



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan  
County Executive

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**MEMORANDUM**

**Privileged and Confidential**

TO: Michael Fordham Dennis  
Compliance Director  
Human Relations Commission

FROM: Robert G. Schoshinski  
Assistant County Attorney

DATE: December 21, 2000

RE: Human Relations Commission's Authority to Award Attorney's Fees Where  
There Has been No Finding of a Violation of Chapter 27

**I. QUESTION**

This memorandum deals with your question of whether the Human Relations Commission (HRC) can award attorney's fees to a complainant in an employment discrimination case where there has been no finding of a violation of Chapter 27 of the County Code. The issue arises from a case where an employee filed a complaint for discrimination based on disability alleging that the employer failed to reasonably accommodate her disability. The employee now contends that, after her complaint was filed, the employer granted the accommodation. The employee no longer wishes to pursue her complaint, but is asking the HRC to grant her attorney's fees because she contends that her actions in filing a complaint and retaining an attorney precipitated the employer's action.

**II. SHORT ANSWER**

In my view, the HRC cannot award attorney's fees to a complainant until a commission panel holds a hearing on the complaint and makes a finding that the respondent has violated Chapter 27.

**III. FACTS**

The facts stated in this memorandum are taken from your memorandum and the attached copy of correspondence from the complainant's attorney.

The complainant filed a complaint against her employer alleging discrimination based on disability based on her employer's alleged failure to grant her a reasonable accommodation. After making several requests for the accommodation, she hired an attorney and filed a complaint.

The complaint is now in the conciliation stage and the complainant's attorney has contacted you and informed you that the employer has granted the requested accommodation. Because of this, the complainant no longer wishes to go forward with conciliation and hearing of her complaint, but asks that the HRC proceed with the complaint solely to determine the amount of attorney's fees that the employer should pay to the complainant. The complainant's attorney bases his request on the "catalyst" theory that has been used by some Federal Circuit Courts of Appeals in addressing federal fee-awarding statutes. The "catalyst" theory holds that a party may be entitled to attorney's fees if her actions caused the opposing party to change its practices without reaching an ultimate judgment.

#### **IV. OPINION**

Chapter 27 does not allow the HRC to award attorney's fees to a complainant in an employment discrimination case unless there has first been a hearing and a finding by a commission panel that the respondent has violated a provision of the Chapter.

Section 27-25 sets out the penalties and monetary awards available to a complainant in an employment discrimination case. Section 27-25 states: "Upon a finding by the commission panel that there has been a violation of this division, it may order, in its discretion, and if appropriate, the hiring, reinstatement or upgrading of employees . . . The commission panel may in accordance with the standards of proof set forth in section 27-26 also make the following monetary awards determined by the commission panel from evidence of record as the actual damages, costs or losses involved or in such amounts as may be specified below . . ." Among the monetary awards enumerated are attorney's fees. (Section 27-25(c), incorporating by reference Section 27-7(k)(1)).

Because the statute conditions the panel's authority to award attorney's fees on a finding of a violation of the law, the HRC does not have authority to make such an award without such a finding. In order to make a finding of a violation under the procedures set out by Chapter 27, a panel would have to hold an evidentiary hearing or refer the case to a hearing examiner. The statute simply does not contemplate an award of attorney's fees without a hearing and finding of violation.

The complainant's request that the HRC use the "catalyst" theory as articulated by some Federal Circuit Courts of Appeal must be denied. Those court's used the "catalyst" theory in awarding fees under attorney's fees provisions of various federal statutes. Those statutes differ

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in their procedural structure from Chapter 27. None of them specifically require a finding of legal violation before making the award as Section 27-25 does. The theory, moreover, has been rejected by some Circuits including our Fourth Circuit. Although, as the complainant's attorney points out, the Fourth Circuit's rejection of the theory is not binding on issues of state and local law, likewise the approval of the theory by other circuits is not binding authority.

Chapter 27, therefore, does not allow the HRC to make an award of attorney's fees without a hearing and finding of violation.

cc: ✓ Marc Hansen  
Chief, Division of General Counsel

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