Suit, however, was brought on October 29, some fifty days later. Thus even if the Section 706(e) time period of thirty days was tolled by the first suit, plaintiff's new suit would still be jurisdictionally defective.

Id. at 974.

The Johnson court acknowledged the McClendon decision. It stated:

Although Bomer and McClendon are authority for the proposition that the filing of a suit which was dismissed without prejudice did not toll the thirty-day filing requirement of Title VII, the District Court was of the view that the complaint should have been refiled within thirty days after such dismissal. But, even extending the time an additional thirty days, the new suit was still jurisdictionally defective because it was not filed within that time.

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.

Johnson, 489 F.2d at 529.

When Federico received her "Letter of Right to Sue" from the EEOC she had 90 days to institute an action. (R. 7, 7A). Under the holding of Johnson and McClendon, even if Federico were granted

an additional 90 days to file suit in another forum after the state court dismissal, she failed to take such action. She chose, five months after the district court dismissal, and two years after her voluntary dismissal of her UADD claim, to request that the UADD reconsider her claim.

Federico cites Simmons v. Mountain Bell, 806 P.2d 6 (Mont. 1990) for authority that her claim is not barred by 180-day limitations period. Simmons did not involve the voluntary dismissal of the plaintiff's charges with the state agency. Simmons involved a charging party, who as a result of charges filed, was allegedly retaliated against. The charging party then sought to amend her original complaint to include charges of retaliation. The charging party sought to amend her charges because of alleged **new** torts committed against her. Federico has not sought to amend any complaint. Federico withdrew her charges with the UADD. She now seeks to have her same old charges renewed. Federico's request is not based on any alleged new claim. Simmons provides no helpful insight to the resolution of this matter.

If Federico is permitted to resume her original action with the UADD, UADD and Sears will both suffer prejudice and hardship. The UADD will never be able to close a file. Under Federico's argument, so long as she filed the initial claim within 180 days of the alleged tort, she could then resume that claim any time in the future. This will result in claims which are stale and impossible for the UADD to administer.

Sears will be forced to defend itself once again in an action before the UADD. Sears has already defended itself once before the UADD, and once in state court. Sears should not be subjected to Federico's forum shopping tactics.

POINT II

PETITIONER VOLUNTARILY WITHDREW HER CAUSE OF ACTION FROM THE UADD AND SHOULD BE ESTOPPED FROM REILING HER CLAIM WITH THE UADD.

Federico herself withdrew her charge and embarked on an alternative procedure. She has no ground to invoke any equitable consideration for her position.

Pursuant to a request from Federico, her administrative action with the UADD was voluntarily withdrawn on March 21, 1991. (See Petitioner's Brief, p.4, ¶¶ 4-5). Federico expressly stated by letter and waiver that she no longer desired that the UADD pursue her action. In an undated letter, Federico stated:

Please be informed that my intentions are to file this action in **Federal District Court**, and therefore, request that EEOC and the UADD cease any further investigative findings and that EEOC issue a Notice of Right to Sue.

(R. at 3) (emphasis added).

In a handwritten letter, dated March 4, 1991, Federico states:

I am requesting a right to sue letter from you. **I no longer wish you to work on my case.**

Could you please send me any and all letters that I have giv[en] to you concerning my case with the Industrial Commission.

I would also like to thank-you for the time and effort.

(R. at 4) (emphasis added).

In a signed waiver, Federico states that she requested "the withdrawal of my charge because I have exhausted the administrative remedies and intend to file in federal court." (R. at 5A). Federico also received a letter from John A. Medina, Director of the UADD, expressly notifying Federico that the UADD would no longer pursue her claim:

This letter is to inform you that your complaint is being closed, effective the date shown above, for the following reason:

You have asked the State of Utah to discontinue its administrative process and are requesting EEOC to provide you a Notice of Right to Sue.

Further, you have indicated that you do not wish to proceed and you have signed withdrawal forms in this matter. No further action will be taken by us on this complaint.

If you have any questions regarding this decision, feel free to contact this office.

(R. at 6) (emphasis added).

Federico could not have made her intentions more clear. Now having received the agency dismissal she unequivocally demanded, she asks the Court of Appeals to hold that she may revive the dismissed claim.

The express words of correspondence between Federico and the UADD clearly placed Federico on notice that she would no longer be able to pursue an action with the UADD. Federico did not contact

the UADD office with any questions. She did not contact the UADD until March 4, 1993, two years later, when she sought the UADD's reconsideration of her action.

Federico argues that she "was not clearly informed beforehand that the Commission would take such a rigid posture." (Petitioner's Brief, p. 12). The language of the letter from the UADD is clear and unequivocal. Federico's own correspondence with the UADD evidences that Federico knew her claim would not again be processed by the UADD.

Federico also argues that the UADD must reconsider her claim because she was "unrepresented" and not informed that her rights with the UADD would be "forever and unalterably forfeited". (See Petitioner's Brief, p. 12). Federico cites no authority to support her argument that alleged lack of counsel and understanding caused her to think that she could refile with the UADD.

Federico's written communication indicating her desire to file in Federal Court shows that she was not lacking understanding. Notwithstanding her apparent knowledge, the law in Utah holds pro se claimants to the same standard as members of the bar.

Generally, a person who represents him-or-herself will be held to the same standard of knowledge and practice as any qualified member of the bar.

Wurst v. Dept. of Empl. Sec., 818 P.2d 1036, 1039 n.3 (Ct. App. Utah 1991); see also Nelson v. Jacobsen, 669 P.2d 1207, 1213 (Utah

1983). The petitioner in Wurst had represented herself in proceedings with the Industrial Commission.

In any event, shortly afterward Federico had counsel who filed the state court action on her behalf.

The correspondence between Federico and the UADD, the express language of the waiver, and Utah case law defeat Federico's claim of lack of understanding and bar her refiling of her claim with the UADD.

Federico's argument to have the UADD reconsider her original claim is barred by estoppel.

The elements necessary to invoke equitable estoppel are:

(1) A statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Orton v. Utah State Tax Comm., 864 P.2d 904, 909 (Ct. App. Utah 1993).

Federico requested that the UADD "no longer work on her case" so that she could pursue an action in "Federal District Court." (R. at 3-4). Federico stated that she had "exhausted the administrative remedies" available to her. (R. at 5(b)). Federico has now altered her position and sought to have the UADD reconsider her

original claim. The UADD did not further pursue investigation of this claim because of its reliance on Federico's withdrawal of her claim. Although Sears conducted some discovery pursuant to Federico's state court complaint, Sears, recognizing the state court's lack of subject matter jurisdiction, did not conduct the extensive investigation and discovery that it would have conducted had the action remained open at the UADD.

The UADD, if forced to reconsider this claim, would suffer injury because it will be forced never to close a file that has been voluntarily closed by any claimant. The UADD would have to keep all charges voluntarily withdrawn in a "quasi-active" status, permitting charging parties the right to re-open their claim at any time in the future. The limitations period would thus be rendered meaningless.

Federico's actions evidence an express intent on her part to have the UADD dismiss her charges against Sears. She has shown no evidence to support her argument that she was lacking in knowledge. She is estopped from refiling her same charges against Sears some two years later.

POINT III

FEDERICO DOES NOT BENEFIT FROM THE SAVING STATUTE, UTAH CODE ANN. §78-12-40.

Federico first filed a claim with the UADD. She then withdrew that claim and filed an action in state district court. She then sought to have the UADD resume her claim after the district court dismissed her claim for lack of subject matter jurisdiction.

Federico argues that if the original UADD discontinuance of her claim as a result of her own request, 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." (Petitioner's Brief, p. 13).

Utah Code Ann. § 78-12-40 states:

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 of fortune.

Federico fails to support her argument that her request to the UADD to reconsider her claim was timely, even if § 78-12-40 applies. The voluntary dismissal of the UADD claims was in March, 1991. The request to have the UADD reconsider the claim was in March, 1993, two years later. Even if the Utah saving statute were applied to UADD claims, the statute would allow a grace period of one year from the first dismissal. Even under the most liberal

interpretation of the saving statute, it would not extend to the March, 1993, request to reconsider.

In any event, the saving statute applies to civil actions, and not to agency claims. The express language of the statute is that a party may "commence a new action" within one year from the "reversal of fortune." Federico did not "commence a new action" with the UADD. Federico sought the UADD to "resume consideration of her charges".

The word "commenced" is defined in Utah Rule of Civil Procedure 3(a), which states, "A civil action is commenced (1) by filing a complaint with the court, or (2) by the service of a summons." Because Muir had filed a complaint with the court, she commenced her action and therefore may take advantage of the saving statute.

Baumgart v. Utah Farm Bureau Ins. Co., 851 P.2d 645, 647 (Ct. App. Utah 1993).

In Utah, suits are commenced by the filing of a complaint or the service of a summons, not by the filing of a notice of claim, which is more properly classified as a precondition to suit than as the means of commencing a suit.

Madsen v. Brothick, 769 P.2d 245, 254 (Utah 1988).

Federico did not attempt to or commence an action with the UADD in March 1993. Requesting investigation by the UADD is not equivalent to filing a "complaint with the court" or serving a summons.

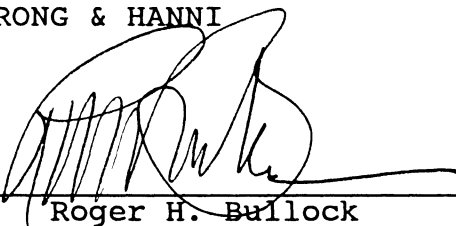
CONCLUSION

The request to reopen the charge in March, 1993, is far beyond the 180-day mandate within which to file charges. Federico's original charges filed with the UADD were dismissed at her own request, and thereafter, she could have taken advantage of the right to pursue her claim of violation of federal law, but did not do so. There are no circumstances in this case which would require this court to relieve Federico of the effect of the limitation for filing charges with the UADD.

Dated this 23 day of August, 1994.

STRONG & HANNI

By



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INDUSTRIAL COMMISSION OF UTAH

By

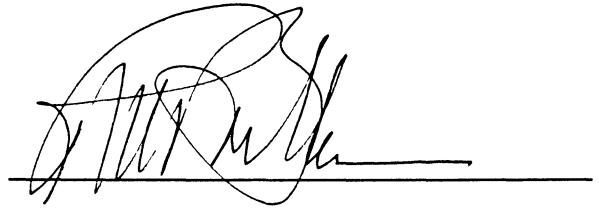


Alan L. Hennebold
General Counsel

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Brief of Respondents was mailed, first-class postage prepaid, this 23 day of August, 1994, to the following:

Lynn P. Heward
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A handwritten signature in black ink, appearing to read "Lynn P. Heward", is written over a horizontal line.

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