

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN**

<p>Caryl Sprague RR 1, Box 154 North Branch, MN 55056</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>Ann Hacklander-Ready 783 Jairus Dr. Lexington, KY 40515</p> <p style="text-align:center">Respondent</p>	<p style="text-align:center">COMMISSION'S DECISION AND FINAL ORDER ON COMPLAINANT'S REQUEST FOR COSTS AND ATTORNEY'S FEES</p> <p style="text-align:center">Case No. 1462</p>
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BACKGROUND

On May 25, 1989, the Complainant, Caryl Sprague, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondents, Maureen Rowe and Ann Hacklander (n/k/a Ready) discriminated against the Complainant on the basis of her sexual orientation by refusing to sublease to her a room in a house that they were renting. The Respondents denied that they had discriminated against the Complainant on any basis and asserted that their housing decision was not covered by the ordinance and was constitutionally protected.

After investigation of the claim, the Commission investigator assigned to the complaint issued an Initial Determination concluding that there was probable cause to believe that discrimination had occurred. The complaint was transferred to conciliation to see if the parties could reach an agreement resolving all of the allegations of the complaint. The parties were not able to reach such an agreement. The complaint was then transferred to the Hearing Examiner for a public hearing on the merits of the complaint.

A public hearing was held before Commission Hearing Examiner Sheilah O. Jakobson on October 14, 1991. After taking testimony and providing the parties the opportunity to submit briefs or written argument, the Hearing Examiner issued, on December 27, 1991, her Recommended Findings of Fact, Conclusions of Law and Order determining that the Respondents had discriminated against the Complainant on the basis of her sexual orientation in violation of the ordinance. The Hearing Examiner proposed an order that included a make whole remedy including out-of-pocket damages of \$300, emotional distress damages of \$2,000, punitive damages of \$1,000 and a cease and desist order.

The Respondents timely appealed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order. After considering the arguments of the parties, on July 10, 1992, the Commission reversed the Hearing Examiner. The Commission determined that the City Council had not intended to regulate housing decisions between roommates and that the Commission was therefore without jurisdiction to hear the complaint. The Commission did not consider the arguments of the parties on the merits of the complaint.

The Complainant timely appealed the Commission's Decision and Final Order. After the opportunity to submit briefs, Circuit Court Judge Sarah O'Brien, on August 19, 1993, issued a decision finding that the Commission was in error in interpreting the ordinance not to regulate the housing transaction alleged in the complaint. Judge O'Brien remanded the complaint to the Commission for consideration of the arguments of the parties on the merits of the complaint.

Upon remand, the Commission, on February 10, 1994, affirmed the Hearing Examiner's finding of liability. The Commission amended the Recommended Findings of Fact, Conclusions of Law and Order by vacating the award of punitive damages and increasing the award of emotional damages to \$3,000.

The Respondents timely appealed the Commission's Decision and Final Order to Judge O'Brien who had retained jurisdiction over the complaint. After consideration of the arguments of the parties, on September 30, 1994, Judge O'Brien issued a decision affirming the Commission's Decision and Final Order.

The Respondents appealed Judge O'Brien's September 30, 1994 decision to the Court of Appeals. The court in a decision issued on September 26, 1996, determined that the Commission had properly found liability and properly assessed damages for the Complainant's out-of-pocket losses but determined that the Commission was not empowered to award the Complainant emotional distress damages. The basis of the Court's decision was that the City Council had not as of the time of the complaint clearly authorized the Commission to make awards of emotional damages. The Court vacated the Commission's award of \$3,000 for emotional distress.

Prior to the Court of Appeals' decision, the Complainant reached a settlement with Respondent Maureen Rowe. She was released from further liability for damages or attorney's fees or costs. The Respondent Ann Hacklander-Ready did not participate in the settlement however.

The Respondent appealed the Court of Appeals' decision to the Wisconsin Supreme Court. The Court declined to accept the appeal. The Respondent then sought to appeal the decision to the United States Supreme Court. The Supreme Court denied the Respondent's petition for certiorari.

Subsequent to the Supreme Court's action, the Commission issued an order setting forth a schedule for the submission of a request for attorney's fees and costs by the Complainant, and providing the Respondent with the opportunity to object to any request made by the Complainant.

The Complainant filed her request on October 10, 1997. The Respondent objected to the petition of the Complainant.

The Commission met to consider the Complainant's petition and the Respondent's objection on January 22, 1998. Participating in the Commission's deliberations were Commissioners: Diggles, Fieber, Tomlinson, Turner, Vedder, Washington, Zarate and Zipperer.

DECISION

This complaint has been perhaps the most heavily litigated complaint before the Commission in the last decade. The cost in time and resources to each of the parties and to the Commission has been high. Despite these costs important principles have been defined and both parties have had a degree of success in pursuing their respective goals. As is often the case, neither side has emerged with total victory.

In this context, the Complainant has filed a petition seeking \$23,354.64 in attorney's fees and costs. The Respondent has objected on several grounds to the petition of the Complainant. The Commission will attempt to address each of the objections individually.

Before reviewing the Respondent's objections, a brief procedural explanation may be helpful. Once there is a final finding of liability, a prevailing Complainant may petition or move the Commission for an award of attorney's fees and costs, if any, brought about in pursuit of the complaint. Such petitions are appropriate in order for the Commission to fulfill its responsibility under the ordinance to attempt to make the injured Complainant whole. If a prevailing Complainant is not reimbursed for his or her reasonable attorney's fees, it will hinder other victims from pursuing their claims of discrimination and would tend to thwart the purposes of the ordinance. Also, if a Complainant is expected to bear his or her own costs, pursuit of a complaint may result in a net loss particularly if a Respondent aggressively litigates a claim and takes full advantage of its rights of appeal.

Once a petition for costs and fees is filed with the Commission, the Respondent is given an opportunity to object to the petition. As in this case, objections may be made as to the amount of the award or to the basis of the costs and fees. In objecting to a petition, the burden of proof shifts to the Respondent. It is the Respondent that must demonstrate that a petition is unwarranted, deficient in some manner or represents overreaching by the Complainant. If the reviewing body is unable to resolve the objections based upon the record before it, the body may hold additional proceedings to gain sufficient information to come to an appropriate award.

In the current case, the Commission is able to resolve any conflict between the Complainant's petition and the Respondent's objection without recourse to further proceedings. The record is sufficiently clear as supplemented by the parties for the Commission to make a determination of reasonable costs and fees. The Commission will now address the individual objections set forth by the Respondent.

The Respondent argues that the Complainant's attorney's \$150 per hour rate is excessive, particularly since the case was argued before an administrative agency, not a jury. The Respondent suggests that a rate of \$125 per hour is more reasonable. The Respondent bases her claim on the fact that is the rate charged by her attorney for similar cases.

The hourly rate of \$150 appears reasonable. It is within the prevailing rates in Madison for similarly qualified attorneys. The Respondent's counsel's rate of \$125 is not necessarily relevant, nor is the fact that the case was not brought before a jury. Very few housing or fair employment discrimination cases are actually brought before a jury. Further, the rate charged was on the low side of the customary and usual rate charged by the Complainant's attorney (\$150 - \$200).

An attorney's usual and customary rate is presumed to be a reasonable rate unless there is evidence produced by the Respondent demonstrating that the rate is unusual or excessive. Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. 09/23/93, Ex. Dec. 07/29/93), Harris v. Paragon Restaurant Group, Inc., et al, MEOC Case No. 20947 (Comm'n Dec. 02/27/95, Ex. Dec. 08/08/94, Ex. Dec. 09/27/89). It is the Respondent's burden to make such a showing. The Respondent fails to meet her burden in this regard.

The Respondent asserts that the amount claimed is unreasonable given the final judgment of only \$300. The Respondent contends that the amount of attorney's fees and costs must somehow be proportional to the relief obtained.

It is true that attorney's fees in this case may seem excessive at first, especially when compared against the \$300 final monetary award. Generally however, the standard is not one of proportionality. The reviewing body must determine whether the outcome achieved substantially the purposes for bringing the action. In a claim of housing discrimination, monetary relief is often not the primary purpose of a claim. The purpose may be simply to establish a right to the housing and to seek an order for that housing. While the Complainant in this case sought a monetary award, it does not appear that this was the primary purpose for filing this complaint. The Complainant appears to have been motivated more by principle than a desire for significant financial gain. By establishing and defending her right to the housing, the Complainant achieved her goal and assisted the Commission through clarification of the ordinance's scope and coverage.

The \$300 award is typical in housing cases and the case was under litigation for over six (6) years. It is widely recognized that exclusive of attorney fees, out-of-pocket costs for victims of housing discrimination are very low. To routinely reduce attorney fees in such cases would undercut a victim's ability to obtain skilled counsel and frustrate the intent of the ordinance. A simple finding of discrimination is of significant value. Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984). By itself, such a finding can support an award of significant attorney's fees. Watkins, supra.

The Respondent disagrees with the Complainant's assertion that the Respondent relentlessly pursued the litigation rather than settling and further believes it was the Complainant who did not take settlement seriously. The Respondent does not provide any legal basis of support for the Commission's consideration of settlement positions of the parties.

Generally speaking, either party's actions in pursuing a position are irrelevant to the process of determining an award of costs and attorney's fees. To the extent that a Complainant's attorney undertakes unnecessary or duplicative work in pursuit of a claim, there may be some limited relevance to the Commission's inquiry. The Respondent does not point to any elements of the Complainant's petition to demonstrate that the work was either unnecessary or duplicative.

Besides, it appears from the record that both parties aggressively pursued litigation. However, most of the appeals extending this dispute were taken by the Respondent. In fact, the circuit court criticized the Respondent for consistently raising constitutional concerns regarding the right of privacy and the right of association even after the City Council resolved this issue. Additionally, the Complainant did enter into a private settlement with Maureen Rowe which suggests a willingness to consider alternatives to continued litigation.

The Respondent asserts that the Complainant unnecessarily pursued the case even after the Madison City Council amended the ordinance to exempt roommate situations. Further the Respondent believes that such pursuit was because of the Complainant's vindictiveness and desire to obtain money from the Respondent.

The record does not appear to support the Respondent's view. The Hearing Examiner found that emotional distress and harm occurred as a result of the Respondent's unlawful discrimination. This is sufficient cause to seek redress despite the Court of Appeals' ultimate decision that compensatory relief was unavailable under the ordinance.

The Respondent claims that the Complainant's attorney's fees should be limited or denied because the MEOC dismissed the complaint, ruling that the ordinance was not intended to apply to roommate living arrangements. It is true that MEOC dismissed the case and was subsequently reversed by the trial court. However, it is not clear, nor does the Respondent explain, why this is relevant to the matter of reasonable attorney fees. The Complainant was ultimately successful. An error in interpretation of the ordinance on the part of the Commission cannot work to deprive the prevailing Complainant of the attorney's fees portion of her "make whole" remedy.

The Respondent believes that since attorney fees were not awarded by the circuit court, the Court of Appeals, or the Wisconsin Supreme Court, that MEOC is not authorized to award fees incurred in these forums. It is well established that the MEOC can award reasonable attorney fees to a prevailing Complainant. Chung, supra; Harris, supra; Watkins, supra. The Respondent cites no cases which support its position. Further, Complainant's attorney has not included in his fee petition time spent in reviewing the Respondent's unsuccessful petition to the Wisconsin Supreme Court.

The Respondent asserts that the Complainant should not be compensated for fees for work performed on issues where she did not prevail. (This appears to refer to the rejection of compensatory damages by the court of appeals.)

It may be appropriate to reduce an attorney's fees award if the Complainant's success is partial or limited. For example, a Complainant who files a complaint based on race and age discrimination, but prevails only on the race issue, may face a reduction in that portion of the fees expended on the age claim. In this case, however, there was only one basis and the Complainant prevailed. A Complainant is entitled to recover the costs and reasonable attorney's fees on any significant issue on which she or he prevails. To reduce the attorney's fees expended simply because the Complainant was unable to obtain relief for a portion of the damage caused by the discriminatory action would unfairly deny the Complainant the make whole remedy required for prevailing Complainants.

The Respondent contends that the petition for fees is too vague and does not identify time spent on issues on which the Complainant prevailed. Attorney Kelly's itemized statement of services adequately documents the 154.4 hours expended and does so by the tenth of the hour. While we would have preferred more specificity on some items, the information furnished was documented sufficiently to determine the reasonableness of the services provided and determine that the work performed was necessary and not duplicative.

The Respondent argues that because the judgment is joint and several liability between Hacklander-Ready and Respondent Maureen Rowe, the settlement executed with Maureen Rowe on or about December 22, 1994 relieved Hacklander-Ready from liability prior to this date. Thus, fees should relate only to work performed after January 1, 1995.

Hacklander-Ready and Rowe were named separately as Respondents in this action and each chose to resolve the case differently. While a portion of the attorney fees expended in settling with Respondent Rowe are properly deducted (see below), it is unreasonable to carve away almost 80% of the attorney's fees as Respondent suggests, simply because one of the Respondents settled. The work performed prior to the settlement was necessary to ultimately establish liability and was not made irrelevant or duplicative by the settlement.

Alternatively, fees for work performed before the settlement should be reduced by the amount the Complainant was paid in the settlement. While it is unreasonable to ask that the full amount of the settlement be offset against the claimed attorney fees, we agree that attorney fees expended to achieve the settlement with Maureen Rowe are properly deducted. Such fees are commonly factored within the settlement and payment of them again is unwarranted.

ORDER

1. The Respondent is ordered to pay the Complainant's reasonable attorney's fees in the amount of \$23,160 less the reasonable attorney's fees expended in achieving the private settlement with Maureen Rowe. Payment pursuant to this order shall be made within thirty (30) days of this order's becoming final or under terms acceptable to the Complainant and her attorney.
2. The Respondent is ordered to pay the Complainant's reasonable costs in the amount of \$194.64.
3. Complainant is ordered to file a supplementary fees petition which documents and is reduced by the time expended in achieving settlement with Maureen Rowe. The amended petition shall be filed within fifteen (15) days of the undersigned date. The Commission's order will become final upon filing of the amended petition.

Joining in the decision of the Commission are Commissioners Diggles, Fieber, Tomlinson, Turner, Vedder, Washington, Zarate and Zipperer.

Signed and dated this 9th day of February, 1995.

FOR THE COMMISSION

Vicki Washington
President