

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by Janeen Rosas,
Commissioner, Department of Human
Rights,

Complainant,

**AWARD OF LITIGATION COSTS
AND CIVIL PENALTY**

v.

Distinctive Dental Services, P.A.,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) George A. Beck on September 12-13, 2000 at the McLeod County Sheriff's Office, 810 East 10th Street, Glencoe, Minnesota. The record closed on December 21, 2000 with the filing of post-hearing memoranda. On January 22, 2001, the Administrative Law Judge issued a decision finding that the Respondent had discriminated against the Complainant on the basis of marital status in violation of the Minnesota Human Rights Act. The matter is now before the Administrative Law Judge to determine what, if any, punitive damages, civil penalty and litigation and hearing costs should be awarded. The record closed on March 23, 2001.

Richard L. Varco, Jr., Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota, 55103-2106, appeared on behalf of the Commissioner of the Minnesota Human Rights Department (Complainant). Duane G. Johnson, Attorney at Law, 4318 Xerxes Avenue North, Minneapolis, Minnesota 55412, appeared on behalf of Distinctive Dental Services, P.A. (Respondent).

Based upon all of the files, records, and arguments of counsel and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED as follows:

1. The Respondent shall pay the Commissioner of Human Rights within 30 days of the date of this Order the amount of \$11,738.73 for litigation and hearing costs in this matter.
2. The Respondent shall pay a civil penalty of \$2,000 to the Commissioner of Human Rights for the State's general fund.

Dated this 6th day of April 2001.

GEORGE A. BECK

Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2, this Order is the final decision in this case and, under Minn. Stat. § 363.072, any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

MEMORANDUM

Procedural History

On January 22, 2001, the Administrative Law Judge issued a decision in this matter finding that the Respondent had discriminated against the Complainant on the basis of marital status in violation of the Minnesota Human Rights Act. The ALJ awarded the Complainant \$34,103.04 in compensatory damages and gave the parties 10 days to submit relevant financial data to determine what if any litigation and hearing costs, punitive damages, and civil penalty should be awarded. On March 1, 2001, the ALJ suspended consideration of these issues at the request of the parties to allow the parties time to engage in settlement discussions. On March 21, 2001, counsel for the Department of Human Rights informed the ALJ that the parties were unable to resolve the matter through settlement discussions. Accordingly, the Administrative Law Judge resumed consideration of the remaining issues in this matter.

Litigation and Hearing Costs of the Department of Human Rights

Pursuant to Minn. Stat. § 363.071, subd. 7 (2000), the Administrative Law Judge must order a Respondent who is determined to have engaged in an unfair discriminatory practice to reimburse the Department of Human Rights for all appropriate litigation and hearing costs, unless payment of the costs would impose a financial hardship on the Respondent. This provision defines appropriate costs to include the cost of services rendered by “administrative law judges, court reporters . . . as well as the costs of transcripts and other necessary supplies and materials.” Respondent asserts that it will suffer financial hardship if it is forced to bear the State’s litigation costs in addition to the compensatory damages award and its own cost of defense. Respondent requests that the ALJ decline to award the Department any litigation or hearing costs. In support of its financial hardship claim, Respondent has submitted its tax returns and schedules for the years 1997, 1998 and 1999. After reviewing these documents, the ALJ concludes that Respondent has failed to establish that it will suffer a financial hardship if ordered to pay litigation and hearing costs in this matter.

The Commissioner has submitted affidavits and exhibits in support of the Department’s request for reimbursement of its costs and disbursements in this matter. The Commissioner seeks reimbursement of the litigation and hearing costs either charged or to be charged to the Human Rights Department by the Office of Administrative Hearings. As of the date of this Order, litigation and hearing costs for this matter amount to \$9,603.72. This overall total includes the amount of \$957.66 for transcript preparation costs charged by the court reporter; \$146.46 for Westlaw usage charges; \$4,559.20 for OAH services provided during the period of December 1999 –

December 2000; and \$3,940.40 for OAH services provided since January 1, 2001. The Administrative Law Judge finds the fees and expenses for services associated with the litigation of this matter to be appropriate and reasonable.

In addition, the Complainant seeks reimbursement for the following costs and disbursements: \$2,942.00 for airline tickets for Bryan Correll and Marybeth Correll to attend and testify at the hearing in this matter; \$265.93 for a rental car used by the Corrells "to transport them to and from the September 12-13, 2000 hearing"; \$232.50 for transcription services provided in the deposition of Marybeth Correll; and \$566.00 for transcription services provided in the deposition of Dr. Michael Thoennes.

After reviewing the exhibits submitted by the Commissioner, the Administrative Law Judge finds the cost of the Corrells' airline tickets to be unreasonably high. The ALJ will allow only \$1,200 for the total cost of the airline tickets. On June 6, 2000, the ALJ notified the parties that the hearing in this matter would take place on September 12-14, 2000. The hearing was continued to September at the Department's request, in part to accommodate the needs of Dr. Correll and his wife.^[1] The June 6th notice gave the Department and the Corrells over three months in which to arrange for their flights and secure less costly airplane tickets. The Commissioner has given no reason to justify the unusually high cost of \$1,471 per round trip ticket. The Commissioner's request for reimbursement of \$2,942 in airplane ticket costs is denied. The ALJ instead finds that an award of \$600 per round trip ticket is reasonable and appropriate.

Likewise, reimbursement for the \$263.93 rental car charge is not appropriate. This charge reflects use of a rental car for one week, at a rate of \$39.33 per day. Given that the hearing in this matter took only two days, it is not reasonable for Respondent to pay for the Corrells' use of a car for one week. The ALJ finds that an award of \$136.51, reflecting the cost of renting the car for three days, to be reasonable and appropriate. Finally, the ALJ finds the costs associated with the transcription services provided in the depositions of Marybeth Correll and Dr. Michael Thoennes to be reasonable and appropriate.^[2] Therefore, the Administrative Law Judge concludes that a total award of \$11,738.73 for costs and disbursements in this matter is reasonable and justified under the circumstances of the case. Respondent is ordered to reimburse the Department this amount.

Punitive Damages

Punitive damages are imposed to punish the respondent and to deter him and others from intentional wrongs and deliberate disregard of the rights or safety of others.^[3] The Administrative Law Judge may award punitive damages in an amount not more than \$8,500 to a victim of unfair discriminatory practices^[4]. Punitive damages shall be awarded only upon clear and convincing evidence that the acts show deliberate disregard for the rights or safety of others.^[5] A respondent acts with "deliberate disregard" if he or she had knowledge of facts or intentionally disregarded facts that create a high probability of injury to the rights or safety of others, and

- (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

- (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.^[6]

In addition, any award of punitive damages must be measured by several factors including: “the seriousness of the hazard to the public arising from the defendant’s misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, ... the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons.”^[7]

The Commissioner argues that she has met the standard for an award of punitive damages in this matter. According to the Commissioner, the record contains clear and convincing evidence that the sole reason for Dr. Correll’s termination from DDS was his wife’s employment with a competitor dentist. Not only did Dr. Thoennes specifically list Marybeth Correll’s employment as the reason for Dr. Correll’s discharge in his termination letter, Dr. Thoennes told Dr. Correll that he could retain his job if his wife quit her employment. The Commissioner maintains that Dr. Thoennes’ conduct reflected a deliberate disregard for the rights and safety of others.

The ALJ concludes that the record does not support an award of punitive damages in this matter. Although the evidence demonstrated that Respondent terminated Dr. Correll on the basis of marital status, the record falls short of establishing by clear and convincing evidence a “deliberate disregard” for Dr. Correll’s rights. Instead, the record demonstrated that Dr. Thoennes wrongly thought he was justified in firing an employee whose spouse worked for a competitor. Dentistry is a competitive business, particularly in a small town with a limited patient base. Respondent’s clinic is located in a small town and Dr. Neff, the dentist who hired Dr. Correll’s wife, is the only other dentist practicing in that location. Dr. Thoennes was concerned that Dr. Correll’s wife could divulge competitive information to Dr. Neff and harm his business. Although Dr. Thoennes’ motivation does not alter the conclusion that Respondent discriminated against Dr. Correll on the basis of marital status, it does bear on the issue of punitive damages and militates against a finding of “deliberate disregard” on the part of Respondent.

Moreover, the factors listed in Minn. Stat. § 549.20, subd. 3, weigh against a award of punitive damages. For example, there was little, if any, hazard to the public arising from Respondent’s misconduct, Respondent did not profit from its misconduct, the misconduct involved a single act and not a pattern of behavior lasting for any significant duration, and Respondent has already been assessed compensatory damages and a civil penalty as a result of the misconduct. Based on all these factors, the ALJ concludes that the record does not contain clear and convincing evidence that Respondent acted with deliberate disregard for Dr. Correll’s rights. An award of punitive damages is not warranted in this matter.

Civil Penalty

Minn. Stat. § 363.071, subd. 2 (2000) provides in part that:

The administrative law judge shall order any respondent found to be in violation of any provision of 363.03 to pay a civil penalty to the state. This penalty is in addition to compensatory and punitive damages to be paid to an aggrieved party. The administrative law judge shall determine the amount of the civil penalty to be paid taking into account the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent. Any penalties imposed under this provision shall be paid to the general fund of the state.

Respondent discriminated against Dr. Correll on the basis of marital status in violation of Minn. Stat. § 363.03, subd. 1(2)(b). The violation at issue was serious and intentional. Although there was little, if any, public harm, the record demonstrated that Respondent terminated Dr. Correll based solely on his wife's employment with a competitor dentist. After considering Respondent's financial resources, the ALJ orders Respondent to pay a civil penalty to the Commissioner of Human Rights in the amount of \$2,000.

G.A.B.

^[1] June 1, 2000 letter from Varco to ALJ Beck.

^[2] See, *Green-Glo Turf Farms, Inc., v. State*, 347 N.W.2d 491, 495 (Minn. 1984); *Romain v. Pebble Creek Partners*, 310 N.W.2d 118, 123-24 (Minn. 1981) (allowing costs of depositions as disbursements).

^[3] *Rosenbloom v. Flygare*, 501 N.W.2d 597, 602 (Minn. 1993).

^[4] Minn. Stat. § 363.071, subd. 2 (2000).

^[5] Minn. Stat. § 549.20, subd. 1(a) (2000).

^[6] Minn. Stat. § 549.20, subd. 1(b) (2000).

^[7] Minn. Stat. § 549.20, subd. 3 (2000).