

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Gretchen B. Maglich, Commissioner,
Minnesota Department of Labor and
Industry, State of Minnesota,

**ORDER AWARDING
ATTORNEY'S FEES, COSTS,
AND DISBURSEMENTS**

Complainant,

v.

Miller-Dwan Medical Center,

Respondent.

The Commissioner of Labor and Industry filed a written petition on August 18, 1999 seeking an award of attorney's fees, costs and disbursements in the above matter. Respondent, Miller-Dwan Medical Center filed a response to the Petition on August 30, 1999, on which date the record in this matter closed.

Richard L. Varco, Jr., Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, MN 55103-2106 represented the Commissioner. Thomas F. Andrew, Esq. of the firm of Brown, Andrew, Signorelli & Zallar, P.A., 300 Alworth Building, 306 West Superior Street, Duluth, MN 55802-1803 represented the Respondent.

NOTICE

This Order, together with the Findings of Fact, Conclusions of Law and Order dated July 26, 1999 constitutes the final decision in this case under Minn. Stat. § 182.669. Judicial review is available under Minn. Stat. §§ 14.63 – 14.69.

Based upon the Petition and Response filed by the parties, and the entire record in this matter, and for the reasons set out in the attached Memorandum:

IT IS HEREBY ORDERED: The Commissioner of Labor and Industry is awarded attorney's fees, costs and disbursements in the total amount of \$32,248.50.

Dated this 22nd day of September, 1999.

GEORGE A. BECK
Administrative Law Judge

NOTICE

Under Minn. Stat. § 182.669 interest shall accrue on, and be added to, the unpaid balance of an Administrative Law Judge's Order from the date the Order is signed, until it is paid, at the annual rate provided in Minn. Stat. § 549.09, subd. 1(c).

MEMORANDUM

In an Order dated July 26, 1999 in this matter the Respondent was ordered to pay to Deborah Scott total compensatory damages in the amount of \$5,150.40. Prejudgment interest was ordered on a portion of that award. The Respondent was also ordered to remove material from Ms. Scott's personnel file and to refrain from hindering her future employment. The Respondent was also ordered to post a notice in its work place explaining the outcome of this case. In addition to this relief, the applicable statute also provides as follows:

In addition, the Administrative Law Judge may order payment to the Commissioner or to the employee of costs, disbursements, witness fees, and attorney fees.^[1]

The July 26, 1999 Order allowed the Commissioner to file a Petition for Costs and Attorney's Fees.

In its Petition the Commissioner seeks a total award for attorney's fees and costs and disbursements incurred in the amount of \$41,661.60. The Complainant claims costs and disbursements for this contested case proceeding in the total amount of \$1,997.10 which includes \$47.87 for copies of medical records, \$96.05 for a hotel for a prehearing trip to Duluth, \$558.07 for hearing expenses including mileage, hotel, meals, photocopies and telephone calls, \$1,273.43 for the complainant's portion of the transcript cost, and \$21.68 as a witness fee. Each of these disbursements are supported by receipts, checks or other appropriate documentation.^[2] Additionally, the complainant incurred costs for an expert witness, Dr. William H. Loman, who testified at the hearing. He spent 8.5 hours preparing for his testimony, traveling to and from the hearing, and testifying. He was compensated at the rate of \$75.00 per hour for a total cost of \$637.50. These costs and disbursements appear to be reasonable considering the nature and location of the hearing. They were not contested by the Respondent in its response to the petition.

The Affidavit of Assistant Attorney General Nancy J. Leppink indicates that she expended 327 hours preparing and litigating for this case. Based upon a review of her time sheets she states that the hours were allocated among various tasks as follows:

File review	8 hours
Discovery	50 hours
Trial Preparation	115 hours
Witness preparation	30 hours
Trial	24 hours
Post hearing memoranda	<u>100 hours</u>
TOTAL:	327 hours

The affidavit states that the hourly billing rate for Assistant Attorneys General approved by the Minnesota Department of Finance for the time period in question is \$79.00 per hour. This would result in a charge for 327 hours of attorney time of \$25,833.00.

The Complainant also seeks recovery of costs paid to two paralegal employees of the Attorney General's Office. Carrie Darmody worked on this case from October 19, 1998 through January 21, 1999. She also worked on the case from April 19 to June 23, 1999. A second paralegal, Michael Feeney worked on this case while Ms. Darmody was on leave from January 21 through April 16, 1999 and then continued to work on the case through June 21, 1999. Both paralegals were working on this matter from just prior to the hearing and through late June of 1999. Only Mr. Feeney attended the hearing.

The Petition claims 110 hours for Mr. Feeney and 109.9 hours for Ms. Darmody. The billing rate approved by the Department of Finance for the paralegals is \$60.00 per hour. Both Mr. Feeney and Ms. Darmody have worked for the Attorney General's Office in excess of 15 years. The total cost claimed for paralegal time is \$13,194.00, for a total paralegal and attorney fee bill of \$39,027.00. The paralegal hours are supported by detailed time records which sets out in tenths of an hour the amount of time expended on various dates for this case. In the case of Mr. Feeney the records describe the activity leading to the time billed.^[3]

The Respondent opposes an award of attorney's fees in this matter on several grounds. First, it notes that the statute provides that the Administrative Law Judge may order payment of attorney's fees. It notes that some statutes seem to mandate an award of attorney fees.^[4] In the case cited the statute provides that damages shall include "actual damage sustained plus interest from the date of ...sale, costs and reasonable attorney's fees."^[5] The Respondent suggests that the discretion provided to the Administrative Law Judge should be exercised in favor of the Respondent since the findings of fact demonstrate that Miller-Dwan did act responsibly in a number of the

actions it took to deal with the employee's concerns.^[6] It argues that it was relying on what it believed was controlling precedent. It points out that Ms. Leppink believes that this is a case of first impression and therefore the Respondent could not be expected to properly interpret the statute.

A discrimination action under Minn. Stat. § 182.669 is most nearly analogous to a discrimination case brought under the Minnesota Human Rights Act. That statute provides, in part, that:

In all cases, the administrative law judge 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, in addition to punitive damages in an amount not more than \$8,500.00.^[7]

It is appropriate to apply the case law developed under the Human Rights Act in regard to attorney's fees. That case law does not accord any special meaning to the use of "may" as opposed to "shall". Rather, it sets out the appropriate guidelines for awarding attorney's fees. Additionally, the fact that the Respondent acted in a responsible fashion in its investigation and the fact that there is little precedent in this area would more logically be relevant to an award of punitive damages or the trebling of compensatory damages. An award of attorney's fees, if done within the parameters set out in the case law, is generally made in order to reimburse a party for reasonable expenditures and to encourage actions of the nature authorized, to be maintained. It seems clear the legislature intended to encourage enforcement by allowing an award of attorney fees to the Complainant. The record also demonstrates the employee made it quite clear to the employer that she believed it was violating the statute.

The leading case on attorney fee awards in discrimination cases in Minnesota is *Anderson v. Hunter, Keith, Marshall & Company*^[8] That case incorporates federal case law on attorney fees.^[9] *Hensley* requires a determination of the so-called "lodestar" figure. This figure is arrived at by multiplying the number of hours reasonably expended on litigation, by a reasonable hourly rate. The hourly billing rate claimed for attorney time on this case is \$79.00 per hour which is the amount approved by the Department of Finance. The rate is obviously reasonable based upon rates normally charged by attorneys in this community with equivalent experience and qualifications. The rate for paralegals at \$60.00 per hour is likewise a reasonable amount. The Respondent did not challenge the hourly rate figures.

The *Hensley* decision also requires a discussion of a number of factors. Those relevant to this case include the time and labor required, the novelty and difficulty of the issues, the customary fee, the results obtained, and the experience and ability of the attorney. The Respondent challenges the attorney fee award on three grounds, namely the results obtained in the case, time not reasonably expended by counsel and inadequate documentation of hours.

The determination of the lodestar (which includes a consideration of time and labor required) must include a decision as to whether the hours were reasonably

expended. The Respondent argues that two lines of evidence advanced by the Complainant, namely the alleged changes to the reuse room after July of 1996 and the attempt to prove that Deborah Scott's second child had a heart murmur, were non-productive and that the time spent on these issues was not reasonable. Additionally it contends that time spent attempting to prove that other dialysis unit employees who worked with Renalin had difficulties in their pregnancies produced no evidence of prohibitive value.

It is true that the evidence related to these three issues did not result in findings which supported the Complainant's case. With hindsight, it can be said that the time spent on these issues was not productive. However, this would not have been clear to Complainant's counsel as the case was being developed. The evidence concerning the changes to the reuse room venting system was conflicting as was the evidence concerning the presence of a heart murmur. While the record does not contain evidence which proves that other employees had problems with their pregnancies, the fact that the employee was aware of these claims was relevant. The Respondent's contention is not that too many hours were spent on a particular activity or issue but rather that certain issues were not worth pursuing. It is concluded that the Complainant's counsel's attempt to prove the allegations in regard to the challenged issues was reasonable.

The Respondent also challenges the reasonableness of the fees claimed on the grounds that Complainant seeks an award both for attorney time and paralegal time at the hearing, and attorney time and paralegal time for a trip to Duluth prior to the hearing to visit the dialysis center. In *Anderson* the Supreme Court questioned the reasonableness of fees for more than one attorney at trial when only one attorney questioned witnesses and argued the case.^[10] Given the number of witnesses and exhibits at the hearing in this matter, the assistance of a paralegal, billed at the rate of \$60.00 per hour, is a reasonable expenditure. The Respondent also challenges "double billing" by Ms. Leppink and a paralegal for a trip on Saturday, April 17, 1999 to visit the medical center. However, the records submitted by the Attorney General do not show any billing by Ms. Darmody or Mr. Feeney on that date. The Complainant acknowledges in her petition, however, that for a period of time there were two paralegals working on this case at the same time as the attorney. This was the case from April 16, 1999 to June 21, 1999. The Complainant has not justified the need for two paralegals in its petition and the billing of paralegal Darmody for this time period is therefore deleted from the award since the reasonableness has not been demonstrated.

The Respondent also challenges the proposed fee award on the grounds that it is inadequately documented. The Minnesota Supreme Court has noted that hours expended must be "adequately documented".^[11] If the records submitted are too imprecise to conduct a meaningful review, the total award may be reduced.^[12] In the case of the attorney time expended on this case, all that has been submitted is an affidavit from counsel which indicates the number of hours spent on six different activities related to this case. The affidavit does not indicate on what date the hours were recorded. The lack of detailed time records for the attorney time and the lack of specificity, makes it difficult to ascertain the reasonableness of the fees. The number of

hours claimed in most categories does not appear to be far afield, with perhaps the exception of the time devoted to post hearing memoranda. However, the Complainant has the burden to establish entitlement to an award and the lack of specificity justifies a reduction in the attorney fees sought by 20% due to inadequate documentation.^[13]

The time records submitted for paralegal Feeney contain the date the work was done, the number of hours expended on that day and the activities involved. Although some of the entries (such as "discussion") might have been more detailed the records are adequate to support the claim for paralegal Feeney's fees. In the case of paralegal Darmody the entries indicate the date and number of hours on that date except for three entries do not indicate what activity was being performed. It is appropriate to reduce those fees charged for paralegal Darmody by 15% for those entries which lack any indication of the activity involved.

Respondent also challenges the amount of award based upon the results obtained. It notes that the compensatory damages totaled only \$5,150.40 while the attorney's fees and costs claimed are in the total amount of \$41,661.60. It cites a recent Minnesota case in which the Court awarded attorney's fees of \$31,562.50 after a jury award of \$150,000.00.^[14] The Cox case involved a four day jury trial and post-trial motions. It is clear that the Minnesota Supreme Court has considered the results obtained in cases, in an award of attorney's fees.^[15] The total amount of compensatory damages is not be the only factor considered in the reasonableness of attorney fees, however. The Minnesota Supreme Court has observed that an obvious reason for the awarding of attorney's fees in discrimination cases was "to encourage victims of discrimination to bring suit, particularly where the relief sought is not a large money judgment, and to make legal counsel available in these cases."^[16] Attorney fee awards exceeding damages are not unknown.^[17] In *Giuliani* the Court noted that:

[I]n light of the complexity of these cases, often involving modest damages, it is not surprising nor particularly material that the attorney fees in this case exceed the amount of damages awarded. Attorneys who prevail in discrimination cases before our Courts serve an important public function which accomplishes a social objective identified by the Human Rights Act.^[18]

This is not a case in which the Complainant sought a large award of damages and failed to obtain it. Rather, it was clear from the beginning that the wage claim would be modest since the employee was quickly re-employed. Although the Respondent points out that the damage award for emotional distress was only \$2,000.00, the Complainant did not ask for any specific amount to be awarded in its post-hearing memorandum. Nonetheless, this case obviously involves an important right, as set out in the statute, that is equally if not more important than the money damages involved. A reduction of attorney's fees simply because a case involved a small amount of compensatory damages would not encourage the Complainant to protect the employee rights codified in the OSH discrimination statute. Additionally, as the parties both acknowledge, this case may establish a precedent of value beyond the damage award in this particular case.

Hensley also suggests a discussion of the novelty or difficulty of the issues involved in a particular case. This factor weighs in favor of the Complainant since there is little precedent to guide counsel in a proceeding of this type. Accordingly, counsel for the Complainant was faced with the challenge of constructing and proving up a case without any blueprint from past cases. It should be noted that the Complainant essentially proved everything she sought to prove in this matter. This case was therefore novel and required a high level of skill on the part of counsel, who has been employed with the Attorney General's Office for 15 years.

Accordingly, with the percentage reduction applied to the attorney's fees and the fees for paralegal Darmody the attorney fees and paralegal fees awarded are as follows:

Attorney Fees	\$20,666.40
Paralegal Fees – Feeney	\$ 6,600.00
Paralegal Fees – Darmody	\$ 2,347.50

Added to this award are the costs and disbursements of \$2,634.60, for a total award of \$32,248.50. It is assumed in making this award that all of these fees and costs were in fact billed by the Attorney General to the Complainant. If that is not the case, the administrative law judge and the respondent should be promptly notified.

G.A.B.

^[1] Minn. Stat. § 182.669, subd. 1

^[2] Leppink Aff. Ex. C-I

^[3] Leppink Aff. Ex. A.

^[4] *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 539 (Minn. 1986)(Interpreting Minn. Stat. § 80A.23).

^[5] Minn. Stat. § 80A.23, subd. 2(1982).

^[6] Response to Petition, p. 2.

^[7] Minn. Stat. § 363.071, subd. 2.

^[8] 417 N.W. 2d 619 (Minn. 1988).

^[9] *Hensley v. Eckerhart* 461 U.S. 424 (1983); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19(5th Cir. 1974).

^[10] 417 N.W. 2d at 629.

^[11] *Specialized Tours, Inc. v. Hagen*, 492 N.W.2d, 520, 542 (Minn. 1986).

^[12] *Baufield v. Safelite Glass Corporation*, 831 F. Supp. 713, 721-22 (D. Minn. 1993).

^[13] See *Baufield*, supra, at 722.

^[14] *Cox v. Crown Coco, Inc.*, 544 N.W. 2d 490, 500 (Minn. App. 1996).

^[15] *Specialized Tours, Inc.*, 392 N.W. 2d at 541; *Anderson*, 417 N.W. 2d at 630.

^[16] *Sigurdson v. Isanti County*, 386 N.W. 2d, 715, 722 (Minn. 1986).

^[17] *EEOC V. Accurate Mechanical Contractors*, 863 F. Supp. 828 (E.N.Wis. 1994) (Court approved attorney's fees of \$38,345 on client award of \$5,580.65); *Giuliani v. D. Stuart Corp.* 512 N.W. 2d 589, 596-97 (Minn. Ct. App. 1994) (Attorneys fees of \$18,527.50 on client award of \$12,000.00.)

^[18] *Giuliani* at 596-97.