MIKE DEVOLDER, - Complainant, and IOWA CIVIL RIGHTS COMMISSION,

VS.

FRIEDMAN MOTOR CARS, LTD., MIKE FRIEDMAN, SCOTT HENRY, AND PAT SULLIVAN, Respondents.

CP # 12-89-19466

FINDINGS OF FACT

Procedural History:

1A. After a five day public hearing, on April 1-5, 1991, concerning three interrelated complaints of race and sex discrimination filed, respectively, by Commissioner Orlando Ray Dial (CP # 06-89-18956), Complainant Cristen Harms (CP # 11-89-19422), and Complainant Mike DeVolder (CP # 12-89-19466), a proposed decision was issued in which the Complainants prevailed on substantially all their allegations. This proposed decision was unanimously adopted in full by the Iowa Civil Rights Commission on February 28, 1992 and was incorporated by reference into the Commission's Final Decision and Order. These Findings of Fact and Conclusions of Law have a combined numerical and alphabetical designation to distinguish them from the Findings of Fact and Conclusions of Law adopted by the Commission on February 28, 1992.

2A. The Final Decision and Order was "final in all respects except for the determination of the amount of attorney's fees." As an alternative to conducting a hearing on the attorney's fee issue, Complainant DeVoider and Respondents Friedman Motorcars, Ltd., Mike Friedman, Scott Henry, and Pat Sullivan entered into a stipulation providing that "the issue of Mr. DeVoider's attorneys' fees and expenses may be heard by the Iowa Civil Rights Commission, pursuant to the written pleadings presented to the Iowa Civil Rights Commission by both parties, and that the information provided in these written pleadings will be substituted and take the place of any hearing on a request by Mike DeVoider for attorney's fees." The stipulation was entered in an order by the Administrative Law Judge on or about June 24, 1992.

Claims for Attorney's Fees November 20, 1989 Through June 30,1992;

3A. Complainant Mike DeVolder's Reply Brief, filed on July 15, 1992, included a detailed, itemized claim of Attorney Fees and Expenses which requested a total of $23,807.50 in fees for attorney and paralegal work performed from November 20, 1989 through June 30, 1992 at rates varying from $45.00 to $120.00 per hour for a total of 221.6 hours of work. One hundred seventy-three (173) hours or seventy-eight percent (78%) of this work was performed by attorney Paul A. Curtis. Thirty-two and three tenths (32.3) hours or fourteen and six tenths percent (14.6%) of this work was performed by attorney Mariclare Thinnes. (Reply Brief - Exhibit A). Billings by these two attorneys account for 92.6% of the hours claimed.

Attorney's Fees Requested for Work on Petition for Judicial Review From Final Order of Commission:

4A. In his itemized claim, Complainant DeVoider includes claims for work on May 7, 11, and 15, 1992 pertaining to the Respondents' petition for judicial review of the final Commission decision. (Reply Brief - Exhibit A). The total amount of fees requested for work pertaining to the petition for judicial review is $16.00 + $120.00 + $32.00 = $168.00. These fees should be denied at this time, because all claims for work done before the district court on a petition for judicial review of a final decision of the Commission should be considered by the agency after remand by the district court and not before. See Conclusion of Law No. 12A. Therefore, the claim for attorney's fees should be reduced by $168.00. After this reduction the amount of attorney's and paralegal's fees through June 30, 1992 is ($23,807.50 -$168.00) or $23639.50.

Enhancement of Attorney's Fees Claimed Through June 30,1992:

5A. In his Reply Brief, Complainant DeVolder has asked for "an enhancement or upward adjustment of the fees awarded [for the period ending June 30,1992] in the amount of 15%" for contingency including both risk of nonpayment (in event the case had been lost) and delay in payment (due to the delay in payment in contingent fee cases under fee-shifting statutes whereby the attorney is not paid until after the completion of litigation, which may include litigation of the fee award itself). This increases the claim by the following amount: ($23639.50 X 15%) = $3545.93. Therefore, the claim for attorney's and paralegal fees through June 30, 1992 is: ($23639.50 + $3545.93) $27185.43.

Claim for Attorney's Fees Incurred in July 1992:

6A. In his Reply Brief, Complainant DeVolder also requests additional fees in the amount of $1320.00 for five hours for attorney Paul Curtis and nine hours for attorney Mariclare Thinnes for preparation, in July of 1992, of the reply brief on the attorney fees issue. Reply Brief at 2 n.1, 9. The request does not state the hourly rate used, but it appears to be $120.00 per hour for work by Paul Curtis and $80.00 per hour for work by Mariclare Thinnes. [(5 hours X $120.00 per hour) + (9 hours X $80.00 per hour)] = [$600.00 + $720.00] = $1320.00. This would be consistent with the $120.00 per hour rate charged for work by Paul Curtis on the rough draft of the initial fees application and brief on March 26, 1992 and the $80.00 per hour charged by Mariclare Thinnes for her work in 1992. This brings the total claim for attorney's fees and paralegal work through July 15, 1992 to ($27185:43 + $1320.00) or **$28505.43.**

Summary of Attorney's Fees Claims:

7A. Complainant DeVolder's claims for attorney's and paralegal's fees may be summarized as follows:

Amount	Description
$23807.50	Fees through 6/30/92 prior to either (a) elimination of fees for work done with respect to petition for judicial review of final decision or (b) enhancement for

	contingency.
-168.00	Less fees for work done with respect to petition for judicial review of final decision.
= $23639.50	Fees through 6/30/92 after elimination of fees for work done with respect to petition for judicial review of final decision and prior to enhancement for contingency.
+ 3545.93	Plus 15% enhancement for contingency. ($23639.50*.15)=$3545.93.
=$27185.43	Fees through 6/30/92 after elimination of fees for work done with respect to petition for judicial review of final decision and after enhancement for contingency.
+1320.00	Plus additional fees for work from July 1, 1992 through July 15, 1992.
= $28,505.43	**TOTAL ATTORNEY AND PARALEGAL FEES.**

(Reply Brief - Exhibit A; Application for Attorney Fees and Expenses hereinafter referred to as "Application").

Total Expenses: .

8A. Complainant DeVolder also asks for a total of $237.51 in expenses through June 30, 1992. The expenses set forth are reasonable and even low for litigation of this complexity and should be awarded in their entirety. (Reply Brief - Exhibit A; Application).

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

9A. 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 (1) 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.

The Time Necessarily Spent:

10A. Complainant DeVolder's attorney submitted detailed computer printouts of time records which present:

> [T]ime entries for time spent on legal matters ... total time and a proposed billing based on normal hourly rates charged by [the] firm to clients of the firm ... The computer printout was not created for purposes of the application [for attorney's fees] but is a normal and regular part of [the] firm's bookkeeping and billing records. The computer printout shows the dates time was spent, the individual attorney or staff member performing the work, the actual time spent on each occasion, the hourly rate applicable to the time and costs by time entry.

(Affidavit of Paul A. Curtis in Support of Application for Attorney fees and Expenses, *hereinafter* referred to as "Affidavit").

11A. A careful examination of the time expended by counsel and paralegals on this case reveals that all of the time claimed by Complainant was reasonable and necessarily spent on this case. (It should be again noted that time expended on the Respondents' petition for judicial review of the final decision has already been excluded from DeVolder's claims.) Although Respondents have neither stated any objection to any particular items claimed by DeVolder nor disputed the accuracy of the time records submitted, the vast majority of which were originally set forth in DeVolder's application for fees filed on March 27, 1992, they have suggested that the time spent was excessive because, in their view, "the great bulk of legal time required in this action was to resolve legal issues which arose between the Commission; Cristen Harms; and the Respondents. Although extensive pleadings were filed in this matter, the bulk of the pleadings involved discovery issues between Cristen Harms and the Respondents." Respondents' Resistance to Complainant's Application for Attorney's Fees at 2. (hereinafter referred to as "Resistance").

12A. The record does not support Respondents' view for several reasons: First, it neglects the extent of discovery motions concerning DeVoider. On January 22, 1991, when Respondents filed a motion to compel discovery directed toward Cristen Harms, they also filed a motion to compel discovery directed toward Mike DeVoider. These motions were heard and ruled upon simultaneously. The ruling on Respondents' motion for continuance, filed on January 23, 1991, which was based on the need to complete discovery against not only Complainant Harms, but also Complainant DeVolder, affected all three cases.

13A. Second, time spent by Complainant DeVolder's counsel on discovery motions and pleadings concerning Cristen Harms and the Iowa Civil Rights Commission was minimal. It resulted in the generation of less than $2521.50 in fees, which amounts to less than 8.8 per cent of the total fees and less than 10.1 percent of the total fees when the 15% enhancement is excluded. These fees are reflected in the following time expenditures, which are either in whole

or in part concerned with such matters (work performed with respect to these matters is underlined):

DATE	HOURS	HOURLY RATE	AMOUNT	WORK
01/15/91	1.0	$120.00	$120.00	Preparation for and attend hearing re motion to compel information from counselor of Harms.
01/16/91	0.5	$120.00	$60.00	Conference with state's attorney re law re compel-counselor of Harms to testify.
01/21/91	1.0	$120.00	$120.00	Conference with client re trial, review of briefs re deposition of counselor of Harms; Review of Decision.
01/24/91	3.0	$120.00	$360.00	Preparation for and hearing re motion to compel and to continue, review of petition for judicial review, preparation for trial.
01/26/91	1.5	$120.00	$180.00	Work re response to motion to compel and petition for

				judicial review.
01/27/91	.9	$75.00	$67.50	Attention to pleadings and petition, attention to Iowa Administrative Procedures Act, prepare first draft of motion to dismiss petition for judicial review.
01/28/91	1.2	$75.00	$90.00	Office conference re court's discovery order, legal research re administrative proceedings and exhaustion of administrative remedies.
01/28/91	3.5	$120.00	$420.00	Legal research re judicial review, work re response, review of witnesses, telephone conferences with witnesses, conference with client re continuance of trial, work re supplement to discovery.
01/29/91	3.0	$75.00	$225.00	Attention to

				Iowa Administrative Act, Office Conference, file motion to dismiss, attention to court's ruling and file, attention to testimony of Mike DeVolder in preparation for supplemental responses to interrogatories, telephone conference with Mike DeVolder.
01/29/91	2.0	$120.00	$240.00	Review court order, Review and revision of motion to dismiss, conference with state re same, work re additional discovery information.
01/31/91	3.5	$75.00	$262.50	Attention to Commission's motion to dismiss, preparation of supplemental responses to interrogatories.
02/14/91	.8	$120.00	$96.00	Review of resistance to motion to dismiss and amendment to

				petition for judicial review, office conference re hearing.
02/25/91	.4	$75.00	$30.00	Review file material re preparation motion to dismiss petition for judicial review.
02/26/91	.3	$120.00	$36.00	Office conference re hearing on motion to dismiss petition for judicial review.
02/27/91	.2	$120.00	$24.00	Review of pleadings from state, resisting motion to stay.
03/13/9	.5	$120.00	$60.00	Conference with judge and state re hearing on motion to dismiss and rescheduling of same.
03/19/91	2.1	$75.00	$157.50	Preparation for the hearing on motion to dismiss, petition for judicial review and application for stay.

TOTAL FEES WHICH WERE PARTIALLY OR COMPLETELY DEVOTED TO DISCOVERY MOTIONS AND PLEADINGS CONCERNING COMPLAINANT HARMS AND IOWA CIVIL RIGHTS COMMISSION $2521.50.

(Application; Reply Brief -Exhibit A).

14A. Third, Respondents' position ignores the close relationship between all three complaints. See Findings of Fact Nos. 64, 66-67, 84-85, 102-05, 10709,116. If it had not been for Complainant DeVolder's actions as a secret informant, it is quite likely that there would have been no Commission investigation and no Commission initiated complaint would ever have been filed. See Findings of Fact Nos. 30-40,139. The retaliation DeVoider experienced was due, in part, to his involvement in the Commission's investigation. See Findings of Fact Nos. 107-109. The race and sex discrimination in public accommodations and employment alleged in the Commission's and Cristen Harms' complaints involve essentially the same incidents of discrimination as those which adversely affected the work environment of Mike DeVoider. See Findings of Facts Nos. 23, 29-30, 36-37, 49, 56-61, 64, 66-67, 76, 84-85, 102-105, 136. The retaliation DeVolder experienced was also due to his own internal complaints and actions taken in resistance to these discriminatory practices. See Findings of Fact Nos. 106-07, 109, 111-113. The successful prosecution of the Commission's and Cristen Harms' allegations was important to DeVolder's case and the time expenditures by DeVoider's attorney which were pertinent to those allegations were necessary and proper.

The Difficulty of Handling and Importance of the Issues:

15A. The variety, difficulty, complexity, and importance of the factual and legal issues in this case are as great as any ever heard by the Iowa Civil Rights Commission. Particularly novel or complex issues are underlined below. With respect to DeVolder's complaint, pertinent legal issues included, but are not limited to, the following procedural issues: (a) Whether failure to follow certain procedural rules with respect to the probable cause finding and conciliation required dismissal of DeVolder's complaint, (b) whether service of the Notice of Hearing on Respondent Sullivan's attorney was legally sufficient to effect service on Respondent Sullivan; (c) whether DeVolder had sufficient standing to file a complaint based on the allegations of race and sex discrimination stated therein; (d) whether the maintenance of a racially and sexually hostile working environment as well as the continued retaliatory abuse of Complainant DeVolder constituted continuing violations, (e) whether the Commission was barred, under the doctrine of issue preclusion, from determining whether DeVoider's discharge was due to retaliation, and (f) whether the Respondents' motion for change of venue seeking a Change of Administrative Law Judges was properly denied.

16A. Substantive legal issues included, but are not limited-to: (a) what are the proper orders and allocations of proof in cases relying on direct evidence for proof of various allegations of discrimination as compared to cases relying on circumstantial evidence?; (b) what is the proper order and allocation of proof in sexual harassment cases? (c) what is the proper standard to apply in regard to determining what behavior is reasonably considered to be offensive in sexual harassment cases and whether such conduct is sufficiently severe and pervasive enough to create an abusive working environment?; (d) what are the elements which must be shown to prove a

claim of sexual or racial harassment when the harassment is directed at employees of a different race and/or sex than the complainant? (e) what is the proper order and allocation of proof in retaliation cases?, and (f) does employee misconduct resulting directly from illegal retaliation or discrimination constitute a legitimate reason for discharge?

17A. Remedial issues included: (a) what are the proper standards for determination of back pay? (b) what are the proper standards for determination of damages for physical pain and suffering and emotional distress? (c) what are the appropriate legal standards applicable to determining awards of interest? and (d) what remedies are suitable for cases of this nature involving race and sex discrimination in employment and public accommodations and retaliation. This list, of course, does not take into account the variety of issues involving attorney's fees discussed herein.

The Nature and Extent of the Service:

18A. The time records of the Complainant's attorneys indicate that the services provided by his law firm in this matter extended from approximately two weeks before the time the complainant filed a complaint to July 1992. (Reply Brief and Exhibit A). The attorneys provided a full and varied range of services in this case including assistance with completion of the charge, assistance with the investigation and a successful motion for reconsideration, discovery matters, successful resistance to Respondents' petition for judicial review of discovery orders of the administrative law judge, successful prosecution of the case at trial, the filing of briefs, and the litigation of the attorneys fees issues.

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

19A. In a case requiring the number of hours of work which have been expended in this case, it may be reasonably inferred that the Complainant's attorneys had to forego some other employment for which those hours could have been expended. This conclusion is also supported by evidence in the record. (Affidavit).

The Standing and Experience of the Complainant's Attorneys in the Profession:

20A. Official notice is taken of the following facts which are readily capable of certain verification through reference to the 1992 edition of the Martinddale-Hubbell Law Directory, Fairness to the parties does not require that they be given the opportunity to contest these facts:

> A. Paul A. Curtis received his Juris Doctor degree at the University of Michigan in 1982. He was admitted to the bar in Iowa in 1983. He is a member of the Polk County, Iowa State and American Bar Associations. He is a member of the Labor and Employment Law and Litigation Sections of the ABA.
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> B. Mariclare Thinnes received her Juris.Doctor degree with distinction at the University of Iowa in 1990. She was admitted to the bar in Iowa in 1990. She is a member of the Iowa State and American Bar Associations.

C. Although neither Mr. Curtis nor Ms.Thinnes are individually rated in the Directory, "Martindale-Hubbell does not undertake developing ratings for every listed lawyer. The absence of a rating should not be misconstrued. Some lawyers have requested their ratings not be published. In other instances, definitive information has not yet been completely developed."

D. The complainant's law firm of Gamble & Davis is "AV" rated by Martindale-Hubbell. This is the highest attainable rating. The first letter in this rating represents a rating, 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 "A" rating represents a rating of legal ability "from Very High to Preeminent."

E. 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 professional responsibilities." A "V"rating reflects a "Very High" general recommendation.

21A. The Administrative Law Judge would rate the quality of trial and motion practice of Mr. Curtis as high. The same would be true with respect to the research done by him and other attorneys with Gamble & Davis as reflected in the claims for fees. Of course, not all legal propositions set forth by Complainant's attorneys on brief or in argument were accepted, but that is to be expected in the normal course of events. Some measure of the quality of the performance of the counsel for a prevailing party may be reflected by the quality of his or her opposition. The Respondents' attorney, Patrick W. Brick, is an experienced and highly skilled trial lawyer. Official notice is taken, based on the Martindale Hubbell Law Directory, that both Mr. Brick, and the law firm, Brick, Seckington, Bowers, Swartz & Gentry, are "AV" rated. Fairness to the parties does not require that they be given the opportunity to contest these facts.

The Customary Charges For Similar Services:
22A. The billing submitted by Complainant's attorneys is "based on normal hourly rates charged by our firm to clients of the firm." (Affidavit). Official notice is taken of the 1992 Martindale Hubbell Law Directory listing for Gamble & Davis which indicates 25 attorneys are members of the firm. Official notice is taken of the fact that these rates are not out of line for attorneys of similar experience in law firms of this quality, size, and prominence engaged in the practice of employment discrimination law in the Des Moines area. Fairness to the parties does not require that they be given the opportunity to contest these f acts.

23A. The hourly rates requested for work by attorneys Paul Curtis and Mariclare Thinnes are as follows:

YEAR	CURTIS HOURLY RATES	THINNES HOURLY RATES
1989	$100.00	Not applicable.
1990	**$110.00**	**$65.00**

1991	$120.00	$75.00
192	$120.00	$80.00

24A. Taking into account the location of Gamble & Davis in a large,metropolitan area, which is the capital of the state, the size of the firm, the relative seniority and experience of the attorneys, and the increase of fees overtime, the hourly rates requested are reasonable. It can be reasonably inferred that the higher-than-average hourly rates of Mr. Curtis are due, in part to his being with a large firm with which he has longer seniority than Ms.Thinnes. Her lower-than average rates may be due to her having less experience and seniority than Mr. Curtis. These conclusions are supported by reference to the following facts which are derived from the 1990 Economics Survey of the Iowa State Bar Association. Official notice is taken of the following facts. Fairness to the parties does require that they be given an 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. It therefore encompasses both metropolitan and rural areas. **There is support in the survey for the "common perception that lawyers from the big city earn far more than the rural lawyer."** (Survey at 31). The median annual income of attorneys in private practice varies by the size of the cities in which they are practicing: A. Population <10,000 - Income $57,500. B. Population 10,000-100.000 - Income $70,500. C. Population > 100,000- Income $79,500. (Survey at Table 13). An attorney's hourly "rate is a strong factor in relation to income. [M]edian income steadily increases with an increase in hourly rates."(Survey at 36). **It can be reasonably inferred that the average statewide hourly rates indicated by the survey are substantially lower than those reflective of the Des Moines market.**
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> B. 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 largest firm category listed in Table 65 is for "eleven or more lawyers." "Larger firms tend to use a higher hourly rate for both trial and non-trialwork." (Survey at 63). In large firms, seniority with the firm is the second most important factor after "revenue generated and collected" in determining individual compensation. (Table 74).

Time Limitations Imposed ty the Client or Circumstances:

25A. There is no evidence in the record of any time limitations imposed by the client or circumstances which would affect the attorney's fees.

The "Undesirability" of the Case:

26A. There is no evidence in the record that this case resulted in animosity by important elements in the community toward the Complainant's attorneys or law firm because they undertook representation of the Complainant in a civil rights case.

The Nature and Length of the Professional Relationship With the Client:

27A. There is no evidence in the record of any professional relationship between the attorneys and Complainant DeVoider prior to this case. If Complainant DeVoider were a long-term client of the law firm at the time this case was initiated, it might be reasonable to infer that such a relationship would result in more favorable treatment of him than newer clients with respect to fees.

Awards in Similar Cases:

28A. Two cases, Lynch v. City of Des Moines and Landalls v. Rolfes. have been brought to the attention of the Commission, through the briefs of the parties, as examples of hourly fee awards in other employment discrimination cases in Iowa. Lynch was cited by Respondents because of the reduction of fees claims by the court while Landalls was cited by the Complainant because of the increase in fees over the Complainant attorney's historical rates by the court. Resistance at 4; Reply Brief at 2-3. Awards of $1 00.00 per hour were made in both of these 1990 cases. This rate is $10.00 per hour less than Complainant's attorney Curtis charged and $35.00 per hour more than Complainant's attorney Thinnes charged. These cases do not establish a rule or presumption that the appropriate attorney's fees rate for all attorneys for all litigation under the Iowa Civil Rights Act in 1990 was $100.00 per hour. As discussed in the Conclusions of Law, the amount of attorney's fees to be awarded depends on the facts of each case. See Conclusion of Law No. 8A. Even if such a presumption had been established, once this hourly rate is applied to the hours worked by both of the Complainant's attorneys in 1990, the end result is very similar:

1990 Claim For Curtis $100.00 Hour	At Per	1990 Claim For Thinnes $100.00 Hour	At Per	1990 Claim For Curtis $110.00 Hour	at Per	1990 Claim For Thinnes At $65.00 Per Hour	
$1270.00		$340.00		$1397.00		$221.00	
TOTAL AT $100.00 PER HOUR = ($1270.00 +$340.00) = $1610.00				TOTAL AT ACTUAL RATES = ($1397.00 + $221.00) = $1618.00			

Amount Involved, Responsibility Assumed, and Results Obtained:

29A. The Complainant's attorneys achieved exceptional and excellent results in this litigation. The Complainant prevailed on every claim he made. In the words of the final decision and order, DeVolder proved (1) "the establishment and/or maintenance of a racially hostile work environment by Respondents;" (2) "the establishment and/or maintenance of a sexually hostile work environment by Respondents;" (3) "DeVolder was subjected to verbal and physical abuse in retaliation for his lawful opposition to discrimination by Respondents;" and (4) "DeVolder was subjected to a retaliatory and discriminatory discharge by Respondent[s]."

30A. The results obtained included awards to Complainant DeVolder for emotional distress and physical pain and suffering in the amount of $15,000.00 and back pay in the amount of $2,500.00. Interest was also awarded. Because of the interrelated nature of these cases, the

Complainant's counsel may also take some credit for the award of $22,706.89 in back pay to Cristen Harms.

31A. Of far greater importance, however, are the non- monetary remedies in this case which shall be implemented so as to eliminate past and prevent future discriminatory practices. These remedies include the public exposure of and injunctive relief against widespread practices of race and sex discrimination in employment, race discrimination in public accommodations, and retaliation. The Commission's final order includes the posting of notices at Respondents' place of business to inform employees and the public that Respondents now recognize that equal employment opportunity and equal opportunity in public accommodations are the law of the land. Similar notices are to be placed in Respondents' job advertising. Job Service of Iowa, a nondiscriminatory recruitment source, is to be notified of future job openings.

32A. The final order requires a complete revision of Respondents' hiring practices for salespersons in order to reduce the possibility of race and sex discrimination. This includes the establishment of written job descriptions and written procedures for filling openings, the filing of an annual applicant flow report with the Commission, and the maintenance of application files for the Commission's inspection.

33A. The order requires management personnel to study specified publications concerning job interviewing inquiries and sexual harassment. In addition, Respondents are required to implement educational programs for management personnel on racial and sexual harassment, discrimination in public accommodations, and discrimination in hiring. Non management personnel are to be educated concerning harassment, public accommodations discrimination, and appropriate grievance procedures for harassment complaints. Respondents are required to implement written policies on harassment, including grievance procedures.

34A. The wide and varied responsibilities assumed by Complainant's counsel in this case have already been described. See Finding of Fact No. 18A.

Whether the Fee is Fixed or Contingent Including Delay In Payment and Risk of Nonpayment for Contingency Fee Cases:

35A. This case was taken by DeVolder's counsel on a contingent fee basis. If DeVolder had lost, no fee would have been recovered. (Affidavit). The contingent fee agreement provided that:

> Gamble & Davis [the complainant's attorney's law firm] shall receive only those fees and expenses awarded by the Court should you win your case or one-third of the total award, which ever is greater. If you do not win your case, then no fees shall be received by Gamble & Davis. You agreed that no settlement will be entered into which does not provide for payment of reasonable attorney fees and expenses. In addition, there is no guaranty as to outcome of this case.

(Reply Brief - Exhibit B).

Delay in Payment:

36A. At this point, delay in payment for the earliest fees accrued by Complainant DeVolder's attorneys has stretched to over two and one-half years. The ultimate date on which payment will be made depends on the outcome of the current appeal of the Commission's final decision and order and any appeal made of this decision awarding attorney fees. It may be well over an additional year before attorney's fees in this case are finally paid. The delay in payment has already been great enough to justify an enhancement in the fees to account for the delay in order to provide a reasonable fully compensatory attorney's fee for Complainant DeVolder. This enhancement constitutes no windfall for the Complainant. Once all factors are taken into account, it is clear that the hourly rates claimed by Complainant DeVolder's attorney would be reasonable only if his counsel had been regularly paid throughout this litigation. Failure to take delay in payment into account when finally computing a reasonable attorney's fee would discourage private attorneys from taking these cases.

37A. One way for delay to be taken into account is to increase the hourly rate for fees charged at earlier stages of the case to the rate charged at the end of the case. See Conclusion of Law No. 34A. In this case, however, such an enhancement would not account for any of the delay in payment since January 15, 1991, the date reflecting the last fee increase claimed by Complainant's attorney. An enhancement of 10% to account for delay would be appropriate given (a) the delay in payment at the current hourly rate since January 15, 1991, and (b) the discrepancy between the current hourly rates, for the two attorneys who did over ninety percent of the work, of, respectively, $120.00 for Paul Curtis and $80.00 for Mariclare Thinnes and their hourly rates at earlier stages of the case of, respectively $100.00 and $110.00 for Mr. Curtis, and $65.00 and $75.00 for Ms. Thinnes.

38A. This enhancement does not account for the probable delay which will occur in the event this attorney's fee decision is appealed to district court or any further delay in payment due to the appeal of the final decision which has already been undertaken.

Risk of Nonpayment:

39A. As previously noted, if DeVolder had lost, his attorney would have received no payment. See Finding of Fact No. 35A. Although the contingency fee agreement provides that, in the event DeVolder prevailed, his attorneys would receive either "those fees and expenses awarded by the court ... or one third of the total award, whichever is greater;' there never was any realistic prospect that one-third of the total award would meet or exceed the product of the hours reasonably expended multiplied by e. reasonable hourly rate. (Reply Brief - Ex. B). Complainant admitted in his testimony that the emotional distress damages would not exceed $15,000.00. See Finding of Fact No. 136. Back pay was only $2,500.00. When Mr. DeVolder became a client of Gamble & Davis, on November 20, 1989, he was employed in a position which paid an amount equivalent to that he made at Friedman's, i.e. $2500.00 in six weeks or $21,666.00 per year. Before taking that job, he was unemployed for a six week period commencing on July 31, 1989. See Findings of Fact Nos. 8,135. See Application. Under these facts, it may be reasonably inferred that neither the attorney nor the client were able to mitigate the risk of nonpayment in any way. Some enhancement should, therefore, be granted to compensate for the Complainant's attorney's risk of loss or nonpayment in this case. See Conclusion of Law No. 56A.

40A. There is no evidence in the record of any specific aspects of this case which have aggravated the economic risk of nonpayment beyond that normally present in a contingent fee case. The aspect of delay has already been considered. There is no evidence of greater economic risks because of a particular attorney's circumstances. Although this case has its novel aspects, they do not constitute legal risks which either create an economic disincentive independent of the basic risk present in a contingent fee case or which are not already adequately compensated by the lodestar calculation of a reasonable hourly rate times reasonable number of hours expended.

41 A. Official notice is taken of the facts derived from the Iowa Civil Rights Commission's Annual Reports for the 1989 and 1990 fiscal years which are set forth in attachments to this decision which are designated, respectively, as Exhibit # 1 and Exhibit # 2. These are facts which can be readily ascertained from the report and which are within the specialized knowledge of this agency. Fairness to the parties does not require that they be given the opportunity to contest these facts. The statistics given in the exhibit provide a conservative estimate of the risk of loss in civil rights cases brought before this Commission, if success is defined as at least a probable cause finding of discrimination after a full investigation, or prevailing in public hearing, and/or a settlement of the case. As a class, civil rights cases brought before this Commission present an approximately 60% to 80% risk of loss or nonpayment to attorneys who represent their clients, as Mr. DeVolder was represented here, at all stages of the administrative process. (Reply Brief-Exhibit A). See Finding of Fact No. 18A.

42A. While these statistics cannot perfectly reflect the risk of loss in the market, they at least provide an indication that the risk of loss or nonpayment is substantially greater than the 4% or 5% risk of loss which would be adequately compensated by the five percent enhancement awarded here. See Conclusion of Law No. 65A. In addition, official notice is taken that the majority of complainants whose cases are being processed before the Commission, exclusive of those whose cases are transferred to the judicial system by obtaining a right to sue letter, are not represented by private counsel prior to public hearing. Furthermore, since January of 1989, a majority of complainants have not been represented by private counsel at the public hearing. Therefore, the success rates before the Commission may safely be said to not reflect the incentives or disincentives of current fee award practices. See Conclusions of Law Nos. 63A, 68A.

43A. Official notice is also taken of facts set forth in an attachment to this decision which is designated Exhibit # 3. This is an "Analysis of Determinations of Iowa Civil Rights Act Cases By the Iowa Appellate Courts [from] July 1, 1989 [to] June 30, 1992." These are facts which are readily capable of certain verification through examination of the Iowa appellate court decisions listed therein. Fairness to the parties does not require that they be given the opportunity to contest these facts. These facts indicate that a plaintiff's attorney faces an approximately 64% risk of loss or nonpayment in litigating discrimination cases before the Iowa appellate courts. Although these cases probably reflect the influence of current fee award practices, they still provide an indication that a 5% enhancement is quite conservative.

44A. Official notice is taken of Disciplinary Rule 2106 of the Iowa Code of Professional Responsibility for Lawyers which states, in part:

(B)..... **Factors to be considered as** guides in determining the reasonableness of a fee include **the following:**

...

(8) Whether the fee is fixed or contingent.

DR 2-106(B).

45A. Official notice is also taken of the following facts as being within the specialized knowledge of this agency: In Iowa, lawyers charge a premium when their entire fee is contingent on winning. In the Des Moines and Iowa market, a five per cent premium over an attorney's usual hourly rates, which are charged when there is no risk of nonpayment, would represent a reasonable and conservative premium in civil rights cases or any case with a risk of loss or nonpayment of 60% or more. Fairness to the parties does not require that they be given the opportunity to contest these facts.

46A. Given that Complainant DeVolder's counsel had "other paying client work and lawsuits available at our customary and normal hourly rates" throughout their representation of DeVolder in this case, (Affidavit), it may be reasonably inferred that the failure to award some premium for risk of loss or nonpayment will discourage this firm and others of similar quality from representing contingent fee complainants in future civil rights cases in favor of cases where there is no risk of nonpayment.

47A. In light of the facts and circumstances set forth above, a five percent enhancement of attorney's fees to compensate for risk of loss or nonpayment is reasonable and appropriate in this case.

Award of Fees and Expenses:

48A. Taking into account all the factors set forth throughout this decision, Complainant DeVolder should be awarded total attorney and paralegal fees of $28,505.43 Expenses of $237.51 should also be awarded. These constitute, reasonable, appropriate, and fully compensatory awards of fees and expenses.

CONCLUSIONS OF LAW

Procedure:

1A. In this case, the parties elected to have the attorney's fee issue heard pursuant to written pleadings submitted by the parties and information submitted therein. See Finding of Fact No. 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).

Official Notice.

Official Notice in General.

2A. 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 § 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).

Official Notice and Statistics:

3A. The Iowa Supreme Court has taken judicial notice of 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). 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), or industry data. 29 AM. JUR. 2d Evidence § 112 & n.8 (1967).

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). An adjudicator who is an attorney, as the Commissions'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 § 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. McCienahan, 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 § 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. Frank Robinson, CP # 08-86-15103, slip op. (Iowa Civil Rights Comm'n August 29, 1991)(fees for complainant's attorney); Ruth Miller, CP # 04-86-14561, slip op. at 71, 75 (October 29, 1990)(fees for employer on motion for sanctions); Diane Humburd, 10 Iowa Civil Rights Commission Case Reports 13 (1989) (Supplemental Decision awarding fees for complainant's attorney).

Reasonable Attorney's Fees Remedy:

5A. The Iowa Civil Rights Act allows the award of reasonable attorney fees" as part of the remedial action which the Commission may take in response to the Respondents' discriminatory practices Iowa Code § 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 1 990).

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. 400,40102,88 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).**The Respondents in this case concede that Complainant DeVolder, as a successful plaintiff, is entitled to reasonable attorney's fees.** Resistance at 1.

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. This burden has been met here. See Findings of Fact Nos. 3A-4A, 6A, 8A, 10A.

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

9A. **"The intial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hour's 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). The lodestar amount for the period ending June 30,1992 is $23,639.50. The lodestar amount for the period from July 1, 1992 to July 15, 1992 inclusive is $1320.00. See Findings of Fact Nos. 3A, 4A, 6A, 7A. These amounts are based on "customary rates" which reflect an expectation that the attorney will "be paid promptly and without regard to

success or failure" and account for no risk of nonpayment. Hensley v. Eckerhart, 461 U.S. at 448-49, 76 L.Ed. 2d at 60. See Findings of Fact Nos. 22A-23A. Such customary rates take into account the place of residence of the attorney or the location where the attorney's services are to be performed, Stanley v. Indianola, 261 Iowa 146, 152,153 N.W.2d 706 (1967), and the "prevailing market rates in the relevant community." Blum V. Stenson, 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L. Ed. 2d 891, 900 (1984). See Findings of Facts Nos. 22A-24A.

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. See Finding of Fact No. 11A. "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).

12A. In this case, after consideration of the factors discussed below, the only hours excluded from Complainant's billing were those spent before the district court on the petition for judicial review of the final decision. See Finding of Fact No. 4A. This was not because those hours were found to be unreasonable or unnecessary. Rather, the claim for those hours was brought at an inappropriate point in this litigation. The district court sits in an appellate capacity when reviewing final contested case decisions, Mary v. Iowa Dept. of Transportation, 382 N.W.2d 128 (Iowa 1986), and the tee determination on such review should not be made until after the district court has rendered its decision. See Lynch v. City of Des Moines, 464 N.W.2d 236, 240-41 (Iowa 1990)(case remanded to trial court for determination of appellate attorney fees).

13A. Respondents challenged the hours spent by Complainant DeVolder's counsel litigating legal issues which arose between the Commission, Complainant Cristen Harms, and the Respondents. See Finding of Fact No. 1 1 A. The rejection of this challenge is appropriate given the complete success of Complainant DeVolder and the closely interrelated nature of these claims as set forth in the Findings of Fact. See Riverside v.. Rivera, 477 U.S. 561, 569,106 S.Ct. 2686,91 L. at n.4; Hensley v. Eckerhart, 461 U.S. at 434-37, 76 L.Ed. 2d at 51-52. See Finding of Fact No. 14A.

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. This duplication has been eliminated in the final list of factors set forth in Finding of Fact No. 9A. All of th factors set forth in Finding of Fact No. 9A have been considered in this case. See Findings of Fact Nos 10A- 46A. 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, lnc., 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. 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, 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. See Finding of-Fact No. 29A.

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 (1 984), **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. **When as here, the Complainant has obtained"exceptional success, an upward enhancement may be justified."** Blum V. Stenson, 465 U.S. 886, 897, 104 S. Ct. 1541, 79 L. Ed. 2d 891, 901 (1984). See Finding of Fact No. 29A.

30A. As noted, factors which may be considered in adjusting the lodestar include those listed previously. Hensley, 461 U.S. at 434, 76 L.Ed.2d at 51 & n.9. See Conclusions of Law Nos. 14A, 16A. As a matter of law, however, **the maximum amount of the attorney's fees award is not limited by any amountset** in **any contingent fee agreement between the complainant and his attorney.** Landals v. Rolfes, 454 N.W.2d 891, 898 (Iowa 1990)(citing Blanchard v. Bergeron, 489 U.S. 87, 96, 109 S.Ct. 939, 103 L.Ed. 2d 67, 77 (1989)). Furthermore, care must be taken to avoid either "double-counting" or cumulative application of these factors as many of them are normally adequately reflected in the lodestar. See Blum v. Stenson, 465 U.S. at 898-901, 79 L.Ed. 2d at 901-04; Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 554 (1989). In this case only two factors, delay and risk of nonpayment, have been found which justify any upward enhancement of the lodestar. See Findings of Fact Nos. 36A-45A.

Enhancement of Lodestar Amount Due to Delay In Payment:

31A. There is no question that, with respect to Federal fee shifting statutes, delay in payment in contingent fee cases is a factor which may result in an increase in the lodestar fee. Missouri v. Jenkins, 491 U.S. 274, 284, 109 S.Ct. 2463, 105 L. Ed. 2d 229, 240(1989)(fee shifting provisions in civil rights cases under 42 U.S.C. § 1988); Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 716, 750, 107 S. Ct. 3078, 97 L.Ed. 2d 585, 592, 613 n.13 (1987)(plurality and dissenting opinions)(interpreting fee shifting provision of Clean Air Act); Schlei & Grossman, Employment Discrimination Law: 19871989 Supplement 210 (1991)(fee-shifting provisions of Title VI[of Civil Rights Act of 1964). This authority is persuasive on this issue as it takes into account the economic realities of the practice of law and is consistent with the purpose of fee shifting statutes, i.e. "ensuring that private citizens can afford to pursue the legal actions necessary to advance the public interest vindicated by the policies of [environmental and] civil

rights [legislation]." See Ayala v. Center Line, Inc., 415 N.W.2d 603, 605 (Iowa 1987)(citing Newman v. Piggie Park Enterprises, 390 U.S. 400,40102 (1968)).

32A.

> Clearly compensation received several years after the services were rendered-as is frequently the case with complex civil rights litigation-is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings..... This delay, coupled with the fact that..... the attorney's *expenses* are not deferred pending completion of the litigation, can cause considerable hardship.... If no compensation were provided for the delay in payment, the prospect of such hardship could well deter otherwise willing attorneys from accepting complex civil rights cases that might offer great benefit to society at large;the result would work to defeat Congress purpose in enacting [attorney's fees shifting statutes.)

Missouri v. Jenkins, 491 U.S. 274, 284,109 S.Ct. 2463, 105 L. Ed. 2d 229, 240 & n.6. (1989).

33A.

> [D]elay in payment . . . is an integral aspect of contingency payments for which compensation is appropriate. Delay in payment causes cash-flow problems and deprives an attorney of the use of money, thus magnifying the economic risk associated with the uncertainty of payment.

Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. at 750, 97 L.Ed. 2d at 613 (dissenting opinion).

34A. Delay may be viewed as a factor separate from the risk of nonpayment, Id., 483 U.S. at 716, 97 L-Ed. 2d at 592, or as a factor which is part of the risk of nonpayment, Id., 483 U.S. at 749, 97 L.Ed. 2d at 613 (1987)(dissenting opinion), but which should not be again factored in when considering an enhancement for risk of nonpayment after a separate enhancement for delay has been granted. Cf. Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 554 (1989)(noting that, in Blum the Supreme Court cautioned against the cumulative application of the Johnson criteria). See Finding of Fact No. 44A. An enhancement for delay may be implemented "either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." Pennslyvania v. Delaware Valley Citizens' Council, 483 U.S. at 716, 97 L.Ed. 2d at 592 (1987)(plurality opinion). The first option was followed in Landals v. Rolfes, 454 N.W.2d 891, 89798 (Iowa 1990). The latter option was followed here, resulting in a 10% enhancement of the lodestar. See Finding of Fact No. 37A.

Enhancement of Lodestar Amount Due to Risk of Nonpayment:

Federal Court Decisions as Precedent:

35A. Because this Commission hereby adopts a position with respect to the enhancement of attorney's fees awards for risk of nonpayment which is inconsistent with the majority opinion expressed in the recent United States Supreme Court decision of Burlington v. Dague, 505 U.S. __ , 112 S. Ct. __ $ 120 L. Ed. 2d 449 (1992), it is necessary to review the factors which should be taken into account when determining whether federal precedent is considered to be persuasive authority. In Burlington, the Court interprets fee-shifting provisions which are similar to those found in Federal civil rights laws, and the Iowa Civil Rights Act, Iowa Code § 601A.15(8)(a)(8)(1991),so as to bar an enhancement of an attorney's fee award due to the risk of nonpayment present in a contingent fee case under the particular "fee shifting statutes at issue." Id. 120 L. Ed. 2d at 459. (construing fee shifting provisions of the Solid Waste Disposal Act and the Clean Water Act).

36A. Federal court decisions, including United States Supreme Court decisions, applying Federal anti-discrimination laws or fee-shifting statutes are not controlling or governing authority in cases arising under the Iowa Civil Rights Act. See e.g. Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829, 831 (Iowa 1978). Nonetheless, they are often relied on as persuasive authority in these cases. Eg. Landals v. Rolfes, 454 N.W.2d 891, 898 (Iowa 1990); Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982). Although opinions of the United States Supreme Court are often entitled to great deference, Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862,866 (Iowa 1978), its decisions have been rejected as persuasive authority when their reasoning is inconsistent with the broad remedial purposes of the Act, Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d at 831, or of local civil rights ordinances. Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d at 866-67.

37A. In determining the persuasive value of any Federal decision, or decision of another state, or other legal authority, it must be borne in mind that the Act is a "manifestation of a massive national drive to right wrongs prevailing in our social and economic structures of our country," Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 765 (Iowa 1971).

38A. Federal decisions should be rejected as persuasive authority when violative of the controlling authority requiring liberal interpretation and construction of the Iowa Civil Rights Act. When determining the sense and meaning of the written text of a statute providing regulations conducive to public good or welfare, the statute is liberally interpreted. State ex. rel. Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624, 629 (Iowa 1971). When determining the legal effect of its provisions, the Iowa Civil Rights Act "shall be broadly construed to effectuate its purposes," Iowa Code § 601A.18 (1991), and "liberally construed with a view to promote its objects and assist the parties in obtaining justice." Iowa Code § 4.2. "in construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it." Monroe Community School District v. Marion County Board of Education, 251 Iowa 992,998, 103 N.W.2d 746 (1960); Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829,832 (Iowa 1978). Therefore, constructions of the statute which "effectively defeat the remedial purpose of Chapter 601A [the Iowa Civil Rights Act]." should be rejected. See Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162,167 (Iowa 1982).

39A. When the Supreme Court of Iowa rejected the holding of the Supreme Court of the United States, in General Electric Company v. Gilbert, 429 U.S. 125, 97 S.Ct. 401, 50 L. Ed. 2d 343 (1976), that employment discrimination on the basis of pregnancy was not sex discrimination, the Iowa Court relied on the holdings of four federal Circuit Courts of Appeal which, prior to General Electric, had found that pregnancy discrimination did constitute sex discrimination and upon the reported decisions of two trial and two appellate state courts which rejected the holding in General Electric. Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d at 866.

Federal Authority on Enhancement for Risk of Non-Payment:

40A. In two decisions, in which a majority of the United States Supreme Court did not address the issue, Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L.Ed. 2d 40 (1983); Blum v. Stenson, 465 U.S. at 901, 79 L.Ed. 2d at 903 & n.17, Justice Brennan authored separate opinions, joined by Justices Marshall, Blackmum and Stevens in Hensley, Hensley, 461 U.S. at 448-49 (concurring and dissenting in part), and Justice Marshall in Blum, Blum, 465 U.S. at 90204 (concurring opinion), asserting that under the legislative history of 42 U.S.C. § 1988, "the risk of not recovering any attorney's fees [in a case where payment of attorney's fees is contingent on success) is a proper basis [for] an upward adjustment to an otherwise compensatory fee." Blum, 465 U.S. at 902 (Brennan, J., concurring)(citing Hensley, 461 U.S. at 448-49)(Brennan, J. concurring in part and dissenting in part).

41A. In 1987, three years after Blum, the United States Supreme Court rendered its decision in Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 107 S. Ct. 3078, 97 L.Ed. 2d 585 (1987). In that case, a plurality of four justices (White, Rehnquist, Powell, Scalia) concluded that "enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual feeshifting statutes." Id., 483 U.S. at 727. In a ruling in the alternative, the plurality suggested that, if fee shifting statutes were to be construed to allow such an enhancement, then an upward adjustment of the lodestar to compensate for risk of nonpayment could be made, but such adjustment would only exceed an amount equal to one-third (33%) of the lodestar only under "the most exacting justification." Id., 483 U.S. at 730.

42A. It must be noted however, that the plurality opinion on this issue did not constitute the governing federal law because a majority (five) of the court, as reflected by Justice O'Connor's concurrence and Justice Blackmun's dissent (joined by Justices Brennan, Marshall, and Stevens), recognized that an enhancement to the lodestar amount to compensate for risk of nonpayment "is appropriate in specified cases." Id., 483 U.S. at 742 & n.7 (Blackman, J. dissenting). The reason Justice O'Connor concurred in judgment reversing such enhancement is not because of disagreement with the principle that such enhancement is appropriate, Id., 483 U.S. at 731 (O'Connor, J., concurring), but because, in her view, the enhancement in the case was not supported by either evidence or findings of fact which would justify such an enhancement under her standards, which differed from those set forth by the dissent. Id., 483 U.S. at 731-34 (O'Connor, J., concurring).

43A. At the time that Pennsylvania v. Delaware Valley Citizens' Council was decided, not only did a majority of the Court agree that enhancement for risk of nonpayment in a contingent fee case was appropriate under fee shifting statutes, but, as the plurality admitted, "[m]ost [federal circuit] Courts of Appeals ['numerous Courts of Appeals'] [agreed with Justice Brennan's concurrence in Blum]and have allowed upward adjustment of fees because of the risk of loss [or nonpayment] factor."Delaware Valley, 483 U.S. 711, 717 & n.4. By the plurality's count, the 4tt., 5th, 6th, 8th, 9th, 10th, llth and Federal Circuit Courts of Appeals ail had actually "approved an upward adjustment of the lodestar to compensate for the risk of not prevailing." Id. The plurality also noted the lst Circuit allows such an upward adjustment. Id. 483 U.S. at 717-18. The dissent agreed with this, but-noted that the 2nd, and 3rd Circuit Courts of Appeals had also either "upheld enhancements for contingency or ruled that such enhancements are allowable in appropriate circumstances." Id., 483 U.S. at 741 n.6 (Blackmun, J. dissenting). Both the plurality, Id, 483 U.S. at 71920 & n.6 (plurality opinion) and the dissent, Id., 483 U.S. at 741 n.6 (Blackmun, J. dissenting), agreed that the 7th and District of Columbia Circuits had questioned the propriety of risk enhancement. The dissent, however, also noted that panels of both the 7th and District of Columbia Circuits had "indicated such enhancements would be appropriate in certain circumstances." Id ., 483 U.S. at 741 n.6 (Blackmun, J. dissenting).

44A. After the Delaware Valley case was decided, panels in both the District of Columbia Circuit and the Seventh Circuit, as well as most of the other circuits, came to view Justice O'Connor's opinion allowing contingency fee enhancements as the holding of the case. Soto v. Adams Elevator Equipment Company, 941 F.2d 543,56 Fair Empl. Prac. Cas. 1270, 1278 (7th Cir. 1991); McKenzie v. Kennickell, 875 F.2d 330, 55 Fair Empl. Prac. 1037,1040-41 (D.C;. Uir. 1989); Schlei & Grossman, Employment Discrimination Law: 1987-1989 Supplement 209 (1991).

State Authority on Enhancement for Risk of Non-Payment:

45A. State courts addressing this issue have either held that an enhancement of attorney's fees for risk of nonpayment is appropriate under some circumstances, Xieg v. Peoples National Bank, 63 Wash. App. 572, 821 P.2d 520, 528 (1991)(enhancement-for-risk of nonpayment allowed); Lane v. Head, 566 So.2d 508, 513 (Fla. 1990)(Overton, J. concurring)(enhancement for risk of nonpayment allowed in severely restricted circumstances)(interpreting Standard Guaranty insurance Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990)); Wilson v. General Motors Corp., 454 N.W.2d 405 (Mich. App.1990)(enhancement for risk of loss available in extraordinary circumstances); Bishop Coal v Salyers, 380 S.E. 2d 238, 239 & n.11 (W. Va. 1989) (contingent fee enhancement due to risk of loss appropriate in many circumstances); Doran v. University of Maine, 40 Fair Empl. Prac. Cas. 1459, 1462-63 (Maine Superior Court 1986)(contingent risk of nonpayment is one factor to be considered in determining whether fee is to be enhanced), or that the contingent nature of the fee should be taken into account in computing the lodestar, Standard Guaranty Insurance Co. v. Quanstrom, 555 So.2d 828, 834 (Fla. 1990)(contingent fee considered as a factor in computing attorney's fees).

Analoguous Iowa Authority:

46A. The Iowa appellate courts have not ruled upon the question of whether an award of attorney's fees under the Iowa Civil Rights Act may be enhanced to compensate for the risk of nonpayment. The Iowa Supreme Court has held, however, that when determining the amount of an attorney's fees award in a condemnation case, courts should consider that "the recovery of a fee in this type of action is wholly contingent upon plaintiff recovering damages in a larger amount than awarded by the condemnation commission." Stanley v. Indianola, 261 Iowa 146,152, 153 N.W.2d 706 (1967). In cases involving the determination of fees for court appointed defense attorneys, the Court has also held that the opposite of risk of nonpayment, which is the "certainty of payment from the public treasury," should be taken into account in determining fees for court appointed defense attorneys in criminal cases. Hulse v. Wifvat, 306 N.W.2d 707, 712 (191981). The factor of "whether the fee is fixed or contingent" is recognized under the Iowa Code of Professional Responsibility for Lawyers as a factor to be taken into account when determining fees. DR 2-106(B)(6).

The Rule of Burlington v. Dague *Prohibiting Enhancement of Attorney's Fees Awards for Risk of Non Payment Should be* Rejected:

47A. In light of the prevailing state and federal authority allowing the enhancement of fees for the risk of nonpayment at the time Burlington v. Daque was decided, and of Iowa authority recognizing contingency as a factor in the establishment of an appropriate fees award, it is reasonable to conclude that the Iowa Supreme Court will reject the rule of Burlington and allow an enhancement of attorney's fees for the risk of nonpayment in civil rights cases. See Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d at 866.

48A. The reasoning expressed in the dissents in Burlington and Delaware Valley also reflects an understanding of the legislature's intent and the purposes served by allowing an award of a "reasonable attorney's fee" in civil rights cases. See Conclusions of Law Nos. 5A, 6A, 31A, 38A. While not denying the principles that (a) a reasonable attorney's fee is to be a fully compensatory fee calculated on basis of prevailing market rates and practices, and (b) that an attorney paid on a contingent fee basis will charge more than one who is paid regardless of whether his client wins or loses:

> [The Burlington majority] . . . refuses to draw the conclusion that follows ineluctably: If a statutory fee consistent with market practices is"reasonable," and if in the private market an attorney who assumes the risk of nonpayment can expect additional compensation, then it follows that a statutory fee may include additional compensation for contingency and still qualify as reasonable. [The majority's decision] will seriously weaken the enforcement of . . . many of our Nation's civil rights laws and environmental laws.
>
> ...
>
> [Due to this decision which denies compensation for the risk of nonpayment] in precisely those situations targeted by the fee-shifting statutes-[such as civil rights cases] where plaintiffs lack sufficient funds to hire an attorney on a win or lose basis and where potential damage awards are insufficient to justify a standard

> contingent fee arrangement [where the fee is taken as a percentage of the total damages] . .. the expected return from [environmental and civil rights] cases brought under ... fee shifting provisions will be less than could be obtained in otherwise comparable private litigation offering guaranteed, win-or-lose compensation. Prudent counsel under these conditions [will] tend to avoid... fee-bearing [environmental and civil rights] claims in favor of private litigation, even in the very situations for which the attorney's fee statutes were designed. This will be true even if the [environmental or civil rights] fee-bearing claim is more likely meritorious than the competing private claim.

Burlington v. Dague, 505 U.S.__, 120 L. Ed. 2d at 460, 461 (Blackmun, J. dissenting).

49A. The objections to contingency fee enhancement set forth by the majority in Burlington, and the plurality in Delaware Valley, are largely based on the misconception that the enhancement must be based on the *"degree* of risk presented by a particular case." Pennsylvania v. Delaware Valley Citizens'Council, 483 U.S. at 745, 97 L.Ed. 2d at 610 (dissenting opinion). The award of contingent fees based on an analysis of the strength or weakness of the particular case at the outset of the litigation is fraught with difficulties. Id. 483 U.S. at 745-47, 97 L. Ed. 2d at 610- 12. This is not the path followed by the dissents in Burlington or Delaware Valley or the path this Commission proposes to follow. Burlington v. Dague, 505 U.S. __, 120 L. Ed. 2d at 462 (Blackmun, J. dissenting); Pennsylvania v. Delaware Valley Citizens' Council,483 U.S. at 745, 747 97 L.Ed. 2d at 610, 612 (Blackmun, J., dissenting).

50A.

> Enhancement for risk is not designed to equalize the prospective returns among contingent cases with different degrees of merit. Rather it is designed to place contingent employment as *a whole* on roughly the same economic footing as non contingent practice.

Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. at 745-46, 97 L.Ed. 2d at 610-11 (Blackmun, J. dissenting).

51A.

> [T]he "risk" for which enhancement might be available is not the particular factual and legal riskiness of an individual case, but the risk of nonpayment associated with contingent cases considered as a class.

Burlington v. Dague, 505 U.S. __ , 120 L. Ed. 2d at 461 (Blackmun, J. dissenting).

52A. Additional objections of the majority to contingent fee enhancement are adequately and accurately addressed in Justice Blackmun's dissent in Burlington, Id., 505 U.S. __ , 120 L. Ed. 2d at 462-464 (Blackmun, J. dissenting).

Three Step Analysis For Determining When an to What Degree Enhancement for Risk of Nonpayment Is Appropriate in Attorney's Fees Awards Under the lowa Civil Rights Act.

53A. The Blackmun dissent in Delaware Valley set forth a three step analysis, suggested by the American Bar Association in an amicus (friend of the court) brief, for "determining when, and to what degree, enhancement is appropriate in calculating a statutory attorney's fee." Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. at 748, 97 L.Ed. 2d at 612 (Blackmun, J. dissenting).

This analysis is followed in this case. See Findings of Fact Nos. 35A, 39A, 40A.

54A. The first step is for the tribunal to:

> **determine whether an attorney has taken a case on a contingent basis.** If a client has contracted to pay the "lodestar" fee (i.e. reasonable hours times a reasonable hourly rate), regardless of the outcome of the case, and has paid the attorney on a continuing basis, then the attorney has clearly avoided the risk of nonpayment and enhancement is not appropriate.

(emphasis added). It was determined in this case that the case was taken on a contingent fee basis. See Findings of Facts No. 35A, 39A.

55A. The **second step** requires the court to:

> **determine if an attorney has been able to mitigate the risk of nonpayment in any way.** For example, if a client has agreed to pay some portion of the lodestar amount, regardless of the outcome of the case, the attorney has mitigated the risk of loss to some extent, although the percentage of total expenses paid by the client will indicate how much of a mitigating factor this contribution should be considered to be.... Or, for example, if the attorney has entered into a contingent fee contract in a suit seeking substantial damages, the attorney again has mitigated the risk to some extent by exchanging the risk of nonpayment for the prospect of compensation greater than the prospective lodestar amount. Even in such cases, of course, a court must still calculate a reasonable attorney's fee to be assessed against the defendant. There is no reason to grant a defendant a "windfall" by excusing payment of attorney's fees simply because a plaintiff has entered into a contingent fee contract.

Id., 483 U.S. at 748-49, 97 L. Ed. 2d at 612-13 (Blackmun, J. dissenting)(emphasis added).

56A. In this case, the contingent fee arrangement was not found to have mitigated the risk z)f nonpayment as there was never any chance that the one third of damages awarded to Complainant DeVolder would ever have equaled, let alone exceeded, the lodestar amount. See Finding of Fact No. 39A. **"If an attorney and client have been unable to mitigate the risk of nonpayment, then an enhancement for contingency is appropriate."** Id., 483 U.S. at 749, 97 L. Ed. 2d at 613 (Blackmun, J., dissenting)(emphasis added). Since the Complainant has met his

burden of persuasion on the issue of enhancement for risk of nonpayment by demonstrating both (a) that the case was taken on a contingent basis, and (b) that the attorney has not been able to mitigate the risk of nonpayment, such an enhancement is being awarded in this case.

57A. In the **third step** of the analysis, the fact finder is required to:

> **determine whether specific aspects of the case have aggravated [the] economic risk [of nonpayment beyond that demonstrated by reference to contingent fee cases as a class].** The enhancement for contingency compensates the attorney primarily for the risk of spending numerous hours, often years, on a case with the knowledge that no payment may ever be recovered. Other aspects of the case, however, can aggravate the economic risk inherent in contingency payments.

Pennsylvania v. Delaware Valley Citizen's Council, 483 U.S. at 749-50, 97 L. Ed. 2d at 613 (Blackmun, J. dissenting).

58A. These "other aspects of the case" are accounted for by this third step. Id. There is no further enhancement in the lodestar for risk of nonpayment in this case due to analysis under this third step. Under the dissent's treatment of contingency enhancement cases, delay in payment would be taken into account at this time. Id., 483 U.S. at 750, 97 L.Ed. 2d at 613. Since a separate enhancement is already being given for delay, delay is not being considered as part of the enhancement for risk of nonpayment. See Findings of Fact Nos. 36A-37A. At this stage, any greater economic risks due to an attorney's particular circumstances would be taken into account. Id., 483 U.S. at 750-51, 97 L. Ed. 2d at 614. None were shown here. Finally, "the 'legal' risks facing a case may be so apparent and significant that they will constitute an economic disincentive independent of that created by the basic contingency in payment." Id., 483 U.S. at 751, 97 L. Ed. 2d at 614. In most cases, however, including this one, the novelty and difficulty of the case will be reflected.in the lodestar, and no further enhancement of the fee will be appropriate. Id. See Finding of Fact No. 40A.

Is a Five Percent Enhancement for Risk of Nonpayment An Appropriate Amount?:

59A. During the two year period between 1987, the year in which the Delaware Valley decision was rendered, and 1989, "'pure' contingency enhancements (i.e., leaving aside cases involving partially contingent fee arrangements, or cases in which plaintiff asked for less than was justified by the record) have varied by locality, and have ranged from 10 percent to 200 percent of the lodestar award." Schlei & Grossman, Employment Discrimination Law: 197889 Supplement 209 (1991).

60A. In addition to the factors set forth in the three step analysis of the Delaware Valley dissent, and the range of risk enhancements set forth above, Professor John Leubsdorf's article "The Contingency Factor in Attorney Fee Awards" is helpful in determining if a five percent enhancement for risk of nonpayment is reasonable or excessive. This article was relied on by both the plurality and the dissent in the Delaware Valley case. 90 Yale L. J. 473 (1981)(cited in Pennsylvania v. Delaware Valley Citizen's Council, 483 U.S. at 721-22, 97 L. Ed. 2d at 595

(plurality opinion);Id., 483 U.S. at 746, 97 L. Ed. 2d at 611 n.1 1 (Blackmun, J. dissenting)). The dissent made specific reference to Professor Leubsdorf's "alternative approaches for calculating and awarding contingency enhancements." Pennsylvania v. Delaware Valley Citizen's Council, 483 U.S. at 746, 97 L. Ed. 2d at 611 n.1 1 (Blackmun, J. dissenting). Professor Leubsdorf's proposals all rely on the use of an across-the-board multiplier to be applied in all contingency cases. This reference to Professor Leubsdorf's article is not intended to suggest that the approaches set forth therein are the only acceptable methods for evaluating an appropriate enhancement for risk of nonpayment. See Pennsylvania v. Delaware Valley Citizen's Council, 483 U.S. at 747, 97 L. Ed. 2d at 612 n.12 (Blackmun, J. dissenting).

61A. Leubsdorf discussed two possible approaches which would not require legislative action. The first is to simply double the lodestar amount, an enhancement of 100%. Id. at 511-512. While this solution would be easy to administer, it is not necessarily reflective of the risk of loss for civil rights claims as a class. Clearly, however, a five percent enhancement is not excessive when compared to this solution.

62A. The second solution is a "market equalizing" approach where available litigation statistics are reviewed in order to establish an appropriate risk of loss or nonpayment for civil rights cases as a class. Id. at 507, 512. The purpose of this approach is to:

> set the contingency multiplier so that claims in which success is uncertain will be as likely [but not more likely] to be litigated as are similar claims of people who can afford to pay for ordinary litigation.

Id. at 507.

63A. This method requires the examination of the success rate of paying cases in categories of litigation that are unaffected by fee awards. Id. at 509. Preference would be given to data on those categories which are analogous to civil rights cases but which do not "reflect the incentives or disincentives of current fee award practices." Id. Once the risk of loss is determined, an appropriate multiplier or enhancement is calculated in order to ensure that, over time, if the attorney took care to litigate cases with a chance of success at least equal to that of the average case, the economic incentive to litigate civil rights cases would match or approach, but not exceed, the incentive to litigate cases where the attorney is paid by the client regardless of the outcome of the case. Id. at 507-08.

64A. Once the appropriate success rate for civil rights cases is determined, the necessary enhancement multiplier can be determined by a formula: (Success rate) X (enhancement multiplier) = 1. The "multiplier" refers to the amount by which the basic hourly fee (and therefore the lodestar) is multiplied in order to account for the contingent risk. Id. at 479. For example, if the appropriate success rate for civil rights cases were two-thirds, the multiplier would be 1.5. This would reflect a 50% enhancement of the lodestar. See Id. at 507.

65A. In this case, only a five percent enhancement for contingent risk is being awarded. Expressed as a multiplier, this would be 1.05. Under Professor Leubsdorf's market equalizing

approach, such an enhancement would reflect an extraordinarily high success rate of between 95% and 96% in civil rights cases, and an extremely low risk of loss of only 4% to 5%.

66A. Ideally, determination of the risk of loss would be based on the success rate of "a class [of paying cases] closely analogous to a class of fee award cases." Id. at 509. Professor Leubsdorf recognized, however, that such data would often be unavailable and reliance would have to be placed on other data, such as the success rates in categories of litigation unaffected by fee awards. Id.

67A. In this case, part of the data relied on are case processing statistics of the Iowa Civil Rights Commission. Although these cases were all technically subject to the fee shifting provisions of the Act at the time they were filed, it was the public policy of the Commission from 1985 until January of 1990 to not award attorney's fees for work done prior to the issuance of the Notice of Hearing. Diane Humburd, 10 Iowa Civil Rights Commission Case Reports 13, 15 (1990)(Supplemental Attorney Fees Decision)(overruling Cheri Dacy, 7 Iowa Civil Rights Commission Case Reports 17, 25 (1985)).

68A. For this reason, and for other reasons discussed in the Findings of Fact, Complainant success rates before the Commission during that time period and after could scarcely be said to have been influenced by attorney's fees awards. See Finding of Fact No. 42A. An examination of the available data, set forth in the Findings of Fact, demonstrates that an enhancement which would, under the market equalizing approach, reflect a plaintiff success rate in excess of 95%, and a risk of nonpayment of only 4% to 5%, is a very conservative enhancement for risk of nonpayment.

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, Mike DeVolder, is entitled to a judgment against Respondents Friedman Motorcars, Ltd., Mike Friedman, Scott Henry, and Pat Sullivan for the fees of his attorneys in the amount of $28,505.43 and for litigation expenses in the amount of $237.51.

Signed this the 6th day of October, 1992.

DONALD W. BOHLKEN
Administrative Law Judge
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50319
515-281-4480

FINAL DECISION AND ORDER

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

IT IS SO ORDERED.

Signed this the 4th day of December 1992.

Carolyn Rants
Chairperson
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50319

Copies to:

Teresa Baustian
Patrick Brick
Paul Curtis

Note: The Commission's supplemental final decision on attorney's fees was appealed to Polk County District Court by the respondents but was settled prior to any decision by that court.