

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONNA M. DONNELL, :
 :
 Plaintiff, :
 :
 v. : Civil Action No. 03-0086 (JR)
 :
 GORDON R. ENGLAND, Secretary of :
 the Navy, :
 :
 Defendant. :

MEMORANDUM ORDER

Following a four-day employment discrimination trial in which a jury returned a verdict in plaintiff's favor on seven of eight counts of discriminatory and retaliatory failure to promote and awarded compensatory damages of \$2 million (reduced by the Court to \$300,000 because of the statutory cap), the plaintiff has moved for retroactive reinstatement (with back pay) as a form of equitable relief, and the defendant Secretary of the Navy has moved for judgment as a matter of law, for a new trial or for remittitur.

1. **Judgment as a matter of law or new trial.** The defense motion for judgment as a matter of law is based simply on the quantum of evidence produced at trial. My conclusion, after reviewing the arguments of the parties in the whole record, is that the defendant is correct on five of the seven counts on which judgment was rendered for the plaintiff, but that the judgment must stand on the remaining two.

For her retaliation claims (as to the Coggins, Hayes, Hutchinson and Hicks positions) plaintiff's testimony that she was outspoken about a glass ceiling at NavFac was insufficient evidence of protected activity and, absent any other evidence of protected activity or that a decision maker had any knowledge of such protected activity, did not establish a *prima facie* case of retaliation. Before the Coggins selection in April 2000 and the Hayes/Hutchinson selections in May 2000, the only person who arguably had knowledge of any protected activity by the plaintiff was Mr. Galgano, with whom plaintiff had a hallway discussion about discrimination in 1994 or 1995, but Galgano was not involved in the Coggins, Hayes, or Hutchinson selections. Plaintiff filed an EEO complaint in July 2000, but there was no evidence that any of the people involved with the Hicks selection more than a year later knew anything about it or were connected with it in any way.

All of the evidence on the point tended to show that Kelly, the person selected for what is known as the Kelly position, had considerably more experience and was better qualified for the position than plaintiff. Plaintiff either failed to establish that she was as qualified as Kelly, or she failed to adduce evidence that the non-discriminatory reason given for Kelly's selection (better qualifications) was

pretextual. The gender discrimination count as to the Kelly position thus also fails.

The gender discrimination claim as to the Coggins position and the retaliation claim as to the Kelly position, however, were both within the province of the jury to decide. Coggins was selected over both Jackie Minnick and the plaintiff, apparently because of qualifications having to do with "sea lift experience," which had not been advertised as requisite experience for the job. Jackie Minnick may have had a claim to gender discrimination superior to that of the plaintiff, but both were qualified for the job, both were excluded, and the jury may rationally have determined that the "sea lift" qualifications were pretextual.

Plaintiff's claim of retaliation as to the Kelly position survives the defense motion because of its temporal proximity to the time of plaintiff's EEO complaint (a matter of some three months), because of the involvement of Mr. Galgano in the selection (he of the hallway conversation some five years earlier), and particularly because of the unexplained ten-day delay between the time panel members were notified that plaintiff had improperly been omitted from the certified list of applicants (which may have been around October 10, 2000) and the time panel members were notified that plaintiff had to be considered (around October 23).

2. Equitable relief.

Although the insult of gender discrimination (in the Coggins selection) and retaliation (in the Kelly selection) was established by the jury's verdict, the record of this trial leaves no question but that the plaintiff would not have been hired for either of those positions absent the discrimination. For the Coggins application, it was Jackie Minnick and not the plaintiff who might have been entitled to instatement. And in the Kelly selection, Kelley's extensive experience as an IT manager with Price Waterhouse Cooper & Washington made him a much more attractive candidate whose experience related directly to the work.

With due regard to Title VII's emphasis on "make whole" relief, however, an appropriate form of equitable relief in this case is to award plaintiff back pay at the GS 14 level from the time of the Coggins selection until the date of her resignation. Plaintiff does not claim constructive termination, nor would the record support such a finding. Her resignation was voluntary, and accordingly no instatement or front pay will be awarded.

3. Remittitur.

Most of the government's argument for remittitur is premised on the jury's award of \$2 million of compensatory damages. That award has been reduced to the statutory cap amount

of \$300,000, however, and an award of that size does not shock the conscience.

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It is accordingly **ORDERED** that the defendant's motion for judgment as a matter of law [45] is **granted** with respect to the retaliation claims related to the selections of Coggins, Hayes and Hutchinson and **granted** with respect to the sex discrimination claim made with respect to the Kelly selection, but **denied** with respect to the sex discrimination claim in connection with the selection of Coggins and the retaliation claim in connection with the selection of Kelly. It is

FURTHER ORDERED that the motions for new trial and remittitur [45] are **denied**. It is

FURTHER ORDERED that plaintiff's petition for equitable relief [44] is **granted** with respect only to back pay and only to the date of plaintiff's resignation and **denied** in all other respects. And it is

FURTHER ORDERED, pursuant to LCvR 54.2 that the parties confer and attempt to reach agreement on attorneys fee issues, that an extension of time for filing a motion under Rule 54(d) (2) (B) for attorneys fees is **granted**, and that a status

conference is set for **May 11, 2005 at 4:30 p.m.** for the purposes set forth in LCvR 54.2(a).

JAMES ROBERTSON
United States District Judge