
UTAH LABOR COMMISSION

ELIZABETH ANN BERTSCH,

Petitioner,

vs.

OVERSTOCK.COM,

Respondent.

**ORDER REVERSING
ALJ'S DECISION**

ORDER OF REMAND

Case No. 8-04-0838

Overstock.com (“Overstock”) asks the Utah Labor Commission to review Administrative Law Judge Lima's order dismissing Overstock’s appeal of a determination by the Utah Antidiscrimination and Labor Division (“UALD”) that Overstock violated the Utah Antidiscrimination Act by discriminating and retaliating against Elizabeth Ann Bertsch.

The Labor Commission reviews Judge Lima’s order pursuant to § 63G-4-301 of the Utah Administrative Procedures Act and § 34A-5-107(11) of the Utah Antidiscrimination Act.

BACKGROUND AND ISSUE PRESENTED

Ms. Bertsch filed a complaint of employment discrimination with UALD in which she alleged that Overstock had unlawfully discriminated against her on the basis of religion and gender, and had retaliated against her for complaining about this discrimination.

During UALD’s investigation into Ms. Bertsch’s complaint, Overstock was represented by its human resources director, Ms. Osterberg. By October, 2007, UALD had completed its investigation and reached the tentative conclusion that Overstock had discriminated and retaliated against Ms. Bertsch. UALD’s investigator contacted the parties to schedule a conciliation conference to review UALD’s investigative findings and to attempt to resolve the dispute. Ms. Osterberg informed the investigator that Overstock’s legal department “would be handling everything from that point forward.” Ms. Osterberg specifically asked that the investigator contact Mr. Christensen, Overstock’s in-house attorney, to schedule the conciliation conference.

The investigator then spoke with Mr. Christensen by telephone. Mr. Christensen also advised the investigator that he would be Overstock’s primary contact for all future correspondence. Accordingly, the investigator addressed the letter formally scheduling the conciliation conference to Mr. Christensen, as well as to Ms. Bertsch and Ms. Osterberg. Mr. Christensen attended the conciliation conference and served as Overstock’s primary spokesperson.

The parties were unable to resolve their dispute at the conciliation conference. On November 2, 2007, UALD issued its written determination that Overstock had unlawfully discriminated and retaliated against Ms. Bertsch. The determination ordered Overstock to pay lost wages to Ms.

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Bertsch and to provide other incidental relief. The determination also advised the parties of their right to file an appeal within 30 days. UALD did not send the determination to Mr. Christensen, Overstock's attorney, but instead mailed it to Ms. Osterberg, with a cover letter that was addressed only to Ms. Bertsch. Because Ms. Osterberg did not understand that any action was necessary on Overstock's part, she filed the cover letter and attached determination away. Mr. Christensen did not learn of the determination until December 11, 2007, 39 days after it had been issued, when he asked Ms. Osterberg if she had received anything regarding Ms. Bertsch's complaint. Ms. Osterberg retrieved the determination, and Mr. Christensen filed an appeal that same day. He also requested extension of the 30-day time limit for filing the appeal.

Ms. Bertsch objected to the extension and asked Judge Lima to dismiss Overstock's appeal of the UALD determination as untimely. Judge Lima granted Ms. Bertsch's motion to dismiss. In summary, Judge Lima concluded that the provisions of the Utah Antidiscrimination Act and the Utah Administrative Procedures Act do not permit extension of the 30-day period for filing an appeal of a UALD determination. Consequently, because Overstock did not file its appeal within the 30-day period, the Commission had no jurisdiction to consider the appeal.

In requesting Commission review of Judge Lima's decision, Overstock points out that UALD did not send its determination to the attorney—Mr. Christensen—that Overstock had designated as its representative. Overstock also points out that the cover letter which accompanied the determination was addressed to Ms. Bertsch, not to Overstock, and added to the confusion. Overstock argues that these factors caused Overstock's delay in filing an appeal of UALD's determination. Finally, Overstock notes that it immediately filed an appeal as soon as its attorney learned that the determination had been issued.

DISCUSSION AND CONCLUSION OF LAW

Any party aggrieved by a UALD determination in an employment discrimination case is entitled to obtain de novo review of the determination before an administrative law judge. Specifically, §34A-5-107 (5) (c) of the Utah Antidiscrimination Act provides (emphasis added):

A person may file a written request to the Division of Adjudication for an evidentiary hearing to review de novo the . . . determination and order **within 30 days of the date of the determination and order.**

However, the foregoing 30-day appeal deadline established by §34A-5-107 (5) (c) must be interpreted and applied in a manner that is consistent with other provisions of law, particularly the more general provisions of § 34A-1-302(4) of the Utah Labor Commission Act, which apply to all proceedings before the Labor Commission:

A party in interest shall be given notice of the entry of a presiding officer's order or any order or award of the commission. The mailing of the copy of the order or award

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to the last-known address in the files of the commission of a party in interest and to the attorneys or agents of record in the case, if any, is considered to be notice of the order.

In this case, it is undisputed that Ms. Osterberg and Mr. Christensen informed UALD that Mr. Christensen was Overstock's attorney; that he should receive all future correspondence regarding Ms. Bertsch's complaint; and that he would be representing Overstock in future proceedings. Consequently, UALD was aware of Mr. Christensen's participation on behalf of Overstock, as evidenced by the fact that UALD sent notice of the conciliation conference to Mr. Christensen. Under these circumstances, the Commission concludes that § 34A-1-302(4) of the Utah Labor Commission Act required UALD to send its determination to Mr. Christensen, and that the 30-day appeal period established by §34A-5-107(c) of the Utah Antidiscrimination Act did not begin to run until Mr. Christensen received actual or constructive¹ notice of the determination. See *Buczynski v. Industrial Commission, et al.* 917 P.2d 552 (Utah 1996). Because Overstock filed its appeal as soon as it received the required notice of UALD's determination, the Commission concludes that Overstock's appeal of that determination is timely. Overstock is therefore entitled to the *de novo* review authorized by § 34A-5-107 (5) (c) of the Utah Antidiscrimination Act.

ORDER

The Labor Commission sets aside Judge Lima's dismissal of Overstock's appeal. The Commission remands this matter to Judge Lima to proceed with the adjudication of Ms. Bertsch's complaint of employment discrimination and retaliation. It is so ordered.

Dated this 29th day of April, 2009.

Sherrie Hayashi
Utah Labor Commissioner

¹ The Commission does not view Ms. Osterberg's receipt of a copy of the determination as constituting constructive notice to Mr. Christensen because Ms. Osterberg reasonably believed UALD would send notice of any significant actions directly to Mr. Christensen. Furthermore, when Ms. Osterberg did receive a copy of UALD's determination, the significance of the document was clouded by the confusing cover letter that was directed to Ms. Bertsch, rather than to Overstock.

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CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Reversing ALJ's Decision and Order of Remand in the matter of Elizabeth Ann Bertsch, Case No 8-04-0838 , was mailed first class postage prepaid this ____day of April, 2009, to the following:

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and by Interdepartmental Mail to:

Heather Morrison, Director
Utah Antidiscrimination & Labor Division

Sara Danielson
Utah Labor Commission