

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARY ELIZABETH BASS,

Plaintiff,

v.

DONNA TANOUE, Chairman,
Federal Deposit Insurance Corporation,

Defendant.

Civil Action No. 00-0115

DAR

MEMORANDUM OPINION

INTRODUCTION

Following a four-day trial before a jury in this Title VII action, the jury returned a verdict in plaintiff's favor, finding by a preponderance of the evidence that defendant discriminated against her on account of her race in excluding her from consideration for the grade 14 position of Chief of the Financial Review Unit in defendant's Acquisition Services Branch in September, 1997. The jury awarded plaintiff \$1,500,000 in compensatory damages, and the court entered judgment for plaintiff in the amount of \$300,000. See 42 U.S.C. § 1981a(b)(3)(D).

This matter is now before the court for consideration of Plaintiff's Motion for an Award of Equitable Relief (Docket No. 55). In it, plaintiff seeks (1) re-promotion to a permanent grade 14 level, retroactive to January, 1997, and placement in the position of Chief of the Financial Review Unit, or, another grade 14 position in her career field in defendant's Washington, D.C. office; (2) an award of

full back pay, including all pay increases, step increases, quality step increases, awards and bonuses, with interest thereon, as well as any other benefits which she could have received at the permanent grade 14 level, from January, 1997; (3) correction of all official records “to accord with the equitable relief awarded by the Court”; (4) a permanent injunction against discriminatory and retaliatory conduct against plaintiff in the future; and (5) an award of costs, including reasonable attorney’s fees of \$69,343.00, with interest thereon. Plaintiff’s Motion for an Award of Equitable Relief at 2-3; see Memorandum of Points and Authorities in Support of Plaintiff’s Motion for an Award of Equitable Relief (“Plaintiff’s Memorandum”) at 3-11.

Defendant opposes the motion except with respect to plaintiff’s request for an award of costs. With respect to all other requests for equitable relief, defendant submits that “the equitable relief Plaintiff requests does not comport with the jury verdict or the evidence in this case.” FDIC’s Opposition to Plaintiff’s Motion for Equitable Relief (Defendant’s Opposition”) at 1. Defendant maintains that the jury’s verdict “does not establish that Ms. Bass would have been selected” for the position of Chief, Financial Review Unit, and that “[t]hat question was neither asked of nor answered by the jury.” Defendant submits that “[t]he verdict thus provides no basis for concluding that [plaintiff] would have been entitled to the position [absent] discrimination.” FDIC’s Opposition at 2. With no citation of authority, defendant maintains that “[t]he denial-of-opportunity-to-compete case actually pled, tried, and decided here is distinct from the kind of denial-of-promotion case that would justify the retroactive promotion remedy Plaintiff seeks.” Id. at 6.

Defendant argues that “since the Court should not grant the retroactive promotion request, the

back pay request becomes moot.” Defendant’s Opposition at 11. Defendant also submits that if plaintiff were awarded a retroactive promotion as equitable relief, then back pay should be calculated as if plaintiff had received “fully successful” rather than “outstanding” performance appraisals, see Defendant’s Opposition at 11, and be calculated effective November 23, 1997, when the position of Chief of the Financial Review Unit was filled, rather than January, 1997, when plaintiff’s grade was reduced from a temporary grade 14 to a permanent grade 12. Id. at 12.

Defendant asserts that “[s]ince promotion is not appropriate, correction of records is also inappropriate.” Defendant’s Opposition at 12. With respect to the issuance of a permanent injunction, defendant, without citation to any authority, submits that “[t]here has been no finding that future discrimination will, or is likely to occur. Absent such a finding, a blanket injunction against actions already expressly prohibited by law is inappropriate.” Id.

Plaintiff, in her reply, suggests that “[t]he fundamental problem” with defendant’s opposition is that “it fails to recognize that since the 1991 amendments to the Civil Rights Act of 1964 . . . the remedies phase in a discrimination case is necessarily bifurcated[,]” and that “determinations regarding equitable relief are reserved for the court.” Plaintiff’s Reply in Further Support of Her Motion for an Award of Equitable Relief (“Plaintiff’s Reply”) at 4. Plaintiff maintains that there was therefore “no reason for the plaintiff or this Court to ask the jury whether Ms. Bass should have received the promotion to the position of the Chief of the Financial Review Unit at the CG-14 level.” Id. at 6. Plaintiff observes that “[i]n any event, the defendant did not submit such a jury interrogatory for this Court’s consideration.” Id. at 6, n.2. Plaintiff asserts that the “clear implication of plaintiff’s articulation

of her claims was that had she not been deprived of a fair opportunity to be considered [for the] Chief of [the] Financial Review Unit position, she would have received the promotion.” *Id.* at 6-7. Plaintiff further submits that defendant “envisioned this case prior to the trial as a non-selection case in light of the fact that it expected to present testimony regarding whether or not plaintiff was qualified for the position of Chief of the Financial [Review] Unit[,]” and “[u]ltimately . . . *treated* [it] as a non-selection case considering it told the jury in its opening argument that Ms. Bass was not qualified.” *Id.* at 7. Finally, plaintiff observes that

[a]t no time during the trial did the defendant put on evidence by the selecting official or any other FDIC management official that Ms. Bass was not the most qualified individual for the position despite this Court’s ruling during a bench conference that the door had been opened regarding Ms. Bass’ qualification.

Id. at 9.

DISCUSSION

Section 2000e-5(g)(1) of Title 42 of the United States Code provides, in relevant part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1).

This Court has observed that “Title VII entitles individuals to be ‘[made] whole for injuries suffered on account of unlawful employment discrimination.’” Hayes v. Shalala, 933 F. Supp. 21, 24 (D.D.C. 1996) (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)). Accordingly, “[d]istrict courts must strive to grant ‘the most complete relief possible’ in cases of Title VII violations.” Lander v. Lujan, 888 F.2d 153, 156 (D.C. Cir. 1989) (citing Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976)). To that end, “the courts must make the victim ‘whole’ by ‘plac[ing him], as near as may be, in the situation he would have occupied if the wrong had not been committed.’” Lander, 888 F.2d at 156 (citing Albermarle, 422 U.S. at 418-19) (internal citation omitted). In fashioning a remedy which satisfies the objectives of Title VII, the district court is vested with “considerable discretion.” Lander, 888 F.2d at 156; see Hayes, 933 F.Supp at 25. Thus,

a district court which endeavors to fashion a remedy for discrimination cannot confine itself to narrow or technical measures which, while perhaps bearing a logical connection to the plaintiff’s complaint, fail to reflect the whole of the plaintiff’s injury. Rather, comprehensiveness, and a keen sensitivity to the equities of the case before it, must control the court’s determination.

Brown v. Marsh, 713 F. Supp. 20, 22 (D.D.C. 1989), aff’d, 918 F.2d 214 (D.C. Cir. 1990); cert. denied, 502 U.S. 810 (1991).

Retroactive Promotion

This Circuit has expressly held that “Title VII envisioned that making a victim whole would

include his reinstatement to the position he would have held but for the discrimination.”

Lander, 888 F.2d at 156. Additionally, this court has observed that Section 2000e-5(g) of Title VII “specifically includes reinstatement as an appropriate judicial remedy,” and that reinstatement “is the preferred remedy in the absence of special circumstances militating against it.” Hayes, 933 F.Supp. at 25 (citing Squires v. Bonser, 54 F.3d 168, 173 (3d Cir. 1995)). “A district court may order a retroactive promotion if it finds that the plaintiff ‘would have attained the position but for the defendant’s unlawful employment practices.’” James v. Norton, No. CIV.A. 99-2548, 2001WL 1524422, at *3 (E.D. Pa. Nov. 30, 2001) (citing Richerson v. Jones, 551 F.2d 918, 923 (3d Cir. 1977)).

Absent from defendant’s opposition is any suggestion that “special circumstances [militate] against” a retroactive promotion. See Hayes, 933 F.Supp. at 25. Instead, defendant opposes plaintiff’s request for a retroactive promotion as equitable relief solely on the ground that such relief “would put Plaintiff in a better position than she would have been entitled to had there been no discrimination.” Defendant’s Opposition at 2. However, the undersigned finds that defendant’s contention is predicated upon a flawed interpretation of the role of the jury in making a determination with respect to liability, and that of the court in fashioning equitable relief which satisfies the objective of Title VII that a prevailing plaintiff be afforded make-whole relief. Indeed, this Circuit has long recognized that “in Title VII cases ‘the questions of statutory violation and appropriate statutory remedy are conceptually distinct.’” Johnson v. Brock, 810 F.2d 219, 223 (D.C. Cir. 1987) (citing Smith v. Secretary of the Navy, 659 F.2d 1113, 1120 (D.C. Cir. 1981)).

The undersigned finds that no authority supports the proposition advanced by defendant that

“[t]he denial-of-opportunity-to-compete case actually pled, tried, and decided here is distinct from the kind of denial-of-promotion case that would justify the retroactive promotion remedy Plaintiff seeks.” Defendant’s Opposition at 6. Defendant offers no authority in support of the proposition. Nor does defendant propose any alternative measure of equitable relief.¹

This Circuit has held that a defendant may defeat a request for a retroactive promotion as equitable relief once discrimination has been found only by “[proving] by clear and convincing evidence that [plaintiff’s] qualifications were such that he would not in any event have been selected.” Day v. Mathews, 530 F.2d 1083, 1085 (D.C. Cir. 1976); see Milton v. Weinberger, 696 F.2d 94, 98 (D.C. Cir. 1982). Defendant introduced the issue of plaintiff’s qualifications during defendant’s counsel’s opening statement, but offered no evidence that plaintiff was not the best qualified person for the position. See Plaintiff’s Reply, Exhibit 1 at 146-52.² Defendant’s recognition of the need to put on evidence regarding plaintiff’s qualifications is also evident upon an examination of the witness list defendant included in the parties’ joint pretrial statement, where defendant identified four witnesses from

¹ Defendant’s opposition to a retroactive promotion, back pay, correction of records and injunction against future discrimination and retaliation is tantamount to a suggestion that even though the jury found in plaintiff’s favor on each question it was asked to decide, and awarded her compensatory damages of \$1,500,000, she is entitled to no equitable relief. Such an anomalous result is plainly inconsistent with Title VII’s objectives. See Squires, 54 F.3d at 171 (“the denial of a make-whole remedy must be supported by ‘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.’”).

² Defendant’s failure to offer such evidence is rendered even more inexplicable by the statement of defendant’s counsel, as part of her objection to a question to plaintiff by her counsel about her qualifications, that “we have to prove that she could not have been selected for the job” since the case “has turned into a non-selection case[.]” Plaintiff’s Reply, Exhibit 1 at 147.

whom defendant expected to elicit testimony regarding plaintiff's qualifications. See Joint Pretrial Statement (Docket No. 32) at 15-17.³ However, defendant did not do so, and now entirely fails to point to any evidence offered at trial from which the undersigned could find by clear and convincing evidence "that [plaintiff's] qualifications were such that [she] would not in any event have been selected." See Day, 530 F.2d at 1085.

The only evidence on which defendant relies in support of her opposition to plaintiff's request for a retroactive promotion as equitable relief is the trial testimony of Freddie Cook. Mr. Cook is an African-American man who was a permanent Grade 15 when the "Expression of Interest" e-mail was sent, and who like plaintiff, did not receive it. Mr. Cook testified that he "probably would have been the best candidate" had he received the "Expression of Interest" e-mail and decided to apply. Trial Transcript, Vol. II at 13-14. The undersigned finds, however, that the fact that Mr. Cook - - who was also excluded from consideration - - was qualified, and believed that he would have been the best qualified, is hardly "clear and convincing" evidence that plaintiff was not the best qualified applicant. Indeed, such evidence shows, at most, that absent discrimination, at least one other qualified African-American candidate would have applied.

Plaintiff's testimony regarding her qualifications was thus un rebutted. Plaintiff's testimony included a discussion of the fields of study for the bachelor's and master's degrees she earned; her work experience prior to 1991, when she began her tenure at the Resolution Trust Corporation; her

³ Defendant made no effort at trial to demonstrate that the selectee was better qualified than plaintiff; nor does defendant, in her opposition to plaintiff's motion for equitable relief, suggest that there is any evidence from which the court could so find.

promotions from the grade 12 level to the grade 13 level, then to the grade 14 level; her duties and responsibilities, including her performance of “the duties that became [the] job” of Chief of the Financial Review Unit; and her qualifications for the position of Chief. See Plaintiff’s Reply, Exhibit 1 at 126-58, 168-69, 196-200.

Moreover, the record makes plain that the jury, while not specifically asked to find whether plaintiff would have been selected for promotion to the position of Chief of the Financial Review Unit absent discrimination, in fact found that plaintiff was qualified for the position. First, the jury’s verdict is an unequivocal rejection of defendant’s assertion, in her counsel’s opening statement, that “even if the Plaintiff had applied, the personnel rules would have prevented her from getting the job of the unit chief, and that’s because, unfortunately, she wasn’t qualified.” Trial Transcript, Vol. I at 123.⁴ Second, the jury was instructed with respect to its evaluation of the evidence regarding plaintiff’s qualifications, and obviously found, in its determination, that the reasons articulated by defendant for not allowing plaintiff to compete were pretextual:

If you find that Ms. Bass was qualified to apply for the grade 14 vacancy in ASB’s Policy and Compliance Section, the position of chief of the Financial Review Unit, and was nevertheless excluded from those considered candidates for the vacancy, and that most of those considered were white and were not as well-qualified for the position as was Ms. Bass, and you find that the defendant has not offered a legitimate reason or reasons for this different treatment of Ms. Bass, you may find that the plaintiff has proven her claim of intentional employment race discrimination.

⁴ See n.2, n.3, supra.

Trial Transcript, Vol. V at 69-70 (emphasis supplied).

Accordingly, the undersigned find that plaintiff was qualified for the position of Chief of the Financial Review Unit. “Where courts have found that a plaintiff was qualified for a promotion, they have awarded that promotion retroactively.” James, 2001 WL 1524422, at *3 (surveying recent decisions in which retroactive promotion ordered as equitable relief). As defendant has failed to show by clear and convincing evidence -- either offered at trial or proffered in her opposition to plaintiff’s motion for equitable relief -- that plaintiff would not have been promoted absent discrimination, the undersigned will order that defendant immediately promote plaintiff to the position of Chief of the Financial Review Unit at a permanent grade 14, effective November 23, 1997, the date on which the position was filled.

Back Pay

Plaintiff seeks back pay, from early January, 1997, with a pay differential between what she earned as a grade 12 and what she would have earned as a grade 14, until she is actually promoted, and her pay is adjusted. Plaintiff’s Memorandum at 8. Plaintiff also seeks any step increases, bonuses and merit pay “as if she had been appointed to the Financial Review Unit Chief’s position at the permanent grade 14 level in earliest January 1997 and served there with distinction since that date.” Id.

Defendant, with no citation of authority, maintains that “since the Court should not grant the retroactive promotion request, the back pay request becomes moot.” Defendant’s Opposition at 11. Alternatively, defendant asks that if plaintiff is retroactively promoted as equitable relief, then (1) her

back pay be calculated as if she had earned “fully successful,” and not “outstanding” performance appraisals; and (2) that the calculation of back pay begin effective November 23, 1997- - the date on which the position of Chief of the Financial Review Unit was filled - - rather than January, 1997.

Defendant does not address plaintiff’s request for interest on the award.

“In calculating a back-pay award, [a] court must, as nearly as possible, recreate the conditions and relationships that would have been, had there been no unlawful discrimination.” Walker v. Dalton, 89 F. Supp. 2d 20, 24 (D.D.C. 2000) (citations and internal quotations omitted). Moreover, “a court should calculate the amount of money the claimant could have reasonably earned if the discrimination had not occurred. The figure should include the base pay, raises, and bonuses or benefits the claimant would have reasonably expected to earn.” EEOC v. Delight Wholesale Co., 765 F. Supp. 583, 587-88 (W.D. Mo. 1991), aff’d, 973 F. 2d 664 (8th Cir. 1992). See also Bonura v. Chase Manhattan Bank, N.A., 629 F. Supp. 353, 355 (S.D.N.Y. 1986) (“In calculating back pay, the Court may take into account any salary increases that [plaintiff] could reasonably have expected to receive had [she] not been [discriminated against].”). Furthermore, “since the [defendant’s] unlawful conduct has created the necessity for this backpay judgment, any ‘uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating (party).” Mead v. United States Fidelity and Guaranty Co., 442 F. Supp. 114, 134 (D. Minn. 1977) (citations omitted).

Defendant’s contention that plaintiff should be awarded no back pay is plainly at odds with the objectives of Title VII; indeed, this Circuit has observed that even in an instance in which a court determines that a promotion as equitable relief is properly denied, “[n]othing [in such instance] is

intended to suggest that the employee who is denied the promotion should also be denied back pay, seniority credit, attorney's fees, costs, equitable relief, or the like, where any such relief is otherwise found to be appropriate." Milton, 696 F.2d at 99 n.14.

The undersigned finds that an award of back pay is required in order to, "as nearly as possible, recreate the conditions . . . that would have been, had there been no unlawful discrimination." See Walker, 89 F.Supp. at 24. The undersigned further finds that plaintiff demonstrated that she had been performing at consistently high levels until she was given "the lowest performance evaluation rating in my career history" by Patricia McClintock, her then supervisor and competitor for the position of Supervisory Contract Policy Analyst. See Trial Transcript, Vol. I at 205. Moreover, defendant neither offered evidence of any instance in which plaintiff's performance was other than exemplary, nor otherwise attempted to demonstrate that plaintiff's performance could have been expected to be anything less than outstanding had she been selected Chief of the Financial Review Unit. For these reasons, the undersigned finds that the plaintiff's back pay award is more appropriately based on continued "outstanding" ratings. Cf. Hayes, 933 F.Supp. at 26 (where most recent evaluation of "fully successful" was not contested at trial, back pay and benefits calculated as if plaintiff had received "fully successful," rather than "outstanding" rating.). Such result is consistent with the admonition that "any 'uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating [party].'" Mead, 442 F. Supp. at 134 (citations omitted).⁵ The

⁵ To the extent that this methodology may be deemed to overcompensate the plaintiff, "the deterrence objectives of Title VII's remedy provision may excuse this result." Brown, 713 F. Supp. at 22 n.5 (citing Albermarle, 422 U.S. at 417-18; Louisiana v. United States, 380 U.S. 145, 154 (1965) (a court "has not merely the power but the duty to render a decree which will so far as possible

award shall be calculated from November 23, 1997, the date on which the position of Chief of the Financial Review Unit was filled, to the date plaintiff is actually promoted and her pay adjusted upward to the grade 14 level. The undersigned will also award interest on the back pay.

Correction of Records

Defendant opposes plaintiff's request for correction of all FDIC records solely on the ground that "like back pay, correction-of-records relief depends entirely on whether a promotion is granted." Defendant's Opposition at 12. However, upon consideration of the findings regarding retroactive promotion and back pay, as well as the objectives of Title VII, correction of records will be ordered. See Hayes, 933 F.Supp. at 27.

Injunctive Relief

The undersigned will also grant the injunctive relief requested by plaintiff. See Shepherd v. American Broadcasting Co., 862 F. Supp. 486, 502 (D.D.C. 1994), vacated on other grounds, 62 F.3d 1469 (D.C. Cir. 1995) (injunctive relief ordered where, as here, plaintiff remains an employee of defendant). See also Mitchell v. Secretary of Commerce, 715 F. Supp. 409, 410 (D.D.C. 1989), aff'd, 918 F.2d 214 (D.C. Cir. 1990), cert. denied, 502 U.S. 810 (1991) ("The Court is concerned that, absent such an injunction the [defendant's] mistreatment of [plaintiff] will continue, albeit in subtle ways that may be beyond immediate judicial supervision.") While this Circuit has not held that enjoining a

eliminate the discriminatory effects of the past *as well as bar like discrimination in the future.*" (emphasis in original)).

defendant from further acts of discrimination is a “mandatory” remedy, it is a “typical” remedy, and the district court has broad discretion in the discharge of its “duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar discrimination in the future.”

Albermarle, 422 U.S. at 417 (internal quotations omitted).

Defendant’s contention that “a blanket injunction against actions already expressly prohibited by law is inappropriate” in the absence of any finding by the jury that future discrimination or retaliation will occur, or is likely to occur, is thus contrary to the law of this Circuit. Instead, this Circuit has held that

the request for injunctive relief will be moot only where there is no reasonable expectation that the conduct will recur, or where interim events have “completely and irrevocably eradicated the effects of the alleged violation[.]”

Bundy v. Jackson, 641 F.2d 934, 946 n.13 (D.C. Cir. 1981).

Like the Bundy court, this court “perceives no such certainty here, most obviously because [plaintiff’s] agency has taken no affirmative steps to prevent recurrence of the [discrimination], and because [the employees who undertook the discriminatory actions] still work for the agency.” Bundy, 641 F.2d at 946 n.13. Indeed, defendant does not proffer that it has taken any “affirmative steps” to ensure that there is no recurrence of any discrimination against plaintiff, and that she will not be subjected to retaliation. Nor does defendant dispute that one official whose conduct was the subject of this action remains one of plaintiff’s supervisors, and that the other official will be after plaintiff is promoted in accordance with the court’s order.

CONCLUSION

On the basis of the findings set forth herein, equitable relief is awarded to plaintiff in accordance with the Order entered on this date.

DEBORAH A. ROBINSON
United States Magistrate Judge

DATE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARY ELIZABETH BASS,

Plaintiff,

v.

DONNA TANOUE, Chairman,
Federal Deposit Insurance Corporation,

Defendant.

Civil Action No. 00-0115
DAR

ORDER

In accordance with the Memorandum Opinion filed on this date, it is, this _____ day of December, 2001,

ORDERED that Plaintiff's Motion for an Award of Equitable Relief (Docket No.55) is **GRANTED**, and that

(1) FDIC shall place plaintiff in the position of Chief, Financial Review Unit, Acquisition Services Branch, or in a comparable position at the grade 14 level, in plaintiff's career field, in the Washington, D.C. office of the FDIC;

(2) FDIC shall provide plaintiff with full back pay (including all pay increases, step increases, quality step increases, awards and bonuses), with interest thereon, as well as all other benefits which she could have received since November 23, 1997 had she been selected for the permanent grade 14 Chief, Financial Review Unit position, and had she served in that position since that time, in an environment free

of discrimination and retaliation, with “outstanding” performance ratings;

(3) FDIC shall correct all of its records, including plaintiff’s official personnel folder (“OPF”), to accord with the equitable relief awarded by the Court;

(4) FDIC shall be permanently enjoined against engaging in discriminatory or retaliatory conduct against plaintiff in the future; and

(5) FDIC shall pay plaintiff’s costs of this action (and of the administrative complaints that preceded it), including her attorneys’ fees in the total amount of \$69,343.00 (\$68,544.50 of which is for reasonable attorneys’ fees and \$798.50 of which is for non-fee expenses incurred by both plaintiff and her lawyers), with interest thereon, and shall do so by check made payable to the order of “Mary E. Bass and David H. Shapiro, Her Attorney”.

DEBORAH A. ROBINSON
United States Magistrate Judge