

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

-----  
ROSETTA R. JORENBY,

Plaintiff,

v.

DATEX-OHMEDA, INC.,

Defendant.

-----

OPINION AND  
ORDER

01-C-699-C

This case is currently scheduled for trial on May 12, 2003, on plaintiff's claim that defendant subjected her to a hostile work environment because of her sex in violation of Title VII of the Civil Rights Act of 1964. Defendant has filed a motion in limine to preclude plaintiff's vocational expert, Stephen Weigert, from testifying. According to plaintiff, Weigert will calculate the amount of plaintiff's lost earning capacity and plaintiff's psychologist, Hollis Jellinek, will testify that plaintiff is unable to work because of the sexual harassment she received while working for defendant.

Defendant argues that evidence of plaintiff's future lost wages is barred by this court's opinion and order dated July 16, 2002. In that opinion, I granted defendant's motion for summary judgment on plaintiff's constructive discharge claim because plaintiff had failed to

include the claim in her charge with the Equal Rights Division. July 16, 2002, Op. and Order, dkt. #19, at 17; see Cheek v. Western & Southern Life Insurance Co., 31 F.3d 497, 501 (7th Cir. 1994) (plaintiff suing under Title VII may include only those claims that were part of charge with EEOC or ERD). According to defendant, by dismissing plaintiff's constructive discharge claim, this court prevented plaintiff from recovering any lost wages, past, present or future. In essence, defendant's contention is that because plaintiff cannot argue she was forced to resign because of harassment, she also cannot argue that the harassment made her unable to work.

In response, plaintiff concedes that she is barred from seeking front pay, but asserts that she may still recover for lost earning capacity. She reasons that although front pay is a substitute for reinstatement and a remedy for constructive discharge, her claim for lost future wages does not rely on the fact of termination. Rather, she argues, her "inability to return to defendant's employ and her inability to work anywhere else are caused by her mental health condition, the primary cause of which was not the termination of her employment but the campaign of unchecked harassment she endured for a protracted period of time." Plt.'s Br., dkt. #48, at 10.

As a general matter, the parties appear to agree that, in a Title VII case, lost future earnings may be awarded as a "nonpecuniary loss" under 42 U.S.C. § 1981a(b)(3). Williams v. Pharmacia, Inc., 137 F.3d 944, 952 (7th Cir. 1998). Thus, the question is: does the

dismissal of a claim for constructive discharge prevent a plaintiff from recovering future lost earnings caused by damage to her mental health?

The parties have cited no case law addressing this question directly and I have found none in my own research. However, plaintiff relies on Williams to argue that she may recover lost future wages. In that case, a jury found that the plaintiff had been denied a promotion because she was female and then terminated because she had filed a grievance challenging differential pay between male and female employees. Id. at 947. The district court awarded one year's worth of front pay as equitable relief and the jury awarded \$250,000 in lost future earnings as a result of the damage to plaintiff's reputation. Id. at 951-53. The court of appeals upheld both awards. In explaining the difference between the two, the court stated that front pay award "approximated the benefit [the plaintiff] would have received had she been able to return to her old job" while the lost future earnings award "compensate[d] [the plaintiff] for a lifetime of diminished earnings resulting from the reputational harms she suffered as a result of [the defendant's] discrimination." Id. at 953.

There are notable differences between this case and Williams. First and most important, the plaintiff in Williams had been terminated, whereas in this case plaintiff chose to quit and she is prohibited from arguing at trial that she was constructively discharged. Second, the lost future earnings in Williams were awarded as the result of injury to the plaintiff's professional reputation. In this case, plaintiff is not arguing that her reputation

has been damaged but rather that her mental health has been damaged.

Despite the difference between the two cases, I conclude that Williams supports a conclusion that plaintiff is entitled to offer evidence of future lost earnings, so long as she has sufficient evidence to allow a reasonable jury to find that she has a permanent disability preventing her from working *and* that her disability was caused by the sexual harassment she was endured. See Lindale v. Tokheim Corp., 145 F.3d 953, 959 (7th Cir. 1998) (damages for future lost earnings may not be based on conjecture). In Williams, the court did not address directly a plaintiff's opportunity to recover lost future earnings if she has not been terminated or constructively discharged. However, the court did state, "Even if reinstatement had been feasible in this case, [the plaintiff] would still have been entitled to compensation for her lost future earnings." Williams, 137 F.3d at 953. The court explained that even if the plaintiff still works for the defendant, her future earning capacity may be limited because it will be more difficult for her to seek new employment in the future as a result of the injury to her reputation. Id. Thus, the court suggested that the fact of termination is not important to sustain an award for future lost earnings; rather, it is the lingering effects of discrimination that should be the focus of the inquiry.

This reading of Williams supports plaintiff's position. Plaintiff is not seeking damages that arose from her discharge. Instead, she is seeking to recover damages arising directly from the harassment she received. Defendant disagrees, arguing, "If plaintiff may

not claim she was constructively discharged (for discriminatory reasons), the responsibility for her unemployment rests with her, not defendant.” Dft.’s Reply Br., dkt. #50, at 3. This is true, but only to the extent her unemployment is a result of her choice to leave defendant’s company. If an employee chooses to quit her job unnecessarily, her former employer is not required to pay for the time it takes her to find a comparable position. However, if the reason a former employee remains unemployed is not because she is unsuccessful in finding a job or chooses not to look for one, but rather because she is *unable* to work *because* of defendant’s discriminatory treatment, defendant cannot argue that it is plaintiff’s own fault for not finding employment.

Furthermore, although in Williams, the jury awarded lost future earnings to the plaintiff because of injury to her reputation rather than a mental health condition, I do not believe that difference is determinative. Rather, the important fact is that the discrimination “caused a diminution in [the plaintiff’s] ability to earn of living.” Id. at 952 (internal quotations omitted). The particular way that plaintiff’s ability has been hindered is not relevant.

Defendant insists that plaintiff’s request for future earnings is “a not-too-subtle end-run around the Court’s decision.” Dft.’s Reply Br., dkt. # 50, at 2. I cannot agree. It is true that like a claim of constructive discharge, plaintiff’s request for future lost earnings provides an explanation for why she is not working. However, it does not follow that she

can recover for lost earning capacity only if she was constructively discharged. In a claim for constructive discharge, the question is whether working conditions were so onerous that a reasonable person would feel compelled to resign. Simpson v. Borg-Warner Automotive, Inc., 196 F.3d 873, 877 (7th Cir. 1999). In contrast, the inquiry for plaintiff's lost earnings claim is: *regardless* whether plaintiff chose to leave or was terminated, is she unable to work *now* as a result of defendant's harassment? Although I must assume that a reasonable person would not have felt compelled to resign at the time plaintiff terminated her employment, this sheds little light on the long term effects of the harassment she endured.

Thus, although the July 16 opinion foreclosed plaintiff's ability to argue that she was constructively discharged and thus entitled to recover front pay, it did not address whether plaintiff's emotional distress stemming from her harassment is so great that she is now unemployable. Defendant cannot limit plaintiff's damages for emotional harm by repackaging them as compensation for termination. Whether plaintiff will be able to prove a disability or its causal connection to her harassment is a different question. At this point, however, defendant is only challenging the testimony of Weigert, who according to plaintiff, will testify only regarding the *amount* of plaintiff's future lost earnings, *assuming* that plaintiff was unable to work and that her disability was the result of defendant's discrimination. Defendant has not challenged Weigert's qualifications regarding his ability to make that calculation. It is Hollis Jellinek who will testify regarding plaintiff's mental condition.

Defendant raises an objection to her testimony for the first time in a reply brief, which is insufficient. Defendant may challenge the admissibility of Jelinek's testimony in a separate motion, as it has indicated it will do. If plaintiff cannot provide admissible evidence supporting the fact and cause of her disability, I will reconsider my ruling at that time.

ORDER

IT IS ORDERED that defendant Datex-Ohmeda, Inc.'s motion to exclude the testimony of Stephen Weigert is DENIED.

Entered this 17th day of April, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge