

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DIANE J. SCHROER, :
 :
 Plaintiff, :
 :
 v. : Civil Action No. 05-1090 (JR)
 :
 JAMES H. BILLINGTON, Librarian :
 of Congress, :
 :
 Defendant. :

MEMORANDUM ORDER

Diane Schroer is a male-to-female transsexual. In August 2004, before she changed her legal name or began presenting as a woman, she applied for the position of Specialist in Terrorism and International Crime with the Congressional Research Service (CRS) at the Library of Congress. The selecting official for the position, Charlotte Preece, offered Schroer the job, but then rescinded the offer after learning of Schroer's intent to present as a woman when she started at CRS. After a bench trial in August 2008, I found that the Defendant had violated Title VII of the Civil Rights Act by discriminating against Schroer because of sex. See Dkt. 70.

Now before me is Schroer's motion for post-trial relief. She seeks compensation for back pay and lost employment-related benefits, nonpecuniary losses, and past pecuniary losses. Her motion will be granted.

A. Back pay and benefits

Victims of employment discrimination are entitled to "the most complete makewhole relief possible." Peyton v. DiMario, 287 F.3d 1121, 1126 (D.C. Cir. 2002). They are entitled to compensation for lost back pay and employment-related benefits, see Thompson v. Sawyer, 678 F.2d 257, 290 (D.C. Cir. 1982), and prejudgment interest thereupon, see Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1139 (D.C. Cir. 1999).

There are two ways to calculate lost back pay and benefits: the periodic mitigation method and the aggregate mitigation method. The periodic mitigation method compares a plaintiff's anticipated wages and benefits for certain periods (calendar years, most often) with her actual earnings during those periods. She is entitled to an award for periods when her anticipated earnings would have exceeded her actual earnings, without any offset for periods when her actual earnings exceeded her anticipated earnings. The aggregate mitigation method compares the plaintiff's anticipated earnings with her actual earnings over the entire recovery period. If her anticipated earnings would have been less than her actual earnings, she does not receive a back pay award.

Here the choice of method makes a big difference. Schroer would not receive a back pay award under the aggregate

mitigation method: From January 2005 (when she would have begun working at CRS) until the end of 2008, she earned approximately \$700,000 -- more than the \$668,000 she would have made at CRS during that time. See Dkt. 72, at 9-10. But she earned most of that \$700,000 in 2006 and 2007, so, under the periodic mitigation method, she would still be entitled to compensation for her shortfalls in 2005 and 2008.

I encountered this issue once before in Hartman v. Duffey, 8 F. Supp. 2d 1 (D.D.C. 1998). There I affirmed the Special Master's decision to calculate back pay using the periodic mitigation method. I wrote:

Title VII's back pay provision was expressly modeled after that of the National Labor Relations Act, see Albermarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975). The Supreme Court upheld the periodic approach to mitigation, NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344 (1953), reasoning that aggregation would give employers the incentive to delay reinstatement for as long as possible, "since every day the employee put in on the better paying job [would] reduce[] back pay liability." Id. at 347. Because timely reinstatement is an important remedy under Title VII, periodic mitigation is the preferred method for determining back pay liability in discrimination cases.

Hartman, 8 F. Supp. 2d at 6 (citations omitted).

Few courts have explicitly addressed this issue in the decade since Hartman, presumably because -- as I noted in that decision -- the law is well-settled in favor of the periodic mitigation method. See id. (citing cases). Those courts that

have taken up the issue more recently have summarily reaffirmed the preferability of the periodic mitigation method. See Godinet v. Mgmt. and Training Corp., 56 Fed. App. 865, 872 (10th Cir. 2003); Wirtz v. Kansas Farm Bureau Services, Inc., 274 F. Supp. 2d 1215, 1219-21 (D. Kan. 2003). I will do the same here.

In support of her request for an award of back pay, Schroer submits the declaration of Dr. Amy McCarthy, a consultant who has provided back pay calculations in a number of employment discrimination cases. See Declaration of Amy McCarthy, Ph.D, Att. C. Applying the periodic mitigation method, Dr. McCarthy concludes that Schroer's total loss including interest over the recovery period was \$183,653. See Corrected Declaration of Amy McCarthy, Ph.D. The Defendant does not challenge Dr. McCarthy's calculations, and I find nothing in the record to dispute them. Accordingly, Schroer will be awarded \$183,653 in back pay and benefits.

B. Nonpecuniary losses

As a victim of intentional discrimination, Schroer is also entitled to compensation for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," 42 U.S.C. § 1981a(b)(3), with "other nonpecuniary losses" encompassing "injury to professional standing, injury to character and reputation, injury to credit standing, [or] loss of health," Enforcement Guidance:

Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, at *5, available at 1992 WL 189089 (July 14, 1992) [hereinafter "EEOC Guidance"]. Because the defendant Library of Congress has more than 500 employees, Schroer's compensation for nonpecuniary losses may not exceed \$300,000. See 42 U.S.C. § 1981a(b)(3)(D).

The evidence in the record -- detailed declarations from Schroer and from her therapist, Martha Harris -- provide ample support for the maximum award. Schroer was on the verge of two difficult transitions when she applied for the Terrorism Specialist position: her transition out of the military after 25 years of service, and the "real life experience" portion of her transition from male to female. See Declaration of Diane Schroer, ¶¶ 2-5. After interviewing for the position at CRS, Schroer thought the job would be ideal for both her professional and personal transitions. Id. ¶¶ 5-7. She was thrilled that she was offered the job. Id. ¶ 5.

After getting the offer, Schroer arranged a lunch with Charlotte Preece, the selecting official for the position. Schroer wanted to let Preece know about her intent to present as a woman when she started working, and to answer any questions Preece may have had about the gender transition process. Id. ¶¶ 6-7. Though Preece appeared to take the news in stride, she

called Schroer the next day to let her know that CRS was rescinding its offer. Id. ¶ 8.

Schroer was devastated. Id. ¶ 10. She found the reversal especially crushing because it cast doubt on the viability of living an open and productive life as a woman. She writes:

When I realized that the Library didn't want me because I am a transgender woman, I was particularly distressed because I knew this was going to make the already difficult process of transitioning successfully still more difficult, if not downright impossible. That worried me to no end, caused me to lose hope, and doubt my ability to live life as a woman successfully. I am not certain if I can adequately characterize how depressing, demoralizing and temporarily debilitating it is to lose hope. Especially when that hope was founded on something that, in my mind, was completely reasonable, doable, and logical. Doing a meaningful job and putting my qualifications and experience to work, completing my transition and just going on with life -- all of these things seem[ed] to me to be reasonable and achievable. When the Library took all that away, my life changed dramatically, because there were no other positive options.

Id. ¶ 17.

Schroer's professional transition plan was in limbo too. She had cut ties with her previous employers and projects after receiving the offer from CRS, id. ¶ 12, and in the months after CRS' decision -- in the midst of her gender transition -- she was fearful of applying for other positions only to be rejected because she was a transsexual, id. ¶ 18. She finally had to turn

to her friends in the military for employment. Though they were able to find her work, it was often unfulfilling and uncredited -- a far cry from the kind of work she had done in the military and had hoped to do at CRS. Id. ¶¶ 19-21.

Martha Harris, Schroer's therapist, knew Schroer to be a confident individual who prided herself on her self-reliance. Declaration of Martha Harris, ¶¶ 17-21. But in the months following CRS' decision, Harris found Schroer to be tentative, frustrated, and embarrassed by having to rely on her friends for work. Id. ¶ 22. Schroer complained of countless sleepless nights when she would second-guess her decision to inform Preece of her intent to present as a woman. Id. ¶ 23.

Schroer's personal and professional situation improved in the following years, but there was still fallout from CRS' decision. She worked as a freelance consultant, which provided relative financial security, but failed to offer the kind of advancement opportunities and professional interaction she was looking for when she applied to CRS. Schroer Decl. ¶ 21. She filed an EEO complaint with the Library in the hopes that Preece and others would rethink their decision, but it was rejected without investigation. Id. ¶ 24. And while she gained greater confidence living life as Diane instead of David, her experience with CRS still made her question whether she could be truly comfortable and accepted as a woman. Id. ¶ 32.

Schroer credibly describes how CRS' decision caused each of the injuries listed in 42 U.S.C. § 1981a(b)(3). She experienced the emotional pain and suffering of losing her dream job merely because she was a transsexual; the inconvenience of scrambling to find adequate employment and achieve financial security; the mental anguish of second-guessing the way she chose to disclose her intent to present as a woman; and the loss of enjoyment of life that comes from worrying about whether her personal life stood in the way of her professional success. An award of \$300,000 as compensation is appropriate and certainly not excessive.

C. Past pecuniary losses

Finally, Schroer is entitled to compensation for "moving expenses, job search expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses that [we]re incurred as a result of the [Defendant's] discriminatory conduct." EEOC Guidance, at *4. These past pecuniary losses are "not included in the [statutory] caps and are fully compensable where actual out-of-pocket losses can be shown." Id. at *5.

Schroer seeks compensation for two sets of expenses. She spent \$2,550 on therapy sessions with Martha Harris following the CRS decision. See Harris Decl. ¶ 34. These sessions helped her cope with the personal and professional problems resulting

from CRS' decision. See Schroer Decl. ¶ 38. She also spent \$4,987.80 for two procedures in 2006 and 2008 to address broken teeth. Schroer's dentist, Joseph Desio, claims that Schroer's dental problems were caused by stress-triggered clenching and grinding in the aftermath of CRS' decision. See Declaration of Joesph G. Desio, ¶¶ 3-5 & Att. A-C. The Defendant does not dispute these claims, and there is sufficient evidence to support a finding that these expenses were incurred as a result of the Defendant's discriminatory conduct.

Conclusion

The Plaintiff is awarded \$183,653 for back pay and benefits, \$300,000 for nonpecuniary losses, and \$7,537.80 for past pecuniary losses.

The Clerk will enter judgment in Plaintiff's favor in the amount of \$491,190.80. It is **SO ORDERED**.

JAMES ROBERTSON
United States District Judge