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United States District Court, District of Columbia.

Juanita GRIFFIN, Plaintiff,
v.
WASHINGTON CONVENTION CENTER, Defendant.

No. CIV. A. 93-2297(JMF).

July 21, 2000.

MEMORANDUM OPINION

FACCIOLA

Introduction

***1** In my opinion of July 6, 2000, I explained why I ordered plaintiff reinstated to her former position with defendant Washington Convention Center with all the benefits and entitlements she would have had had she not been discharged in violation of Title VII of the 1964 Civil Rights Act. That opinion, as well as the Court of Appeals decision, *Juanita Griffin v. Washington Convention Center,* 142 F.3d 1308 (D.C.Cir.1998), describes the facts of this case, which need not be repeated a third time. For purposes of this opinion, however, it is important to understand that a jury has found that the Convention Center discharged plaintiff on the basis of her gender in violation of Title VII and awarded her $19,000 in compensatory damages. At trial, and subsequently at a hearing held to receive evidence on the issues of reinstatement and back pay, plaintiff testified as to her efforts to find work following her termination and to her income in the years following her termination. Enforcing that verdict, I have already denied the Convention Center's request that plaintiff not be reinstated. This opinion will implement the third aspect of Title VII's remedial purposes, making plaintiff whole through the payment of back pay. An Order entering final judgment accompanies this opinion.

The Convention Center's Claim that Plaintiff Failed to Mitigate Damages

Plaintiff freely concedes that there must be deducted from the back pay to be awarded her earnings as evidenced by the W 2 forms given her by her employers and her tax returns. [FN1] The Convention Center claims that plaintiff, however, was out of work too long and could have found work sooner had she looked more diligently. Defendant also theorizes that plaintiff could have made more money by looking for work every day at the union hiring hall, where the union makes temporary workers available to companies that need them. Thus, defendant claims that plaintiff failed to mitigate her damages.

FN1. Plaintiff's income during this period of time must have included unemployment and workmen's compensation benefits (Tr. at 97, 105), but the Convention Center makes no argument as to the deductibility *vel non* of this money. "Tr" is a reference to the transcript of the hearing held on the defendant's Motion for Entry of Final Judgment on April 21, 2000.

The Presumption in Favor of Back Pay

In *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975), the Supreme Court held that the discretionary decision to award back pay must be informed by one of the goals which gave rise to Title VII--the achievement of equal employment opportunities by the destruction of barriers which favored certain employees over others because of their race or, as in this case, their sex. The near certainty of an expensive back pay award to a successful Title VII plaintiff provides ample motivation to the employers " 'to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' " *Albemarle Paper Co.,* 422 U.S. at 417-18, quoting *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir.1973).

An equally important motive behind the enactment of Title VII was to make the victims of illegal discrimination whole. Congress modeled the Title VII back pay provisions upon section 10(c) the National Labor Relations Act, 29 U.S.C. § 160(c) of which Congress was presumed to be aware when it enacted Title VII. Under those provisions, the National Labor Relations Board traditionally awarded back pay as a matter or course when it found a worker had suffered the loss of pay and benefits through a violation of the National Labor Relations Act. *Albemarle Paper Co.,* 422 U.S. at 419-20. The Supreme Court therefore concluded that an equally liberal presumption had to operate in Title VII cases, particularly in light of Congress' rejection of less favorable back pay provisions during the Congressional consideration of the legislation which would eventually become Title VII. Accordingly, "[i]t follows that, given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421. *See Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702, 719 (1978) ("The *Albemarle* presumption in favor or retroactive liability can seldom be overcome ...").

The Statutory Requirement for Deduction of Interim Earnings

***2** Title VII, as amended, requires, however, that: "[i]nterim

earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C.A. § 2000e-5(g) (1994). Since actual earnings are a matter of arithmetic, the controversy is always about whether the Title VII plaintiff has exercised "reasonable diligence" to find work after the discharge that led to her successful Title VII action.

Reasonable Diligence

Lest the presumption in favor of back pay be easily overcome and the purposes of Title VII defeated, the courts have interpreted the words "reasonable diligence" stringently in favor of Title VII plaintiffs and against the employers who discharged them. Thus, the presumption in favor of back pay can be overcome only by the defendant showing that there was substantially equivalent employment available and that the plaintiff failed to search for it in a meaningful way and accept it once found. [FN2]

> FN2. The burden of proof of establishing a failure to mitigate by not using reasonable diligence to find similar employment is on the defendant. *United States v. Chicago*, 853 F.2d 572, 578 (7th Cir .1988); *Rasimas v. Michigan Department of Mental Health*, 714 F.2d 614, 623 (6th Cir.1983); *Edwards v. School Board*, 658 F.2d 951, 956 (4th Cir.1981); *Hennessy v. Penril Datacomm Networks*, 864 F.Supp. 759, 764-765 (N.D.Ill.1994); *Equal Employment Opportunity Commission v. Kallir, Phillips, Ross Inc.*, 420 F.Supp. 919, 924 (S .D.N.Y.1975). *See National Labor Relations Board v. Madison Courier, Inc.*, 472 F.2d 1307, 1312-13 n. 9 (D.C.Cir.1972).

The obligation to make a "reasonably diligent" search for employment is not onerous and does not require success. *Rasimas v. Michigan Department of Mental Health*, 714 F.2d 614, 624 (6th Cir.1983). A heroic effort is not necessary. *Ford v. Nicks*, 866 F.2d 865, 873 (6th Cir.1989). Instead, a defendant must show that the plaintiff failed to pursue a course of action that would have created a reasonable chance of success. *United States v. Chicago*, 853 F.2d 572, 578 (7th Cir.1988). A Title VII plaintiff will lose her statutory right to back pay only if the course of action she followed to find work was so deficient as to constitute an unreasonable failure to seek employment. *Equal Employment Commission v. Kallir, Phillips, Ross Inc.*, 420 F.Supp. 919, 925 (S . D.N.Y.1975). It therefore suffices if plaintiff uses the traditional means of securing a substantially equivalent position such as searching the want ads, gathering information about possible jobs, and applying for vacancies. *See e.g., Equal Employment Commission v. Financial Assurance Inc.*, 624 F.Supp. 686, 693 (W.D.Mo.1985); *Equal Employment Opportunity Commission v. Pacific Press Publishing Association*, 482 F.Supp. 1291, 1317 & n. 38 (N.D.Calif.1979); *Pedreya v. Cornall Prescription Pharmacies, Inc.*, 465 F.Supp. 936, 950 (D.Colo.1979). *See also Hunter v. Allis Chalmers Corporation*, 797 F.2d 1417, 1428 (7th Cir.1986) (suggesting that in that Circuit burden is to show minimum diligence and even 3 year unsuccessful search for employment would not disqualify plaintiff from back pay).

Substantially Equivalent

A constituent element of the defendant's burden of establishing a lack of reasonable diligence is to establish the existence of employment which is "substantially equivalent" to the job the Title VII plaintiff lost. If the plaintiff failed to look for and then accept such employment her back pay will have to be reduced. The discharged Title VII plaintiff is certainly not obliged, however, to "go into another line of work, accept a demotion, or take a demeaning position ..." *Ford Motor Co. v. Equal Employment Opportunity Commission*, 458 U.S. 219, 231 (1982). To the contrary, by now, three Circuits have defined the defendant's obligation as requiring a showing of the existence of a job that is virtually identical to the job that the Title VII plaintiff lost. *Rasimas v. Michigan Department of Mental Health*, 714 F.2d 614, 624 (6th Cir.1983). *Accord: Graefhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1203 (7th Cir.1989); *Sellers v. Delgado Community College*, 839 F.2d 1132, 1138 (5th Cir.1988). While other courts have not yet stated the principle that generously, their decisions certainly establish a job that is different from the job lost in pay, collateral benefits, status, and opportunity for advancement is not substantially equivalent to the job lost. *See e.g. United States v. Chicago*, 853 F.2d 572, 578 (7th Cir.1988); *Equal Employment Opportunity Commission v. Exxon Shipping Co.*, 745 F.2d 967, 980 (5th Cir.1984) (jobs not equivalent when job refused required weekend work); *Rasimas v. Michigan Department of Mental Health*, 714 F.2d 614, 625-26 (6th Cir.1983) (plaintiff not required to accept employment unreasonable distance from her home); *Equal Employment Opportunity Commission v. FLC & Bros. Rebel Inc.*, 663 F.Supp. 864, 870 (W.D.Va.1987).

Plaintiff's Efforts

***3** Plaintiff testified at the trial and at the hearing that the impact of losing a job she loved was so psychologically devastating that she became depressed. Tr. at 93-94. When she recovered, she began to look for an electrician's job which was similar to the job she lost at the Convention Center. She wanted a job as an electrician in maintenance where she would work inside for a single employer, such as a government agency. She therefore applied for such positions and looked for information concerning vacancies

in these positions in places where such vacancies were posted. Tr. 44-50, 87, 98. After a period of time, when she either received no response to certain applications or rejections from others, and her savings and unemployment compensation had just about run out, she went to the union hiring hall and secured *seriatim* temporary employment by various employers. Tr. at 58. She continued doing that up to February 16, 2000, when she broke two bones in her wrist. Tr. at 105. Since then she has been receiving workmen's compensation benefits. *Id.*

The time since plaintiff's discharge can therefore be divided into three periods: (1) from her discharge to her recovery from her psychological distress (2) from that recovery through her unsuccessful efforts to find work, and (3) to her bowing to the inevitable by finding work through the union hiring hall.

The First Period

As to the first period, plaintiff testified that the psychological devastation of losing her job left her with no motivation to look for work for a substantial period of time. Tr. at 94. During that time she relied upon the spiritual counseling of her mother. Tr. at 90. Plaintiff apparently fears doctors and dislikes medication. Tr. 89, 93. Ultimately, she recovered sufficiently to look for work.

The Convention Center offered evidence from a professor of economics who testified that an analysis of statistical data convinced him that, during the first time period, an out of work electrician was able to find comparable work within seven to nine weeks of losing her job. Tr. at 158. The professor ventured this opinion as to the time period when plaintiff testified she was too distraught to look for work. *Id.* Nowhere did the Convention Center present any evidence to counter plaintiff's claim that she was too emotionally distressed to seek work. Thus, the Convention Center is asking me to compare an apple--a motivated electrician actively seeking work--with an orange--an electrician too distraught to look for work--and then condemn the orange for not acting like the apple. Had the Convention Center produced evidence that plaintiff was malingering and should have been looking for work and I credited that testimony, I could have made the comparison the Convention Center seeks between plaintiff and the archetypical well-motivated electrician. Without such proof, however, plaintiff's testimony that she was too distraught to work stands uncontradicted and the Convention Center provides me with no evidence upon which to predicate a conclusion which is the very opposite of that testimony. The jury clearly accepted the plaintiff's assertion as to her post- discharge distress and, as I have explained in my opinion accompanying my order reinstating her, I do not believe that I am free to disregard the jury's verdict in determining the judgment to be predicated on that verdict. Furthermore, even if I could, I would not, because I find plaintiff's testimony as to the disabling effect of her distress credible.

The Second Period

***4** During the period of time from her recovery to her going to the hiring hall, plaintiff checked vacancy notices and newspaper ads and made unsuccessful applications to several employers. Tr. at 44-45, 47, 106, 108-109. The Convention Center makes no showing that these efforts would have failed to uncover jobs that were available. It produced no evidence whatsoever as to general economic conditions and employment rates, let alone statistical or expert evidence for this period which would have tended to prove that there were jobs available for which plaintiff was qualified and she would have found had she looked more diligently. Instead, its argument was that plaintiff should have gone to the hiring hall sooner than she did. Hence, it never really focused on the availability of permanent jobs for journeymen electricians in this area during this period of time. The Convention Center therefore utterly failed to carry its burden of proof that plaintiff would have found work in this period of time had she looked more diligently than she did.

The Third Period

As to final period of time, when plaintiff secured work through the hiring hall, the unspoken premise of the Convention Center's position has to be that the work available through the hiring hall was substantially equivalent to the job plaintiff lost at the Convention Center because the central tenet of the "reasonably diligence" analysis is that the Title VII plaintiff can lose her back pay only if she rejects a substantially equivalent position.

On the basis of the evidence before me, I must find that the work plaintiff secured through the hiring hall was not the "substantial equivalent" of the job plaintiff lost at the Convention Center. Her job at the Convention Center entitled her to an annual salary, known in advance, and to health benefits, sick and vacation leave, and a pension. She gained seniority and could hope for advancement to a supervisory position. She worked indoors at the Convention Center, which is a block from the very epicenter of the Washington Metropolitan Area Metro system, the subway stop understandably called "Metro Center."

The union hiring hall was entirely different. Employers who agreed to pay a certain wage would tell the hiring hall of their needs for electricians. Tr. at 122-125. Electricians who had been out of work the longest got priority in bidding on the jobs. An electrician would lose that priority if she rejected more than a certain number of offered jobs. Tr. at 148. Most, if not all, of the jobs were at construction sites

meaning that the work was outside and the only sanitation facility was a "Port a John." [FN3] The jobs could be "short calls," *i.e*, the work was expected to last less than a week and, as plaintiff testified, the employer could easily fire workers since the employer knew that other workers could be readily secured through the hiring hall. Tr. at 68. The hiring hall jobs gave the worker no sick or vacation leave, (Tr. at 137), which are significant considerations to a person like plaintiff, a working single mother with small children. *See* Tr. at 99 (plaintiff lost job because she had to care for her child who had surgery on his leg). Thus, if plaintiff's child got sick and she could not arrange child care, she would lose a day's pay or even the job itself. While there was testimony that employers who use the hiring hall must make contributions to a pension fund, there was no testimony as to the worker's entitlement to a pension in terms of years worked. Finally, the worker who accepts the hiring hall job must get transportation to the construction site. The union's geographical jurisdiction extends from the District to five counties in Maryland (Montgomery, Prince George's, Calvert, Saint Mary's, and Charles), the northern half of Virginia, and as far west as three counties in West Virginia. Tr. 124. As anyone who commutes in the greater Washington metropolitan area knows, traffic, congestion and construction on major arterial highways, such as the Washington Beltway, are lengthening the daily commute intolerably. Nevertheless, this plaintiff had to use her own resources to get to the job site no matter where it was. In one instance, the job was so far away that she had to rise at 4 a.m., get her children to day- care, and then drive with a fellow worker who had a car to the job site. When she lost that ride, she lost the job for lack of means to get to work. Tr. at 101. [FN4]

> FN3. This was a significant consideration to plaintiff who might be the only woman at the site. *See* Tr. at 58 (portable toilets were unsanitary).

> FN4. Note that plaintiff testified to having jobs in, for example, Herndon, Poolsville, and Beltsville. Tr. at 101, 71, 73.

***5** The comparison between the job plaintiff lost and the hiring hall job she took is therefore between an indoor job, accessible by public transportation, with an annual salary, pension, health care, vacation and sick leave and seniority and a series of outdoor temporary jobs of unknown duration without vacation and sick leave, seniority, established and certain pension rights, where the risk of being fired was great and where the worker was obliged to get herself to the job site wherever it was. I cannot describe the job plaintiff lost and the hiring hall jobs as substantially equivalent without ignoring the case law, the evidence, and the English language.

Moreover, even if I were wrong and the hiring hall jobs were substantially equivalent, the Convention Center's claim for a reduction in back pay fails for a more pedestrian reason--its failure to meet its burden of proof. The Convention Center is urging me to take what plaintiff earned in her hiring hall jobs and deduct it from what she would have earned had she availed herself of the hiring hall jobs. The problem with that claim is that the Convention Center has not provided me with any information upon which to estimate what plaintiff would have earned had she taken the hiring halls job it claims she should have taken. It did not produce, for example, a statistical analysis of the median or average annual income of electricians who accepted hiring hall jobs in the period since plaintiff's discharge to serve as a basis of comparison. Instead, it produced one witness, Randolph Scott, who has been responsible for handing out jobs at the union hiring hall since 1997. Understandably, he agreed that the availability of jobs at the hiring hall is an absolute function of the economy. Tr. at 154. In recent flush times, with the area undergoing a construction boom, jobs are available and a hiring hall worker who takes every job may earn $52,000 a year. Tr. at 127. Mr. Scott also explained that, while it predates his taking his present position, he recalls that times were tough for a substantial period of time since the plaintiff's discharge. In 1993-1994 he recalls that there was so little work at the hiring hall that an electrician could be "on the bench," i.e., at the hiring hall waiting to be called for a job, for a year. Tr. at 139. In 1995-1996 things got better, with 200 to 300 workers on the bench, which would translate into waiting a month for a job. Tr. at 139.

Unfortunately for the Convention Center, this is the only evidence it provided me as the premise for the deduction from back pay it seeks. [FN5] To make that deduction I would have to guess what economic conditions were at any given point in the eight years since plaintiff's discharge, guess that work was available, guess as to her entitlement as opposed to the other electricians who had been on the bench longer than she was, guess how long the job would have lasted and then guess how many similar jobs would have come available in a given year. I appreciate that comparing a known, what plaintiff earned, with an unknown, what she would have earned had she gone to the hiring hall, may require reasonably estimates as to the latter. Making reasonable estimates is a judicial function; leapfrogging from wild speculative guess to wild speculative guess is not. The Convention Center has simply not provided me with any evidentiary basis upon which I could make the deduction it seeks and I will not make any such deduction.

> FN5. Note that the Convention Center reviewed through Mr. Scott plaintiff's work history which purported to show that she was fired from certain jobs and quit others. But, as plaintiff correctly

pointed out, the records are based on statements to the union from the employers and are objectionable hearsay. Tr. at 155. I must sustain that objection. In any event, cross examination established that plaintiff's work records, as maintained by the union, contained many errors. Tr. at 147-150. In light of these errors I cannot credit the work record even if it did not contain hearsay.

***6** In conclusion, then, I find that, assuming for the sake of the argument that the jury verdict permits any other conclusion, the Convention Center has failed to meet its burden of proof that plaintiff was not too distraught to look for work upon being discharged. I further find that the Convention Center failed to carry its burden of proof to establish that, upon recovery, plaintiff failed to make reasonably diligent efforts to find jobs similar to her job at the Convention Center. I also find that the hiring hall jobs that were made available to plaintiff were not substantially equivalent to the job she lost at the Convention Center. Finally, I find that, even if I am wrong in that conclusion, the Convention Center has failed to establish the amount of the deductions to be made from the back pay award to plaintiff. I therefore will not make any deductions from the back pay I am awarding plaintiff.

Prejudgment Interest

Plaintiff has asked in her demand for an award of prejudgment interest. Given the opportunity to challenge an award of pre-judgment interest, the Convention Center has declined to do so. [FN6] A survey of the law in this Circuit indicates, in any event, that an award of prejudgment interest is indeed appropriate.

FN6. In its *Opposition to Plaintiff' Motion for Entry of Judgment* ("Opposition"), defendant notes that plaintiff seeks "back pay plus prejudgment interest in the sum of $261,710.11." *Opposition* at 1. Never in that pleading or any subsequent pleading did the Convention Center challenge plaintiff's entitlement to prejudgment interest.

"The back pay provision of Title VII 'is a manifestation of Congress' intent to make persons whole for injuries suffered through past discrimination,' and 'prejudgment interest, of course, is an element of complete compensation.' " *Berger v. Iron Workers Reinforced Rodmen, Local 210,* 170 F.3d 1111, 1139 (D.C.Cir.1999), *quoting Loeffler v. Frank,* 486 U.S. 549, 558, (1988). *Accord: Thomas v. National Football League Players Association,* 131 F.3d 198, 207 (D.C.Cir.1997) ("The presumption strongly favors prejudgment interest, *Barbour v. Merrill,* 48 F.3d 1270, 1278-9 (D.C.Cir.1995), but the trial court may disallow interest where attributable to substantial, unexplained delay by the plaintiff.") The decision as to how to compute prejudgment interest is wholly within the discretion of the trial court. *Forman v. Korean Air Lines Co.,* 84 F.3d 446, 450 (D.C. Cir1996) ("KAL concedes that the decision on how to compute prejudgment interest is discretionary with the district court. We quite agree with our sister circuits that the use of the prime rate for determining prejudgment interest is well within the district court's discretion") (citations omitted).

In exercising that discretion, the judges of this Court have taken numerous approaches. *See Chadwick v. District of Columbia,* 56 F.Supp.2d 69, 73 n. 2 (D.D.C.1999) ("Unless the parties agree otherwise, prejudgment interest should be awarded at the prime rate for each year between plaintiff's constructive discharge and the entry of judgment"); *Jefferson v. Milvets System Technology,* 986 F.Supp. 6, 9 (D.D.C.1997) ("Neither the plaintiff nor the defendant has suggested a methodology whereby the Court is to calculate pre- judgment interest. Therefore the Court holds that pre-judgment interest shall be calculated in accordance with 28 U.S.C. § 1961, which governs post- judgment interest"); *Hartman v. Duffey,* 8 F.Supp.2d 1, 3 (D.D.C.1998) ("there is no unjust enrichment to the government in selecting the one-year Treasury Bill Rate as the rate of pre-judgement interest ... That rate was the pre-*Forman* recommendation of the experts and has been, over time, about one- half percent greater then the three month T Bill rate urged by the government."). Understandably, the various judges of this court that have confronted this question have exercised their discretion in different ways. I will exercise my discretion and follow plaintiff's unopposed suggestion that I use the post-judgment rates that are posted by the Clerk of Court, which are the 12 month Treasury Bills, updated at each new auction. They appear to me to be a realistic and reasonable calculation of what plaintiff lost. I will do so on a monthly basis, using the rate in effect each month up to the date of entry of judgment. [FN7]

FN7. Plaintiff was asked to indicate whether she wished to pursue back bay for the period of time from April 21, 2000, until I ordered her reinstated on July 6, 2000. She declined to do so. Therefore, utilizing plaintiff's calculations (which defendant did not oppose, *see* Defendant's May 16, 2000 *Report to the Court*), which carry plaintiff through the end of January 2000, I understand plaintiff's back calculation to result in a figure of $270,373.28. Utilizing the 12 month T-Bill rate applicable in each month since the end of January, I find that the interest earned, compounded monthly, was $8155.49, giving Ms. Griffin a total back pay award, including pre-judgment interest of $278,528.77 though July 21, 2000.

Conclusion

***7** For the foregoing reasons, in an Order and Final Judgment to accompany this Opinion, I will Order the defendant pay plaintiff $19,000 in compensatory damages, $278,344.53 in back pay and post-judgement interest. I will also order, in accordance with Title VII, that plaintiff submit a claim for attorney's fees, and will give defendant appropriate time to respond.

2000 WL 1174967, 2000 WL 1174967 (D.D.C.)

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