

BEFORE THE IOWA CIVIL RIGHTS COMMISSION

CP # 05-88-17707

CONNIE ZESCH-LUENSE, Complainant,
and
IOWA CIVIL RIGHTS COMMISSION,

vs.

THE CHICKEN HOUSE and ROBERT PLILEY, Respondents,

FINDINGS OF FACT:

I. Procedural History:

1A. By a Final Decision and Order and Remand for Determination of Attorney's Fees issued on November 4, 1994, the Commission found that the Respondents had "directed Complainant to deny service to a Native American because of his race and terminated her for her refusal to do so." The order also remanded the case to the Administrative Law Judge for the determination of attorney's fees. (The findings of fact and conclusions of law set forth here have a combined numerical and alphabetical designation in order to distinguish them from the findings of fact and conclusions of law incorporated by reference in the Commission's final decision of November 4, 1994.) After unsuccessful attempts were made by the parties to stipulate to the fees, a Notice of Attorney's Fees Hearing was issued by the Commission on February 8, 1995. That Notice stated, in part:

5. At this point, no response has been made by Respondents Robert Pliley and the Chicken House to the scheduling conference notice [which had been issued in order to arrange a time, date and place for an attorney's fee hearing]. In order to avoid the expense and time of conducting a hearing in Marshalltown in which the Respondents choose not to participate, the Respondents shall notify the undersigned in writing by May 1, 1995 as to whether or not they intend to participate in the hearing. The written communication must be received by the undersigned by May 1, 1995. Any motions for continuance by any party should also be filed by that date unless there are exceptional circumstances which require a continuance. In the event neither Respondent indicates an intent to so participate by that date, an order cancelling the hearing shall be issued. The complainant may then submit her claim for attorney's fees by affidavit filed with the undersigned on or before May 17, 1995. The complainant shall mail copies of the affidavit to all other parties of record.

Notice of Attorney's Fees Hearing.

2A. Respondent Pliley indicated twice in writing that he did not wish to participate in the hearing. Respondent Chicken House did not respond to the Notice of Attorney's Fees Hearing.

Therefore, pursuant to the provisions in the Notice, the attorney's fee hearing was vacated by an order issued on May 8, 1995.

3A. The complainant, through her attorney, Barry Kaplan, filed an affidavit setting forth her claim for attorney's fees on May 15, 1995. This affidavit is attached to this decision and incorporated by reference in the decision as if fully set forth herein.

4A. The complainant asks for a total of \$1507.50 in attorney fees for 4.5 hours of work at the rate of \$80.00 per hour (\$360.00) and 13.50 hours of work at the rate of \$85.00 per hour (\$1147.50). The complainant makes no request for any enhancement of fees beyond this amount.

II. Factors to Be Considered in Determining Hours Reasonably Expended and a Reasonable Hourly Rate:

A. A Variety of Factors May Be Considered:

5A. A variety of factors may be considered in determining the amount of attorneys fees including: (a) the time necessarily spent, (b) the difficulty of handling and importance of the issues, (c) the nature and extent of the service, (d) the preclusion of other employment by the attorney due to acceptance of the case, (e) time limitations imposed by the client or circumstances, (f) the standing and experience of the attorney in the profession, (g) the customary charges for similar services, (h) the "undesirability" of the case, (i) the nature and length of the professional relationship with the client, (j) awards in similar cases (k) the amount involved, responsibility assumed, and results obtained, and (l) whether the fee is fixed or contingent including delay in payment and risk of nonpayment for contingency fee cases. See Conclusions of Law Nos. 14A-16A.

B. The Time Necessarily Spent:

6A. Complainant Zesch-Luense's attorney, Barry S. Kaplan, submitted an affidavit setting forth actions taken by him, the date of the action, and the hours expended. A careful examination of time expended by counsel on this case reveals that all of the time claimed by Complainant was reasonable and necessarily spent on this case.

C. The Difficulty of Handling and Importance of the Issues:

7A. The factual and legal issues in this case were of at least average difficulty. While, in a sense, all civil rights cases are important, this case would be accurately described as one of average importance. One factor which made this case notably more difficult for the complainant, however, was that the Respondent was allowed to present witnesses without prior notice to either the Commission or the Complainant. This was permitted, despite the Respondent's prior representations that he would not be calling any witnesses, because he was not represented by counsel and apparently did not understand procedures. Despite these surprise witnesses, the Complainant and Commission's representatives were able to adequately counter their testimony through cross-examination without any need for a continuance to call further witnesses. See Findings of Fact Nos. 6-7.

D. The Nature and Extent of the Service:

8A. The time records of attorney Kaplan indicate that the nature and extent of the services provided to the Complainant were that which would normally be expected in a civil rights case ranging from conferences with the client to representing her at hearing.

E. The Preclusion of Other Employment by the Attorney Due to Acceptance of the Case:

9A. In any case requiring the number of hours required by this one, it may be reasonably inferred that the attorney had to forego some other employment for which those hours would have been otherwise expended. The number of hours expended, however, is not sufficient to make this a major factor in this award of attorney's fees.

F. The Standing and Experience of the Complainant's Attorney in the Profession:

10A. Official notice is taken of the following facts derived from page 177 of the 1994 edition of the Iowa Legal Directory and page IA47P of the 1995 edition of the Martindale-Hubbell Legal Directory. Fairness to the parties does not require that they be given an opportunity to contest these facts:

A. Attorney Barry S. Kaplan received his Juris Doctor degree at Drake University in 1975. He was admitted to the Iowa bar in that same year. He is also admitted to practice before the U.S. Court of Appeals for the Eighth Circuit and the U.S. District Courts for the Southern and Northern Districts of Iowa. He is a member of the Marshall County, Iowa State, and American Bar Associations.

B. Mr. Kaplan has a "BV" rating from Martindale Hubbell. The first letter in this rating represents an evaluation, based on confidential surveys of members of the bar and the judiciary, of legal ability. "[I]t takes into consideration experience, nature of practice and qualifications relevant to the profession." The "B" rating is one of "high to very high" legal ability.

C. The second letter in this rating represents the "general recommendation" rating. This rating "embraces faithful adherence to professional standards of conduct and ethics of the legal profession, professional reliability and diligence, and standards relevant to the attorney's discharge of his responsibilities." A "V" rating reflects a "Very High" general recommendation.

11A. The Administrative Law Judge would rate the quality of representation provided by Mr. Kaplan as certainly high enough to warrant the hourly rate requested for him.

G. The Customary Charges for Similar Services:

12A. Official notice is taken of facts given in the firm resume for Mr. Kaplan's firm, Fairall, Fairall, Kaplan & Hoglan, which is set forth in the 1994 Iowa Legal Directory. Mr. Kaplan's firm

consists of three partners, including himself, one associate, and one lawyer who is of counsel to the firm. The firm is located in Marshalltown, Iowa. Fairness to the parties does not require that they be given the opportunity to contest these facts.

13A. Official notice is also taken of the following facts derived from the 1990 Economics Survey of the Iowa State Bar Association. Fairness to the parties does not require that they be given the opportunity to contest these facts:

A. The survey is a statewide survey of attorneys to obtain economic information relating to the practice of law for the calendar year 1990. (Survey at 3). In calendar year 1990, the average hourly rate for trial work statewide was \$91.00 per hour. The average hourly rate in 1990 for non-trial work statewide was \$89.00 per hour. (Survey at 35). The median hourly rate for firms with five lawyers was \$87.00 for both trial and nontrial work. (Survey at 63).

14A. Given that this survey was taken five years ago, the hourly rate requested for attorney Kaplan's work is not only reasonable, but conservative.

H. Time Limitations Imposed by the Client or Circumstances:

15A. There is no evidence in the record of particular time limitations imposed by the client or circumstances which would affect the attorney's fees.

I. The "Undesirability" of the Client:

16A. There is no evidence in the record that this case resulted in animosity by important elements in the community toward Mr. Kaplan or his firm because he undertook representation of Complainant Zesch-Luense in this civil rights case.

J. Awards in Similar Cases:

17A. The hourly rate requested for the Complainant's attorney is well within the range of fee awards in Iowa in discrimination cases. The Iowa Supreme Court and Iowa Court of Appeals have approved awards of \$100.00 per hour in attorney's fees. *Lynch v. City of Des Moines*, 464 N.W.2d 236, 238 (Iowa 1990); *Landals v. George A. Rolfes, Co.*, 454 N.W.2d 891, 897 (Iowa 1990); *Edson v. Chambers*, 519 N.W.2d 832 (Iowa Ct. App. 1994). This Commission has approved awards, which were not stipulated to, ranging from a low of \$75.00 per hour, *Diane Humburd*, 10 Iowa Civil Rights Commission Case Reports 13, 14 (1989), to a high of \$120.00 per hour, *Mike DeVolder*, 11 Iowa Civil Rights Commission Case Reports 135, 135-36, 150-51 (1992).

K. Amount Involved, Responsibility Assumed, and Results Obtained:

18A. The Complainant's attorney achieved excellent results in this litigation. Complainant Zesch-Luense prevailed with respect to all her alleged violations of aiding or abetting, retaliation, and race discrimination in public accommodations under the Iowa Civil Rights Act.

She obtained a back pay remedy of \$1,137.50 and an emotional distress damage award of \$10,000.00. Interest on these awards at the rate of ten percent per annum was also awarded. Other remedies obtained included a cease and desist order and the posting of non-discrimination notices at the Chicken House restaurant. The attorney's fees requested are justified in light of these results.

L. Whether the Fee is Fixed or Contingent:

19A. There is no evidence in the record indicating whether the fee agreement between Complainant Zesch-Luense and attorney Kaplan was on a fixed or contingency fee basis.

M. Award of Fees:

20A. Taking into account all the factors previously discussed, the fees requested reflect the product of a reasonable hourly rate multiplied by a reasonable number of hours of work. There is no need for a further adjustment of the fees under these facts. The Complainant has met her burden of establishing a reasonable attorney's fee by documenting the appropriate hours expended and the hourly rates. Complainant Zesch-Luense should be awarded, therefore, a reasonable attorney's fee in the amount of \$1507.50.

CONCLUSIONS OF LAW:

I. Procedure:

1A. In this case, the parties were given the opportunity to have an evidentiary hearing on the attorney's fee issue, but the Respondents chose not to participate. Therefore, this award is based on a review of the attorney's fee affidavit and other information in the record. See Findings of Fact Nos. 1A-2A. An award of attorneys fees may be made in the absence of a separate evidentiary hearing where, as here, the opportunity for an attorneys fees hearing has been provided and all parties have elected to not take advantage of the opportunity. See *Rouse v. Iowa Department of Transportation*, 408 N.W.2d 767, 768 (Iowa 1987).

II. Official Notice:

A. Official Notice in General:

2A. Official notice was taken of certain facts in this case. See Findings of Fact Nos. 10A, 12A, 13A. Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. Iowa Code S 17A.14(4) (1991). Judicial notice may be taken of matters which are "common knowledge or capable of certain verification." In *Re Tresnak*, 297 N.W.2d 109, 112 (Iowa 1980). Judicial notice does not depend on actual knowledge of the judge. He may investigate and refresh his recollection of facts by any means he deems to be safe and proper. *Haaren v. Mould*, 144 Iowa 296, 303, 122 N.W. 921 (Iowa 1909).

B. Official Notice and Statistics:

3A. Judicial notice may also be taken of other impartial compilations of statistical data, such as census statistics, *Iron Workers Local No. 67 v. Hart*, 191 N.W.2d 758, 769 (Iowa 1971), case processing statistics set forth in annual reports of the Iowa Civil Rights Commission, *Estabrook v. Iowa Civil Rights Commission*, 283 N.W.2d 306, 311 (Iowa 1979), or industry data. 29 AM. JUR. 2d Evidence S 112 & n.8 (1967).

C. Official Notice and Attorney's Fees:

4A. Judicial notice may also be taken of facts generally known in the legal profession. In *Re Tresnak*, 297 N.W.2d 109, 112 (Iowa 1980); see *State v. Kaufman*, 202 Iowa 157, 161, 209 N.W. 417 (Iowa 1926). Similarly, an adjudicator who is an attorney, as the Commission's Administrative Law Judge is, may determine the value of a lawyer's services based on the judge's own knowledge. 29 AM. JUR. 2d Evidence S 82 (1967)(citing *In Re Gudde's Will*, 260 Wis. 79, 49 N.W.2d 906). A court is presumed to have some knowledge of the value of an attorney's services, particularly when the services were rendered in the court's own jurisdiction and presence. See *Kratz v. Heins*, 169 N.W. 33 (Iowa 1918); *Gates v. McClenahan*, 103 N.W. 969 (Iowa 1905). It is reasonable to conclude that an administrative tribunal with the authority to award attorney's fees and experience in doing so also has such expertise as part of the "specialized knowledge of the agency." Iowa Code S 17A.14(4). Cf. *Lynch v. City of Des Moines*, 464 N.W.2d 236, 240 (Iowa 1990)(court is an expert on attorney fees and need not adopt fees suggested by expert witnesses); *Landals v. Rolfes*, 454 N.W.2d 891, 897 (Iowa 1990)(court an expert on attorney fees); *Parrish v. Denato*, 262 N.W.2d 281, 285 (Iowa 1978)(court an expert on fees, but cannot exclude other relevant evidence). See e.g. *Mike DeVolder*, 11 Iowa Civil Rights Commission Case Reports 135, 135-36, 150-51 (1992)(award of fees to complainant); *Frank Robinson*, 11 Iowa Civil Rights Commission Case Reports 67, 69 (1991)(same); *Ruth Miller*, 11 Iowa Civil Rights Commission Case Reports 44 (1990)(fees for employer on motion for sanctions); *Diane Humburd*, 10 Iowa Civil Rights Commission Case Reports 13 (1989)(award of fees to complainant).

III. Legal Authority and Standards for Awarding Attorney's Fees:

5A. In the *Mike DeVolder* case, the Commission set forth the following principles concerning the legal authority for the award of attorney's fees, the underlying purpose of such an award, and the legal standards for such an award:

Reasonable Attorney's Fees Remedy:

5A. The Iowa Civil Rights Act allows the award of "reasonable attorneys fees" as part of the remedial action which the Commission may take in response to the Respondents' discriminatory practices. Iowa Code S 601A.15(8)(a)(8) (1991). Attorneys fees can only be awarded to complainants when discrimination has been proven. See *Id.* The burden of persuasion is upon the Complainant to prove "both that the services were reasonably necessary and that the charges were reasonable in amount." *Landals v. George A. Rolfes, Co.*, 454 N.W.2d 891, 897 (Iowa 1990).

6A. The reason for awarding attorneys fees to prevailing complainants in contested cases under the Iowa Civil Rights Act is the same as that for awarding attorneys fees to prevailing plaintiffs in civil actions brought under the Act, i.e. "to ensure that private citizens can afford to pursue the legal actions necessary to advance the public interest vindicated by the policies of the civil rights acts." *Ayala v. Center Line, Inc.*, 415 N.W.2d 603, 605 (Iowa 1987)(citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401-02, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263, 1265-66 (1968)). Therefore, a prevailing complainant "should ordinarily recover an attorneys fee." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)(emphasis added).

Standards for Awarding Attorney's Fees:

7A. It is the policy and practice of this "Commission to award reasonable attorneys fees to successful complainants for services performed at all stages of the administrative complaint process." *Diane Humburd*, 10 Iowa Civil Rights Commission Case Reports 13, 15 (1990)(Supplemental Decision).

8A. The amount of the attorneys fee to be awarded depends on the facts of each case. *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S. Ct. 1933, 76 L.Ed. 2d 40, 48 (1983). Where, as here, agreement on the attorneys fees issue has not been reached, the successful complainant bears the burden of establishing the amount of her attorneys fees by "documenting the appropriate hours expended and hourly rates." *Id.*, 461 U.S. at 437, 76 L.Ed. 2d at 53. The complainant's attorney is not required to document each minute of his time in great detail, but should identify the general subject matter of his time expenditures. *Id.* & n.12.

Mike DeVolder, 11 Iowa Civil Rights Commission Case Reports 135, 143 (1992). The burden of proof described above has been met here. See Finding of Fact No. 20A.

IV: Attorney's Fees: The "Lodestar" Calculation and Factors Used In Determining Reasonable Attorney's Fees:

6A. The Commission's decision in the DeVolder case also set forth the following legal principles, which were applied in this case, concerning the "lodestar" calculation and factors used in determining what is a reasonable attorney's fee in a civil rights case:

The Lodestar Calculation (Hours Reasonably Expended Multiplied by a Reasonable Hourly Rate):

9A. "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum v. Stenson*, 465 U.S. 886, 888, 104 S.Ct. 1541, 79 L.Ed. 2d 891, 895 (1984). The product of this calculation is known as the "lodestar." *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 898 (Iowa 1990).

Determination of Hours Reasonably Expended:

10A.

Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important factor in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary."

Hensley v. Eckerhart, 461 U.S. at 434, 76 L.Ed. 2d at 50-51 (Quoting Copeland v. Marshall, 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (1980)(en banc)(emphasis in original)). "Hensley requires a fee applicant to exercise "billing judgment" not because he should necessarily be compensated for less than the actual number of hours spent litigating a case, but because the hours he does seek compensation for must be reasonable." Riverside v. Rivera, 477 U.S. 561, 569, 106 S.Ct. 2686, 91 L. Ed. 2d 466, 476 at n.4. In light of the complexity of this case, and other appropriate factors, the number of hours expended has been found to be reasonable. . . . "Thus, counsel did, in fact, exercise the 'billing judgment' recommended in Hensley." Id.

11A. Although hours may be excluded after examination of the claims in light of appropriate factors, Lynch v. City of Des Moines, 464 N.W.2d 236, 240 (Iowa 1990), the tribunal is not required to reduce hours claimed and may award all hours claimed if it believes such hours were reasonably expended after viewing the case as a whole. Landals v. George A. Rolfes, Co., 454 N.W.2d 891, 897 (Iowa 1990).

...

Factors Considered in Determining a Reasonable Hourly Rate and Reasonable Hours Expended:

14A. The courts have relied on two sets of factors which should be taken into account in determining "whether services were reasonably necessary and that the charges were reasonable in amount." Landals v. George A. Rolfes Co., 454 N.W.2d 891, 897 (Iowa 1990). These lists are somewhat duplicative. . . .In Iowa, the controlling authority provides:

Appropriate factors to consider in allowing attorney fees include the time necessarily spent, the nature and extent of the service, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service.

Id.

15A. A case frequently relied upon in the Federal courts, and other state courts, is Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), which lists twelve factors derived from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106. Hensley v. Eckerhart, 461 U.S. at 430, 76 L.Ed. 2d at 48 & n.3. These same factors are set

forth, although organized as eight and not twelve factors, in the Iowa Code of Professional Responsibility for Lawyers. DR 2-106(B).

16A.

The 12 [Johnson] factors are (1) the time and labor required; (2) the novelty and difficulty of the case; (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 circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of a case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Hensley v. Eckerhart, 461 U.S. at 430, 76 L.Ed. 2d at 48 n.3.

17A. Where, as here, the case presents related claims, all of which were successful, the Commission "should focus on the overall relief obtained by the [complainant] in relation to the hours reasonably expended on the litigation." *Id.*, 461 U.S. at 435, 76 L.Ed. 2d at 51-52. An award of a fully compensatory fee, including compensation for all hours reasonably expended during the litigation, should be made when the complainant has obtained excellent results, as this complainant has. *Id.*, 461 U.S. at 435, 76 L.Ed. 2d at 52. . . .

Adjustment of the Lodestar:

18A. Although there is a rebuttable presumption that the lodestar amount represents a reasonable hourly rate, *Blum v. Stenson*, 465 U.S. 886, 897, 104 S.Ct. 1541, 79 L. Ed. 2d 891, 901 (1984), the "lodestar" may be further adjusted either upward or downward based on the important factor of "results obtained", *Hensley v. Eckerhart*, 461 U.S. at 434, 76 L.Ed. 2d at 51; *Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 554* (1989), or on the other factors set forth above if they are not fully accounted for in the lodestar. *Blum v. Stenson*, 465 U.S. at 897, 79 L. Ed. 2d 91, 901 n.14 (1984); *Hensley v. Eckerhart*, 461 U.S. at 434, 76 L. Ed. 2d at 51 & n.9.

Mike DeVolder, 11 Iowa Civil Rights Commission Case Reports 135, 143-145 (1992).

7A. In accordance with the above principles, the lodestar figure (hours reasonably expended multiplied by a reasonable hourly rate) results in a reasonable attorney's fee of \$1507.50. There is no need for further adjustment of the attorney's fee amount. See Finding of Fact No. 20A.

DECISION AND ORDER:

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, Connie Zesch-Luense, is entitled to a judgment against Respondents Robert Pliley and the Chicken House for the fees of her attorney, Barry Kaplan, in the amount of \$1507.50.

Signed on this the 15th day of May 1995.

Donald W. Bohlken
Administrative Law Judge
211 E. Maple Street
Des Moines, Iowa 50309
515-281-4480
FAX 515-242-5840

FINAL ORDER ON THE AWARD OF

ATTORNEY'S FEES

1. On this date, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's supplemental proposed decision and order on attorney's fees which is hereby incorporated in its entirety as if fully set forth herein.

IT IS SO ORDERED.

Signed this the ____th day of June, 1995.

Dale Repass
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