STATE OF WISCONSIN PERSONNEL COMMISSION

CURTIS ALLISON,
Complainant,

v.

Secretary, DEPARTMENT OF REVENUE,
Respondent.

Case No. 98-0190-PC-ER

RULING ON MOTION FOR COSTS

This matter is before the Commission as a complaint of discrimination based on race with respect to a decision not to hire the complainant for a Retailer Marketing Specialist position. Respondent sought to take complainant's deposition. Complainant did not appear at the scheduled deposition and respondent seeks costs. Additional undisputed facts relevant to the motion are set forth below. The parties have filed briefs.

FINDINGS OF FACT

1. Complainant resides in Milwaukee.

2. Complainant appeared *pro se* in this matter until a date after March 30, 1999.

3. On March 15, 1999, respondent sent a Notice of Deposition to complainant's home address. The notice stated that complainant's deposition would be taken on March 30, 1999, at 1:00 p.m. in the offices of respondent's attorney, in Madison.

The notice stated, in part:

> This Notice will operate as a subpoena, pursuant to Wis. Stat. §804.05(1) to compel attendance of Curtis Allison at the aforementioned time and place.
>
> The deposition will be held before a notary public or other officer authorized to administer oaths. The deposition will continue from day to day until completed.

4. On March 17, 1999, respondent sent complainant a letter pertaining to certain exhibits that were subject to the Commission's Protective Order issued on March 10, 1999. At the conclusion of the letter, respondent noted:

> I look forward to meeting you at your March 30, 1999 deposition at our offices.

5. Respondent also telephoned the complainant on the afternoon of Friday, March 26, 1999, to remind him about the March 30th deposition. A woman answered the telephone and informed respondent that complainant was not at home. Respondent left a message with her to remind complainant that his deposition would be taken at 1:00 p.m. on March 30, 1999, in the offices of respondent's counsel in Madison. Counsel also left his direct telephone number at work for complainant to call if he had any questions or difficulties in attending the deposition.

6. Respondent's counsel did not receive a telephone call or other communication from complainant indicating he could not attend the March 30th deposition or that he needed to reschedule the deposition.

7. Respondent hired a court reporter and reserved conference room space for taking complainant's deposition during the afternoon on March 30th.

8. The court reporter and respondent's Lottery Division Director appeared at the scheduled deposition at 1:00. When complainant had not appeared by 1:25 p.m., respondent's counsel telephoned complainant's residence. A woman answered the telephone. Respondent's counsel asked for complainant to come to the telephone. After approximately one minute, complainant answered the telephone.

9. Respondent's counsel reminded complainant of the scheduled deposition. Complainant acknowledged that he had received the notice of deposition, but he had simply put it in a box in the event he would retain an attorney in the future regarding the case. Respondent's counsel responded by noting that the notice of deposition operated as a subpoena under Wisconsin law, and that complainant had an obligation to at-

tend the deposition. Complainant responded that he would not be attending the deposition. Complainant did not provide any other basis for failing to attend the deposition.

10. On March 31, 1999, respondent sent a Second Notice of Deposition for April 8, 1999. That deposition was postponed and respondent issued a Third Notice of Deposition for April 22, 1999. Complainant appeared at that deposition.

OPINION

Respondent requests the Commission issue an order under §804.12(4), Stats., for reimbursement of reasonable expenses as a consequence of complainant's failure to attend his deposition on March 30, 1999. Pursuant to §804.12(4):

> If a party . . . fails (a) to appear before the officer who is to take the party's deposition, after being served with a proper notice . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others, it may take any action authorized under sub. (2)(a)1., 2. and 3. In lieu of any order or in addition thereto, the court shall require the party failing to act . . . to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Respondent contends there was no substantial justification or other circumstances that would make such an award unjust.[1]

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[1] Although the respondent is not requesting any of the sanctions set forth in §804.12(2)(a)1., 2. and 3., those provisions read:

> 1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
> 2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;
> 3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

There are really two questions raised by this motion. The first is whether the Commission is effectively required by §804.12(4) to consider awarding "reasonable expenses" where there is a failure to appear at a properly noticed deposition of a party. If the first question is answered affirmatively, the second is whether the complainant's failure to appear on March 30th "was substantially justified" or if "other circumstances make an award of expenses unjust."

I. Is the Commission required to perform a "reasonable expenses" analysis?

The key statutory language in answering this question is as follows: "In lieu of any order or in addition thereto, the court *shall* require the party failing to act . . . to pay the reasonable expenses." (emphasis added)

The Commission is unaware of any reported case interpreting this language. However, a related provision was interpreted in *Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 146, 502 N.W.2d 918 (Ct. App., 1993):

> Solsrud asserts for various reasons that the trial court erred by imposing sanctions under sec. 804.12(3), Stats. That section provides:
>
> > If a party fails to admit the genuineness of any document or the truth of any matter as requested [in a request for admissions], and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in the making of that proof, including reasonable attorney's fees. The court *shall make the order unless if finds that* (a) the request was held objectionable pursuant to sub. (1), or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (d) there was other good reason for the failure to admit. (Emphasis added.)
>
> Before addressing Solsrud's assertions more fully, we must interpret the statute's language and determine whether it applies to this case. . . . The word "shall" is presumed to be mandatory unless a different construction is necessary to carry out the legislature's clear intent. *In re C.A.K.*, 154 Wis. 2d 612, 521, 453 N.W.2d 897, 901 (1990). We conclude that in

> sec. 804.12(3), Stats., the word "shall," used in reference to the court ordering reasonable expenses and attorney's fees, is mandatory, not directory, for the following reasons.
>
> First, we note that the legislature, in enacting sec. 804.12, Stats., authorizing the imposition of sanctions for various discovery violations, differentiated between the sanctions by making some discretionary with the trial court through the use of the word "may"[2] and using the word "shall" in sections providing for other sanctions. The legislature using directory language to authorize some sanctions and presumptively mandatory language in providing for others, evinces its intent to treat the sanctions differently. *See* Graczyk, *The New Wisconsin Rules of Civil Procedure*, ch. 804, 59 Marq. L. Rev., 463, 521 (1976).
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> Second, because the language of sec. 804.12(3), Stats., is almost identical to the language in Fed. R. Civ. P. 37(c), federal caselaw construing that section is instructive. The sixth circuit ruled in *Bradshaw v. Thompson*, 454 F.2d 75, 81 (6th Cir. 1972), that "[Rule 37(c)] *requires* the Court to award expenses including reasonable attorney's fees to a party whose request for the admission of the truth of any matter under Rule 36 is denied and who thereafter proves the truth of the matter, unless any one of the four conditions is found to exist." (Emphasis added.) The plain language of sec. 804.12(3) requires the court to award expenses upon the motion of the party requesting the admissions if (1) admissions were properly requested, (2) the party upon whom the request was served failed to admit the genuineness of a document or the truth of a matter, (3) that was subsequently proved genuine or true and (4) the court finds that none of the four exceptions listed in the statute exist.

[3] *See* subsec. (2), failure to comply with discovery order, and subsec. (4), failure to attend the party's own deposition, serve answers to interrogatories, respond to request for inspection or supplement responses when obligated to do so under sec. 804.01(5), Stats.

The same distinction between "may" and "shall" that the court noted in *Solsrud* is also present in §804.12(4), Stats. By using "may," the statute allows the court to exercise its discretion as to whether to "take any action authorized under sub. (2)(a)1., 2. and 3." In contrast the statute requires the "party failing to act" to "pay reasonable expenses" under certain specified conditions.

Just as in *Solsrud*, the existence of comparable language in the Federal Rules of Civil Procedure provides additional guidance in interpreting §804.12(4), Stats. Pursuant to Fed. R. Civ. P. 37(d):

> If a party . . . fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. . . . In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The expense shifting sanctions found in this provision has been explained in Moore's Federal Practice 3D, 37-164, as follows:

> Rule 37(d) treats monetary (expense shifting) and non-monetary sanctions quite differently. The Rule gives district courts a wide range of discretion in determining whether to impose non-monetary sanctions, and the type of non-monetary sanction to be imposed *(see* §37.96[1]). In sharp contrast, expense shifting sanctions are mandatory, unless the party to be sanctioned can show that its "failure was substantially justified or that other circumstances make an award of expenses unjust." (footnote omitted)

For similar reasons to those explained in *Solsrud*, the Commission concludes that the plain language of sec. 804.12(4) requires the court to award expenses upon the motion of the party scheduling the deposition if (1) the deposition was properly noticed, (2) the failure to appear was not substantially justified; and (3) other circumstances do not make an award of expenses unjust.

The Commission's authority under ch. 804, Stats., is premised on §PC 4.03, Wis. Adm. Code, which provides:

> All parties to a case before the commission may obtain discovery and preserve testimony as provided by ch. 804, Stats. For good cause, the commission or the hearing examiner may allow a shorter or longer time for discovery or for preserving testimony than is allowed by ch. 804, Stats. For good cause, the commission or the hearing examiner may is-

> sue orders to protect persons or parties from annoyance, embarrassment, oppression or under burden or expense, or to compel discovery.

The authority of the Commission relating to discovery was limited in *Dept. of Transp. v. Wis. Pers. Comm.*, 176 Wis. 2d 731, 500 N.W.2d 664, (1993), where the Wisconsin Supreme Court concluded the Commission lacked the authority to order a state agency to pay costs and attorney's fees related to a discovery motion:

> Costs, including attorney's fees, may not be taxed against the state without express statutory authorization. This rule is well established. We find no statute that expressly authorizes the Commission to tax costs against the DOT in a discovery-related motion. . . .
>
> Section 804.12(1)(c) does expressly authorize expenses, including attorney's fees. It does not, however, expressly authorize the assessment of those expenses against the state. . . .
>
> The question is not whether we think it would be a good idea to award costs and attorney's fees in this case. Express statutory authorization is required in order to tax costs and attorney's fees against the state. The legislature has expressly authorized costs to be taxed against the state under other circumstances. *See* secs. 227.485 and 814.245, Stats. If the legislature wishes costs and attorney's fees to be awarded in cases such as this, it can do so again. We hold that in this case the Commission does not have the authority to tax costs and attorney's fees against the state. 176 Wis. 2d 731, 736-38 (citations omitted)

The limitation in the *DOT* case is clearly not involved in the present case. The language of that decision in no way suggests that the Commission lacks the authority to authorize expenses against a party other than the state.

One consequence of §PC 4.03, Wis. Adm. Code, is that the mandatory language found in §804.12(4), Stats., for awarding expenses, must be applied by the Commission where there has been a failure to make discovery, the failure is by a party other than the state, and a motion for reasonable expenses has been filed.

II. Was complainant "substantially justified" or are there "other circumstances"?

"Reasonable expenses" are inappropriate if the Commission "finds the failure was substantially justified or that other circumstances make an award of expenses unjust." Sec. 804.12(4), Stats. The burden of demonstrating substantial justification or other circumstances is on the party who failed to respond to the discovery request. Moore's Federal Practice 3D, 37-166, 169.

Complainant raises two theories as to why an award of reasonable expenses would be inappropriate. First, he notes that he appeared *pro se* at the time of the March 30th deposition and prior to that deposition. Such status may be relevant when reaching a determination not to award expenses:

> [C]ourts also might conclude that an award of expense shifting sanctions would be unjust when the party who lost the motion was proceeding pro se, was not sophisticated about the law, and whose position appeared to have been the product of a good faith misunderstanding of his or her rights and obligations pursuant to the discovery rules. Moore's Federal Practice 3D, 37-169

While the Commission agrees that a party's *pro se* status may be a factor in determining that expenses would be unjust, mere status as a *pro se* litigant is not an automatic bar to awarding reasonable expenses. Here, complainant, who was represented by counsel at the time the respondent's motion for reasonable expenses was briefed, argued:

> The complainant in this case, at the time he was scheduled for his deposition, was appearing pro-se on his complaint of discrimination. The courts and administrative agencies have typically afforded a great deal of flexibility and deference to pro-se appellants. This is due to the complainant's lack of knowledge of the law, and the resulting responsibilities, particularly surrounding procedural issues. Mr. Allison's failure to appear for his deposition on March 30 was simply a complainant not understanding the importance of his appearing for his deposition and not understanding the consequences of his failure to appear. Until Mr. Allison had a chance to receive counsel regarding those aspects of the discovery process, (by the Commission or his own retained counsel), sanctions are inappropriate.

The problem with complainant's argument is that respondent not only served him with a copy of the notice of deposition, counsel for respondent also mentioned the deposition in another letter and called him to specifically remind him in advance of the deposition. As set forth in Finding 9, complainant acknowledged receipt of the notice, but stated he had simply put it into a box in the event he would retain an attorney in the future. Complainant does not contend that he was unaware he was required to appear for the deposition, he merely says that he did not understand the importance of appearing and he did not understand the consequences of not appearing.

While there may be many circumstances under which it would be unjust to make an award of expenses against a *pro se* party, they are not present here given the efforts by respondent's counsel to insure complainant's presence at the March 30th deposition.

Complainant also argues that the imposition of sanctions "would serve no useful purpose," but "would be punitive in nature" because the complainant subsequently did appear for his deposition on a later date of April 22nd. Acceptance of this argument would mean that a complainant would have a free pass to ignore the first notice of deposition as long as s/he appeared as a consequence of the second or third notice. This argument is inconsistent with the clear statutory indication that reasonable expenses are to be paid absent substantial justification or other circumstances.

ORDER

Because the complainant has failed to demonstrate substantial justification or other circumstances so as to make an award unjust, respondent's motion for reasonable expenses under §804.12(4), Stats., is granted. Respondent is directed to file documentation setting forth its reasonable expenses, including attorney's fees.

Dated: July 20, 1999 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner