



4-2023

Utah Antidiscrimination Efforts: Shortcomings, Challenges, and the Way Forward

Greta L. Asay

Brigham Young University, greta.asay@gmail.com

Follow this and additional works at: <https://scholarsarchive.byu.edu/byuplr>



Part of the [Labor and Employment Law Commons](#)

BYU ScholarsArchive Citation

Asay, Greta L. (2023) "Utah Antidiscrimination Efforts: Shortcomings, Challenges, and the Way Forward," *Brigham Young University Prelaw Review*. Vol. 37, Article 4.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol37/iss1/4>

This Article is brought to you for free and open access by the Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact ellen_amatangelo@byu.edu.

UTAH ANTIDISCRIMINATION EFFORTS: SHORTCOMINGS, CHALLENGES, AND THE WAY FORWARD

*Greta L. Asay*¹

I. INTRODUCTION

Consider this hypothetical situation: Ms. Friedmann worked as an accountant for five years at a Utah company. In her last year, her supervisor, Mr. Lewis, repeatedly made unwelcome sexual advances and comments directed at Friedmann. What started as more subtle forms of sexual harassment soon escalated into aggressive advances. Friedmann, upset and uncomfortable, went to the company's Human Resources department to see what could be done to address these issues, but no meaningful action was taken. When Lewis heard that Friedmann had brought complaints against him to HR, he retaliated by threatening to demote her.

Recognizing the discrimination that she experienced, Friedmann filed a claim with the Utah Antidiscrimination and Labor Division Commission (UALD), which is designed to provide a framework for employees to seek legal action after experiencing unlawful discrimination based on identity. Similar to many victims of sexual harassment, Friedmann had no evidence to substantiate her claim, and the agency declared that no discrimination occurred. Friedmann decided to appeal this decision to the Equal Employment Opportunity Commission (EEOC), hoping to prove her case and receive

1 Greta L. Asay is a junior studying Sociology at Brigham Young University with a minor in Legal Studies. She plans to attend law school in Fall 2024. Greta would like to thank her editor, Juliette Ball. Juliette is a junior studying Microbiology at Brigham Young University. She plans to attend law school in Fall 2024.

reparations. Yet again, the decision was that officially, no discrimination had taken place. Frustrated after months of fighting for her rights only to be told she was not discriminated against, Friedmann ultimately quit her current job to find work at a different company, while her supervisor faced no legal consequences.

Although this is a hypothetical example, situations of discrimination such as the one Friedmann experienced are common in Utah. While being decidedly pro-business², Utah is not considered an employee-friendly state³: Utah seems to have chosen to privilege employers over employees. According to a study conducted by Oxfam, a nonprofit human rights organization, Utah was ranked 44th for “Best State to Work” in 2022; this index is calculated from Utah’s score on wages, worker protections, and rights to organize.⁴ Compared to other states, Utah guarantees limited protections and few benefits to employees. Although Utah does have some laws in place to protect employees from discrimination, the processes of investigation, enforcement, and remedial action do not effectively support and defend employees who experience unlawful discrimination. Utah’s government should revise the UALD’s subpoena and remedial powers and investigation processes to address its current shortcomings, which would meaningfully benefit employees to increase efficiency and accountability.

II. BACKGROUND

Discrimination in the workplace is experienced by people of many different identities, especially institutionally disadvantaged groups such as women, people of color, and members of the LGBTQ+ community. Discriminatory practices in the workplace generally

2 *Best States for Business 2019: Utah*, Forbes, <https://www.forbes.com/places/ut/> (last visited Jan 19, 2023).

3 *What Are Employee-Friendly States?*, Paycor, (Sep. 16, 2021), <https://www.paycor.com/resource-center/articles/what-are-employee-friendly-states/>.

4 Kaitlyn Henderson, *Best and Worst States to Work in America 2022*, Oxfam (2022), https://webassets.oxfamamerica.org/media/documents/BSWI_2022_Report_Final.pdf.

take two forms: disparate impact or disparate treatment. While disparate impact includes unintentional discriminatory practices, disparate treatment is intentional.⁵ Both disparate impact and treatment can create an unhealthy and potentially unsafe work environment.

Although discrimination might be exhibited in a variety of ways, common examples include harassment, such as repeated inappropriate comments, offensive jokes, or ridicule; biased and unfair treatment, such as not receiving a reasonable pay raise or promotion for no valid reason⁶; a hostile work environment, where the words or actions of colleagues can negatively impact or interfere with an employee's ability to work⁷; and retaliation, where an employer may terminate or take other adverse action against an employee when they make efforts to reduce the harm rendered by coworkers and supervisors.⁸ The difference between one-time jokes at the expense of another or passing over someone for a promotion and illegal discrimination is that illegal discrimination targets a "person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information."⁹ "To be unlawful, the conduct must create a work

5 Joshua Thompson, *Understanding the difference between disparate treatment and disparate impact*, Pacific Legal Foundation (2014), https://pacificlegal.org/understanding-difference-disparate-treatment-disparate-impact/?gclid=Cj0KCQiAorKfBhC0ARIsAHDzslum_r5VNvFM3U-kMlciXr-m8v-AgvqBv0NNKO8-JiESjDdXod1kBU_IaAv7cEALw_wcB.

6 HR Search & Rescue, *What Is Considered Unfair Treatment At Work?*, HR Search & Rescue (2022), <https://hrsearchandrescue.com/what-is-considered-unfair-treatment-at-work/>.

7 Nikoletta Bika, *Horrible workplaces: The signs of a hostile work environment and what to do about it*, Resources for Employers, <https://resources.workable.com/stories-and-insights/hostile-work-environment-signs-fixes> (last visited Feb 2, 2023).

8 *What is Employment Discrimination?*, US EEOC, <https://www.eeoc.gov/youth/what-employment-discrimination> (last visited Jan 19, 2023).

9 *Prohibited Employment Policies/Practices*, US EEOC, <https://www.eeoc.gov/prohibited-employment-policiespractices> (last visited Feb 28, 2023).

environment that would be intimidating, hostile, or offensive to reasonable people.”¹⁰

Discrimination in the workplace can have negative impacts on the mental health, work performance, and engagement of employees.¹¹ All of these discriminatory practices are prohibited by both federal and state laws, but nonetheless overtly and covertly persist in workplaces.¹² The Civil Rights Act of 1964 and the Utah Antidiscrimination Act of 1965 were created to protect workers from unlawful identity-based discrimination and provide a way for those who were discriminated against to pursue legal action.

A. Civil Rights Act of 1964

The Civil Rights Act of 1964 “prohibits discrimination on the basis of race, color, religion, sex, or national origin.”¹³ The purpose of this act is to protect individuals from unequal treatment and covers discrimination in employment by forbidding discrimination

-
- 10 *Harassment*, US EEOC, <https://www.eeoc.gov/harassment> (last visited Feb 28, 2023).
- 11 Gallup Inc, *Understanding the Effects of Discrimination in the Workplace*, Gallup.com (2021), <https://www.gallup.com/workplace/349865/understanding-effects-discrimination-workplace.aspx>; Kathleen M. Rospenda, Judith A. Richman, and Candice A. Shannon, *Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace*, 24 J. Interpers. Violence 5, 819-843 (May 2009).
- 12 Mark C. Perna, *Workplace Discrimination And Abuse Far More Common Than We Might Think*, Forbes, <https://www.forbes.com/sites/markperna/2021/05/26/workplace-discrimination-and-abuse-far-more-common-than-we-might-think/> (last visited Jan 19, 2023); Ten Spot, *New Survey Reveals Gen Z Holds the Key to the Evolution of Company Culture, with Social Issues, Workforce Engagement, and Treatment of Others at Work Top of Mind*, GlobeNewswire (May 26, 2021), <https://www.globenewswire.com/en/news-release/2021/05/26/2236366/0/en/New-Survey-Reveals-Gen-Z-Holds-the-Key-to-the-Evolution-of-Company-Culture-with-Social-Issues-Workforce-Engagement-and-Treatment-of-Others-at-Work-Top-of-Mind.html>.
- 13 *Civil Rights Act (1964)*, National Archives (2021), <https://www.archives.gov/milestone-documents/civil-rights-act> (last visited Jan 19, 2023).

based on sex and race in hiring, promoting, firing, and other employment decisions. Title VII of the Civil Rights Act created the Equal Employment Opportunity Commission (EEOC), which enforces the laws that protect against discrimination in employment practices.¹⁴ Since the Civil Rights Act of 1964, amendments have been made to the law, most notably with the Civil Rights Act of 1991; this was passed to amend Title VII and expand the rights and protections of workers.¹⁵ This law gives the EEOC the authority to conduct investigations of charges of discrimination in the workplace as well as to file lawsuits on behalf of clients.

B. The Utah Antidiscrimination Act of 1965

Similar to Title VII of the Civil Rights Act, the Utah Antidiscrimination Act (UADA) of 1965 “prohibits employment discrimination on the basis of race, color, religion, sex, age (40 or over), national origin, disability, sexual orientation, gender identity, pregnancy, childbirth or pregnancy-related conditions.”¹⁶ The UADA protects employees against unlawful discharging, demotions, retaliations, refusal to hire, or other discriminatory employment practices. The UADA established the Utah Antidiscrimination and Labor Division Commission (UALD) of the Utah Labor Commissioner’s Office. The Employment Discrimination Unit of the UALD is charged with enforcing both state and federal laws pertaining to discrimination in employment and is the agency that investigates claims of discrimination.

14 *Title VII of the Civil Rights Act of 1964*, US EEOC, <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964> (last visited Jan 19, 2023).

15 *Civil Rights Act of 1991 (Original Text)*, US EEOC, <https://www.eeoc.gov/civil-rights-act-1991-original-text> (last visited Feb 28, 2023).

16 *Employment Discrimination*, Utah Labor Commission, <https://labor-commission.utah.gov/divisions/utah-antidiscrimination-and-labor-uald/employment-discrimination/> (last visited Jan 19, 2023).

Filing a discrimination claim with the UALD is open to any employee, with or without legal representation.¹⁷ Discrimination claims can be cross-filed through the UALD and the federal administrative agency, the EEOC; because the UALD is a Fair Employment Practices Agency (FEPA) under the EEOC, it has the authority to act as an agent of the EEOC.¹⁸ It is not necessary to file with both the UALD and the EEOC.¹⁹ These two agencies cooperate to process claims through a ‘work-sharing agreement’; when cases are dually filed with the EEOC and UALD, it is the UALD that handles the case.

The process for both agencies is similar: intake, mediation, and investigation.²⁰ An individual must first file a complaint, either through an attorney or *pro se*, with the UALD within 180 days or with the EEOC within 300 days of the date that the filer believes they were discriminated against.²¹ Both agencies provide the option of mediation; the use of a mediator between an employee and their employer can help resolve disputes.²² However, if mediation is rejected by either party or if an agreement is unable to be made, the charge is supposed to be forwarded to an investigator. After obtaining and examining the facts of the claim, the investigator will come to a decision about the validity of the claim. The individual who filed the claim can appeal the decision and seek litigation two times at the state level; if they remain dissatisfied with the decision, they can

-
- 17 *Information for Filing an Employment Discrimination Complaint*, United States District Court for the District of Utah (2020), https://www.utd.uscourts.gov/sites/utd/files/discrim_guide.pdf.
- 18 *Filing a Discrimination Claim - Utah*, Workplace Fairness, https://www.workplacefairness.org/file_UT (last visited Jan 19, 2023).
- 19 *Overview*, US EEOC, <https://www.eeoc.gov/overview> (last visited Jan 19, 2023).
- 20 *A Performance Audit of the Utah Antidiscrimination and Labor Division’s Employment Discrimination Unit*, (Jan 2017) [Hereinafter Performance Audit].
- 21 *Filing a Discrimination Claim - Workplace Fairness* *supra* note 18
- 22 *Mediation*, US EEOC, <https://www.eeoc.gov/mediation> (last visited Jan 19, 2023).

appeal their case at the federal level.²³ If a client filed with the UALD but wishes to sue, they can withdraw the charge and request a Notice of Right to Sue through the EEOC.²⁴ These remedial options are meant to provide employees with adequate means for legal action.

However, there are currently issues with the UALD's abilities to properly, effectively, and adequately deliver justice for those who were discriminated against. The UALD is currently unable to properly investigate the claims of discrimination it receives. This commission lacks the necessary resources to effectively address the needs of the individuals who file claims. Additionally, the separation of the UALD and EEOC creates problems, specifically in regard to power and authority, for clients, attorneys, and the UALD. Because the UALD does not have the power or resources to adequately enforce or investigate claims of discrimination in the workplace, changes can and should be made to the UALD by the State of Utah to effectively address the claims and enforce the protections provided by federal statutory law.

III. PROOF OF CLAIM

A. Successes of the UALD

It is important to note that the structure and system of the UADA has significant potential to be an asset to both employers and employees. The UADA is successful in many ways in ensuring and protecting equality in the workplace. Employees in Utah enjoy the rights and protections against unlawful discrimination, and violations of

23 Christopher Snow *Personal Interview*, (2022); Chapter 10 ADMINISTRATIVE APPEALS, CIVIL ACTIONS, AND APPOINTMENT OF COUNSEL, US EEOC, <https://www.eeoc.gov/federal-sector/management-directive/chapter-10-administrative-appeals-civil-actions-and-appointment> (last visited Feb 28, 2023).

24 *Employee's Guide to Appeal of a Utah Antidiscrimination and Labor Division Determination and Order (Request for Evidentiary Hearing)*, <https://www.laborcommission.utah.gov/wp-content/uploads/2018/08/Employees-Guide-to-Appeal-of-a-UALD-Determination-and-Order.pdf> (last visited Feb 2, 2023).

these antidiscrimination laws are theoretically enforced; however, they are not consistently or sufficiently enforced. Additionally, in the case that an employee is unlawfully discriminated against based on the identities protected, the UADA provides a way for those individuals to seek legal action and potentially receive reparations. Through the UALD, individuals are entitled to pursue remedial action when wrongfully discriminated against. Continuing the example of the case of Ms. Friedmann, as an employee, had the protected right to pursue legal action for the discrimination she faced. Those who experience unlawful discrimination are also able to participate in mediation, which has been successful in some cases.²⁵ The UADA is important because it not only protects employees from discrimination, but can preempt it, discouraging discrimination in the first place.

B. Shortcomings of the UALD

1. Investigations

Despite the general successes of the UALD, there are many shortcomings of the agency that have significant impacts on the effectiveness, efficiency, and integrity of the agency. To investigate and review the effectiveness and efficiency of the Employment Discrimination Unit of the UALD, a performance audit was conducted by the Office of the Legislative Auditor General (OLAG) in 2017 and reported to the Utah Legislature.²⁶ The audit examined multiple issues of the UALD and laid out both general and specific grievances with the process and internal organization. As a whole, the main issue was that the process of the investigations and outcomes were inadequate, inconsistent, and largely disorganized. According to the OLAG, the investigative process itself has proven to be generally inadequate, and the various components of the system that are used to conduct investigations and make decisions are individually and collectively problematic.

25 Performance Audit *supra* note 20, at 22. Note: In 2016, 31% of cases closed participated in mediation. 49% percent of these were successful mediations.

26 *Id.* at 20

The OLAG found that the investigators are not adequately qualified due to the lack of a formal training program; training in the UALD is referred to as “handholding” by the staff, which means that instead of formal training, there is informal job shadowing and explanations of cases.²⁷ The training programs that are currently in place have proven to be insufficient in preparing investigators. Both the initial training for new investigators and re-training for the seasoned investigators was informal, not tracked, and insufficient. The major contributor to this insufficiency is limited funding— the UALD does not have the budget or resources to either train investigators themselves or send investigators to be trained by other agencies, such as the EEOC.²⁸

Another issue that impacts and complicates the shortcomings is the lack of resources and time.²⁹ Due to the number of claims filed in proportion to the number of staff, those who work at the UALD are often overworked, which results in backlogged investigations.³⁰ If the staff of the UALD are unable to spend adequate time and effort on their investigations, it is possible that some cases do not receive the attention that they need to reach an accurate decision, and thus are decided prematurely.

Additionally, there is the relatively minor but nevertheless relevant issue of promptness; investigations are not conducted in a timely manner. Although there are some deadlines in place, these deadlines are generally ignored and are not enforced. This issue exacerbates the general disorder and mismanagement of the investigation process; the lack of policies puts the UALD at risk for conducting inadequate and inconsistent investigations. Furthermore, unnecessarily lengthy investigations inconvenience all parties involved, taking up more time, resources, and money than it needs to.³¹

27 *Id.*

28 *Id.*

29 *Id.* at 54

30 Lauren Scholnick *Personal Interview* (2022)

31 Snow Interview *supra* note 23

i. Low Rate of Cause Findings

Around the country, employment discrimination cases are notoriously difficult for a plaintiff to win³²; in Utah, they are even more difficult. Compared to other federal and state agencies, the UALD is less likely to rule in favor of employees.³³ The ultimate outcome of an employment discrimination case is whether there were ‘cause findings’ or ‘no cause’. When the UALD investigation findings lead to a ‘no cause’, it means that there was no sound reason to believe that illegal discrimination had occurred; the UALD findings of ‘no cause’ (67.7%) was higher than the EEOC (65.2%) or FEPA average (60.3%).³⁴ The cause findings, which refer to when “the UALD determined there was reasonable cause to believe illegal discrimination occurred based on evidence obtained during an investigation”, are considered merit resolutions because they are outcomes that are beneficial to the client.³⁵ Compared to the other agencies, the UALD has an abnormally low rate of cause findings—comprising only 0.4 percent of their investigations; this is below the national average of state FEPAs (1.5%) and the EEOC average (3.5%).³⁶ This low rate of cause findings could indicate that employees who were discriminated against are unlikely to receive a favorable outcome.

The low rate of cause findings and high rate of ‘no cause’ findings may be a reflection of the inadequate investigations, which contributes to the public’s perception of bias in the system. The OLAG found reason to believe that the “division’s low rate of cause findings is influenced by several factors, including a lack of processes and investigator training, weak performance measures, which refers to the evaluation of employees based on a standard, and high

32 Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win*, 61 LA. L. REV. 559 (2001); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, II Cornell Law School 1 (2008).

33 Performance Audit *supra* note 20, at 33

34 *Id.*

35 *Id.* at 31

36 *Id.*

turnover.”³⁷ Additionally, the investigations conducted by the UALD overwhelmingly fail to provide clear justification and evidence of how and why a case outcome decision was reached.³⁸ There is little internal oversight in the justification of the investigation process, and the oversight process that is in place is informal and not standardized. External review of the conclusion of the investigations is also limited, which has resulted in reduced accountability for the investigations and the outcomes.

ii. Navigating the System

Clients may have a difficult time navigating and going through the UALD system, namely because they have a heavy burden of proof.³⁹ Clients must be able to use physical evidence to prove that they were discriminated against; however, this can be very difficult, since most discrimination happens through words or actions, which are rarely documented.⁴⁰ Complaints of retaliation are the most common form of discrimination that are reported to the UALD; it is likely that there are more complaints of retaliation than other forms of discrimination because it is easier to document and prove.⁴¹

37 *Id.* at 33

38 *Id.* at 11

39 ‘Nate Carlisle, ‘*It doesn’t matter what you say*’: In Utah, the agency that investigates job discrimination is so mistrusted that some lawyers go to the feds instead, The Salt Lake Tribune, Dec 17, 2017, <https://www.sltrib.com/news/politics/2017/12/17/it-doesnt-matter-what-you-say-in-utah-the-agency-that-investigates-job-discrimination-is-so-mistrusted-that-some-lawyers-go-to-the-feds-instead/> [hereinafter ‘*It doesn’t matter what you say*’].

40 *Proving Discrimination*, Workplace Fairness, <https://www.workplacefairness.org/proving-employment-discrimination> (last visited Jan 19, 2023).

41 Susan Baird Motschieder, *EEOC AND UALD FILINGS UPDATE*, Parsons, Behle, & Latimer (Nov 13, 2018) <https://parsonsbehle.com/insights/eec-and-uald-filings-update-blog>; Nate Carlisle, *Utah employers were accused of a lot more discrimination and retaliation in 2017*, The Salt Lake Tribune, (Feb 11, 2018) <https://www.sltrib.com/news/politics/2018/02/09/utah-employers-were-accused-of-a-lot-more-discrimination-and-retaliation-in-2017/>.

Because those who file the claims have a heavy burden of proof to prove that they were discriminated against, many ultimately cannot prove that discrimination occurred, resulting in the UALD declaring ‘no cause’. Because of the general inefficiency and inadequacy of the UALD, lawyers may actually recommend to their clients that they go through the EEOC instead.⁴² While the requirement for evidence is similar for both the EEOC and UALD⁴³, going to the EEOC is more likely to result in a favorable outcome for the client, and thus may be more appealing to them.⁴⁴ The discouragement of clients from going through the UALD and choosing to file with the EEOC instead is counterintuitive because by doing so, the UALD becomes obsolete while the EEOC is further overworked.

2. Mediation

Mediation early in the process has the potential to be productive and beneficial for the plaintiff and the defendant because it gives the parties the opportunity and flexibility to reach an agreement, and thus avoid the investigation and other legal process.⁴⁵ Even if mediation doesn’t end with a resolution, it can allow both parties to better understand each side’s case and perspective.⁴⁶ The UALD is required by law to make mediation available to parties prior to the

42 It doesn’t matter what you say’ *supra* note 39

43 *CM-602 Evidence*, US EEOC, <https://www.eeoc.gov/laws/guidance/cm-602-evidence> (last visited Feb 2, 2023).

44 Performance Audit *supra* note 20, at 30

45 James Kerwin, *How Mediation Works When Both Parties Agree They Need Help Resolving the Dispute*, PON - Program on Negotiation at Harvard Law School (2022), <https://www.pon.harvard.edu/daily/mediation/navigating-the-mediation-process/> (last visited Jan 19, 2023); Matt A. Mayer, *Use of Mediation in Employment Discrimination Cases*, The, 1999 J. Disp. Resol. (1999) Available at: <https://scholarship.law.missouri.edu/jdr/vol1999/iss2/2>.

46 Snow Interview *supra* note 23; *see id.* Kerwin.

investigation⁴⁷, and currently employs two full-time certified mediators that conduct mediations for disputes relating to its employment, housing, and wage divisions.⁴⁸ However, some clients may prefer to use outside mediators if they believe it will benefit their case more so than if they used the UALD's mediators; these outside mediators may come from law firms or other legal organizations, such as an alternative dispute resolution provider.⁴⁹ Outsourcing professional mediators, while perhaps beneficial in theory, is much more expensive than using the services by the UALD's mediators. Even if parties do opt to outsource mediators, those mediators may lack court-qualified training that is specific to mediation.

While it can be helpful for both parties to meet and potentially reach an agreement, mediation does not always equally benefit both sides. Early mediation may even benefit the defendant more than the plaintiff by using the information and evidence that the plaintiff presents to build a stronger defense.⁵⁰ It is also possible that browbeating can occur during mediation, which is when the mediator consciously or subconsciously forces or steers an outcome of the negotiation that favors the defendant over the plaintiff, perhaps in the interest of time

47 Utah Antidiscrimination Act, 34A-5-107(a) Utah Code (2018), https://le.utah.gov/xcode/Title34A/Chapter5/34A-5-S107.html?v=C34A-5-S107_2018050820180508.

48 Jaceson Maughan, *Labor Commission Response to Agency Review*, (2021), <https://le.utah.gov/interim/2021/pdf/00004100.pdf>.

49 *About Us | JAMS Mediation, Arbitration*, ADR Services, <https://www.jamsadr.com/about/> (last visited Jan 19, 2023); Patrick J. Lamparello and Noa M. Baddish, *Mediating Employment Disputes*, Lexis Nexis (June 19, 2019), <https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/mediating-employment-disputes>.

50 Scholnick Interview *supra* note 30; Mark Woodward-Smith, *Mediation – advantages and disadvantages*, Systech, <https://www.systech-int.com/insights/thoughts/mediation-advantages-and-disadvantages> (last visited Jan 19, 2023); Michael A. Zody, *Resolution Conferences Conducted by the Utah Anti-Discrimination Division: The Elements of a Successful Administrative Mediation Program*, 21 University of Utah Journal of Contemporary Law (1995).

or resources.⁵¹ Because browbeating can make mediation unequal, it weakens the integrity of mediators and the mediation process itself. The legal intention of mediation is to benefit both parties equally, but if this is not the case, changes need to be made to address this.

The mediation process as it currently is practiced does not follow the intent of the law: the UALD conducts investigations at the same time as the mediation process is taking place, when it is the law for mediation to be completed before an investigation is started.⁵² Although it may seem minor, it is important that mediation is conducted before the investigation begins so that the process of the investigation doesn't interfere with or impact the outcome of mediation. When the investigation and mediation are conducted at the same time, it may defeat the purpose of mediation.

3. Powers

The UALD does have subpoena power⁵³ to “subpoena witnesses to compel their attendance at a hearing, to take testimony, and to compel a person to produce documents at a hearing”⁵⁴; however, this power isn't useful because the UALD does not hold hearings. The subpoena powers of the UALD are limited, irrelevant, and cannot meet the needs of the agency. Specifically, while the UALD does have some power to obtain records⁵⁵, it does not have the power to subpoena evidence, such as records from employers for its investigations. Because of this, an employer may refuse to submit incriminating evidence, thus placing the discriminated party at a further disadvantage. This lack of power leads to and produces obstacles that hinder the progress and ability of investigations and may mean there is a lack of useful evidence that can be used to make a fair decision.

51 Scholnick Interview *supra* note 30

52 Utah Code §34A-5-107(3) *supra* note 47

53 Utah Antidiscrimination Act, 34A-5-104 Utah Code (2022), <https://le.utah.gov/xcode/Title34A/Chapter5/34A-5-S104.html>.

54 Performance Audit *supra* note 20, at 25

55 Administrative Rule R 606-1-3, Utah Code (2015).

Another issue with the UALD relating to its power is the limited remedial options. Those who file discrimination claims with the UALD have a relatively narrow choice of remedies compared to those who file with the EEOC⁵⁶: the UALD offers reinstatement, back pay and benefits, and attorney's fees and costs⁵⁷; the EEOC offers non-discriminatory placement, back pay, front pay, attorney's fees and costs, and compensatory damages.⁵⁸ Because of this, many clients choose filing with the EEOC over the UALD, making the UALD, to a certain extent, both obsolete and redundant. Due to the relationship and power division between the UALD and the EEOC, the UALD possesses statutory authority over employers that the EEOC does not have, meaning the EEOC cannot require certain actions or reparations of the employer while the UALD can⁵⁹; for example, the UALD can require the reinstatement of a terminated employee.⁶⁰ While this in itself is beneficial for the UALD, it is not indicative of the general power the UALD holds.

One problem that has significant ramifications for Utah employees is that in order to receive the protection of the UADA, there must be at least 15 employees in the company they work for.⁶¹ This requirement⁶² was initially created by the federal government to

56 Employment Discrimination *supra* note 16

57 Utah Antidiscrimination Act, 34A-5-107 Utah Code (2018), <https://le.utah.gov/xcode/Title34A/Chapter5/34A-5-S107.html>

58 *Chapter 11 REMEDIES*, US EEOC, <https://www.eeoc.gov/federal-sector/management-directive/chapter-11-remedies> (last visited Jan 19, 2023).

59 EEOC FILINGS UPDATE *supra* note 41

60 *Id.*

61 Utah Antidiscrimination Act, 34A-5-102 Utah Code (2018), https://le.utah.gov/xcode/Title34A/Chapter5/34A-5-S102.html?v=C34A-5-S102_2016051020160510.

62 Title VII *supra* note 14

“avoid placing too great a burden on smaller employers,”⁶³ which, while appropriate at the time it was created in 1964⁶⁴, cannot fit the needs of most states now. Since the Civil Rights Act was passed in 1964, the country, including Utah, has experienced significant population growth, increased diversity, social and cultural change, and technological innovation⁶⁵—all of which have changed how people work.⁶⁶

In response to these advancements and the diversification of the economy, many states have lowered their minimum number of employees⁶⁷; Utah, however, is not one of these states. Utah is currently home to a significant number of small businesses⁶⁸: 96.7% of Utah businesses are considered small businesses, and approximately 47.2% of all Utah employees are employed by small businesses.⁶⁹

-
- 63 Thomas J. Crane, *Less than 15 (or 20) Employees Can = Freedom to Discriminate*, San Antonio Employment Law Blog (2011), <https://www.sanantonioemploymentlawblog.com/2011/05/articles/discrimination/less-than-15-or-20-employees-can-freedom-to-discriminate/> (last visited Jan 19, 2023).
- 64 Title VII *supra* note 14
- 65 *The Changing Demographic Profile of the United States*, EveryCRSReport (Mar 31, 2011), <https://www.everycrsreport.com/reports/RL32701.html#:~:text=The%20U.S.%20population%E2%80%9494currently%20estimated,what%20it%20was%20in%201950.>
- 66 *Changes in the American workplace*, Pew Research Center’s Social & Demographic Trends Project (Oct 6, 2016), <https://www.pewresearch.org/social-trends/2016/10/06/1-changes-in-the-american-workplace/>.
- 67 Aaron Hofelder, *Employment Discrimination Laws in Your State*, NOLO, www.nolo.com, <https://www.nolo.com/legal-encyclopedia/employment-discrimination-in-your-state-31017.html> (last visited Jan 19, 2023).
- 68 *2021 Small Business Profile: Utah*, U.S. Small Business Administration Office of Advocacy, <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/08/30143730/Small-Business-Economic-Profile-UT.pdf> (last visited Feb 28, 2023).
- 69 Melanie King, *The Best States for Small Business Lending: #1 Utah, #2 Washington*, Lendio (May 1, 2017) <https://www.lendio.com/blog/best-states-small-business-lending-1-utah-2-washington/>; 9 *Fascinating Small Business Statistics in Utah*, Lincoln Business Guides (2022), <https://lbg-online.net/small-business-statistics/utah/>.

However, these employees cannot claim the rights and protections of the UADA, thereby putting them in vulnerable and potentially unsafe environments. Additionally, there are currently no remedial options for those discriminated against in businesses with less than 15 employees, which leaves a significant number of employees completely unprotected from unlawful discrimination.⁷⁰ This can pose serious threats to these employees, particularly institutionally disadvantaged groups.⁷¹

C. Prescriptions

Solutions that could significantly benefit the effectiveness of the UALD can be made on both major- and minor-levels. These solutions can be organized into three general areas: investigation, mediation, and power; the significant and insignificant issues of the UALD can be resolved through the prescriptive elements in these three categories. The UALD would benefit from changes made within the agency and the investigation process. In the 2017 audit, the OLAG recommended several solutions that could address the issues that were identified. The suggestions that were made were in direct response to the problems and shortcomings that the OLAG identified, and thus, in conjunction with other solutions, would improve the investigations and mediation process and strengthen the power of the UALD.

1. Investigations

Because of the current inadequacies of the investigations conducted by the UALD, the OLAG recommends a few ways that these issues can be addressed. One such way is the standardization and formalization of the investigation process. This is a commonsensical

70 Scholnick Interview *supra* note 30

71 In *Gottling v. P.R. Inc.* (*Gottling v. PR INC.*, 61 P.3d 989 (2002)), the plaintiff, Gottling, was unlawfully terminated by her supervisor because she refused to maintain a sexual relationship with him. Gottling brought forward the case on the grounds of wrongful termination. However, she was unable to seek legal reparations because she worked in a business that had less than fifteen employees.

improvement that can be made, and there is considerable merit to this recommendation. Establishing a structured investigation process should include active and meaningful oversight from the investigator's supervisor(s) to ensure the consistency and thoroughness of all investigations. Standardizing investigations ought to include creating a comprehensive policy and procedures manual that can provide UALD employees with the necessary instructions to conduct a complete and thorough investigation. Developing and establishing a "formal, standard, and documented investigation program ... should improve UALD's management and investigation of employment discrimination charges."⁷² The investigators and supervisors must be held accountable for the entire process of the investigation. The proper management of investigations is required to ensure this, and would benefit not only the UALD itself, but also all those who are involved, such as the employers, employees, and attorneys. Increased organization and order is a relatively straightforward way to improve the UALD, its investigations, and people's experiences and interactions with the agency.

Formal training of investigators is another keyway to improve the UALD investigations. It is necessary to the integrity and accuracy of investigations that those charged with fact-finding and decision-making have proper, up-to-date, and continuous training. Investigators should be required to undergo thorough training when they are first hired as well as consistent and continual re-trainings as they continue to work for the UALD. This required training will help investigators learn the essential instructional information, necessary skills, and proper procedures for conducting investigations; re-training allows employees to review the information and procedures, further develop their skills, and be of greater help to newer employees.

Additionally, a potential way to improve investigations is to limit the appeals process, which could free up the UALD's time and resources. Limiting the appeals process at the state-level from the opportunity of two appeals to one would still provide the clients to seek reparations and legal action but would require them to take their case directly to the federal-level if they lost the first appeal. It is

72 Performance Audit *supra* note 20, at 18

important that the client would still have the benefit of another chance to try their case if they didn't agree with the outcome at the state level because it provides them with more opportunities to seek legal action. This restriction would ultimately be advantageous because it would allow the investigators to focus on the cases at hand and allow them to give more effort to thorough investigation.⁷³ Thus, it would likely benefit the plaintiffs, because their cases would receive more attention; the defendants, because they would not have to go through as many appeals; and the staff of the UALD, because they would not be as overworked and could put in greater effort into their cases.

2. Mediation

Because mediation is a viable and potentially productive way for cases to be settled earlier in the process, the system and structure of mediation should be as constructive and beneficial as possible. To improve the mediation process, changes should be made to the program as well as to the training and education of the mediators. One straightforward change that can be easily implemented is for the UALD's mediation program to follow the process as intended in the law⁷⁴, specifically regarding the order of processes.⁷⁵ The law clearly states that mediation should come first, and, if it is not successful, only then can the investigation be conducted; mediation and the investigation should not be happening at the same time. When mediation comes before the investigation, parties are more likely to be receptive to resolution than if the investigation was already taking place.⁷⁶ Additionally, conducting the mediation first "saves Commission resources by avoiding the investigation of a charge that might be appropriately resolved through mediation."⁷⁷ Conducting mediation before the investigation is in the UALD's best interest because it can

73 Scholnick Interview *supra* note 30

74 Utah Code 34A-5-107(3) *supra* note 47

75 Performance Audit *supra* note 20, at 23

76 *Questions And Answers About Mediation*, US EEOC, <https://www.eeoc.gov/questions-and-answers-about-mediation> (last visited Jan 19, 2023).

77 *Id.*

potentially save them resources and time.⁷⁸ It is necessary that every process, system, and part of the UALD is following the intent of the law because it ensures accountability and transparency of the agency and its workings.

If parties opt to outsource a mediator from an agency or firm, it is crucial that they have adequate knowledge of the law and that they are equipped with the necessary skills to help both parties reach a resolution.⁷⁹ Because mediation is a potentially important and private way that clients and their employers can reach an agreement, it is crucial that mediators are not only well-trained, but that they have specialized mediation training.⁸⁰ Requiring that all mediators, whether they are on the staff of the UALD or not, have the necessary and proper training will help standardize the mediation process while still allowing mediators the flexibility to take different approaches and techniques.

Additionally, it would be beneficial if training included information on how mediation can potentially be unproductive and even harmful for plaintiffs; when a mediator is aware of this, they are in a better position to avoid unequal mediation. This sensitizing training can help mediators learn how to conduct mutually beneficial mediations. Although training by itself may not be enough to adequately address all problems associated with mediation, it can help provide mediators with important negotiating and sensitizing skills, thereby improving the mediation process for both the plaintiff and defendant. The certification of training that is specific to mediation would better equip mediators to appropriately and sensitively mediate; this would strengthen and ensure the integrity of the mediation process.

These improvements would benefit the mediation process and those involved by increasing transparency, accountability, efficiency, and neutrality. It is important that mediators are not only well-trained, but that they have the transparent intention to be of help to

78 Resolution Conferences *supra* note 30

79 Scholnick Interview *supra* note 30

80 Jepson *Personal Interview* (2022)

both parties as much as they can.⁸¹ It is also important that the integrity of the UALD's mediation process is upheld and strengthened. With these improvements, mediation becomes a more productive and potentially beneficial option for the plaintiffs and defendants. While mediation does not mitigate discrimination itself, it is nevertheless important because it provides a way for those who have already experienced discrimination to seek and potentially receive reparations.

3. Powers

The UALD should be granted different and broader subpoena power than it currently is entitled to.⁸² One of the strengths of the EEOC over the UALD is that it is "entitled to all information relevant to allegations that have been listed in the charge"⁸³, which is permitted due to the subpoena power of the EEOC to obtain this information. With increased subpoena power, the UALD would have access to more evidence that could potentially have importance in the investigations and trials. Additionally, the UALD would be able to conduct its investigations more efficiently.

To address the issue of limited remedial action, the OLAG calls for the revision and increase of remedial powers granted to the UALD.⁸⁴ This would likely prove to be greatly beneficial to the plaintiffs because

81 *Id.*

82 Performance Audit *supra* note 20, at 25

83 *Id.*

84 *Id.*

it offers them more options to address their specific needs.⁸⁵ As previously mentioned, the power of the UALD is not as well-equipped to address the needs of those seeking reparations and justice when compared to that of the EEOC⁸⁶; therefore, a sensible solution to this that would significantly benefit the clients of the UALD is additional remedial power. The UALD should be granted meaningful independent powers to fulfill its role as protector of employees' rights. This would be a worthwhile change because it would allow the UALD to be able to adequately and separately initiate legal action pertaining to the discrimination claims instead of relying on the EEOC to accomplish this⁸⁷. These remedial options would ideally parallel those of the EEOC.

Providing legal protections for those who work in businesses with a staff of fewer than 14 would significantly benefit those employees.⁸⁸ The Utah State Legislature, which holds the power to decrease the minimum number of needed employees, should follow

85 One example of a state that has expanded its legal remedial options for employment discrimination is California. California's state agency that handles discrimination cases is the Civil Rights Department (CRD). The CRD offers a wider variety of remedies than the UALD, including covering back pay (past lost earnings), front pay (future lost earnings), hiring/reinstatement, promotion, out-of-pocket expenses, policy changes, training, reasonable accommodations, damages for emotional distress, punitive damages, and attorney's fees and costs (*Employment Discrimination*, Civil Rights Department, State of California, <https://calcivilrights.ca.gov/employment/#faqABody> (last visited Feb 2, 2023)). The wider range of remedial options increases clients' discretion in seeking compensation that they believe would be most appropriate to their situation. Because of these remedies, California is significantly better equipped in addressing discrimination claims and has more success in effectively settling issues. For example, most clients in California go through their state agency rather than the EEOC, unlike Utah (*2020 Annual Report: Department of Fair Employment and Housing*, <https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/01/2020-DFEH-Annual-Report.pdf> (last visited Feb 2, 2023)).

86 EEOC Remedies *supra* note 58

87 Steve Bedar *Personal Interview* (2022)

88 Scholnick Interview *supra* note 30

the example of the other⁸⁹ states that have lowered their requirement and amend the UADA to extend legal protection to include businesses with fewer than 15 employees. Recently, a bill, titled ‘Workplace Protection Amendments’, was proposed that moved to lower the required number of employees to qualify for protection under the UADA from fifteen to five.⁹⁰ However, this bill was not passed. Creating and passing another bill to amend the UADA, perhaps at a higher number than five, would be an important and much-needed change. Increasing the minimum number from five could be a better compromise that would make the bill more likely to pass. This extension of protection would greatly benefit employees working in small businesses by providing them the opportunity to seek legal action if they are discriminated against. Because small businesses and their employees are such an integral part of Utah’s economy and workforce, it is crucial that the UADA protects as many of these workers as it can.

D. Significance

Importantly, the UALD recognizes its own shortcomings, and agrees that the agency, as it currently operates, is unable to fully address the issues raised by the OLAG. In response to these problems, internal solutions and changes are currently being made. For example, amendments were recently made to the UADA, granting the UALD increased power to investigate and settle discrimination claims⁹¹; notably, the UALD was granted subpoena power during investigations.⁹² The changes that were made were intended to improve the agency and its power generally by addressing specific

89 Employment Discrimination Laws in Your State *supra* note 67

90 HB0283, <https://le.utah.gov/~2018/bills/static/HB0283.html> (last visited Jan 19, 2023).

91 HB0030, <https://le.utah.gov/~2018/bills/static/HB0030.html> (last visited Feb 2, 2023).

92 James R. Moss, Jr., *Utah 2018 Legislative Report: Employment Law Developments*, Lexology (2018), <https://www.lexology.com/library/detail.aspx?g=d615e87f-72d7-464c-a054-d07eec3a14e2>; *See Id.*

issues that had arisen. While these changes are undoubtedly beneficial and necessary, additional solutions can also be adopted to further improve the UALD.

Implementing the changes previously described will likely yield significant improvements in the UALD. Positive results would theoretically include a greater number of cause findings, increased investigation efficiency, strengthened integrity and accountability of the UALD and its processes, greater equity between employers and employees, and extended protections to a greater number of Utah employees. These changes would help the UALD to be more in line with the law and the ideal of justice. The UALD would also be able to better address the current issues within its agency, thereby helping to address discrimination in the workplace in Utah; this would likely make Utah a safer and better place to work in.

The existing system and structure of the UALD has the potential to address discrimination in the workplace. It is important that the system and structure are already in place, but changes and adjustments need to be made in order to improve the system and structure, thereby fulfilling its potential. While the EEOC can be a useful alternative for Utah employees, the agency is not equipped to handle every discrimination case in Utah in addition to its cases from all over the country. Furthermore, the state agency was created for the sole purpose of helping its citizens, and therefore is in a significantly stronger position to address the unique needs and ensure protections for Utah employees than the EEOC.⁹³ For example, the UALD has greater initial jurisdiction over employers than the EEOC, meaning the UALD can be better equipped to offer legal action.⁹⁴ The UALD should be able to effectively protect employees from unlawful discrimination and help those who have been subject to discrimination receive the legal reparations to which they are entitled.

93 Bednar Interview *supra* note 87

94 EEOC and UALD FILINGS UPDATE *supra* note 41

IV. CONCLUSION

For Utah employees facing discrimination in the workplace, limited meaningful action can be taken on their behalf. Because of how the UALD currently operates, those seeking remedial action or compensation are unlikely to receive that which they believe they are entitled. Issues such as informal and insufficient claim investigations, lack of training for investigators and mediators, inadequate mediation, limited resources, and narrow remedial options all negatively impact the effectiveness of the UALD, thereby failing to fully protect employees from unlawful identity-based discrimination. Changes that can and should be made by the state of Utah include internal improvements to the investigation process to increase efficiency and thoroughness, increased training and education for both investigators and mediators, revision of the mediation process to protect the plaintiff's interests and increased remedial options. Through the adoption of these changes, the UALD is better equipped to protect Utah employees as well as support those who experience unlawful discrimination.