

STATE OF WISCONSIN

PERSONNEL COMMISSION

**CURTIS ALLISON,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
REVENUE,**  
*Respondent.*

**RULING ON  
MOTION FOR  
REASONABLE  
EXPENSES**

Case No. 98-0190-PC-ER

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. In a ruling dated July 20, 1999, the Commission granted respondent's motion for reasonable expenses under §804.12(4), Stats., and directed respondent to file documentation setting forth its reasonable expenses, including attorney's fees. Respondent subsequently filed a motion seeking \$3,788.45 for reasonable expenses, including attorney's fees. The parties have filed briefs.

#### FINDINGS OF FACT

1. Respondent is represented by the firm of DeWitt Ross & Stevens at an agreed upon rate of \$150 per hour.
2. As a consequence of complainant's failure to appear at a deposition on March 30, 1999, counsel for respondent spent the following time on this matter:
  - a. 4 hours on March 30, 1999, to attend the scheduled deposition, speak with complainant on the telephone regarding his failure to attend and to prepare a motion, memorandum and affidavit to dismiss or compel discovery;
  - b. 1.8 hours on March 31<sup>st</sup> to review and edit the motion, memorandum and affidavit;

- c. .75 hours on April 23<sup>rd</sup> to prepare a letter to the examiner regarding the motion;
  - f. .2 hours on April 28<sup>th</sup> to review correspondence from the Personnel Commission and confer;
  - g. .3 hours on May 4<sup>th</sup> to prepare for a conference on May 4<sup>th</sup>;
  - h. .3 hours on May 6<sup>th</sup> for a conference with the complainant and a representative of the Personnel Commission;
  - i. 19.8 hours on May 18 and 19, June 7, 9, 10 and 11, 1999, to research, prepare and edit respondent's reply brief. This total included 4.25 hours of a law clerk at the rate of \$60 per hour.
3. Respondent also spent \$60.65 for the court reporter to appear on March 30<sup>th</sup> and \$37.80 on March 31<sup>st</sup> to photocopy exhibits and pleading.
4. Complainant appeared *pro se* in this matter until a date after March 30, 1999, i.e., until after the point that complainant failed to appear for the deposition.

#### OPINION

The question before the Commission is to determine respondent's "reasonable expenses" under §804.12(4), Stats: "[The Commission] shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure [to appear for the deposition.]"

In his brief, complainant suggests that reasonable expenses for respondent should amount to \$75.00, which represents the "30 minutes of time waiting for Mr. Allison to appear on 3/30/99." This sum fails to reflect the costs of the court reporter on March 30<sup>th</sup>. It also fails to take into account the steps taken by respondent to seek sanctions for complainant's failure to appear, which may appropriately generate expenses that were "caused by" complainant's failure to appear.

Complainant also appears to contend that, given the circumstances of the case, no expenses should be awarded:

Mr. Allison has spent his entire working career in sales. His level of educational achievement is a high school diploma with some college credits. He is certainly not sophisticated nor skilled at legal procedures. He was not represented by counsel at the time of his first scheduled deposition. He had no way of knowing that his failure to appear for his deposition could ultimately cost him almost \$4000.00. At the time the Complainant received his notice of the deposition, he was being inundated with paperwork regarding his case. In the same time period that he received his notice of deposition, he was being sent the Respondent's answer to his complaint, numerous documents relating to the protective order on discovery matters, and other related paperwork both from the Commission and from the Respondent. . . . In fact, no delay in this case nor any other harm was wrought by Mr. Allison's failure to appear on March 30<sup>th</sup> (with the exceptions already noted of a court reporter appearance fee and the time spent waiting until it was apparent Mr. Allison was not going to appear).

Rather than relating to the question of what constitutes "reasonable expenses," these arguments address the issue, already decided in the July 20<sup>th</sup> ruling, of whether complainant's failure to appear "was substantially justified or that other circumstances make an award of expenses unjust."<sup>1</sup> Sec. 804.12(4), Stats.

Complainant also contends the time spent by respondent on the reply brief was "clearly inflated" when it is viewed in light of the time spent on the original brief: "It would be logical that most of the research on a motion is done when the motion is initiated, not in preparation for a reply brief." This argument does not mention that the Commission's letter setting a schedule to file written arguments on respondent's motion for expenses invited the parties to discuss two specified rulings in their submissions.<sup>2</sup> Respondent did address the two cases in its reply brief and the requisite research could have caused respondent to expend some additional time.

Nevertheless, the Commission does view the time spent preparing respondent's *reply* brief as excessive rather than reasonable. The total of 19.8 hours (4.25 hours

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<sup>1</sup> Even if it was appropriate for the Commission to consider the financial status of a party when deciding what expenses are "reasonable," the complainant has not established that status.

<sup>2</sup> The May 6, 1999, letter stated, in part: "The undersigned invited the parties to discuss the following cases in their submissions: *Trans. Dept. v. Personnel Comm.*, 176 Wis. 2d 731, 500 N.W.2d 664 (1993); *Tatum v. LIRC*, 132 Wis. 2d 411 (Ct. App. 1986)."

spent by a law clerk, and 15.55 hours spent by two attorneys) generated a 10-page brief, double-spaced. It cited just one case other than the two cases identified in the Commission's May 6<sup>th</sup> scheduling letter.

Given this background and the narrowness of the legal issue involved, the Commission concludes that 3 hours of attorney time and 2 hours of law clerk time are "reasonable" in terms of respondent's reply brief.

In reaching this conclusion, the Commission has considered its ruling in *Harden et al. v. DRL & DER*, 90-0106-PC-ER, etc., 5/20/93. In *Harden*, the Commission awarded respondents \$443.26 for 12.8 hours of legal work relating to a motion for sanctions for failure to comply with discovery request, and a "renewed" motion for sanctions. The Commission noted:

[T]he complainants "simply failed to respond" to respondent's initial discovery request served on March 3, 1992, until after respondent filed its first motion for sanctions and after a subsequent prehearing conference. When they finally did provide documents on May 15<sup>th</sup>, the material was incomplete in that complainants did not include some cross-referenced documents. When respondent wrote complainants on July 16<sup>th</sup> asking for assistance in locating this last group of documents, there was no response. Respondent then renewed its motion on August 5<sup>th</sup> and complainants did not provide the last group of documents until September 21<sup>st</sup>, after briefs had been filed on the renewed motion. While on first blush, nearly 13 hours appears to be a lengthy expenditure of time, it is reasonable in light of the protracted nature of the dispute and the numerous procedural steps along the way, including *two motions, two briefs, a conference attended by the parties and a hearing on the motion for sanctions*. (emphasis added)

Respondent argues that the order to pay reasonable expenses apply to both complainant and complainant's attorney. However, the conduct in question occurred before the complainant was represented by counsel, so the award is appropriately made against complainant himself, rather than against his attorney.

ORDER

Respondent's request for expenses is granted in part and denied in part. The total of respondent's reasonable expenses under §804.12(4), Stats., is as follows:

a. \$1,102.50 for 7.35 hours of attorney fees, at the rate of \$150 per hour, for the period from March 30<sup>th</sup> through May 6, 1999, i.e. until respondent began work on its reply brief.

b. \$60.65 for the court reporter's appearance on March 30<sup>th</sup>.

c. \$37.80 for copying costs on March 31<sup>st</sup>.

d. \$450.00 for 3 hours of attorney fees, at the rate of \$150 per hour, for respondent's reply brief.

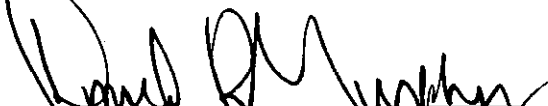
e. \$120.00 for 2 hours of law clerk fees, at the rate of \$60 per hour, for respondent's reply brief.

Within 10 days of the date of this order, the respondent shall provide complainant with any necessary account information and the complainant has 30 days thereafter for making payment in the total amount of \$1,770.95.

Dated: September 8, 1999 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner