

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

Kathleen Gardner 2024 Overlook Pass, # 2 Middleton WI 53562 <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> Wal-Mart Vision Center 7202 Watts Rd. Madison WI 53719 <p style="text-align:center">Respondent</p>	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON ATTORNEY'S FEES Case No. 22637
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The Hearing Examiner on March 6, 2001, having found that the Respondent, Wal-Mart Vision Center, discriminated against the Complainant, Kathleen Ann Gardner, on the bases of sex and age in violation of the Madison Equal Opportunities Ordinance, ordered the Respondent to pay the Complainant's reasonable costs and fees associated with bringing this action. On April 13, 2001, Complainant's counsel submitted a petition for costs and fees. On May 1, 2001, Respondent's counsel submitted a response arguing for a reduction in the costs and fees proposed by Complainant's counsel. Based upon the record in this matter, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order as follows:

RECOMMENDED FINDINGS OF FACT

At all times relevant to this proceeding, the Complainant was represented by Sabin S. Peterson. The Complainant first became associated with Mr. Peterson when he represented her in an unemployment compensation proceeding relating to her termination by the Respondent in the present matter. Subsequent to this initial representation, Mr. Peterson relocated his law practice from Madison, Wisconsin to Minneapolis, Minnesota. The Complainant, after consulting with plaintiff's counsel in the Madison area, contacted Mr. Peterson for representation in the present matter.

At all times relevant to these proceedings, the Respondent was represented by Brian A. Price of Gonzalez, Saggio and Harlan, a law firm located in Milwaukee, Wisconsin.

The Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order issued on March 6, 2001 provided that the Complainant could submit a petition for her costs and fees including a reasonable attorney's fee upon the Recommended Findings of Fact, Conclusions of Law and Order becoming final.

Peterson represented the Complainant at an hourly rate of \$150 per hour throughout this action. This fee was equivalent to that charged for services while he was employed with Axley Brynelson. It was the same hourly rate he charged in his private practice in Minneapolis, Minnesota.

Peterson is an experienced trial attorney whose practice emphasized representation of employers in discrimination and labor related matters. At the time he entered into representation of the

Complainant, he had at least nine years of such experience in addition to three years of judicial clerkship experience.

Peterson's records indicate that he put in 170.85 hours of billable time in connection with his representation of the Complainant.

Peterson expended \$986.06 in costs during his representation of the complainant. The majority of these costs are for travel-related expenses, depositions and postage. Peterson made no claim for meals, lodging or telephone expenses.

\$2,194.34 of Peterson's requested attorney's fee were related to responding to a motion to compel discovery filed by the Respondent.

\$600 requested by Peterson cannot properly be accounted for.

The Complainant received a substantial benefit as a result of the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order in this matter. That benefit is not appreciably diminished by her lack of economic benefit.

CONCLUSIONS OF LAW

An attorney's hourly rate is presumptively reasonable for purposes of a fee petition.

The Complainant was entitled to retain any attorney she wished to represent her and was not limited to attorneys in the Madison area.

Complainant should not be enriched by compensation for time expended in responding to Respondent's successful motion to compel discovery.

Complainant should not be compensated for hours for which they cannot be accounted.

The Complainant's costs and fees may not be reduced because she did not obtain all of the relief she sought during hearing.

ORDER

The Respondent shall, within 30 days of this order's becoming final, pay to the Complainant \$22,987.50 for a reasonable attorney's fee relating to the bringing of this complaint.

The respondent shall, within 30 days of this order's becoming final, pay to the Complainant the sum of \$831.72 as compensation for costs expended in connection with bringing this action.

MEMORANDUM DECISION

Once a finding of discrimination becomes final, the prevailing Complainant is entitled to recover his or her reasonable costs and fees including a reasonable attorney's fee in bringing the Complaint. The test for reasonableness is whether hours or expenses were necessary to obtain the anticipated outcome and that they were not duplicative of other charges. Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. 07/29/93), Meyer v. Purlie's Cafe South, MEOC Case No. 3282 (Ex. Dec. 05/20/95), Sprague v. Hacklander-Ready, MEOC Case No. 1462 (Comm. Dec. 02/09/1998).

In calculating the reasonableness of an attorney's fee, his or her customary charge is presumed reasonable. Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. 07/29/93). The \$150 per hour charged by Peterson is also consistent with an hourly rate approved by the Hearing Examiner and the Commission for other attorneys with similar qualifications. Sprague v. Hacklander-Ready, MEOC Case No. 1462 (Comm. Dec. 02/09/1998), Balch v. Snapshots Inc. of Madison, MEOC Case No. 21730 (Ex. Dec. 12/09/93), Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. 07/29/93), Harris v. Paragon Restaurant Group, et. al., MEOC Case NO. 20947 (Comm. Dec. on fees 02/27/95). The burden of demonstrating the inappropriateness of an attorney's hourly rate falls squarely on the Respondent.

An attorney's fee award is calculated by taking the attorney's reasonable hourly rate and multiplying it by the hours reasonably expended by the attorney in representation of the Complainant. In the present matter, the Respondent does not seriously challenge Peterson's hourly rate, but makes several objections to specific hours and expenses for which Peterson seeks compensation.

First, the Respondent asserts that Peterson should not be compensated at his hourly rate and for his travel expenses related to travel between Minneapolis and Madison. It is the Respondent's contention that the Complainant could have and should have obtained local counsel to represent her interests. As an alternative, the Respondent argues that compensation for Peterson's travel should be limited to that amount that would have been charged to Respondent's counsel in traveling from Milwaukee to Madison.

The Hearing Examiner finds no basis in the record or the law for the position taken by the Respondent. Any party before the Commission may be represented by whomever they wish. The only limitation with respect to attorneys is that they must be licensed to practice law in the state of Wisconsin. At all times relevant herein, Peterson was so licensed. Even if Peterson were not licensed to practice law in the State of Wisconsin, it appears that under the rules of the Commission, he could have represented the Complainant as a lay representative. The only effect that this might have had would be in recognition of the level of Mr. Peterson's compensation.

It seems clear from the record before the Hearing Examiner that the trips to Madison for which Mr. Peterson seeks compensation were reasonably necessary in connection with his representation of the Complainant. Mr. Peterson seeks compensation for four trips, one of which was to initially review the Commission file at the beginning of his representation, two were made in connection with depositions initiated by the Respondent, and the fourth was for the actual hearing. Three of these trips are reasonable and do not represent overreaching or padding of the expenses on the part of the Complainant. The fourth trip was necessary, i.e. to attend a deposition, though perhaps could have been avoided by a greater level of cooperation in discovery. As a result, mileage and hourly fees related to this trip (\$154.34 and \$600) have been eliminated.

While novel, the Respondent's contention that Peterson's compensation for his trips to Madison should be limited to an amount equivalent to that expended by Respondent's counsel has no basis in fact or law. Peterson was deprived of the opportunity to utilize his time for other remunerative efforts while in transit and while engaged on behalf of the Complainant while here in Madison. It would be arbitrary and capricious for the Hearing Examiner to limit Peterson's fees as requested by the Respondent. As Complainant chose to be represented by counsel from Minneapolis, Respondent could have easily chosen to be represented by in-house counsel from Arkansas, or by retained counsel from anywhere in the United States. Simply because it chose to be represented by counsel from Milwaukee provides no basis for limiting the Complainant's choice of counsel. The Respondent knew early on of the Complainant's choice and was capable of making calculations of potential risk and

loss should the Complainant have prevailed. Simply because the Respondent lost does not afford any reason for limiting the award of attorney's fees.

Second, the Respondent contends that Complainant's counsel expended more time on routine tasks than was warranted and should not be compensated for that time. Specifically, the Respondent asserts that Peterson expended more time than reasonable for preparation of discovery, in hearing preparation and for preparation on writing of post-hearing briefs. On this record, the Hearing Examiner is unable to determine whether Peterson expended more time than necessary in these tasks. Mr. Peterson is clearly an experienced attorney and may well have a different style or approach than that of Respondent's counsel. Without some evidence presented by Respondent in support of its contention that the time claimed by Peterson was excessive, the Hearing Examiner will not second-guess the amount of Peterson's time expended in connection with each of those tasks. Had the Respondent wished to seriously challenge the hours expended by Peterson, it should have presented affidavits from independent counsel who, after reviewing the record, could offer an opinion as to the appropriateness of those hours.

Third, the Respondent asserts that it should not be required to pay for the time necessarily expended by Peterson to respond to its motion to compel discovery. It asserts that had Peterson or his client met their responsibility in responding to discovery, the time would not have been necessary.

Under the circumstances of this case, the Hearing Examiner is inclined to agree with the Respondent. The discovery issue in this case was not one of some unusual nature or involving privilege or other unusual defenses. While the Complainant was not being unusually obdurate, had she been somewhat more forthcoming, the fees charged by Complainant would not have been necessary. Accordingly, the Complainant's fees and costs award will be reduced by \$2,194.34.

Fourth, the Respondent points to two items of inaccurate accounting for tasks incurred. First, the Respondent contends that the Complainant should not be compensated for 4 hours of time on March 16, 1998, because the entry makes no sense in relationship to when events must have occurred. Similarly, the Respondent points to 1.3 hours relating to review of the Respondent's discovery motion. These 1.3 hours were tallied in connection with the Respondent's motion to compel discovery and will not be separately deducted here. It seems likely that the Complainant most likely expended the time for which he seeks compensation but has failed to properly set forth the dates on which the work occurred. It is the Complainant's responsibility to set forth an accurate, contemporaneous accounting of his time and expenditures. Meyer v. Purlie's Cafe South, MEOC Case No. 3282 (Ex. Dec. 05/20/95). These entries call into question at least to the extent of these items, the accuracy of the account. Accordingly, Peterson's fee award will be reduced by the amount of \$600.00 as a result of the failure to properly account for his time and expenditures.

Finally, separate from the specific accounting and "reasonableness" issues, the Respondent seeks a one-third reduction in the award of attorney's fees contending that the Complainant's limited outcome fails to support an attorney's fee award that greatly exceeds the monetary recovery of the Complainant. The Hearing Examiner disagrees.

The Commission has on numerous occasions recognized that there is a significant benefit, not only to the complainant, but to society as a whole, when a discriminator is called to justice. Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. 07/29/93), Sprague v. Hacklander-Ready, MEOC Case No. 1462 (Comm. Dec. 02/09/1998), Meyer v. Purlie's Cafe South, MEOC Case No. 3282 (05/20/95). These cases rely on the court's finding in Watkins v. LIRC, 117 Wis.2d 753, 345 N.W.2d 482 (1984), recognizing that even where there is no monetary award, a finding of discrimination is sufficient to

support an award of attorney's fees. On the basis of these cases alone, the Hearing Examiner would make an award of the fees requested by Peterson as indicated above. As the Complainant points out, this case could have and should have been tried on fairly simple, straightforward theories. It was the Respondent's introduction of multiple and somewhat unique theories of defense that resulted in much of the expenditures claimed by Peterson. While the Respondent certainly has the right to defend itself in whatever way it deems most appropriate, it must recognize that its actions and theories of defense may have economic consequences to it should they fail.

The ordinance is typical of many laws enacted to further social justice and welfare. It relies on public attorneys general to bring complaints to enforce the rights of individuals and to further its overall goal of reducing and eliminating discrimination. To this end, there is a strong public purpose in encouraging and pursuing claims with even modest economic outcomes in order to fulfill its goals. To reduce an attorney's fees award because of limited economic success would have a chilling effect on the willingness of attorneys to bring complaints as intended by the ordinance. The Hearing Examiner will not make the reduction requested by the Respondent. Accordingly, Complainant's counsel shall receive \$22,987.50 in fees, which is calculated at the rate of \$150.00 dollars per hour for 153.25 hours, and \$831.72 dollars for costs expended in this action.

Signed and dated this 1st day of June, 2001.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner