

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

Karen A. Vovk,

Complainant,

V.
FEES

AWARD OF ATTORNEY'S

Tom Thumb Food Markets, Inc.,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson commencing on October 22, 1990. James G. Ryan, Attorney at Law, Mavity & Ryan, 426 Parkdale Plaza, 2660 South Highway 100, Minneapolis, Minnesota 55416, appeared on behalf of the Complainant, Karen A. Vovk. George L. May, Attorney at Law, Hertogs, Fluegel, Sieben, Polk, Jones & LaVerdiere, 999 Westview Drive, Hastings, Minnesota 55033, appeared on behalf of the Respondent, Tom Thumb Food Markets, Inc. On August 23, 1991, a Decision was issued in the case which found that the Respondent had discriminated against the Complainant in her employment, and damages were awarded. As part of the Order, reasonable attorney's fees were awarded. Because that issue was not addressed in the post-hearing briefs, counsel for the Complainant was permitted a period of time to submit documentation and argument concerning his fees in this matter, and counsel for the Respondent was given an opportunity to respond to the Complainant's request. The final submission was received from the Respondent on October 4, 1991.

STATEMENT OF ISSUES

The following issues are presented in this case:

- (1) Whether the attorney's fees submitted on behalf of the Complainant are reasonable.
- (2) Whether it is appropriate to include in an award of attorney's fees time expended and billed for work performed by a legal assistant.
- (3) Whether the contingent fee agreement entered into by the Complainant and her attorney should limit the award of

attorney's fees in this matter.

- (4) Whether the costs submitted on behalf of the Complainant are reasonable and properly taxable to the Respondent.

Based upon all the records, files and arguments of counsel, the Administrative Law Judge makes the following:

FINDINGS_QF FACT

1. The Complainant filed a charge of discrimination with the Minnesota Department of Human Rights on or about March 23, 1989. The Complainant requested that the case be referred to the Office of Administrative Hearings for hearing after the matter had been pending for 180 days without disposition. See Findings of Fact paragraphs 77-78, contained in Findings of Fact.-Conclusions and Order, OAH Docket No. 11-1700-4595-2 (Aug. 23, 1991).

2. The hearing of this matter occurred over the course of seven full days. Eleven witnesses testified at the hearing, the deposition of a twelfth witness was received in evidence, and 39 exhibits were received in evidence on behalf of the Complainant.

3. Prior to the hearing, numerous prehearing conferences were held, both in person and via telephone conference call. The Complainant brought three successful motions to compel discovery. The Administrative Law Judge issued five written Prehearing Orders and one oral Order. These Prehearing Orders dealt with various issues raised by the parties, including discovery and scheduling matters and disputes regarding the issuance of subpoenas.

4. The Complainant was represented by James G. Ryan. Mr. Ryan was admitted to practice in 1978 and supplemented his income while in a Ph.D. program from 1979 to 1984 by doing research and writing for law firms. He has engaged in the full-time practice of law from May 1984 to the present, with a significant concentration in equal employment opportunity matters.

5. Mr. Ryan was retained by the Complainant, Karen A. Vovk, on June 5, 1989, on a contingent fee basis. The Complainant had already filed her charge of discrimination with the Department of Human Rights prior to retaining Mr. Ryan. Pursuant to a written agreement between the Complainant and Mr. Ryan, the Complainant agreed to pay attorney's fees in the amount of 33.33% of her recovery in this matter, less any attorney's fees awarded by a Court or Administrative Law Judge.

6. Mr. Ryan was assisted by a legal assistant in his office with respect to this matter. The legal assistant, Kristiana S. Mortensen, was employed as a legal assistant for Mr. Ryan's law firm for three years and, as of December 1990, had had seven total years of experience working as a legal secretary and legal assistant.

7. A memorandum of law and supporting affidavits were submitted by the Complainant in support of her request for attorney's fees. The affidavits were executed by James G. Ryan, Kristiana S. Mortensen, and two attorneys specializing in employment law, Douglas A. Hedin and David A. Singer.

8. The Complainant seeks attorney's fees for the time spent by Mr. Ryan at the rate of \$125.00 per hour for work performed prior to January 1, 1991, and \$145.00 per hour for work performed after that date. These rates

correspond to those customarily billed by the law firm of Mavity & Ryan to its clients for work performed by Mr. Ryan during the time periods in question.

9. Mr. Ryan expended 298.6 hours of work on this matter when the \$125.00/hour billing rate was in effect and 147.5 hours when the \$145.00/hour rate was in effect (including time spent in drafting the fee petition). The total amount sought by the Complainant for the services of James G. Ryan thus is \$58,712.50.

10. The Complainant seeks to include in the attorney's fees award the time spent by Kristiana Mortensen on this matter, calculated at the rate of \$45.00 per hour. This rate corresponds to the rate customarily billed by the law firm of Mavity & Ryan to its clients for work performed by Ms. Mortensen during the time period in question.

11. Ms. Mortensen expended 139.2 hours of work on this matter. The total amount sought by the Complainant for the services of Kristiana Mortensen thus is \$6,264.00.

12. Costs and disbursements totalling \$3,481.50 are also sought by the Complainant. This amount includes charges for the following items:

- (1) Messenger services
- (2) Photocopy services
- (3) Deposition costs
- (4) Photo development
- (5) Witness and mileage fees
- (6) Service fees
- (7) Exhibit preparation expenses
- (8) Rental of dictaphone transcriber to transcribe hearing tapes
- (9) Copies of hearing tapes

13. The Complainant does not seek attorney's fees for ail of Mr. Ryan's time calculated at his current rate of \$145.00 per hour, nor does she seek any enhancement of the "lodestar" figure.

14. The Respondent was represented by James Hamilton, Attorney at Law, Hertogs, Fluegel, Sieben, Polk, Jones and LaVerdiere, until just prior to the commencement of the hearing in this matter, at which time Mr. Hamilton left his employment with the law firm and George L. May (also of the Hertogs firm) replaced Mr. Hamilton as counsel for the Respondent. Mr. May was admitted to practice in 1970 and has been certified as a civil trial specialist by the Minnesota State Bar Association. age Affidavit of James G. Ryan, Exhibit F.

15. In her Findings of Fact, Conclusions and Order dated August 23, 1991, the Administrative Law Judge concluded that the Complainant was entitled to damages for mental anguish and suffering in the amount of \$10,000.00, punitive damages in the amount of \$6,000.00, compensatory damages equal to two times lost wages in the total amount of \$72,318.00, and prejudgment interest

on lost wages of \$36,158.59 from June 3, 1988. The Judge also ordered the Respondent to cease and desist from the discriminatory practices set forth in the decision, required that all persons employed by the Respondent in a management or supervisory capacity receive appropriate training with respect to sexual harassment and employment discrimination based on sex, and ordered the Respondent to pay a civil penalty of \$15,000.00 to the General Fund of the

State of Minnesota. The Order issued by the Judge also indicated that reasonable attorney's fees and costs would be awarded.

16. In the letter it submitted in response to the Complainant's fee petition, the Respondent urges that the award of fees in this matter should be limited to \$28,244.39 (33.3% of the total sum awarded to the Complainant of approximately \$94,818.00), in accordance with the contingent fee arrangement between the Complainant and her attorney, and that the attorney's fees should be satisfied from the amount already awarded to the Complainant in this case. The Respondent did not challenge the hourly rates relied upon by the Complainant in her petition and stated that it was not in a position to "question the details or the intricacies of [the] fee petition. "

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. Minn. Stat. 363.071, subd. 2 (1990), provides that "the administrative law judge may . . . order the respondent to pay an aggrieved party who has suffered discrimination . . . reasonable attorney's fees

2. Although Minn. Stat. 363.071, subd. 2 (1990), does not expressly authorize an award of costs to the Complainant in this proceeding, the Minnesota Human Rights Act does provide for an award of costs to the prevailing party in a District Court action (see Minn. Stat. 363.14, subd. 3 (1990)), and it is appropriate to allow an award of costs in this proceeding. See, e.g., Findings of Fact, Conclusions of Law and Order in *Maeser v. North Star Dodge-Center, Inc.*, 52-1700-2928-2 (Dec. 18, 1989), aff'd-in-unpub. decisions No. CO-90-131 (Minn. App. 1990) (see July 6, 1990, Fin. & Comm.); Award of Attorney Fees in *Berg v. Isle* and *Pulling v. Ilse* HR-86-023-PE, 4-1700-565-2 (Oct. 20, 1986).

3. The amount of attorney's fees provided under a contingent fee arrangement does not impose a limit on the fees that are recoverable under the Minnesota Human Rights Act. Accord (under 42 U.S.C. 1988) *Blanchard v. Bergeron*, 489 U.S. 87, 95-96 (1989).

4. Under the Minnesota Human Rights Act, the attorney's fees awarded need not be proportionate to the amount of damages actually recovered by the complainant. Accord (under 42 U.S.C. 1988 and Title II of the Civil Rights Act of 1964) *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) *Newman v. Piggie Part Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

5. The time spent by an attorney in preparing an attorney's fee petition is normally recoverable as part of the attorney's fee award. Accord (under Title VII of the Civil Rights Act of 1964, as amended) *Colter v. Tennessee*, 805 F.2d 146 (6th Cir. 1986), cert. denied 482 U.S. 914 (1987); *Johnson v. University College* 706 F.2d 1205 (11th Cir. 1983), cert. denied, 464 U.S. 994 (1983).

6. It is appropriate to include in an award of attorney's fees reasonable fees for the work of a legal assistant, provided that the work performed by the legal assistant is work traditionally done by an attorney, is not duplicative, and is not clerical in nature. Accord (under 42 U.S.C. 1988 and Title VII of the Civil Rights Act of 1964) Missouri v. Jenkins,

491 U.S. 274, 288 (1989) Hawkins v. Anheuser-Busch Inc. 697 F.2d 810, 817 (8th Cir. 1983).

7. It is appropriate in this case to award attorney's fees based upon 446.1 hours of attorney time, and to calculate the fees for Mr. Ryan's time based upon an hourly rate of \$125.00 for work performed prior to January 1, 1991, and \$145.00 for work performed after January 1, 1991. These rates are reasonable given the background, experience and performance of Mr. Ryan in this matter, the customary billing practices of Mavity & Ryan, and rates charged by other attorneys practicing in this field.

8. It is appropriate in this case to include in the attorney's fee award 134.2 hours in time spent by the legal assistant for the Complainant's attorney, and to calculate the fees for the legal assistant's time based upon an hourly rate of \$45.00. Such a rate is reasonable given the background and experience of Ms. Mortensen and the billing practices of Mavity & Ryan. The hours requested by the Complainant for legal assistant time of 139.2 have been reduced by five hours to reflect time spent by the legal assistant on work of a clerical nature.

9. The Complainant thus is entitled to attorney's fees in the total amount of \$64,751.50 (\$58,712.50 for Mr. Ryan's time and \$6,039.00 for Ms. Mortensen's time). This amount reflects a reasonable number of hours of attorney and legal assistant time billed at a reasonable rate to represent the Complainant in this matter.

10. It is appropriate to reimburse the Complainant for costs and disbursements incurred in this proceeding, in the total amount of \$3,481.50. These charges are reasonable and are properly taxable to the Respondent.

11. These Conclusions are made for the reasons set forth in the attached Memorandum which is incorporated in and made a part of these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that the Respondent shall pay jointly to Karen A. Vovk and James G. Ryan the amount of \$64,751.50 for attorney's fees and the amount of \$3,481.50 for costs in this matter.

Dated this 4th day of November, 1991.

BARBARA L. NEILSON
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

Costs

As mentioned in the Conclusions of Law above, there is no express authorization contained in the Human Rights Act for an award of costs in an administrative proceeding. The statute does authorize such an award to prevailing parties in District Courts. Several administrative decisions have concluded that such an award is appropriate in instances in which the complainant is represented by a private attorney, in light of the similarities between the administrative and judicial processes in human rights cases. see Findings of Fact._ Conclusions of Law and Order in Maeser v. North Star Dodge Center Inc., 52-1700-2928-2 (Dec. 18, 1989) at 8; Award of Attorneys Fees in Berg v. Ilse and Pulling y. Ilse HR-86-023-PE, 4-1700-565-2 (Oct. 20, 1986) at 3-4.

The Complainant should not be penalized for requesting an administrative hearing rather than bringing suit in District Court. The nature of the action in district court is identical to the proceeding before an Administrative Law Judge, and the Legislature must have intended that the same types of awards could be made in both. Accordingly, the Judge has concluded that it is appropriate to allow an award of costs and disbursements in this proceeding. The Respondent has not raised any challenge to the particular costs and disbursements sought by the Complainant, and they appear to be reasonable and justified under the circumstances of this case.

Attorney's Fees

The Minnesota Human Rights Act permits the Administrative Law Judge to require the respondent to reimburse a charging party who prevails at the hearing for "reasonable attorney's fees." Minn. Stat. 363.071, subd. 1a (1990). The Minnesota courts have generally followed case law developed under Title VII of the Civil Rights Act of 1964, as amended, in interpreting the attorney's fee provisions of the Minnesota Human Rights Act. For example, the Minnesota Supreme Court noted in Anderson v. Hunter, -Keith, Marshall & Co.,, 417 N.W.2d 619, 628 (Minn. 1988):

Because Minn. Stat. 363.14, subd. 3 (1986), allowing a successful plaintiff in a discrimination case such as this to recover attorney fees is "virtually identical" to similar provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(b), in reviewing attorney fees awards, we have followed federal law. See, e.g., Sigurdson, y. Isanti County, 386 N.W.2d 715, 722 (Minn. 1986).

The Court went on to point out that Hensley v. Eckerhart, 461 U.S. 424 (1983), is "[t]he seminal case addressing the analysis to be employed in awarding attorney fees under federal statutes." Anderaon, 417 N.W.2d at 628. It thus is appropriate to look to Hensley and other federal case law as guidance when assessing the proper amount of a fee award under the Human Rights Act.

The Hensley decision requires, as a first step, that a "lodestar" figure be calculated by multiplying the hours reasonably expended in the matter by

the reasonable hourly rate. The Supreme Court in Hensley and later decisions has approved consideration of a twelve-factor checklist in arriving at a reasonable and proper award of attorney's fees. See e.g. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air 438 U.S. 711, 714-17 (1978); Blum v. Stenson 465 U. S 886, 897 (1984) Hensley 461 U. S at 434. These factors are as follows:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill requisite to perform the legal services properly;
- (4) the preclusion of other employment by the attorney due to the acceptance of the case;
- (5) the customary fee;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) the amount involved and the results obtained;
- (9) the experience, reputation, and ability of the attorneys;
- (10) the "undesirability" of the case;
- (11) the nature and length of the professional relationship with the client; and
- (12) awards in similar cases.

The leading case discussing these factors is Johnson v., Georgia Highway Express Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). Accord City of Minnetonka v. Carlson 298 N.W.2d 763, 766-67 & n. 4 (Minn. 1980) (decided prior to Hensley; sets forth nine factors corresponding in large part to those discussed in Johnson). Although, in the past, courts calculated a lodestar figure and then considered these factors to adjust the figure so that it would be reasonable under the circumstances, "[r]ecent Supreme Court pronouncements on the subject . . . caution courts to take many of these factors into consideration when establishing the lodestar figure itself, and to award enhancements or reductions to the lodestar in only the exceptional case." 3 A. Larson & L. Larson, Employment Discrimination 58.20 at 11-106.47 (Matthew Bender 1990). Each of these factors thus will be considered in arriving at a reasonable award of attorney's fees in the case at bar.

Prior to applying these factors in this case, it is necessary to address the Respondent's argument that any fees awarded in this case should be limited in accordance with the contingent fee agreement entered into by the Complainant and her counsel. The Respondent contends that fees in this matter should not exceed the amount of \$28,244.39 (33.3% of the approximately \$94,818.00 in damages awarded to the Complainant pursuant to the August 23, 1991, Order) and that the fees should be satisfied from the amount already

awarded to the Complainant in this case. The Respondent urges that the "unique nature of this action . . . should preclude Mr. Ryan from recovering more than he contracted for with Ms. Vovk." It argues that Mr. Ryan took the risk when accepting the Complainant's case of pursuing a claim for which there was no established precedent, that Tom Thumb's defense was not "overly vigorous" but merely reflected its view that it faced no liability under the Act, and that the case law does not require the Judge to "automatically override a bargained-for fee arrangement." Letter responding to Complainant's Petition for Attorney's Fees dated October 2, 1991 .

It is clear under *Blanchard v. Bergeron*, 489 U.S. 87 (1989), that "a contingent-fee contract does not impose an automatic ceiling on an award of

attorney's fees" that may be recovered under 42 U.S.C. 1988. The Court in Blanchard reasoned as follows:

As we understand 1988's provision for allowing a "reasonable attorney's fee," it contemplates reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less. Should a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount. The defendant is not, however, required to pay the amount called

for in a contingent-fee contract if it is more than a reasonable fee calculated in the usual way. It is true that the purpose of 1988 was to make sure that competent counsel was available to civil rights plaintiffs, and it is of course arguable that if a plaintiff is able to secure an attorney on the basis of a contingent or other fee agreement, the purpose of the statute is served if the plaintiff is bound by his contract. On that basis, however, the plaintiff should recover nothing from the defendant, which would be plainly contrary to the statute. And Congress implemented its purpose by broadly requiring all defendants to pay a reasonable fee to all prevailing plaintiffs, if ordered to do so by the court. Thus it is that a plaintiff's recovery will not be reduced by what he must pay his counsel [W]e have said repeatedly that "[t]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. . . . The courts may then adjust this lodestar calculation by other factors. We have never suggested that a different approach is to be followed in cases where the prevailing party and his (or her) attorney have executed a contingent-fee agreement.

Id. at 93-94.

By analogy, the same analysis should apply to the award of attorney's fees under the Minnesota Human Rights Act. Like 42 U.S.C. 1988, the Minnesota Human Rights Act gives the Judge the discretion to award a "reasonable attorney's fee." The August 23, 1991, Order entered in this case

reflects the Judge's determination that reasonable attorney's fees and costs would be awarded in addition to the other amounts assessed. Although the Respondent correctly points out that the Judge is not required to automatically override a contingent fee agreement, the Blanchard case does indicate that the Judge should proceed to consider the relevant factors in order to assess whether the contingent fee amount would, in fact, be a "reasonable" fee under the facts and circumstances of this case. See also Maeser v. North Star Dodge Center Inc, No. 52-1700-2928-2 (Dec. 18, 1989)

, attorney's fee Award aff'd in unpub. decision, No. CO-90-131 (Minn. App. 1990)(after considering the twelve Johnson factors, Administrative Law Judge Frankman awarded attorney's fees in an amount that nearly equaled the total damages awarded to Ms. Maeser, despite the existence of a contingent fee arrangement).

1. Time and Labor Required

Mr. Ryan's affidavit reflects the great deal of time and energy that was

necessary to bring the case to a successful conclusion. This case was

vigorously defended at every stage of the proceedings. The necessity for the issuance of subpoenas for certain witnesses and documents was disputed, and required written and/or oral argument prior to resolution. Discovery was protracted, and three successful motions to compel were filed by the Complainant and one by the Respondent. The Complainant found several relevant documents during the course of a post-hearing examination of the documents underlying one of the Respondent's hearing exhibits. It was necessary to spend time researching and writing the post-hearing brief and proposed findings and conclusions, a task that was made more difficult by the absence of a formal transcript of the tape-recorded, seven-day hearing.

The Judge has carefully examined the detailed time records submitted by Mr. Ryan and Ms. Mortensen. Based upon Mr. Ryan's time records, it appears that Mr. Ryan spent roughly 182.7 hours conducting research and drafting pleadings; 65.8 hours preparing for the hearing; 52.1 hours attending the hearing; 42.1 hours in connection with discovery in the case; 32.1 hours corresponding or talking with the Complainant (including preparation for such discussions); 26.4 hours preparing for and attending depositions; 14.2 hours preparing the fee petition and reviewing the affidavit prepared by Ms. Mortenson; 12.1 hours discussing the case with potential hearing witnesses; 11.6 hours preparing for and participating in conferences with the Administrative Law Judge; 5.1 hours contacting the Department of Human Rights regarding obtaining the Complainant's file; and 1.9 hours corresponding or talking with opposing counsel. Mr. Ryan expended a total of 446.1 hours.

Ms. Mortensen's time records reveal that she spent a total of 139.2 hours assisting Mr. Ryan. It is difficult to isolate or even roughly approximate the amount of time she spent on various tasks because the time records frequently identify only the total time spent on several different tasks during a particular day. Ms. Mortensen's work included interviewing potential hearing witnesses; drafting discovery requests and responses and reviewing the Respondent's responses to discovery requests; drafting letters and pleadings; consulting and meeting with personnel from the Department of Human Rights and the Department of Jobs and Training in an attempt to obtain copies of materials relating to the Complainant; reviewing depositions; inspecting various Tom Thumb stores; compiling a photographic exhibit with respect to the store survey; assisting in interviewing the Complainant and preparing for that interview; conferring with Mr. Ryan regarding the case; and inputting information into the database.

As set forth in the above Conclusions of Law, it is proper to follow the guidance of cases decided under Title VII of the Civil Rights Act of 1964 and include as part of an attorney's fee award reimbursement for reasonable legal assistant fees, provided that the work performed by the legal assistant is work traditionally done by an attorney, is not duplicative, and is not clerical in nature. See, e.g., *Missouri v. Jenkins*, 491 U.S. 274, 288 (1989); *Hawkins v. Anheuser-Busch Inc.*, 697 F.2d 810, 817 (8th Cir. 1983). Mr. Ryan was the only attorney working on the case, and it appears that Ms. Mortensen's assistance in conducting investigative work and drafting discovery, pleadings, and letters enabled him to minimize the time that he would otherwise have spent on various aspects of the case. It is appropriate, however, to delete from Ms. Mortensen's total hours the five hours expended by Ms. Mortensen in inputting notes into the database because that work apparently is clerical in nature.

Mr. Ryan's expertise in human rights matters obviously served him well, and the Judge has not noted any excess hours expended for the work performed in this matter, or any time spent on duplicative or unnecessary tasks. It appears that Mr. Ryan made efficient and productive use of his time in this case. Although a portion of the time spent by Mr. Ryan and Ms. Mortensen involved preparation of a "store survey" exhibit that ultimately was not admitted into evidence at the hearing, the work was performed in good faith on a matter that was related to the issues on which the Complainant prevailed, and the relevancy of the resulting exhibit presented a close question for the Court's consideration at the hearing. Significantly, the Respondent has not argued that the time spent on the store survey was unreasonable or should be deducted, nor has the Respondent raised any question regarding the reasonableness of the total time expended on behalf of the Complainant.

2. Novelty and Difficulty of the Questions

This case presented, to the Judge's knowledge, a novel issue concerning the responsibility of an employer to remedy harassment of a supervisor by her subordinate. Although the issues presented in the case were straightforward and the outcome hinged on the credibility of those testifying at the hearing, the facts in support of the Complainant's case were made more difficult to marshal by virtue of the existence of the supervisor/subordinate relationship. The Complainant's case was also complicated by the need to refute numerous alleged legitimate, nondiscriminatory reasons urged by the Respondent for her separation from the company.

3. Requisite Skill

Adequate representation of the Complainant in a case arising under the Human Rights Act requires litigation skills as well as familiarity with a large body of state and federal rules, guidelines, statutes and case law. Mr. Ryan was a persuasive advocate for the Complainant, and was well-prepared and well-organized in presenting his case. His briefs were well-researched, and the proposed findings and conclusions submitted by him were detailed, accurate, and obviously prepared with great care. He thus possessed and displayed the skills requisite to perform the legal service properly.

4. Preclusion of Other Employment due to Acceptance of the Case

There is no evidence that Mr. Ryan was precluded from taking on any

particular matter by virtue of his representation of the Complainant in this matter. This factor thus is not relevant in the determination of the fee award.

5. Customary Fee

The affidavits submitted by Mssrs. Ryan, Singer and Hedin establish that the \$125.00 and \$145.00 hourly rates sought by in the fee petition are those customarily charged by Mavity & Ryan to its clients during the particular time periods in question and are consistent with (or perhaps less than) the rates charged by reasonably comparable Twin Cities attorneys practicing in the human rights area. Mr. Singer, who devotes a majority of his practice to the representation of plaintiffs in employment discrimination and discharge matters, indicates in his affidavit that the rates sought by Mr. Ryan "are consistent with and entirely within the range of the hourly rates charged by

practitioners within the community, including myself, for persons with the background, experience and credentials of Mr. Ryan." Singer Affidavit, I IV.

Mr. Hedin, who has engaged in full-time private practice longer than Mr. Ryan but did not begin to specialize in employment law until late 1984, indicates in his affidavit that the rates sought by Mr. Ryan are "less than my own hourly rates have been since 1987 and [are] certainly consistent with, if not substantially less than those charged by other attorneys who specialize in plaintiff's employment law." Hedin Affidavit, I IV.

The Respondent has not questioned the reasonableness of the rates sought by the Complainant. Although several courts have calculated fee awards based upon application of the current hourly rate to all hours worked (regardless of the rate in effect at the time the hours were worked) and the Complainant arguably would be entitled to seek reimbursement at the rate of \$145.00 per hour for all of the time expended in connection with the case, the Complainant is seeking compensation only at his regular hourly rate at the time the hours were worked. This further evidences the reasonableness of the Complainant's requested rate. The Administrative Law Judge is persuaded that the rates sought are reasonable and consistent with those charged in the community by attorneys of reasonably comparable skill and experience.

The \$45.00 hourly rate sought for work performed by Ms. Mortensen is also found to be reasonable. The Complainant demonstrated that this rate corresponded to the fee customarily charged by Mavity & Ryan for Ms. Mortensen's work. In the Maeser decision, Judge Frankman took "Judicial notice of the custom in this area to bill distinctly for paralegal . . . time at the \$40-\$45 rate" Id. at 10.

6. Fixed or Contingent, Fee

Mr. Ryan agreed to take the Complainant's case on a 1/3 contingent fee basis. The retainer agreement specifically contemplated that an award of attorney's fees would be sought by the law firm, and provided that the Complainant would pay the firm a sum equal to 1/3 of her recovery, "less any attorney's fees awarded [the firm] by the court or an administrative law judge" Ryan Affidavit, Ex. B.

7. Time Limitations Imposed by the Client Or the Circumstances

This case proceeded to hearing in an expeditious fashion and may have required some rescheduling and delay with respect to other matters handled by the Complainant's counsel. However, the Complainant resisted an initial continuance requested by the Respondent, the hearing dates were selected in an

effort to accommodate the schedules of both counsel, and the Complainant has not provided any specific evidence that the hearing and briefing schedules in this case interfered with other matters. Accordingly, this factor is not relevant in this case.

8. Amount-Involved and Results Obtained

Counsel for the Complainant obtained an excellent result for his client and current and future Tom Thumb employees. The Complainant prevailed on all three of her claims (sexual harassment, disparate treatment, and retaliation). The Respondent was ordered to cease and desist from its discriminatory practices and provide appropriate training to management and supervisory personnel with respect to sexual harassment and employment

discrimination based on sex, the Complainant's back pay was doubled to a total amount of \$72,318.00, and the Complainant was also awarded \$10,000.00 in damages for mental anguish and suffering and \$6,000.00 in punitive damages. As mentioned above, the initial evaluation of the prospect of recovery as well as the proof of the Complainant's case were undoubtedly made more difficult because of the supervisory/subordinate relationship between the Complainant and the employee accused of harassment.

9. Experience, Reputation and Ability of Attorneys

This factor has been discussed above in the discussion of the time and labor required, the requisite skill of counsel, and the amount involved and the results obtained.

10. Undesirability of the Case

Apart from the risk inherent in taking a case involving the novel question of the company's obligation to remedy harassment of a supervisor by a subordinate, this factor is not relevant.

11. Nature and Length of the Professional Relationship with the Client

The Complainant retained Mavity & Ryan for the first time with respect to the case at bar. This factor thus is not relevant.

12. Awards in Similar-Cases

In the Maeser case, Judge Frankman awarded fees to the prevailing attorneys in a sexual harassment case in the total amount of \$45,190.50, calculated at the rate of \$100.00 per hour for two attorneys and \$40.00 to \$45.00 per hour for law clerks. Total damages awarded to the Complainant in the Maeser case were approximately \$67,000.00 (plus prejudgment interest). The attorneys involved had requested reimbursement at the \$100.00 rate.

Mr. Hedin was awarded attorney's fees based upon a rate of \$125.00 per hour in two cases decided four years ago, and \$150.00 per hour by the Minnesota Court of Appeals in a case decided in 1990. Hedin Affidavit, If II and IV.

As discussed above, it has been determined that the time and labor required in this matter were extensive, the hours expended by Mr. Ryan and Ms. Mortensen were reasonable (with the exception of five hours of Ms. Mortensen's time), and the hourly rates sought are those customarily charged by Mr. Ryan's firm and are reasonable and consistent with those charged and awarded for similar services by reasonably comparable attorneys in the community. Mr. Ryan is experienced in human rights matters and displayed great skill and ability in prosecuting a case which presented a novel issue and numerous alleged legitimate reasons for the Complainant's separation from employment to

a highly successful conclusion. The Respondent did not submit any evidence challenging the accuracy or reasonableness of the hours charged or the facts asserted in the affidavits supplied by the Complainant. Because, based upon a consideration of all the factors set forth above, the amount of \$64,751.50 constitutes a reasonable attorney's fee in this matter, it would not be proper to limit the award to the amount of the contingent fee agreement.

B.L.N.