State of Wisconsin

Labor and Industry Review Commission

Kevin Lorenz, Complainant **Woodman's Food Market**, Respondent ERD Case No. CR202002781 EEOC Case No. 26G202100206C	**Fair Employment Decision**[1] **Dated and Mailed:** December 18, 2024 lorenke_err.doc:111

The decision of the administrative law judge is **reversed**. Accordingly, the commission issues the following:

Order

1. That the respondent shall cease and desist from discriminating against the complainant on the basis of his use or nonuse of lawful products off the respondent's premises during nonworking hours.

2. That the respondent, if it has not already done so, shall offer the complainant instatement to a position substantially equivalent to the position he held prior to his discharge. This offer shall be tendered by the respondent or an authorized agent and shall allow the complainant a reasonable time to respond. Upon the complainant's acceptance of such position, the respondent shall afford him all seniority and benefits, if any, to which he would be entitled but for the respondent's unlawful discrimination, including sick leave and vacation credits.

3. That the respondent shall make the complainant whole for all losses in pay the complainant suffered by reason of its unlawful conduct by paying the complainant the amount he would have earned as an employee, including pension,

[1] **Appeal Rights**: See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review. Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website, http://lirc.wisconsin.gov.

health insurance, and other benefits, from the date the respondent discharged the complainant until such time as the complainant resumes employment with the respondent or would have resumed such employment but for his refusal of a valid offer of a substantially equivalent position. The back pay for the period shall be computed on a calendar quarterly basis with an offset during each calendar quarter for any interim earnings from work the complainant would not have performed had he remained employed with the respondent. Any unemployment insurance or welfare benefits received by the complainant during the above period shall not reduce the amount of back pay otherwise allowable but shall be withheld by the respondent and paid to the Unemployment Compensation Reserve Fund or the applicable welfare agency. Additionally, the amount payable to the complainant after all statutory set-offs have been deducted shall be increased by interest at the rate of 12 percent simple. For each calendar quarter, interest on the net amount of back pay due (i.e., the amount of back pay due after set-off) shall be computed from the last day of each such calendar quarter to the day of payment. Pending any and all appeals from this Order, the total back pay will be the total of all such amounts.

4. That the respondent shall pay to the complainant reasonable attorney's fees in the total amount of $42,237.65. A check in that amount shall be made payable jointly to the complainant and his attorney, Ben Hitchcock Cross, and delivered to Mr. Cross.

5. That within 60 days of the date this Order is issued, the respondent shall comply with all terms of this Order and file with the commission a Compliance Report detailing the specific actions it has taken to comply with this Order.[2] Pursuant to Wis. Stat. 227.54, the institution of a proceeding for judicial review shall not stay enforcement of the commission decision unless a stay is ordered by

[2] The concurring commissioner would delay enforcement of the commission decision until after all appeals have been exhausted which would in effect be entering a stay without any evaluation of whether the respondent is entitled to a stay. That decision should be made by the court pursuant to Wis. Stat. § 227.54, who after providing each party with an opportunity to be heard, would decide whether a stay is warranted. In *State v. Gudenschwage*r, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995), the Wisconsin Supreme Court held that a stay pending appeal is appropriate when the moving party (1) makes a strong showing that it is likely to succeed on the merits of the appeal; (2) shows that it will suffer irreparable injury unless a stay is granted; (3) shows that the other party will not be substantially harmed; and (4) shows that a stay will not harm the public interest. The commission, by delaying enforcement of its Order for a short period of 60 days, has provided the respondent, should it decide to appeal, a reasonable period of time to seek a stay from the court. The concurring commissioner does not contend that there is support in the record for a stay. Instead, without hearing from the parties, the concurring commissioner speculates that the parties may suffer irreparable harm if a stay is not granted, and does not even address whether the respondent is likely to succeed on the merits of the appeal. It could prejudice the interests of one of the parties for the commission to prejudge the issue, and issue a stay without any notice to the parties or consideration of the factors which would guide a court in deciding whether to issue a stay.

the reviewing court. The commission will not pursue enforcement while a motion for such a stay is pending.

The Compliance Report shall be prepared using the "Compliance Report" form which has been provided with this decision. The respondent shall submit a copy of the Compliance Report to the complainant at the same time that it is submitted to the commission. Within 10 days from the date the copy of the Compliance Report is submitted to the complainant, the complainant shall file with the commission and serve on the respondent a response to the Compliance Report.

Notwithstanding any other actions a respondent may take in compliance with this Order, a failure to timely submit the Compliance Report required by this paragraph is a separate and distinct violation of this Order. The statutes provide that every day during which an employer fails to observe and comply with any order of the commission shall constitute a separate and distinct violation of the order and that, for each such violation, the employer shall forfeit not less than $10 nor more than $100 for each offense. *See* Wis. Stat. §§ 111.395, 103.005(11) and (12).

By the Commission:

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against him based on his disability and his use or nonuse of a lawful product off the respondent's premises during nonworking hours, in violation of the Wisconsin Fair Employment Act (hereafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision finding that no discrimination occurred. The complainant filed a timely petition for commission review of the portion of the decision finding no discrimination based upon his use or

nonuse of lawful products but specifically requested that the commission not review the issue of discrimination based upon disability.[3]

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission makes the following:

Findings of Fact

1. The complainant began working for the respondent in 1999. The respondent operates multiple grocery stores in Wisconsin. At the time of his discharge, the complainant worked as a third shift stocker.

2. Prior to February 16, 2020, the complainant consumed alcohol on a regular basis during nonworking hours and at locations other than the respondent's premises.

3. The complainant took an approved Family and Medical Leave Act (FMLA) leave from January 29, 2020 through February 26, 2020, due to a back injury.

4. While on leave for his back injury, the complainant received inpatient alcohol detox treatment at Rogers Behavioral Health from February 16 through February 19, 2020. This treatment was completed prior to the complainant being released to return to work from his back injury and while he was still on FMLA leave due to that injury.

5. The respondent became aware that the complainant had received inpatient treatment during his FMLA leave and asked what he was treated for. The complainant responded honestly that his treatment was related to his use of alcohol. The respondent requested that the complainant complete documentation requesting a second FMLA leave to cover the time period that he was treated at Rogers Behavioral Health, and he did so.

6. During the complainant's employment, the respondent had a policy requiring any employee who attended a rehabilitation program to sign a last chance

[3] While the filing of a petition for review by any party vests the commission with jurisdiction to review the entire decision, the commission will generally not be inclined to exercise that jurisdiction to address issues that are neither expressly nor implicitly raised by a petition for review. *Dude v. Thompson*, ERD Case No. 8951523 (LIRC Nov. 16, 1990). Here, the commission has exercised its discretion to review only the claim related to off-duty use of lawful products. The commission notes that, although, the parties briefed the issue of whether the administrative law judge properly excluded medical record evidence, that issue is only relevant to the disability claim, so the commission has not reviewed or addressed that issue in its decision.

agreement regardless of when the rehabilitation program took place or whether the employee's alcohol or drug use had affected his or her work.

7. On March 10, 2020, the respondent's Kenosha store manager, Louie Ludeman, presented the complainant with a last chance agreement that stated in part:

> WHEREAS, the Employee has acknowledged to the Company that he is seeking treatment for alcohol abuse and/or alcoholism. An employee's use and/or possession of alcohol while working or being under the influence of alcohol while working would be considered serious violations of the Company's policies that can result in termination;; (sic)
>
> WHEREAS, the Company wishes to provide Employee an opportunity to remain employed by the Company and reiterate its policies regarding alcohol use and possession while working and being under the influence while working. Accordingly, and in order for Employee to remain employed by the Company, Employee and the Company have agreed to set forth herein the minimum conditions to which Employee must adhere;

8. The last chance agreement also required, as conditions of remaining employed, that the complainant enroll in a medically recognized and supervised drug and/or alcohol rehabilitation treatment or other counseling program, that he communicate the status of his treatment as well as details about the treatment program to the respondent, that he complete treatment and actively participate in after-care treatment, and that he submit to random alcohol and drug testing.

9. The complainant signed the last chance agreement when Mr. Ludeman presented it to him, but later that day requested a meeting with the regional manager, Mr. Malafa, to discuss the agreement.

10. Mr. Malafa and the complainant met a few days later. Mr. Malafa informed the complainant that he had conferred with the respondent's general counsel, Sara Eagle-Kjome, regarding the respondent's last chance agreement policy. He informed the complainant of the respondent's policy and clarified that the complainant was required to sign the last chance agreement because the respondent had become aware that he had attended a rehabilitation treatment program.

11. The complainant was absent from work for a week from May 17 through May 22, 2020 based on his doctor's recommendation because he was being treated for vertigo. The complainant asked his doctor to submit FMLA documentation to the respondent regarding these absences, but the doctor failed to do so.

12. Following his treatment at Rogers Behavioral Health, the complainant remained sober for approximately six weeks. However, at some point he began drinking alcohol again. The complainant checked in to a rehabilitation facility on June 7, 2020. He requested FMLA leave from the respondent in order to undergo rehabilitation treatment from June 7, 2020 through July 23, 2020, and the leave was granted. Following his treatment, the facility provided a return to work release, and he returned to work for the respondent.

13. While the complainant was in the rehabilitation facility, he spoke to Ms. Eagle-Kjome and confirmed that he was receiving rehabilitation treatment because he had abused alcohol.

14. On August 3, 2020, the respondent terminated the complainant's employment because of his use of alcohol.

15. The complainant did not consume or possess alcohol at work at any time during his employment with the respondent.

16. The complainant did not report to work under the influence of alcohol at any time during his employment with the respondent.

17. The complainant's use of alcohol did not impair his ability to perform his job-related responsibilities for the respondent at any time during his employment with the respondent.

Conclusions of Law

1. The respondent discriminated against the complainant in the terms and conditions of his employment, within the meaning of the Act, by requiring him to sign a last chance agreement on the basis of his use of a lawful product off the respondent's premises during nonworking hours.

2. The respondent discriminated against the complainant, within the meaning of the Act, by discharging him because of his use of a lawful product off the respondent's premises during nonworking hours.

Memorandum Opinion

Wisconsin Stat. § 111.322 provides that it is an act of employment discrimination to terminate from employment or to discriminate against any individual in the terms, conditions, or privileges of employment because of any bases enumerated in Wis. Stat. § 111.321. Wisconsin Stat. § 111.321 includes "use or nonuse of a lawful product off the employer's premises during nonworking hours" as one such prohibited basis of discrimination. This provision was intended to provide protections for the use or non-use of products such as tobacco or alcohol. *See Hoyer v. Calumet Med. Ctr.*, ERD Case No. CR200702672 (LIRC May 7, 2010). The complainant established that he used a lawful product, alcohol, off the respondent's premises and during nonworking hours, and that the respondent took adverse

employment actions against him when it required him to sign a last chance agreement and subsequently discharged him. The commission concludes that these actions were taken by the respondent because of the complainant's off duty use of alcohol, and were in violation of the Act.

The respondent argues that it did not have a policy of requiring any employee who had sought rehabilitation treatment to sign a last chance agreement. Rather, it asserts that it only required employees to do so if their drug or alcohol abuse affected their work. However, the evidence demonstrates that the complainant specifically inquired as to why he was required to sign the last chance agreement and recorded the regional manager's response. That audio recording is in the record in this matter and the commission finds it persuasive. The regional manager not only stated that the respondent's policy was to require any employee who had attended rehabilitation treatment to sign a last chance agreement, but he indicated he had confirmed this information with "Sara," who the commission infers to be Sara Eagle-Kjome, the respondent's general counsel, who testified that she made the decision to require the complainant to sign a last chance agreement and drafted the agreement. At the time the respondent required the complainant to sign the agreement, it had no evidence that the complainant's use of alcohol had in any way impaired his ability to perform his work. Based on the foregoing, the commission concludes that it was the respondent's policy to require that any employee seeking treatment for alcoholism must sign a last chance agreement, and that the complainant was required to sign the last chance agreement because the respondent learned he had been treated for alcohol abuse. Since the complainant's use of alcohol, a lawful product, occurred off the respondent's premises during non-working hours, with no evidence to suggest that he was impaired while at work, the commission concludes that the respondent's decision to place him on a last chance agreement as a result of his alcohol use was in violation of the Act.

Next, the respondent argues that it discharged the complainant because of his attendance and not for any reason protected by the Act. It argues that the complainant has offered no evidence that this asserted non-discriminatory reason for the complainant's discharge is pretextual. However, the complainant recorded the discharge meeting, and that second audio recording, which is also part of the hearing record, establishes otherwise. The recording provides clear evidence that the respondent's reason for discharging the complainant was his use of alcohol, not his attendance. During the discharge meeting, Ms. Eagle-Kjome confirmed with the complainant that he had abused alcohol, asserted that his abuse of alcohol was inconsistent with the terms of the last chance agreement,[4] and informed the

[4] As the administrative law judge noted in his decision, the complainant's abuse of alcohol did not violate the terms of the last chance agreement, which is limited to use or possession of alcohol while working or being under the influence of alcohol while at work.

complainant he was being discharged because of that violation of the last chance agreement. The complainant's attendance was not discussed during the discharge meeting.

The commission has considered whether any of the exceptions to Wis. Stat. § 111.322 found in Wis. Stat. § 111.35 are applicable in this case, but concludes they are not. The respondent argues that the complainant's use of alcohol impaired his ability to undertake adequately his job-related responsibilities, a circumstance which would allow it to lawfully terminate the complainant's employment pursuant to Wis. Stat. § 111.35(2)(a). However, as stated above, the respondent presented no evidence that the complainant's use of alcohol impaired his ability to undertake his job-related responsibilities. The complainant testified that he experienced symptoms of withdrawal during some of his work shifts, but emphasized that this did not impact his work performance. The respondent's general counsel testified that the respondent had no evidence the complainant was under the influence of alcohol at work or that he had used alcohol during any of his shifts.

Further, there is no evidence that the complainant's use of alcohol, or his treatment at Rogers Behavioral Health, affected his attendance. The complainant missed no work because of his alcohol use or abuse prior to June 7, 2020, when he began an approved FMLA leave. The respondent points to testimony from Ms. Eagle-Kjome that the complainant's return to work from the leave of absence he took because of his back injury was delayed due to his treatment at Rogers Behavioral Health. However, the complainant credibly testified that he completed his treatment at Rogers Behavioral Health prior to being released to return to work for his back injury, and the commission sees no basis to conclude that either the complainant's alcohol use or his treatment for alcoholism resulted in extending the period of FMLA leave that was approved for the back injury. While the complainant may have missed some work after June 7 for reasons related to his alcohol use, he was already on an approved leave of absence at that time, so it cannot reasonably be found that his alcohol use affected his attendance or otherwise impaired his ability to undertake his job-related responsibilities. Finally, upon his release from rehabilitation treatment, the complainant returned to work, and the respondent presented no evidence to suggest that he missed any additional work as a result.

For all the reasons set forth above, the commission concludes that the respondent discriminated against the complainant in the terms and conditions of his employment and by discharging the complainant, in violation of the Act. The administrative law judge's decision is therefore reversed.

Attorney's Fees

The complainant is entitled to payment of his reasonable attorney's fees incurred in pursuing this matter. *Fields v. Cardinal TG Co.*, ERD Case No. 199702574 (LIRC

Feb. 16, 2001). In calculating reasonable attorney fees, the most useful starting point is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This figure is commonly referred to as the "lodestar" figure. *Hensley v. Eckerhardt*, 461 U.S. 424, 31 FEP Cases 1169 (1983). The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. *Olson v. Phillips Plating*, ERD Case No. 8630829 (LIRC Feb. 11, 1992) (citing *Hensley*). Here, the complainant's attorney has requested an award of $74,997 in attorney's fees and $555.35 in costs related to litigating this matter. The fee request includes hours billed by four different attorneys, a paralegal, and a law student.

Reasonable hourly rates: A reasonable fee is calculated according to the prevailing market rates in the relevant community. It is anticipated that, along with the fee petition, the attorney requesting payment will submit affidavits from other attorneys in the locality establishing that the requested rates are in line with those prevailing in the community for similar services for lawyers of comparable skill, experience, and reputation. An hourly rate determined based on such affidavits is normally deemed to be reasonable. *Roytek v. Hutchinson Technology*, ERD Case No. 199903917 (LIRC Feb. 15, 2005).

In his fee petition, the complainant requests reimbursement at an hourly rate of $295 for attorneys Ben Hitchcock Cross, Paul Schinner,[5] and William Wetzel, $395 for attorney Nola Hitchcock Cross, and $175 for paralegal Michael Jungbluth. The respondent challenges the hourly rate for attorneys Wetzel and Ben Cross. With respect to attorney Wetzel, it argues that the $295 rate is not adequately substantiated. The commission agrees. The brief in support of the fee petition indicates that a supporting affidavit from attorney Wetzel is included as an attachment, but it is not. Further, the brief indicates that attorney Wetzel has practiced since 2014 but does not elaborate upon his practice area or relevant experience. Therefore, it is difficult to evaluate whether $295 is a reasonable hourly rate. However, the commission considers it unnecessary to determine the appropriate hourly rate for attorney Wetzel because he billed only a total of .4 hours in this matter and did not adequately explain the reason for the charge: a "conference on disability case with non use, discuss non uses." As noted above, it is the complainant's burden to establish entitlement to an award. Absent any further

[5] A "Declaration of Paul Schinner" was provided to the commission on October 14, 2024, after the fee petition was filed. In that document, attorney Schinner indicated his hourly rate was $325. However, in his petition, the complainant requests reimbursement at an hourly rate of $295 for attorney Schinner.

explanation as to why attorney Wetzel was consulted, the commission is disinclined to allow the charge.[6]

Regarding the hourly rate for attorney Ben Cross, the respondent argues that $295 per hour is unreasonable considering his experience. Again, the commission agrees. Attorney Ben Cross began working on this matter in August of 2020, at which time he had been a licensed attorney for approximately one year. The complainant submitted four affidavits in support of the fee petition, none of which establish that the $295 rate was a reasonable rate for a new attorney. Two of the affidavits were procured in 2017 and substantiate the hourly rate charged by attorney Nola Cross, but have no relevance in determining the appropriate rate for attorney Ben Cross. The third, an affidavit submitted by attorney Victor Forberger, who has significant legal experience, addresses only the rates charged by attorney Forberger and contains no opinion about appropriate fees for a new attorney. The final affidavit, submitted by attorney Patrick O'Connor, who owns and operates a solo law firm and became licensed to practice law in 2015, indicates that he is compensated at a rate of $300 per hour in employment discrimination matters. Although in his affidavit attorney O'Connor provides a general statement that he is familiar with attorneys at the Cross Law Firm and knows that they charge rates consistent with other plaintiff's employment lawyers in the market, this assertion does not support a finding that a rate of $295 is appropriate for an attorney with only a year or two of experience. To the contrary, given that attorney O'Connor has practiced law four years longer than attorney Cross and charges $300 an hour for employment-related law, it does not appear that $295 is a reasonable hourly rate for attorney Cross' services. The question, then, is what rate would be more appropriate. The respondent suggests that a rate of $225 per hour is appropriate because the commission awarded fees at a billing rate of $225 per hour in *Lamont v. Nelson Global Products*, ERD Case Nos. CR201302178 and CR201401347 (LIRC June 10, 2019) for work performed in 2017 by an attorney with two years of experience. However, the commission considers the *Lamont* decision instructive, but not fully dispositive, given that attorney Cross' services were performed in 2020 through 2023. Considering the passage of time, and based on the commission's experience in awarding attorney's fees in the complainant's attorneys' market, the commission concludes that an hourly rate of $260 would be reasonable for the services performed by attorney Ben Cross in this matter.

The respondent has not challenged the hourly fees charged by attorneys Paul Schinner and Nola Hitchcock Cross or by the complainant's paralegal, Michael Jungbluth, and the commission considers those hourly rates to be reasonable.

[6] The commission notes that, following the commission's receipt of the respondent's response brief opposing the complainant's attorney's fee petition, the complainant was given an opportunity to submit a reply and chose not to do so.

Amount of time reasonably expended: The respondent has identified several charges contained in the complainant's fee petition which it contends should be disallowed or considers unreasonable. First, the complainant's attorney included 7.3 hours in his fee petition for an individual named Heather Morrissey to "attend hearing with Attorney Ben Hitchcock Cross." The complainant's attorney has not provided specific information regarding Ms. Morrissey's billing rate or involvement in the case.[7] The commission has previously declined to award fees for a second chair attorney at a hearing when no explanation as to why the second attorney was needed at the hearing was provided. *Gilbertson v. Wingra Redi-Mix, Inc.*, UI Dec. Hearing Nos. CR201400424, CR201700698 (LIRC Dec. 10, 2020). Given the lack of justification provided by the complainant's attorney for billing for Ms. Morrissey's time, the commission will not award any fees related to her time or attendance at the hearing. For the same reason, the commission will reduce the fee award by the 6 hours billed by paralegal Jungbluth for attending one day of the hearing.

The respondent also argues that it should not be required to pay fees attributed to rescheduling the final day of the hearing because the rescheduling was caused by the complainant and attorney Ben Cross' failure to appear at the hearing as originally scheduled. The commission agrees. The hearing date and time was communicated by the ALJ to the parties in person at the close of the first hearing day and through an electronic meeting invite. Attorney Ben Cross indicated he believed the hearing was scheduled for a different date and, further, that he did not receive the electronic meeting invite from the ALJ. Where the need to reschedule was due to a mistake on the part of the complainant's attorney, it would be unreasonable to require the respondent to pay fees related to this issue. This represents a reduction of 1.1 hours billed by Ben Cross and .5 hours billed by paralegal Jungbluth.

Next, the complainant's fee petition includes 1.3 hours to "Prepare for hearing" on January 10, 2023, the day after the final day of hearing. Because the hearing was already complete at that time, no fee will be awarded for these hours. The petition also includes 22.5 hours billed between January 24, 2024 and July 24, 2024 for tasks such as reviewing transcripts and drafting briefs. The entry on July 24 specifically references drafting a letter to "EEOC." Because the final briefs to the commission were filed in October of 2023, with no further briefing scheduled until September of 2024, at which time the parties were given an opportunity to brief the issue of attorney fees, the commission infers that this portion of the fee request was related to the proceedings before the EEOC. The commission has traditionally disallowed time spent on matters outside of the case that is before the Equal Rights

[7] The respondent's counsel asserts that Ms. Morrissey was a law student at the time of the hearing, and the commission has no information to the contrary.

Division. *See Fields v. Cardinal TG Co.*, ERD Case No. 199702574 (LIRC Feb. 16, 2001). Therefore, fees for these hours will not be awarded.

The respondent additionally argues that a number of other entries in the complainant's attorney's list of fees should be disallowed because they are not related to this matter. As noted above, it is the complainant's burden to establish entitlement to an award. Upon review of the complainant's billing statement, the commission concludes that the following fee entries are disallowed because they do not appear relevant to this case:

May 4, 2021	Nola Cross	Classification, class action, and case management strategy	.6 hours
September 12, 2022	Ben Cross	Conference on removal to federal court	.6 hours
September 12, 2022	Pail Schinner	Conference on removal to federal court	.6 hours
September 5, 2023	Michael Jungbluth	Memo regarding an EEOC case	.6 hours

Reduction based upon partial success: The complainant's complaint alleged discrimination on the basis of disability as well as the off-duty use of a lawful product. The complainant pursued both claims at the hearing, but did not prevail on either one. In his petition for commission review, the complainant specified that he was only pursuing his claim regarding the off-duty use of a lawful product and indicated he intended to proceed with the disability claim in a different forum. Therefore, the commission has only reviewed the finding of no discrimination with respect to the complainant's off-duty use of a lawful product. It has found discrimination on that basis alone.

While the commission generally reduces the fee award to reflect partial success when a complainant prevails on only some issues, a partial success reduction is not usually applied in cases where the complainant contends that he was discriminated against on multiple bases but only establishes discrimination on a single basis, particularly where the additional, unsuccessful claim did not add significant time to the overall litigation. *See Smith v. State of Wisconsin DWD*, ERD Case No. CR200602582 (LIRC Jan. 4, 2019). Here, however, it is apparent that the disability discrimination claim on which the complainant did not prevail added a significant amount of time to the overall litigation. Attorney Ben Cross indicated in his affidavit that "because this is a disability case, the Complainant had to obtain and decipher extensive medical records and work with medical providers on the issue of disability" and that "the issues on disability prior to the hearing involved

substantial research." Indeed, the briefs submitted to the ALJ devoted more space to the disability claim than to the off-duty use claim. Given those facts, the commission concludes that a reduction in fees is appropriate in this case notwithstanding that the complainant achieved significant success and prevailed on his claim that he was discharged for discriminatory reasons.

The question, then, is what reduction is appropriate. The commission notes that a total of 11.2 hours were billed with a description directly related to the complainant's disability discrimination claim that were not otherwise excluded above (.2 by attorney Nola Cross, 2.9 by attorney Ben Cross, and 8.1 by paralegal Jungbluth). Those hours are specifically excluded. Because the remaining entries are too vague to determine whether they relate to the disability claim or the off-duty use claim, the commission considers it appropriate to reduce the remaining hours by a percentage. Based on its experience evaluating attorney fee requests in similar cases, the commission concludes that a 30% reduction in the remaining fee award adequately reflects the fact that a significant portion of this litigation was related to an issue on which the complainant did not prevail. This reduction applies both to work performed prior to the filing of the petition for commission review and to the proceedings before the commission since, in spite of asking the commission not to review the disability claim, the complainant's brief to the commission included arguments related to the admission of his medical records, an issue only relevant to his disability claim.

After the hours described above are removed, the following reimbursable hours remain:

Staff Member	Hours	Rate
Paralegal Jungbluth	173.6	$175
Attorney Ben Cross	100.2	$260
Attorney Schinner	10.3	$295
Attorney Nola Cross	2.2	$395

Applying the hourly rates described above the total fee would be $60,339.50. After applying the 30% reduction, a total of $42,237.65 is awarded. The complainant's request for $555.35 in costs is denied, as no explanation has been provided for those costs.

NOTE: The commission consulted with the administrative law judge who held the hearing to obtain his impressions as to the credibility of the witnesses, based on their demeanor, which were a factor in the appeal tribunal decision. However, the administrative law judge had no demeanor impressions to impart.

MICHAEL H. GILLICK, Chairperson (concurring):

I agree with this decision in all respects except for the provision requiring compliance within 60 days of the order. I would continue the commission's long held practice of requiring compliance after all appeals have been exhausted.

To my knowledge, no party has ever asked for an earlier date for compliance, and there are many reasons justifying the commission's practice on that issue. First, if the decision were reversed on appeal, it is likely that a complainant would struggle mightily to reimburse any money paid. Second, under the present practice, a complainant's monetary award earns twelve percent interest, an amount not otherwise likely available to a complainant. Third, reversing a reinstatement required by the order would likely create serious problems for both parties, particularly if it had required displacing another worker.

The majority instead has decided to require compliance within 60 days of the issuance of its order and indicates that, if the respondent chooses to appeal, it may seek a stay from the circuit court judge. The majority discusses the criteria a circuit court judge would consider when deciding whether to grant a stay and suggests that a commission order that does not require compliance until after all appeals have run is improper because the commission has not considered those same criteria. However, the commission is not a court and, when it determines the time at which its order will be effective, it is not granting a stay; the commission is obligated to set a time at which its order becomes effective[8] and acts within its authority when it chooses to make its order effective after all appeals have run. While I acknowledge that the commission also has the authority to require compliance at an earlier point, as the majority orders here, I do not believe it is compelled to do so, or that to do so is in the interests of the parties or better effectuates the purpose of the Act. It is rather my considered opinion that all parties are better served by requiring compliance only after all appeals are exhausted.

/s/

Michael H. Gillick, Chairperson

cc: Attorney Erik Eisenmann
Attorney Catarina Colon
Attorney Sara Eagle-Kjome
Attorney Ben Hitchcock Cross

Editor's Note: This decision has been appealed to circuit court.

[8] See Wis. Stat. § 103.005(6)(b) which provides that special orders, such as this commission order, take effect as directed in the order.