IP 98-1697-C B/S EEOC v. Preferred Management [4]
Judge Sarah Evans Barker — Signed on 9/24/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,
vs.
PREFERRED MANAGEMENT CORP D/B/A PREFERRED HOME HEALTH CARE, PREFERED MEDICAL CARE INC, PREFERRED HOME HEALTH CARE VINCENNES INC D/B/A PREFERRED HOME HEALTH CARE LAFAYETTE, PREFERRED HOME HEALTH CARE VINCENNES INC D/B/A PREFERRED HOME HEALTH CARE VINCENNES,
Defendants.

CAUSE NO. IP98-1697-C-B/S

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SOUTHERN DISTRICT OF INDIANA
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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

vs.

PREFERRED MANAGEMENT CORP., d/b/a/ PREFERRED HOME HEALTH CARE, ET AL. , Defendant.

IP 98-1697-C B/S

ENTRY ON PENDING POST-TRIAL MOTIONS

I. *Introduction.*

Pending before the court are three post-trial motions: plaintiff's unopposed Motion to Amend Judgment; plaintiff's Motion for Equitable Relief; and defendants' Motion to Stay Money Judgment and Approve Irrevocable Letter of Hold in Lieu of a Bond. We address all three motions here. We GRANT plaintiff's motion to amend judgment. We GRANT in part and DENY in part plaintiff's motion for equitable relief. And we DENY defendant's motion insofar as it asks us to approve its proffered letter of hold in lieu of a bond, but GRANT defendant's motion insofar as it asks us to stay execution of the money judgment, with the proviso that the stay be extended for thirty days only, during which time Preferred is ordered to post a bond sufficient to secure the money judgment against it. The bond that defendant posts in the thirty days following this entry must take into account today's GRANT of plaintiff's motion to amend the judgment to include an additional $12,176.79 ($7,474 in back pay plus $4,702.79 in interest on the back pay) on behalf of Mary Mulder.

II. *Discussion*.

A. *EEOC's Motion to Amend Judgment.*

The EEOC asks us to amend the judgment by adding an award of $12,176.79 ($7,474 in back pay plus $4,702.79 in interest on the back pay) in favor of Mary Mulder. The EEOC prevailed on its constructive discharge claim on behalf of Ms. Mulder and, before trial, the parties had stipulated back pay in the amount of $7,474. The EEOC then calculated pre-judgment interest on that amount by using the IRS's fluctuating interest rate, a method approved by the Seventh Circuit. *EEOC v. O'Grady*, 857 F.2d 383, 391-391 (7th Cir. 1988).

A prevailing plaintiff is presumptively entitled to back pay. *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 659 (7th Cir.), *cert. denied*, 122 S.Ct. 1070 (2001). She is also entitled to interest "as a normal incident" of the make-whole award. *Loeffler v. Frank*, 486 U.S. 549, 558 (1988).

Preferred has not challenged either the EEOC's request to amend the judgment or the amount requested. We conclude that both the request and the amount are reasonable. Accordingly we GRANT the EEOC's motion to amend and here amend the judgment to include the award of $12,176.79 in favor of Ms. Mulder.

B. *EEOC's Motion for Equitable Relief*.

The EEOC seeks equitable relief in the form of an injunction prohibiting future acts of discrimination in hiring on the basis of religion, and against future harassment on the basis of religion, and also requiring Preferred to post a notice announcing employees' rights under Title VII and a means

for addressing any complaints of discrimination or harassment based on religion. For the reasons that follow, we GRANT plaintiff's motion with the modifications noted below.

Title VII vests the court with broad equitable authority. 42 U.S.C. § 2000e-5(g); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 420, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975). This includes the authority to issue an injunction to deter future unlawful conduct where there is a reasonable concern that the discrimination may continue or where the work environment is hostile. *E.E.O.C. v. Ilona of Hungary, Inc.*, 97 F.3d 204, 214 (7th Cir. 1996); *EEOC v. Gurnee Inn*, 914 F.2d 815, 817 (7th Cir.1990); *Dombeck v. Milwaukee Valve Co.*, 40 F.3d 230, 238 (7th Cir.1994). Indeed, an injunction is presumed to be warranted where, as here, the plaintiff has proven a pattern or practice of discrimination (here in the form of harassment) based on religion. *U.S. v. Balistrieri*, 981 F.2d 916, 933-934 (7th Cir. 1993) (housing discrimination case which Seventh Circuit analogized to employment discrimination cases.). *See EEOC v. Massey Yardley Chrysler Plymouth*, 117 F.3d 1244, 1253 (11th Cir. 1997) (Eleventh Circuit observed: "the Seventh Circuit suggested that the EEOC is normally entitled to injunctive relief where it proves discrimination against one employee and the employer fails to prove that the violation is not likely to recur.").

We agree with the EEOC that an injunction is warranted especially where those who engaged in the unlawful conduct represent the highest officers in the company and where there is no indication that those officers are either no longer in power or that their conduct has changed. Preferred opposes the EEOC's request for an injunction on the ground that an injunction against future discrimination or harassment is not required because Preferred did not really discriminate in the past. That argument borders on the impertinent and is not well calculated to convince us that an injunction is not warranted.

First, it assume facts contrary to the jury's conclusion. And second, it offers us no basis for optimism about Preferred management's future conduct.

We also agree that requiring Preferred to post a notice substantially identical to the one that the EEOC appended to its motion for equitable relief is reasonably calculated to reduce or eliminate future acts of discrimination and/or harassment based on religion and to notify employees of their rights under Title VII. See *EEOC v. Massey Yardley Chrysler Plymouth*, 117 F.3d at 1253 (district court abused discretion in not granting injunction, including posting of notice).

Substantially identical, however, does not mean identical. Accordingly, we order the EEOC to submit: (1) a proposed injunction consistent with this opinion; (2) a proposal stating the duration that it seeks to maintain the Notice on Preferred premises and the location(s) of the Notices in Preferred facilities; and (3) a revised Notice consistent with the following revisions to the proposed Notice accompanying its motion. First, since the Notice indicates in bold text that it is posted pursuant to the order of this court, the first paragraph should be stricken as repetitive. Second, in the fifth (or final paragraph) the words "and is encouraged to exercise that right" should be stricken from the sentence: "An employee has the right, and is encouraged to exercise that right, to report allegations of employment discrimination in the workplace." Employees properly informed of their rights are capable of determining whether and when to exercise them.[1] We reserve judgment about Preferred's objection that the injunction is overbroad until we review the revised injunction and the notice accompanying it.

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[1]We reject Preferred's objection, however, to the inclusion of a statement concerning retaliation. We view that statement as merely a reminder to employees of their right to complain about discrimination without fear of reprisal and not an indication that Preferred actually has retaliated against employees for complaining.

Finally, we reject the EEOC's suggestion that Preferred be ordered to report on an annual basis regarding all complaints of religious harassment and how they have handled those complaints. We find such a requirement to be unnecessarily intrusive and we expect Preferred to conform to the requirements of the injunction, just as we would expect any defendant to conform to the law's requirements. However, we will approve a provision in the EEOC's proposed injunction which orders Preferred to maintain a file consisting of any and all employee statements, whether oral or written, complaining of religious discrimination or harassment. Preferred may maintain the file in its Human Resources Department with access limited to upper management.

C. *Preferred's Motion to Stay Money Judgment and Approve Irrevocable Letter of Hold in Lieu of a Bond.*

Preferred asks us to stay execution on the money judgment until after "the ultimate disposition of any appellate proceedings" and to approve the security it has offered in the form of a "letter of hold" in lieu of a bond. Before addressing the merits of its motion, we express our disapproval and frustration that the parties were unable to agree between them on a compromise method for providing the necessary security against default of the money judgment. As this decision makes clear, courts are good at providing zero-sum answers to issues brought before them; only willing parties can work out compromises convenient to both of them.

Fed.R.Civ.P. 62(b) and (d) provide for the posting of security, usually in the form of a supersedeas bond, when a party seeks to stay execution of a judgment pending a motion for a new trial

(62(b))[2] or appeal (62(d)).[3] Two obvious points are worth noting. First, providing security during the pendency of post-trial motions or appeals is a practical means of creating confidence that an already-rendered money judgment will be satisfied. As Judge Posner has observed:

> The philosophy underlying Rule 62(d) is that a plaintiff who has won in the trial court should not be put to the expense of defending his judgment on appeal unless the defendant takes reasonable steps to assure that the judgment will be paid if it is affirmed. Posting a supersedeas bond is the simplest way of tendering this guaranty but in appropriate cases alternative forms of security are allowed. . . .

Lightfoot v. Walker, 797 F.2d 505, 506-507 (7th Cir. 1986).[4]

Second, posting a bond is the *usual* means of providing such security. *Olympia Equipment v. Western Union Telegraph Co.,* 786 F.2d 794, 796 (7th Cir.1986). Accordingly, while courts have discretion to approve alternative methods of creating security, the party seeking an alternative to a bond bears some burden to show the "reasonable steps" it has taken to allay the concerns that the prevailing party and the court may have as to the likelihood that the judgment will be paid. Here, Preferred criticizes the EEOC's opposition to its motion, but addresses none of its concerns.

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[2]Rule 62(b) provides: "In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b)."

[3]Rule 62(d) is triggered after a party files its notice of appeal, an event that has not occurred here. It provides: "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court."

[4]We use the standard under Rule 62(d) both because it is substantially identical to the standard under Rule 62(b) and because Preferred has indicated that it is likely to appeal the underlying verdict.

The Seventh Circuit has outlined several factors to consider in determining whether to waive a supersedeas bond and approve an alternative means of security. They include: (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence the court has in the availability of funds to pay the judgment; (4) whether defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether defendant is in such a precarious financial situation that the requirement of posting a bond would place other creditors in an insecure position. *Dillon v. City of Chicago*, 866 F.2d 902, 904-05 (7th Cir. 1988), *summarizing*, *Lightfoot* and *Olympia Equipment*.

The EEOC has addressed only the first and third of these criteria. Preferred addresses only the cost of a bond as a factor that we should consider in approving its letter of hold, a point to which will return shortly. For now, we note that two points raised by the EEOC are sufficient to warrant our conclusion in disapproving the letter of hold and requiring Preferred to post a bond. First, the nagging uncertainty over Preferred's continuing financial health, a concern that has surrounded this litigation since the discovery phase; indeed, it was a subject of expert testimony during trial. Second, the revocable nature of the letter of hold, according to which National City Bank may, on thirty days notice, refuse to extend the letter of hold past August 8, 2003.[5] That provision may be subject to several legal interpretations, a fact which, by itself, *undermines* the very security that the letter of hold is supposed to ensure. Instead of security, the letter may create an opportunity for more litigation.

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[5]We note the tension between a letter of hold that is guaranteed only until August 8, 2003 and Preferred's request for a stay "pending ultimate disposition of any appellate proceedings," which might, of course, continue well past August 8, 2003.

Preferred states, without support, that a bond will cost it $28,000, or ten percent of the approximate total of the judgment. (It also notes that, if it ultimately prevails, the amount of the bond will be taxed to the EEOC.) Judge Posner has suggested that "[t]he cost is usually one percent of the amount of the bond. . . ." *Lightfoot v. Walker*, 797 F.2d 505, 506-507 (7th Cir. 1986). In that event, $2,800 would be the correct figure. We are in no position to evaluate cost as a factor because Preferred has offered no evidence in support of its assertion.

For these reasons, we GRANT that portion of Preferred's motion which asks us to stay execution of the money judgment, but DENY that portion of its motion which asks us to approve its letter of hold as an alternative to a bond. Accordingly, we stay execution of the money judgment for thirty days, during which time Preferred is ordered to secure a bond which includes the $12,176.79 in back pay and interest discussed earlier.

It is so ORDERED this ______ day of September 2002.

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SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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