UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAROLEE BRADY HARTMAN, *et al.*, Plaintiffs, v. JOSEPH DUFFEY, Defendant.	Civil Action No. 77-2019-CRR

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO REVERSE SPECIAL MASTER'S DECISION REGARDING CLAIM OF JUDITH L. AMBROSE

Defendant, by his undersigned attorneys and pursuant to Local Rule 108(a), hereby submits the following memorandum of points and authorities in support of defendant's motion to reverse the Special Master's decision regarding the claim of Judith L. Ambrose in the above-captioned case:

Introduction

On September 30, 1996, the Special Master issued a report granting the claim of Judith L. Ambrose. See Initial [sic] Report of Special Master Regarding 1976 Claim of Judith L. Ambrose (hereafter "Report"). That claim concerns Ms. Ambrose's alleged application for a position as a Radio Broadcast Technician (hereafter "RBT") at the United States Information Agency (hereafter "USIA") in September 1976. Defendant denied liability for two alternative reasons. First, defendant did not concede fact of application, and contended that the claimant failed to satisfy her burden of proving that she applied and was rejected for the

position at issue. Second, defendant contended that if the claimant had applied as she claims, she would have been rejected on the ground that she lacked the quality and quantity of technical experience required for the position. _See_ Ct. Exh. B.[1] The Special Master rejected those defenses and awarded the claimant back pay in the amount of $565,902. In addition, because the claimant is currently a USIA employee, the Special Master ordered that she be promoted to the grade and step level predicted by the Court-appointed experts' damages model and receive other relief to place her in the position she would now be in had she been hired in response to her alleged 1976 application.

Defendant submits that the Special Master's report with respect to this claim is fundamentally flawed in four major respects: (1) improper analysis of the claimant's burden of proof of application and rejection; (2) improper analysis of the defendant's burden of proof; (3) improper disregard of the claimant's failure to mitigate her damages; and (4) failure to permit defendant to conduct reasonable discovery. The grounds for these objections are set forth herein.

Standard of Review

The clearly erroneous standard of review applies to the Special Master's findings of fact. Fed. R. Civ. P. 53(e)(2). This standard is a guide to be followed in the exercise of the Court's

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[1] Citations to the record herein will use the following formats: "Tr." refers to the transcript of the hearing; "Ct. Exh." refers to the Court's exhibits; "Pla. Exh." refers to plaintiffs' exhibits; and "Def. Exh." refers to defendant's exhibits.

discretion rather than a limitation on its power. See United States v. Twin City Power Co., 248 F.2d 108, 112 (4th Cir. 1957), cert. denied, 356 U.S. 918 (1958); General Plywood Corp. v. Georgia-Pacific Corp., 362 F. Supp. 700, 704 (1973), aff'd 504 F.2d 515 (5th Cir. 1974).

In applying the clearly erroneous standard, the Court must review the record to determine if such error has been made. See D.M.W. Contracting Co. v. Stoltz, 158 F.2d 405, 407 (D.C. Cir. 1946), cert. denied, 330 U.S. 839 (1947). Findings are clearly erroneous if they are without evidentiary support, or were induced by an erroneous application of law. See, e.g., Cuddy v. Carmen, 762 F.2d 119, 123 (D.C. Cir.), cert. denied, 474 U.S. 1034 (1985). Moreover, even findings that are supported by substantial evidence may be overturned if the Court, based on the entire record, is left with the definite and firm conviction that a mistake has been made. See, e.g., Oil, Chemical, and Atomic Workers Int'l Union v. NLRB, 547 F.2d 575, 580 (D.C. Cir. 1976), cert. denied, 431 U.S. 966 (1977).

The Special Master's conclusions of law are entitled to no special deference, and may be overturned whenever they are believed to be erroneous. Oil, Chemical, and Atomic Workers Int'l Union v. NLRB, 547 F.2d at 580; In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 380-81 n.3 (D.D.C. 1978). In addition, a master may not insulate his analysis from plenary review by characterizing it as findings of fact. Thus, to the extent that the Special Master's analysis implicates the application of a legal standard to

historical facts, review of his analysis is plenary. See, e.g., Bogardus v. Commissioner, 302 U.S. 34, 39 (1937); EEOC v. Metal Service Co., 892 F.2d 341, 345 (3d Cir. 1990).

Claimant's Failure to Prove Application and Rejection

The Court's class-wide finding of sex discrimination

> does not, of course, automatically entitle each member of [the] class to relief. . . . [Rather], the finding of discrimination only creates a presumption that each class member is entitled to an individualized hearing at which . . . her particular claim to relief can be assessed.

Hartman v. Wick, 678 F. Supp. 312, 333 (D.D.C. 1988). When, as here, the fact of application is not conceded by defendant, the claimant

> must show, by a preponderance of the evidence, that she applied for a job in one of the relevant categories . . . and was rejected. At that point, she will have the benefit of the presumption of discrimination that results from the Court's finding of defendant's liability toward the plaintiff class.

Id. at 335. Thus, in the instant case, the claimant had to prove, by a preponderance of the evidence, that she applied for an RBT position in September 1976 and was rejected.

The only evidence presented to establish fact of application was the claimant's own testimony that she applied as alleged. The Special Master held that the claimant's testimony alone was sufficient to satisfy her burden of proof because, in the Special Master's view, the claimant testified with sincerity and conviction. This reasoning, however, confuses two very different subjects. The controlling issue here is whether the claimant has proven that she applied for an RBT position in September 1976, not whether the claimant sincerely believes that she so applied.

Regardless of the sincerity of the claimant's subjective belief, her testimony is flawed by patent gaps of recollection which, when viewed in light of the surrounding circumstances and the total lack of corroborating evidence, makes it at least as equally probable as not that the claimant is confused, albeit sincerely, about her alleged application and did not apply as she claims. For this reason, the Special Master's decision that the claimant's testimony was enough to satisfy her burden of proof is clearly erroneous.

The claimant testified that, during the period from 1975-1976, she attempted to find work in the broadcasting industry by a mass mailing campaign to educational and broadcast organizations throughout the United States. See Tr. at 108, 117, 153-57. Yet, the claimant produced no documentary or other evidence to corroborate this claim and was able to recall only two specific applications: one to an American Indian tribe in North Dakota and the one she claims to have sent to USIA. Id. at 118-19. The Special Master speculates that the claimant might remember the latter application because a job at USIA represents the "pinnacle of the profession." See Report at 8-9. This view, however, was never expressed by the claimant, who offered no explanation why she was able to so clearly recall her application to USIA in contrast to the many other applications she claims to have submitted during the same time frame. In fact, the claimant's testimony indicates that her recollection of an application to USIA is not reliable.

The claimant stated definitively in an interrogatory answer that she applied for the RBT position in response to an

advertisement in Broadcasting magazine. At the hearing she withdrew this assertion, admitting that she did not know what had prompted her alleged application to USIA, and that her mind was "fuzzy on this point." Tr. at 157-59, 176-77. This change is indicative of a witness whose memory must be doubted despite the apparent sincerity of her testimony.

The claimant also asserted that she received a rejection letter from USIA several months after she submitted her alleged application, and that she then remarked to a friend "Geez, they must have had really great candidates." Id. at 116-17. Because the claimant's description of this rejection letter was similar to the rejection letter used by USIA, the Special Master inferred that the rejection letter the claimant recalled must have been sent by USIA. Report at 10-11. The claimant, however, acknowledged that she received rejection letters from a number of potential employers, and there is nothing in her description of the putative rejection letter from USIA to distinguish it from any other form rejection letter. See Tr. at 154-55. Moreover, the claimant never produced the rejection letter, did not identify the friend she spoke to about it, and did not present her friend as a witness to corroborate the claimant's version of this incident. Consequently, the claimant's statements about the rejection letter cannot be relied on to bolster the claimant's assertion that she applied to USIA as she alleges.

In short, the record as a whole indicates that the claimant's belief that she applied to USIA, even if honestly held, is at least

as likely to be incorrect as it is likely to be correct. Given the claimant's failure to produce any other witnesses or documentary evidence to corroborate her alleged application, the claimant's mere belief that she applied is insufficient to prove fact of application by a preponderance of the evidence.

Defendant's Burden of Proof

The Special Master's analysis of the defendant's burden of proof is flawed in two critical respects. First, the Special Master applied an obviously incorrect legal standard. This error is apparent from the following passage in the Report:

> There is no way to know exactly what happened when Ms. Ambrose filed her application in 1976. . . . It is possible that in 1976, a time when there were few female radio broadcast technicians at VOA, someone rejected here without actually having the application fairly evaluated. It is possible that someone removed a portion of the application so that the evaluator had an incomplete form. It is possible that the evaluator treated men and women differently in 1976.

Report at 38-39. Thus, the Special Master required defendant to establish his defense to the exclusion of all possible doubt. This standard is far more onerous than the "clear and convincing" standard adopted by the Court in its remedial order. Furthermore, in Price Waterhouse v. Hopkins, 490 U.S. 228, 253-54 (1989), the Supreme Court made clear that defendant's burden may be no greater than a preponderance of the evidence. The Teamsters claims review process in the instant case should be modified to conform to that precedent. See Mooney v. Aramco Service Co., 54 F.3d 1207, 1219-20 & n.18 (5th Cir. 1995).

Moreover, defendant satisfied his burden of proof even under the clear and convincing standard. The individual at USIA who was

responsible for screening applications for RBT positions to determine whether the applicants had the minimum qualifications to be considered for such positions was Robert Holland. Significantly, Mr. Holland was the only person performing that function at USIA at the time of the claimant's alleged application. Tr. at 190-91, 292. Thus, if the claimant applied and was rejected as she contends, the reason for her rejection is clear: the claimant was rejected because Mr. Holland determined that she lacked the minimum qualifications for the position. For this reason, the claimant can prevail only if there is a finding that Mr. Holland rejected her application because of her gender. The second critical flaw in the Special Master's analysis of the defendant's burden of proof arises in connection with this issue.

The Special Master held that the claimant should prevail because of his conclusion that the claimant was qualified for the position and would have fully described all of her relevant experience in the application she allegedly submitted. The Special Master's conclusion that the claimant was in fact qualified was based on a series of hypothetical questions that the Special Master asked Mr. Holland that purported to correspond to the claimant's experience as a broadcast technician up to the date of her putative application. Then, based on the claimant's assertion that she attempted to tailor her job applications to the particular positions for which she was applying, the Special Master assumed that the claimant's alleged 1976 application described her experience in the same elaborate detail as the Special Master's

hypothetical questions. Because Mr. Holland agreed that the Special Master's hypothetical applicant would be minimally qualified for an RBT position the Special Master reasoned that the claimant was minimally qualified as well, and that her putative application would have so demonstrated. The Court should reject this analysis for two reasons.

First, the Special Master's notion that the claimant would have described her qualifications in a manner that corresponded to the Special Master's hypothetical questions is too speculative to be credited. The only examples of employment applications or resumes prepared by the claimant that are part of the record do not describe the claimant's experience in terms that approach the nature or extent of the qualifications embodied in the Special Master's hypothetical questions. Although the Special Master found that a supplemental page had been removed from one of those examples, this finding is not supported by the record. The claimant, upon examining that application, remarked that she had additional experience, early in her career, that was not reflected in the application. She did not claim that she remembered including that additional information on a supplemental page that was subsequently removed by unknown nefarious agents of USIA to disadvantage her, as the Special Master seemingly inferred. _See_ tr. at 130-33; Def. Exh. 1. Moreover, the application in question resulted in the claimant being hired by USIA, and is contained in the claimant's official personnel file. Both that application and the file in which it is located appear complete in all respects.

Under these circumstances, there is no legitimate basis to conclude that the someone tampered with the application. See Tr. at 183-86.

The only other example of the claimant's method of presenting her experience is a resume that the claimant prepared for her official personnel file in 1995. See Def. Exh. 2. This resume likewise falls far short of describing the claimant's qualifications in anything resembling the exquisite terms used by the Special Master in his hypothetical questions. The claimant explained that this resume was so terse because she prepared it quickly and without the care and attention that she would use if applying for a job. Tr. at 135-36. It is clear, however, that the claimant's alleged 1976 application would also have been hurriedly prepared. At the time of that alleged application, the claimant was working 80 hours a week, every week, at a retail store, and would "sneak in" job applications as time permitted. Tr. at 107-08; see Def. Exh. 1. Hence, the claimant would not have had time to prepare an elaborate employment application even if she had been inclined to do so.[2]

Second, even assuming that the claimant had prepared and submitted an application that fully described her experience in

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[2] The Special Master pointed to two application forms submitted by men to show that the claimant's qualifications could have been inferred even if she had not presented a detailed description of her experience. See Report at 35-38. But, as Mr. Holland explained, applicants could submit additional material along with their applications that he would consider when evaluating their qualifications. Tr. at 297-98. Because there was no evidence as to what, if any, additional materials were submitted by the two male applicants, their application forms, standing alone, are not sufficient to prove that they were improperly judged to be better qualified than the claimant.

reasonable detail, the rejection of that application does not necessarily mean that the claimant must prevail. The purpose of the Teamsters claims review process is to identify those claimants who were victims of sex discrimination. The relevant question, therefore, is not whether the claimant has shown that she was minimally qualified for the position she sought, but whether she was denied that position because of her gender. An applicant whose qualifications are honestly misjudged is not a victim of sex discrimination. As the Court of Appeals has recently made clear "[e]ven if a court suspects that a job applicant 'was victimized by [ ] poor selection procedures' it may not 'second-guess an employer's personnel decision absent demonstrably discriminatory motive.'" Fischbach v. Dep't of Corrections, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (quoting Milton v. Weinberger, 696 F.2d 94, 100 (D.C. Cir. 1982).

In the instant case, Mr. Holland testified that he did not take an applicant's sex into account when he made a determination whether the applicant had the minimum qualifications required to be considered for an RBT position. Tr. at 192-93. The Special Master did not take issue with this testimony, did not question Mr. Holland's expertise, and specifically found Mr. Holland to be a credible witness. See Report at 17, 34. Because the claimant's alleged application would have been rejected by Mr. Holland, and could only have been rejected by Mr. Holland, the only conclusion that can fairly be drawn from the Special Master's findings is that Mr. Holland made a good faith mistake when he evaluated the

claimant's qualifications. Such an error does not amount to sex discrimination.

Failure to Mitigate Damages

The Court's remedial order and Title VII require that any award of backpay be reduced by amounts a claimant could have earned using reasonable diligence. Hartman v. Wick, 678 F. Supp. at 337; 42 U.S.C. 2000e-5(g). In this case, defendant demonstrated that substantially equivalent jobs were available and that the claimant failed to exercise reasonable diligence to seek such a position. The Special Master erred by failing to reduce the claimant's back pay award to account for these facts.

Approximately fifty broadcast organizations, including the major networks and owned-and-operated radio stations, were in business in the private sector in the Washington area during the period 1977 - 1979. The compensation paid by these organizations was the basis for wage comparability surveys that were critical in negotiations between the RBT union (National Federation of Federal Employees) and USIA that set the wages of the RBTs. Vacancies at these organizations were available in the relevant time frame, including specific positions with the ABC network. Tr. at 238-48, 253, 259.

While plaintiffs relied on parts of an Office of Management and Budget ("OMB") 1983 study that included charts of pay scales of the broadcast industry as evidence of lower pay in the private sector than at USIA at the entry levels, defendant showed that such scales are flawed in their failure to account for disparity in length of

work-week hours and consequent distortion of an hourly comparison to VOA. See Tr. at 255-56. Moreover, after several years' experience, the pay in the networks tended to approach, and at one network exceeded, that at USIA even without accounting for the hourly wage distortion. Other factors in comparability represented trade-offs, e.g., while the private sector offered less generous retirement benefits, it offered more generous primary benefits like life and health insurance and premium compensation packages. See Pla. Exh. 29, Bates No. Misc. 010896-897.

The Special Master focused his decision, however, not primarily on the issue of the availability of substantially equivalent positions but on his finding that the claimant exercised reasonable diligence in seeking alternative employment. See Report at 49-52. As a result of the Special Master's ruling, the claimant's gross back pay award was not reduced even though she voluntarily ceased looking for substantially equivalent employment in March 1979. The Special Master's rationale for this result is based on cases which hold that, after engaging in a diligent but futile job search for some reasonable period of time, a victim of discrimination may lower her sights, accept the best paying position available, and cease any further search for interim employment. There is, however, a significant fact -- which the Special Master ignored -- that distinguishes those cases from the situation presented here.

In particular, the claimant experienced difficulty in her job search only up to the point at which she obtained a first-class radiotelephone operator's license from the Federal Communications

Commission (hereafter "FCC"). This FCC license, although not absolutely required to obtain employment as a technician in the broadcasting industry, was nevertheless a helpful credential. Tr. at 121. In order to obtain such a license, an individual had to pass a series of tests administered by the FCC. Id. at 153. The claimant's course work at Kent State University, where she obtained her college degree, did not deal at all with FCC licenses or with the elements of broadcast electronics that were tested by the FCC to obtain such licenses.[3] Thus, the claimant was not able to pass those tests until after she had completed additional study at the Cleveland Institute of Electronics and at the Elkins Institute of Electronics. Id. at 120-21, 148-49, 151-52.

Once the claimant obtained a first-class radio telephone operator's license in August 1978, she was soon able to gain employment in the broadcasting industry, and she accepted a job with Georgia Public Television only a few months later. Id. at 121-22. After the claimant became employed at Georgia Public Television, she voluntarily withdrew from the job market because she "liked Georgia Public Television." Indeed, the claimant subsequently applied for only two other positions. She described those applications as being "very off the wall," and testified that she learned of those openings "out of the clear blue sky." One job opening that she "just happened to see" she decided not to pursue because it "was not right for me." The other opening was a

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[3] This fact belies the Special Master's notion that Kent State University is to radio broadcasting technicians what the Juliard is to musicians. See Report at 19-20.

position at USIA that the claimant learned about "by accident." She applied for the latter position and was hired. Id. at 122, 162-63.

In order to qualify as substantially equivalent employment, a job must provide virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the position which a claimant was denied. Humphreys v. Medical Towers, Ltd., 893 F. Supp. 672, 690 (S.D. Tex. 1995). The claimant's position at Georgia Public Television was not substantially equivalent to the RBT position at USIA under this test. See tr. at 262. In light of the obvious boost that her first-class radiotelephone operator's license gave to the claimant's employment prospects, there is no reason to believe that she could not have found employment substantially equivalent to the RBT position had she continued her job search for a reasonable period of time after she obtained that license. The claimant's decision to discontinue her job search in March 1979 -- only seven months after she obtained the first-class radiotelephone operator's license -- reflects her personal preference, not a reasonable lowering of her sights following a futile attempt to obtain a job that was substantially equivalent to the RBT position at USIA.

The Special Master also held that the availability of substantially equivalent positions in Washington, D.C. was not relevant because defendant did not show that the claimant was actually aware of those openings. See Report at 53. The adoption of this test, however, would effectively eliminate the requirement

that claimants exercise reasonable diligence to obtain comparable employment. Because the claimant sought a position with USIA in Washington, D.C., acknowledged that the job market for broadcast technicians is nationwide, and admitted that she was available for work anywhere in the country, the Court should rule that the claimant failed to exercise reasonable diligence by not pursuing other employment opportunities in the Washington, D.C. area that were substantially equivalent to RBT positions with USIA. See, e.g., EEOC v. Farmer Bros. Co., 31 F.3d 891, 906 (9th Cir. 1994); Johnston v. Harris County Flood Control District, 869 F.2d 1565, 1578-79 (5th Cir. 1989), cert. denied 493 U.S. 1019 (1990); Joshi v. FSU Health Center, 48 Fair Emp. Prac. Cas. (BNA) 656 (N.D. Fla. 1986).

Failure to Permit Reasonable Discovery

The Order of Reference instructs the Special Master to permit discovery to allow for the full consideration of the claims during the Teamsters hearings. See Order of Reference at 7-8. The Special Master has not followed this instruction. Instead, the Special Master has truncated discovery in a manner that has prejudiced defendant.

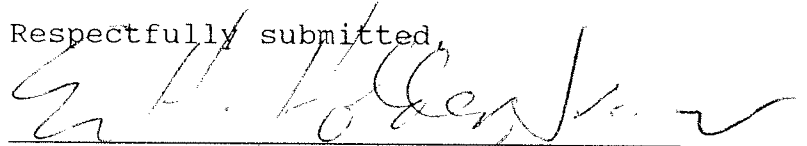
As noted above, plaintiffs offered evidence pertaining to the application process for certain men. Essentially, plaintiffs offered this evidence to show that exceptions to certain standard operating procedures were made in order to favor male candidates. Even though that evidence, properly appraised, was insufficient to prove that the reason for the claimant's rejection was a pretext

for sex discrimination, defendant did not have a fair opportunity to address these examples because defendant did not know that they would be raised until they were actually raised at the hearing. Had defendant been permitted to take reasonable discovery, defendant could have had learned in advance of plaintiff's intent to present that evidence and could have prepared his case to address plaintiff's claims of pretext. But, because defendant was permitted to conduct only limited discovery, which did not extend to plaintiffs' proposed evidence of pretext, defendant was effectively denied that opportunity.

Conclusion

The Special Master's handling of Ms. Ambrose's claim exemplifies a variety of errors being committed by the Special Master in the Teamsters hearings: improper analysis of the parties' respective burdens of proof, improper analysis of a claimant's obligation to mitigate her damages, and a failure to permit reasonable discovery. Because of these errors, the Special Master's decision on Ms. Ambrose's claim should be reversed, and that claim should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion to Reverse Special Master's Decision Regarding Claim of Judith L. Ambrose, together with the accompanying memorandum of points and authorities and the proposed Order attached hereto, was served on October 15, 1996, by mailing a copy thereof, first-class postage prepaid, to the following counsel:

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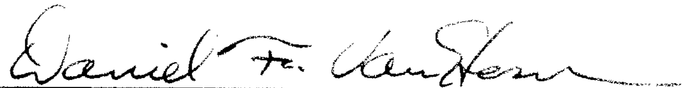

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