

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building – Third Floor
Des Moines, Iowa 50319

DAVID LUCAS,)	Docket No. 12ICRC005
)	
Complainant,)	
)	
and)	
)	
IOWA CIVIL RIGHTS COMMISSION,)	
)	
v.)	
)	ORDER DENYING REQUEST
BEEF PRODUCTS INC.,)	FOR ATTORNEY FEES
)	
Respondent.)	

The parties to this proceeding are Complainant David Lucas, the Iowa Civil Rights Commission, and Respondent Beef Products Inc. (“BPI”). On April 16, 2010, Lucas filed a Complaint with the Commission alleging BPI discriminated against him on the basis of disability when it refused to hire him. Lucas averred BPI discriminated against him based on his children’s disabilities, and noted his prior work-related injuries. The Commission commenced an investigation. Following a determination that probable cause existed in the case, the Commission filed a Statement of Charges against BPI, alleging BPI discriminated against Lucas on the basis of his perceived disability and engaged in disability association discrimination when it rescinded Lucas’ job offer after learning about his son’s disabilities. The Commission transferred the matter to the Department of Inspections and Appeals for a contested case hearing.

On May 24, 2013, BPI filed a Motion for Summary Judgment and/or to Dismiss, and Index of Evidence in Support of motion for Summary Judgment and/or to Dismiss, and a Brief in Support of Motion for Summary Judgment and/or to Dismiss. On June 17, 2013, the Commission filed a Resistance to Motion for Summary Judgment and/or to Dismiss, two differing Statements of Disputed Material Facts, and Index of Evidence in Support of Resistance to Motion for Summary Judgment and/or to Dismiss, and a Brief in Support of Resistance to Motion for Summary Judgment and/or to Dismiss. BPI filed a Reply Brief in Support of Motion for Summary Judgment and/or to Dismiss, and Response to Commission’s Statement of Facts on June 27, 2013. The Motion for Summary Judgment was granted, in part, with respect to Lucas’ association claim. The Motion was denied with respect to Lucas’ disability discrimination claim.

The hearing on the merits of Lucas’ disability discrimination claim was held on August 28, 2013 at the Wallace State Office Building. Assistant Attorney General Katie Fiala and attorney Alex Smith represented the Commission and Lucas. Attorney Crystal Raiber also

appeared on Lucas' behalf. Shawn Nelson appeared on behalf of the Commission, but did not testify. Lucas appeared and testified. Attorney Heidi Gutttau-Fox represented BPI. Tina Auge, Lynnelle Conley, and Rick Wood appeared and testified on behalf of BPI. Jennifer Stubbs appeared on behalf of BPI, but did not testify. Exhibits A through Z were admitted into the record. The record was held open for post-hearing briefing.

On November 27, 2013, I issued a Proposed Decision finding Lucas had proven BPI engaged in a discriminatory or unfair practice by improperly rescinding Lucas' job offer based on a perceived physical injury in violation of the Iowa Civil Rights Act. I ordered BPI to cease and desist from engaging in discriminatory or unfair practices that violate the Iowa Civil Rights Act, and awarded Lucas \$8,366.80 for lost wages and benefits, and \$25,000 for emotional distress, for a total of \$33,366.80. I assessed costs to BPI.¹ I returned the administrative appeal file to the Commission.

On December 17, 2013, Lucas' private attorney, Raiber, filed an Application and Affidavit for Attorney Fees and Costs. BPI filed a Resistance to Complainant's Fee Application on January 2, 2014.²

In the Commission's Post-Hearing Brief and Reply Brief, the Commission requested an award of damages and an award of all allowable costs. The Commission did not request an award of attorney fees. Allowable costs include: (1) the daily charge of the court reporter for attending and transcribing the hearing; (2) all mileage for the court reporter for traveling to and from the hearing; (3) all travel time charges for the court reporter for traveling to and from the hearing; (4) the costs of the original of the transcripts for the hearing; and (5) postage incurred by the administrative law judge in sending by mail (regular or certified) any papers made part of the record.³ The rule on costs does not affect the award of remedial orders recoverable under Iowa Code section 216.15(8)a.⁴ Costs are separate from remedial relief. The rules do not include attorney fees in costs.

Under Iowa Code section 216.15(9), if the administrative law judge finds the respondent has engaged in a discriminatory or unfair practice, the administrative law judge "shall issue an order requiring the respondent to cease and desist from the discriminatory or unfair practice" and afford necessary remedial action. Remedial action includes, but is not limited to "payment to the complainant of damages for an injury caused by the discriminatory or unfair practice which damages shall include but are not limited to actual damages, court costs and reasonable attorney fees."⁵ No request was made for attorney fees in the post-hearing briefing or before the date the Proposed Decision was issued.

The rules address attorney fee awards.⁶ The Commission retains jurisdiction to determine the amount of attorney fees when the Commission has determined a party is entitled to

¹ 161 IAC 4.32.

² BPI's counsel also filed a Motion for Extension of Time to Respond to Fee Application because she was out of the country, which is granted.

³ 161 IAC 4.32(3).

⁴ *Id.* 4.32(4).

⁵ Iowa Code § 216.15(9)a.

⁶ 161 IAC 4.28.

attorney fees.⁷ The rules discuss the holding of a hearing on the issue of the amount when the parties disagree on the amount of the fees.⁸

Attorney Raiber filed a request for attorney fees on December 17, 2013, long after post-hearing briefing and after the filing of the Proposed Decision. Failure to raise the issue prior to the issuance of the Proposed Decision constitutes a waiver of the issue under the Commission's rules.⁹ I do not have jurisdiction to address a request in this case that was made after the Proposed Decision was issued and the matter was transferred back to the Commission.

ORDER

Attorney Raiber failed to raise the issue of attorney fees prior to the issuance of the proposed decision, which constituted a waiver of the issue. The matter has been transferred back to the Commission following the issuance of the proposed decision. The request for attorney fees is denied for lack of jurisdiction.

Dated this 3rd day of January, 2014.



Heather L. Palmer
Administrative Law Judge
515-281-7183

cc: AG – K. Fiala
Atty – C. Raiber and A. Serovy
Atty – H. Guttau-Fox
ICRC – A. Smith

⁷ 161 IAC 4.28(1).

⁸ *Id.* 4.28(3).

⁹ *Id.* 4.20(6).

Notice

Any adversely affected party may appeal this decision to the Iowa Civil Rights Commission within 30 days of the date of the decision.¹⁰ The appeal must be signed by the appealing party or representative of the appealing party and contain a certificate of service upon the other parties, and specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.¹¹

The Commission may also initiate review of a proposed decision on its own motion at any time within 60 days following the issuance of the decision.¹²

¹⁰ *Id.* 4.23(1).

¹¹ *Id.* 4.23(3).

¹² *Id.* 4.23(2).