

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

SAMI ELESTWANI,

Plaintiff,

v.

MEMORANDUM AND ORDER

NICOLET BIOMEDICAL,

04-C-947-S

Defendant.

On June 30, 2005 after a jury trial judgment was entered in the above entitled matter in favor of plaintiff against defendant in the amount of \$1,560,000.00 together with reinstatement to the position of Key Accounts Manager all pursuant to Exhibit 303 attached hereto together with costs and reasonable attorney fees.

On July 8, 2005 plaintiff moved for a partial new trial on the issue of lost future earnings or in the alternative a motion to alter or amend judgment. On July 12, 2005 plaintiff moved for attorney fees and costs. On July 14, 2005 defendant moved for judgment as a matter of law concerning damages, for a remittitur or a new trial. These motions have been fully briefed and are ready for decision.

MEMORANDUM

PLAINTIFF'S MOTION FOR A NEW TRIAL ON DAMAGES OR TO AMEND JUDGMENT

Plaintiff moves under Rule 59(a), Federal Rules of Civil Procedure, for a partial new trial by jury on the issue of plaintiff's lost earning capacity or in the alternative to alter or

amend judgment under Rule 59(d) to include damages for plaintiff's lost future earnings. Damages for lost future earnings compensate an employee for a lifetime of diminished earnings resulting from the injury to professional standing, character, and/or reputation caused by the discrimination. Williams v. Pharmacia, Inc., 127 F.3d 944, 952 (7th Cir. 1998). To recover for lost earning capacity a plaintiff must produce competent evidence suggesting that his injuries have narrowed the range of economic opportunities available to him. Id.

Plaintiff argues that the jury should have been specifically instructed on lost future earnings. The jury was instructed as follows:

Plaintiff is entitled to recover damages in an amount which will reasonably compensate him for losses sustained as a result of defendant's unlawful conduct.

This instruction allowed the jury to consider any evidence of lost future earnings. Id. Plaintiff agrees that these damages were compensatory damages rather than front pay. Since plaintiff's lost future earnings could have been considered by the jury as compensatory damages, plaintiff is not entitled to a partial new trial on the issue of his lost earning capacity.

Plaintiff has not shown as a matter of law that he is entitled to lost future earnings between \$15,000.00 and \$25,000.00 per year. The testimony presented by plaintiff's expert focused on the pay loss of plaintiff where he remained in a technician position as

opposed to a position in neurodiagnostic sales. This evidence was relevant to front pay and not lost future earning capacity. There is no record evidence that plaintiff would suffer a loss of earning capacity were he reinstated to his former position. Accordingly, his motion to alter or amend judgment will be denied,

DEFENDANT'S RULE 50 MOTION

Defendant moves for judgment as a matter of law with respect to punitive damages. In deciding a motion for judgment as a matter of law under Rule 50(b), Federal Rules of Civil Procedure, the Court must determine whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed. Haley v. Gross, 86 F. 3d 630, 632 (7th Cir. 1996). It is not appropriate for the Court to consider the credibility of the witnesses or to weigh and balance the evidence. Isaksen v. Vermont Castings, Inc., 825 F. 2d 1158, 1163 (7th Cir 1987).

Before the Court submitted the question of damages to the jury defendant moved for judgment as a matter of law on punitive damages which was denied. Defendant renews its motion. Defendant argues that it did not act with malice or with reckless indifference to the federally protected rights of plaintiff.

A finding of liability against a defendant under 42 U.S.C. § 1981 does not automatically entitle a prevailing party to an award of punitive damages. Ramsey v. American Air Filter, Co., Inc., 772 F.2d 1303, 1314 (7th Cir. 1985). The jury was instructed that plaintiff was entitled to punitive damages where the discrimination was maliciously, wantonly or oppressively done.

Some evidence was presented at trial that Moses, plaintiff's supervisor and the Vice President of Sales, acted with malice towards plaintiff. Plaintiff testified that Moses told him that plaintiff holding the position of Key Account Manager was not good for the company in light of 9/11 since plaintiff was Middle Eastern and was required to travel and interact with "high profile" customers. The jury could have found based on the testimony of Moses that he discriminated against plaintiff and continued to deny it so as to protect himself and the defendant. The jury could also have inferred malice from the defendant's continuing argument that plaintiff had lied about the discrimination in order to obtain money.

Defendant now raises the argument that plaintiff is not entitled to punitive damages because it acted in good faith. In Kolstad v. American Dental Ass'n., 527 U.S. 526 (1999), the Court held that punitive damages may not be awarded if the alleged discriminatory acts were contrary to the employer's good faith efforts to comply with Title VII. Defendant has waived any

argument it had under Kolstad because it did not request any instruction under Kolstad or raise the argument in its prior Rule 50 motion. Further, there was evidence presented that defendant did not act in good faith to comply with its obligation under the law to investigate the alleged discrimination by Moses.

Evidence was presented at trial that supports the jury's finding that plaintiff was entitled to punitive damages. Defendant's motion for judgment as a matter of law on the issue of punitive damages will be denied.

DEFENDANT'S RULE 59 MOTION

In the alternative defendant moves for a new trial on damages because both the compensatory and punitive damages awards are excessive or in the alternative a remittitur of the damage award. A new trial may be granted pursuant to Rule 59 if the verdict is against the weight of the evidence, the damages are excessive or for some other reason the trial was not fair to the moving party. Forrester v. White, 846 F.2d 29, 31 (7th Cir. 1988).

To determine whether a damage award is excessive, the Court must decide whether the award is monstrously excessive, whether there is no rational connection between the award and the evidence and whether the award is roughly comparable to awards made in similar cases. Tullis v. Townley Engineering and Manufacturing Co., 243 F.3d 1058, 1066 (7th Cir. 2001).

Defendant argues that the \$80,000.000 award of compensatory damages is excessive. There was testimony that plaintiff suffered a great deal because of his termination which the jury found to be discriminatory. Plaintiff testified that the discrimination had a substantial adverse impact on his self esteem, his family and social life and his core set of values. He testified that he had difficulty sleeping and eating, lost forty pounds and that the discriminatory termination placed a strain on his marriage which eventually resulted in a divorce.

In Ramsey v. American Air Filter Co. Inc., 772 F. 3d at 1313, the Court reduced a compensatory damage award from \$75,000 to \$35,000 finding that the award was excessive because plaintiff had not been treated for emotional harm or been depressed for any sustained period of time. Although plaintiff was not treated for emotional harm, the Court finds there is sufficient evidence of emotional harm to support the award of \$80,000.00 in compensatory damages.

Defendant argues that the punitive damages award is excessive. The Court agrees. While there was some evidence the defendant acted with malice in discriminating against plaintiff there is not overwhelming evidence of malice which would support an award of punitive damages in the amount of 1.4 million dollars.

The United States Supreme Court in BMW of North America, Inc., v. Gore, 517 U.S. 559, 574-575 (1996) addressed the reasonableness

of a punitive damages award. The Court discussed three considerations: the degree of reprehensibility of the conduct, the ratio between the actual damages and the punitive damages and comparable sanctions. Punitive damages up to ten times actual damages have been upheld. Id., at p.581.

In Ramsey the Court held that if the Court concludes that a jury's award of punitive damages is merely a windfall to the prevailing party it may reverse the award. In Ramsey the Court held that the fact that the jury deliberated less than one hour demonstrates likelihood that the jury was motivated by improper reasons such as caprice and prejudice. The Court in Ramsey reduced the punitive damages award from \$150,000.00 to \$20,000.00.

In Lust v. Sealy, Inc., 383 F.3d 580, 590-591 (7th Cir. 2004), a jury awarded Lust \$100,000.00 in compensatory damages and \$1 million in punitive damages after finding that she was denied a promotion because of her gender. The Court reduced the award to \$27,000.00 in compensatory damages and \$273,000.00 punitive damages to bring the award within the statutory cap of \$300,000.00. On appeal the United States Court of Appeals for the Seventh Circuit further reduced the punitive damages award to \$150,000.00.

Although the jury found that the defendant discriminated against plaintiff with malice, the conduct is not so egregious as to warrant a punitive damage award of \$1.4 million dollars which is 17.5 times the compensatory damages award. This would be a

windfall to the plaintiff. The fact that the jury deliberated only about one-half hour before arriving at the 1.4 million dollar punitive damages award indicates it may have been motivated by improper motives. Based on these factors the Court concludes that the punitive damages award in this case is excessive.

As the Court stated in Pinner v. Schmidt, 805 F.2d 1258, 1265 (5th Cir. 1986), cert. den., 483 U.S. 1022 (1987), "Despite the excessiveness of the award, however, we believe it is appropriate for us to order a conditional remittitur so as to avoid, if possible, a second trial." See Haluschak v. Dodge City of Wauwatosa, 909 F.2d 254, 256-57 (7th Cir. 1990).

Accordingly, a remittitur will be entered where defendant is granted a new trial on punitive damages unless plaintiff accepts an award of \$700,000.00 in punitive damages. In the event plaintiff fails to accept this remittitur by September 15, 2005 a new trial on punitive damages will be immediately rescheduled.

Defendant argues that a new trial should be granted on both liability and damages. The Court disagrees. Liability has already been decided in this case. Defendant has not argued either on a motion for directed verdict or in its motion for a new trial that there were any errors in the trial on liability. Further, defendant has not shown that the issue of punitive damages is so intertwined with the issue of liability that it cannot be tried

separately. A new trial on damages is all that is required absent the acceptance by plaintiff of the remittitur.

Plaintiff's motion for attorneys fees and costs will not be addressed until final judgment is entered.

ORDER

IT IS ORDERED that plaintiff's motion for a partial new trial on the issue of lost future earnings or in the alternative to alter or amend the judgment is DENIED.

IT IS FURTHER ORDERED that defendant's motion for judgment as a matter of law with respect to punitive damages is DENIED.

IT IS FURTHER ORDERED that defendant's motion for a new trial on compensatory damages is DENIED.

IT IS FURTHER ORDERED that defendant's motion for a new trial on punitive damages pursuant to Rule 59, Federal Rules of Civil Procedure is GRANTED unless the aforesaid remittitur of \$700,000.00 is accepted by plaintiffs not later than September 15, 2005.

Entered this 23rd day of August, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge