

Employment Discrimination in Utah

Utah Advisory Committee
to the U.S. Commission
on Civil Rights

1997

A report of the Utah Advisory Committee to the United States Commission on Civil Rights prepared for the information and consideration of the Commission. Viewpoints and recommendations in this report should not be attributed to the Commission, but only to the Advisory Committee or those persons whose opinions are quoted.

The United States Commission on Civil Rights

The United States Commission on Civil Rights, first created by the Civil Rights Act of 1957, and reestablished by the United States Commission on Civil Rights Act of 1983, is an independent, bipartisan agency of the Federal Government. By the terms of the 1983 act, as amended by the Civil Rights Commission Amendments Act of 1994, the Commission is charged with the following duties pertaining to discrimination or denials of the equal protection of the laws based on race, color, religion, sex, age, handicap, or national origin, or in the administration of justice: investigation of individual discriminatory denials of the right to vote; study and collection of information relating to discrimination or denials of the equal protection of the law; appraisal of the laws and policies of the United States with respect to discrimination or denials of equal protection of the law; maintenance of a national clearinghouse for information respecting discrimination or denials of equal protection of the law; investigation of patterns or practices of fraud or discrimination in the conduct of Federal elections; and preparation and issuance of public service announcements and advertising campaigns to discourage discrimination or denials of equal protection of the law. The Commission is also required to submit reports to the President and the Congress at such times as the Commission, the Congress, or the President shall deem desirable.

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An Advisory Committee to the United States Commission on Civil Rights has been established in each of the 50 States and the District of Columbia pursuant to section 105(c) of the Civil Rights Act of 1957 and section 3(d) of the Civil Rights Commission Amendments Act of 1994. The Advisory Committees are made up of responsible persons who serve without compensation. Their functions under their mandate from the Commission are to: advise the Commission of all relevant information concerning their respective States on matters with the jurisdiction of the Commission; advise the Commission on matters of mutual concern in the preparation of reports of the Commission to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public and private organizations, and public officials upon matters pertinent to inquiries conducted by the State Advisory Committee; initiate and forward advice and recommendations to the Commission upon matters in which the Commission shall request the assistance of the State Advisory Committee; and attend, as observers, any open hearing or conference that the Commission may hold within the State.

Letter of Transmittal

Utah Advisory Committee
to the U.S. Commission on Civil Rights

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As part of its responsibility to assist the Commission in its factfinding function, the Utah Advisory Committee submits this report of its study of employment discrimination in Utah. Members of the Advisory Committee who participated in the project unanimously approved the report by a vote of 11 to 1. The study is based on background research and interviews by Committee members and staff, public factfinding meetings conducted in Salt Lake City on December 9-10, 1993, and followup data collection and additional interviews conducted after the factfinding meetings. Persons who provided information were given an opportunity to review relevant sections of the report and, where appropriate, their comments and corrections were incorporated. In two instances the Committee felt it necessary to also respond to comments made by the Utah Anti-Discrimination Division (UADD) and the U.S. Equal Employment Opportunity Commission (EEOC).

The study was initiated by the Advisory Committee following a number of previous activities. At its November 1992 Utah Advisory Committee meeting, members were briefed by a prominent Salt Lake City civil rights attorney and also received information obtained from interviews with State officials, community organizations, and private individuals concerning serious obstacles to the resolution of employment discrimination complaints in Utah. After receiving additional data, the Utah Advisory Committee at its April 1993 meeting voted to conduct a study of employment discrimination in Utah. The Committee's objective was to review the history, intent, adequacy, and effectiveness of legislation, and enforcement power.

This report identifies and analyzes barriers Utah workers face in attempting to file employment discrimination complaints in pursuit of relief or remedies for alleged discriminatory acts. The Committee found that although the State of Utah has an agency, the Utah Anti-Discrimination Division, charged to investigate, resolve, and conclude complaints of employment discrimination, citizens, community organizations,

State legislators and the media voiced numerous concerns regarding its effectiveness. Records indicate that as far back as 1988 citizens were pleading with agency administrators and elected officials for assistance. Allegations and criticisms included insensitivity, unresponsiveness, inefficiency, and inaction. The UADD was accused of maintaining a large backlog of cases, unreasonable processing time, questionable case closures, poor investigations, and no judicial enforcement. Concerns were so great that a number of organizations asked for an audit of the UADD.

Among the findings resulting from its study, the Utah Advisory Committee noted that although several improvements have taken place, the UADD continues to face numerous obstacles. In addition to several recommendations made in this report, a number of administrative weaknesses were identified and recommendations suggest the realignment of the UADD within State government as some form of stand alone agency. The Advisory Committee also recommends that the U.S. Commission on Civil Rights consider evaluating whether the U.S. Equal Employment Opportunity Commission, Phoenix District Office, has fully lived up to its obligation and responsibility to ensure that the UADD, operating as a Fair Employment Practices Agency, enforces Federal regulations prohibiting employment discrimination in Utah.

The Advisory Committee urges the Commission to accept this report and to support its followup activities.

Sincerely,


Michael N. Martinez, *Chairperson*
Utah Advisory Committee

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Acknowledgments

The Utah Advisory Committee wishes to thank staff of the Rocky Mountain Regional Office for its help in the preparation of this report. The project was the principal assignment of Malee V. Craft. Evelyn S. Bohor provided essential support services. Editorial assistance and preparation of the report for publication were provided by Gloria Hong. The factfinding meeting phase was carried out by Malee V. Craft under the overall supervision of William F. Muldrow, former Regional Director; report drafting and followup were done jointly by Malee V. Craft and Ki-Taek Chun under the overall supervision of Ki-Taek Chun, former Acting Regional Director; and subsequent processing of the report was under the overall supervision of John F. Dulles, Regional Director.

Preface

In keeping with its research and information dissemination responsibilities, the Utah State Advisory Committee to the U.S. Commission on Civil Rights conducted factfinding meetings in Salt Lake City on December 9-10, 1993, to receive information on issues related to employment discrimination in Utah. These meetings were part of a larger research project carried out by the Committee to determine the extent to which Utah citizens are provided equal and fair treatment and are protected by State and Federal laws while going through the employment discrimination complaint process. The Advisory Committee project provided a forum to bring to the forefront employment discrimination experienced by many Utah workers, and their frustrations in seeking redress. The factfinding meetings were also the catalyst for a number of changes within State government and the Utah Anti-Discrimination Division.

Throughout the project, every effort was made to obtain accurate and factual data and to hear from persons with various perspectives, responsibilities, and experiences related to the topic. Twenty-seven individuals participated in the Committee's factfinding meeting, including State elected officials, community and public organizations, Native American tribes, representatives from State and Federal agencies, and the legal community.¹ Additional information was received through staff

¹Participants in the factfinding meetings were:

December 9, 1993

- Mario Blanco, civil rights manager, Office of Civil Rights, Utah Department of Transportation
- Lenores Bush, executive director, Utah Opportunity Industrialization Center
- K.S. Cornaby, chairman, Utah Anti-Discrimination Task Force
- John Flores, former commissioner, Utah Industrial Commission
- L. Zane Gill, attorney at law
- James Gonzales, executive director, Utah Coalition de La Raza
- Margaret Grochocki, program manager, Senior Employment Program, Salt Lake County
- George A. Lopez, former investigative agent, Utah Anti-Discrimination Division
- Kathleen Mason, president, Utah Women's Lobby
- John Pace, attorney, Utah Legal Clinic, Utah Civil Rights and Liberties Foundation
- Frank Pignatelli, Utah House of Representatives
- Mani Seangsuwan, program coordinator, Asian Association of Utah
- Olene S. Walker, Lieutenant Governor of Utah
- Jeanetta Williams, president, NAACP, Salt Lake branch
- John Valentine, Utah House of Representatives
- Dora Van, executive director, Native Civil Rights Project

December 10, 1993

- Rick J. Sutherland, attorney at law, Sutherland & England
- Ken Mayne, director of apprenticeship, Carpenters Joint Apprenticeship and Training Committee
- Kim Marquardt, director, Corporate Human Resources and Management and Training Corporation
- Colleen Colton, commissioner, Industrial Commission of Utah
- Richard Wyss, division chief, Public Affairs Division, Utah Attorney General's Office
- Tom Roberts, attorney, Utah Attorney General's Office
- Richard Gomez, education equity coordinator and fair employment practice officer, Utah State Office of Education
- Julie Davies, public relations director, Utah Federation of Business and Professional Women.
- Floyd Astin, administrator, Utah Department of Employment Security
- Charles Burner, Director, Phoenix District Office, U.S. Equal Employment Opportunity Commission
- Irene Mee, Regional Director, Office of Federal Contract Compliance, U.S. Department of Labor

interviews, both in person and by telephone, and from material submitted through the mail.

This report is compiled from data collected during the project and is intended to present information, statistics, and recommendations addressing issues related to employment discrimination in Utah. The study should serve to identify areas of concern, heighten community and public awareness of Federal and State legislation, and policies and procedures that affect Utah workers, in addition to alerting State officials and legislators of possible solutions to better address and enforce employment discrimination in Utah.

Contents

1.	Employment Discrimination and Protection of Victims in Utah	1
	Employment Discrimination in Utah	1
	Who Protects the Discriminated?: The UADD	10
	Have the Victims Been Protected by the UADD?: Through the 1993 Public Uproar	13
2.	Citizen Concerns and Public Scrutiny of the UADD	28
	Citizen Complaints	29
	The UADD Task Force	34
	Report by the Governor's Transition Team	40
3.	Shortcomings of the UADD	42
	UADD Perceived to be Unfriendly and Hostile	44
	Long Complaint Processing Time	46
	Poor Quality of Investigations	47
	Lack of Judicial Enforcement	51
	Cause Findings Not Litigated	55
	The UADD Acting as a Contract Agency for the EEOC	58
	Difficult to Obtain Legal Counsel	61
4.	The UADD: After the 1993 Public Scrutiny	67
	The Operation of the UADD in 1994	68
	The UADD Advisory Committee	75
	Questionable Commitment of the Industrial Commission	82
	The UADD: Federal Accountability	88
	Audit of the UADD	90
	Continuing Criticisms of the UADD	92
5.	Toward a Utah Human Rights Commission	98
	The 1976 Study by the Office of Equal Employment Opportunity	98
	The 1978 Proposal by the Utah Equal Employment Opportunity Division	100
	Resolutions by Advocacy Organizations	102
	The UADD Task Force Report, 1993	103
	The Factfinding Meeting of the Utah Advisory Committee to the U.S. Commission on Civil Rights, 1993	104
6.	Findings and Recommendations	108
Tables		
1.1	Discrimination complaints filed with the UADD, FY 85-FY 94	3
1.2	Bases of discrimination complaints, FY 85-FY 94	6
1.3	Ranking of complaint bases by FYs, FY 85-FY 94	7

1.4 Performance indicators of UADD, FY 85-FY 94	15
4.1 Complaint processing time, ADR vs. Investigation	72

Figures

1.1 Discrimination complaints filed with the UADD, FY 85-FY 94	5
1.2 Complaints based on gender, age, disability, race and national origin, FY 85-FY 94	8
1.3 Complaints by bases: (gender + age + disability) vs. (race + national origin)	9
1.4 Cumulative Backlog of complaints, FY 85-FY 94	17
4.1 Schematic illustration of complaint disposition (Jan. 1 to Dec. 31, 1994)	69-70

Appendices

i	Steps a Complainant Takes to File a Charge of Discrimination
ii	Filing a Charge of Employment Discrimination
iii	U.S. Equal Employment Opportunity Commission Letter of Reply
iv	Utah Advisory Committee Response to EEOC Reply to Draft of Report
v	Industrial Commission's UADD Letter of Reply
vi	Utah Advisory Committee Response to UADD Reply to Draft of Report
vii	Summary of Legislative Audit Report and Followup Audit of UADD

1. Employment Discrimination and Protection of Victims in Utah

Employment Discrimination in Utah

Employment discrimination in Utah, according to community and advocacy organizations, has been widespread and is increasing. For example, Jeanetta Williams, president of the Salt Lake Branch of the National Association for the Advancement of Colored People (NAACP), reported that her organization receives five to eight discrimination complaints daily.¹ She also observed that people of color are now being denied employment opportunities "at a higher rate,"² and increasingly more males are being discriminated against than females.³ Manuel Romero, chair of Utah Coalition de La Raza, the largest Hispanic civil rights organization in Utah, reported that since its formation nearly 2 years ago, the coalition has received 35 to 40 discrimination complaints.⁴

Concerning the prevalence of employment discrimination, James Gonzales, executive director of Utah Coalition de La Raza, cautioned not to take the reported number of complaints as a reliable indicator of how widespread it is. Most of his organization's constituents, he pointed out, are from Central and South America and are reluctant to go public or go to government agencies because of past experience with government agencies in their native countries. Although the extent of underreporting is not known, he is certain that it is real and poses a serious problem.⁵ Consequently, he believes that employment discrimination against Hispanics is much worse than available statistics may indicate.⁶

¹ Transcript of the factfinding meeting conducted by the Utah Advisory Committee to the U.S. Commission on Civil Rights in Salt Lake City, Utah, Dec. 9-10, 1993, vol. 1, p. 177 (hereafter cited as *Transcript*).

² *Ibid*

³ *Ibid.*, p. 182.

⁴ Utah Anti-Discrimination Division Task Force hearing minutes, Apr. 2, 1993, p. 29.

⁵ *Transcript*, vol. 1, p. 103.

⁶ *Ibid.*, pp. 112-13.

Mani Seangsuwan of the Asian Association of Utah, an organization established to advocate equality of Asian Americans in Utah in employment and other services,⁷ reported that many Asian Americans enter the workplace expecting long-term employment, but are generally laid off after 3 to 6 months.⁸ They are told that because of their limited English and educational backgrounds, there is not enough work for them.⁹ Many Asian Americans, he observed, "are not fully informed of their rights, . . . [and are] unfamiliar with this country, . . . afraid to face employers, . . . and afraid to talk to the employer or their supervisor."¹⁰ His organization finds that many clients have adequate skills to do a job, but "the employers often say 'no, we need you to speak better English in order to continue to work with us,' or they prefer our clients to work part-time instead of full-time."¹¹

The above organizations do not compile systematic information on complaints, and the only source of discrimination statistics in Utah is what is available from the Utah Anti-Discrimination Division (UADD) of the Industrial Commission. Complaint statistics compiled by the UADD for the past 10 years permit a trend analysis for both the number and the type of complaints filed.

Number of Complaints Filed

As shown in table 1.1, the number of complaints filed with the UADD has steadily increased over the past 10 years from 507 and 493 cases respectively in the first 2 years to 903 and 893 in the last 2 years. From the first 2 to the last 2 years in this period, the number of complaints filed increased by 78 percent, consistent with the observations of many advocacy organizations that they have been receiving an

⁷ Ibid., p. 164. The Asian Association of Utah, located in Salt Lake City and operating since 1977, teaches immigrants and refugees job skills.

⁸ Ibid., p. 167.

⁹ Ibid.

¹⁰ Ibid., pp. 167-68.

¹¹ Ibid., p. 168.

TABLE 1.1
Discrimination complaints filed with the UADD, FY 85 - FY 94

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Charges filed with UADD	507	493	527	483	535	560	680	804	903	893

Source: Anna R. Jenson, director, UADD, Utah Industrial Commission, Mar. 14, 1995.

increasing number of complaints from their clientele. The noticeable increase has occurred since FY 91, and these trends are illustrated in figure 1.1.

Bases of Complaints

A statewide poll of 607 adults conducted for the *Salt Lake Tribune* in April 1993 showed that more than 94 percent of State residents believe discrimination exists in Utah.¹² Three of five Utah citizens said discrimination reveals itself in racial biases and religion, while over half acknowledged sexism as a major bias.¹³ Complaint data resemble closely the sentiment of those polled.

Table 1.2 shows the numbers of complaints filed for each of the past 10 years, broken down by bases of complaints,¹⁴ while a ranking of these numbers is shown in table 1.3. Figure 1.2 illustrates the five bases on which most complaints are filed during the 10-year period. These tabular and visual displays reveal three interesting trends.

First (see tables 1.2 and 1.3), there is a remarkable consistency across the 10-year span concerning the relative frequency of complaint bases. For example, gender is the most frequently cited basis of complaints, then age and disability, in that order. Starting from 1993, disability replaces age as the second most frequently cited basis of complaints, which is not surprising considering the increasing awareness of the protection provided by the Americans with Disabilities Act.

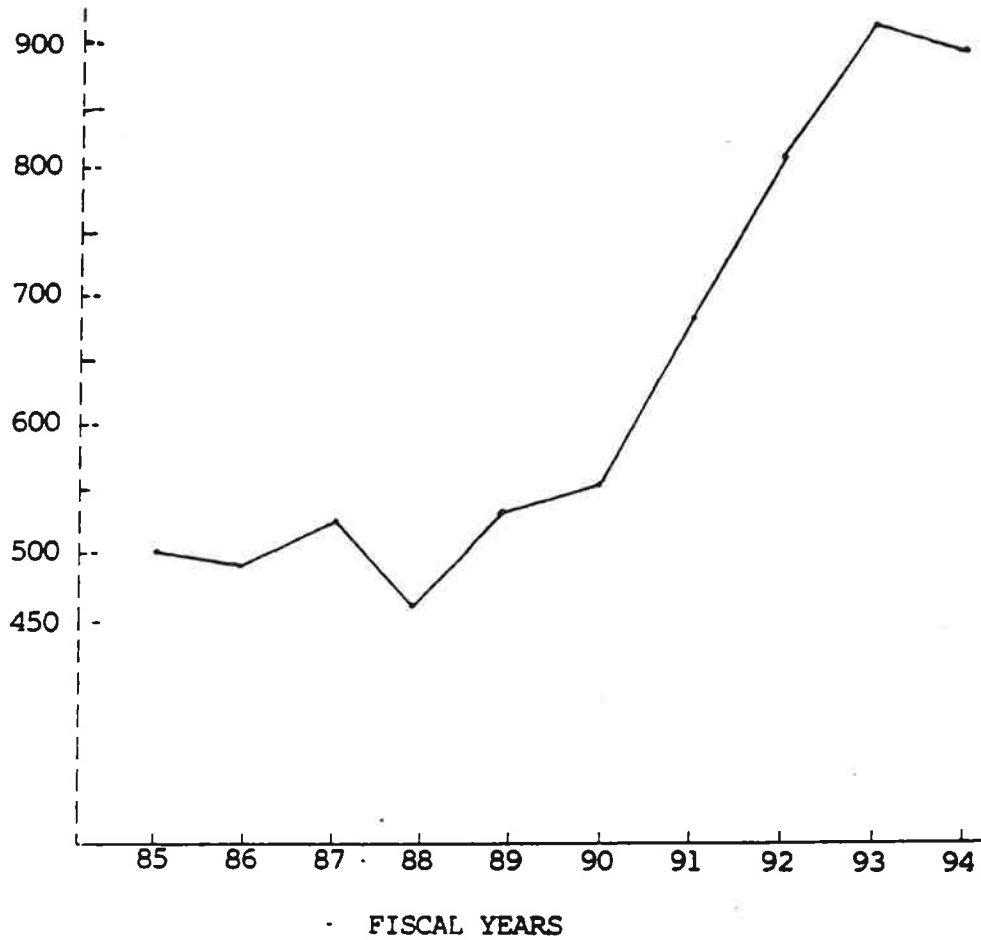
Second, the total number of complaints based on gender, age, and disability (the three most frequently cited bases of complaints) has increased steadily from 61 percent in FY 85 to 77 percent in FY 94. On the other hand, complaints based on race/color and national origin show a dramatic decrease, from 28 percent in FY 85 to 13 percent in FY 94. That is, by FY 94, complaints based on race/color and national origin declined to one in seven cases. This trend is illustrated in figure 1.3. These statistics

¹² Michael Phillips, "Bias in Utah? Most say 'yes'," *Salt Lake Tribune*, May 9, 1993, p. A1.

¹³ Ibid.

¹⁴ Bases of complaints used in the table are adopted from the UADD system. "Gender" includes "sex discrimination," "sexual harassment," and "maternity."

Figure 1.1
Discrimination Complaints Filed with the UADD, FY 85-FY 94



Source: Anna R. Jensen, director, UADD, Utah Industrial Commission, Mar. 14, 1995.

TABLE 1.2
Bases of discrimination complaints, FY 85-FY 94

Basis											Average
	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94	FY85-94
Gender ¹	209 41%	182 37%	231 44%	182 38%	212 40%	208 37%	230 34%	255 32%	339 38%	315 35%	236 37%
Age	76 15%	94 19%	85 16%	130 27%	91 17%	107 19%	146 21%	205 25%	160 18%	123 14%	122 19.15%
Handicap/ Disability	23 5%	24 5%	31 6%	46 10%	67 13%	95 17%	102 15%	107 13%	166 18%	252 28%	91 14.30%
Race/Color	60 12%	62 13%	48 9%	37 6%	58 11%	46 8%	78 11%	76 9%	64 7%	64 7%	59 9.30%
National Origin	81 16%	72 15%	44 8%	53 11%	54 10%	60 11%	74 11%	76 9%	81 9%	53 6%	65 10.20%
Retaliation	19 4%	20 4%	31 6%	16 3%	28 5%	22 4%	21 3%	37 5%	54 6%	47 5%	30 4.71%
Religion	30 6%	18 4%	19 4%	11 2%	11 2%	10 2%	9 3%	32 4%	25 3%	17 2%	18 2.82%
Equal Pay	9 2%	21 4%	38 7%	8 2%	14 3%	12 2%	10 1%	16 2%	14 2%	22 2%	16 2.51%
Total	507 100% ²	493 100%	527 100%	483 100%	535 100%	560 100%	670 100%	804 100%	903 100%	893 100%	637 100%

¹ Included in this category are complaints based on gender discrimination, sexual harassment, and maternity

² Column-wise percentages may not add up to 100 due to rounding errors.

Source: Anna R. Jensen, director, UADD, Utah Industrial Commission, Mar. 14, 1995.

TABLE 1.3
Ranking of complaint bases by FYs, FY 85-FY 94

Bases	FYs									
	85	86	87	88	89	90	91	92	93	94
Gender	1 ¹	1	1	1	1	1	1	1	1	1
Age	3	2	2	2	2	2	2	2	3	3
Disability	6	5	6.5	4	3	3	3	3	2	2
Race/Color	4	4	3	5	4	5	4	4.5	5	4
National Origin	2	3	4	3	5	4	5	4.5	4	5
Retaliation	7	7	6.5	6	6	6	6	6	6	6
Religion	5	8	8	7	8	8	7	7	7	8
Equal Pay	8	6	5	8	7	7	8	8	8	7

¹ Entries are within-column (i.e., within-FY) ranking of complaints by bases

For example, for FY 85 complaints based on gender were the largest, followed by national origin (2nd), age (3rd), race/color (4th), and religion (5th).

Source: Derived from data contained in table 1.2. Anna R. Jensen, director, UADD, Utah Industrial Commission, Mar. 14, 1995.

Figure 1.2 Complaints Based on Gender, Age, Disability, Race and National Origin, FY 85-FY 94

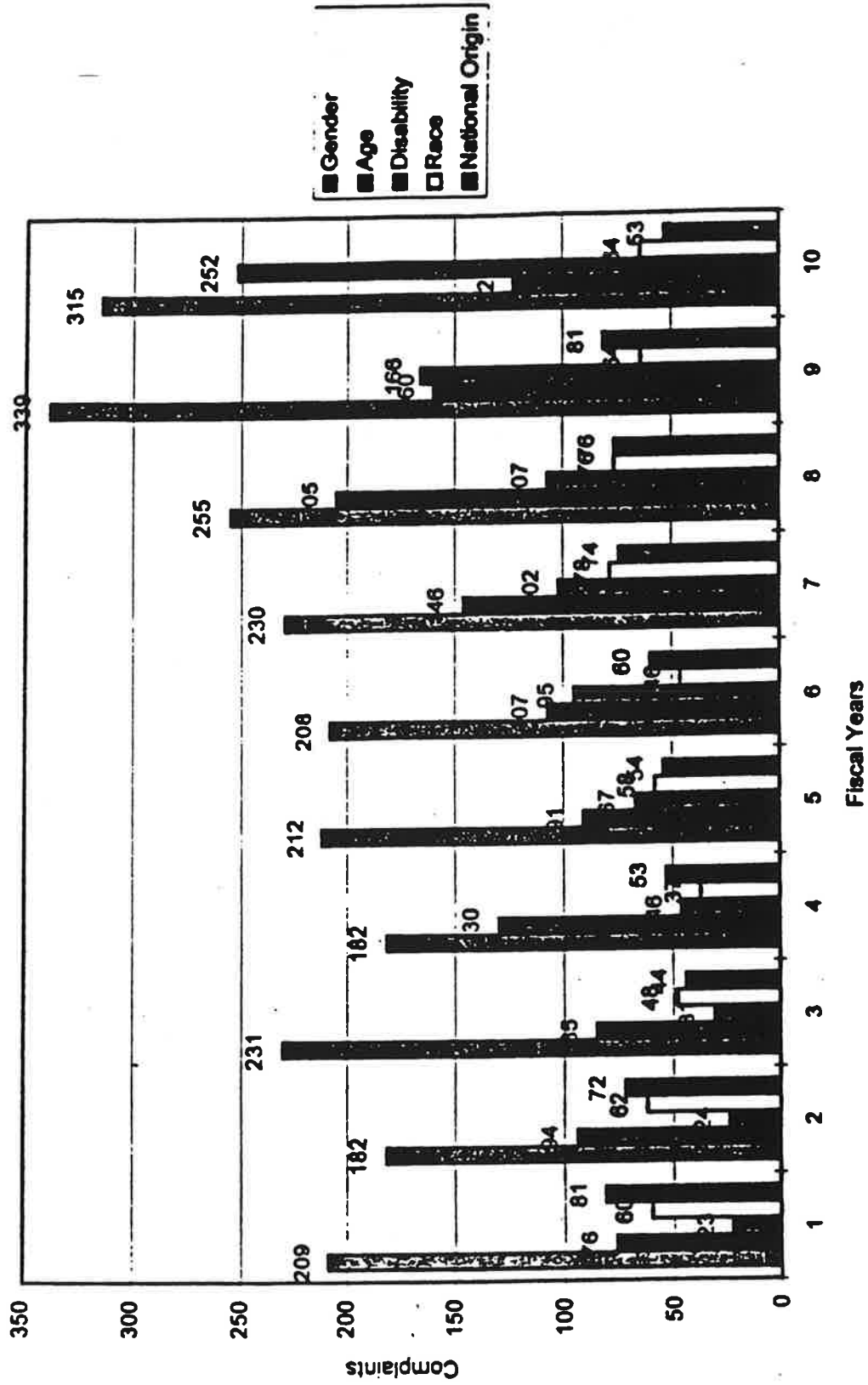
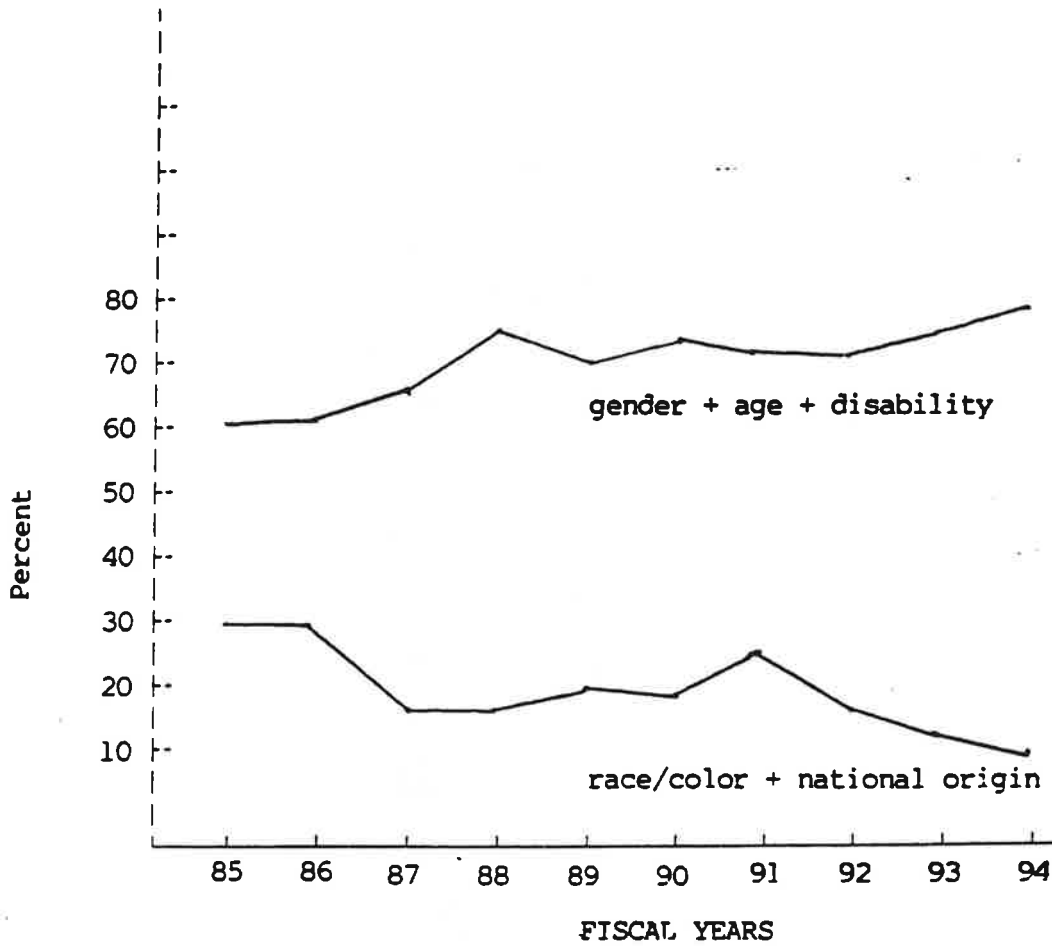


Figure 1.3
Complaints by Bases:
(gender + age + disability) vs. (race + national origin)



Source: Derived from figures presented in table 1.2.

flatly contradict the general perception that employment discrimination complaints have to do with race/color and national origin, and that complaints are typically filed by racial/ethnic minorities.¹⁵

Third, retaliation as a basis of complaints (table 1.3) retains the sixth place in relative ranking among all bases. In the past 3 years the percentage of complaints based on retaliation has remained at the 5 percent to 6 percent level (see table 1.2). This means that in at least 1 of 20 cases, employers have allegedly taken punitive, retaliatory actions against complainants for filing complaints.

Who Protects the Discriminated?: The UADD

The Utah Anti-Discrimination Act,¹⁶ enacted by the Utah Legislature in 1965, provides protection to citizens of Utah from unlawful employment discrimination. The act prohibits discrimination in matters related to hiring, promotion, termination or demotion, compensation, or other conditions of employment.¹⁷ The Industrial Commission of Utah was charged with implementing the act's provisions, by establishing within the commission the Utah Anti-Discrimination Division (UADD).¹⁸ Almost 30 years later, the UADD continues to operate under the jurisdiction of the Industrial Commission, which was created in 1917 to oversee and regulate workers' compensation and resolution of disputed claims.¹⁹ The commissioners are not

¹⁵ These statistics suggest that case intake personnel, investigators, and mediators need to be trained accordingly. In addition, the primary targets of coalition building may center on women's groups, the aged, disability groups, and then the traditional community organizations that represent minorities.

¹⁶ UTAH CODE ANN. § 34-35 (1965).

¹⁷ The bases of prohibited discrimination include race, color, sex, pregnancy and related conditions, child birth, age, religion, national origin, and handicap. UTAH CODE ANN. § 34-35-6 (a)(i) (1965).

¹⁸ UTAH CODE ANN. § 34-35-3 (1965).

¹⁹ The commission consists of three full-time, paid commissioners who are appointed by the Governor for 6-year terms subject to Senate confirmation. UTAH CODE ANN. § 35-9-3. The current commissioners are Stephen M. Hadley, chairman; Thomas R. Carlson, and Colleen S. Colton. Commissioner Carlson has been on the Industrial Commission for 8 years. Commissioner Hadley for 29 years, and Commissioner Colton since June 1992, when she was appointed to fill the term of a vacated slot. Governor Leavitt recently announced the reappointment of Commissioner Carlson to the commission, which brought about citizen demonstrations opposing his reappointment. Opponents of his reappointment pointed out that under his leadership the Industrial Commission and its Anti-Discrimination Division have been hostile to the victims of workplace discrimination and neglected to perform their duties as mandated by the law. Marina O'Neill.

involved in the day-to-day operation of the agency but have the final approval for any policymaking or changes.²⁰ One member of the Industrial Commission, Colleen S. Colton, has been designated to supervise and work specifically with the UADD, and the administrative oversight of the UADD is one of her direct responsibilities.²¹

The UADD is an exclusive remedy agency, and as such, a person who feels discriminated against is required to go first to the UADD to file a discrimination complaint, if the employer has 15 or more employees.²² This is the first step a complainant must go through in order to pursue relief or remedies for the alleged discriminatory acts.

The UADD accepts charges of employment discrimination from individuals who claim they have encountered employment discrimination.²³ A complaint can be filed in person or by mail with the UADD within 180 days after the alleged discriminatory act.²⁴ If more than 180 days, but less than 300 days, have elapsed, however, a complaint may be filed with the U.S. Equal Employment Opportunity Commission (EEOC).²⁵ The complainant also has the option of filing a claim with the EEOC 30 days after receiving notice that the State or local agency has terminated the processing

"Leavitt choice draws fire from advocates." *Ogden Standard Examiner*, Apr. 10, 1995, p. A4; Judy Fahys, "Leavitt ignores protests, backs Industrial Commission pick." *Salt Lake Tribune*, Apr. 19, 1995, p. B4; and Judy Fahys, "Carlson survives critics, keeps Industrial Commission seat." *Salt Lake Tribune*, Apr. 26, 1995, p. B8.

²⁰ Colleen Colton, *Transcript*, vol. 2, p. 60.

²¹ *Ibid.*

²² The UADD follows the 15 or more employee Federal guideline. U.S. Equal Employment Opportunity Commission, publication titled "Laws Enforced by the U.S. EEOC." Title VII of the Civil Rights Act of 1964, § 2000e, (b), p. 7. For an employee who desires to file a complaint against the employer with 14 or fewer employees, there are no State or local agencies in Utah set up to offer assistance. The only option for these individuals is to obtain an attorney and go to court.

²³ "The Utah Anti-Discrimination Division of the Industrial Commission of Utah," brochure, undated.

²⁴ *Ibid.*

²⁵ *Ibid.* Utah is serviced by the Phoenix District Office of the U.S. Equal Employment Opportunity Commission; their address and phone number is: U.S. Equal Employment Opportunity Commission, Phoenix District Office, 4520 North Central Avenue, Suite 300, Phoenix, AZ 85012, telephone 612-640-5000.

of the charge.²⁶ The UADD also handles complaints from State agencies, such as boards, commissions, departments, or institutions, and also from employment agencies and labor organizations. The steps a complainant takes to file a complaint are schematically presented in appendix I and described in appendix II.

The UADD is mandated by law to investigate, resolve, and conclude, as rapidly and as thoroughly as possible, complaints of employment discrimination.²⁷ In addition, the UADD is empowered to make legislative and policy recommendations, make reports to the Governor at least once a year, and issue reports to eliminate employment discrimination and promote good will among diverse racial/ethnic groups.²⁸

Since October 1979, the UADD has maintained a work-share agreement with the EEOC.²⁹ The EEOC, the Federal agency responsible for enforcing employment discrimination laws, accepts from citizens complaints of employment discrimination, but processes them largely through its local contract agencies, referred to as fair employment practices agencies (FEPAs) or EEOC 706 contract agencies. In Utah, the UADD is the only agency that has contracted with the EEOC to receive and process employment discrimination charges. To qualify as an EEOC 706 agency, the UADD was required to have a fair employment practices law and be empowered to grant relief, seek relief, or institute criminal proceedings.³⁰

²⁶ Charles Burner, Director, Phoenix District Office of the U.S. Equal Employment Opportunity Commission, written comments in response to draft report to Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, July 30, 1996.

²⁷ UTAH CODE ANN. § 34-35-3 (1965).

²⁸ UTAH CODE ANN. § 34-35-5 (g)(h)(i)(j) (1965).

²⁹ Request for Information from FEP Agencies, document, Office of Program Operations, Charge Resolution Review Programs, State and Local Programs Division, U.S. Equal Employment Opportunity Commission, fiscal year 1993, p. 1 (hereafter cited as Request for Information from FEP Agencies). The Request for Information from FEP Agencies document is used in awarding Title VII and ADEA Charge Resolution Contracts to State and local Fair Employment Practices Agencies.

³⁰ 29 C.F.R. § 1601.70 (1) and (2)(1996).

Additionally, in granting FEPA status to State and local agencies, the EEOC requires that an applicant agency meet 10 specific criteria,³¹ including that the agency "demonstrate its willingness and ability to enforce its law(s) in such a manner that, in fact, the practices prohibited are comparable in scope to those practices prohibited under Federal law,"³² and "demonstrate its capability to pursue [the] elimination of discrimination and seek or provide compensatory and prospective relief."³³

Have the Victims Been Protected by the UADD?: Through the 1993 Public Uproar

Information on how the UADD had performed its duties of protecting Utahns from workplace discrimination is presented in this section, covering FY 85 through FY 93 when there was a surge of citizen concerns, media exposure, and official investigations about the UADD. The issue of UADD performance after the 1993 public uproar is discussed in chapter 4.

Statistics on UADD: Unavailability and Suspect Quality

Critics of the UADD have long sought in vain to gain access to basic information on the agency's workload and performance indicators such as the number of complaints filed and closed, percentage of cause findings, number of final orders the UADD has enforced, processing time, staff size, and budget. Although this information should have been made public as a matter of routine, requests for information had often been rebuffed by UADD officials, or responded to with partial or sometimes contradictory numbers. Even when made available, important data were without dates or had overlapping reporting periods, making verification extremely difficult for average citizens.³⁴

³¹ Request for Information from FEP Agencies. pp. 1-3.

³² Ibid., item 3. p. 1.

³³ Ibid., item 4. p. 2.

³⁴ This characterization of the situation is based on testimonies given to the UADD Task Force, the Utah Advisory Committee to the U.S. Commission on Civil Rights, and representatives of many civil rights organizations. Specific citations are provided where appropriate throughout the report.

Because the Utah Advisory Committee to the U.S. Commission on Civil Rights believed that information on several aspects of UADD performance was indispensable to a balanced review of the agency, starting in December 1994 the Rocky Mountain Regional Office of the U.S. Commission on Civil Rights made strenuous efforts to obtain needed information from the UADD and the Industrial Commission. Those persons playing an active role in the operation and issues regarding the UADD were contacted. Stephen M. Hadley, chairman of the Utah Industrial Commission, agreed to cooperate; and Alan Hennebold, general counsel of the Industrial Commission, and Anna Jensen, then-director of the UADD, provided unceasing assistance so that by June 1995 most of the needed information had been gathered. These data are presented in the following sections and subsequent chapters.

Increasing Backlog

At an early 1993 meeting of the Utah Anti-Discrimination Division Task Force (UADD Task Force) established by then-Governor Norman H. Bangerter to address citizens' concerns about the UADD (see chapter 2 for further details), Commissioner Colleen Colton said that the backlog had been reduced and the UADD had only two cases which were filed prior to 1992,³⁵ giving an impression that all was well and the UADD was in control of the situation.

However, the statistics shown in table 1.4 reveal a different story about the UADD. In every fiscal year through FY 93, the UADD has received more complaint charges than it was able to close during the year, creating a backlog of cases. As years went by, the total number of backlogged cases kept increasing. For example, in FY 85 and FY 86, the first 2 years of our review period, there were 54 and 23 cases in backlog, respectively. The annual backlog remained under 40 until FY 88, but skyrocketed to 140 in FY 89, staying high thereafter (92 in FY 90, 109 in FY 91, and 167 in FY 93) with the exception of FY 92 (39 in FY 92).

³⁵ Utah Anti-Discrimination Division Task Force meeting minutes, Jan. 8, 1993, p. 2 (hereafter cited as UADD Task Force minutes). See chap. 2, sec. B, for further details concerning the UADD Task Force.

TABLE 1.4
Performance Indicators of UADD, FY 85-FY 94

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Cases open at beginning of yr (carryover from prev. yr.)				252 ¹	287	427	519	628	667	834
Cases filed by UADD	507	493	527	483	535	560	680	804	903	893
Cases waived to EEOC	98	48	88	62	42	36	29	127	67	93
Cases retained with UADD	408	445	439	421	493	524	651	677	836	800
Current cases backlog	54	23	36	35	140	92	109	39	167	(-126)
Cases closed during year	354	422	403	386	353	432	542	638	669	926
Cases open at end of year (cumulative backlog)	N/A	N/A	252	301	337	443	518	475	617	447
Investigators:										
UADD investigators	5 ¹	4	4	4	4	4	4	4	5	5
Contract attorneys in FTE							0.89 ¹	1.68	2.56	5.57
Total FTE	5	4	4	4	4	4	4.89	5.68	7.56	10.57
Cases closed per Investigator	70.8	105.5	100.8	96.5	88.2	108.0	110.8	112.3	88.5	87.6
Average processing time	N/A	91	133	199	257	262	301	278	235	232
Budget:										
State	N/A	N/A	62.5K	115.6K	95.6K	128.0K	174.6K	185.2K	230.8K	272.1K
net % of IC budget total	N/A	N/A	1.7	3.5	2.7	3.4	4.0	4.1	5.07	5.3
Federal (EEOC)	N/A	N/A	183.6K	118.8K	144.7K	140.6K	111.1K	194.4K	241.2K	332.4K
Total	N/A	N/A	246.1K	232.4K	240.3K	268.6K	285.7K	379.6K	472.0K	604.5K

Note: K=thousands, FTE=full time employees

¹ Carryover cases are cumulative backlog cases of the previous year.

² These cumulative backlog cases are obtained by adding unresolved cases to carryover cases. However, they differ considerably from what is provided by the UADD.

³ Figures of the size of UADD investigative staff provided here are derived from the UADD payroll ledger through the collective effort of the UADD, the Industrial Commission's budget officer, and staff of the Rocky Mountain Regional Office of the U.S. Commission on Civil Rights. Anna R. Jensen, Gordon Linnett, telephone interviews, Mar. 28, 1995.

⁴ FTE (full-time equivalent) figures for contract attorneys are adjusted for on-the-job training. For each contract attorney, two months were subtracted for training, although four to five months are required to become proficient. Anna R. Jensen, telephone interview, Mar. 28, 1995.

The situation regarding cumulative backlog is problematic because data provided by the UADD are contradictory. For example, the current-year backlog for FY 88, was 35 and the cumulative backlog for the previous year (FY 87) was 252, thereby resulting in the cumulative backlog of 287 for FY 88. Yet, the UADD data claim the backlog to be 301. Similarly, for FY 89, since its current backlog was 140, its cumulative backlog should have been either 427 or 441, depending on whether one uses 287 or 301 as the cumulative backlog for FY 88. But the figure cannot be 337 as shown in the UADD data. A similar confusing situation prevails for all succeeding years.

Repeating this process of adding current backlog numbers to the cumulative backlog numbers yields a backlog of 708 cases for FY 94. According to the UADD compilation, however, the cumulative backlog for FY 94 is 447. In other words, due to some inexplicable discrepancies, the UADD figure of cumulative backlog at the end of FY 94 is 447 compared to our computation of 708 backlog cases, 77 percent more than the UADD figure (see the row labelled "cases open at end of year (cumulative backlog)").

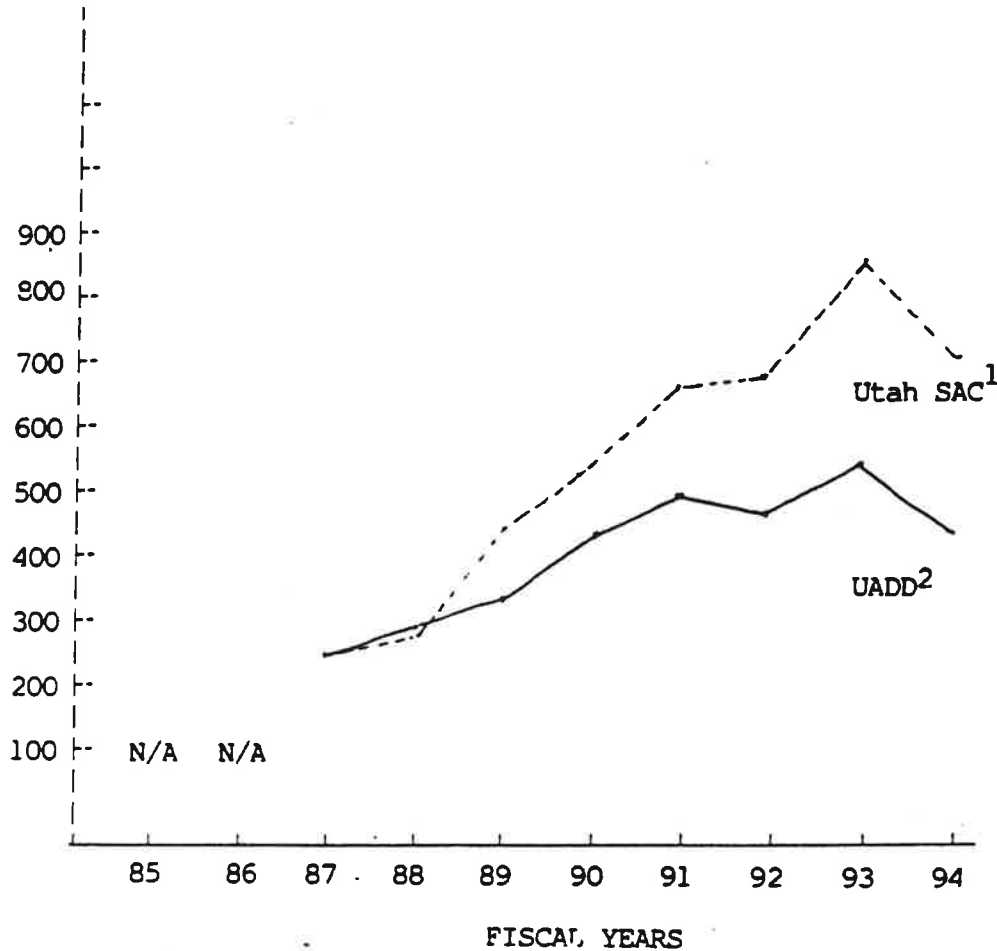
Both of these cumulative backlog figures, although they differ in magnitude, have one thing in common: the trend over the years. There has been a steady increase in backlog over the years reaching a peak in FY 93,³⁶ though in FY 94 the UADD closed more complaints than it received resulting in a decrease of 126 cases in cumulative backlog. This trend is illustrated in figure 1.4.

Size of Investigative Staff

Faced with an increasing backlog, the UADD in the past few years hired contract attorneys who worked for periods as short as 1 month or as long as several years. Since available figures on the numbers of UADD investigators, contract attorneys, or both, were contradictory, it was deemed necessary to clarify the situation. A

* The cumulative backlog is computed by adding a given year's unresolved cases to the cumulative total of the previous year. It starts with FY 87, the first year for which the UADD provided annual pending inventory of 252 cases. Note that figures for backlog cases computed in this manner are different from the UADD figures. Adding the FY 88 current backlog of 35 to 252 yields 287 cases of cumulative backlog for FY 88. Yet the UADD provides 301 as the cumulative backlog for FY 88. The discrepancy remains unexplained.

Figure 1.4
Cumulative Backlog of Complaints, FY 85-FY 94



- 1) Numbers computed by the Utah State Advisory Committee to the U.S. Commission on Civil Rights.
- 2) Numbers provided by the Utah Anti-Discrimination Division, Utah Industrial Commission (see table 1.4 for further details).

Source: Derived from figures presented in table 1.4

collaborative effort among the director of the UADD, the budget director of the Industrial Commission, and the staff of the U.S. Commission on Civil Rights yielded the following figures for contract attorneys: 0.89 full-time equivalent (FTE) for FY 91, 1.68 FTE for FY 92, 2.56 FTE for FY 93, and 5.57 FTE for FY 94.³⁷ (See the row labelled "contract attorneys" in table 1.4). On the other hand, the number of regular UADD investigators remained at four until it increased to five for FY 93 and FY 94.

Thus, the number of complaints filed steadily increased every year, showing a 63 percent increase between FY 85 (507 cases) and FY 92 (804 cases), but during this period, the number of investigators decreased from five to four. Contract attorneys were hired to compensate for the shortage of investigative staff. The total number of UADD investigators and contract attorneys in FY 92 was 5.68 FTE, which translates into a mere 14 percent increase in investigative staff over FY 85. Given such a staffing shortage, then, the cumulative backlog was bound to keep increasing. Starting from FY 93, the number of investigators increased considerably. Regular UADD investigators have increased from four to five, and in FY 94 there were more contract attorneys than regular UADD staff investigators. Compared to FY 85, the size of investigative staff more than doubled. This dramatic increase in staff coincides in timing with the public uproar about the inefficiency of the UADD.

Investigator Caseload

Since the EEOC "expects an investigator to close seven cases per month, including all methods of closure,"³⁸ using this standard, one could expect a full-time investigator to close between 77 to 84 cases a year.³⁹ As shown in table 1.4, the

³⁷ On every one of the 26 contract attorneys hired, information on starting and ending dates and the percentage of time worked was provided by the UADD, which was then counted in person months by the U.S. Commission on Civil Rights staff and then converted into full-time equivalent person years for each fiscal year. Figures so obtained were then verified by the UADD. Mr. Gordon Linnett, budget director, Utah Industrial Commission, participated in a three-way conference call verification of the UADD investigators with Anna Jensen, UADD director, and Ki-Taek Chun, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Mar. 28, 1995.

³⁸ Anthony DeDios statement, UADD Task Force minutes, Mar. 5, 1993, pp. 2-3.

³⁹ The figure of 77 cases per annum assumes 11 working months allowing for fringe benefits such as annual and medical leave, while the figure of 84 cases is based on 12 working months. Given the EEOC standard, it is of interest to note that the Minority Report of the Utah Anti-Discrimination Division Task Force, Findings and Recommendations, Sept. 2, 1993, p. 7 (hereafter cited as Minority Report), recommends "not more than 90 cases per year" as the caseload for the UADD;

number of cases closed per investigator varies from 71 (FY 85) to 112 (FY 92). With the exception of FY 85, the annual caseload per investigator exceeds the 84 cases per annum standard, and the median caseload for the 10-year period is 98.7. Since the productivity of UADD investigators exceeded the national standard, the backlog of complaints at the UADD cannot be attributed to low staff productivity.

According to a 1992 survey of nine western States including Utah, the median number of cases closed per investigator per year is 80.⁴⁰ The remaining eight States, except Utah, have much smaller numbers of cases per investigator and the median number of cases for these eight States is 73.9. Investigators at the UADD, thus, carried a workload much heavier than their colleagues' at comparable agencies in neighboring States.

The EEOC believes that "90 cases per investigator is too many to handle."⁴¹ By this EEOC criterion, in 5 of the past 10 years, the UADD investigators have been given "too many cases to handle." In 3 of these 10 years, deviation from the 90-case mark is less than 5 percent and may well be considered functionally equivalent. Viewed this way, then, in 8 of the past 10 years (1987-1994), UADD investigative staff have had to handle "too many" cases, a caseload that is clearly dysfunctional.

Several administrators expressed the common sentiment that overloading investigators results in quality deterioration. Ann MacIntyre, administrator of the Montana Human Rights Commission, with 15 years of experience, states:

To try to close more than six to eight cases per month is asking for trouble. If you overload them beyond the limit, they [the investigators] are likely to produce more no cause findings because it is much more time-consuming to document a cause finding. Overloading brings about a deterioration in quality. I try to limit case assignment to less

in contrast, the Governor's Task Force on the Utah Anti-Discrimination Division, Findings and Recommendations, July 27, 1993, p. 4 (hereafter cited as UADD Task Force Report), recommends "a caseload of 60 active cases, approximately six month's inventory," which translates into about 120 cases per year.

⁴⁰ The survey, conducted by Ann MacIntyre, director of the Montana Human Rights Commission, included nine western States or districts: Alaska, Colorado, Denver District, Idaho, Montana, Nebraska, Oregon, Utah, and Washington. Robyn Kaelin, UADD Task Force hearing, Feb. 5, 1993, attachment B. These data were also verified with Ann MacIntyre, telephone interview with Ki-Taek Chun, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Mar. 7, 1995.

⁴¹ Anthony DeDios statement, UADD Task Force minutes, Mar. 5, 1993, p. 4.

than eight cases per month, even if I may have to backlog incoming cases. Overloading produces counterproductive job stress and quality deterioration.⁴²

Jack Lang y Marquez, director of the Colorado Civil Rights Division, with 20 years experience with the agency, also expresses a similar management philosophy.⁴³ The per month caseload for these two agencies in FY 94 was eight for Montana and seven for Colorado.

Indeed, overworked investigators at the UADD are emerging as the main reason the division is coming under increasing criticism from people who have filed complaints and waited many months before their case is concluded.⁴⁴ The concern expressed most often to members of the UADD Task Force was that the caseload of investigators was too high.⁴⁵ Attorney Elizabeth Dunning, who has experience with the UADD dating back to 1982,⁴⁶ said the cutbacks in personnel and the increasing caseload for UADD investigators have damaged the system.⁴⁷

Processing Time

The UADD had never compiled statistics on processing time, making it impossible to compare with other counterpart agencies in other States.⁴⁸ In early 1993, Colleen Colton told the UADD Task Force that the UADD had conducted a survey to obtain comparable case processing data from other States. She said as soon as data were received and collected, they would be shared with the UADD Task

⁴² Ann MacIntyre, telephone interview with Ki-Taek Chun, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Mar. 7, 1995.

⁴³ Jack Lang y Marquez, director, Colorado Civil Rights Division, interview with Ki-Taek Chun, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Mar. 8, 1995.

⁴⁴ Roger Pusey, "High caseload called key problem in Anti-Discrimination Division," *Deseret News*, Nov. 25, 1993, p. D7.

⁴⁵ *Ibid.*

⁴⁶ UADD Task Force minutes, Feb. 19, 1993, p. 4.

⁴⁷ *Ibid.*

⁴⁸ UADD Task Force minutes, Jan. 8, 1993, p. 2.

Force.⁴⁹ A review of UADD Task Force minutes indicates that information was never supplied.

But figures obtained from the UADD in 1995 showed that during the period between FY 87 and FY 91 when the investigative staff remained more or less unchanged, the average processing time increased along with the increase in cumulative backlog, exceeding the 300-day mark in FY 91 (see the row labelled "average processing time" in table 1.4). As investigative staff expanded substantially from FY 92, the average processing time shows a parallel decrease. When the increase in staff in FY 94 resulted in closing more complaints than received during the year, there was a decrease in cumulative backlog for the first time since FY 87.

Approximately 20 percent of all complaints⁵⁰ end in the "administrative resolution" category,⁵¹ which are resolved in a relatively short period of time. Therefore, a sizeable number of complaints must have taken much longer than the average processing time. Many individuals who have gone through the UADD complaint system stated that their cases have taken as long as 2 to 3 years (see chapter 3 for further details). These testimonies are credible considering that the average processing time has remained between 200 to 300 days for the past 6 years (1989-1994) as shown in table 1.4. Along with the increase in backlog, the processing time shows a parallel increase. The average processing time was 91 days in FY 86, but by FY 91 it exceeded the 300-day mark. From FY 92, however, the processing time begins to decrease somewhat: 278 in FY 92, 235 in FY 93, and 232 in FY 94. In the past 3 years, both the number of cases filed and the cumulative backlog increased, but complaints were brought to a closure in a shorter period of time, still over the 200-day mark, largely due to a drastic increase in investigative staff.

⁴⁹ Ibid.

⁵⁰ 19.7 percent in FY 91; 21.1 percent in FY 92; 20.1 percent in FY 93; and 28.8 percent in FY 94. Anna R. Jensen, director of the UADD, telephone interview with Ki-Taek Chun, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, May 4, 1995.

⁵¹ Included in this category of outcomes are issuance of right-to-sue letter at complainant's request, failure to locate the complainant, failure of the complainant to respond, failure of the complainant to cooperate, withdrawal with no benefit by the complainant, and no jurisdiction. None of these cases have proceeded to an official investigation stage.

Budget

The UADD budget comes from two sources, the State general funds through the Industrial Commission and the EEOC reimbursement for FEPA agreement (see the row labelled "Budget" in table 1.4). In the past 10 years, the UADD operation has been supported more by Federal funds than by State funds except in FY 91. For example, in FY 87, the first year fiscal data are available, 75 percent of the UADD budget came from Federal funds with the remaining 25 percent from State sources and in FY 94 the Federal contribution was 55 percent.

Although the State contribution to the UADD's budget as allocated through the Industrial Commission, has been increasing every year in dollar amount (i.e. \$62,500 in FY 87 to \$272,100 in FY 94), expressed as an average of the Industrial Commission's total budget, for the years studied, the State contribution seems to have plateaued at about the four percent level. Thus, in spite of the drastic increase in the number of complaints Utah citizens have filed with the UADD, the Industrial Commission has not allocated more than four percent of its total budget to employment discrimination. Given the increasing backlog and citizen complaints, this earmarking of the UADD budget needs explanation.

The Industrial Commission has yet to offer a persuasive rationale for its budget allocation. Continuing absence of such an effort does not help diffuse the allegation that the Industrial Commission lacks commitment to protecting those citizens who are allegedly discriminated against in the workplace.⁵²

Quality of Investigations

Onsite investigations are an integral part of a thorough investigation and critical to information verification. At a meeting of the UADD Task Force, one UADD investigator stated that although onsite investigations would be useful, it was difficult to conduct them because of the caseload and time limitations of the investigators and

⁵² See chaps. 2 and 3 for further discussion of the allegations that the Industrial Commission is insensitive and unconcerned with the plight of the discriminated and that it works for the employers.

that onsite investigations were left to the discretion of individual investigators.⁵³ Concerning the UADD policy on this matter, Colleen Colton did not answer if onsite investigations were mandatory, but merely maintained that "the position of the Commission is that each investigator should have the best information available in each case."⁵⁴

It seems that onsite investigations were a rarity, if there ever were any. One member of the UADD Task Force who went through the UADD system commented that while her case was with the UADD, there was no onsite investigation or interviews with suggested witnesses and the investigation consisted of reviewing submitted documents without checking their veracity.⁵⁵

Given the dysfunctional level of caseload (see an earlier section of this chapter, "investigator caseload") and the absence of mandatory investigative guidelines, it would not be surprising if the quality of investigations suffered adversely. As discussed in chapter 3, such had been the case.

Mediation

The Utah Anti-Discrimination Act requires that the UADD provide mediation and conciliation. But many people with discrimination claims say they were not given an opportunity to negotiate with their employer.⁵⁶ The statute says:

. . . the commission shall promptly assign an investigator to attempt a settlement between the parties by conference, conciliation, or persuasion. If no settlement is reached, the investigator shall make a prompt impartial investigation of all allegations made in the request for agency action.⁵⁷

⁵³ UADD Task Force minutes, Jan. 22, 1993, p. 3.

⁵⁴ Ibid.

⁵⁵ Lee Ann Schlager. Ibid., p. 2.

⁵⁶ Joan O'Brien. "Critics blast review of anti-bias agency," *Salt Lake Tribune*, Apr. 25, 1993, p. E1.

⁵⁷ UTAH CODE ANN. § 34-35-7.1(3)(a)(b) (Supp. 1996).

According to the statute, investigators are to make attempts at settlement first. When their efforts are unsuccessful, they are to report to the UADD director to proceed with the investigation.⁵⁸

Notwithstanding these requirements, such remedies as mediation and reconciliation had been denied to the complainants. For several years individuals who have gone through the UADD system have complained that at no point during the time that their claim was being investigated were they given the opportunity for mediation or conciliation. For example, Rebecca Atwater filed a complaint and received a cause finding. Not only was she not given an opportunity for mediation during the investigation, but she was denied such an opportunity even when she asked for it.⁵⁹

Questioned as to why mediation had not been utilized, Colleen Colton said that mediation and conciliation had been tried in the past, but with the increasing number of cases it was dropped.⁶⁰ Anna Jensen, then-director of the UADD, was quoted as saying:

When there were few cases we did that all the time . . . but we have gradually gotten away from that. Mediation is time-consuming . . . and the division has only six investigators handling an average of 60 new cases a month.⁶¹

Faced with numerous complaints, urging from the public, and questions from the UADD Task Force, the UADD in April 1993 announced a "renewed commitment" to mediation and conciliation, promising to schedule a resolution conference between the employer and worker immediately after a claim is filed.⁶² (See chapter 4 for further discussion.)

Cause Findings

UADD's critics alleged that the agency was issuing too few cause findings to the detriment of victims of workplace discrimination and that such behavior was another

⁵⁸ Ibid.. (4)(a).

⁵⁹ Joan O'Brien, "Groups criticize anti-bias agency," *Salt Lake Tribune*, Apr. 3, 1993, p. B8.

⁶⁰ Roger Pusey, "Anti-bias commission making improvements," *Deseret News*, Mar. 31, 1993, p. D7.

⁶¹ Joan O'Brien, "Groups criticize anti-bias agency," *Salt Lake Tribune*, Apr. 3, 1993, p. B8.

⁶² Joan O'Brien, "Critics blast review of anti-bias agency," *Salt Lake Tribune*, Apr. 25, 1993, p. E1.

reflection of the agency's not acting as a guardian of the workers, but as a friend of employers.⁶³ Releasing pertinent statistics would have addressed the allegation, thereby restoring the image of the UADD as a responsive agency.

Instead of releasing statistics, however, at a meeting with the UADD Task Force in January 1993, Colleen Colton stated that the UADD would be transferring cases to the EEOC for review and enforcement of its cause findings⁶⁴ and that the transfer would terminate the case for State purposes with no appeal right to the Industrial Commission or the State court. In February 1993, however, a staff person of the Industrial Commission quietly corrected Colleen Colton's statement, saying that since the right of appeal is provided by the statute, the UADD could not abridge it arbitrarily by transferring a case to the EEOC when the UADD failed reconciliation.⁶⁵ This episode illustrates how the Industrial Commission and UADD had undermined their own credibility.

More pertinent to the statistics on cause findings, at a December 1993 factfinding meeting of the Utah Advisory Committee to the U.S. Commission on Civil Rights, Colleen Colton stated:

Recently, because of some confusion with statistics released, the UADD received a visit from the [EEOC] district office and . . . they reviewed all of UADD's determinations, all of UADD's cause findings for a period of about 1½ years.⁶⁶

Since all written determinations had been reviewed and they had to be compiled first prior to reviewing, it would have been a relatively simple tabulation to count the total number of determinations and numbers of cause and no-cause findings. Instead of providing such information, she merely noted that the EEOC official had many

⁶³ Joan O'Brien, "Groups criticize anti-bias agency." *Salt Lake Tribune*. Apr. 3, 1993. p. B8.

⁶⁴ UADD Task Force minutes. Jan. 22, 1993, p. 5.

⁶⁵ UADD Task Force minutes. Feb. 19, 1993, p. 1.

⁶⁶ *Transcript*. vol. 2. p. 76. Since the factfinding meeting was held in early December 1993, the period of time Ms. Colton was referring to dated back to mid-1992.

favorable comments that UADD's determinations were exemplary and were "probably the best he [the EEOC official] had ever seen in almost 30 years with the agency."⁶⁷

Colleen Colton, thus, did not provide the statistics at the factfinding meeting, nor in the ensuing days after the meeting. According to the annual resolution reports compiled by the EEOC,⁶⁸ in calendar years (CY) 1990 and 1991 there were no cause findings. In CY 1992, there were 2 cause findings out of 567 resolutions (0.4 percent) and 29 out of 730 cases were cause findings in CY 1993 (4.0 percent).⁶⁹ Until the 1993 public uproar about the UADD, there were hardly any cause findings. It was only in CY 1993 that there was any sizeable number of cause finding cases. Even in CY 1993, only 4 out of 100 complaints were found to have merit. Considering the adverse impact of case overload and alleged poor investigation of complaints, it is conceivable that more complaints may have turned out to have merit had they been investigated more thoroughly.

Enforcement

For many years Utah citizens have complained that the UADD does not enforce its determinations and has never enforced a final order in the 30 years the agency has had authority to do so. Validating citizen concerns, a local attorney who has represented several plaintiffs in discrimination cases said Utah's law is toothless for several reasons. He explained:

Even if the State finds that a company is guilty of discrimination, there is nothing in the statute that requires the State to enforce anything The company can just keep going about its business and, often, it fires the complaining employee with no consequences at all.⁷⁰

Kenneth Frew, who filed a discrimination complaint in 1991 and received a cause finding in 1992, said:

⁶⁷ Ibid.

⁶⁸ U.S. Equal Employment Opportunity Commission (EEOC), "Resolution Reports, 1990, 1991, 1992, 1993," computer printouts dated Apr. 3, 1995.

⁶⁹ Ibid.

⁷⁰ Paul Rolly, "State little help to victims of workplace bias," *Salt Lake Tribune*, Oct. 5, 1992, p. B1.

I have been involved with the UADD system since June 1991 . . . until November 1994. I was forced to go to Federal [court] because the State did not enforce their determination[s]. I was told by . . . several . . . investigators that "we can give a cause finding, but there is no law that gives us the power to enforce the final order."⁷¹

Although numerous requests over the years have been made to the UADD to produce specific cases that have been enforced, the UADD has never provided any statistics. Testimonies from additional claimants whose cause findings were not enforced (see chapter 3) place the UADD even in a more questionable light. Pushed for data at the December 1993 meeting, Colleen Colton said:

As I attempted to determine what needed to be done in the area of enforcement, if we needed law changes, in reviewing that law, I looked at all of the cause findings for the past year and a half . . . those cases that were completely finally adjudicated--were no longer under appeal and had not been resolved by some means of conciliation--we identified three cases that emerged that could have been or should have been litigated After the final determination and orders were written, three of those could benefit from litigation, and they are currently in that pipeline at the present time with the concurrence of the Attorney General's Office.⁷²

Colleen Colton's data contradicts the 29 cause findings reported by the EEOC for Utah for CY 1993.⁷³ Commissioner Colton's data are further contradicted by Assistant Attorney General Thom Roberts. In March 1994, he announced that a local employer was the first in the State to bear the brunt of a new partnership between the UADD and the attorney general's office,⁷⁴ adding that the case was the only one that had been referred to his office by the Industrial Commission thus far.⁷⁵

⁷¹ Kenneth Frew, written statement, dated June 6, 1995, given to the Utah Advisory Committee to the U.S. Commission on Civil Rights at its meeting, June 6, 1995.

⁷² *Transcript*, vol. 2, p. 80. The period Colleen Colton referred to is approximately between June 1992 through November 1993.

⁷³ U.S. Equal Employment Opportunity Commission (EEOC), "Resolution Reports, 1993," computer printouts dated Apr. 3, 1995.

⁷⁴ Marina O'Neill, "A.G., Anti-Discrimination team up," *Ogden Standard-Examiner*, Mar. 31, 1994, p. C9. Martec Systems was the first employer required and forced to comply with an "order" issued by the UADD.

⁷⁵ *Ibid.*

2. Citizen Concerns and Public Scrutiny of the UADD

In 1991 and 1992, the Utah Anti-Discrimination Division (UADD) came under criticism from diverse sources for its alleged insensitivity, unresponsiveness, and inefficiency. Community organizations and individuals who had filed complaints also voiced their concerns about the UADD. The print media revealed how the victims of workplace discrimination had been adversely affected by the "callous inaction" of the UADD and how, in some cases, the UADD failed to protect victims from employer retaliation. Organized labor also voiced its strong concern over the UADD, pointing out specific issues of inordinate backlog, unreasonable processing time, questionable case closures, poor investigations, and no judicial enforcement.¹ The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) even asked for a full investigation of UADD practices and case closures.²

In response to these mounting concerns, in December 1992, then-Governor Norman H. Bangerter appointed a task force to review the UADD. This committee, known as the Utah Anti-Discrimination Division Task Force (UADD Task Force), released its report on July 27, 1993. In January 1993, the transition team of newly elected Governor Michael O. Leavitt prepared a special report on the UADD. In December 1993, the Utah Advisory Committee to the U.S. Commission on Civil Rights held its factfinding meeting focusing on the UADD controversy.

To help understand the controversy surrounding the UADD and place it in perspective, this chapter provides highlights of citizen concerns about the UADD up to 1993, the UADD Task Force, and Governor Leavitt's transition team. Major allegations about the UADD and pertinent facts and the results of various investigations are presented in chapter 3.

¹ Utah State AFL-CIO news release. "Request for full investigation civil rights enforcement in the State of Utah," undated. Other documentation obtained by the Rocky Mountain Regional Office of the U.S. Commission on Civil Rights indicates that this news release was prepared in 1992. Also, the release was sent to Governor Norman H. Bangerter, whose term ended on Dec. 31, 1992.

² Ibid.

Citizen Complaints

In the late 1980s the Industrial Commission was alerted that the UADD's inefficiency was causing great stress and pain to the victims of employment discrimination. For example, at a 1988 hearing of the Industrial Commission, one victim, who had to wait for over 3 years for a cause finding, testified:

The investigation has been long and traumatic I am not alone. Over the past three and a half years, I have spoken with approximately 100 women who have experienced or are currently experiencing discrimination in the workplace The length of the investigation weakens the case and adds tremendous stress and trauma to the victim The law states that the company cannot retaliate against the charging party or her witnesses. Neither myself nor my witnesses were protected. My witnesses claim that they were intimidated and one was even fired.³

It was not until the early 1990s, however, that citizen concerns about the UADD came to the forefront of public attention. In late 1991, Representative Frank Pignanelli, member of the Utah House of Representatives, received complaints from citizens who felt they had been "cheated and abused" by the State and the system that was supposed to help them.⁴ These citizens pointed out that charges filed with the UADD had dragged on too long, and that this had caused them not only personal damage but also harm to their careers and their families.⁵ The calls and letters received by Representative Pignanelli's office, were not only from advocacy groups but, more important, from individuals who did not know each other, and Representative Pignanelli came to the conclusion that there was indeed a problem with the UADD.⁶

In 1992 citizen concerns and frustration with the UADD continued to grow. Nine community and advocacy organizations formed a working coalition to voice their collective concern. The coalition included the Utah Women's Lobby, Utah Coalition

³ Julie Davies, testimony before a Industrial Commission of Utah hearing on pregnancy discrimination, Salt Lake City, Utah, October 1988.

⁴ Frank Pignanelli, transcript of the factfinding meeting conducted by the Utah Advisory Committee to the U.S. Commission on Civil Rights, Salt Lake City, Utah, Dec. 9-10, 1993, vol. 1, p. 23 (hereafter cited as *Transcript*).

⁵ *Ibid.*

⁶ *Ibid.*, pp. 23-24.

de La Raza, Disabled Rights Action Committee, Salt Lake branch of the National Association for the Advancement of Colored People (NAACP), Utah State/AFL-CIO, and others, constituting a diverse cross section of Utah citizens. They requested that the U.S. Equal Employment Opportunity Commission (EEOC) investigate the operation of the UADD,⁷ and wrote letters of concern to the U.S. Department of Justice, U.S. Commission on Civil Rights, U.S. attorney/Salt Lake office, Utah Legislature, Utah attorney general's office, and the Governor.⁸ They pressed the Governor's office to meet with their representatives. Alerted to the festering problems at the UADD, the National Organization for Women also took an active interest.⁹

The year 1992 witnessed outbursts of citizen anger and frustration about the UADD's alleged deficiencies. To cite illustrative examples:

- 1) In early 1992, U.S. Senator Orrin G. Hatch (R-UT) was also alerted to the problem.¹⁰ In requesting an appointment with U.S. Senator Hatch to discuss her concerns about the UADD, a concerned citizen, Robyn Kaelin, said, "After working through the UADD and the EEOC to find a realistic solution to employment problems I faced, I realize the system does not work as originally intended."¹¹
- 2) On February 1, 1992, Utah citizen Lila Johannessen, whose case had been in the UADD system since 1987, contacted U.S. Senator Hatch begging him for help. She wrote:

I filed [a] discrimination [complaint] in 1987, it's taken almost five years [for the UADD] to investigate my case and make a determination. I [have] spent many hours filling out papers at the discrimination board, . . . only to have my case reassigned to someone else, and start the process over. In desperation, I begged the discrimination board to investigate . . . I was told to hire a lawyer, which surprised me, yet I did . . . my hearing date has been postponed

⁷ NAACP/Salt Lake branch, letter to the U.S. Equal Employment Opportunity Commission, Sept. 25, 1992.

⁸ Utah Coalition of La Raza, letter to the U.S. Department of Justice, Sept. 17, 1992; Disabled Rights Action Committee, letter to the U.S. Department of Justice, Oct. 8, 1992; and Coalition for Civil Rights Enforcement in Utah, letter to the Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Oct. 15, 1992.

⁹ Robyn Kaelin, letter to the National Organization for Women (NOW), June 16, 1992 (hereafter cited as Robyn Kaelin letter to NOW, June 16, 1992).

¹⁰ Robyn Kaelin, letter to U.S. Senator Orrin G. Hatch, Jan. 27, 1992.

¹¹ Robyn Kaelin, letter to U.S. Senator Orrin G. Hatch, Feb. 10, 1992.

for the fifth time I need answers I've lost more than my job, I've lost confidence in myself and my own abilities to help myself Please help me.¹²

- 3) On February 26, 1992, another concerned citizen wrote to the Industrial Commission and the office of Senator Hatch, voicing concerns about the UADD, its system, and the status of cases investigated, closed, and settled. In addition to enforcing UADD orders and adopting mediation as a step to solve disputes before they escalate to the lawsuit stage, this letter suggested establishing a task force to conduct an overall assessment of the UADD.¹³
- 4) On September 1, 1992, at the Women's Grand Council of the Governor's Commission for Women and Families, Julie Davies, who had previously filed a discrimination complaint with the UADD, described her painful experience of dealing with the agency and pleaded with participants. Ms. Davies, as a representative of the Utah Women's Lobby, a statewide women's organization, called upon the council to join the Women's Lobby in studying ways of creating a more effective system of enforcement so that citizens' civil rights are adequately protected. At this meeting, representatives wanted to find a better, less costly, and more expedient way of handling employment discrimination.¹⁴
- 5) On September 15, 1992, representatives of community organizations requested a full investigation of the UADD. They declared, "We believe that the UADD does not have the power, the resources, nor the incentive to fulfill its purpose and enforce civil rights laws on behalf of individual workers, thereby, warranting a full investigation."¹⁵
- 6) On October 15, 1992, community representatives wrote the Rocky Mountain Regional Office of the U.S. Commission on Civil Rights with concerns about the number of "no cause" findings, the speed with which these determinations

¹² Lila Johannessen. letter to U.S. Senator Orrin G. Hatch, Feb. 1, 1992.

¹³ Robyn Kaelin. letter to Stephen M. Hadley, chairman, Industrial Commission of Utah, Feb. 26, 1992; and letter to Ronald Madsen, office of U.S. Senator Orrin G. Hatch, Feb. 26, 1992.

¹⁴ Julie Davies, issue paper and statement of Utah Women's Lobby, Sept. 1, 1992. This meeting was attended by most of the women's organizations in the State and by a number of gubernatorial candidates. Ms. Davies' issue paper and speech were approved by the Women's Grand Council of the Governor's Commission for Women and Families prior to her making the presentation and was distributed to all meeting participants. Utah Women's Lobby, Civil Rights Act Enforcement, September 1992.

¹⁵ Utah Coalition for Civil Rights Enforcement in Utah (coalition of local community organizations), statement to Governor Norman H. Bangert, U.S. Department of Justice/Regional Office, Utah Legislature, U.S. Attorney/Salt Lake office, and Utah Attorney General's Office, Sept. 15, 1992. A copy of the statement is on file at the Rocky Mountain Regional Office of the U.S. Commission on Civil Rights.

were made, the length of time it took to process complaints, and the UADD's lack of enforcement of civil rights laws.¹⁶

- 7) On October 19, 1992, a concerned citizen lobbyist, Julie Davies, wrote to Governor Bangerter pleading for him to take some action before his term of office was up. Claiming she suffered because of the agency's inability or unwillingness to effectively deal with an "obvious violation" of her civil rights,¹⁷ she stated:

The [Industrial] Commission and [the UADD] have responded poorly to the concerns voiced by me and by others. The procedures used by this agency are wasting our tax dollars and actually adding injury to Utah employees, [and their] families.¹⁸

- 8) In October 1992, at the request of concerned citizens, a meeting was held with the Governor, which included, among others, two commissioners of the Industrial Commission, two citizen representatives, and a Governor's aide. At this meeting, several issues surrounding the UADD were discussed, emphasizing the fact that many Utah citizens wanted some action taken to improve the situation. The formation of a neutral task force to investigate the procedures at the UADD was suggested, and it was agreed that the Governor's office would take the lead in forming and announcing such a task force. Against this backdrop, it is important to note two facts here. First, this meeting was initiated by concerned citizens, not by the Industrial Commission. Second, it took place prior to the Industrial Commission's letter to the Governor, in which the UADD Task Force was mentioned.¹⁹
- 9) In December 1992, Julie Davies wrote to Lt. Governor-Elect Olene Walker,²⁰ pointing out numerous problems saddling the UADD and the agency's lack of commitment to enforce the laws. Ms. Davies recommended that the incoming administration call for and accept the resignation of the

¹⁶ Coalition for Civil Rights Enforcement in Utah, letter to Arthur Fletcher, Chairman, U.S. Commission on Civil Rights, Oct. 15, 1992.

¹⁷ Julie Davies, letter to Governor Norman H. Bangerter, Sept. 19, 1992.

¹⁸ Ibid.

¹⁹ Robyn Kaelin, letter to Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Mar. 1, 1995, pp. 3-4 (hereafter cited as Robyn Kaelin letter to Malee V. Craft, Mar. 1, 1995).

²⁰ Julie Davies, letter to Lt. Governor-Elect Olene Walker, Dec. 4, 1992. (This was a followup letter to a meeting held on Dec. 2, 1992, with Lt. Governor-Elect Walker, Julie Davies, and Robyn Kaelin.)

members of the Industrial Commission.²¹ She also warned the incoming administration of a possible lawsuit against the State because of the alleged inefficiency and malpractice at the UADD: "They are fed up and feel that the quickest and surest avenue for change is this lawsuit."²²

In addition, the UADD itself received calls from complainants who felt they were victims of the system.²³ The UADD acknowledged that there were problems in those days, "As we looked at those issues, there were many problems that I was hearing about from many . . . sources. Many of these individuals had legitimate complaints."²⁴

A significant number of complainants of workplace discrimination had to suffer for a long time without relief. Sometimes they were even harmed by the retaliatory actions of their employers, all due to the alleged inefficiency and neglect of the UADD. Complainants suffered further because the investigations conducted by the UADD, allegedly, were often incomplete, not thorough, or even biased. These sufferings and problems were persuasively portrayed in an October 1992 newspaper article by Paul Rolly in the *Salt Lake Tribune*, "State little help to victims of workplace bias."²⁵

By late 1992, there seemed to be a consensus that the UADD indeed had problems and it should be closely investigated, thereby creating a political climate that almost forced the State government to take action.

The controversy over the UADD and employment discrimination continued in 1993. In early 1993, a comprehensive report by Rich Tuttle stated that because the

²¹ Ibid., pp. 1-3. With regard to Ms. Davies asking for the resignation of the commissioners. Lt. Governor-Elect Olene Walker indicated that she responded to Ms. Davies' suggestion and told her that members of the Industrial Commission would be evaluated as would all heads of departments at the start of the new administration. (Governor Leavitt and Lt. Governor Walker's term as heads of state began January 1993.) Lt. Governor Walker also stated that she had discussed with Governor Leavitt the problems and concerns enumerated by Julie Davies. Lt. Governor Olene Walker, written response to draft report, July 8, 1996.

²² Ibid., pp. 1-2.

²³ Ibid.

²⁴ Colleen Colton, commissioner, Industrial Commission of Utah, *Transcript*, vol. 2, p. 65.

²⁵ Paul Rolly, "State little help to victims of workplace bias," *Salt Lake Tribune*, Oct. 5, 1992, p. B1.

laws of Utah have not kept pace with Federal regulations, employees in Utah have fewer legal remedies when they suffer discrimination.²⁶ The report also claimed that many experts in employment discrimination believe that regulators in the Utah Industrial Commission are overly influenced by business interests, sustaining an implicit belief that most employee claims against their employers are fraudulent. According to this report, regulators in Utah have established a legal system that favors employers at the expense of employees, sending a subtle message to employers that discrimination claims are a low priority that carry few, if any, penalties.²⁷ Concerning this pro-employer, antiemployee sentiment, the report quoted Bruce Wilson, practicing attorney, as stating:

The Utah Industrial Commission offers extremely weak protection for employees. The legal system is so consistently biased against employees that, in my opinion, it has to be planned. [I] witnessed dozens of incidents where employers would feed slanted data to commissioners to support the belief that most claims by employees against their employers were fraudulent. State programs designed to entice businesses to locate in Utah have caused legislators and regulators to establish a particularly "friendly" system for companies.²⁸

The UADD Task Force

In response to widespread and mounting public criticism of the UADD, Governor Norman H. Bangerter, with the concurrence of Governor-Elect Michael O. Leavitt, appointed an eight-member citizen task force in November 1992 to "investigate and review the practices and procedures of the UADD."²⁹ It held 10 public meetings.

²⁶ Rich Tuttle. "Herculean harassment. female employees complain of discrimination." *Private Eye Weekly*, Mar. 3, 1993. p. 8

²⁷ Ibid.

²⁸ Ibid. Attorney Wilson's has over 13 years' experience representing injured workers seeking relief through the Worker's Compensation Division of the Industrial Commission. He also represented a complainant who filed a complaint with the UADD. His client received a cause finding and the employer was requested to comply with specific demands of the order, however, the employer refused to comply and the order was not enforced by the Industrial Commission.

²⁹ The Governor's Task Force on the Utah Anti-Discrimination Division, Findings and Recommendations, July 27, 1993. p. 1 (hereafter cited as UADD Task Force Report). More specifically, it was charged to: 1. ascertain whether a time lag problem exists, 2. review the investigative procedures used by the division, 3. examine current law with respect to the legal representation of claimants, 4. determine the status of compliance with State and Federal law, and 5. make recommendations.

Two of these meetings were dedicated solely to receiving comments from the public;³⁰ a major portion of a third meeting was devoted to hearing comments from local civil rights attorneys.³¹ Based on the presentations made at these meetings, written submissions, and review of other materials, the UADD Task Force, in July 1993, issued its report containing 11 findings and 4 recommendations.³² The Task Force Report was approved by the Task Force with one person dissenting. Accompanying this UADD Task Force Report, however, was a 23-page Minority Report of the UADD Task Force that casts specific issues in a radically different light.³³ (Specifics of these differences between the UADD Task Force Report and its Minority Report are discussed in detail in chapter 3.)

Information contained in the Minority Report of the UADD Task Force raises questions about the process by which the UADD Task Force Report was produced, thereby making the integrity of the report suspect. In addition, there were some unusual circumstances surrounding the appointment of the UADD Task Force, particularly in reference to the steps leading to the UADD Task Force appointment and its composition. An examination of these issues is provided in the following pages to help the reader comprehend the layered nature of the UADD controversy.

Appointment of the UADD Task Force

As the preceding section shows, the problems and concerns about the UADD had been brought to the attention of the Utah Industrial Commission as early as 1988.³⁴

³⁰ These meetings (Mar. 19, 1993 and Apr. 2, 1993) were advertised in the press and the public was invited to present information either orally at the meeting or by mail. The UADD Task Force received comments from a variety of sources, including the representatives of the UADD, the Coalition for Civil Rights Enforcement in Utah, the Phoenix Office of the U.S. Equal Employment Opportunity Commission, practicing attorneys with first hand experience with the UADD, and those who had filed complaints with the UADD.

³¹ Utah Anti-Discrimination Division Task Force meeting minutes, Feb. 19, 1993, pp. 2-9 (hereafter cited as UADD Task Force minutes).

³² UADD Task Force Report, pp. 2-14.

³³ Kathleen C. Mason, Minority Report of the Utah Anti-Discrimination Division Task Force, Findings and Recommendations, Sept. 2, 1993, p. 3 (hereafter cited as Minority Report).

³⁴ Julie Davies, testimony before a Industrial Commission of Utah hearing on pregnancy discrimination, Salt Lake City, Utah, October 1988.

By that time, the idea of an independent investigation of the UADD had already been discussed among advocacy organizations³⁵ and mentioned to members of the Utah congressional delegation.³⁶

In spite of these developments, the Utah Industrial Commission claims that instead of being pressured, it "initiated the UADD Task Force."³⁷ In a November 1992 letter to the Governor, the Industrial Commission suggested that "a blue-ribbon committee be appointed . . . to review the process of handling anti-discrimination cases."³⁸ In support of such a request the Industrial Commission stated:

Questions have been raised by individuals who have filed discrimination charges in the past alleging that the system is unresponsive to the claims of the classes protected by the [Utah] Anti-Discrimination Act. It is our opinion that the Division is doing an excellent job; however, we realize that there is always room for improvement.³⁹

Colleen S. Colton, a member of the Industrial Commission, provided further explanation: "The Industrial Commission called attention to the allegations being voiced by a few individuals and felt that a task force response would be more credible than the [UADD] and the [Industrial] Commission defending the allegations."⁴⁰

Thus, the Industrial Commission claims the credit for having taken the initiative in proposing the UADD Task Force, when in fact the public pressure was so overwhelming as to leave no choice for the commission. It also maintains that the allegations, probably made by a few individuals, are not serious. Critics of the UADD find this posture typical of the Industrial Commission. Those critics said it reflected the Industrial Commission's lack of candor bordering on deception, its insensitivity

³⁵ Robyn Kaelin letter to NOW, June 16, 1992.

³⁶ Julie Davies, letter to U.S. Senator Orrin G. Hatch, Sept. 19, 1992.

³⁷ Colleen S. Colton, commissioner, Industrial Commission of Utah, letter to Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Aug. 2, 1993, p. 2 (hereafter cited as Colleen S. Colton letter to Malee V. Craft, Aug. 2, 1993).

³⁸ Stephen M. Hadley, Thomas R. Carlson, and Colleen S. Colton, commissioners of the Industrial Commission, letter to Governor Norman H. Bangert, Nov. 10, 1992, p. 1.

³⁹ Ibid.

⁴⁰ Colleen S. Colton letter to Malee V. Craft, Aug. 2, 1993.

about the victims' concerns and needs, and its cavalier attitude towards the allegations directed against the UADD.

Even a member of the UADD Task Force, Kathleen Mason, contradicted the claim made by the Industrial Commission. She stated:

[There] was a great deal of interest at that point by the press. There were a number of articles in the newspaper, [on] radio, [and] television. People had gotten to the point of frustration, feeling like there was nowhere to go, and also there were a number of groups contacting the Governor's office and other entities. So I believe that is why the response [of the UADD Task Force] [came about] at this time.⁴¹

When queried about the assertion that the Industrial Commission initiated the UADD Task Force, Ms. Mason quipped, "It's like the old saying that if you're being run out of town, get in front and lead the parade."⁴²

Composition of the UADD Task Force

At the October 1992 meeting described above (see footnote 19), Governor Bangerter promised that the two citizen delegates present at the meeting, Julie Davies and Robyn Kaelin, would be appointed to the UADD Task Force and that the UADD Task Force would be set up within 1 month.⁴³

Just before the Governor's announcement of the UADD Task Force, however, these two persons found out that they were not going to be appointed. Surprised and upset, they requested a meeting with the Governor and instead talked with newly elected Lieutenant Governor Olene Walker in December 1992. At that meeting, according to Robyn Kaelin and Julie Davies, Ms. Walker stated that the two previously-agreed-upon nominees could not be appointed because of opposition from a member of the Industrial Commission, Colleen S. Colton.⁴⁴ Because of the

⁴¹ Kathleen Mason, *Transcript*, vol. 1, p. 235.

⁴² *Ibid.*, p. 237.

⁴³ Robyn Kaelin letter to Malec V. Craft, Mar. 1, 1995, p. 4.

⁴⁴ *Ibid.*

imminence of the expected announcement, these unsuccessful candidates agreed to a compromise candidate, Kathleen Mason.⁴⁵

The UADD Task Force consisted of eight individuals,⁴⁶ who included three attorneys, a State representative, a judge, a representative from private industry, a community representative, and a citizen who had filed a complaint and gone through the UADD process.⁴⁷ Six of these eight members, appointed to investigate the UADD of the Industrial Commission, were from the list of nine individuals recommended by the Industrial Commission.⁴⁸

At the factfinding meeting of the Utah Advisory Committee to the U.S. Commission on Civil Rights, one member of the UADD Task Force stated that soon after the UADD Task Force was formed, there was one vacancy for the seat reserved for someone who had gone through complaint processing with the UADD. For this vacancy the Utah Women's Lobby recommended "several people who had cases, who had cause findings, who had litigated cases and would be supposed winners in the system, but they were rejected by the [Industrial] Commission because it was felt that they were too biased against the UADD."⁴⁹

According to UADD critics, these developments demonstrate that the Industrial Commission screened out critics of the UADD by maneuvering the appointment

⁴⁵ Lt. Governor Walker did not recall making the statement naming Colleen Colton as the person responsible for blocking Davies' and Kaelin's appointment. She wrote "as I recall the conversation, I stated that because of the controversy surrounding Julie Davies and Robyn Kaelin, that an individual less controversial should be selected. Kathleen Mason was agreed on as a logical individual." Lt. Governor Olene Walker, written comments to Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, in response to the Utah Advisory Committee to the U.S. Commission on Civil Rights draft report, July 8, 1996.

⁴⁶ UADD Task Force minutes, Jan. 8, 1993, p. 1.

⁴⁷ Lee Ann Schlager was named to the UADD Task Force as an individual who had filed a complaint with the UADD and had personal knowledge of the process. According to Ms. Schlager, she was told by a UADD investigator that he put forth her name to Commissioner Colton when asked for a recommendation to serve on the UADD Task Force. Ms. Schlager had interfaced with UADD staff at the same degree as other complainants in the system, that is to say as much as the UADD allowed. Ms. Schlager obtained legal counsel and worked out a settlement with her employer without a UADD investigation and little more than administrative involvement. Lee Ann Schlager, telephone interview with Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Mar. 24, 1995.

⁴⁸ Industrial Commission, letter to Governor Norman H. Bangert, Nov. 10, 1992: one of the nine individuals was not available for appointment, and another person was appointed by the director of the UADD.

⁴⁹ Kathleen Mason, *Transcript*, vol. 1, pp. 221-22.

process of UADD Task Force members, seriously damaging the credibility of the UADD Task Force.

Allegations that the UADD Task Force Report was Produced by a Subverted Process

According to the Minority Report, the staff person assigned to assist the UADD Task Force was an employee designated by the Industrial Commission, in spite of the fact that this staffing arrangement was objected to by some members of the UADD Task Force and the public as a potential conflict of interest that could taint the objectivity of the UADD Task Force.⁵⁰

This staff person wrote the first draft of the UADD Task Force Report and distributed copies to UADD Task Force members for comments. Recommendations and comments were submitted to the staff person who incorporated input from UADD Task Force members, and the revised, second draft was then distributed to UADD Task Force members prior to the next meeting. The staff person, however, "chose not to include these recommendations [now contained in the Minority Report] in the second draft distributed to the UADD Task Force and the public."⁵¹ That is, either on his own or under direction from someone else, this staff person unilaterally decided what inputs and recommendations were to be incorporated into the second draft. Therefore, the UADD Task Force and the general public were blindfolded to the discrepancies between the staff-revised draft and what had become the Minority Report. The substantive merits of the Minority Report were never discussed by either the UADD Task Force or the general public. Thus, critics argue that a serious public disservice was committed by depriving the UADD Task Force of an opportunity to benefit from considering divergent viewpoints.⁵² The UADD Task Force Report makes no mention of this procedural irregularity, while the Minority Report claims that

⁵⁰ Minority Report, p. 1.

⁵¹ Ibid., p. 3.

⁵² The minutes of the meeting at which the UADD Task Force discussed and voted on its report makes no mention of the fact that input from certain members was not included in the draft report under consideration, let alone an explanation as to why certain input was ignored. With minor changes and clarifications, the staff-written report was approved and accepted by a vote of six to one. UADD Task Force meeting minutes, July 27, 1993.

the suspect process was caused by the staff person of the Industrial Commission, as if to validate the initial charge of conflict of interest.⁵³ (For the substance of these two reports, see chapter 3).

Report by the Governor's Transition Team

Soon after Michael O. Leavitt was elected Governor in November 1992, his transition team began to review individual departments of State government and made recommendations to the Governor-elect in January 1993. Included in this effort was the Industrial Commission transition team, which had a subteam charged specifically to evaluate the controversy surrounding the UADD. This subteam made 13 specific recommendations designed to provide better protection to the victims of employment discrimination.⁵⁴

The range of recommended changes was sweeping. It involved the reorganization of the UADD, change in personnel, and policy redirection for the UADD. Examples of these recommendations include:

- The [Industrial] Commission should hire a UADD director with strong management skills. The report noted that the three individuals under consideration for the director position lack those needed skills. Also, the [Industrial] Commission has not practiced equal employment opportunity in filling the position, noting that open recruitment should occur for all job vacancies.
- The Governor should request an audit of UADD's finances, programs, and procedures with special attention given to how Federal (EEOC) monies are being spent.
- The UADD should bring itself into compliance with the contract requirements set forth by the EEOC.
- The enforcement provisions taken out of the Utah Anti-Discrimination Act should be reinstated.

⁵³ Minority Report, p. 3. It is also significant that the Minority Report notes, "The Task Force spent less than two hours discussing the report. The Task Force did not discuss any of the Findings section and only a portion of the Recommendations."

⁵⁴ Labor Anti-Discrimination Division team, Industrial Commission of Utah, report submitted to Governor Michael O. Leavitt in January 1993, undated, pp. 1-2. (Transition team reports were submitted to Governor Leavitt at meetings held in January 1993. The reports were rough and were presented by members of each individual team). Other subteams under the Industrial Commission included Worker's Compensation, Utah Occupational Safety & Health Division, and the Industrial Accidents Division.

- An advisory board should be established to represent a cross section of the community to provide input to the UADD.
- The UADD should conduct more onsite investigations.
- UADD files and investigators need to be a part of the hearing files for the administrative law judges and the administrative law judges need to become more familiar with antidiscrimination laws.⁵⁵

Robin Riggs, legal counsel to the Governor, confirmed that each transition team reported to the Governor. According to Mr. Riggs, the transition team report included recommendations for

- 1) conducting a financial and procedural audit;
- 2) establishing an advisory board;
- 3) reducing the existing backlog; and
- 4) making an increased use of mediation.⁵⁶

⁵⁵ Ibid., pp. 1-2.

⁵⁶ Robin L. Riggs, legal counsel, Office of the Governor, telephone interview with Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, June 15, 1995.

3. Shortcomings of the UADD

Mounting public concern about the Utah Anti-Discrimination Division (UADD) led to intense scrutiny of the agency in 1993 (see chapter 2), resulting in the identification of a number of specific deficiencies and obstacles that had stood in the way of effectively protecting the victims of workplace discrimination. This chapter discusses seven specific shortcomings identified in the process of the 1993 public scrutiny. These shortcomings include the UADD's unfriendly posture to clients, long processing time, poor quality of investigation, lack of judicial enforcement, and nonlitigation policy. It also compares some of the significant differences between the UADD Task Force Report and its Minority Report.

Since these issues, though treated individually here, in real life occur in combination, real life examples might convey a sense of what an ordinary complainant goes through with the UADD. Two cases are described below for this illustrative purpose.

Case 1: Jane Doe¹

She filed a complaint with the UADD in October 1990. In mid-1992, a cause finding was issued by one investigator, but at that point her file was turned over to a contract attorney to write a final determination. The contract attorney, however, overturned the cause finding. When she questioned the contract attorney and reviewed her file, it was discovered that many documents were missing. It was never determined what had happened to the missing documents in her file. Because Ms. Doe had previously made copies of everything in her file, she was able to resupply documents to the contract attorney, who then changed the determination back to a cause finding. When the reinstated cause finding was issued, her employer requested and was granted an administrative hearing. After several postponements, the hearing finally began in September 1993 and dragged on for months. Prior to the hearing, she retained an attorney on a contingency basis but was required to pay out-of-pocket costs. Because of a lack of financial resources, she was not able to instruct her attorney to take depositions, travel to interview witnesses, or purchase hearing transcripts, whereas her employer was able to do those things. The employer's attorney ran a bill up in excess of \$80,000. Ms. Doe felt handicapped and outgunned.

¹ Jane Doe is a fictitious name: the complainant has requested that her identity remain anonymous. The following account is based upon information she supplied by telephone interview with Malce V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Mar. 31, 1995.

After more than 6 months, the administrative hearing finally came to a close in March 1994 and her cause finding was overturned to a "no cause" finding. At that juncture, she, by law, had the option of appealing the decision to a higher level within the Industrial Commission, to the U.S. Equal Employment Opportunity Commission (EEOC) or to Federal court. Ms. Doe appealed to the EEOC and her file was transferred in May 1994. As of April 1995, her appeal is sitting with the EEOC. The EEOC investigator assigned to her case is currently on a leave of absence and the EEOC is not sure when the investigator will return to work. Ms. Doe has spent over \$4,000 on the complaint and she has, for all intent and purposes, given up. She now feels that she will never be made "whole." Her life has been destroyed and she still does not have an answer to her complaint.

Case 2: Angela Jones²

In March 1990, Ms. Jones began having problems with her employer and at that point contacted the UADD. She maintained an informal communication with an investigator, and finally filed a formal complaint in September 1991. In June 1992, 9 months after the filing, she was informed that she had one of the strongest cases in 10 years. Between June and October, she tried repeatedly to speak with her investigator without any success. The investigator never returned her calls. At one point in October, she called 40 times in 1 day to the point that the switchboard receptionist recognized her voice. She even talked to Commissioner Colleen Colton. On October 17, she was told that she would receive, by certified mail, her determination the next day. It did not arrive. At this point, she felt "perplexed" because her "whole life was at stake." On the following Monday, she contacted the director of the UADD and was told that a mistake had been made and her case had been sent to the legal department. Finally, in early November she received a faxed copy of her cause finding determination, but never a certified copy of the determination.

Ms. Jones was "upset" because she thought that [Colleen Colton] condoned the way her investigator treated her and kept throwing her back to the same people that she was having problems with. She asks, "I want somebody to answer me why, when I had a problem with an investigator, the commissioner didn't handle it."

Ms. Jones alleges that the investigator had in his possession tape recordings of harassments and retaliations that she had endured at work, yet none of these issues were addressed in her file. The employer requested a de novo (i.e., a new) hearing. She had never had an opportunity for mediation or conciliation; she had been waiting for the chance to meet with her employer. She felt that her

² Angela Jones. Utah Anti-Discrimination Division Task Force hearing minutes, Mar. 19, 1993, pp. 1-4 (hereafter cited as UADD Task Force hearing minutes).

investigator had deliberately lied to her and failed to keep her complaint file up to date. She also felt that she had been shuffled from one person to another for well over a year.

There are puzzling, and even disturbing, aspects to the way her case was handled. Nevertheless, when Ms. Jones finished her testimony to the UADD Task Force, members of the UADD Task Force did not ask even one question pertaining to either facts or implications. Representatives of the UADD were present at the meeting, but the UADD Task Force chose not to pursue the matter. She was thanked for her testimony and the next speaker was asked to make a presentation.³ Although the UADD Task Force chair noted that her presentation would be utilized in their deliberation, her case was not discussed in the UADD Task Force Report at all. Minutes of the UADD Task Force meetings do not indicate any trace of discussion about her case.

UADD Perceived to be Unfriendly and Hostile

The UADD was perceived by the general public as an agency that was unfriendly and hostile to complainants. The general public, it seemed, went to the UADD more out of desperation than out of any realistic expectation that they could count on the UADD to assist them. Representatives and proponents of the UADD noted that the agency began to make numerous improvements in services to complainants soon after the UADD Task Force began its review of the UADD in January 1993.⁴ Lt. Governor Olene S. Walker also reported that the UADD had been responsive to the Governor's charge to reinvent government by being more responsive to its clients. She cited as examples of changes such as the UADD's adoption of the alternate dispute resolution process and education outreach efforts.⁵ These statements, in one sense, are an implicit recognition that the UADD had not been friendly or client-oriented in the past.

³ Ibid., p. 4.

⁴ Colleen Colton, commissioner, Industrial Commission of Utah, transcript of the factfinding meeting conducted by the Utah Advisory Committee to the U.S. Commission on Civil Rights in Salt Lake City, Utah, Dec. 9-10, 1993, vol. 2, pp. 66, 67, and 70-74 (hereafter cited as *Transcript*).

⁵ *Transcript*, vol. 1, pp. 84-87.

This theme of unfriendliness is clearly reflected in a number of statements made by individuals and organizational representatives. For example, Robert Archuleta, a representative of Crossroads Urban Center and the Utah Hispanic Association, stated:

The perception now is that when you say that name [UADD], people laugh at you and say hell with you. It just doesn't work. The stories and the history that you've heard at the past meeting and today points out pretty well that we have a system that is at best inept and inadequate and at worst negligent.⁶

Personal testimony of a complainant mirrors a similar perception that the UADD is unfriendly and almost hostile to its clients. This complainant observed:

I encountered verbal deterrence and my credibility was also questioned by the intake worker at the UADD office. Information leaks from the UADD office led to management and co-worker harassment before my employer was even served with my charges. A combination of all these acute obstacles and racial innuendoes rendered me helpless and untrusting of the UADD office.⁷

Kim Marquardt, director of Corporate Human Resources, Management and Training Corporation, with operations in 17 States, observed that the UADD has remained distant from its constituency, neglecting its outreach functions. She would rate the UADD "at the bottom of the list" of those States whose antidiscrimination systems she was familiar with.⁸

Representatives from private industry also expressed concern that the UADD had failed to create a climate favorable to combating unlawful discriminatory employment practices through vigorous public education outreach programs. For example, Ken Mayne of the AFL-CIO considers it an important obligation of the UADD to get across the message that there are serious employment discrimination problems in Utah and that employers play a part in combating unlawful practices. This failure, says Mr. Mayne, is in part responsible for the agency's reputation of being unsympathetic and unfriendly to its clients.⁹

⁶ UADD Task Force hearing minutes. Apr. 2, 1993, p. 27.

⁷ Nancy Alires Johnson, a signed statement submitted to the UADD Task Force. Mar. 18, 1993. On file at the Rocky Mountain Regional Office, U.S. Commission on Civil Rights.

⁸ UADD Task Force hearing minutes. Apr. 2, 1993, p. 13.

⁹ *Transcript*, vol. 2, p. 29. Mr. Mayne is director of apprenticeship, Carpenters Joint Apprenticeship & Training Committee/AFL-CIO.

One former complainant contended that, notwithstanding UADD's claim of improved service and positive changes, the UADD remains insensitive to clients' needs and unprofessional in its conduct. She claimed that the information supplied by the agency is "incomplete and in some cases inaccurate."¹⁰ She was certain that the UADD Task Force, when it reviewed all the documents and testimonies, "will find that there are serious problems with the Industrial Commission and the UADD."¹¹

Long Complaint Processing Time

Every member of the public who testified at the UADD Task Force hearings pointed out that their case was in the system for over a year before receiving a determination.¹² Available statistics indeed show that the processing time has increased over the years. As shown in table 1.4, the average processing time has shown a steady increase: it was under 100 days in FY 86, broke the 200-day mark in FY 89, and peaked at 301 days in FY 91. From FY 92, the processing time has been decreasing, but in FY 93 and FY 94, it still took over 230 days on the average.¹³

Those testifying also stated that every day of delay in handling the case results in losses for all parties, including taxpayers. The delay also makes the case harder to resolve because the employer-employee relationship often deteriorates after the filing of a formal complaint and witnesses move or become unavailable.¹⁴ Processing delays frequently subject the victims to an ever-exacerbating work situation, personal stress, and financial hardship.

¹⁰ Julie Davies. UADD Task-Force hearing minutes. Mar. 19. 1993, p. 10.

¹¹ Ibid.

¹² Kathleen C. Mason, *Minority Report of the Utah Anti-Discrimination Division Task Force, Findings and Recommendations*. Sept. 2, 1993, p. 4 (hereafter cited as *Minority Report*).

¹³ Note that these figures are averages and approximately 20 percent of complaints end up in the "administrative resolution" category, processed in a couple of months. Therefore, it is very likely that a sizable proportion of cases are processed in a much longer time than what the average processing time would indicate.

¹⁴ *Minority Report*, pp. 4-5.

The long processing time discourages potential complainants from filing by creating a specter of prolonged frustration and pain. Jeanetta Williams, president of the Salt Lake City branch of the NAACP, which receives five to eight discrimination complaints daily,¹⁵ observed that although complainants are advised to report to the UADD, "for the most part they are always reluctant to do so"¹⁶ because of the long processing time.

The delay in processing causes problems for employers as well. Kim Marquardt of Management and Training Corporation observed:

Both employees and employers in Utah have concerns that their rights aren't protected, because the UADD is a very painfully slow process for handling claims As an employer, [we believe] that workplace disputes are best resolved at the lowest possible level and as early as possible. We find it's virtually impossible to repair the employer-employee relationship when a claim . . . drags on for a year or sometimes longer.¹⁷

The UADD Task Force found that the processing time is a real problem and recommended "hiring a sufficient number of well-qualified investigators to handle the current caseloads and to deal with the backlog of cases on file."¹⁸ In contrast, the Minority Report conveyed a much more serious picture of complainants' frustration and anger caused by inexcusably long delays, concluding that the processing simply took "too long."¹⁹

Poor Quality of Investigations

Several witnesses at the UADD Task Force hearing testified that UADD investigative procedures used to include onsite investigations and factfinding conferences, but not any more. They claim that bypassing such essential investigative

¹⁵ *Transcript*, vol. 1, p. 177.

¹⁶ *Ibid.*, pp. 178-79.

¹⁷ *Transcript*, vol. 2, p. 48.

¹⁸ The Governor's Task Force on the Utah Anti-Discrimination Division, *Findings and Recommendations*, July 27, 1993, p. 11 (hereafter cited as UADD Task Force Report).

¹⁹ *Minority Report*, p. 4.

steps results in superficial investigations and, in the name of processing expediency, the quality or thoroughness of investigations is being sacrificed.²⁰ Some went so far as to claim that UADD investigators sometimes falsify documents or data to the detriment of claimants.²¹ Although contract attorneys were hired to write determinations on the backlog cases, it is alleged that they are without proper training or experience.

L. Zane Gill, who has practiced employment law for 12 years in Salt Lake City, handled a case in San Juan County, Utah, where Native American employees of the county were allegedly discriminated against and wrongfully terminated. His case serves as an example of the alleged poor quality of investigations and how it can be detrimental to the claimant and frustrating for the attorney:²²

Mr. Gill was involved in the case from the point of its filing. Although all pertinent information was turned over to the UADD, he eventually had to threaten to embarrass the investigators who were assigned to the San Juan case in order to get them to investigate the case properly. His perception was that UADD investigators were so overworked and so understaffed they were more concerned about the pending closure deadlines than what actually went into the file. At one point he contacted the investigator to discover that the investigator was within a week of closing the case with a "no cause" determination. Mr. Gill found out that the investigator had done next to nothing, which prompted him to open his file to the investigator, sharing interview tapes and other documents in his possession. He also outlined inquiry topics for followup by the UADD investigator. The situation, he recalls, was "almost a joke. I told the investigator in no uncertain terms that if she closed the case 'no cause' that I would go public and she had better do something more to investigate the case and give us a real determination on the facts."²³ The investigator confirmed as much of the information as she could, and on the basis of that information the determination was changed to a "cause finding."

Despite the testimonies concerning the importance of onsite investigations and factfinding conferences, the UADD Task Force merely stated that such steps are

²⁰ Angela Jones, UADD Task Force hearing minutes, Mar. 19, 1993, pp. 2-4.

²¹ Ibid.

²² The description provided here is based on Mr. Gill's presentation to the factfinding meeting of the Utah Advisory Committee to the U.S. Commission on Civil Rights. *Transcript*, vol. 1, pp. 62-72.

²³ *Transcript*, vol. 1, pp. 68-69.

"helpful" and "needed," without inquiring why critical investigative steps were bypassed.²⁴ The Minority Report, on the other hand, was much more critical of these investigative lapses. According to the Minority Report, these investigatory steps are "critical" because "the information supplied by the respondent was accepted at face value with no investigation,"²⁵ or "companies refused to give the UADD the [requested] information/documentation and the UADD refused to use the subpoena power."²⁶

Carolyn Cox, an attorney in private practice who has worked with the UADD since 1988, advises her clients to withdraw from the UADD and go to court because the judicial process allows a better opportunity for a claimant to perform the necessary discovery.²⁷ According to Ms. Cox, UADD investigators do not have the time to conduct a factfinding conference in each case, and therefore, there is no opportunity for the investigator to develop the evidence in a case. She said investigators must rely on the representations of the parties rather than on the information they possibly would have developed had they had the time to conduct onsite investigations or factfinding conferences.²⁸

Faced with an increasing backlog, the UADD hired contract attorneys to review case files and write determinations on backlog cases (see table 1.4). Although the UADD Task Force Report found that contract attorneys were useful in reducing the backlog,²⁹ its Minority Report disputed their usefulness, citing witnesses, including a former UADD investigator, who criticized that the contract attorneys were recent law school graduates without either appropriate on-the-job training or actual experience in

²⁴ UADD Task Force Report, p. 4.

²⁵ Minority Report, p. 5.

²⁶ Ibid., p. 6.

²⁷ Utah Anti-Discrimination Division Task Force meeting minutes, Feb. 19, 1993, p. 2 (hereafter cited as UADD Task Force minutes). Local civil rights attorneys were invited and made presentations.

²⁸ Ibid.

²⁹ UADD Task Force Report, p. 4.

employment law or case reviews.³⁰ Concerning requisite qualifications, an EEOC official noted, "only a senior investigator with legal experience can realistically write a determination."³¹ Yet, some witnesses at the UADD Task Force hearing claimed that contract attorneys wrote determinations "without being a part of the investigation and without even reviewing the files with the investigators or parties to the case."³²

In spite of these explicit criticisms, the UADD Task Force Report is silent about whether the UADD's investigators have been able to conduct thorough, competent investigations.³³ In stark contrast, its Minority Report unequivocally concludes that "the procedures used by the [UADD] do not result in a thorough investigation."³⁴ Without an independent review of the processed cases, it is not possible to ascertain the alleged deterioration in quality caused by the use of contract attorneys and the administrative pressure for case closures. Since the UADD Task Force did not review individual cases for their investigative quality, the allegation remains unanswered whether the use of inexperienced contract attorneys and caseload pressure have damaged the quality of investigation. The UADD Task Force's mandate clearly included a review of "the investigative procedures used by the Division."³⁵ Therefore, it was within the jurisdiction of the UADD Task Force to confront these issues.

Even after the deficiencies in the UADD investigative procedures were pointed out by the UADD Task Force, the Industrial Commission maintained the posture that it was doing all that was necessary. Instead of proposing specific remedies, it adopted a public relations campaign that all was well at the Industrial Commission. For

³⁰ Minority Report, p. 7.

³¹ Ibid.

³² Ibid.

³³ The UADD Task Force implicitly presumes some deficiencies when it recommends: "[developing] procedural standards . . . [to] address the methods of investigations employed by the Division, including . . . the timely utilization of on-site investigations and fact-finding conferences." UADD Task Force Report, pp. 11-12.

³⁴ Minority Report, p. 5.

³⁵ UADD Task Force Report, p. 1.

example, at the December 1993 factfinding meeting, several months after the UADD Task Force Report, Colleen Colton stated:

The UADD serves as impartial factfinder and mediator in attempting to resolve employment disputes It is not easy for an investigator or a mediator to ascertain exactly the facts that have occurred [in the past] [But] they must rely on numerous witnesses, supported documentation and information presented to them. If they do not have the information or if the facts are not presented, they have no way of addressing those issues.³⁶

She neglected to point out that UADD investigators didn't even follow up or interview the leads they were given, let alone identifying or following up on witnesses they might have uncovered on their own. Commissioner Colton's omission of information which was considered to be extremely important angered the critics of the UADD and fostered mistrust in the agency and its leadership.

Lack of Judicial Enforcement

According to the 1993 brochure, the UADD mission is "to investigate, resolve and conclude, as rapidly and as thoroughly as possible, complaints of employment discrimination."³⁷ It also states:

The UADD is mandated by law to investigate as thoroughly as possible, resolve and conclude all charges (filed against public and private agencies) of employment and/or housing discrimination, [while] the EEOC is mandated to investigate, process and enforce Federal law dealing with charges of employment discrimination. When a charge is filed with the UADD, it is filed simultaneously with the EEOC.³⁸

Furthermore, the brochure states that individuals are protected from retaliation once a complaint is filed. Specifically, it says: "The employer may not take any action in retaliation against any individual for filing, testifying, assisting or participating in an investigation, conciliation or administrative proceeding."³⁹ Not only does the brochure clearly state that the UADD will expeditiously investigate and resolve

³⁶ *Transcript*, vol. 2, p. 62.

³⁷ "Filing a Charge of Employment Discrimination," The Industrial Commission of Utah, Utah Anti-Discrimination Division, brochure, undated.

³⁸ *Ibid.*

³⁹ *Ibid.*

charges of discrimination, but it also gives the complainants an assurance of protection against retaliation from their employers. Since complainants who come to the UADD for assistance are under duress and often desperate, the brochure is likely to create in the minds of the complainants an expectation that their hardship and woes will cease if and when the agency issues a cause determination in their favor. The complainants come to believe that the UADD and the EEOC will make sure that justice is carried out.

On several critically important aspects, however, complainants are left totally uninformed. The brochure does not make it clear that since the UADD has no enforcement power, the issuance of a cause determination has no binding power and is meaningless unless the respondent is willing to settle or reconcile. It also fails to mention that the respondent can challenge the cause determination, requesting an evidentiary hearing. If the request is granted, the UADD ceases to have any jurisdiction, the evidence gathered in the UADD process cannot be admitted, and the complainant most likely needs legal representation. In the brochure, there is no mention as to how long the UADD process is likely to take. It is easy to understand how disappointed and disillusioned the complainants must be when, at the end of the long ordeal, they discover that the UADD is powerless to protect the interests of the discrimination victims.

Since UADD neither enforces its order nor litigates on behalf of the prevailing complainant, a seasoned employer knows that a discrimination complaint filed with the UADD poses no real threat⁴⁰ and sometimes engages in retaliatory actions with impunity.⁴¹ For this reason, Robert Wilde, a practicing attorney and president of the Utah Employment Lawyers Association, believes that no attorney in his right mind would leave a case of any significance with the UADD when there is the opportunity to go to Federal court and seek punitive and compensatory damages.⁴² If the statute

⁴⁰ Robert Wilde, *Transcript*, vol. 2, pp. 222, 223-24.

⁴¹ *Ibid.*, pp. 223-24.

⁴² *Ibid.*, p. 222.

was changed to grant enforcement power to the UADD, he believes attorneys would be more willing to leave cases in the State court.⁴³

Concerned with the adverse ramifications on complainants, the Utah Minority Bar Association in 1993 petitioned Governor Leavitt to bring the State of Utah in accord with the other 44 States that enforce their respective antidiscrimination legislation and thereby provide for State prosecution of those who violate the Utah Anti-Discrimination Act.⁴⁴

The Utah Federation of Business & Professional Women is concerned about the disparity of remedies provided in different areas of the Industrial Commission jurisdiction. In some divisions of the Industrial Commission, such as workers' compensation, enforcement is mandated in the agency code. Fines and penalties are often applied.⁴⁵ There is no question that the agency will provide remedies to workers found to have valid claims. In the words of this organization's spokesperson, Julie Davies: "It does not make sense that employment discrimination charges are not given the same enforcement power as other violations to laws relating to the workplace, particularly when all these divisions are under the same administrative umbrella."⁴⁶

According to L. Zane Gill, a practicing attorney in Salt Lake City, another benefit will accrue to granting the UADD enforcement power that other divisions of the Industrial Commission have: "[It will] keep [attorneys] out of the system which is not a bad thing. We don't really need to be involved in these cases. They don't require that high a level of expertise, and they shouldn't be complicated by the involvement of attorneys."⁴⁷

⁴³ Ibid., pp. 224-25.

⁴⁴ Utah Minority Bar Association, letter to Governor Leavitt, July 8, 1993. On file at the Rocky Mountain Regional Office, U.S. Commission on Civil Rights.

⁴⁵ Julie Davies, *Transcript*, vol. 2, p. 136.

⁴⁶ Ibid., pp. 136-37.

⁴⁷ *Transcript*, vol. 1, p. 66.

Both the UADD Task Force Report and its Minority Report maintained that judicial enforcement is necessary.⁴⁸ It is interesting, however, that an identical conclusion is conveyed in a drastically different manner. The UADD Task Force Report stated: "The inability to compel compliance with the final order of the Commission, following the investigation of and determination of a case by the Division, was cited by some individuals as a substantial failing of the law."⁴⁹ Contrast this statement with the language adopted in its Minority Report:

The inability to compel compliance with the final order of the Commission . . . , was cited by attorneys, a former UADD investigator, a former Industrial Commissioner, members of the Task Force, and numerous members of the community who had extensive dealings with the Division as a substantial failing of the law and the Commission [emphasis original].⁵⁰

The rendition by the Minority Report is more substantial and implicates the UADD through the Industrial Commission.

Regarding the enforcement power of the UADD, the Minority Report raises a fundamental issue. It points out that "in 1989, the Commission initiated the removal of the enforcement provision in the Code which allowed the Commission to obtain a court order compelling [compliance]."⁵¹ It further noted that "the Commission initiated legislative changes in 1985 to remove its ability to represent the case."⁵² Based on these facts, the Minority Report concluded that "the Industrial Commission refused to utilize the enforcement provisions even when it was a recognized part of the

⁴⁸ UADD Task Force members rendered a split decision on whether they should recommend enforcement of cause findings. The measure requiring the Industrial Commission or the attorney general to enforce "cause" findings passed by a vote of 4-3. Some members expressed concern about a State agency taking the side of a complainant against business and suggested weaker wording. But those UADD Task Force members who voted to make enforcement mandatory said the Industrial Commission has the authority to enforce an order by civil means and hadn't chosen to do so. Roger Pusey, "Panel seeks to require anti-bias enforcement," *Deseret News*, July 28, 1993, p. D5. UADD Task Force member, retired District Court Judge Raymond Uno said, "If it's a weak [recommendation] when you start, it's going to be weaker when they [lawmakers] get done with it." Judy Fahys, "Task Force seeks to put teeth in job anti-bias law," *Salt Lake Tribune*, July 28, 1993, p. B7.

⁴⁹ UADD Task Force Report, p. 5.

⁵⁰ Minority Report, p. 9.

⁵¹ *Ibid.*, p. 8.

⁵² *Ibid.*

law."⁵³ Independent research by George Lopez, a former investigator with the UADD, also provides a corroboration that the Industrial Commission has not been committed to protecting the victims of employment discrimination through enforcement of its orders and litigation.⁵⁴

George Lopez, a witness at the UADD Task Force hearing, also pointed out that although the Industrial Commission represents an employee to pursue the employer for "non-payment of a \$50 earnings all the way through, even up to the court of appeals," the same zeal and commitment are not reflected in the case of a civil rights violation.⁵⁵ According to him, this discrepant level of vigilance indicates a lack of the Industrial Commission's commitment to pursue and vigorously enforce civil rights protection. The lack of firm commitment is a serious, consequential matter because it sends a signal to the culprits of discriminatory practices that there is little to fear and because it deepens the cynicism of the public that the agency created by their tax dollars to protect them is turning a deaf ear.⁵⁶

Cause Findings Not Litigated

Colleen Colton, a member of the Utah Industrial Commission, explained to the UADD Task Force that the UADD does not and "should not litigate on behalf of all cause findings that fail reconciliation because the EEOC litigates on behalf of all cause findings that pass EEOC review and still fail conciliation."⁵⁷ In justification of the UADD's nonlitigation policy, Anthony DeDios, a State/local coordinator of the EEOC Phoenix Office for Utah, stated "the UADD can rely on the EEOC to litigate on behalf

⁵³ Ibid. p. 9. These disturbing facts are mentioned in the UADD Task Force Report in an inconsequential manner: "until 1989, there was a provision in the Code which allowed the Commission to obtain a court order compelling compliance with the final order of the Commission." UADD Task Force Report, p. 5.

⁵⁴ George A. Lopez, "A Failed Mission in Utah: Twenty Five Years of Not Enforcing Utah's Anti-Discrimination Act," (pending publication), College of Law, University of Utah, Salt Lake City, Utah, 1992, pp. 39-40 and 49-66.

⁵⁵ George Lopez, UADD Task Force hearing minutes, Mar. 19, 1993, pp. 17-18.

⁵⁶ Ibid., p. 17.

⁵⁷ Minority Report, p. 11.

of its cause findings."⁵⁸ He emphatically and repeatedly stated that the EEOC litigates on behalf of all cause findings, both individual and class action cases. that fail conciliation, even though he could not cite an individual case from Utah that had been litigated by the EEOC within the past 5 years.⁵⁹

Considering the pivotal significance of Anthony DeDios' statement, it is noteworthy that his testimony was quietly withdrawn later when its validity was challenged. After the UADD Task Force meeting, Anthony DeDios in correspondence to Julie Davies, who challenged him on the veracity of his statement, wrote, "I made an erroneous statement The Commission [EEOC] does not litigate all cause cases that fail conciliation."⁶⁰

Interestingly enough, several months earlier in 1992 this same official stated, "The EEOC never litigates on behalf of individuals, just class action suits."⁶¹ It is significant that a Federal official with 20 years of experience with the EEOC made a public statement to justify the UADD's policy, squarely contradicting his earlier statement. The statement by Anthony DeDios, when made initially, provided the sole basis for justifying why the UADD did not and should not litigate on behalf of cause findings. Because of its strategic importance, his misstatement is too critical to write off as an unfortunate error or a lapse of memory. This incident raises several issues that should not have been ignored.

First, why did Anthony DeDios fail to correct his statement to the UADD Task Force? Since Julie Davies challenged him on the veracity of his statement, he owed an answer to her, but was the UADD Task Force not owed a similar correction? Since Colleen Colton appeared to be relying on his misinformation, was he not obligated to correct her as well?

⁵⁸ Ibid.

⁵⁹ Ibid. This rendition of Anthony DeDios' presentation is corroborated by the UADD Task Force hearing minutes. Mar. 5, 1993, p. 6.

⁶⁰ Anthony DeDios, letter to Julie Davies, Mar. 2, 1993.

⁶¹ Julie Davies. UADD Task Force hearing minutes, Mar. 19, 1993. p. 13.

Second, upon discovering that her justification for the UADD's nonlitigation policy was based on inaccurate information, was Colleen Colton not obligated either to substitute a new justification or concede that the UADD needed to reconsider its nonlitigation policy? She was present at the meeting when the UADD Task Force was alerted of the retraction, but she chose not to respond at all.

Third, the inaccurate information diverted, and in effect prevented, the UADD Task Force from inquiring if, in light of the new revelation, the UADD had to abandon its nonlitigation policy. Neither Anthony DeDios nor Colleen Colton publicly corrected their mistakes, and the UADD Task Force failed to seek clarification on the consequences of their actions. Were these acts of incompetence or deliberate deception? Was there an intent to deceive the general public? As Julie Davies underscored in her notifying the UADD Task Force of Anthony DeDios' retraction, "there is no good excuse for Colleen Colton or DeDios to testify as they did."⁶² Incensed by these events, Julie Davies recommended that the UADD Task Force "ask Governor Leavitt to hold employees at the UADD, the Industrial Commission, and the EEOC accountable for the misinformation."⁶³

Yet, the UADD Task Force Report makes no mention of the DeDios-Colton misstatement. It does not discuss the issues raised concerning the UADD's nonlitigation policy and its justification.⁶⁴ The UADD Task Force Report simply remains silent on these critical issues.

On the other hand, the Minority Report takes due account of this information and notes "the admission in Mr. DeDios' letter is significant to our review and recommendations for State law reform."⁶⁵ It concludes by stating, "The EEOC has

⁶² Ibid.

⁶³ Ibid., p. 10.

⁶⁴ One section that comes closest to discussing these issues states: "The observation was made that the Utah Anti-Discrimination Act provides for enforcement of the Act through investigation and conciliation efforts. Enforcement of the Anti-Discrimination Act does not involve litigation or other methods by the Division [UADD] to obtain enforcement through judicial means." UADD Task Force Report, p. 9.

⁶⁵ Minority Report, p. 11.

not proved to be a reliable source of information or remedy. Legislative provisions for sure enforcement within the State are critical."⁶⁶

The UADD Acting as a Contract Agency for the EEOC

The UADD has been designated since 1979 as a fair employment practices agency (FEPA), sometimes referred to as a 706 agency, of the EEOC. In this capacity, the UADD enters into a contractual agreement with the EEOC to take cases dealing with issues of discrimination based on race, color, religion, sex, national origin, age, or disability.⁶⁷ The agency receives and processes complaints of employment discrimination for the EEOC and receives monetary compensation for each case processed.⁶⁸ The compensation is received regardless of the type of closure, i.e., regardless of whether the complaint results in a "no cause" finding, a "cause" finding, or a settlement or reconciliation.

In order to maintain its FEPA status, an agency has to sign, each year, a contract assuring the EEOC that it meets the EEOC requirements. Regarding this point, the UADD Task Force hearings brought forth two issues:

- 1) How the money received from the EEOC has been spent,
and
- 2) Whether the UADD meets Federal requirements in terms of enforcement.

Use of EEOC Money

Spurred by the frequent reminder that budget increases have not kept up with the increase in the number of complaints, leaving the UADD plagued by staff shortages, the UADD Task Force raised questions regarding the expenditure of the approximately \$250,000 the UADD receives from the EEOC. One member of the UADD Task Force, Kathleen Mason, asked if "the money received from the EEOC may be used by

⁶⁶ Ibid., p. 23.

⁶⁷ Spencer C. Pratt, fiscal analyst, Office of the Legislative Fiscal Analyst, State of Utah, letter to Representative John Valentine, Dec. 28, 1993. A copy of the letter is on file at the Rocky Mountain Regional Office, U.S. Commission on Civil Rights.

⁶⁸ The dollar amount received per case varies from contract year to contract year, and averages about \$500 per case.

the Industrial Commission generally, or whether the money is exclusively for UADD use."⁶⁹ Anthony DeDios, an official from the EEOC Phoenix Office, replied, "The EEOC may prefer that the UADD have exclusive use of the money."⁷⁰ When this question was restated, Anthony DeDios stated that "he did not know the answer"⁷¹ but suggested that "[the UADD director] could call the EEOC in Washington, D.C., to determine whether there are restrictions."⁷²

Given the mounting backlog, it is important to know the restrictions placed on the use of EEOC funds because they could have been used exclusively to hire additional investigators and strengthen processing capability. Anthony DeDios' inability to answer a budget question, combined with his unwillingness to obtain an answer, is surprising, since the UADD is under contract with the EEOC, and he is the EEOC representative for Utah. The questions of EEOC restrictions aside, the UADD Task Force could have obtained information from the Industrial Commission on how it has used the EEOC reimbursement money. Not only did the UADD Task Force not pursue this issue, the UADD Task Force Report makes no mention of it, although the Minority Report concluded:

Without an audit of the Division it is impossible to know if the funds collected by this Division in the past have been or are currently used for the purpose for which they are collected and allocated. This is a serious question left unanswered.⁷³

The UADD Task Force, as noted earlier (see chapter 2), was denied an opportunity to consider input from the author of the Minority Report. Had there been an exchange among UADD Task Force members, the UADD Task Force Report may have been more responsive to the issues raised instead of appearing to squash them. This is another instance where a serious problem was created because of the alleged

⁶⁹ UADD Task Force minutes. Mar. 5, 1993. p. 5.

⁷⁰ Ibid.

⁷¹ Minority Report. p. 11.

⁷² UADD Task Force minutes. Mar. 5, 1993. p. 6.

⁷³ Minority Report. p. 12. Ms. Jensen "never reported to the Task Force regarding the question." Ibid.

inattention by the staff person assigned by the Industrial Commission to share critical details outlined in the Minority Report with the Task Force.

EEOC Requirements for a Contract Agency

In granting FEPA status to State and local agencies, the EEOC requires that an applicant agency meet 10 specific criteria, including that the agency "demonstrate its capability to pursue elimination of the discrimination and seek or provide compensatory and prospective relief."⁷⁴ In its FY 1993 contract, then-UADD director Karen Suzuki-Okabe answered in the negative on this criterion, amplifying its answer with the footnote, "Currently the State of Utah is involved in the process of reviewing and redrafting the State law to include the foregoing provisions for compensatory and prospective relief."⁷⁵

The Minority Report specifically points out that "without any changes in procedures [from 1992], the [Industrial] Commission has answered this qualification contrary to Karen Suzuki-Okabe's earlier response."⁷⁶ By answering this criterion in the affirmative, the UADD in effect told the EEOC that the UADD did provide compensatory and prospective relief. This is a clear misrepresentation. According to the Minority Report, many individuals and advocacy organizations "called for this to be investigated and for the Commission to be held accountable for any misrepresentations made in this or other contracts."⁷⁷

Underlying these concerns is the allegation that the UADD obtained FEPA status by misrepresentation, and the money collected from the EEOC, about one quarter million dollars, may have been spent possibly for purposes other than elimination of discrimination at the workplace, all at the expense of victims of workplace discrimination. Although these issues can be readily verified and are clearly open to

⁷⁴ Office of Program Operations. Charge Resolution Review Programs, State and Local Programs Division. U.S. Equal Employment Opportunity Commission, Request for Information from FEP Agencies. p. 2, item 4.

⁷⁵ Ibid.

⁷⁶ Minority Report. p. 11.

⁷⁷ Ibid.

factual clarification, the UADD Task Force Report does not even mention that these issues were even raised at the hearings.

Although one of the UADD Task Force's stated missions was to "determine the status of compliance with State and Federal law,"⁷⁸ its report states that "the Task Force did not conduct an independent evaluation of the EEOC contract because of its limited resources and the absence of a directive to evaluate Utah's substantial equivalency with Federal law."⁷⁹ In spite of the public charge of official misrepresentation and the call for investigation, the UADD Task Force was content with quoting a statement from an EEOC official, "Utah law and the procedures of the Division are substantially equivalent to the EEOC requirements."⁸⁰ Notwithstanding all the hearings it held, it is as if the UADD Task Force failed to hear the charges presented at the hearings.

Difficult to Obtain Legal Counsel

Most people who file a complaint with the UADD come to the agency because their situation has become intolerable and they have no place else to go. They are oftentimes kept out of the judicial system because they are out of a job or earn low salaries and do not have enough money to retain an attorney.⁸¹ Not only is it prohibitively expensive to obtain private counsel to begin with, but many attorneys are reluctant to take discrimination cases, making it doubly difficult for many complainants to obtain legal counsel.

Many have testified concerning the high cost of legal counsel. For example, Samantha Bird, who filed a complaint with the UADD, so far has spent over \$5,000 to

⁷⁸ UADD Task Force Report, p. 1.

⁷⁹ Ibid., p. 7.

⁸⁰ Ibid., p. 6.

⁸¹ Gill, *Transcript*, vol. 1, pp. 65-66.

pursue her complaint.⁸² She said that in order for her to continue to pursue her case, it will cost an additional \$30,000 to bring her case to trial.⁸³ Samantha Bird "talked to over ten attorneys in Utah and none of them would take the case on contingency."⁸⁴ Another UADD complainant, Felix Jensen, so far has spent \$1,800 to retain an attorney.⁸⁵ Other complainants also have found the cost of legal counsel to be beyond what they could afford.⁸⁶

Most attorneys will not take an employment discrimination case on a contingency fee basis because of the length of time necessary to complete a case (cases can drag on for several years and require hundreds of hours of work), and because many Utah judges do not award 100 percent of fees charged by attorneys. Jane Doe, who was mentioned earlier in the report, sought out an attorney when her employer, appealing her "cause finding" determination, asked for an evidentiary hearing with the Industrial Commission. According to her, several attorneys said they would take her case only if it was settled before the evidentiary hearing, adding that "no matter how strong the case is, it usually is overturned at the evidentiary hearing." After talking with approximately 10 attorneys, Ms. Doe was able to retain one on a contingency fee basis, but she had to pay out-of-pocket costs of more than \$4,000.⁸⁷ Robyn Kaelin, another complainant, found an attorney who finally agreed to accept her case only after making 23 contacts.⁸⁸

⁸² Samantha Bird, letter to William F. Muldrow, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Dec. 9, 1993, p. 1. A copy of the letter is on file at the Rocky Mountain Regional Office, U.S. Commission on Civil Rights.

⁸³ Ibid.

⁸⁴ Ibid., p. 2.

⁸⁵ Ibid.

⁸⁶ Robyn Kaelin, UADD Task Force minutes, Feb. 5, 1993.

⁸⁷ Jane Doe, telephone interview with Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Mar. 31, 1995.

⁸⁸ Robyn Kaelin, telephone interview with Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Mar. 13, 1995.

Both the UADD Task Force Report and the Minority Report agree that it is difficult for claimants to obtain counsel for private enforcement of a cause finding because most attorneys are reluctant to take discrimination cases due to the very low monetary return on the time invested in a case.⁸⁹ The case of Shirley Arnett, a witness at the UADD Task Force hearing, illustrates the difficulty in obtaining legal counsel. After her complaint had stagnated at the EEOC for 3 years, she finally decided to look for an attorney. Referring to her experience, she asked:

Take a guess how many attorneys I went to before I found one in the State of Utah. I challenge you, take a guess Twenty four, and he only took it because I was down to the wire. It was going to be a dead case . . . within 24 hours, and he says "I'll take it, but only to get you into the court."⁹⁰

Less than 4 percent of the attorneys registered with the Utah State Bar Association (179 out of 4,597 attorneys)⁹¹ specialize in or handle labor/employment law in Utah, and the number of attorneys willing to take an employment discrimination case is even smaller. Several attorneys were in agreement that taking on employment discrimination cases is time consuming and costly. There are not many instances where an attorney will take a case on a contingency fee basis without a substantial sum of money being paid out by the complainant up front.

Carolyn Cox, an attorney who practices discrimination law in the Salt Lake City area, stated that her firm does refer individuals to other attorneys, but it is still difficult for claimants to obtain counsel.⁹² Although her firm does not have a formal policy on taking employment discrimination cases, she said that they usually do not take claimant cases because of the costs involved.⁹³ L. Zane Gill, a discrimination law attorney in private practice, commented, "Handling discrimination cases is extremely

⁸⁹ The Minority Report concludes, "claimants are unable to obtain . . ." while the UADD Task Force Report acknowledges, "claimants may be unable to obtain . . ." Minority Report, p. 9. and UADD Task Force Report, p. 5.

⁹⁰ Shirley Arnett, UADD Task Force hearing minutes, Mar. 19, 1993, p. 22.

⁹¹ Arnold Birrell, Utah State Bar Association, telephone interview with Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Feb. 1, 1995; and Utah State Bar Association, Section Membership 1994-1995, data as of Jan. 19, 1995.

⁹² UADD Task Force minutes, Feb. 19, 1993, p. 4.

⁹³ Ibid.

labor intensive and very difficult to make a living . . . and the fee soliciting statutes don't work. There are many easier ways to make a living, so unless you are dedicated to the idea of litigating these cases for the social purpose it serves, there really is very little monetary incentive"⁹⁴

As complainants are unable to obtain legal counsel within the private sector, other venues such as local, State, or Federal programs are just as sparse and even nonexistent. Only a limited number of these organizations provide services on a pro bono basis and/or charge small fees.⁹⁵ The Utah Civil Rights and Liberties Foundation, Inc., the Utah Minority Bar Association, and the Utah Employment Lawyers Association are three such organizations actively accepting complaints, but their resources are very limited.

John Pace, an attorney with the Utah Civil Rights and Liberties Foundation, Inc., a private, nonprofit organization, said his organization has represented a number of people.⁹⁶ Approximately 18 or more formal legal consultations per week are conducted in which people are informed of their legal rights.⁹⁷

Robert Wilde, an attorney and president of the Utah Employment Lawyers Association, said it is not uncommon for people to be referred to the Lawyers Association by other attorneys. Many individuals who contact his association state that their attorneys were not willing to take their cases although they thought the cases were meritorious.⁹⁸ Concerned that many people are being shuffled around, he also said that those attorneys who have taken the oath (admittance to the bar) have an obligation to assist people and understand what their rights are.⁹⁹

⁹⁴ *Transcript*, vol. 1, p. 60.

⁹⁵ Utah Civil Rights and Liberties Foundation, Inc., *Transcript*, vol. 1, p. 115.

⁹⁶ *Transcript*, vol. 1, p. 117.

⁹⁷ *Ibid.*

⁹⁸ *Transcript*, vol. 2, pp. 218-19.

⁹⁹ *Ibid.*, p. 221.

Robert Wilde said, "Among the claims that come into our office, the ones we always like to see, naturally, are the large claims, people who have a lot of damages and good liability, and where the employers, as soon as you call them, are willing to write a check."¹⁰⁰ He explained that those people with larger claims don't have a problem getting counsel. They are referred to attorneys who practice in the field, and those attorneys can identify one of those claims immediately and take the case.¹⁰¹ According to Robert Wilde, the problem is with those complainants who are making minimum wage and have gone back to another minimum wage job. An attorney could take the case and work in anticipation of obtaining some attorney's fees. However, judges historically do not award the full amount of attorney's fees for the time that is invested in the case, and there is always a possibility of losing the case. As a result, such cases get left at the UADD, and it is economically impossible/difficult to handle such claims.¹⁰²

According to John Pace, plaintiffs' attorneys must be extremely careful and selective in the cases that they take because they are looking at anywhere from 2 to 3 years or longer and tens of thousands of dollars to invest in a case. He added that if they take a case on a contingent fee basis, they are gambling that 3 or 4 years down the road they are going to win and the judge will award them attorney's fees. They are also hoping that the judge will do more than judges usually do in the Federal district court in Salt Lake City, who award attorneys approximately one-half to two-thirds of what they claim.¹⁰³ He said he would be extremely hesitant to take employment cases knowing that an employer, especially a large employer, is going to comb through that person's records no matter how private or confidential, looking for anything to discredit the plaintiff, and also knowing that some Utah judges allow those

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid., pp. 222-23.

¹⁰³ Pace, *Transcript*, vol. 1, p. 117.

types of tactics.¹⁰⁴

¹⁰⁴ *Ibid.*, p. 131.

4. The UADD: After the 1993 Public Scrutiny

The year 1994 was eventful for the Utah Anti-Discrimination Division (UADD). In response to criticisms voiced in 1993 (see chapter 3), the UADD had endeavored to improve its operation and better serve its clients. Both the 1994 and 1995 Utah Legislatures have taken an active interest in the UADD, passing two bills on the UADD in 1994¹ and deciding to audit the UADD in 1995.² The two bills enacted by the 1994 legislature were far reaching, one granting judicial enforcement power to the UADD³ to ensure a meaningful protection for victims of workplace discrimination and another establishing the UADD Advisory Committee⁴ to advise and recommend changes when needed so that the UADD could perform its functions. Along with signs of improvement at the UADD, however, criticisms of the agency have continued unabated and the print media also continued to keep the issue alive through 1994.⁵ In order to provide a current overview of the UADD, this chapter

- a) considers the agency's performance characteristics for 1994;
- b) highlights the early challenges of the UADD Advisory Committee and reviews what it has found to this date;
- c) discusses the Industrial Commission's commitment to eradicating employment discrimination, its historical involvement with legislation affecting the UADD's power, and the 1994 mandated legislation giving the UADD enforcement power;
- d) reviews if the UADD is in compliance with Federal guidelines;
- e) summarizes the 1995 audit of the UADD by the Legislative Auditor General; and

¹ H. B. No. 78. [Utah] Anti-Discrimination Division Advisory Committee: and H. B. No. 96. [Utah] Anti-Discrimination Act Amendments. For current laws, see UTAH CODE ANN. § 34-35-4.5 (Supp. 1996) and UTAH CODE ANN. § 34-35-9 (Supp. 1996) respectively.

² Representative Dave Jones, member, Utah House of Representatives, telephone interview with Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Feb. 23, 1995.

³ H. B. No. 96. Sponsored by Representative Frank R. Pignanelli, passed Mar. 2, 1994, and enacted on May 2, 1994. For current law, see UTAH CODE ANN. § 34-35-9 (Supp. 1996).

⁴ H. B. No. 78. Sponsored by Representative Frank R. Pignanelli, passed Mar. 2, 1994 and enacted on May 2, 1994. For current law, see UTAH CODE ANN. § 34-35-4.5 (Supp. 1996).

⁵ A few examples of prominent coverage in 1994 are: Julianne Basinger, "Utah employers are getting away with discrimination," *Network*, vol. 16, no. 12, February 1994, p. 16; Judy Fahys, "Discrimination watchdog toothless? Utah agency claims it still has bite," *Salt Lake Tribune*, Jan. 23, 1994, p. F1; and Judy Fahys, "Critics to advise anti-discrimination agency," *Salt Lake Tribune*, June 21, 1994, p. D7.

- f) describes examples of continuing criticisms of the agency by the legal community, the media, and concerned citizens.

The Operation of the UADD in 1994

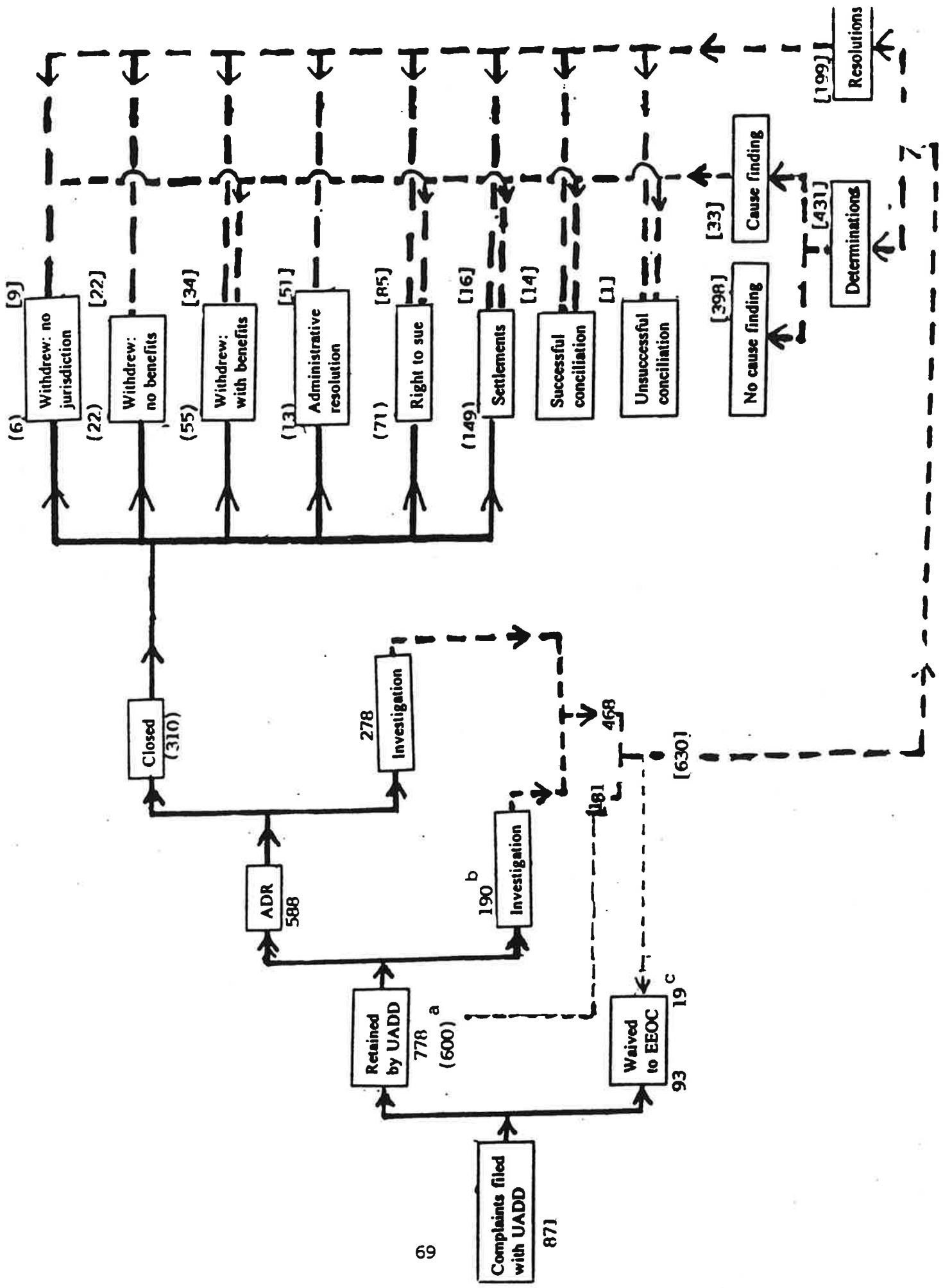
In order to reduce the backlog and process complaints expeditiously, the UADD introduced mediation conferences in recent years and currently continues to use the procedure. Called the Alternative Dispute Resolution (ADR) method, these new proceedings began in June 1993. Under the ADR method, a private voluntary meeting, called a resolution conference,⁶ was scheduled at the time a charge of discrimination was filed, whereas in the past (prior to 1993) a complaint was automatically turned over to an investigator. The new procedure involved using professionals who worked in fields such as employee relations and personnel and either already had mediation experience or completed mediation training conducted by the UADD. UADD staff were also utilized to assist in the new program. An employment discrimination case would proceed to investigation only if the parties failed to resolve through the resolution conference. Also at the time of filing a charge, a complainant could request to proceed to investigation, directly bypassing the resolution conference.

However, those individuals who were familiar with Utah antidiscrimination statutes were not excited about the division's "new" procedure, billed as the best procedure in several years, which would benefit the complainant (employee) as well as the respondent (employer). When several former and current complainants heard the announcement, they were upset to learn that what they had been asking for all along was now touted as a big, new, and innovative process.

Figure 4.1 provides an overview of all the cases processed by the UADD and their specific outcomes. In calendar year 1994, 871 complaints were filed with the UADD out of which 778 cases were retained by the UADD, the remaining 93 cases being waived to the EEOC. Of those 778 retained cases, approximately 75 percent

⁶ The resolution conference provides the disputing parties an opportunity to communicate their concerns and issues with a neutral third party acting as a mediator. The mediator does not impose a decision on the parties or take sides, but only encourages the parties towards resolution. UADD, Alternative Dispute Resolution Program Overview, undated, p. 1.

Figure 4.1: Schematic Illustration of Complaint Disposition (Jan. 1 to Dec. 31, 1994)



- a. On Jan 1, 1994, there were 600 cases of backlog, carryover cases from the previous years, whereas at the end of 1994, only 406 cases remained unresolved and were carried over to 1995. During the calendar year 1994, therefore, the UADD is supposed to have processed a total of 972 cases (i.e. $778-600-406=972$) although computer printouts indicate a total of 940 processed cases (see table 4.1) This small discrepancy remains unexplained. Anna R. Jensen, director, UADD, telephone interview, Apr. 26, 1995.
- b. After 60 days, a complaint is automatically taken out of the ADR route and turned over to investigation.
- c. Nineteen cases were waived to EEOC subsequent to intake during the processing. Anna R. Jensen, director, UADD, telephone interview, May 3, 1995.

(588 cases) were referred to the ADR route while 25 percent (190 cases) proceeded directly to investigation instead of going through the ADR process. Of the 588 ADR cases, approximately one-half reached a satisfactory closure to both parties (310 cases), while in 47 percent of the cases (278 cases) the ADR failed to produce a satisfactory resolution. As shown in table 4.1, ADR cases on the average reached resolution in 76 days, which is less than one-third of the time an investigation on the average has taken in the past 7 (1988-1994) years (see table 1.4). Thus, about 40 percent of all complaints (310 out of 778) filed in 1994 were resolved through the ADR procedure expeditiously without subjecting the complainants to an unbearably lengthy investigative process. About 60 percent of the 310 ADR-processed cases were closed either because disputing parties reached settlements (149) or complainants withdrew their charges with benefits (55) (see figure 4.1). The reduction in processing time and material gains brought to the complainants are distinct benefits that the ADR has brought to victims of workplace discrimination.

The length of time it takes to process a discrimination case is an integral part of the overall complaint process. Although the average processing time for all cases handled by the UADD was 234 days, the average processing time for investigated cases was 310 days (see table 4.1). This average processing time of 310 days is the longest in the entire history of the UADD, exceeding the peak 301 days in FY 91 (see table 1.4). In spite of an increase in staff and the promotion of the UADD image as an efficient, improved agency, the processing time for investigation in 1994 had increased, reaching a point of unprecedented delay.

Most investigations result in "cause" or "no cause" findings. Many questions still remain unanswered surrounding this issue. In November 1994, Colleen Colton, a member of the Industrial Commission in charge of the UADD, said:

Information on the final outcome of past cases investigated by the division is not available--we simply don't have it. Our agency is tremendously underfunded. There is no computer tracking system for past cases, and files might be located in

Table 4.1
Complaint processing time, ADR vs. Investigation

	FY 1992	FY 1993	CY 1994
ADR	N/A	N/A	(310) ¹ 76 ²
Investigation	(638) 278	N/A	(630) 310
All cases	(638) 278	(669) 235	(940) 234

N/A=not available

¹ number of cases

² in days

Source: Anna R. Jensen, director, UADD, May 1, 1995.

several places. We don't have the manpower to go to archives and physically pull 32,000 cases.⁷

In 1994 there were a total of 630 investigations,⁸ resulting in 431 written determinations. Of these written determinations, 33 cases (7.6 percent) were "cause findings," while the remaining 398 cases (92.4 percent) were "no cause findings." When referenced to the total number of cases processed, however, only 3.5 percent were found to be cause findings. That is, in 1994 the UADD issued cause determinations in only 3.5 percent of all cases it processed.

In January 1995, however, Colleen Colton⁹ informed the Utah Advisory Committee to the U.S. Commission on Civil Rights that the number of cause determinations for 1994 was 18.9 percent.¹⁰ Considering the fact that the percentages cited in this report are based on raw data gathered with the assistance of, and verified by, the UADD staff, U.S. Commission on Civil Rights staff could not determine how different figures were obtained and reported by Industrial Commission administrators. Viewed in light of the criticism that UADD's percentage of cause findings is too low, the Industrial Commission's claim of 18.9 percent needs to be explained to regain the trust of the public. Until such clarification, the discrepancy remains an unexplained puzzle.

In June 1995, the Rocky Mountain Regional Office of the U.S. Commission on Civil Rights made a request to the UADD through the division director and legal counsel for data concerning "no cause" findings.¹¹ At that time, UADD staff stated

⁷ Marina O'Neill, "Council lacking support," *Ogden Standard Examiner*, Nov. 16, 1994, p. E1. Response to earlier requests made by the UADD Advisory Committee members.

⁸ As shown in figure 4.1, this total consists of 468 of the 1994-filed cases and 181 backlog cases less 19 cases waived to the EEOC.

⁹ Commissioner Colleen S. Colton, letter to Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Jan. 13, 1994, app. C, p. 2. A copy of the letter is on file at the Rocky Mountain Regional Office, U.S. Commission on Civil Rights.

¹⁰ *Ibid.* Furthermore, Colleen Colton reported the percentage of cause findings for preceding years to be 15 percent for 1991, 14 percent for 1992, and 6.4 percent for 1993.

¹¹ Letter from Ki-Taek Chun, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, to Alan L. Hennebold, general counsel and Anna R. Jensen, director, UADD, June 21, 1995. A followup letter was written on June 23, 1995, to spell out the request for data in more detail.

that someone would have to be put to work on the project and it would take a couple of weeks to compile the necessary statistics,¹² indicating that the UADD had not yet compiled statistics on "cause" findings.¹³

The per-investigator caseload for 1994 was 88.9 cases,¹⁴ exceeding what the EEOC considers a permissible maximum (see chapter 1). In spite of a staff increase, UADD investigators were still overloaded to a dysfunctional level, raising the question of whether staff overload may be adversely impacting the quality of investigations. Investigative staff of the UADD are evaluated by their superiors by the number of cases they are able to process. In addition, no recognition or allowance is made for the extra work involved in cause findings although cause determinations require more work. As a result, investigators are in effect penalized for producing cause findings.¹⁵ There is disincentive to doing a thorough investigation to produce a cause finding.

Available research findings support the contention that assigning numerical goals for case closings without regard to case outcomes may be responsible for a low percentage of cause findings. From a reanalysis of 165 completed cases in one State EEO agency, Lenahan O'Connell found:

Cause findings require much more investigator work. The mean number of witnesses interviewed in cause and no-cause cases is 5.2 and 1.5 respectively. The number of documents analyzed is 9.4 and 5.4 respectively. Cause cases take proportionately more time to complete.¹⁶

¹² Ibid.

¹³ Alan Hennebold, general counsel, Industrial Commission of Utah, letter to Ki-Taek Chun, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, July 12, 1995.

¹⁴ This figure was derived by dividing 940 cases closed by 10.57 full time equivalent (FTE) staff. For computation of FTEs, see table 1.4 in chap. 1.

¹⁵ Utah Anti-Discrimination Division Task Force meeting minutes, Apr. 16, 1993, p. 3 (hereafter cited as UADD Task Force minutes). Because cause findings take more time, investigators tend to try and complete a case as quickly as possible, which generally results in more "no cause" findings.

¹⁶ Lenahan O'Connell, "Investigators at Work: How Bureaucratic and Legal Constraints Influence the Enforcement of Discrimination Law," *Public Administration Review*, vol. 51 (March/April 1991), p. 127.

Based upon this finding, he recommends granting credit for three closed cases for each cause finding produced as a means of improving the quality of investigations.¹⁷

The UADD Advisory Committee

Creation of the UADD Advisory Committee

The Utah Anti-Discrimination Division Task Force (UADD Task Force), appointed by then-Governor Bangerter in 1993, recommended that the State legislature consider creating an Anti-Discrimination Advisory Council. According to this recommendation, the advisory council, to be appointed by the Governor with the advice and consent of the Senate, "would advise the UADD regarding policies and procedures consistent with the enabling legislation . . . and recommend procedural changes or legislative amendments that would facilitate the Division's accomplishment of its statutory responsibilities."¹⁸ In endorsing the creation of an advisory body, the Minority Report of the UADD Task Force added an oversight responsibility by saying, "The Advisory Council should monitor all changes and evaluate the success or failure of those changes."¹⁹

In support of an advisory committee to the UADD, many community organizations as well as private citizens voiced their approval by their attendance and testimony at hearings held by the Business, Labor, and Economic Development Interim Committee.

In the final days of the 1994 legislative session, the Utah Legislature enacted a bill, H. B. No. 78, introduced by Representative Frank R. Pignanelli,²⁰ establishing the Utah Anti-Discrimination Division Advisory Committee (UADD Advisory Committee). This bill charged the UADD Advisory Committee with "offer[ing] advice

¹⁷ Ibid., p. 130.

¹⁸ The Governor's Task Force on the Utah Anti-Discrimination Division, Findings and Recommendations, July 27, 1993, p. 15 (hereafter cited as UADD Task Force Report).

¹⁹ Minority Report of the Utah Anti-Discrimination Division Task Force, Findings and Recommendations, Sept. 2, 1993, p. 24 (hereafter cited as Minority Report).

²⁰ UTAH CODE ANN. § 34-35-4.5 (Supp. 1996).

on issues requested by the Commission and the legislature and also make recommendations to the Commission and division regarding issues of employment discrimination," but not with the oversight function recommended in the Minority Report.²¹ On June 20, 1994, the Governor announced the formation of the UADD Advisory Committee consistent with the legislation.²²

At this point, a brief consideration of the passage of this bill seems instructive in helping to better understand the UADD and its advisory committee. Initially the bill was opposed by many members of the House and the Senate, and Governor Leavitt thought the bill was not needed.²³ The Utah Manufacturers Association, representing business in Utah, criticized the plan as being unfriendly to business and argued that the committee should have equal numbers of employer and employee representatives.²⁴

The Industrial Commission was also opposed to the idea of creating the UADD Advisory Committee. At first, the Industrial Commission requested that it be given an opportunity to discuss the ramifications and potential impact prior to any legislative action and that a fiscal impact study also precede legislative action.²⁵ The Industrial Commission then offered its own version of its advisory committee in which the Industrial Commission would appoint the advisory committee and the UADD director would serve as the committee chairperson with the authority to call meetings. When it appeared certain that an advisory committee would be established contrary to its suggestions, the Industrial Commission apparently decided to influence the process of appointment. In late 1993, the Industrial Commission was able to state that both the

²¹ Ibid

²² Office of the Governor. Press Release. June 20, 1994. Composition of the 15-member committee included one representative from small business, employers, labor, and the Utah State Bar. In addition, representatives from each of the following protected classes: race, color, national origin, gender, religion, age, and persons with disabilities.

²³ Judy Fahys, "Anti-bias bills advance but face opposition," *Salt Lake Tribune*, Feb. 5, 1994, p. D6.

²⁴ Ibid.

²⁵ The Industrial Commission of Utah, "Response to the Governor's Task Force, Findings and Recommendations for the Utah Anti-Discrimination Division," Sept. 2, 1993, p. 8.

Governor's office and the Industrial Commission agreed that the Governor would appoint the members and chair of the advisory committee.²⁶

It is clear that the Industrial Commission had interaction with the Governor's office. Reminiscent of the role it played in forming the UADD Task Force (see chapter 2), the Industrial Commission appears to have influenced the process when it could not avert the formation of the advisory committee.

During the June 20, 1994, press conference held to announce the appointment of the 15-member UADD Advisory Committee, Colleen Colton neither extended an official welcome nor commented on how she would work with the advisory committee, but highlighted several successes of the UADD, leaving an impression that since the UADD was doing well, the advisory committee was really not needed.²⁷

The UADD Advisory Committee: An Unwelcome Presence

The UADD Advisory Committee had a rocky start from the day of its first meeting in October 1994. The Industrial Commission was more of an adversary to it, and the UADD Advisory Committee had to function in spite of the Industrial Commission.

From the start, some members of the UADD Advisory Committee faced what they believed were unfriendly, insulting treatment by the Industrial Commission and felt harassed. Members were not even granted parking permits to attend committee meetings, not to mention other assistance such as taking meeting notes and making background materials available. Several members found they had received parking tickets after attending a meeting, prompting some to threaten to resign.²⁸ The committee chairman observed that "it has become an insult to people in this room who have not only given their time, but who, to add insult to injury, are now paying their

²⁶ Patricia Owen, associate general counsel, Office of Legislative Research and General Counsel, memo, "Draft Bill--Anti-Discrimination Division Advisory Committee," Dec. 9, 1993. Employees of the Office of Legislative Research and General Counsel act as staff to the Business, Labor, and Economic Development Interim Committee.

²⁷ Robyn Kaelin, member, UADD Advisory Committee. Ms. Kaelin was present at the press conference on June 20, 1994.

²⁸ Marina O'Neill, "Council lacking support: Utah discrimination cases suffering," *Ogden Standard-Examiner*, Nov. 16, 1994, p. E1.

own parking tickets."²⁹ Such treatment was alleged to be in sharp contrast to how the Industrial Commission has treated members of its other advisory committees.³⁰

The UADD Advisory Committee, from the very beginning, had its mission questioned and its independence challenged. At the first meeting, committee members were told by Colleen Colton that the committee was to hold quarterly meetings. Only after a vehement objection and heated debate, the UADD Advisory Committee was allowed to go ahead and hold monthly meetings.³¹

In a December 8, 1994, letter, the Industrial Commission "directed [the UADD Advisory Committee] to focus on specific requests for input presented by the Commission and to abandon discussions of [other issues]." Angered by the tone of this letter and its open challenge to the committee's autonomy, the committee chairman requested a clarification from the State legislature and the Governor's office. Both Representative Frank Pignanelli, sponsor of the enabling bill, and Robin Riggs of the Governor's office, affirmed that the "Committee is free to set its own agenda in addition to helping the Commission."³² Representative Pignanelli added, "You're the last vanguard for public input . . . and the Committee was set up to [see] whether the system was working."³³

With its mission so reaffirmed and its independence restored, the UADD Advisory Committee got back on the track to pursue its mandate. According to its chairperson, the UADD Advisory Committee on numerous occasions had requested data, including statistics on cause findings and examples of successful complaints, but

²⁹ Marina O'Neill. "Bias council bolstered: Members say they have been thwarted." *Ogden Standard-Examiner*. Dec. 14, 1994, p. D1.

³⁰ Pat O'Connor, president, Injured Workers Association of Utah, telephone interview with Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, July 10, 1995. Mr. O'Connor was a member of the Workers Compensation Advisory Council for 5 years through the end of 1994. He acknowledged that parking and lunch was provided, and materials and information were accessible to members.

³¹ Utah Anti-Discrimination Division Advisory Committee, meeting minutes, Oct. 4, 1994 (hereafter cited as UADD Advisory Committee minutes).

³² Marina O'Neill. "Bias council bolstered: Members say they have been thwarted." *Ogden Standard-Examiner*, Dec. 14, 1994, p. D1.

³³ Ibid.

over and over again its requests were denied.³⁴ Instead of providing the requested information, the Industrial Commission criticized the UADD Advisory Committee for asking for the wrong type of information, i.e., data the Industrial Commission felt were outside the jurisdiction of the advisory committee. With regard to cause findings, the commissioners said, "the success of the system is not measured by the numbers that are successfully adjudicated."³⁵ It also informed the UADD Advisory Committee that numbers reflecting the frequency and type of successful claims had not been maintained.³⁶

On March 23, 1995, responding to the UADD Advisory Committee request, the then-director of the UADD, Anna Jensen, submitted a proposal recommending a number of changes which she felt were necessary regarding the operation and organization of the UADD.³⁷ Although the UADD Advisory Committee welcomed Ms. Jensen's recommendations as forthright and thoughtful, Colleen Colton faulted Ms. Jensen for a breach of protocol and reprimanded her accordingly. Ms. Colton, however, never cared to respond or comment on the substance of Ms. Jensen's recommendations.³⁸ The UADD Advisory Committee became concerned that Ms. Jensen was reprimanded for having responded to its request. The committee felt the breach of protocol was a pretext for obstructing the committee's business, demonstrating once again the uncooperative posture of the Industrial Commission. Hearing the rumor that a retaliatory personnel action was afoot against Ms. Jensen, the committee became alarmed and its chairman, Walker Kennedy III, registered an urgent

³⁴ Walker Kennedy III, chair, UADD Advisory Committee, letter to Colleen Colton and Anna Jensen, director, UADD, Nov. 18, 1994.

³⁵ Commissioners, Industrial Commission of Utah, letter to Walker Kennedy III, chair, UADD Advisory Committee, Dec. 8, 1994.

³⁶ Ibid.

³⁷ Anna R. Jensen, director, UADD, memorandum to Commissioners, Industrial Commission, Mar. 23, 1995.

³⁸ Colleen S. Colton, commissioner, Industrial Commission of Utah, memorandum to Anna R. Jensen, director, Utah Anti-Discrimination Division, Mar. 27, 1995. Colleen Colton had been designated to oversee the operation of the UADD.

note of concern with the Industrial Commission that the committee would regard any retaliatory action as an extremely serious matter.³⁹

Some months later, however, the director of the UADD left the agency. After submitting her resignation, she said a teary farewell to her staff, and left the building an hour later.⁴⁰ Although her departure was said to be voluntary, newspaper articles reported that Anna Jensen's reputation for cooperating with State and Federal investigators scrutinizing the UADD may have angered her Industrial Commission supervisors.⁴¹ "Some members of a legislative advisory committee [UADD Advisory Committee] studying ways to improve the agency said Anna Jensen's suggestions may have contributed to her departure."⁴² Commenting on recommended changes, Anna Jensen said, "I thrive in change, so I don't always pick up that some people don't. Some find it difficult."⁴³ Questioned about her abrupt departure, she said "It's lots of complex things and I'd like to steer away from that. I decided for personal reasons to just move on."⁴⁴ Although Anna Jensen was the sole bread earner of the family with a child to support, she left her position with no prospect for immediate employment, and eventually left the State of Utah.⁴⁵

The UADD Advisory Committee continued to experience frustration and exacerbation. In an April 1995 status summary of its working relationship with the Industrial Commission, the committee chairman wrote:

³⁹ Robyn Kaelin, member, UADD Advisory Committee, telephone interview with Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Mar. 31, 1995.

⁴⁰ Marina O'Neill, "Utah director resigns," *Ogden Standard-Examiner*, Aug. 12, 1995, p. 1.

⁴¹ Ibid.

⁴² The Associated Press, "Utah anti-discrimination head resigns, recommends changes," *Salt Lake Tribune*, Aug. 16, 1995, p. C10.

⁴³ Marina O'Neill, "Suggestions may have hastened UADD leader's departure," *Ogden Standard-Examiner*, Aug. 15, 1995, p. A11.

⁴⁴ Ibid.

⁴⁵ Anna R. Jensen, telephone interview with Ki-Taek Chun, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Sept. 11, 1995.

Inconsistent numbers are being reported to this Committee, the Utah Legislature, and the public. The Committee believes that the Legislative Auditor's Office should conduct an in-depth review of this data from 1991 to the present.⁴⁶

There are no standardized operating procedures to guide UADD staff in their investigations of employment discrimination. The Committee has consistently recommended that the investigative files be more uniform in order to be more court-worthy. Moreover, the Committee believes that more uniformity and standardization must be introduced and established for administrative hearings, appeals, and alternative dispute resolution processes.⁴⁷

The Committee believes that the Industrial Commissioners should remain detached from UADD's daily operation, so as to fulfill their statutory roles in reviewing appeals, in order to prevent any appearances of conflict of interest by either Party.⁴⁸

The Committee is concerned that the Commissioners' perception of the Committee's roles differs from that envisioned by the Legislature, Governor, and the UADD Task Force.⁴⁹

According to an article in the *Salt Lake Tribune*, critics of the UADD and the Industrial Commission are harsher in their assessment and go so far as to accuse the UADD and Industrial Commission of doctoring statistics.⁵⁰ Many of these same critics question how committed the Industrial Commission is to countering employment discrimination. The perception held by citizens and community organizations is that "the current system is a waste of taxpayer's money, a needless burden to employers and a disservice to the people it is supposed to protect."⁵¹ Constituents of a State representative have complained over the years that the agency takes too long, costs

⁴⁶ UADD Advisory Committee. letter to the Rocky Mountain Regional Office. U.S. Commission on Civil Rights. Apr. 25, 1996. This letter was also addressed to Governor Leavitt, Lt. Governor Walker, the legislative auditor, and State legislators. A copy of the letter on file at the Rocky Mountain Regional Office. U.S. Commission on Civil Rights.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Judy Fahys. "Criticism haunts 2 Utah agencies," *Salt Lake Tribune*, May 7, 1995, p. E1

⁵¹ Ibid., p. E4.

employees too much, and tends to favor businesses. The recurrent theme seems to be that the system is stacked against employees.⁵²

This perception of a lack of commitment by the Industrial Commission has caught the attention of key lawmakers and the Governor's office. "The general consensus is that there are some problems," says Bob Linnell, an aide to Governor Mike Leavitt.⁵³ One solution that has been suggested and has gained new credibility is to create a State labor department in place of the Industrial Commission and create a human rights commission in place of the UADD, even though the notion of a human rights commission was rejected by lawmakers in their 1994 general session.⁵⁴ This solution would untangle the conflicting roles Industrial Commissioners have now, as advocates for workers in the UADD process and hearing officials in antidiscrimination cases that are appealed, and it would also give discrimination victims a clearer voice.⁵⁵

Questionable Commitment of the Industrial Commission

Critics argue that the UADD, under Colleen Colton's direction, is still engulfed in a cloud of controversy and suffers the deepening distrust of the general public, advocacy organizations, and the State legislature. Marti Jones, an attorney in private practice, summarizes the general sentiment: "It is quite possible that [the Industrial Commission] does not consider employment discrimination a high priority issue in Utah."⁵⁶ Critics contend that the Industrial Commission has not demonstrated a desire or resolve to enforce antidiscrimination laws. Although the Industrial Commission has traditionally exercised its enforcement power for divisions other than

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ UADD Task Force hearing minutes, Mar. 19, 1993, p. 9.

the UADD,⁵⁷ little evidence exists to show that it is willing to exercise a comparable level of enforcement power for civil rights violations. A former UADD investigator, George Lopez, observes "[the Industrial Commission] would appoint internal counsel or an attorney to represent the case all the way through even up to the Court of Appeals if we were talking about a boiler or elevator [code violation]. There is no evidence available to prove that the same process is applied in the case of civil rights violations."⁵⁸ The attorney general's office has litigated one complaint only and the Industrial Commission has not produced any evidence that other cases have also been successfully litigated.

In addition to the selective nonenforcement for civil rights violations, the Industrial Commission, as shown in the following section, has played a significant role in weakening the Utah Anti-Discrimination Act or maintaining the status quo. In some cases, it even initiated legislation that actually watered down and reduced its responsibility to protect victims of employment discrimination.

Legislative Amendments

Since Utah adopted its current antidiscrimination law in 1963, there has never been an effective State order to cease employment discrimination.⁵⁹ Critics of the UADD have said that the Industrial Commission has been and continues to be nonsupportive of victims of employment discrimination in Utah. A former investigator for the UADD, said:

There is no one speaking on behalf of the worker When Congress amended the Civil Rights Act in 1991 to force stronger penalties for discrimination in the workplace, Utah was one of the few states that didn't pass legislation to make the State law as tough as the Federal law.⁶⁰

⁵⁷ The divisions include Industrial Accidents (Workers Compensation), Adjudication, Labor, and Utah Occupational Safety and Health.

⁵⁸ George Lopez, UADD Task Force hearing minutes, Mar. 19, 1993, p. 18. An example: the Industrial Commission will pursue an employer for a safety violation, or nonpayment of earnings as small as \$50, but has been reluctant to enforce an order for an employer to correct a violation of employment discrimination.

⁵⁹ Paul Rolly, "State little help to victims of workplace bias," *Salt Lake Tribune*, Oct. 5, 1992, p. B2.

⁶⁰ *Ibid.*, p. B1.

The Utah Anti-Discrimination Act (discussed in chapter 1) had originally included provisions giving the UADD judicial enforcement power through the Industrial Commission. Specifically, the Industrial Commission could petition the court for an enforcement order on behalf of its previous judgements.⁶¹ Additionally, the act stated: "The commission shall establish rules to govern, expedite, and effectuate the foregoing procedures and its own actions"⁶² This section of the law is important as it gives the Industrial Commission full authority to carry out all the provisions of the act. In addition, the Utah Anti-Discrimination Act required the UADD to provide representation of a file in any further proceeding before the Industrial Commission. Language in the act specifically stated that the agency would appoint an agent or an attorney to represent the case in support of the complaint.⁶³

In 1985, however, a section of the act was repealed, taking away the Industrial Commission's ability to represent the case.⁶⁴ Specifically, the Industrial Commission could no longer provide an attorney or agent to support the complaint at a hearing.⁶⁵ Among the reasons cited for striking that section of the act was the preservation of the division's independent role as an impartial forum for resolution of discrimination cases.⁶⁶ In other words, the Industrial Commission wanted to stay neutral between the employee and the employer, although it was charged with the responsibility of protecting employment discrimination victims.⁶⁷

⁶¹ George Lopez. UADD Task Force hearing minutes. Mar. 19. 1993, p. 16.

⁶² UTAH CODE ANN. § 34-35-7.1(1985).

⁶³ H. B. No. 82. passed Feb. 5. 1981. In effect May 12. 1981. For current law, see UTAH CODE ANN. § 34-35-7 (1988).

⁶⁴ Minority Report. p. 8 Section 34-35-7. UTAH CODE ANN. 1953. as last amended by Chapter 1. Laws of Utah 1981. This section was repealed in Chapter 189. Laws of Utah 1985.

⁶⁵ George R. Danielson, coordinator, Legal Affairs, Utah Department of Commerce, personal interview in Salt Lake City, Utah, with Malee V. Craft and William F. Muldrow, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Apr. 29, 1993.

⁶⁶ UADD Task Force minutes. Jan. 8. 1993, p. 3.

⁶⁷ In addition, removal of the provision 1) effectively nullified the effort of the UADD as the policing division whose duty was to enforce against employment discrimination in Utah; and 2) also held the UADD to a different standard of operation when compared with other investigative divisions of the Industrial Commission such as the Division of Occupational Safety and Health (UOSH), which enforces safety and health violations and is allowed to present its findings and have

In 1990, the Utah Anti-Discrimination Act was amended again and complainants suffered another defeat. In addition to the UADD's not representing the case at the hearing, it was no longer permissible to admit evidence and/or information discovered during the investigation. Under the 1990 amendment, the file was reviewed "de novo," which means that any previous discoveries of evidence were not allowed in the hearing.⁶⁸ New information would be required to be presented at a hearing. Critics believed that "de novo" might nullify all the work the investigator had put into the complaint, in essence making the complainant start over.

That same year, another amendment to the Utah Anti-Discrimination Act resulted in removing a provision that previously had allowed the Industrial Commission to seek judicial enforcement of its orders.⁶⁹ Specifically, the amendment removed the expressed authority of the Industrial Commission to petition the court for the enforcement of its orders. According to critics, it was a huge blow to claimants and effectively gutted the commission's role in enforcing its orders and ensured that the Industrial Commission did not have to petition the court. The amendment also made certain that complainants who had an order issued on their behalf could not hold the commission accountable to enforce its orders. The reason given for this amendment was to bring the Utah Anti-Discrimination Act into compliance with the Utah

legal representation at formal hearings before the Industrial Commission. George Lopez, written comments in response to draft report to Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, July 15, 1996.

⁶⁸ UTAH CODE ANN. § 34-35-7.1(4)(c)(1990).

⁶⁹ George Danielson, staff, UADD Task Force, letter to Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, July 13, 1993, and George Lopez, former investigator for the UADD, UADD Task Force hearing minutes, Mar. 19, 1993, p. 17. UTAH CODE ANN. § 34-35-7.1(12)(13)(1990).

Administrative Procedures Act (UAPA).⁷⁰ The bill was sponsored by Senator K.S. Cornaby⁷¹ who subsequently chaired the UADD Task Force.

In 1991, the Utah Anti-Discrimination Act was amended for the fifth time since 1985. Enforcement responsibility was placed directly in the provisions of UAPA.⁷² Because the Industrial Commission had never enforced an order⁷³ it was deemed that an enforcement provision in the act was not needed.⁷⁴ At no point during this 6-year period did commissioners, legal staff of the Industrial Commission, UADD officials, or the attorney general's office take the initiative to compare the provisions of the UAPA and the act to determine if the amendment and previous amendments were indeed needed. George Danielson, staff of the UADD Task Force, surmised there had not been any judicial interpretation of UAPA to explain why the act was amended.⁷⁵ Upon reviewing the UAPA and the act, it was evident that the Industrial Commission had already been given the power to enforce its own orders. These events give the appearance that the Industrial Commission really did not want to carry out the mandate of the law, and because of this important oversight, enforcement power had been stripped from the Industrial Commission. George Lopez stated, "it was not an accident

⁷⁰ George Danielson, staff, UADD Task Force, letter to Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, July 13, 1993 and Jennifer R. Langheinrigh, staff, House of Representatives, State of Utah, letter to Robyn Kaelin, Jan 20, 1993. The Utah Administrative Procedures Act (UAPA), says in part:

" . . . the provisions of this chapter apply to every agency of the state and govern: All state agency actions that determine the legal rights, duties, privileges, immunities, or other legal interests of one or more identifiable persons. UAPA § 63-46b-1 (1)(a) 1987. [The act] does not govern: the procedures for making agency rules, or the judicial review of those procedures or rules. UAPA § 63-46b-1(2)(a), 1987. In addition to other remedies provided by law, an agency may seek enforcement of an order by seeking civil enforcement in the district courts. UAPA, § 63-46b-19(1)(a), 1987."

⁷¹ Jennifer R. Langheinrigh, staff, House of Representatives, State of Utah, letter addressed to Robyn Kaelin, Jan. 20, 1993.

⁷² UTAH CODE ANN. § 34-35-7.1(12)(13)(1991). The amendments to the act refer to the Utah Administrative Procedures Act (UAPA) § 63-46b-16 and Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

⁷³ George Lopez, UADD Task Force hearing minutes, Mar. 19, 1993, p. 17.

⁷⁴ Several viewpoints for nonenforcement have been voiced but one opinion continues to surface year after year. Enforcement would place the Commission in the "untenable" position of appearing to be partial to charging parties, and ruin its comfortable relationship with business which had been built up over 30 years. George Lopez, written comments submitted to Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, July 15, 1996.

⁷⁵ George Danielson, letter to Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, July 13, 1993. During the community uproar in 1993, the Industrial Commission finally admitted that they had not examined the Utah Anti-Discrimination Act nor UAPA and did not know that they could enforce their own orders.

that the Industrial Commission moved to remove the last vestige of enforcement language from the UADD at a time when it was bolstering enforcement power under the Industrial Accidents Division and Division of Labor."⁷⁶

Between 1991 and 1992, a few State legislators began to take note of citizen complaints about the UADD, voiced continuously since the late 1980s, and wanted to strengthen discrimination laws. However, legislation drafted and sponsored in 1992 to bring State law into compliance with the Civil Rights Act of 1991 failed.⁷⁷ This legislation was not initiated by the Industrial Commission. In explaining why the Industrial Commission neither took the initiative in supporting the bill nor sought a sponsor for the bill, Thomas R. Carlson, a member of the Industrial Commission, stated that it decided to wait for recommendations from the UADD Task Force because the task force might want to include a review of the failed 1992 bill as part of its study.⁷⁸ This refusal to play a leadership role and the disinterest in a bill designed to better protect discrimination victims suggest that the Industrial Commission is not interested in protecting persons who suffer discrimination.

In early 1993, an attorney, making a presentation before the UADD Task Force, suggested that the UADD Task Force make a recommendation to amend the Utah Anti-Discrimination Act so that it would be parallel to the 1991 amendments to the Civil Rights Act.⁷⁹ The UADD Task Force did not act on this recommendation.

During the 1993 legislative session, the Industrial Commission actively promoted six bills related to safety, workers' compensation, labor, and Industrial Commission authority, but none related to employment discrimination.⁸⁰ The commission also

⁷⁶ According to Mr. Lopez, this viewpoint was shared by many others with similar opinions, and many feel the lack of judicial interpretation or lack of initiative on the part of the Industrial Commission and other State officials was not an oversight. George Lopez, written comments in response to the draft report to Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, July 15, 1996.

⁷⁷ Commissioner Thomas Carlson, Industrial Commission, UADD Task Force minutes, Jan. 8, 1993, p. 4.

⁷⁸ Ibid.

⁷⁹ Dunning, UADD Task Force minutes, Feb. 19, 1993, p. 5.

⁸⁰ Thomas R. Carlson, "1993 Legislation", On-The-Job, quarterly newsletter, Industrial Commission of Utah, vol. 8, April 1993, p. 1.

requested Representative Kelly C. Atkinson to sponsor a Fair Housing Bill amendment.⁸¹ In an Industrial Commission newsletter article, Thomas Carlson discussed these bills but made only a passing mention of employment discrimination. An inference to be drawn here is that the Industrial Commission's interest in and commitment to antidiscrimination was not a high priority.⁸²

In 1994, House Bill 96, sponsored by Representative Frank Pignanelli, amended the Utah Anti-Discrimination Act to add judicial enforcement of the UADD's cause findings and to allow attorney's fees to be collected.⁸³ Here, as in other legislation, this bill was initiated and supported by concerned citizens outside the Industrial Commission, while the commission itself appeared to be uninterested.

In this fashion, the Industrial Commission has acted in a manner that raises many questions regarding its commitment to protect victims and to enforce State antidiscrimination regulations. In addition, Utah citizens are also concerned with its obligation to meet Federal guidelines.

The UADD: Federal Accountability

The UADD is obligated to carry out its mandate to protect Utah citizens from employment discrimination because it maintains a work share agreement with the EEOC (see chapter 3) which requires that State laws are enforced and that the State is in compliance with EEOC guidelines.⁸⁴

At the UADD Task Force meeting, Anthony DeDios, an EEOC regional representative for Utah, was asked whether there was a statement in the contract

⁸¹ Ibid.

⁸² The failed bill from the 1992 legislative session was reintroduced in the 1993 session as House Bill 228, Utah Anti-Discrimination Act Amendments. After some consideration by State legislators, the bill failed passage in the House and died there.

⁸³ H.B. 96. [Utah] Anti-Discrimination Act Amendments, Mar. 3, 1994. For current law, see UTAH CODE ANN. § 34-35-9 (Supp. 1996).

⁸⁴ UADD Task Force minutes, Jan. 8, 1993, p. 3.

between the EEOC and the UADD that required Utah law to provide enforcement.⁸⁵ Mr. DeDios did not respond to the question.

He was also queried about the UADD's ability to perform complete, thorough investigations. In response, Mr. DeDios stated that the EEOC reviews all cause determinations⁸⁶ and also performs a "substantial weight review" of a percentage of the no cause determinations.⁸⁷ According to Anthony DeDios, when the EEOC determines that an agency's cases are "substantially equivalent," then, and only then, the State agency is said to have performed a complete, thorough investigation of cases, and meets the requirements of the EEOC.⁸⁸

The Industrial Commission and UADD officials have also showcased the fact that the UADD enjoys an approval rate in excess of 99 percent of the cases closed. And Mr. DeDios characterized the UADD's rate as fantastic.⁸⁹

A "substantial weight review," however, is not an evaluation of the substance of an investigation, but rather a certification that procedural steps required in an investigation are taken. Obtaining a positive "substantial weight review" by the EEOC has little to do with substantive aspects of a case. EEOC guidelines consist of specific checkoff items such as: Were witnesses interviewed?, Was data gathered? and Was the data analyzed? A "substantial weight review" merely means to ascertain if the case file had required documents and certain letters sent in a timely manner.⁹⁰ Therefore, it is misleading to showcase the results of "substantial weight review" when the focus of an inquiry has to do with the quality of complaint investigations.

⁸⁵ Kathleen Mason. UADD Task Force minutes. Mar. 5. 1993. p. 7. Mr. DeDios is the State coordinator. EEOC district office. Phoenix. AZ. He is the liaison to Utah.

⁸⁶ Anthony DeDios. UADD Task Force minutes. Mar. 5. 1993. p. 6.

⁸⁷ *Ibid.*, p. 3.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Substantial Weight Review Procedures, manual, U.S. Equal Employment Opportunity Commission (EEOC), Order 916, app. A. August 1979.

Audit of the UADD

On January 24, 1995, State Representative Dave Jones made a presentation to the Legislative Audit Committee requesting an audit of the UADD.⁹¹ This request was in response to a broad range of ongoing community concerns about the UADD and advocacy organizations' repeated requests for an audit.⁹²

In requesting an audit, Representative Jones expressed four areas of concern: 1) the administrative structure of the UADD, 2) the relationship between the UADD and the EEOC, 3) the funding of the UADD, and 4) complaint processing.⁹³ He specifically listed a total of 35 questions for these four areas of concern. The list was as sweeping as it was thorough and probing, and it posed most of the questions that needed to be investigated and analyzed for a comprehensive understanding of the controversy.⁹⁴

⁹¹ Representative Dave Jones. Utah House of Representatives, telephone interview with Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Feb. 23, 1995 (hereafter cited as Jones interview with Malee V. Craft, Feb. 23, 1995).

⁹² The request for an audit dates back to the early 1990s. To cite a few precedents of citizen requests:

- On September 19, 1992, the Utah Women's Lobby, by vote of its membership, issued a resolution formally requesting the Legislative Audit Committee to investigate the Utah Anti-Discrimination Division of the Industrial Commission of Utah, including its procedures, case investigations, distribution of revenues, enforcement, fulfillment of mission, and effectiveness.
- In that same resolution, the Utah Women's Lobby requested that the U.S. Department of Justice investigate the relationship between the EEOC and the UADD.
- The AFL-CIO in 1992 issued a news release, entitled "Request for Full Investigation of Civil Rights Enforcement in the State of Utah," offering reasons for the request.
- At its 1993 convention, the Utah Federation of Business and Professional Women passed a resolution calling for a legislative audit of the UADD and its handling of discrimination claims in the State. Passage of this resolution was prompted by the Industrial Commission's claim that it could not enforce its orders because of a legislative amendment releasing the UADD from the responsibility of enforcement.
- The Minority Report of the UADD Task Force, released on Sept. 2, 1993, recommended that an audit of the UADD and the Industrial Commission's handling of the UADD's responsibilities be conducted.
- More recently on Mar. 4, 1994, National Image, Inc., a national Hispanic organization committed to employment, education, and civil rights, wrote to Tony E. Gallegos, Chairman of the U.S. Equal Employment Opportunity Commission, expressing concern about the UADD. A specific request for an audit of the UADD was included in this correspondence, copies of which were sent to Utah Governor Leavitt, U.S. Senators Orrin G. Hatch and Robert F. Bennett, several Utah State representatives, the Industrial Commission, and the UADD.

⁹³ Representative Dave Jones. Utah State Legislature, background paper requesting a performance audit of the UADD, undated, presented to the Legislative Audit Committee, Jan. 24, 1995, p. 1. This document is on file at the Rocky Mountain Regional Office, U.S. Commission on Civil Rights.

⁹⁴ Some of the questions were:

- Does the placement of the UADD within the State Industrial Commission hinder enforcement?
- Does the [Industrial] Commission unduly dominate the UADD politically and administratively?
- How effective is State budgetary oversight of the receipt and use of Federal dollars by the UADD?
- Are Federal funds used in an appropriate and efficient manner?

Presented with the request for an audit, the Legislative Audit Committee⁹⁵ promptly decided to adopt a two-phase audit of the UADD, instructing the Office of the Legislative Auditor General to perform the actual work.⁹⁶ Phase 1 was a survey of the UADD or Industrial Commission's antidiscrimination function and phase 2 entailed a full audit. Phase 1 of the audit started on March 1, 1995. Phase 2 began soon after June 16, 1995, when the audit committee authorized the completion of a full audit based on the findings of the survey phase of the legislative auditor general. The auditor's final report was released to the public on February 9, 1996.⁹⁷

The report identified many issues, but two findings and recommendations are worthy of special notice here. First, it concluded that fundamental changes are needed to improve the investigative function. Because the UADD lacks effective management control, the determination of whether discrimination occurred and the amount of evidence gathered to reach an investigative conclusion varied greatly from investigator to investigator. UADD investigators make decisions about charges based on different philosophies and with little accountability. The report recommends instituting a basic management control to guide and direct investigations, including procedures, training, supervision, and review.⁹⁸ These procedures are needed, even though investigators

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- How do case loads, processing time, and findings for or against complainants compare with other states?
 - Does the UADD have the power to fully enforce its discrimination findings? If so, how does it use that power?
 - Does the newly formed UADD Advisory Committee have the independence it needs to function effectively? Are the UADD director and the Advisory Committee unduly dominated by the Industrial Commission?
 - Does the employee have the same quality of representation as the employer?
 - Does the present mediation process resolve disputes effectively?
 - How many "show cause" findings has the State enforced?
 - Is the evidence produced in the complaint investigation "court worthy"?"

⁹⁵ Tim Funk, Community Coalition of Utah, telephone interview with Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Feb. 28, 1995. The Legislative Audit Committee consists of four members: the Speaker of the Utah House of Representatives, President of the Senate, one U.S. Senator and one U.S. Representative from the minority party. It is a subcommittee of the Legislative Management Committee, a permanent committee of the Utah State Legislature, that meets regularly, and oversees the management operations of all aspects of the legislature, has its own staff, and directs its own reviews and audits of State departments, institutions, colleges, and school districts, etc.

⁹⁶ Jones interview with Malee V. Craft, Feb. 23, 1995.

⁹⁷ Wayne Welsh, auditor general, Office of the Legislative Auditor General, written correspondence and a copy of the audit report to Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Feb. 9, 1996. The report was presented to the Audit Subcommittee of the Legislative Management Committee, Utah State Legislature.

⁹⁸ A Performance Audit of the UADD, Office of Legislative Auditor General, Report to the Utah State Legislature, Report No. 96-01, February 1996.

exercise professional judgment and discretion in deciding what evidence to gather and how to interpret its meaning.

Second, the audit found that "Many of the problems . . . result from administrative weaknesses that may be linked to UADD's placement within the Industrial Commission."⁹⁹ The report recommends that the legislature should consider changing the organizational structure under which antidiscrimination law is administered and enforced in Utah.¹⁰⁰

Continuing Criticisms of the UADD

Since the public outcry of 1993 (see chapter 2), nearly 3 years have elapsed, but the UADD still arouses strong negative feelings in those who have been monitoring the situation. Not only does the UADD remain an object of intense controversy, but it has become a symbol of an abusively arrogant, insensitive State agency that fails to protect the interests of victims of workplace discrimination.

Criticisms remain quite similar to those voiced several years earlier. "Basically, it's an informal process that has no meaning," says Walker Kennedy III, a Salt Lake City attorney and chairman of the UADD Advisory Committee.¹⁰¹ Continuing criticisms include: the Industrial Commission is partial to business, creating a system that favors big employers; it is too lax in enforcing discrimination complaints; the UADD lacks an institutional resolve to enforce antidiscrimination laws; and the leadership of the agency needs a drastic change. There is a deepening sense of despair and futility, accompanied by the undercurrent of anger and resentment that are being directed toward the political leadership of State government because of its allegedly negligent oversight and inaction.

⁹⁹ Ibid., p. ii. Other findings and recommendations include: 1) the legislature should allow the UADD to participate in the formal hearing process, without violating the de novo (i.e., anew) concept; 2) the legislature should consider amending the Utah Anti-Discrimination Act to address charging party withdrawals from the State administrative process; and 3) the intake process should be improved by providing more information about the law and administrative process to complainants before they file a charge of discrimination, and by conducting more thorough intake interviews, Ibid., pp. i-ii.

¹⁰⁰ Ibid., p. ii.

¹⁰¹ Joan O'Brien. "Does Anti-Discrimination Act need to be altered?", *Salt Lake Tribune*, Mar. 27, 1995, p. D3.

Three episodes are offered to provide a glimpse of the embedding political complexity surrounding the leadership of the Industrial Commission, to show the continuing decline of UADD's credibility, and to illustrate how ordinary citizen victims of workplace discrimination suffer because of the UADD. These episodes, described in the remaining pages of this chapter, are: i) reappointment of Thomas R. Carlson to the Industrial Commission, ii) an appraisal of the UADD by a practicing attorney, and iii) the case of Samantha Bird.

Carlson Reappointment

Thomas R. Carlson, a member of the Industrial Commission for over 7 years, was nominated for reappointment to that same position by Governor Mike Leavitt upon Carlson's term expiring on March 1, 1995. His nomination came under fire from individual citizens, community organizations, and the corporate community because of his close ties to business.¹⁰² Citizens of Utah wanted a change in leadership and were expecting the Governor to nominate someone who was pro worker. Thomas Carlson, considered to favor the status quo, had strong supporters from the business community, including the Utah Manufacturers Association. In the opinion of critics, the Industrial Commission was already slanted towards business in Utah.

The NAACP held a news conference, and members of the community-based organization said the reappointment of Carlson would be a sign that the State would continue its "benign neglect" of the Utah Anti-Discrimination Division.¹⁰³ Pat O'Connor, president of the 3,200-member Utah Injured Workers Association, said, "the working person does not have a prayer in this State."¹⁰⁴

Because of the magnitude of the public outcry, the State legislature, in an unprecedented move, held a special hearing to allow citizens to voice their

¹⁰² Marina O'Neill. "Leavitt choice draws fire from advocates." *Ogden Standard-Examiner*. Apr. 10, 1995, p. A4.

¹⁰³ Judy Fahys, "Leavitt ignores protests, backs industrial commission pick," *Salt Lake Tribune*, Apr. 19, 1995, p. B4.

¹⁰⁴ *Ibid.*

concerns.¹⁰⁵ Even after all the testimony, Governor Leavitt did not rescind his nomination to reappoint Carlson. The Senate Appointments Committee unanimously sent forward a favorable recommendation,¹⁰⁶ and Thomas Carlson was eventually approved by the Senate to serve for another term. In the midst of all the controversy and objections to his reappointment, Carlson asked to remain a commissioner for only a part of the 6-year term, indicating his plans to retire.¹⁰⁷

An Overview from a Practicing Attorney

Having learned from her colleague that the U.S. Commission on Civil Rights was conducting an investigation of the UADD, Ann Parker-Judd, a practicing attorney in employment discrimination, wrote to the U.S. Commission on Civil Rights, without solicitation, a single-spaced, four-page letter of concern. Some portions of her letter merit sharing because of her detailed articulation.

The preface to her letter read:

I started with the UADD on a very positive vein, feeling that I was working with an organization that was funded for the purpose of enforcing the anti-discrimination laws . . . [After working with the UADD for nearly 2 years] I have now come to the disturbing conclusion that employees have very little chance of receiving any help from the UADD in remedying the serious discrimination in many Utah work environments.¹⁰⁸

She then listed her concerns as follows:¹⁰⁹

For the first six months, I represented approximately 15 or 20 clients in the UADD on a contingency basis, because they did not have enough money to live on, let alone pay for my representation. Only one of these cases resulted in a settlement. After the first six months, I was forced to tell the employees who called that they would have to be on their own, unless they could pay me for my time, which they usually could not. At least twice a week, I receive calls from people saying they have called everywhere, and there is no one to help them with their cases. It is so extremely costly and time-consuming to pursue these discrimination cases and then you have to have a "smoking gun" to win.

¹⁰⁵ Business, Labor & Economic Development Senate Appointments Committee. Apr. 25, 1995. At this hearing private citizens and community organizations presented reasons why Carlson should not be reappointed.

¹⁰⁶ Judy Fahys, "Criticism haunts 2 Utah agencies," *Salt Lake Tribune*, May 7, 1995, p. E1.

¹⁰⁷ Judy Fahys, "Leavitt ignores protests, backs industrial commission pick," *Salt Lake Tribune*, Apr. 19, 1995, p. B4.

¹⁰⁸ Ann Parker-Judd, letter to Ki-Taek Chun, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Apr. 4, 1995, p. 1 (hereafter cited as Parker-Judd letter).

¹⁰⁹ Parker-Judd letter, pp. 1-4. These descriptions contain slight editing, but are mostly quotations.

Attorneys now know this and are refusing to touch discrimination cases unless someone has thousands of dollars to pay them for their time.¹¹⁰

The UADD is investigating and making decisions after only looking at the employers' side of the case. I have had three "no cause" findings in the past two months. In all three cases the findings strongly indicated that the investigator quoted word-for-word from the employers' written submissions, not from records or affidavits, and gave no indication that they had considered what the employee had submitted. In one case involving a HIV positive client, the investigator did not even consider whether there could have been an accommodation in allowing him to take a three hour training course. Another recent "no cause" finding involved a client who is on crutches. Prior to the "no cause" finding, I was told by the assigned UADD investigator that the retaliation part of this case was so strong that I should pull the case out of the UADD and file in Federal court. To make the story short, one statement in the UADD findings was that the "company did not know he was disabled." It is simply too ludicrous because the man was on crutches and obviously disabled. We had submitted a detailed 22-page affidavit as to all the related events and occurrences, but none of them were even considered in the findings. The investigator did not review any company records or take any statements from employees, but based its decision on the written material submitted by the doctor and human resources person who had both been responsible for the problem in the first place.¹¹¹

A potential client who had already filed a complaint with the UADD called me to say that the UADD investigator assigned to his case told him to go back to his employer and try to resolve the problem. When he went to his employer, he was told by the employer, "I don't know what you are doing filing in the Industrial Commission, they will just find for us anyway."¹¹² I am disturbed by this display of audacity and its implications. It is my understanding the UADD is charged with eliminating workplace discrimination and being an advocate for employees. If that is the case, I find it even more disturbing that Commissioner Colleen Colton, as quoted in the enclosed *Enterprise* article by Travis Rigby,¹¹³ has made such anti-employee, pro-employer statements. Those are statements from a person who is looking out for the rights of employers. When someone in charge of the UADD has those kinds of attitudes, it will be very difficult for the UADD to be anything but another weapon for employers to use against employees.¹¹⁴

I have had four calls, just in the past 24 hours from employees who have been discriminated against, with no money to pay for retaining an attorney, and all I can say

¹¹⁰ Ibid., pp. 1-2.

¹¹¹ Ibid., pp. 2-3.

¹¹² Ibid., p. 2.

¹¹³ Travis Rigby. "Court ruling exposes employers to greater risk of discrimination liability," *Enterprise*, Apr. 5, 1993. pp. 1-2.

¹¹⁴ Parker-Judd letter, p. 4.

to them is that it will be very difficult, if not impossible, to obtain redress with the Industrial Commission or in the courts. I am so discouraged and so disheartened for these people.¹¹⁵

The Case of Samantha Bird

This case¹¹⁶ illustrates the general plight that a complainant encounters not only at the UADD but at the EEOC as well. A cause determination by the UADD in her favor turned out to be the beginning of an even longer ordeal, rather than a cause for celebration signaling the end of her suffering. She had filed a complaint with the UADD on October 15, 1991 and was issued a "cause finding" on her behalf on September 16, 1992. It is significant that until then she was not told that the UADD had no power to enforce its cause findings. Not only was she greatly disappointed by this meaningless determination, making her wonder why she bothered to file the complaint to begin with, but she discovered that she was being drawn into a legal battle she could not afford to pay.

Upon issuance of the cause finding, her employer filed a request for an evidentiary hearing and she had to file a motion with the Industrial Commission to strike the request, which cost her \$5,000 for attorney fees. Her employer's request was denied and she was advised by a UADD investigator to go to Federal court. She spoke with no less than 10 attorneys to represent her on contingency and was told the same thing each time: "since it is hard to win a discrimination case in Utah regardless of the merits of a case because laws and the judicial system are so skewed and favor employers, they need to be paid for their service at the rate of \$100 or more per hour."¹¹⁷ She could not afford the estimated cost of \$30,000, and she had to turn to the EEOC.

As summarized below, her experience with the EEOC was equally aggravating:

¹¹⁵ Ibid., p. 3.

¹¹⁶ The account provided here is based on her presentation before the UADD Task Force hearing, Apr. 2, 1993; the transcript of the factfinding meeting conducted by the Utah Advisory Committee to the U.S. Commission on Civil Rights in Salt Lake City, Utah, Dec. 9-10, 1993, vol. 1, pp. 270-83; and her recent letter to Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Apr. 12, 1995 (hereafter cited as Bird letter).

¹¹⁷ Bird letter, p. 1.

In March 1993, she received a call from a supervisory litigation attorney with the EEOC who said her case had excellent litigation possibilities. Throughout 1993 and 1994 there were many delays, breakdowns in communication, and shifting of investigators. The upshot of the EEOC involvement was that in January 1995, she received a call from her new investigator who said that there was going to be a no cause finding. Samantha Bird learned that the investigator made her decision based on interviews with management and that only one manager supported Ms. Bird's claim. Samantha Bird pointed out to the investigator that her witnesses worked in other cities and other offices. The sole supporting witness was the manager who worked in the same office as Ms. Bird and her boss. She told the investigator's supervisor that she intended to take great exception to the EEOC finding if it was going to issue a finding without providing her and her witnesses "the same opportunity to tell her side of the story." In mid-May 1995, she received a call from the EEOC regional office that her case is pending.

She surmises her 3½-year experience as follows:

I find that the UADD did not help me, the Federal court system proves too costly, and the EEOC office is not helping me. I don't think you'll find my case to be grossly different than most people who file a claim of employment discrimination in Utah. It takes an enormous amount of time to get little or no meaningful action. I feel that we are all just pretending that the system works, yet we know deep down that it doesn't.¹¹⁸

I am reminded of the children's fairy tale of the emperor's new clothes. No one could see any clothes, but they were told repeatedly they were there. Finally, some honest, out-spoken person had the nerve to speak up and announce that, contrary to what they were being told, anyone could see (if they truly looked) that there were no clothes at all. It's time for everyone to take a long, hard look at our Utah system and boldly declare that it's standing here buck naked.¹¹⁹

¹¹⁸ Ibid., p. 3.

¹¹⁹ Ibid.

5. Toward a Utah Human Rights Commission

The notion that Utah needs a State agency devoted to the enhanced protection of civil rights has been around at least since 1978, but has gained prominence in the past 4 years. As dissatisfaction with the Utah Anti-Discrimination Division (UADD) has grown deeper, diverse community and advocacy organizations, representatives of the business community, State and Federal officials, and private citizens have proposed the establishment of an independent State agency. Some have specifically called for establishing a State human rights commission. This chapter provides a chronological overview of these efforts suggesting a new State agency in place of the UADD.

A human rights commission or a new and different type of State agency to handle discrimination issues has been suggested for the following reasons: to eliminate useless bureaucracies;¹ the Industrial Commission is unmanageable and not sensitive to employment discrimination issues;² and the UADD chooses not to take steps to enforce the law, and has never taken on a pattern and practice case, although it should have the responsibility, authority, and the ability to do so.³ Additional rationale for such an agency will be highlighted later.

The 1976 Study by the Office of Equal Employment Opportunity

The Office of Equal Employment Opportunity within the Utah State Personnel Office was commissioned in 1976 to study equal employment in State government.⁴ The purpose of the study was threefold: 1) to determine the status of Utah State government's compliance efforts with equal employment opportunity (EEO); 2) to

¹ John Florez, transcript of the factfinding meeting conducted by the Utah Advisory Committee to the U.S. Commission on Civil Rights in Salt Lake City, Utah, Dec. 9-10, 1993, vol. 1, p. 184 (hereafter cited as *Transcript*).

² *Ibid.*, p. 188.

³ *Ibid.*, p. 191.

⁴ Thomas Harry Kemp, Ph.D., "The Administration of Equal Employment Opportunity in Utah State Government: A Study in Organizational Change." Utah State Personnel Office, Office of Equal Employment Opportunity, June 14, 1976 (hereafter cited as *Administration of Equal Employment Opportunity*).

derive a strategy for effecting change in public agencies; and 3) to apply the change in strategy in an effort to move State government closer to EEO compliance.⁵

With regard to the issue of employment discrimination, the report listed three major drawbacks to Utah's Anti-Discrimination Act. They were:

- 1) the act did not meet Federal standards for validating the personnel function in Utah;⁶
- 2) active pursuit to correct the past practice and vestiges of discrimination were not within the purview of the act; and
- 3) the act's major thrust was in the area of processing complaints of discrimination and adjusting those matters in a quasi-judicial manner.⁷

Further, the study concluded that enforcement and penalty provisions are detailed, and violations are judicially punishable with penalties carrying administrative injunction, misdemeanor, and even criminal sanction for contempt and excessive violation throughout the Utah Anti-Discrimination Act, and the Industrial Commission had the ultimate responsibility for enforcement of the law.⁸

Because the State lacked a central human rights authority, investigations and enforcement of claims of discrimination took place in the Utah Anti-Discrimination Division of the Industrial Commission and other State agencies.⁹ Each of these agencies had only relatively minor investigatory and enforcement powers while the Utah Anti-Discrimination Division had the most.¹⁰

The report concluded that enforcement machinery was visibly fragmented and basically lacking in certain critical agencies, recommending reorganization of State government. Of 16 recommendations affecting all aspects of State government, 3 were specific to employment. They were:

⁵ Ibid., p. iv.

⁶ Ibid., p. 152.

⁷ Ibid., p. 153.

⁸ Ibid., p. 155.

⁹ Ibid., pp. 372-73.

¹⁰ Ibid., p. 373.

1. Establish a Human Rights Commission--establish the Utah State Commission on Human Rights by appropriate legislation and executive prerogative during the 1977 legislative session. It would be concerned with all facets of human life and dignity, where people would have a place to voice their appeals and suits of discrimination.¹¹
2. Reorganize those agencies with responsibility of EEO/Anti-Discrimination and study the most effective and efficient way to consolidate the fragmented, decentralized, and cross-purposed Fair Employment Practices (FEP) machinery of State government.¹² Results would include the consolidation of all FEP Agencies into one visible enforcement and clearing house for discrimination and grievance suits to be used by State employees, applicants for employment, and individuals in private sector employment.¹³
3. Redefine compliance procedures to State and Federal law. Define by State law the procedures each State agency must comply with in respect to its parent agency in the Federal government; standardize all compliance procedures within the State FEP laws; and define the Federal interface with each agency regarding the processing of complaints, grievances, and EEO-related reports.¹⁴

The 1978 Proposal by the Utah Equal Employment Opportunity Division

In 1978, Governor Scott M. Matheson "issued a directive requesting recommended procedures for the establishment of a Human Rights Division within the Department of Community Affairs."¹⁵ The motivation for this directive and the rationale for the intended institutional reform were to reduce the unnecessary duplication of services provided by several State agencies,¹⁶ to ensure a more efficient and responsive government, and to be in compliance with Federal

¹¹ Ibid., p. 395.

¹² Ibid., p. 397.

¹³ Ibid., p. 398.

¹⁴ Ibid., p. 399.

¹⁵ Jack D. Quintana, State EEO coordinator. Utah State Personnel Office, Equal Employment Opportunity Division. (formerly known as the Office of Equal Employment Opportunity). "A Study: Human Rights Division," May 1, 1978, p. 3.

¹⁶ Ibid., pp. 1-2. Agencies noted included the Spanish-Speaking Ombudsman, the Black Ombudsman, the Governor's Commission on the Status of Women, the Governor's Committee on the Employment of the Handicapped, the Equal Employment Opportunity Division, and the Utah Anti-Discrimination Division of the Industrial Commission. Due to State reorganization in 1979, some of these agencies have been abolished or their names and functions changed.

guidelines.¹⁷ Most important, it was an attempt to put in place an agency that could improve the effectiveness of carrying out civil rights mandates, by imposing cease and desist orders and enforcing all orders issued.¹⁸

The Utah Equal Employment Opportunity Division (formerly known as the Office of Equal Employment Opportunity) conducted an extensive study on issues relating to the needs and models of existing human rights commissions in other States. Based on a review of 23 models, the Equal Employment Opportunity Division submitted a draft enabling legislation (named the "Utah State Human Rights Act").

According to this 1978 proposal, the commission was to consist of five members appointed by the Governor with the advice and consent of two-thirds of all the members of the Utah Senate. No more than three members were to be from the same political party and each would hold office for a term of 3 years. The commission would have two divisions, the investigative division and the community service division.

The investigative division's main function was to receive formal, written complaints alleging unlawful discriminatory acts by employers or institutions, either public or private. This division would be granted authority to "hold hearings, subpoena witnesses, compel their attendance, administer oaths, take testimony of any person under oath,"¹⁹ and to "secure enforcement of the order of the Commission or other appropriate relief."²⁰ The division would have other supplementary functions such as:

To investigate where no complaint has been filed, but with the consent of at least four members of the Commission any problem of racial discrimination with the intent of avoiding and preventing the development of racial tension; and

¹⁷ Ibid.

¹⁸ Jack D. Quintana, assistant director, Department of Administrative Services, Division of Facilities Construction & Management, telephone interview with Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Mar. 24, 1995 (hereafter cited as Jack D. Quintana interview with Malee V. Craft, Mar. 24, 1995). The 1978 Human Rights Division proposal was prepared under the direction of Mr. Quintana.

¹⁹ Utah State Human Rights Act (proposed), § 7-g, p. 18.

²⁰ Ibid., § 10, p. 24.

On request of the government, to investigate claims of excessive use of force by police or military personnel in civil rights protest activities.²¹

The community service division, on the other hand, would conduct educational programs and workshops dealing with equal opportunity issues and foster good will between the various ethnic/racial groups in the community, provide mediation between groups, conduct and publish studies, and submit to the legislature and Governor a yearly report on the activities of both divisions of the commission.²²

This extensive proposal, however, did not go far with Utah lawmakers. There were a couple of attempts to introduce legislation, but those bills died quickly and quietly.²³ Although Governor Matheson was sympathetic to the issue, he did not push to establish the commission but relied on the State legislature to do so.²⁴

Resolutions by Advocacy Organizations

At its 1993 convention, the Utah Federation of Business and Professional Women passed a resolution "petition[ing] Governor Leavitt and the Utah Legislature for the creation of a human rights commission, separate from the Industrial Commission of Utah, to replace the Utah Anti-Discrimination Division of the Industrial Commission."²⁵

On September 14, 1993, the Utah Pharmaceutical Alliance passed a resolution petitioning the Governor and the Utah Legislature for a human rights commission that is independent of the Industrial Commission.²⁶

²¹ Ibid., § 7. 11-12, p. 18.

²² Ibid., pp 4-5.

²³ Jack D. Quintana interview with Malee V. Craft, Rocky Mountain Regional Office, U.S. Commission on Civil Rights, Mar. 24, 1995.

²⁴ Ibid.

²⁵ A copy of the Utah Federation of Business and Professional Women resolution is on file at the Rocky Mountain Regional Office, U.S. Commission on Civil Rights.

²⁶ A copy of the Utah Pharmaceutical Alliance resolution is on file at the Rocky Mountain Regional Office, U.S. Commission on Civil Rights.

As discussed in chapter 2, by 1992 it was apparent that the dissatisfaction with the UADD was pervasive, criticisms numerous, and inefficiency widely noted. Prompted by these concerns, diverse groups of organizations and concerned citizens suggested establishing a new State agency in place of the UADD, an agency that would be unencumbered and unconstrained by the Industrial Commission and also be sensitive and responsive to the needs of the victims of employment discrimination.

The UADD Task Force Report, 1993

Several testimonies presented to the UADD Task Force at its hearings were blunt in criticizing the UADD and in recommending possible solutions. For example, Julie Davies detailed the deficiencies of the UADD and described her personal ordeal of going through the UADD process and being retaliated against by her employer during the prolonged period of UADD inaction. She recommended to "remove the UADD from the Industrial Commission and set up a human rights commission. Commission members should represent protected classes."²⁷

George Lopez, who also made a presentation at the UADD Task Force hearing, said he agreed with Ms. Davies that there needs to be some focus as to whether the Industrial Commission is the proper place for the UADD. He emphasized, "that needs to be looked at again."²⁸ And a third witness, Shirley Arnett, a private citizen who also filed a complaint with the UADD, described her lengthy ordeal, recommending, "I, too, am calling for a human rights commission."²⁹ From a legal vantage point, attorney Louise T. Knauer also said a human rights commission needs to be established to handle discrimination complaints.³⁰

²⁷ Julie Davies. Utah Anti-Discrimination Division Task Force hearing minutes. Mar. 19, 1993, p. 14.

²⁸ George Lopez. Ibid., p. 17. Mr. Lopez, a former employee of the UADD, has first-hand experience and knowledge of the many problems faced by the UADD.

²⁹ Shirley Arnett. Ibid., p. 24.

³⁰ Roger Pusey, "High caseload called key problem in Anti-Discrimination Division," *Deseret News*, Feb. 25, 1993, p. D7.

The UADD Task Force Report makes two points. First, it notes that a number of individuals made overlapping suggestions, recommending the "establishment of a human rights commission to enforce civil rights actions in the State."³¹ Second, "recommending the establishment of a human rights commission was beyond the scope of the Task Force's powers."³² Therefore, the UADD Task Force recommended the "formation of a legislative study committee to study the establishment of a human rights commission in Utah."³³

Disagreeing with such restrictive interpretation of the UADD Task Force's mandate, however, the Minority Report of the UADD Task Force strongly recommends the "establishment of a human rights commission in place of the UADD to enforce civil rights remedies in the State."³⁴ As an interim measure, the Minority Report of the UADD Task Force recommends creating an advisory council to advise the UADD on policies and procedures, to recommend legislative amendments when necessary, and to monitor changes and evaluate their success or failure.³⁵

The Factfinding Meeting of the Utah Advisory Committee to the U.S. Commission on Civil Rights, 1993

Many participants at the factfinding meeting of the Utah Advisory Committee also made similar suggestions. For example:

1) Tim Funk, coordinator of Community Coalition of Utah, claimed that there is wide community support for a human rights commission and that he could easily identify 20 to 30 supportive witnesses who could explain the merits of a State human

³¹ The Governor's Task Force on the Utah Anti-Discrimination Division. Findings and Recommendations. July 27, 1993. p. 15 (hereafter cited as UADD Task Force Report).

³² UADD Task Force Report. p. 15.

³³ Ibid., p. 16.

³⁴ Kathleen C. Mason, Minority Report of the Utah Anti-Discrimination Division Task Force, Findings and Recommendations, Sept. 2, 1993. p. 24.

³⁵ Ibid.

rights commission.³⁶ Concerning the prospect of establishing a Utah human rights commission, he says "that's really, I think, what many of us in our hearts think is the ultimate solution."³⁷ He believes that the Industrial Commission neither has the right organizational structure for a civil rights unit, nor is it the place for an antidiscrimination enforcement unit to be located. He maintains that if a human rights commission is not going to be established, the UADD, because it has no credibility in the State, "should be taken out of the Industrial Commission, set aside with a strong advisory committee, and made an executive office of the Governor. And give it some credibility."³⁸

2) Julie Davies, a representative of the Utah Federation of Business and Professional Women, an organization dedicated to the needs of working women in Utah, noted that her organization has concluded that the UADD is hostile and unresponsive to the needs and concerns of discrimination victims.³⁹ She was unequivocal about what needs to be done to remedy the situation. She stated:

[Business and Professional Women of Utah] calls upon the Governor and the Utah Legislature to pass legislation mandating . . . the UADD enforce cause findings in court if necessary due to noncompliance, to pass specific remedy provisions and procedures . . . , to conduct an in-depth study of proposals to remove the UADD from the Industrial Commission, and establish a human rights commission to handle discrimination matters in the State of Utah.⁴⁰

3) Expressing similar frustration and concern, John Florez, a former commissioner of the Industrial Commission, maintained, "If an agency can't solve a complaint, we don't need it, we can't afford it If we can't resolve complaints we should eliminate useless bureaucracies."⁴¹ In his view, employment discrimination is a serious issue. and UADD's neglect of its duties is an "affront" to

³⁶ *Transcript*. vol. 1, p. 295.

³⁷ *Ibid.*, p. 294.

³⁸ *Ibid.*, pp. 295-96.

³⁹ *Transcript*. vol. 2, pp. 139-40.

⁴⁰ *Ibid.*, p. 140.

⁴¹ *Transcript*. vol. 1, p. 184.

the victims and minority community.⁴² Recounting his experience as a commissioner of the Industrial Commission, he concluded that the Industrial Commission lacks leadership and interest in protecting workplace discrimination victims.⁴³ Because continuing the organizational status quo is to set the UADD up to fail, he recommends to "take the [UADD] out of the [Industrial Commission], renew it and have it as a separate agency,⁴⁴ . . . a new agency with new procedures and new mandate, a new mission, new authority, and new responsibilities."⁴⁵ He further thinks that it is realistic to think that there would be support for establishing an independent enforcement agency funded to do the job.⁴⁶

4) K.S. Cornaby, chairperson of the UADD Task Force, which was discussed in chapter 3, stated that it would make sense for the Governor to "look at and review" the possibility of a human rights commission. He noted that the Martin Luther King, Jr., Human Rights Commission, a Governor's commission now in existence for 3 years, could well form the basis of a human rights commission.⁴⁷

5) Kathleen Mason, then-chairperson of the Governor's Commission for Women and Families, who also served on the UADD Task Force, was convinced that the State of Utah should seriously consider the possibility of taking away the antidiscrimination function of the Industrial Commission and consolidate all similar functions into one administrative unit with enforcement authority.⁴⁸ She emphasized the need to weigh carefully organizational options that can facilitate protecting those citizens who suffer

⁴² Ibid., p. 187.

⁴³ Ibid., pp. 188-89.

⁴⁴ Ibid., p. 189.

⁴⁵ Ibid., p. 198.

⁴⁶ Ibid., pp. 195-96.

⁴⁷ Ibid., p. 16. It should be noted that a primary function of the Martin Luther King, Jr. Commission is to raise the consciousness of citizens of Utah with respect to discrimination within the State and with respect to the recognition of the rights of minorities.

⁴⁸ Ibid., pp. 229-30.

workplace discrimination, including the establishment of a human rights commission.⁴⁹ She was not too optimistic about the prospect of establishing such an agency anytime soon, but "out of frustration, out of lack of being able to do anything," recommended, as an interim solution, a strong advisory board for the UADD.⁵⁰

⁴⁹ Ibid.. p. 241.

⁵⁰ Ibid.. pp. 239-40.

6. Findings and Recommendations

Finding 1

Community and advocacy organizations such as the Salt Lake Chapter of the NAACP, Utah Coalition de La Raza, and the Asian Association of Utah agree that employment discrimination in Utah is widespread and on the increase.¹ Although these organizations do not compile data in a systematic fashion, data are available from the Utah Anti-Discrimination Division (UADD) of the Industrial Commission. A summary of data collected by the UADD showed that employment discrimination complaints steadily increased over a 10-year period, from 1985 to 1994.² In addition, a statewide poll conducted for the *Salt Lake Tribune* showed that more than 94 percent of Utah citizens believed that discrimination exists in Utah. Three of five Utahns said discrimination reveals itself in religious and racial biases, while more than half acknowledged sexism.³ Citizens' opinions regarding discrimination were closely aligned with the official data obtained from the UADD report.⁴

Recommendation 1

The UADD should develop training materials and put in place procedures to educate all Utah employers and workers who are protected by State guidelines of their rights and responsibilities with regard to employment discrimination. To make the procedures stronger, the UADD should

1. develop and institute specific time lines for implementation where all Utah firms who employ 15 or more persons and their current employees will have participated in at least one education training session; and
2. the training curriculum should be approved by the UADD Advisory Committee and the U.S. Equal Employment Opportunity Commission (EEOC).

¹ Pp. 1-2.

² P. 2.

³ P. 4.

⁴ P. 4 and table 1.2, p. 6.

Finding 2

The UADD, mandated by State law to investigate, resolve, and conclude complaints of employment discrimination, is empowered to make legislative and policy recommendations, report to the Governor annually, and make public information on its efforts to eliminate employment discrimination.⁵ However, the UADD has not lived up to its obligation to adequately process employment discrimination complaints in Utah. Critics of the UADD have sought in vain to gain access to data such as the number of complaints filed and closed including the number of final orders enforced, the percentage of cause findings, processing time, and budget.⁶ Many individuals and community organizations voiced concerns of insensitivity, unresponsiveness, and inefficiency. The media revealed how victims of workplace discrimination had been affected by the "callous inaction" of the UADD.⁷ Utah workers as well as the general public should be knowledgeable of the state of employment discrimination in the State, and reassured the UADD is doing everything legally possible to protect its citizens. Making the elimination of employment discrimination a high priority in the State sends a clear message to employers that State government and the UADD closely monitor and enforce employment discrimination laws in Utah.

Recommendation 2.1

The UADD should develop a specific time frame (month) to report the results of its work and accomplishments to the Governor and the citizens of Utah on an annual basis.

Recommendation 2.2

The UADD should prepare an annual "state of employment discrimination in Utah" report to be released to the public at a press conference in concert with the annual report to the Governor. This report should be widely disseminated and include specific information on the agency's accomplishments in order to provide the public

⁵ P. 12.

⁶ P. 13.

⁷ P. 28.

with accurate and timely data.

Finding 3

As the sole agency in Utah contracted with the EEOC to receive and process employment discrimination complaints, the UADD carries the responsibility to uphold the law for thousands of people.⁸ It is responsible for ensuring that victims of employment discrimination are protected, treated fairly, and given due process under the law. The work-share agreement with the Federal government states that the UADD will meet 10 specific criteria, including "demonstrate its willingness and ability to enforce its laws(s)."⁹ Designated as a fair employment practices agency (FEPA) or 706 agency, the UADD receives monetary compensation averaging \$500 for each complaint processed regardless of the outcome of the case.¹⁰ To maintain FEPA status, an agency must meet the 10 criteria and demonstrate its capability to pursue the elimination of discrimination and seek or provide compensatory and prospective relief.¹¹ The agreement maintained between EEOC and the UADD since 1979 continues in force¹² despite widespread citizen concerns, media exposure, and official investigations identifying numerous questions about the UADD's ability and willingness to enforce the law.¹³

Recommendation 3.1

The Utah attorney general's office should also review annually and determine whether the UADD continues to maintain 706 contract status by adhering to the rules and regulations of the EEOC, and mandating corrective action where necessary.

⁸ P. 12.

⁹ P. 13.

¹⁰ P. 58.

¹¹ P. 60.

¹² P. 12.

¹³ P. 13.

Recommendation 3.2

The UADD should develop a reporting system where data are made available to required sources, i.e., the EEOC, the Governor of Utah, the UADD Advisory Committee, and where data are accessible to the general public.

Recommendation 3.3

The UADD should ensure that data reporting periods coincide with the Federal and State reporting periods.

Recommendation 3.4

The EEOC should review the contractual agreement between the UADD and its agency annually and insure that the agency is in compliance with the contract requirements. This should include thorough, onsite field investigations in Utah including consultations with employees and civil rights organizations. The committee finds that the UADD's management information systems are inadequate and that serious questions exist concerning the reliability and accuracy of statistics and other data provided by the agency. Lack of confidence in the agency's reporting capability renders it difficult to assess the agency's effectiveness and performance.

Recommendation 3.5

After review, if contract requirements are not met, the EEOC should impose corrective actions or penalties for noncompliance, and initiate a specific deadline for improvement or compliance, or terminate the contract if compliance is not met.

Finding 4

The UADD, for many years, experienced a severe backlog of cases and was chronically understaffed as it attempted to meet the increasing numbers of complaints filed. Critics of the UADD were concerned that the backlog of cases was increasing even more, and many had been within the system for too long. The backlog resulted in poor or no service to complainants. Some Utah citizens felt they had been "cheated and abused" by the State and the system that was supposed to help them.¹⁴ Officials

¹⁴ P. 29.

of the UADD reported that the backlog had been reduced.¹⁵ However, the committee's review of backlog statistics showed a different story.¹⁶

In addition to the backlog and new complaints filed daily, investigators' workloads increased dramatically, which caused their caseloads to be much higher than normal.¹⁷ As a result, investigators were overworked and required to handle caseloads clearly beyond their capabilities. Because of the increased backlog, contract attorneys were hired to complement the small staff of UADD investigators assigned to process complaints.¹⁸ And finally, the length of time it took to process complaints was extreme and typically exceeded the 300-day mark.¹⁹ A number of individuals who have gone through the UADD system complained that their cases took as long as 2 to 3 years to be processed,²⁰ and had caused them not only personal damage but also harm to their careers and their families.²¹ Data reviewed by the committee confirmed these citizen complaints and revealed that UADD's averaging processing time remained between 200 to 300 days over a 6-year period.²²

Recommendation 4.1

The UADD should evaluate its caseload and make staffing projections based on an analysis of the number of new cases accepted annually by the UADD as well as taking into account backlogs from previous years.

Recommendation 4.2

The UADD should request that the State legislature allocate more money to bring UADD staffing up to the level where citizens who file employment

¹⁵ P. 14.

¹⁶ P. 14 and table 1.4, p. 15.

¹⁷ P. 19.

¹⁸ P. 16.

¹⁹ P. 21.

²⁰ P. 21.

²¹ P. 28.

²² P. 21.

discrimination complaints can be properly and adequately served in a timely manner.

Recommendation 4.3

The UADD should monitor each investigator's caseload.

Finding 5

Testimony and the results of systematic evaluations have shown that onsite investigations are necessary and important to address employment discrimination.²³ However, citizens, the print media, and organized labor voiced their concerns over a number of issues, including poor investigations.²⁴ Quality investigations are extremely important for complainants within the UADD system. However, victims suffered further because the investigations conducted by the UADD, allegedly, were often incomplete, not thorough, or even biased.²⁵ It was also noted that onsite investigations were rarely, if ever, conducted and were left up to the discretion of the investigator.²⁶ Also, allegations were heard that the many other facets that make up a quality investigation were not followed or adhered to. Because of the absence of mandatory investigative guidelines, and the size of UADD's caseload, the quality of investigations suffered adversely.²⁷

Recommendation 5.1

The UADD should immediately establish and administer written guidelines and procedures to conduct thorough investigations and implement controls to standardize investigations.

Recommendation 5.2

The UADD should, as soon as possible, develop training modules on the appropriate steps to take to conduct thorough investigations. Participation in the

²³ P. 22.

²⁴ P. 28.

²⁵ P. 33.

²⁶ P. 23.

²⁷ P. 23.

training modules should include all investigative staff. Training should be repeated on a periodic basis to identify unforeseen problems and provide a review for staff.

Recommendation 5.3

UADD investigators should increase the number of onsite investigations that are performed for each case. Supervisory direction should be established to assure that this is achieved.

Recommendation 5.4

The UADD should reduce the size of caseloads per investigator, which should enhance the quality of its case investigations.

Recommendation 5.5

The EEOC should review the agency's guidelines and procedures and assure that UADD investigations are greatly improved.

Finding 6

It appears that the Industrial Commission is remiss in its fiscal responsibility to ensure that Utah workers can receive adequate service when a complaint is filed with the UADD. Inquiries made regarding this issue have been met with less than a persuasive rationale for the UADD's small budget allocation out of the Industrial Commission.²⁸

The UADD budget comes from two sources, State general funds through the Industrial Commission and EEOC reimbursement to the UADD for fulfilling its fair employment practices agency (FEPA) agreement.²⁹ Federal funds have supported a major portion of the UADD operation over the past 10 years.³⁰ In contrast, the average percentage of monies received by the UADD out of the Industrial Commission's total budget was approximately 4 percent, at the time of the Utah Advisory Committee's review, even though the dollar amount had increased slightly

²⁸ P. 22.

²⁹ P. 22.

³⁰ P. 22.

every year.³¹ Therefore, the UADD's operating budget remained constant despite a significant increase in cases filed.

Budget issues have come up over the years, including with Governor Michael O. Leavitt's transition team, which recommended a study of UADD's budget. The report suggested that the Governor request an audit of UADD's finances, with special attention given to how Federal (EEOC) monies are being spent.³² Other questions have surfaced as to whether the UADD has exclusive use of the money received from the EEOC (Federal reimbursement dollars are credited to the Industrial Commission's budget and then allocated to the UADD). When asked, the EEOC Phoenix District Office liaison to the UADD could not provide an answer to the question.³³

Recommendation 6.1

The UADD should prepare detailed statistics and data to present a solid case to the Industrial Commission recommending increased funding.

Recommendation 6.2

The Industrial Commission should present detailed data and information for the Governor and the State legislature recommending increased funding to combat employment discrimination.

Recommendation 6.3

State lawmakers should pass legislation to increase the budget of the Utah Anti-Discrimination Division (UADD).

Recommendation 6.4

The Industrial Commission should reallocate its own budget, designating a larger portion of its funds to the UADD.

³¹ P. 22.

³² P. 40.

³³ P. 59.

Finding 7

Citizen and community concerns surrounding the establishment of a human rights commission have been voiced for over 8 years. Efforts to form a State human or civil rights commission have come from private citizens, State legislators, the legal community, representatives of community organizations, and advocacy groups. These initiatives have resulted from the growing dissatisfaction with the lack of commitment and effectiveness demonstrated by the Utah Anti-Discrimination Division (UADD). The UADD is seen by many as an inept bureaucracy lacking any dedication to assist victims of employment discrimination. They believe that a mechanism is needed to aggressively enforce civil rights mandates, especially employment discrimination laws of Federal and State governments. A statewide civil rights agency is desperately needed to ensure that State government addresses employment discrimination in an effective and responsive manner.

Recommendation 7

The State of Utah should establish a Human Rights Commission for its citizens that is:

- a. independent of other governmental functions and agencies,
- b. adequately funded,
- c. properly managed,
- d. directed by appointed members who are reflective of the entire community and have a demonstrated commitment to civil rights,
- e. unencumbered and unconstrained, and
- f. sensitive and responsive to the needs of victims of workplace discrimination.

Finding 8

The report offers sufficient data to recommend that the UADD be removed from under the oversight of the Industrial Commission.

The UADD has been hampered from serving the public and its inefficiency has been widely noted over the last few years. In addition, the Industrial Commission has proven to be ineffective in managing the UADD. Because of the Industrial Commission's mismanagement and lack of interest, no solid evidence or examples could be identified that established that the UADD/Industrial Commission ever

represented or requested to represent a cause finding against an employer.

Recommendation 8.1

Take the UADD out from under the direction and auspices of the Utah Industrial Commission.

Recommendation 8.2

Make the UADD a stand alone agency.

Recommendation 8.3

Enact legislation that will empower the UADD to enforce its own orders and rulings.

Recommendation 8.4

Enact legislation that would *require* the UADD to enforce its own orders.

Finding 9

A comprehensive report indicated that because discrimination laws in Utah have not kept pace with Federal regulations, employees in Utah have fewer legal remedies when they suffer discrimination.³⁴ Employment discrimination law experts also suggested that regulators in the Utah Industrial Commission were overly influenced by business interests,³⁵ thereby: 1) establishing a legal system that favors employers at the expense of employees; and 2) sending a subtle message to employers that discrimination claims are a low priority that carry few, if any, penalties.³⁶ The Utah Minority Bar Association in 1993 petitioned Governor Leavitt to bring the State of Utah in accord with the other 44 States that enforce their respective antidiscrimination legislation and provide for State prosecution of those who violate the Utah Anti-Discrimination Act.³⁷ In 1994 two bills were enacted by the State legislature, one granting judicial enforcement power to the UADD to ensure

³⁴ Pp. 33-34.

³⁵ P. 34.

³⁶ P. 34.

³⁷ P. 53.

meaningful protection for victims of workplace discrimination.³⁸ Although this was a sign of improvement, criticisms of the agency continued.

Recommendation 9

The State legislature should mandate that the Utah attorney general's office be responsible for reviewing all legislation enacted that affects the enforcement powers of the UADD and the Industrial Commission.

Finding 10

Because of the numerous obstacles that have been enumerated throughout the report concerning the UADD and its ability and willingness to enforce the law, a number of issues arise. Utah workers, community activists, and others have continuously questioned how the UADD could continue to maintain a contract with the EEOC when it has not fulfilled its contractual obligations. As reported, in 1993 a former UADD director, while completing an EEOC document required to continue certification, replied "no" when asked if the UADD met all the requirements to maintain a contract with the EEOC.³⁹ Many individuals and advocacy organizations called for this irregularity to be investigated and the Industrial Commission held accountable for any misrepresentations made in that or other contracts.⁴⁰ When EEOC staff were questioned about the UADD's response, an explanation was not forthcoming nor did the agency produce documentation, Federal guidelines, or regulations that specifically addressed the issue. EEOC's only response was "Utah law and the procedures of the Division [UADD] are substantially equivalent to the EEOC requirements."⁴¹ The EEOC Phoenix District Office could not explain why the UADD had not been placed on corrective action, nor did the EEOC offer to investigate the numerous concerns surrounding the State agency, including those disclosed in the

³⁸ P. 67.

³⁹ P. 60.

⁴⁰ P. 60.

⁴¹ P. 61.

legislative audit report. The Utah Advisory Committee is concerned that the EEOC is failing to assure that the citizens of Utah receive the full protection of Federal antidiscrimination laws in employment, and this failure is resulting in diminished protection for victims of egregious and illegal discrimination.

Recommendation 10.1

The Utah attorney general's office should investigate the UADD to determine compliance with State and Federal laws, and administer corrective action as necessary.

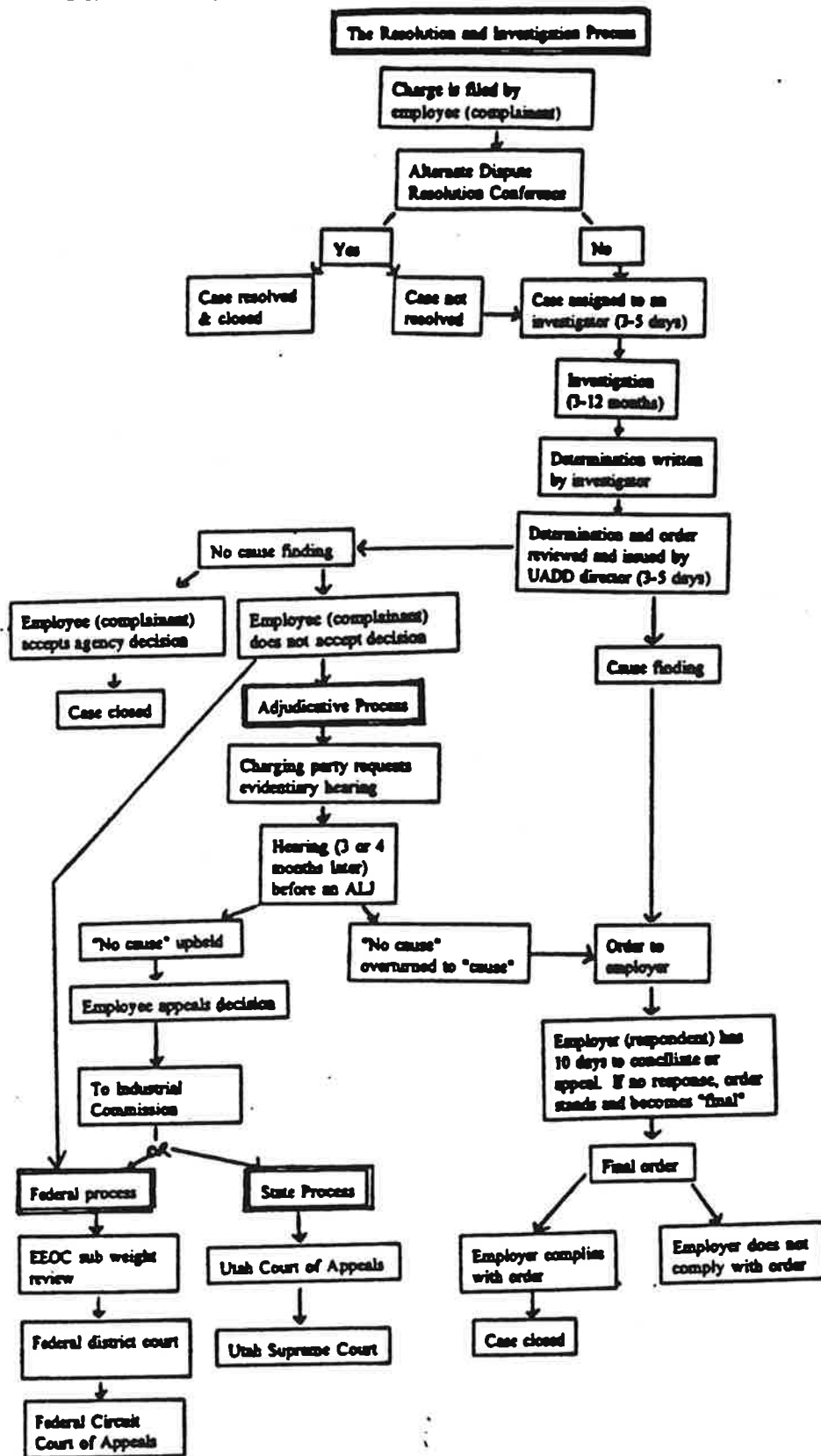
Recommendation 10.2

The Utah Advisory Committee to the U.S. Commission on Civil Rights recommends that the U.S. Commission on Civil Rights initiate an investigation regarding the EEOC Phoenix District Office's reluctance and inaction on its part concerning several issues identified as ongoing irregularities within the operation of the UADD. Furthermore, the Utah Advisory Committee recommends that the U.S. Commission on Civil Rights review EEOC's procedures for certifying the status of State agencies as 706 (FEPA) entities.

Recommendation 10.3

The EEOC Phoenix District Office should be investigated for failing to meet its responsibility as the Federal agency mandated to protect victims of employment discrimination by allowing the UADD to continue operating as a fair employment practices agency when the agency was not meeting required guidelines.

FILING A CHARGE OF EMPLOYMENT DISCRIMINATION



Note: The progression of a complaint filed by the employee (complainant) is used in this example.

As part of the Adjudicative process, the employee and employer (respondent) have the same "appeal" rights. If either is dissatisfied with the decision rendered by the UADD, they may request an evidentiary hearing before an administrative law judge of the Industrial Commission to appeal the agency's decision. However, their request may or may not be granted. If it is granted, there are several lengthy steps involved in the appeal process as well as several places within the complaint process where an appeal can take place. For simplicity purposes, these steps were not listed.

Source: The description of this procedure is based upon information obtained from the U.S. Equal Employment Opportunity Commission and the Utah Anti-Discrimination Division.

The Resolution and Investigation Process

- i) Once a complaint has been filed, and both parties notified, a resolution conference is scheduled immediately between the charging party (complainant) and the respondent (employer). This conference is voluntary and provides an opportunity for both sides to try and solve the employment issue in a neutral and non-threatening situation. One or more impartial persons are present during this conference, and they act as mediators. The goal is to reach an agreement that is satisfactory to both parties.
- ii) If the resolution conference is not successful or no conference is held at all, then the case is assigned to an investigator who investigates the case and then issues a determination. That determination is forwarded to the director of the UADD, and the final determination and order is issued by the UADD director.
- iii) If the determination is a cause finding, which means that the UADD found that there is reason to believe that the employer discriminated against the employee, the employer has 10 days to conciliate. If conciliation is successful, or if the employer does not challenge the order, the case is closed and the order stands.

The Adjudicative Process

- iv) When the complainant or the respondent are dissatisfied with the decision of the UADD, at this juncture, either party has appeal rights. They can request an Evidentiary Hearing. If the complaint moves to the hearing stage, it is no longer directly within the authority of the UADD, and is now in the adjudicative process. Once the hearing is granted, the case will be heard before an administrative law judge. However, it is still under the jurisdiction of the Industrial Commission. The following scenarios fall under this process:
 - a) An employer, who refuses to conciliate or challenges the order, can request an evidentiary hearing (appeal) before an administrative law judge (ALJ) of the Industrial Commission. This request for a hearing must be made within 30 days of the order (cause finding), and may or may not be granted.
 - b) If a no cause finding is issued by the UADD, the employee can request a hearing. Again, the request may or may not be granted. If the request is granted, the complainant (employee) must identify and present new evidence not previously presented in the case file.
 - c) If the complainant's determination is overturned, from a no cause to a cause finding, the respondent (employer) has additional time to appeal to the Commissioners of the Industrial Commission. If the no cause finding is upheld, the complainant can appeal also.

and

The State Process

- v) After the Industrial Commission Review, if either party is still not satisfied with the decision, both parties can go to the Utah Court of Appeals, and then the Utah Supreme Court.

or

The Federal Process

- vi) Alternatively, the **complainant** can bypass the Adjudicative and State processes, move to federal jurisdiction and request a Notice Of A Right To Sue Letter or a "substantial weight review" from the EEOC, then go to Federal District Court, the Circuit Court of Appeals, and then the U.S. Supreme Court.¹

Source: Utah Anti-Discrimination Division.

¹ The Adjudicative Process is not part of the UADD Investigation and Resolution Process. Although the Adjudicative Process is under the jurisdiction of the Industrial Commission, the UADD tries to make the distinction between the two bodies. It is difficult and almost impossible to separate the two because the UADD is a division of the Industrial Commission and its activities are monitored by Industrial Commission commissioners. The separation which the UADD tries to make is confusing and ambiguous to employment discrimination claimants. The adjudicative process requires a substantial amount of time—usually one year or longer—and generally requires the use of attorneys as the charge of employment discrimination moves to a different level. The State process and the processes which come under Federal jurisdiction also generally require the use of attorneys and can take years and thousands of dollars to reach settlement.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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July 30, 1996

Ms. Malee V. Craft
 Civil Rights Analyst
 United States Commission on Civil Rights
 Rocky Mountain Regional Office
 1700 Broadway, Suite 710
 Denver, Colorado 80290

RMRO

96 AUG -1 P2:1

RECEIVED

Dear Ms. Craft:

This is in response to your June 28, 1996, letter in which you provided us with a copy of the draft report, entitled "Employment Discrimination in Utah", prepared by the Utah Advisory Committee to the U.S. Commission on Civil Rights, and solicited our comments. The draft report focuses primarily on the civil rights enforcement efforts of the Utah Anti-Discrimination Division (UADD). I have carefully reviewed the report in my capacity as director of the U.S. Equal Employment Opportunity Commission's Phoenix District Office, which plays a key role in the enforcement of federal civil rights employment statutes in Utah.

As we indicated to you during the course of the Utah Advisory Committee's review, we have endeavored to use our very limited staffing and other resources efficiently in responding to any issue affecting our mission and service to the public. This includes a strong commitment to effective partnership with fair employment practice agencies, such as the UADD, which operate independently from the U.S. Equal Employment Opportunity Commission (EEOC). In view of our respective autonomies, however, we believe that the UADD is better suited to respond directly to issues pertaining to its internal operations and service, as well as to any concerns it may have about the draft report. Nevertheless, we appreciate the opportunity to clarify or correct those portions of the draft report pertaining to our rights and responsibilities emanating from the work-sharing agreement between the UADD and the EEOC Phoenix District Office.

In our view, a significant aspect of the draft report is its emphasis on the importance of allocating adequate resources to ensure operational efficiency and effectiveness in civil rights enforcement. There is no denying that a lack of adequate resources plagues practically all civil rights enforcement agencies and precludes all of us from addressing public expectations as fully as we would like and as the public deserves. At EEOC, we recognize that adequate funding is critical to the success of our mission of ensuring vigorous enforcement of equal employment opportunity laws.

Ms. Malee Craft
Page Two

As you know, the number of charges filed directly with the U.S. Equal Employment Opportunity Commission has increased dramatically in recent years and we have not been able to hire sufficient numbers of investigators, attorneys and other staff to keep pace. We realize that many state and local agencies face similar and sometimes even worse constraints. Notwithstanding our efforts to secure additional resources and the additional enforcement responsibilities placed on us through new legislation and increased public expectations, the additional resources EEOC needs have not been forthcoming.

In order to more effectively implement EEOC's mission of eradicating employment discrimination, address our growing backlog of cases, and assist the fair employment agencies who work with us, in April 1995 we implemented new priority charge handling procedures. The new procedures, which were developed with substantial involvement by the diverse constituencies we serve, are based upon the development of national and local enforcement plans which provide a coordinated approach to achieving the agency's mission through investigation, conciliation, and litigation, in addition to technical assistance and public education. We have implemented new and more flexible procedures for processing charges which challenge our staff to make critical decisions about the appropriate level and type of resources to be utilized for each charge. With this new focusing of our resources and as part of our local enforcement plan, we have targeted the state of Utah for increased outreach and education, as well as enhanced enforcement initiatives.

While resource limitations have affected our past operations and will continue to be a significant factor in our enforcement efforts, we believe it is important to address and dispel any possible mistaken inference from the draft report that we have not used our limited resources responsibly in fulfilling our obligations under our work-sharing agreement with the UADD. In the draft report, there is some discussion about comments by our State and Local Coordinator, Mr. Anthony DeDios, concerning whether EEOC will litigate on cause findings issued by the UADD. The draft report reflects that Mr. DeDios initially represented to the task force committee that EEOC will litigate on behalf of all UADD cause findings, but that he subsequently modified this representation in correspondence to a task force committee member. The draft report goes on in various ways to directly characterize or imply that Mr. DeDios had attempted to deceive the task force. In our view, the draft report's portrayals in this regard do not reflect an objective or accurate assessment of what transpired. For example, the minutes of the March 5, 1993, task force meeting indicate that while Mr. DeDios stated that EEOC will litigate a case where the parties refuse to conciliate a resolution, he went on to state in the same meeting that EEOC legal staff evaluate each case involving a cause finding and conciliation failure to formulate a proposal

Ms. Malee Craft
Page Three

about whether to litigate the case. He also advised that there were no situations where cause findings by the UADD had resulted in litigation by EEOC. Mr. DeDios' comments, when viewed in the context of the meeting in which they occurred, and particularly in the context of the clarifications he subsequently and freely offered when queried, do not support a conclusion that Mr. DeDios had made any willful misrepresentation or had sought to conceal any relevant information about any cases investigated by the UADD which might be litigated by EEOC. To the contrary, all of Mr. DeDios' voluntary comments and our other communications relating to the task force's efforts and your own inquiry, including our January 19 and July 14, 1995, letters in response to queries you posed in this matter, were intended to be appropriately responsive. In my own December 10, 1993, testimony before the task force, I emphasized that EEOC would not attempt to enforce a state agency's finding of discrimination, but rather might adopt the cause finding or issue our own and then make a litigation recommendation. Accordingly, we do not believe there are objective indications of any attempt by our staff to mislead anyone on this issue.

The draft report also indicates that a task force member had asked Mr. DeDios at the March 5, 1993, task force meeting whether the monies paid by EEOC to the UADD for charge processing may be used by the Industrial Commission generally, or whether the monies are for the exclusive use of the UADD. Mr. DeDios indicated that he could not provide a definitive answer and suggested that EEOC headquarters officials could provide specific information. There are no indications that the task force made further inquiry of any EEOC official on this issue. The draft report, however, inaccurately portrays that Mr. DeDios had been unwilling to obtain an answer. At no time following Mr. DeDios' comments at the March 5, 1993, meeting did any task force member or other person contact the EEOC Phoenix District Office or our headquarters facility for this information. Accordingly, we do not believe it is accurate or fair to represent that Mr. DeDios or any other EEOC official demonstrated unwillingness to respond to this or any other question posed by the task force member. Moreover, we can assure you that all EEOC funds expended for work performed by the UADD were consistent with the terms of our contract with the UADD which provides for a fixed payment for each charge processed under the terms of the agreement.

The draft report also questions in general terms whether funds EEOC provided to the UADD pursuant to the work-sharing agreement between the two agencies were properly utilized by UADD, although no specific misuses are identified. The UADD is a properly certified state agency for purposes of entering into work-sharing agreements with EEOC. There are no indications from our review that any EEOC funds have been improperly expended for work performed by the UADD. Of those charges processed by the UADD which we reviewed and for which UADD received EEOC funds, there were no indications that any

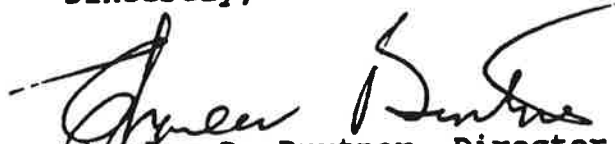
Ms. Malee Craft
Page Four

relevant evidence had been misinterpreted or that further investigation would have resulted in a different determination being made on the charge.

Finally, the draft report, at page 6, contains incorrect information about the time-frames in which a charge must be filed with EEOC. In states like Utah where there is an anti-discrimination law and an agency authorized to grant or seek relief, a charge must be presented to that state or local agency. In such jurisdictions, a charge may be filed with EEOC within 300 days of the alleged discriminatory act, or 30 days after receiving notice that the state or local agency has terminated the processing of its charge, whichever is earlier.

Again, we appreciate this opportunity to comment on and correct potentially significant aspects of the draft report pertaining to our operations. We hope that our comments will be accepted in the constructive manner we intended and that they will serve our collective interest in using limited available resources to vigorously enforce equal employment opportunity laws. Please feel free to call upon us if you have questions concerning this response or if we may be of further service.

Sincerely,



Charles D. Burtner, Director
Phoenix District Office

**Response by the Utah Advisory Committee
to the
Phoenix District Office of the EEOC**

The Phoenix District Office of the U.S. Equal Employment Opportunity Commission (EEOC) responded to the draft report and identified three issues of concern.

(1) Whether an EEOC official provided misleading or inaccurate information concerning the EEOC's role in the enforcement process.

A review of UADD Task Force minutes reflects three specific occasions where EEOC staff stated that the EEOC will litigate cause findings; the EEOC will litigate individual cases; and the EEOC will file suit for individual claimants, not just class action cases.¹ The tone of UADD Task Force minutes reflects the EEOC's ability and willingness to litigate cause findings.

The EEOC representative further conceded that his agency does make mistakes, and encouraged individuals to contact him personally to call attention to any errors.² The Utah Advisory Committee stands by its criticisms and concerns that such statements build unrealistic expectations of EEOC's direct involvement in individual discrimination charges.

When asked specifically at this same meeting how many Utah cause findings were litigated in fiscal year 1992 by the EEOC, he responded that none had been litigated. In fact, data provided to the U.S. Commission on Civil Rights by the EEOC

¹ UADD Task Force minutes. Mar. 5. 1993, pp. 2, 6.

² Ibid., p. 9.

reflected that one case was filed during FY 1992.³ While this discrepancy may not have been intentional, it certainly leads to confusion and uncertainty.

The Utah Advisory Committee's position is further justified because the EEOC representative shortly after the March 5th meeting, contacted a Utah resident rather than contacting the UADD Task Force or the Industrial Commission to clarify his statements. His short letter to Julie Davies said in part that he had made an erroneous statement (see attachment).

Because enforcement is considered to be a critical issue by not only the Utah Advisory Committee but also by many Utah citizens, community organizations and advocacy groups, the EEOC representative had a responsibility to correct, for the record, the misinformation he shared with the UADD Task Force, UADD and Industrial Commission staff/administrators, and the public.

Subsequent to these events, the people of Utah continued to question the UADD and EEOC's role regarding the litigation of cause findings. The Industrial Commission, again relying on statements made by the EEOC representative, unequivocally stated that the UADD does not, and should not, litigate because the EEOC does, which helped the Industrial Commission explain away its policy of non-litigation. The question was again posed to the EEOC by the U.S. Commission on Civil Rights staff. In responding, the EEOC wrote:

...the EEOC will litigate a case if the parties refuses to conciliate. This should not be interpreted to imply that litigation will be undertaken in all circumstances. Our enforcement and litigation efforts serve to support and not supplant those of state and local agencies For the past two years we have been working with UADD staff to develop potential litigation cases from their existing work load. An attorney at EEOC periodically meets with investigators at UADD and reviews and gives advice on cases which have cause potential. UADD in developing these cases has the option to allow EEOC to complete the investigative/conciliation process or to keep the case for completion under their process.⁴

³ Data submitted to the U.S. Commission on Civil Rights, Rocky Mountain Regional Office, also showed that one case was filed in 1993, two in 1994, and one in 1995. Charles D. Burner, district director, U.S. Equal Employment Opportunity Commission, Phoenix District Office, letter to Malee V. Craft, Rocky Mountain Regional Office of the U.S. Commission on Civil Rights, July 14, 1995, p. 3.

⁴ Ibid., pp. 6 - 7.

The Utah Advisory Committee concludes that, intentional or otherwise, statements made by the EEOC before the UADD Task Force or other bodies gave the clear impression that the EEOC would aggressively be responsible for enforcement of cases, including conciliation and litigation, either directly or by offering advice to the UADD. In view of our finding that the State is not successfully enforcing its own findings, such statements by EEOC staff might incorrectly lead to a public perception that the EEOC is the primary enforcer and this might provide false reassurance to victims of discrimination. This impression is not accurate and tends to absolve the UADD of responsibility. The Utah Advisory Committee believes that such perceptions are not only misleading, but confusing and dangerous.

(2) Whether the EEOC representative was unwilling to seek an answer in response to a question posed by a UADD Task Force member.

The EEOC representative was unable to provide an answer and suggested that the director of the UADD call EEOC headquarters to obtain the requested information. The Utah Advisory Committee feels the representative was obligated to offer assistance in his role as the local liaison of the Phoenix District Office to the UADD, and should have offered to obtain the information for the UADD Task Force in addition to seeking the information for his own knowledge and possible future use.

(3) Whether all EEOC funds expended for work performed by the UADD were consistent with the terms of their contract.

The Utah Advisory Committee appreciates the EEOC's response that from its review "there are no indications . . . that any EEOC funds have been improperly expended for work performed by the UADD." However, the EEOC did not offer examples or reference specific reviews they have conducted.

(4) The EEOC response reflected additional time frame information for filing complaints, specifically that the complainant, after having filed with the UADD, also has the option of filing a claim with the EEOC within 300 days of the alleged discriminatory act or 30 days after receiving notice that the State or local agency has terminated the processing of the charge. This information is important. The Utah Advisory Committee relied on information published in a brochure of the UADD

which fails to disclose the additional requirements.⁵ The omission clearly could lead to confusion and misunderstanding by complainants. We are concerned that the EEOC has not reviewed the materials disseminated to the public by the UADD for accuracy and completeness.

Finally, the EEOC response notes that inadequate funding precludes addressing public expectations as "fully as we would like." Despite the fact that the necessary resources have not been forthcoming, the EEOC states that it has implemented new "priority charge handling procedures." It further comments that with this new focusing of resources, "we have targeted the state of Utah for increased outreach and education, as well as enhanced enforcement initiatives." This is of great interest to the Utah Advisory Committee and we regret that the EEOC has not provided any specific information about these new initiatives. In view of the documented problems of the UADD, some elaboration and specificity would have been welcome.

⁵ "The Utah Anti-Discrimination Division of the Industrial Commission of Utah." brochure, undated.



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March 12, 1993

Julie Davies
171 E. 3rd Ave, #709
Salt Lake City, UT 84103

Dear Ms. Davies: . . .

During the Task Force meeting on March 5, 1993 I made an erroneous statement.

I stated that the Commission litigates all cause cases that fail conciliation.

The Commission does not litigate all cause cases that fail conciliation.

Sincerely,

A handwritten signature in cursive script that reads "Antonio DeDios".

Antonio DeDios
State/Local Coordinator



INDUSTRIAL COMMISSION OF UTAH



Michael O. Leavitt
Governor

R. Lee Ellertson
Chairman
Thomas R. Carlson
Commissioner
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Commissioner

July 15, 1996

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Ms. Malee Craft
Civil Right Analyst
U.S. Commission on Civil Rights
Rocky Mountain Regional Office
1700 Broadway, Suite 710
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RE: A Confidential Draft of "Employment Discrimination in Utah"

Dear Ms. Craft:

We are writing in response to your letter requesting corrections "to assure accuracy" of information contained in the subject draft report. We share your desire to have this report as accurate as possible. The Industrial Commission and the Utah Anti-Discrimination Division are critically concerned about the status of employment discrimination in Utah. We will continue to do all we can to fulfill the charge to prevent and address employment discrimination in our state. Because of our desire to continually improve the Anti-Discrimination Division, we are submitting complete and accurate data for inclusion in the report.

Employment discrimination is a complex area of the law and is further complicated by the interplay of federal and state authority. For this reason, much of the data previously submitted has been misinterpreted and it is our desire to try to correct errors and inaccuracies. This submission will limit its review to only major inaccuracies in the draft report and will not attempt to try to clarify minor inaccuracies. In a 100-page report, to attempt to respond to all of subjective statements would be a task that would take much longer than the 10 days allowed, when the report itself took two and one-half years to draft.

As a Commission, we have honored your request to keep this draft report confidential, even though the report was apparently released to the press, as we have received inquiries from the press for statements contained in the report. We have not discussed the report or divulged its contents to any other outside parties.

The following information addresses the major inaccuracies of the report. Supporting documents are attached to make your review easier.

1. The report indicates that the number of charges filed from 1985 through 1994 have increased by 78 percent. This is certainly true, and it would also be worthwhile, in the context of the complete picture, to indicate that the total number of persons employed in the state of Utah in 1985 was 687,000, which has increased to 936,000 in 1995. This is an increase of 249,100 persons more employed or 36 percent. About half of the total increase in charges filed can be attributed to natural growth

July 15, 1996

Page Two

of the workforce. These trends are, incidentally, consistent with the increases shown by national statistics. Utah ranks 36th in the nation in numbers of per capita job-discrimination with 113.6 claims per 100,000 employees.

2. The discussion of increasing inventory of pending cases contains many fallacies. The draft report uses the misnomer "backlog." The UADD reports that were previously sent to your office discuss pending cases, which are a reflection of the number of charges filed, but not yet resolved. A case cannot be considered backlog when it is just filed and has not yet had a chance to be processed or documentation collected.

The report also errs in failing to recognize that some cases are reported as "pending" even after UADD has completed its work. Determinations are held in the pending inventory for a thirty-day appeal period. Then if a determination is appealed, the case remains and is counted as part of the inventory until the final appeal is completed, which may be years.

The report does not acknowledge that EEOC can require UADD to transfer cases to EEOC for action. These cases do not show as closures even though the UADD no longer processes the charge. These are referred to as Potential Litigation Vehicles (PLV) and in one instance, the EEOC transferred 40 cases to the EEOC from UADD inventory. None of these cases appear as closures on the UADD reports, even though UADD has no further jurisdiction over them.

Another potential error is the mixing of the calendar year and the fiscal year, which has been done in some of the data included in the report. As an explanatory note, the EEOC Hero computer system was implemented in the UADD in 1991. Prior to 1991, data was processed by hand and sometimes reported for calendar year and sometimes for fiscal year. This made the data hard to compare. Since 1991, staff has entered data, including data from prior years, into the computer system. Therefore, the computer generated data is the most accurate source for comparative information.

The report relies on a resolution report from the EEOC. Please note that the FEPA agencies do not report "cause findings" to the EEOC, because they are resolved at the agency level, not at the EEOC level. The resolution report reflects work the EEOC has done on cases from Utah. That is why the report would show zero closures.

We are enclosing a copy of the closure codes which FEPA agencies must use. You will note, from the enclosure codes chart, there is no code for cause findings. That

is because, again, cause findings are not reported to the EEOC as such, but always with some other closure code. We are also enclosing a copy of the total pending inventory summaries for each year, from 1988 forward to 1995. Please note the pending inventory reports from the computer indicate the total charges in inventory as well as the average charge age. We are including the summary sheet of each of these reports, as the original report contains confidential information of the charging party and respondent's names, which by law, we are not allowed to disclose.

3. The draft report fails to recognize the impact of alternative dispute resolution (ADR) in lowering overall case ages, the pending inventory, and consequently staff case loads. We have previously submitted information to you which indicates that all parties are eligible to participate in a resolution process within 60 days from filing. A significant number of all charges are closed at this stage. This has considerably reduced the average length of time cases are with the agency. On page 11 of your report, you assume that all charges filed would go to investigation, while in reality, slightly more than half of the charges would proceed to the investigative phase. Obviously, this considerably lowers investigator case load.
4. The discussion regarding UADD's budget also contains inaccuracies. On page 15, you refer to the UADD budget as allocated by the Industrial Commission. In fact, the budget is allocated by the state legislature. The Commission has no funds other than those allocated by the legislature. You also err in stating that the UADD budget as a percentage of the total Commission budget has remained static at the 4 percent level. The current budget of UADD exceeds 11 percent of the Commission budget. In a discussion of the budget, it is critical to note that the state funds have increased every year, with the exception of 1990, with the 1987 appropriation being \$62,657 to the 1996 appropriation of \$248, 100, or a 400 percent increase in state general fund appropriations. Federal funds, however, dropped from the 1987 level and did not reach that same level of funding again until 1992. Federal funding for the years of 1994 and 1995 dramatically increased because of the number of case closures by the agency. In 1987, the UADD proportion of Industrial Commission total funds was 6.76 percent, and in 1995, that proportion was 11.55 percent.

On page 53, the report discusses concerns raised to the UADD Task Force regarding the expenditure of funds. The question was, if the monies received from the EEOC may be used by the Industrial Commission generally, or whether the money is exclusively for UADD use. Although this report does not answer that question, it is important to note that each year the Commission has consistently spent all dollars received from designated state general funds and EEOC monies for Division expenditures only. Also, other Industrial Commission funds, particularly in the areas of technology, have been used to support UADD activities. This is in complete contradiction to the allegations stated on page 55 of the report. All of these monies

have been tracked for budgeting purposes of the state and reports have consistently been issued each year on expenditures of all Commission funds. Copies of budget data are again enclosed for your ease of comparison.

5. The issue of the number of cause findings has been interwoven in several areas of the report. Some of this discussion has been addressed above regarding #2 under "Pending Inventories." However, again for the record, the Commission encloses with this report a list of all cause finding detailed by UADD and EEOC charge numbers for the previous years for which data is available. A simple count of the charges contradicts the data listed on page 19 of the report. The allegations that Utah has fewer cause findings than other states are certainly contradicted by the enclosed articles citing figures from the EEOC, taken from the *USA Today*, August 15, 1995. In one category only, that of charges filed under the ADA, UADD did an analysis comparing Utah charges and national charges, because that was the only category of data specifically available from national sources. The data reveal that Utah has more findings favoring charging parties than EEOC.
6. The discussion of enforcement contains many misrepresentations and omissions of information. First, there appears to be confusion over the term "enforcement" in that it is used synonymously with litigation. However, settlements, conciliations and other methods also constitute "enforcement." The debate ensues over whether those cause findings which have not been resolved have been enforced. On page 20 of the report, the discussion regarding the cause findings is extremely confusing. An assessment of the disposition of reasonable cause findings is also included with this report. The report also fails to recognize that since 1994 UADD has enforced, by litigation and other means, all final cause findings. This information was previously submitted to you concerning the 16 cases that had been referred to the general counsel of the Industrial Commission for enforcement. Information on cases that have progressed through the court system, and are now final, has been supplied by this agency.
7. The discussion of Governor Leavitt's transition team report are in error. On page 21, you state, "In January, 1993, the transition team of newly elected of Governor Michael O. Leavitt prepared a special report on the UADD." In fact, Governor Leavitt appointed transition teams to survey every agency of state government and make recommendations to him. The citations and quotations on page 33 are not part of the transition team report to the Governor. This information is, in fact, taken from writings of John Florez and submitted to the transition team, and Mr. Florez' statement was not included or incorporated into the transition report. The information provided by Mr. Riggs of the Governor's office is correct and is the total of the recommendations. The text of the transition team report to the Governor regarding the UADD is included with this letter.

8. The discussion of the UADD Task Force, its inception, proceedings, and minority report are, at the best, very misleading. For example, it is not made clear in the draft Civil Rights report that the Task Force Minority Report, referred to many times, was drafted and issued by only one member. The other members of the Task Force drafted and approved the final official Task Force report. The Task Force was composed of highly credible individuals who had no other purpose than to serve their state. The composition of the Task Force included a former candidate for governor, a member of the state legislature, a nationally renowned attorney who practices employment law, a retired judge, Corporate Director of EEO & Affirmative Action of a large federal contractor in the state, and other credible individuals. There was broad diversity represented on the task force, and the Civil Rights report does a disservice by discrediting those individuals who participated so ably in examining various issues of employment discrimination and formulating recommendations to the Anti-Discrimination Division. The Commission feels it is also important to make a statement regarding the status of the staff person to the UADD Task Force, as his actions are questioned by some statements in the draft report. George Danielson worked for many years as a staff attorney for the Legislative General Counsel's office and was very familiar with arranging hearings, meetings, and testimony of participants and served as staff to the UADD Task Force. He was not under the control or direction of the Commission at any time during his brief assignment with the task force, but reported to the Chair of the Task Force. He, in fact, was hired as an employee of the Department of Commerce prior to the Task Force completing its work.

9. The draft report's discussion of the UADD Advisory Committee does not reflect a balanced discussion of the views of the members. We would encourage you to inquire of other members, such as Kaye Coleman, Jean Bishop, Lois Barr, David Holdsworth, Felix McGowan, and others, regarding the accuracy of the statements given to you. For example, the statements referring to the initial meeting of the Advisory Committee on page 69, "Members were not even granted parking permits to attend Committee meetings . . .," does not reflect that the Commission does not have any parking permits to grant for any public meetings. Parking permits are issued by the building facilities management to employees of the various agencies on a very limited basis. The UADD did provide secretarial staff to take minutes, make agendas, and do all mailings for the Committee. Any background materials requested were provided. As further clarification, the Advisory Committee voted in its initial meeting to meet quarterly, and then, at a later meeting, voted to change that to monthly.

Again, in the reference on page 69 to a December 8, 1994, letter, the Commission wrote the letter in response to a request by the Advisory Committee to the Governor's office and the legislative sponsor of the bill, as to the perception of the

Committee's role. The statements by Representative Pignanelli and Robin Riggs were supportive of the Industrial Commission, as outlined in the letter.

10. False allegations concerning Commission involvement and support regarding legislative bills could easily be corrected by obtaining factual information from members of the legislature and, particularly, the bill's sponsors. We would be happy to supply you with names and telephone numbers of appropriate legislators if you so choose.
11. The report, beginning on page 88, misconstrues several of the facts in the case regarding Samantha Bird. Ms. Bird voluntarily filed a request for withdrawal of agency action with the Industrial Commission (copy of letters included) and subsequently asked to have her case reinstated with the agency. However, as indicated previously to your office in a letter from Anna Jensen, Utah law precludes any agency action once a case has been withdrawn. Two other charging parties with similar cases with the same employer did not withdraw their cases. When the cases became final, the Commission then represented those two cases in the district court, and subsequently, in the Court of Appeals, and prevailed in obtaining judgment for the parties of their claim against the employer. The Commission was precluded from such action in Ms. Bird's behalf because she had voluntarily withdrawn her case.

In conclusion, the Commission notes that this is not a review and correction of all inaccuracies in the report, but is a general discussion of those that we consider to be of major importance. There are many other corrections that could be made. As an example, the footnote on page 5, #19, indicates the length of service of the Commissioners. The report states, "Commissioner Carlson has been on the Industrial Commission for 14 years, Commissioner Hadley for 25 years, and Commissioner Colton since May of 1992" In fact, Commissioner Carlson has been on the Industrial Commission for eight years, Commissioner Hadley for 29 years, and Commissioner Colton, since June of 1992. We consider many of these small items to be nonsubstantive and, therefore, will not address them. We do believe it is important to note, however, that the processes and policies of the Division and the Commission are continually changing as the agency attempts to address problems as they develop. Many of the statements and issues that the report addressed early have changed significantly since the initial information presented at the public hearing. It is, therefore, very difficult to respond to issues and information that have significantly changed over this extended period of time.

This information is submitted to the staff of the Civil Rights Commission with the intent of being helpful and offering correct interpretations where gaps appear to exist. Contrary to allegations, the Commission reiterates its strong commitment to civil rights related to our charge in employment

July 15, 1996
Page Seven

discrimination and our commitment to continue to address issues and problems as they arise. We believe significant improvement and gains have and will continue to be made in this important area.

Sincerely,



R. Lee Ellertson
Chairman

Thomas R. Carlson
Commissioner



Colleen S. Colton
Commissioner

CSC/poa
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**Response by the Utah Advisory Committee
to the
Utah Anti-Discrimination Division (UADD)
of the Industrial Commission**

Although the commissioners' response identified a number of issues, the Utah Advisory Committee selected what it felt were the most important topics to highlight here.

As an introduction, the commissioners reaffirmed their commitment to fulfill the charge to prevent and address employment discrimination in Utah. They also commented "Because of our desire to continually improve the Anti-Discrimination Division, we are submitting complete and accurate data for inclusion in the report."

This statement causes concern for the Utah Advisory Committee. From the inception of the preparation of this report, the U.S. Commission on Civil Rights and Utah Advisory Committee members were informed that data received from the UADD and the Industrial Commission was indeed accurate and reliable. The statistical tables and charts were all prepared with the idea that the data culminated would withstand criticisms and scrutiny and would stand on its own. The Utah Advisory Committee was very surprised to see the Industrial Commission challenge and identify as inaccurate the very figures they gave us.

The Utah Advisory Committee accepted the data supplied by the UADD and Industrial Commission although there are numerous examples throughout the report that demonstrate that both agencies either refused to provide data; data was misleading; data was incorrect; data was not available; data was

contradictory or incomplete; or there was no explanation given as to why data was not forthcoming.¹

The Utah Advisory Committee believes that a detailed response is not warranted because the Industrial Commission has not submitted any information or evidence that is verifiable nor have they supplied any backup documentation to support their claims.

The Utah Advisory Committee had hoped that the UADD and Industrial Commission would have addressed more significant issues such as cause findings, program management, staffing, budget, and even specific steps taken and the results of those steps to insure that Utah employees receive fair and equitable treatment when they file a complaint with the UADD. Also, the Utah Advisory Committee would have liked to receive a response on how the UADD plans to carry out the laws it is charged with enforcing, specifically cause findings issued by the agency. We feel that the reader will be able to make a clear and unbiased determination based on the information and data which has been presented throughout this report. In this regard the Utah Advisory Committee will highlight a few issues raised by the Industrial Commission and respond to them.

1) Much of the data previously submitted has been misinterpreted. The data presented in this report was submitted to the U.S. Commission on Civil Rights, through permission obtained from Colleen Colton, the commissioner assigned to monitor and direct the operation of the UADD, as well as cooperation from Commissioner Hadley and other Utah state government personnel. Several people were identified by Commissioner Colton as appropriate contact persons within the UADD from which the U.S. Commission on Civil Rights staff could obtain correct and accurate data. Those individuals included the former director of the UADD, Anna Jensen;

¹ *Employment Discrimination in Utah*, report by the Utah Advisory Committee to the U.S. Commission on Civil Rights, 1997, pp. 8-10, 13, 17-20.

lead investigator Jay Fowler, who had been designated acting director of the UADD during several periods when the director position was vacant; and Alan Hennebold, legal counsel for the Industrial Commission.

2) The Industrial Commission states that the report uses the misnomer "backlog" and that the U.S. Commission on Civil Rights was confused on the difference between a backlog case and a pending case. A complete review of all documents received by the U.S. Commission on Civil Rights office revealed that the term "backlog" has the same meaning as "pending" cases, and are one in the same. "Backlog" cases are complaints which are in the UADD system, and at the end of a reporting period, have not been resolved or closed. These cases are then carried over to the next reporting period. The term "backlog" was used not only by Commissioner Colton, but also by UADD staff, the UADD Task Force, legal counsel to Governor Leavitt, and an assistant attorney of the Utah Attorney General's Office.

3) The Industrial Commission stated that determinations (cause or no-cause) which are appealed remain in and are counted as part of the UADD's inventory until the final appeal is completed, which may take years. This clearly indicates that those cases would be counted as "backlog" cases. Table 1.4 illustrates charges filed with the UADD, those waived to the EEOC, those closed, and those carried over to the next fiscal year. Figure 4.1 indicates the various routes a case could take once filed with the UADD.

4) The EEOC's resolution report reflects work the EEOC has done on cases from Utah, and that is why the report would show zero closures. Also, Fair Employment Practices Agencies do not report "cause findings" to the EEOC, because they are resolved at the agency level, not at the EEOC level. One instance is noted in the report where the EEOC Phoenix District Office liaison to the UADD provided statistics regarding the number of cause findings the UADD issued for several fiscal years.

5) The Utah Advisory Committee report assumes that all charges would go to investigation, while in reality slightly more than half of the charges proceed to the investigative phase.

The report clearly identifies, as shown in figure 4.1, the various routes a case could take and also enumerates the number of charges that moved to the investigation phase. Again, the terminology and figures used in the report were supplied and/or used by the UADD.

6) Samantha Bird

Ms. Bird's case was used to illustrate an example of improper case handling, long processing time, case backlog, and a poor investigation, which was experienced not only by Ms. Bird but many other Utah complainants.

As a final note, the Utah Advisory Committee is of the opinion that both the UADD and EEOC had the opportunity to review a draft of the report and our observation is that neither agency chose to address critical issues. The Utah Advisory Committee to the U.S. Commission on Civil Rights made every attempt to be objective and to present information as accurate as possible and remains firm on the information contained in its report as written.

**Summary of
Performance Audit of the Utah Anti-Discrimination Division
conducted by the Office of Legislative Auditor General
to the
Utah State Legislature**

The performance audit amplified and detailed several issues already raised by the Utah Advisory Committee to the U.S. Commission on Civil Rights. It addressed administration and enforcement of employment discrimination law in Utah¹, and specific objectives included:

1. Evaluate the efficiency and effectiveness of UADD's informal charge processing, including charge intake and mediation and investigation.
2. Evaluate the fairness of the Industrial Commission's formal hearing process, and
3. Evaluate the impact of the Industrial Commission's organization structure on the administration and enforcement of anti-discrimination law.

Case files were examined to review intake, mediation, investigation, adjudication, appeal, and enforcement issues. Industrial Commission staff, charging parties, respondents, UADD Advisory Committee members, and attorneys who had represented charging parties or respondents were interviewed.

Because the audit report is too lengthy to append to this report, the Utah Advisory Committee has opted to highlight and summarize in the following pages significant points which relate to the Utah Advisory Committee's report.

¹ A Performance Audit of the UADD, Office of Legislative Auditor General, Report to the Utah State Legislature. Report No. 96-01, February 1996.

Charge Processing - Intake, Mediation, and Investigation

Although the UADD had made some significant changes as a result of several recommendations made by the UADD Task Force, and legislative changes in 1994 which established a UADD Advisory Committee and the addition of enforcement powers to the Utah Anti-Discrimination Act, there was still room for improvement.

Intake could be improved by providing more information about the law and administrative process to complainants before they decide to file a charge of discrimination. A survey of calls to charging parties found that many people complained that they did not understand the UADD process. It was suggested that interviews, which were found to be inconclusive and needing improvement, should be conducted more thoroughly by qualified staff. The intake officer should receive all necessary and relevant information from charging parties, while refusing charges not within the agency's jurisdiction. Accepting obviously invalid charges not only wasted agency resources, but imposed unnecessary costs on charging parties and respondents.

Mediation, known as Alternate Dispute Resolution (ADR), could be improved if the agency strengthened its policies and procedures. Each mediator conducted mediation according to their personal preference, and as a result there was little consistency among mediators' conduct.

Specific recommendations included a policy on mediator behavior, a procedure on admission statements made during the conference, management controls to ensure consistent mediations, and a procedure to provide more information about the ADR process.

Fundamental changes were recommended to improve the investigation function which has been a consistent criticism of the UADD by citizens and community organizations for several years. The audit report stated that in 1995, the UADD Advisory Committee expressed concern that there "were no standardized operating procedures to guide UADD staff in their investigations of employment discrimination." The audit report found that although UADD

does have some written investigative procedures, they are not used. When UADD staff were surveyed only three of eleven staff had ever seen the procedures and none of the staff actually used them to conduct an investigation.

The conduct and outcome of an investigation depends largely on the staff member assigned to the case. Productivity, determinations and the amount of evidence gathered to reach an investigative conclusion varied greatly from investigator to investigator, with each utilizing different philosophies and little accountability. In addition, investigators had large differences in the number of cases closed and the time taken to close cases. Because the UADD allows staff to control their work flow, the public receives very inconsistent timeliness of service which equates to greater costs for employers, employees, and taxpayers. In a review of charges filed in February 1994, it was found that three cases were still open and were over 420 days old. And in one case, one file was never fully investigated and was eventually turned over to the EEOC after 500 days in the system. Specifically, the investigative process is not controlled by management, and each investigator dictates the course and time frame of an investigation with little or no supervision or accountability.

UADD investigators when interviewed stated that certain investigators are more likely to write cause determinations and others are more likely to write no cause determinations. The auditors analyzed all UADD determinations written from January 1994 through June 1995 by investigators who had written more than ten determinations. They found the cause finding percentage of one investigator to be ten times higher than that of another, and concluded that investigator performance affects investigative outcomes. There also was a huge disparity in the numbers of determinations written by investigators. The audit found and UADD staff concurred that management needed to control investigations.

With regard to evidence, there was little in the way of procedures or supervision directing the quality or quantity of evidence gathered, clearly

indicating that some investigators consistently collect more evidence than others. Through interviews with all the UADD investigators the audit staff found that each investigator has a distinct method of investigating a case--some conduct on-site visits, others do not; some interview the charging party, some rarely speak to the charging party; and some investigators make a determination solely on documentation provided by the respondent and charging party, while some obtain affidavits and others feel it is a waste of time and energy because the investigative process is too informal. The audit team was concerned that management allows extremes to exist, and that the investigators do not know what is the acceptable or preferred practice for gathering evidence. This allowance of latitude results in an inconsistent level of service to the public, and one employer who has dealt with the UADD said, "I never know what I'm going to get with the investigation."

The use of contract investigators had not proven to be effective or efficient because case investigations were performed by staff with different levels of experience, according to the audit report. Because of high turnover, particularly of the contract attorneys, the agency could not develop nor demonstrate experienced employment discrimination case management expertise. An EEOC lawyer explained that "it takes more than a year and one half to learn the law and process." However, most of the contract staff for the UADD do not even stay with the agency for a year and one half, and some only stay a few months.

UADD administrators and commissioners reaffirmed on numerous occasions that contract attorneys were experienced. In contrast, the audit report stated "most contract investigators are recent graduates of law school but do not have employment law experience. While state employees go through an extensive screening process, in which employment discrimination experience is weighed heavily, contract staff are barely screened." Contract investigators are hired with different standards, and compensated at different levels which amounted to poor management practice and was bad for morale. Attempts to

phase out the use of contract investigators was met with opposition by the Commission.

The report concluded discrimination law is complex, takes a long time to learn; and it takes considerable time to become an effective investigator.

Recommendations were that the UADD:

- reconsider its use of contract investigators and replace them with regular state staff;
- establish investigative procedures that provide general guidance to staff about how to conduct an investigation and ensure compliance with **Utah Code** requirements for evidence availability;
- improve its training to make sure staff develop a common understanding of the purpose of the investigation and investigative procedures; UADD develop procedures to ensure that investigator work is routinely supervised and reviewed; and
- change its organizational structure by giving the responsibility for providing investigative supervision and review to the case manager.

Management Problems

A leadership problem was observed at the UADD during the audit. One investigator explained that she had a difficult time understanding her role as an investigator because the division in general lacks direction. To illustrate, the audit found no shared vision among staff that could produce a coherent anti-discrimination policy. Early on the audit team learned that some staff viewed the UADD mission broadly as eliminating discrimination while others viewed it more narrowly as processing complaints. Those different factions clearly affected division productivity.

The audit team saw the UADD in turmoil so significant that the quality of performance was substantially affected. Management problems experienced at the UADD did not have an easily identifiable or single cause. They arose, at least in part, from a lack of administrative clarity resulting from organizational structure. However, the commissioners were of the opinion that temporary

personnel problems were the cause of management difficulties and the personnel problems had been resolved.

Two former directors of UADD reported they had difficulty managing the division because of their relationship to the Commission which included difficulty exercising staff leadership, Commission involvement in day-to-day operations, and the inability to make staffing decisions. The question was raised as to who is the immediate supervisory head, the UADD director or a commissioner?

Fairness of Formal Hearings Process

The audit team concluded that the state's anti-discrimination process would more effectively deter discrimination if UADD participated in formal hearings. Also, the UADD Advisory Committee concluded that the administrative hearing process is in need of reform. The team found that a number of attorneys familiar with the anti-discrimination process felt it makes sense for UADD to participate in formal hearings. Evidence indicated that the formal hearing process may have favored respondents over charging parties. The report noted that charging parties generally do not have legal representation, and usually do not prevail in formal hearings. Of sixteen cause cases referred for formal hearing, ten of the sixteen charging parties found legal representation; in contrast, all sixteen respondents on the same cases were represented by attorneys.

This was confirmed when four Administrative Law Judges's made statements such as "the deck is stacked" against the charging party, and the respondents "literally blow charging parties right out of water." An EEOC lawyer said that "some employers in Utah routinely do not cooperate with UADD investigations because they do not take the agency seriously. . . . They consider UADD as a "paper tiger", and employers would better cooperate with investigations if the UADD had some power to defend its determinations when they were challenged." As an example, the Utah Fair Housing Agency, which

is a part of the UADD, no longer acts as a neutral party and now acts on behalf of the charging party by representing its findings in formal hearings or in state district courts.

The UADD should participate in formal hearings which would enhance the effectiveness and fairness of Utah's anti-discrimination process because eliminating discrimination is an important part of the division's mission. Yet, after finding that illegal discrimination occurred, the division takes no active role in the case if it goes to a formal hearing. By excluding UADD involvement in formal hearings, important and readily available information may not be considered. Also, investigators felt that administrative law judges (ALJ) made incorrect legal rulings on cases they had investigated, but there is no mechanism for UADD to explain its findings to the ALJ.

Coordination between the UADD and the Adjudication Division of the Industrial Commission contributed to the confusion and inefficiency. More specifically, the UADD and Adjudication Division operate independently and necessary communications involving withdrawals and closures did not always occur. The UADD did not check the status of cases with the General Counsel and simply put, "the right hand does not know what the left hand is doing."

The difficulty was attributed to the maturity of the Utah administrative process. The Commission's general counsel characterized the anti-discrimination process as relatively immature compared to other Commission processes, such as worker's compensation. If more cases were fully litigated to a final conclusion under state law, the state administrative process would be clarified and justice better served to Utah residents.

Legislature Should Consider Change in Organizational Structure

Many of the problems described in the audit report resulted from administrative weaknesses that may be linked to the UADD's placement within the Industrial Commission. The first major weakness of the Commission structure is that administrative effectiveness is hampered when authority is

vested in a three-person body. The second principal weakness is the mixing of executive, legislative, and judicial functions. During the audit, material was reviewed indicating prior studies had recommended restructuring the Commission. Thirty years ago the Little Hoover Commission report (established by the 1965 Utah Legislature to conduct a comprehensive evaluation of state government to promote economy, efficiency and improved services), characterized administrative commissions as "the most significant and crippling managerial problem in state government." The report criticized administrative commissions as "Unsuited to prompt and decisive action and a major hurdle to effective executive management" . . . and an administrative commission may not "be responsive to the people of Utah since no one can really be held accountable for good, bad, or indifferent administration." About 15 years ago the Committee on Executive Reorganization reported that only two administrative commissions remained in state government--the Industrial Commission and the Tax Commission--and recommended changing their rules. The Committee reported that: "accountability is diffused when an agency is administered by a multi-headed mechanism like the commission."

Governor Leavitt's Transition Committee recommended restructuring the Industrial Commission to provide stronger administration. It stated . . . "that consideration be given to changing the structure to provide for a single administrator with a three-member commission to perform appellate responsibilities on a possible part-time basis."

In addition, some current and former commissioners have stated the Commission's administrative structure should be changed because the Commission structure is not an effective way to administer an agency. One former commissioner said "The 'management by committee' approach is costly, ineffective, creates confusion and diffuses accountability in administration of the agency. Decisions are left in suspension--no one is responsible and gridlock prevails." Another former commissioner described the Commission structure as antiquated which makes it difficult to create direction

for the agency. Governor Leavitt's Transition Committee also expressed the concern that: "Three equal commissioners assure an opportunity for all to be heard, but without strong administrative guidelines employee confusion can take place." The current Commission chairman told the audit team that after 28 years as a commissioner he now feels a change is warranted.

Although sharing authority in a multi-member body is appropriate when making judicial rulings, the audit report found, its effectiveness in the administrative realm is questionable. Since 1983, the Industrial Commission has been the only remaining administrative commission in Utah state government.

A number of solutions to change the Commission structure were offered, including the establishment of a human rights commission. The audit report stated that although the establishment of an independent Human Rights Commission may be an alternative, other options should be considered such as the existing Commission could be restructured to clarify administrative responsibilities and segregate them from judicial functions.

Followup Review of the Utah Anti-Discrimination Division

Because of a number of concerns raised by the audit report, it was deemed that a followup would be done to assess what progress the UADD had made since the report was issued in February 1996. According to the follow-up review which was conducted six months after the audit report, although the UADD had made progress, the Auditor noted the following:

- 1) Concerned that ongoing staffing issues continue to affect the availability of the division to function effectively.
 - a. nearly all the investigative staff who were at the division during the Audit have left the division which has resulted in fewer investigators for handling complaints, and
 - b. the case manager recently announced her resignation.
- 2) The commissioner assigned to provide administrative oversight for the UADD has changed.
- 3) The inventory of pending cases has grown
 - a. largely as a result of fewer determinations being written
 - b. because of the decrease in case closures (appears to be caused by staff turnover), the number of cases contracted with the EEOC was recently cut by 150 cases which will mean a loss of \$75,000 in revenue.
- 4) The audit team is concerned that the intake process does not adequately screen out cases that should not be accepted, resulting in wasted resources at the division.
- 5) The UADD should consider developing a position description for the intake officer. The audit report suggested that a policy statement should have been developed to address this issue, and to date, there does not appear to be an intention to develop a policy statement defining experience needed for the intake officer position.
- 6) The UADD, at the time of the audit follow-up review, did not have any contract attorneys on staff. However, to continue progressing in a positive manner, the UADD will need to identify and deal with the cause of staff turnover.

- 7) Although procedures have been developed or updated to provide better coverage concerning conducting investigations and compliance with Utah Code, a review of some files found the audit team unable to determine if case files had been reviewed with the case manager. Also, some files contained an investigative plan while others did not, and it was not always clear whether on-site interviews were being done. It was suggested that the division director may want to consider implementing a control mechanism that provides for checking off and dating when important processes are initiated and completed, so that some evidence of supervisory review is provided.