

Before the
STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR No. 81 EAG 104-22/02

FEDERAL No. 011810192

In the matter of

William J. Morro
Complainant

against

State of Rhode Island/
Department of Corrections
Respondent

x
x
x
x
x
x
x
x
x
x

FILE COPY

DATE 8/3/82

DECISION ON
COMPLAINANT'S
REQUEST FOR
ATTORNEY'S FEES

INTRODUCTION

On April 30, 1982, the Rhode Island Commission for Human Rights (Commission) issued a decision and order which found that the State of Rhode Island/Department of Corrections (respondent) had committed an unfair employment practice. The decision and order reserved the decision on whether the Commission would award attorney's fees to William J. Morro (complainant) and the amount of the award, if any. The Commission directed the respondent to file an objection if it objected to the award of attorney's fees. The respondent filed an objection on May 7, 1982 and a memorandum on May 18, 1982. The complainant submitted a supplemental memorandum detailing his request for attorney's fees on April 14, 1982 and a reply memorandum to respondent's memorandum on July 20, 1982.

DISCUSSION

I. The Standard for the Award of Attorney's Fees

An amendment to the Fair Employment Practices Act which gave the Commission the authority to award attorney's fees to prevailing complainants became effective in May, 1981. The amendment specifically provides that "[i]n appropriate circumstances attorney's fees may be granted to the attorney for the plaintiff if he prevails." Section 28-5-24 of the General Laws of Rhode Island.

When are the circumstances appropriate for an award of attorney's fees to a prevailing complainant? The Commission often uses federal cases interpreting federal civil rights laws as a guideline in interpreting the Fair Employment Practices Act. The RI Supreme Court has found that federal decisions dealing with Title VII, are persuasive in interpreting the state Fair Employment Practices Act. Narragansett Electric Co. v. Rhode Island Commission for Human Rights, 118 RI 457, 374 A.2d. 1022 (1977).

The language in Title VIII of the Civil Rights Act of 1968 which provides remedies for housing discrimination provides that the court "may grant as relief, as it deems appropriate, ... reasonable attorney's fees..." Section 812(c) of Title VIII of the Civil Rights Act of 1968. In Stepter v. Burke, F. Supp. , 2 Prentice-Hall Equal Opportunity in Housing Para. 15,270 (D. Oh. 1978), the court interpreted this language, which is substantially equivalent

to the language in the Fair Employment Practices Act, to mean that attorney's fees should be awarded to prevailing plaintiffs unless special circumstances would make such an award unjust.

The standard used in Stepter, is the standard which is used to determine whether an award of attorney's fees is appropriate under Title II and Title VII of the Civil Rights Act of 1964. Titles II and VII provide that "the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee..." 42 U.S.C. §2000 a-3(b); 42 U.S.C. §2000e-5(k). This language does not precisely parallel the language in the Fair Employment Practices Act which provides for the award of attorney's fees in appropriate circumstances. However, the meaning of the language is essentially the same. Black's Law Dictionary defines judicial discretion as "the equitable decision of what is just and proper under the circumstances, People v. Pfanschmidt, 262 Ill. 411, 104 N.E. 804, 816, Ann. Cas. 1915A, 1171." Black's Law Dictionary Revised 4th Ed. West Publishing Co., 1968 at 553.

In Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 1 CCH Employment Practices Decisions Para. 9834 (1968) and Christianburg Garment Co. v. EEOC, 434 US 412, 15 CCH Employment Practices Decisions Para. 8041 (1978), the US Supreme Court held that under Title II and Title VII the prevailing plaintiffs should ordinarily recover attorney's fees unless special circumstances make such an award unjust. The Supreme Court held that such a standard is appropriate because the prevailing plaintiff is vindicating public policy by assisting in the elimination of discrimination.

This rationale also applies to the Fair Employment Practices Act. While the Commission like the federal Equal Employment Opportunity Commission (EEOC), has the power to initiate charges, its limited resources restrict the Commission's ability to ferret out discrimination. (In the 1982 fiscal year, the Commission did not initiate any charges but receive 400 charges from complainants.) Thus, the enforcement of the Fair Employment Practices Act depends on the tenacity of complainants who are willing to challenge discrimination. The Commission hearing process has become more complex through the years. In LaPetite Auberge v. RI Commission for Human Rights, RI , 410 A.2d 274 (1980), the RI Supreme Court held that the Commission must allow the parties to conduct discovery before a hearing. The hearing itself has become more formal. The appeal process requires the filing of legal documents within short periods of time. Thus, it is almost impossible for most complainants to navigate the hearing and appeal process without the assistance of an attorney. Because of its limited resources, the Commission must depend on complainants to pursue charges of discrimination and the complainants depend on attorneys to present their cases. Therefore, it is in the public interest for the Commission to adopt the standard for the award of attorney's fees used by the federal courts in the award of attorney's fees under Title VIII of the Civil Rights Act of 1968 and Titles II and VII of the Civil Rights Act of 1964. The Commission will award attorney's fees to prevailing complainants unless special circumstances render such an award unjust.

II. The Circumstances Are Appropriate For The Award of Attorney's Fees To The Complainant.

As discussed above, the Commission will award attorney's fees to prevailing complainants unless the circumstances render the award unjust. In this case, the complainant prevailed by proving that the respondent retaliated against him for filing a charge of discrimination. It is essential to the integrity of the Commission process and to the protection of civil rights that persons who utilize the Commission process or who oppose unlawful employment practices be protected against retaliation. The complainant's willingness to pursue and prove his charge of retaliation resulted in protection of the public interest. The Commission does not perceive any special circumstances which would make an award of attorney's fees unjust. The complainant's vindication of the public interest makes the award of attorney's fees appropriate.

III. The Amount of The Attorney's Fee Awarded To The Complainant.

The complainant's attorney, Lynette Labinger, has submitted an affidavit stating the amount of time which she expended to present complainant's case, her hourly rate and a bill of costs. Complainant submits that he should be awarded \$13,639.50 as attorney's fees and \$110.31 as costs.

The respondent, in its memorandum, refers the Commission to the procedure at the Personnel Appeal Board of awarding attorney's fees in the amount of \$50.00 per hearing day. However, that practice is not persuasive to the Commission as it is set by statute. Section 36-4-42 of the General Laws of Rhode Island. Further, the Commission sees difficulties with awarding attorney's fees only for hearing days and at a low per diem rate. The Commission finds that the federal standards are a more appropriate guideline to the Commission. As explained above, the Commission and the RI Supreme Court have found federal cases persuasive in interpreting the Fair Employment Practices Act. The legislative intent in amending the Fair Employment Practices Act appears to have been to ensure effective enforcement of the Act and to provide a remedy comparable to the remedies available under Title VII. If the Commission set a per diem rate below the standard hourly rate in the legal community, the complainant's problem of attaining effective counsel would not be addressed. Further, to fail to compensate attorneys for preparation for hearing could cause badly prepared cases. In addition, a respondent may ultimately be liable for attorney's fees as computed by the federal standards. In New York Gaslight Club, Inc. v. Carey, 100 S. Ct. 2024 (1980), the U.S. Supreme Court held that prevailing complainants could petition federal courts for awards of attorney's fees under the Civil Rights Act of 1964 for legal work performed in state administrative civil rights proceedings. If the Commission standards provided for a more limited award of attorney's fees than the federal standards, the complainant might sue for the difference in federal court. It saves time and expense for both parties if the Commission uses the same basic standards as the federal courts. Thus, the simplest, most effective method of computing attorney's fees is to use the same basic standards used by the federal courts.

The federal courts look at twelve factors in deciding the amount of attorney's fees to be awarded:

1. The time and labor involved.
2. The novelty and difficulty of the questions involved.
3. The skill needed to perform the requisite legal services.
4. Preclusion of other employment by the attorney.
5. The customary fee in the community.
6. Whether the attorney's fee is fixed or contingent.
7. Time limitations imposed by the client or circumstances.
8. The monetary and other results obtained.
9. The experience, reputation and ability of the lawyer.
10. The undesirability of the case.
11. The nature and length of the attorney's professional relationship to the client.
12. Awards in similar cases.

Palimigano v. Carrahy, 616 F.2d 598 (1st Cir. 1980), cert. den 449 US 839(1980).

The Rhode Island Supreme Court has considered similar factors in evaluating a reasonable attorney's fee for representing an employee before the Worker's Compensation Commission. In Palumbo v. U.S. Rubber Co., 102 RI 220, 229 A.2d 620 (1967), the RI Supreme Court looked at "the amount in issue, the questions of law involved and whether they are unique or novel, the hours worked and the diligence displayed, the result obtained and the experience, standing and ability of the attorney who rendered the services." 102 R.I. 220, 223, 229 A.2d 620, 622.

Ms. Labinger has submitted an affidavit as to her hours and the rate which her firm charges for her services. The respondent did not challenge these. The complainant prevailed on the issue of retaliation but did not prove that the respondent discriminated against him because of age. The hours listed in the affidavit of complainant's attorney include hours spent on presenting complainant's allegations of age discrimination. The Commission awards attorney's fees for the hours expended to present complainant's allegations of age discrimination because the Commission found that in order for complainant to prevail on the issue of retaliation for opposing an unlawful employment practice, the complainant had to demonstrate that he had a reasonable belief that age discrimination had occurred. Therefore, the hours expended to present complainant's allegations of age discrimination were necessary to prove retaliation. Since the number of hours submitted by the complainant's attorney are not challenged by the respondent and are all re-

lated to the successful proof of complainant's claim of retaliation, the Commission will take into consideration that complainant's attorney spent 164.4 hours in presenting complainant's case.

Other facts to be considered in determining a reasonable attorney's fee are the novelty of the legal questions, the diligence of the attorney, the experience, reputation and ability of the attorney, the customary fee in the community and awards in similar cases. The issue of retaliation is not a new one for the Commission, but neither is it everyday. The complainant's attorney was diligent in presenting the complainant's case and in drafting memoranda. In Pilkington v. Bevilacqua, 522 F. Supp. 906 (D. R.I. 1981), the court assessed the value of Ms. Labinger's services to the plaintiff in a case alleging an unconstitutional termination of employment. The court ruled that Ms. Labinger's services in a trial which was tried in 1977 were worth \$75.00 an hour for in court time and \$70.00 for out of court time. The court noted that its previous rulings in civil rights cases established that the customary rate for civil rights cases ranges from \$60.00 to \$100.00 per hour. While Pilkington v. Bevilacqua, supra., involved more complicated issues than the present case, the rate requested by complainant's attorney (\$75.00 an hour up to January 1, 1982, \$90.00 an hour after January 1, 1982) is reasonable considering the rate of inflation and the increase in Ms. Labinger's experience in civil rights litigation since 1977. Considering all the factors discussed above, the Commission finds that \$13,639.50 is a reasonable attorney's fee for the work performed.

ORDER

A violation of Section 28-5-7 of the General Laws of Rhode Island having been found, the Commission hereby orders the respondent:

1. To pay the complainant \$13,639.50 in attorney's fees and \$110.31 as costs for the time period up to and including April 9, 1982;
2. To pay the complainant twelve percent (12%) annual interest on the amount specified in Paragraph 1 above starting thirty days from the date of this Order and ending when the complainant is paid the amount in Paragraph 1 above;
3. To pay the complainant reasonable attorney's fees and costs for legal services performed after April 9, 1982 in connection with the above entitled case, the exact amount to be determined at a later time.

Entered this 3rd day of August, 1982.

Jean Stover
Jean Stover, Commissioner

I have read the record and concur in the judgement.

Thornton B. Drummond, Jr.
Thornton B. Drummond, Jr.
Commissioner

Joaquin F. Gomes
Joaquin F. Gomes, Commissioner