STATE OF WISCONSIN PERSONNEL COMMISSION

KATHY A. WARREN,

Appellant/Complainant,

v.

Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES, [DHFS][1]

Respondent.

Case Nos. 92-0750-PC
92-0234-PC-ER

DECISION
AND
ORDER

The decision of these cases was issued as an Interim Decision and Order to permit the petitioner an opportunity to file a motion for fees and costs. Such a motion was filed and it is ruled upon below. There are no other matters remaining to be decided by the Commission here and the Interim Decision and Order of the Commission, together with this ruling, becomes the final Decision and Order of the Commission in these cases.

The purpose of this ruling is to decide the motion for attorneys' fees and costs filed by appellant/complainant (hereinafter "petitioner") . The parties were permitted to file arguments in regard to this motion and the final argument was filed on August 28, 1996.

The underlying appeal and complaint here relate to respondent's involuntary demotion of petitioner. It is undisputed that, after unsuccessful settlement negotiations, respondent admitted liability on January 13, 1995, and the issue of remedy was heard and decided by the Commission.

The authority of the Commission to award fees and costs in a situation such as the one under consideration here, i.e., a consolidated civil service

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[1] Pursuant to the provisions of 1995 Wisconsin Act 27 which created the Department of Health and Family Services, effective July 1, 1996, the authority previously held by the Secretary of the Department of Health and Social Services with respect to the position that is the subject of this proceeding is now held by the Secretary of the Department of Health and Family Services.

appeal and equal rights complaint, was addressed by the Commission in *Schilling v. UW*, 90-0064-PC-ER, 90-0248-PC, 10/1/92, as follows:

> This matter involves consolidated cases. Case No. 90-0248-PC is an appeal pursuant to §230.44(1)(c), Stats., of a discharge. Case No. 90-0064-PC-ER is a Fair Employment Act (FEA) complaint of handicap discrimination pursuant to §§230.45(1)(b), 111.375(2), Stats. Therefore, there are two potential bases for an award. First, §227.485(2), Stats. provides for an award of costs in certain cases unless it is determined that "the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust." Second in Watkins v. Labor and Industry Review Commission, 117 Wis. 2d 753, 345 N.W. 2d 482 (1984), the Wisconsin Supreme Court held that the FEA provides authority for the award of reasonable attorney's fees to a prevailing complainant.
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> Respondent contends that the enactment of §227.485, Stats., in effect pre-empts the authority to award fees under Watkins and that the process and standard set forth in §227.485 now provides the exclusive means for the award of fees in an FEA case. When the EAJA was enacted in 1985, there were a number of fee shifting provisions in force, including the implied provision the Supreme Court concluded was in the FEA. The Commission is unaware of any precedent for the proposition that the EAJA has been intended to supersede existing provisions. Rather, the legislative intent behind the EAJA apparently was to provide a means for parties to proceedings involving state agencies that were not already subject to some form of specific fee shifting provision to recoup their costs under certain cirumstances. In Watkins, the Court discussed the particular purposes under the FEA that would be served by interpreting the FEA as providing authority for the recovery of attorney's fees. This would permit the complainant to be "made whole," would discourage discriminatory practices in employment by enabling complainants to act as "private attorney[s] general," would discourage employers from discirminating, and would enable complainants to be represented by counsel and thus "fully enforce and give meaning to the rights created by the Act." 117 Wis. 2d at 764-65. All of these purposes would be undermined if the EAJA were applied in a way that limited the award of attorney's fees to cases where the employer had no reasonable basis in law and fact for its action, albeit it violated the FEA.
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> Because the Commission concludes that complainant is entitled to reasonable attorney's fees under the FEA, it will not address the issue of whether respondent's failure to have responded to complainant's petition for fees within the period set forth under §227.485, Stats., constitutes an effective default on the matter of costs, as complainant contends. . . .

Both the Commission and Wisconsin courts have looked to cases decided under the Federal Civil Rights Acts and Title VII for guidance when the applicable standard is the award of "reasonable fees and costs" to a "prevailing party" as it would be here under the standard enunciated in *Watkins*. *See, e.g., Board of Regents v. Personnel Commission (Hollinger)*, 147 Wis. 2d 406 (Ct. App. 1988).

In *Hensley v. Eckerhart*, 461 U.S. 424, 31 FEP Cases 1169 (1983), the U.S. Supreme Court, in ruling on a petition for fees and costs under the Civil Rights Attorney's Fee Awards Act of 1976 (§42 U.S.C. 1988) which authorizes federal district courts to award reasonable attorney's fees to prevailing parties in civil rights litigation, made it clear that the petitioner has the burden of proof and that the proper factors to apply are the following:

1. the time and labor required;
2. the novelty and difficulty of the questions;
3. the skill requisite to perform the legal service properly;
4. the preclusion of employment by the attorney due to acceptance of the case;
5. the customary fee;
6. whether the fee is fixed or contingent;
7. time limitations imposed by the client or the circumstances;
8. the amount involved and the results obtained;
9. the experience, reputation, and ability of the attorneys;
10. the "undesirability" of the case;
11. the nature and length of the professional relationship with the client; and
12. awards in similar cases.

The Court also cited with approval cases in which fees were not reduced simply because the rights involved may be nonpecuniary in nature and those in which fees were awarded which were adequate to attract competent counsel but which did not produce windfalls to attorneys; and made it clear that the level of a plaintiff's success is relevant to the amount of fees to be awarded.

In the context of the instant cases, the primary inquiry centers on the degree of success attained by petitioner. In *In re Burlington Northern*, 833 F.2d 430, 53 FEP Cases 112 (7th Cir. 1987), the Seventh Circuit Court of Appeals, in considering a motion for fees and costs in a Title VII case, stated as follows:

> The district court did, however, analyze lead counsels' fee award under the second situation described by the *Hensley* test that applies where "a plaintiff has achieved only partial or limited success," even where "the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." 461 U.S. at 436. We have explained previously that fee awards falling within *Hensley's* second situation should be analyzed by the district court in three steps: first, "the district court should assess the results obtained by the litigation"; second, "the district court should next measure the extent of plaintiffs' success by comparing the results obtained from the lawsuit with the relief plaintiffs sought"; and finally, "the district court is to structure an award that is reasonable in light of the plaintiffs' success." *Illinois Welfare Rights Organization v. Miller*, 723 F. 2d 564, 568, 569 (7th. Cir. 1983).

It is often difficult in litigation such as that here to separate the successful and unsuccessful contentions advanced by a petitioner. Courts have achieved such a separation in some instances by separating the litigation into its primary stages, relating each item in the application for fees to one of these stages, determining the degree (often in terms of a percentage) of success the petitioner achieved in each stage, and then applying the percentage or other measuring tool for each stage to the number of hours in the application related to that stage. *See, e.g., Cowan v. Prudential Ins. Co., 728 F. Supp. 87,* 52 FEP Cases 565 (D.C. Conn. 1990); *Zabkowicz v. West Bend Co.*, 36 FEP Cases 1540 (E.D. Wis. 1985).

Here, the litigation can logically be separated into three stages: the liability stage, the remedy stage, and the fees and costs stage. It would have to be concluded, based on respondent's admission of liability, that petitioner achieved full success in the liability stage. The fees in the application attributable to the liability stage, i.e., the time period on and before January 13, 1995, total $8,130. Respondent has not argued that the number of hours in the application attributable to this stage are unreasonable in view of the type of proceedings or the stage of the proceedings at the time or in view of the degree of success achieved at the liability stage, and it is not apparent from the face of the application that this number of hours is unreasonable. Since respondent has not challenged the hourly rate applied to these hours, it is concluded that $8,130 should be awarded in fees for the liability stage.

In regard to the remedy stage, petitioner did not prevail on any disputed issue. Petitioner contended at the remedy stage that she should be restored to the Smith position, that the Unit 3 PA Sup position she had been offered was

not substantially equivalent to the position from which she had been involuntarily demoted, and that back pay accrual extended beyond October 7, 1994. The Commission concluded in its Interim Decision and Order of May 14, 1996, that petitioner had failed to sustain her burden of proof in regard to any of these three contentions. As a consequence, it is concluded that the portion of the claimed fees attributable to the remedy phase, i.e., those fees incurred after January 13, 1995, should not be awarded here. These fees total $6,097.50.

The remaining fees in the application relate to the hours expended in presenting and arguing the application itself. In *In re Burlington Northern*, 833 F. 2d 430, 53 FEP Cases 112 (7th Cir. 1987), the Seventh Circuit Court of Appeals made it clear that the award of fees applies to that part of an application relating to the time expended seeking fees and costs. In the instant cases, petitioner has failed to clearly specify which hours in the application were expended working on the issue of fees and costs, and it is petitioner's burden to so specify. The application does list three instances in which the application for fees and costs is mentioned. In each of these instances, however, the description of how the time was expended also mentions a purpose or purposes other than that relating to fees and costs. As a result, it will be assumed for our purposes here that only half the time in each instance was devoted to the fees and costs issue. These three instances and their billing totals are:

1/22/96	$62.50
3/7/96	$100.00
7/2/96	$62.50

Half of the total would be $112.50. However, it should also be noted that petitioner was not totally successful in regard to the contentions she advanced in regard to her application for fees and costs, i.e., although she claimed that all fees presented in her application should be awarded, the Commission has concluded that only those fees related to the liability stage should be included in the award. As a result, the amount of fees attributable to this stage will be reduced by half for a total of $56.25.

Respondent has not disputed any of the claimed costs so they are awarded in the amount of $146.40.

Respondent argues that petitioner's fee award should be limited to $5,000, i.e., the amount included in a settlement offer to her in October of 1994. However, respondent fails to relate this argument to the criteria established by

Hensley or its progeny. Respondent cites *Marek v. Chesny*, 473 U.S. 1, 87 L. Ed. 2d 1, 105 S.Ct. 3012 (1985) in support of its argument. However, *Marek* is clearly distinguishable in that it involved Rule 68 of the Federal Rules of Civil Procedure which sets forth consequences, including consequences relating to fees, if settlement is offered and rejected within the scope of the rule. In a case more similar to the one at issue here, the Seventh Circuit Court of Appeals affirmed the district court's denial of a requested fee in its entirety, noting that one of the reasons for the denial of fees by the district court was "counsel's unreasonable refusal to settle the case earlier." *Vocca v. Playboy Hotel of Chicago, Inc.*, 686 F. 2d 606, 29 FEP Cases 1139 (1982). It is not possible on the basis of the record here to conclude that petitioner's refusal to settle prior to January 13, 1995 (during the liability stage) was unreasonable; and, since the Commission has already concluded that the award should not include fees incurred during the remedy stage, an inquiry as to whether it was reasonable for petitioner to refuse settlement offers during this stage would serve no useful purpose.

In view of the above, it is not necessary to address the arguments relating to the award of fees and costs pursuant to §227.485, Stats.

Finally, petitioner mentions again in her letter to the Commission of July 10, 1996, the following:

> This is to advise you that Ms. Warren's current wage rate is appropriate, noting however our position that Ms. Warren should have received a 3% wage increase in June of 1992, which we assert was an inseparable part of the demotion which has been reversed. With the understanding that we will challenge on review the failure to grant the 3% wage increase, which has caused reduced subsequent wage adjustments, there are not further issues with respect to Ms. Warren's current wage rate.

The 3% wage increase referenced by petitioner has been represented by petitioner to be a merit increase which she was denied in June of 1992 based on an unfavorable performance evaluation. Petitioner was demoted in August of 1992. The failure of petitioner to receive this 3% merit increase was not mentioned in her charge of discrimination nor was it the subject of any of the evidence received at hearing in this matter. This issue has not been before the Commission at any time, so petitioner's reference to it in the context of these cases and as the subject of further appeal remains puzzling.

ORDER

The motion for fees and costs is granted in part and denied in part consistent with the above ruling. Respondent is to pay petitioner $8,332.65 in fees and costs. The Interim Decision and Order, together with this ruling, becomes the final Decision and Order of the Commission in this case.

Dated: October 2, 1996 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:lrm

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate

circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats. 2/3/95