

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Catherine Durand-Graves,

Complainant,

v.

**AWARD OF COSTS
AND ATTORNEY'S FEES**

Unisys Corporation, a Delaware
corporation,

Respondent.

This matter is before Administrative Law Judge Steve M. Mihalchick on the petition of Complainant for attorney's fees and costs and the petition of the Department of Human Rights for reimbursement of hearing costs. Respondent filed an objection to Complainant's petition. The matter was considered without oral argument. Donald Horton, Esq., Horton and Associates, 700 Title Insurance Building, 400 Second Avenue South, Minneapolis, Minnesota 55401-2402, appeared on behalf of the Complainant, Catherine Durand-Graves. Erica Jacobson, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department of Human Rights. Patricia O. Kiscoan, Popham, Haik, Schnobrich & Kaufman, Ltd., 222 South Ninth Street, Suite 3300, Minneapolis, Minnesota 55402-3336, appeared on behalf of the Respondent, Unisys Corporation ("Unisys" or "Respondent"). The record closed upon receipt of Respondent's objection on November 9, 1995.

STATEMENT OF ISSUES

1. What amount of hearing costs should be awarded.
2. What amount of attorney's fees requested on behalf of Complainant are reasonable.
3. What amount of the costs submitted by Complainant are reasonable.

Based upon all of the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Complainant filed a charge of discrimination with the Minnesota Department of Human Rights on August 26, 1993. When the Department of Human Rights had not issued a determination with respect to Complainant's charge of discrimination within 180 days from the filing of the charge, Complainant requested that a hearing be held before an Administrative Law Judge pursuant to Minn. Stat. § 363.071, subd. 1(a). On April 4, 1994, the Chief Administrative Law Judge issued a Notice of and Order for Hearing in this matter setting a prehearing conference for May 2, 1994. Thereafter, the matter was assigned to another Administrative Law Judge for mediation, which was unsuccessful. Respondent brought a Motion for Summary Disposition which was denied by the undersigned Administrative Law Judge in an Order dated June 1, 1995. Thereafter, discovery continued. The hearing in this matter commenced on June 13, 1995, and continued over nine separate days, ending on July 12, 1995.

2. In an Order issued October 6, 1995, and amended October 11, 1995, to correct clerical errors, it was concluded that Respondent had discriminated against Complainant in violation of the Human Rights Act and Complainant was awarded \$60,000.00 as double compensatory damages for wage loss, plus interest thereon, \$40,000.00 for mental anguish and suffering and \$8,500.00 as punitive damages. Respondent was also ordered to pay a civil penalty of \$5,000.00 to the state of Minnesota. Respondent was also ordered to pay the costs of services rendered to the Department of Human Rights by the Office of Administrative Hearings and Complainant's attorney's fees and costs. The determination of the hearing costs and the attorney's fees and costs was to be made upon petition within 30 days of the date of the Order.

3. The Department of Human Rights filed a Petition for Reimbursement of Costs on October 18, 1995, requesting reimbursement of \$10,059.50 as reimbursement for the cost of services rendered by the Office of Administrative Hearings in this matter, to be updated according to the records of the Office of Administrative Hearings. Complainant filed a Petition for Attorney's Fees and Costs, along with supporting affidavits and a Memorandum, on October 20, 1995. Complainant requested reasonable attorney's fees in the sum of \$87,206.91 and costs in the sum of \$5,035.61. Respondent filed its objection to Complainant's Petition for Attorney's Fees and Costs on November 9, 1995.

4. The total hearing costs for this matter billed to the Department of Human Rights by the Office of Administrative Hearings through October 31, 1995, is \$10,540.10. See Attachment 1.

5. Complainant was represented in this matter by Horton and Associates under a contingent fee agreement beginning in March 1993. She was provided with monthly itemized statements. The statements detailed the time spent by the law firm's staff and the costs incurred. Complainant was represented primarily by Donald Horton, the firm's senior attorney, and Leslie Scott, an associate attorney. Mr. Horton worked

approximately 168 hours on the file, mostly at a billing rate of \$210.00 per hour for a total of approximately \$35,100.00. Ms. Scott worked approximately 345 hours on the file at \$135.00 an hour for a total of approximately \$46,600.00. Other associates' and legal assistants' time added an additional \$4,500.00, bringing the total fees at the firm's normal billing rates to \$87,406.91.

6. Donald Horton is an experienced and highly-regarded trial lawyer practicing in the area of employment law and discrimination.

7. On March 29, 1995, a discovery conference was held before the Administrative Law Judge. At that conference, Complainant brought a Motion to Compel Discovery. Complainant was represented by both Mr. Horton and Ms. Scott at the conference and the motion was argued by Ms. Scott. Mr. Horton billed \$525.00 for conferring with Mr. Scott and attending the conference; Ms. Scott billed \$281.25 for her attendance plus other matters that day.

8. On eight days during May and June of 1995, Ms. Scott and one of two legal assistants employed by Horton and Associates reviewed approximately 200 personnel files at the Popham Haik offices. Ms. Scott spent 42.5 hours and the legal assistants spent 44.75 hours at the Popham Haik offices reviewing over 10,000 documents produced by Respondent. At their normal hourly rates, the total for this document review was \$9,541.25. In addition, Horton and Associates paid the Popham Haik firm \$868.00 for photocopy costs for the documents, which was one-half of the Popham Haik cost in accordance with a prior Order of the Administrative Law Judge. During discovery, Respondent had resisted producing the personnel records and during a discovery conference had indicated that the files might be incomplete and suggested that Complainant might use W-2 information for the desired purposes. However, Complainant desired to review all the personnel files and the Administrative Law Judge ordered them produced. As it turns out, the records produced were voluminous and sometimes difficult to read. Little, if any, of the information derived was used during the hearing and it was determined at hearing that Respondent had some of the personnel data contained in the records within its computer system. However, Complainant never requested that specific data.

9. The time records show that Mr. Horton maintained much of the contact with Complainant, negotiated at the mediation session, participated in the most significant depositions and conducted the examination of witnesses and presentation of argument at the hearing. Ms. Scott, or occasionally other associates, conducted the document reviews and legal research, prepared the pleadings, coordinated discovery and assisted at the hearing. In general, their representation of Complainant in this matter was of very high quality with only a few instances of burdening the record with irrelevant material, usually due to over-cautiousness.

10. Respondent was represented in this matter throughout by Ms. Kiscoan, except for a brief period while she was on leave. Ms. Kiscoan was at all times excellent and efficient in her representation of Respondent and in her conduct of the hearing.

11. Complainant seeks reimbursement of costs in the sum of \$5,035.61. Of that amount, Respondent has raised questions regarding the following expenses:

- a. \$868.00 for photocopy costs as described above.
- b. \$102.23 paid to Blumberg Communications for an overhead projector, stand, and screen used very briefly at the hearing.
- c. \$300.00 expert witness fee for Barbara G. Backes, Complainant's psychotherapist who testified at the hearing.
- d. \$2,009.04 for air fare, lodging, copying, postage, parking and telephone expenses associated with arranging for and transporting witnesses Mathilda Delaney and Anne Gehrett to appear as witnesses on behalf of Complainant at the hearing. They were both female sales executives with Respondent. Both were identified as potential witnesses in early June 1995, but the decision to call them was not made until during the hearing and their airplane tickets were not purchased until July 7, 1995. They arrived on the evening of July 10, 1995, Ms. Delaney from Austin, Texas, and Ms. Gehrett from Washington, D.C., testified on July 11, 1995, and returned to their homes that evening.
- e. \$57.65 for Complainant's parking costs.
- f. \$47.55 in copying costs incurred by Horton and Associates on November 15, 1994, at Night Owl Copying Service. The cost was reimbursed by Popham Haik to Horton and Associates on December 9, 1994. However, the amount was not included in the cost claimed by Complainant in this matter, even though the documents appear in Exhibit A to the Affidavit of Complainant.

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

CONCLUSIONS

1. Minn. Stat. § 363.071, subd. 7, requires that the Administrative Law Judge order a respondent who has engaged in unfair discriminatory practices to reimburse the Minnesota Department of Human Rights for "all appropriate litigation and

hearing costs expended". The amount of appropriate litigation and hearing costs in this proceeding is \$10,540.10.

2. 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 . . ." Reasonable attorney's fees are determined by determining a "lodestar" figure based upon reasonable hourly rates and reasonable time expended, and then, if appropriate, adding an "enhancer". *Anderson v. Hunter, Keith, Marshall & Co. Inc.*, 417 N.W.2d 619 (Minn. 1988); *Huffman v. Pepsi-Cola Bottling Company*, unpublished C7-94-2404 (Minn. App. 1995); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Blum v. Stenson*, 465 U.S. 886 (1984).

3. Except for the excessive amount of time spent reviewing and copying Respondent's personnel files, the time spent by the attorneys and legal assistants on this matter was reasonable. The division of labor between Mr. Horton and Ms. Scott was appropriate and having both of them present at motions and the hearing was not redundant. As to the document review, Ms. Scott should have recognized somewhere before eight days that the review was not producing usable information. Moreover, the general information being sought would have been provided by Respondent had the proper discovery requests been made in the first place. During the first three days of the document review, Ms. Scott and a legal assistant each spent 12.25 hours on the document review. The time spent after that was unnecessary. Thus, 30.25 hours will be deducted from Ms. Scott's time and 32.50 hours will be deducted from legal assistant time.

4. The customary hourly rates charged by the attorneys at Horton and Associates are reasonable. In fact, they are conservative in light of the contingent fee retainer. On the other hand, the legal assistant rate of \$85.00 per hour appears excessive. An associate attorney, Michelle Lore, was billed at the rate of \$75.00 per hour in early 1993 by Horton and Associates. A rate of \$70.00 per hour is the maximum reasonable amount for the legal assistants in this case.

5. With the adjustments described above, the "lodestar" figure is \$78,952.57 determined as follows:

<u>Billor</u>	<u>Hours</u>	<u>Rate</u>	<u>Extension</u>
DEH	8.17	\$180	\$ 188.17
	160.27	210	33,656.70
SDP	1.35	135	182.25
LES	314.88	135	42,508.80
MML	11.88	75	891.00
	.63	95	59.85
Legal Ass't.	20.94	70	<u>1,465.80</u>
	518/12	Lodestar	\$ 78,952.57

6. Horton and Associates is entitled to a fee enhancement of 33 percent due to the contingent fee nature of the case and the need to reward the firm for taking on this "glass ceiling" case and doing so in a fairly efficient manner. Compare, for example, *Huffman v. Pepsi-Cola Bottling Company*, C7-94-2402, unpublished (Minn. App. 1995) where an initial award of \$768,395.00 in attorney's fees was reduced to \$400,000.00 by the Court of Appeals. While the contingent fee nature of the case could have been reflected in the hourly rates in this case, it was not. An enhancement of 33 percent is appropriate in this case. That amounts to \$26,054.35, bringing the total attorney's fees award to \$105,006.92.

7. Minn. Stat. § 363.071, subd. 2, does not expressly authorize an award of costs to a Complainant, however, Minn. Stat. § 363.071, subd. 2(a), provides that in addition to the remedies set forth in the statute, the Administrative Law Judge may order any other relief the Administrative Law Judge deems just and equitable. The Minnesota Human Rights Act provides for an award of costs to the prevailing party in a District Court action (see Minn. Stat. § 363.14, subd. 3 (1994)), and it is appropriate to allow an award of costs in this proceeding.

8. The undisputed costs incurred by Horton and Associates are reasonable. They are court reporting services of \$1,520.00, courier services of \$34.00, express mail costs of \$21.50 and long-distance phone costs of \$123.19. The photocopying costs of \$868.00 incurred for the copies of Respondent's personnel records are also reasonable. Although it was determined above that a portion of the time spent reviewing the records was unnecessary, obtaining the copies was not. Moreover, although the Administrative Law Judge ordered that each party pay one-half of the costs at the discovery stage, Complainant has now prevailed and is entitled to recover reasonable costs. The expense of \$102.23 for the overhead projector used briefly at hearing is also reasonable. Although the use of the projector was less than Complainant probably planned, it was used in the hearing presentation. Therefore, the total costs incurred by Horton and Associates of \$2,668.92 should be reimbursed.

9. The \$300.00 expert witness fee for Barbara Backes paid by Complainant was reasonable. Respondent suggests that because the Administrative Law Judge did not specifically mention Ms. Backes in the Findings, Conclusions and Memorandum, she

was unnecessary. That is erroneous for at least two reasons. First, the fact that Ms. Backes was not mentioned in the decision does not mean that the testimony she presented was not a factor in the decision. It indicates only that time pressures and efficiency prevented specification of each and every piece of evidence that affected the decision. Ms. Backes' testimony was important to the Administrative Law Judge in understanding Complainant's mental suffering and how it related to the treatment she received at Respondent and to other factors in her life. Second, in preparing for the hearing and calling witnesses, Complainant, like any other party, cannot be sure of the impact that a particular witness will have upon the trier of fact. Complainant reasonably expected that Ms. Backes would provide helpful, relevant evidence. Thus, the \$300.00 expert witness fee is a reasonable cost.

10. The travel expenses for witnesses Delaney and Gehrett, in the amount of \$2,009.04, were also reasonable. Respondent maintains that these witnesses were not relevant, again, because they were not mentioned in the Administrative Law Judge's decision. And again, that argument must be rejected. Ms. Delaney and Ms. Gehrett provided evidence regarding the treatment of women in positions of the type the Complainant was seeking by Respondent and which left the Administrative Law Judge with the impression that women in executive sales positions at Unisys were treated less fairly than their male counterparts. Their testimony was helpful to Complainant's case, and was reasonably anticipated to be so. The fact that the air fare was probably higher than it could have been because of the last-minute decision to actually call them is not material.

11. The expense incurred by Complainant for parking fees in the amount of \$57.65 is not reasonably chargeable to Respondent. That cost, incurred during the hearing and prior to the hearing, cannot be considered a litigation cost. Thus, Complainant is entitled to be reimbursed \$2,309.04 for the expenses incurred directly by her.

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

ORDER

IT IS HEREBY ORDERED that:

1. Respondent shall pay to the Minnesota Department of Human Rights the amount of \$10,540.10 for hearing costs.
2. The Respondent shall pay to Horton and Associates the amount of \$105,006.92 for reasonable attorney's fees.
3. Respondent shall pay to Complainant Catherine Durand-Graves the amount of \$4,977.96 for reimbursement of costs.

Dated November 20, 1995.

STEVE M. MIHALCHICK
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.

S.M.M.