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

State of Minnesota, by Irene
Gomez-Bethke, Commissioner
Department of Human Rights,

Complainant,

ORDER DISMISSING
COMPLAINT AND DENYING

V.
MOTION

FOR ATTORNEY'S

FEES
Northwest Airlines, Inc.,

Respondent

The above-entitled matter is before the undersigned Administrative Law Judge pursuant to a Complaint dated May 18, 1983, as amended, and a Notice and Order for Hearing filed with the Office of Administrative Hearings on May 24, 1983, Subsequent to the commencement of this action, Robert L. Hobbins of Dorsey & Whitney, Attorneys at Law, 2200 First Bank Place East, Minneapolis, Minnesota 55402, counsel for the above-named Respondent, filed a Motion to Stay this proceeding pending a determination by the United States District Court for the District of Minnesota as to the Complainant's jurisdiction over the Respondent in those matters specified in the Complainant's Complaint.

On April 1, 1984, the Judge of the United States District Court found that

514 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1305 and the Federal Aviation Act, 49 U.S.C. 1301-1552 preempt the application of the Minnesota Human Rights Act, Minn. Stat. sec. 363.01, et seq., insofar as the former would require the Respondent to alter its employee benefit plan to permit employees who are seeking treatment for alcoholism or other chemical dependency to utilize sick leave or vacation benefits or take a medical leave of absence, and insofar as the latter would require the Respondent to permit pilots holding special issuance medical certificates -- which require monitoring as a condition of their validity -- to return to airline flying duty as pilots.

on June 21, 1984, the Administrative Law Judge wrote to Elizabeth V. Cutter, Special Assistant Attorney General, 515 Transportation Building, John Ireland Boulevard, St. Paul, Minnesota 55155, requesting her comments on the dismissal of this matter in view of the decision of the United States District Court. No objections to disnissal were raised by the Complainant, but counsel

for the Respondent indicated that he might file a motion for attorney's fees prior to dismissal. No such Motion was filed. Consequently, on August 24, 1984, the Administrative Law Judge wrote to counsel for both parties noting that if no motions for attorney's fees or objections to dismissal were filed by September 14, 1984, that this matter would be dismissed.

On Friday, September 14, 1984, the Respondent served a motion for attorney's fees on the Complainant. The motion was filed with the Office of Administrative Hearings on Monday, September 17, 1984. on receipt of that motion the parties were notified that no oral arguments would be heard and that the Complainant should file its objections and arguments, if any, in written form. On October 2, 1984, the Complainant filed those documents.

Now, therefore, based on all the files and records and proceedings herein,

IT IS HEREBY ORDERED:

1. That since the Complainant has no jurisdiction over the Respondent under the Minnesota Human Rights Act as to those matters charged in its Complaint, the Complainant's Complaint is dismissed with prejudice.

2. The the Administrative Law Judge has no authority to award Respondent its attorney's fees in this matter and its request for attorney's fees is, therefore, denied.

Dated this 4tn day of October, 1984.

JON L. LUNDE
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, the Commissioner of die Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. S 14.63 through 14.69.

Reported: None.

MEMORANDUM

In this case the Respondent has requested attorney's fees in excess of \$60,000 which it incurred in bringing a declaratory judgment action in the Federal District Court for the District of Minnesota. As a general rule, in the absence of a specific statutory authorization or contractual provision, attorney's fees are not recoverable in a civil action. *Dworsky v. Vermes Credit Jewelry, Inc.*, 244 Minn. 62, 69 N.W.2d 118, 124 (1955); *Grodzicki v. Quast*, 276 Minn. 34, 149 N.W.2d 8, 12 (1967). This so-called "American rule" is also applied in administrative proceedings. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *Dail v. South Dakota Real Estate Com'n.*, 257 N.W.2d 709 (S.D. 1977); 73A C.J.S., *Public Administrative Bodies and Procedure* 165. A similar rule applies to the taxation of costs and attorney's fees against a state or its agencies. The usual rule is that in the absence of an express statutory authorization costs may not be awarded against the state or its agencies. See, e.g., *Dept. of Economic Security v. Minnesota Drug Products, Inc.*, 258 Minn. 133, 104 N.W.2d 640, 645 (1960); 81A C.J.S., *States* 328.

The right to costs and attorney fees, where it exists, depends upon the statutes in force at termination of the proceeding. *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274 (Iowa, 1982). Consequently the Respondent's right to attorney's fees will depend upon the statutes in effect at this time.

Prior to the 1984 legislative session, administrative law judges did not have specific statutory authority to award attorney's fees in contested case proceedings commenced by the Department of Human Rights. That was changed by the Minnesota Act of 1984, c.567 (the Act). Section 5 of the Act, amending Minnesota Stat. sec. 363.071, subd. 2 effective August 1, 1984, to authorize the payment of attorney's fees. As amended, the statute provides, in part, as follows:

. . . In all cases, the hearing examiner may also order the respondent to pay an aggrieved party, who has suffered discrimination, damages for mental anguish or suffering and reasonable attorney's fees

Section 4 of the Act also amended sec. 363.071 adding a new subdivision 1a, authorizing the award of attorney's fees to charging parties who prevail in contested case hearings when the charging party obtains a private attorney to represent him. However, this provision applies only to causes of action arising after August 1, 1984 and is inapplicable here.

Prior to 1984, attorney's fees were specifically allowable only under

Minn. Stat. sec. 363.14, subd. 3, which authorized the district court, in its discretion, to allow attorney's fees to a 'prevailing party'.

In support of its request for attorney's fees the Respondent argues, among other things, that its attorney's fees in the declaratory judgment action brought in Federal Court may be taxed as a cost against the State under Minn. Stat. 363.14, subd. 3. That argument is not persuasive. The statute applies only to District Courts and does not apply to contested case proceedings brought before the office of Administrative Hearings. An administrative agency is not a court for purposes of the statute.

Moreover, 363.14, subd. 3 should not be construed to authorize the awarding of attorney's fees in the administrative proceedings in the absence of an express statutory authorization. Allowing attorney's fees in District Court proceedings but not allowing them in contested case proceedings does not lead to an absurd result and does not suggest that attorney's fees are allowable in the latter because they are allowable in the former. Actions in District Court are substantially different from contested case proceedings. District court actions, unlike those before the Office of Administrative Hearings, are brought without a determination of probable cause, after a charge has been dismissed as frivolous, after a finding of no probable cause has been made, or when an old charge is dismissed by the Department without prejudice. Thus, in District Court actions, no probable cause determination has been made by the Department or the Department has found that no probable cause exists. Moreover, when a charging party proceeds in District Court the charging party is required to obtain private counsel. In contested case proceedings, on the other hand, the Department has issued a probable cause determination, and prior to August 1, 1974, the state provided legal counsel to all charging parties. The Legislature may well have determined that the two types of proceedings were substantially different as a result of these factors and that attorney's fees should be allowable in District Courts but not allowable in contested case proceedings.

More importantly, the Legislature has now addressed the awarding of attorney's fees in contested cases. Those provisions are controlling and cannot be enlarged by relying on other provisions applicable only to the District Courts. Since the Legislature has addressed the awarding of attorney's fees in contested case proceedings, attorney's fees are allowable only if they are within the terms of the 1984 Act.

At the present time Minn. Stat. sec. 363.071, subd. 2 allows an administrative law judge to "order the respondent to pay an aggrieved party, who has suffered discrimination, damages for mental anguish or suffering and reasonable attorney's fees." The plain language of this statute does not authorize an award of attorney's fees to a respondent. It only allows the respondent to be required to pay attorney's fees to an aggrieved party. The language is clear and unequivocal, consistent with the legislative history cited by the Complainant, and requires that the Respondent's motion for attorney's fees be denied.

Under Minn. Stat. 645.27, the State is not bound by the passage of law unless named therein or unless the words of the act are so plain, clear and unmistakable as to leave no doubt as to the intention of the Legislature.

In state v. Anderson, 87 N.W.2d 928 (Minn. 1958) the court applied this statute in determining whether costs could be taxed against the state on an appeal. Since sec. 363.071, subd. 2, as amended, does not plainly, clearly or unmistakably establish a Legislative intention to permit the taxing of costs or attorney's fees against the state, it is concluded that they may not be taxed in this case. The statute only permits the administrative law judge to order a respondent to pay attorney's fees. Consequently, unless the state is the respondent, and is charged with a discriminatory practice by one of its employees or applicants for employment, it is not liable for the payment of attorney's fees in a contested case proceeding.

The Respondent argues that permitting an award of attorney's fees to a prevailing respondent in cases brought before the District Court, while denying attorney's fees to prevailing respondents in contested case proceedings, involves an arbitrary classification which violates equal protection principles. That argument is not persuasive. In Christiansburg

Garment Co., v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 16 F.E.P. 502 (1978) the United States Supreme Court refused to apply the same standard for determining

a plaintiff's entitlement to attorney's fees as would be applied to defendants

under Title VII of the Civil Rights Act of 1964. The Court noted that prevailing plaintiffs are the chosen instrument of Congress to vindicate a policy of high priority, and when prevailing plaintiffs are awarded attorney's

Fees, they are awarded against a violator of federal law. The Supreme Court

held that neither equitable consideration is present in the case of a prevailing defendant. These equitable differences, in addition to the substantive differences in District Court proceedings and contested cases, which were previously mentioned, are persuasive evidence that there is a rational basis for permitting an award of attorney's fees to prevailing complainants in contested case proceedings while prohibiting their award to prevailing respondents.

moreover, even if the administrative law judge had discretion to award attorney's fees to a prevailing respondent in a contested case proceeding, this is not such a case. If attorney's fees are authorized, it is concluded

that only those services performed in contested case proceedings may be considered. In First Federal Sav. & Loan v. Clark Inv. Co., 322 N.W.2d 258,

262 (S.D. 1982) it was held that under a statute authorizing a court to award attorney's fees, the court could only consider those services performed in its

court, and not services performed in a separate declaratory judgement action. Although the Minnesota court has not specifically addressed that issue, the same rule should be applicable here. The administrative law judge is not in a

position to evaluate the respondent's performance in collateral actions or determine the merits of the complainant's complaint under federal laws and

would be required to investigate issues he was not called upon to consider
and

that he is unfamiliar with. Where collateral Federal District Court actions are involved, the respondent's entitlement to attorney's fees in those actions should be decided by the Federal Court and not by the administrative law judge in a contested case proceeding.

In sum, it is concluded that the provisions of Minn. Stat. 363.14, subd. 3 apply only to civil actions pending before the District Court and that the administrative law judge has no implied authority, based on that statute, to award attorney's fees to a prevailing respondent where the statutory provisions applicable to contested cases specifically limit an award of attorney's fees against respondents to aggrieved parties who have suffered discrimination. If there was any ambiguity in the statutes prior to the 1984 legislative session with respect to a prevailing respondent's entitlement to attorney's fees, it has been clarified. Moreover, even if there was some legal basis for awarding attorney's fees to prevailing respondents in a particular case, the Respondent in this case should not receive the costs and attorney's fees it incurred in collateral declaratory judgment proceedings brought before the Federal District Court. For all these reasons the Respondent's notion for attorney's fees must be denied.

J.L.L.