



STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF)
)
Jerome W. Mitchell,)
Complainant)
)
and)
)
State of Illinois Department of)
Corrections,)
Respondent)

CHARGE NO.: 1993 CF 1245
EEOC NO.: 21B930341
ALS NO.: 9488

RECOMMENDED LIABILITY DETERMINATION

This matter is before me following a rehearing on July 6, 2000. The original public hearing took place on October 2, 26, 27, 28, 29 and 30, and November 2, 4, 5 and 6, 1998. Before a recommended order could be drafted, the administrative law judge who presided at the original public hearing left the Commission. At the rehearing, the parties stipulated to the record from the first public hearing and adopted the post-hearing memoranda they submitted at that time for this recommended order.

Statement of the Case

The Department of Human Rights (“Department”) filed the complaint in this case on behalf of Complainant on July 9, 1996. The complaint alleged that the Illinois Department of Corrections and Prison Health Services, Inc. (“PHS”) were the Respondents; Complainant filed a Motion for Voluntary Dismissal as to PHS, which was granted on October 23, 1998, just prior to commencement of the public hearing. Therefore, throughout this recommended order, the terms “Respondent” or “Respondent IDOC” shall refer to the Illinois Department of Corrections unless otherwise specified. Complainant alleges that for the purposes of this complaint, Respondent is

his employer and that on or about October 5, 1992, Respondent denied him promotion to the position of Director of Dentistry at the Pontiac Correctional Center (“Pontiac”), a facility operated by Respondent, due to his race (black). Respondent denies that it is the employer of Complainant for any purpose, and that even if it is found to be his employer in the context of this case, it did not discriminate against him at any time with regard to the appointment of a Director of Dentistry at the Pontiac Correctional Center in 1992.

Findings of Fact

The following facts are based upon the record of the original public hearing in this matter as stipulated by the parties. Factual assertions made at the public hearing, but not addressed in these findings, were determined to be unproven by a preponderance of the evidence or were otherwise immaterial to the issues at hand. Numbers 1 to 11 are those facts that were classified as “uncontested” by the parties in their amended joint pre-hearing memorandum, although they may be edited here; these items are marked by an asterisk (*). Complainant’s exhibits admitted into evidence are denoted “CX-###,” while Respondent’s exhibits are denoted “RX-###.”

1. The Complainant, Jerome W. Mitchell is an African-American male. *
2. The State of Illinois Department of Corrections (IDOC or Respondent), Respondent in this matter, was an “Employer” within the meaning of Section 2-101(B)(1)(a) and (d) and was subject to the provisions of the Illinois Human Rights Act. *
3. During the period of its contract with IDOC (March 1, 1990 to February 28, 1993), Prison Health Services, Inc. (“PHS”), a former respondent in this matter, was an “Employer” within the meaning of Section 2-101(B)(1)(a) and (d) and was subject to the provisions of the Act. *
4. Effective on or about March 1, 1990, PHS entered into a public contract with

IDOC to provide health services, including dental services, at the Dwight and Pontiac Correctional Centers in Illinois. This contract was still in effect in October, 1992. *

5. Effective on or about March 6, 1990, Complainant was hired by PHS to work at Pontiac Correctional Center as a contract health care provider pursuant to its correctional facilities health services contract with IDOC. *

6. Complainant filed a charge of Discrimination, number 1993CF1245, with the Illinois Department of Human Rights on or about October 27, 1992. *

7. The IDOC denied that Ms. (Pauline) Sohn had any input nor influence in the decision to deny Complainant the promotion, nor for any performance evaluations. *

8. IDOC's contract with PHS states that employment decisions were subject to IDOC approval. *

9. IDOC "had the authority to approve or disapprove of all employment decisions made by Respondent PHS." *

10. "Respondent PHS was required to adhere to the wishes of the IDOC in regard to whether PHS could hire, promote or retain any employee." *

11. During the period in which Complainant provided dental services at the Pontiac facility for PHS, Complainant performed his duties in a manner consistent with his employers' standards. *

12. Respondent IDOC answered the complaint in a timely manner. It has been represented by counsel throughout these proceedings.

13. Complainant began serving as director of dentistry at the Pontiac Correctional Center in October, 1996, and was in this position at the time of the original public hearing in this matter.

14. Dr. Robert Miller, who was hired to fill the position of director of dentistry

instead of Complainant in October, 1992, is a white male.

15. Dentists working in the dental clinic at Pontiac Correctional Center were subject to the following “administrative directives” of Respondent (among others):

02.37.101	Travel Guidelines	CX-171
02.37.110	Travel Voucher	CX-170
03.01.106A-J	Housing & Maintenance	CX-149
03.01.301	Affirmative Attendance	CX-113
03.02.110	Grooming Standards and Dress Code	CX-169
03.03.111	Staff Training by Outside Sources	CX-179
04.03.102A-J	Dental Care for Inmates	CX-183
04.03.110A-J	Control of Medication/ Syringes/Needles/Medical Instruments	CX-168
04.03.110C	Control of Medication and Medical Instruments	CX-174
04.03.121A-J	Treatment Protocols	CX-177
04.03.125A-J	Quality Assurance Program	CX-176

16. No person is identified in this record as the decisionmaker regarding the appointment of a director of dentistry at Pontiac Correctional Center in October, 1992.

17. There is no document in the record of this proceeding that states the reasons why Dr. Miller was chosen over Complainant for the position of director of dentistry at Pontiac Correctional Center in October, 1992.

18. When Dr. Miller began his duties as director of dentistry, he was an “independent

contractor” who was compensated at the rate of \$87,360.00 per year, with no benefits paid on his behalf.

19. At his request, Dr. Miller was later designated a regular employee who was paid a salary of \$72,800.00 per year, with a benefit package being provided utilizing the remaining \$14,560.00 of his initial compensation as noted in Paragraph 19 above.

20. In October, 1992, Complainant was a salaried employee receiving \$64,438.00 per year plus benefits.

Conclusions of Law

1. Complainant is an “aggrieved party” and Respondent is an “employer” as those terms are defined by the Illinois Human Rights Act, 775 ILCS 5/1-103(B) and 5/2-101(B), respectively.

2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. Respondent IDOC was an “employer” or “co-employer” of Complainant at the times relevant to the issues described in his charge and complaint.

4. Under the process outlined by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), Complainant has established a *prima facie* case of employment discrimination (failure to promote).

5. Respondent IDOC has failed to articulate a nondiscriminatory reason for the employment action taken against Complainant in that no decision-maker is identified in the record to advance such an articulation and no such reason is otherwise articulated through competent evidence presented at the public hearing. Therefore, Complainant is not required to establish pretext on the part of Respondent and liability for unlawful discriminatory conduct is

established by the *prima facie* case standing alone. Lake Point Tower, Ltd. v. Illinois Human Rights Comm'n, 291 Ill.App.3d 897, 684 N.E.2d 948, 225 Ill.Dec. 957 (1st Dist. 1997) .

6. Complainant did not suffer emotional distress and embarrassment to a degree that entitles him to additional monetary damages.

Discussion

Respondent's Status as Employer or Co-Employer of Complainant

The first matter that must be determined is the issue of whether the Department of Corrections is an “employer” of Complainant. This is a jurisdictional matter, and must be proven by a complainant as part of his case in chief where a respondent has denied this assertion of the formal complaint in its verified answer. Here, Paragraph Seven of the complaint states, “(t)hat PHS and IDOC were joint employers of Complainant,” with IDOC being the only remaining respondent at the public hearing. Complaint, July 9, 1996, Paragraph Seven. With regard to Paragraph Seven, Respondent IDOC both “denie(d) the allegations in Paragraph 7 of the Complaint,” and asserted the affirmative defense that “Respondent, IDOC, denies that it was the Complainant’s employer at the time of the incidents alleged in the Complaint.” Respondent’s Verified Answer, August 29, 1996, at 3, 5.

At one time, the Commission’s view of a record in this posture was that a respondent asserting this affirmative defense must then submit proof that it was not the employer before the Complainant was required to come forward with contrary evidence. Allen and Aero Services International, Inc., Ill. H.R.C. Rep. (1987SF0157, January 20, 1995). However, the Illinois Appellate Court reviewed the Allen decision, and in an opinion delivered by now-Illinois Supreme Court Justice Rita B. Garman, found that “the definition of employer is a threshold element of the civil rights violation as defined by the (Illinois Human Rights) Act ... (and) (i)t is the complainant who must prove that (a respondent) is an ‘employer.’” Aero Services

International, Inc. v. Human Rights Comm'n, 291 Ill.App.3d 740, 748, 684 N.E.2d 446, 225 Ill.Dec. 761 (4th Dist. 1997) (*see also* the court's holding at 752). This, then, is the standard that must be applied to this case.

The Human Rights Acts lists five separate definitions for “employer,” as well as a listing of entities that are not employers for purposes of the Act. 775 ILCS 5/2-101(B). In Aero Services, the section at issue was Section 5/2-101(B)(1)(a) (the so-called “15 employee” requirement), while in this case Respondent has acknowledged that as a state government agency, it is an employer under Section 5/2-101(B)(1)(c), although it denies that it was an employer of this particular Complainant. The status of a respondent as an “employer” in a given case under Section 5/2-101(B)(1)(c) is a question of law that ultimately will be determined through application of the relevant facts available in a case.

In aid of such an analysis, the Commission has long accepted the factors set forth in Bob Neal Pontiac-Toyota, Inc. v. Industrial Comm'n, 89 Ill.2d 403, 433 N.E.2d 678, 60 Ill.Dec. 636 (1982) as those to be considered in determining this issue. Moore and St. Mary's Hospital and Medical Management Affiliates, Inc., Ill. H.R.C. Rep. (1986SF0547, August 21, 2000) is only the most recent reported Commission case citing Neal with approval, while Whittington and K-Mart Corporation, Ill. H.R.C. Rep. (1987SF0520, November 8, 1993) is the leading Commission case providing guidance for applying Neal. In Neal, the Court noted it is a “frequently recurring question of whether one is an independent contractor or an employee for purposes of workmen's compensation” (Neal at 408-09) and that the question is “one of the most vexatious and difficult to determine in the law of compensation.” (Neal at 409, quoting O'Brien v. Industrial Comm'n, 48 Ill.2d 304, 307 (1971)). In short, “(t)he problem, of course, is that there is no clear line of demarcation, for there can be no inflexible rule applicable to all factual situations.” Neal at 409.

Having recognized that there is no simple, objective method of determining whether a person is an employee, the Court listed five factors that can be evaluated in analyzing this point. These are: 1) the amount of control and supervision; 2) the right of discharge; 3) the method of payment; 4) the skill required in the work to be done; and, 5) the source of tools, material or equipment, and the work schedule. The Court identified the right to control as being the single most important factor. Neal at 410.

Respondent is the department of Illinois state government charged with carrying out the responsibilities incumbent upon the state while detaining those members of society who have been duly sentenced to incarceration after conviction of a criminal offense, generally those offenses classified as felonies. Many of the functions Respondent is required to carry out while meeting this responsibility are mandated in state law and are further impacted by the requirements of the Constitution, particularly the Eighth Amendment prohibition against “cruel and unusual punishment.” The statutory Illinois Code of Corrections provides that “(a)ll institutions and facilities of the Department shall provide every committed person with . . . medical and dental care.” 730 ILCS 5/3-7-2(d). In Estelle v. Gamble, 429 U.S. 97 (1976), the Court stated, “(w)e therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ (citation omitted), proscribed by the Eighth Amendment.” Estelle at 104. Redress for the failure of Respondent to provide adequate medical and dental care can be sought through Respondent’s own administrative process or by means of suit in the federal system. McNeil v. Carter, 318 Ill.App.3d 939, 943, 742 N.E.2d 1277, 252 Ill.Dec. 413 (3rd Dist. 2001). Thus, Respondent has significant incentive, if not a legal and Constitutional mandate, to provide medical and dental care to the inmates entrusted to it.

For many years, apparently, Respondent has chosen to bring medical and dental care to its penal institutions through contractors who presumably meet Respondent's specifications for providing a level of medical and dental care that will not subject Respondent to meritorious claims of failing to provide adequate services. Several companies held these contracts for medical and dental services at Pontiac Correctional Center in the years both immediately preceding and following the incident complained of in the present complaint when PHS was the contractor. It appears that when the holder of the contract changed, most of the personnel actually providing the necessary medical and dental services at a correctional facility were retained in place. The remaining parties seem to have no disagreement in considering PHS to be an employer of Complainant. The dispute is whether Respondent should also be considered his "employer" (or "co-employer") under the complaint.

As noted above, there are at least five factors to be considered under the analysis set forth in Neal. There is evidence in the record that Respondent exercised its authority over Complainant in each of the areas listed to varying degrees. Of these factors, however, control is the most significant according to Neal, and, in this case, the record demonstrates numerous ways in which Respondent exercised control over Complainant, his work environment and even the exercise of his professional judgment. The following list does not exhaust the examples of control that are found in the record; others are listed in Paragraph 15 of the Findings of Fact above, and yet others are not stated in this recommended order:

- a. Mandatory training conducted by Respondent; (Sohn, Tr. 79)
- b. Absences reported to Respondent's personnel; (Sohn, Tr. 195)
- c. Respondent conducted a background investigation of persons who were proposed for duty under the vendor contract; (Sohn, Tr. 241)
- d. Mandatory monthly staff meetings; (Sohn, Tr. 262)

- e. All medical and dental care was rendered in accord with the “Department Rules, Administrative Directives, Institutional Directives and local manuals;” (Hartwig, Tr. 366)

In responding to the analysis of the Neal factors set forth by Complainant, particularly the numerous examples of control, Respondent seeks refuge in the holding of a federal National Labor Relations Board decision that was later cited with favor in a three sentence opinion of the U.S. Supreme Court remanding another labor case back to the Illinois Appellate Court. Illinois State Labor Relations Board v. Illinois Nurses Ass’n, 499 U.S. 944 (1991). The case cited in the remandment is Correctional Medical Systems, Inc. and Illinois Nurses Ass’n and Illinois State Labor Relations Board, 299 N.L.R.B. 654 (1990). The National Labor Relations Board (NLRB) found that nurses working in Respondent’s institutions while also employed by the then current holder of the contract to provide medical services could look to the contractor as the employer for bargaining purposes. The opinion notes, at internal page 14, that “(Respondent) does exercise a significant degree of control over certain personnel policies such as hiring selection, staffing, scheduling, and uniforms. However, we find that this operational control would not preclude meaningful bargaining (with the contractor). As indicated by the (Illinois Appellate) court, the control is exercised largely for security reasons.” However, this opinion only recognizes that some elements of control exercised by Respondent are in place to effectuate security, an indisputably valid, significant concern of Respondent, and therefore not amenable to the collective bargaining process. For labor negotiation purposes, most, if not all, of these security-related elements were not appropriate for negotiation in the collective bargaining process in any meaningful manner. For those remaining elements of employment that were subject to collective bargaining, the contractor was the proper “employer.”

The concerns of importance to the NLRB, *i.e.*, defining a fair and reasonable environment for collective bargaining, are not those of concern to this Commission. In a 1997 order resolving

a request for review of actions by the Department of Human Rights, a panel of the Commission viewed favorably the characterization of the Department of Corrections and a contract provider of dialysis services at correctional facilities to be “co-employers” of an employee who charged various counts of unlawful discrimination against both. In re: Request for Review by Mary L. Rademacher, Ill. H.R.C. Rep. (1994SF0896, June 27, 1997). An analysis of the discussion above reveals the correctness of this conclusion. Respondent is mandated to provide medical and dental services to those committed to its care. Further, in pursuit of its valid interest in maintaining the security of its institutions, Respondent also rightfully maintains strict, comprehensive, even severe, regulation of all that enter the institutions to the end of sustaining a safe environment. However, the fact that Respondent is compelled both to provide medical and dental services, and to maintain a safe and secure environment in its facilities, does not relieve it from also providing a work environment that is free from violations of the Human Rights Act. None of its valid security concerns are in conflict with the mandate to maintain a work environment that is free from the various forms of civil rights violations proscribed in the Act, including that prohibiting discrimination based on race. I find that Complainant is an employee of Respondent for the purposes of the Illinois Human Rights Act and has rightfully identified the Illinois Department of Corrections as a Respondent in this action.

Liability for Alleged Discriminatory Conduct

Having made the determination that Complainant is an employee of Respondent for the purpose of enforcement of the Illinois Human Rights Act, it is now necessary to determine if Respondent did, in fact, act in a discriminatory fashion when denying Complainant promotion to the position of director of dental services at Pontiac Correctional Center as alleged.

The complaint alleges that Complainant was denied a promotion due to unlawful discrimination as prohibited by the Illinois Human Rights Act. Because there is no direct

evidence of discrimination in the record, it is appropriate to apply the method of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). This process requires the Complainant to first establish his *prima facie* case by a preponderance of the evidence, which can then be rebutted by the articulation (not proof) of a “legitimate, nondiscriminatory reason” by Respondent for the action taken. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If this is done successfully, Complainant must then establish, again by a preponderance of the evidence, that the reason advanced by Respondent is merely a pretext for the alleged discriminatory conduct. This method of proof has been adopted by the Commission and approved for use here by the Illinois Supreme Court. Zaderaka v. Illinois Human Rights Comm’n, 131 Ill.2d 172, 178, 545 N.E.2d 684, 137 Ill.Dec. 31 (1989).

That one particular formulation of a *prima facie* case would not be applicable to every alleged incident of discrimination was a probability recognized by the Court in McDonnell Douglas. McDonnell Douglas, Note 13, at 802. In this case, the parties have each advanced a proposed variation of the generic McDonnell Douglas *prima facie* case, but I find the formulation presented by Respondent in its initial brief to be the most apt. For the purpose of this recommended order, I will apply the following elements of the *prima facie* case, only a slight variation of that presented by Respondent at page 43 of its initial post-hearing brief: a) the Complainant is a member of a protected class; b) he applied and was qualified for the position for which the Respondent was seeking applicants; c) that although he was qualified, Complainant was not hired for the subject position; and, d) Respondent hired a person for the subject position who was not a member of the protected class and who had similar or lesser qualifications for the position.

There is no dispute between the parties that Complainant is a member of a protected class, that he applied for the subject position and that he was not hired for that position.

However, Respondent disputes every element of the *prima facie* case that refers to Complainant being qualified for the position, or that the person eventually hired only possessed the same or lesser qualifications than Complainant.

Both parties agree that Complainant satisfactorily performed his duties as a staff dentist at Pontiac, and was otherwise well qualified as a dentist. The candidate ultimately chosen to be dental director, Dr. Robert Miller, a white male, had been a dentist for a longer period of time than Complainant, but he had significantly less experience in the highly specialized practice setting engendered by a correctional facility. At best, his qualifications can only be characterized as equal to those of Complainant and, because of the specialized work environment presented by a correctional facility, Complainant can arguably be seen as having qualifications that exceed those of Dr. Miller.

During the public hearing, Respondent attempted to insert evidence in the record that would tend to indicate that Complainant was not suited temperamentally and did not possess the interpersonal skills that would enable him to successfully function as the director of dental services. This material consisted of vague references to Complainant's firing in 1988 from a position at the Danville Correctional Center, which, when subjected to Respondent's "executive review" process, was later found to be insufficient to deny him re-employment at Pontiac, and references to instances where Complainant and his sister, while she was dental director at Pontiac, engaged in apparently personal disputes while on the premises at Pontiac. Few details, including dates, times and whether or not inmates or others were present, are presented regarding these alleged incidents. They were never the subject of written reports in an environment where minute details of common daily occurrences are routinely documented, and no disciplinary action was ever taken against Complainant because of these alleged incidents. Therefore, whatever these "incidents" entailed, they must be viewed as isolated and not dispositive of Complainant's

suitability to be the dental director. The evidence presented by Respondent concerning Complainant's alleged personality shortcomings is neither credible nor sufficient to defeat the completion of his *prima facie* case.

Once a complainant has established a *prima facie* case, the respondent has the opportunity to articulate a nondiscriminatory reason for the action taken. This reason need not be proven, only articulated. However, as happens on relatively rare occasions, if no reason is articulated, the *prima facie* case is deemed sufficient to establish that unlawful discrimination did occur and that the employer is therefore liable. This has occurred in this case. Just as in Lake Point Tower, Ltd. v. Illinois Human Rights Comm'n, 291 Ill.App.3d 897, 684 N.E.2d 948, 225 Ill.Dec. 957 (1st Dist. 1997), no witness presented during the public hearing accepted responsibility for the decision on Complainant's application for promotion. Further, no witness was able to identify the person (or persons) who made the decision and who also accepted responsibility for making that decision. Respondent incorrectly asserts that Complainant must identify the decision-maker(s) and prove that they acted with racial animus. Such proof is not an element of the Complainant's *prima facie* case, however.

No one has stepped forward on behalf of Respondent to say, "I (or we) chose Dr. Robert Miller to be the Dental Director because he was better qualified (or had a better temperament) than Complainant." Near the end of the testimony at the public hearing in this matter, one of the counsel for Respondent acknowledged that no decision-maker had been identified to that point. Hearing Transcript at 1324. And none was identified in the remaining 350 pages of the transcript. Nor is there documentation stating the reasons for the decision or identifying a decision-maker. In testimony, Pauline Sohn, Respondent's health care unit administrator at the time of the search for a dental director, flatly denied being involved in the selection process while claiming that Beverly Clark, the PHS regional administrator at the relevant time, recommended

Dr. Miller as the choice to fill the position. Hearing Transcript at 114 *et seq.* Dr. Owen Murray, the medical director and PHS contractor, also stated with certainty that Ms. Clark made the final decision and offered the position to Dr. Miller. Murray Deposition Transcript (CX-47) at 55. However, Ms. Clark was no longer employed by PHS or working at Pontiac in any capacity at the time Dr. Miller was hired and she specifically testified that she did not make the decision. Hearing Transcript at 517. Other persons reasonably included within the community of people having a role in the hiring of the dental director also denied participation or knowledge of who made the decision to hire Dr. Miller: (then) Pontiac Assistant Warden Jack Hartwig (Hearing Transcript at 385; 1334-5); an executive of PHS (and Beverly Clark's supervisor), Jim Tinney was designated as a "prime suspect" of being the decision-maker by one of Respondent's counsel in a colloquy with the administrative law judge, but he was never called as a witness (Hearing Transcript at 1341); even Dr. Miller, the candidate for dental director who was appointed instead of Complainant, could not identify a person in a management or executive capacity who hired him (or even precisely how he came to know that he was hired!) – all of the relevant information came to him without further attribution from Gary Seep, the health care unit secretary (Hearing Transcript at 1396; 1419-20); Gary Seep said he did not recall the details of the hiring process for the dental director position and therefore could not testify as to who gave him the information he passed on to Dr. Miller (Hearing Transcript at 1206).

With no one available to articulate the reason for the decision, the reasons advanced through the arguments of Respondent's counsel become rhetorical only, incapable of substituting for an articulated reason for the purpose of rebutting Complainant's *prima facie* case. Therefore, I find that by establishing his *prima facie* case, Complainant has established that Respondent acted in a discriminatory manner toward him in violation of the Illinois Human Rights Act as charged in the complaint, and recommend that this be the decision of the Commission.

Damages

Once liability has been determined, it is necessary to determine what award of damages, if any, should be given to Complainant. The record is relatively sparse with regard to evidence of the economic damages to which Complainant may be entitled. However, while an award of backpay cannot be based entirely on speculation, there is enough evidence in this record to enter an award although it lacks the mathematical precision that is often possible. It should be pointed out that there is virtually always some uncertainty inherent in the calculation of backpay because it is impossible to figure in every vagary of “real life,” such as the amount of raises that might have been given or even the assumption of continued employment. But this is part of the price that a respondent must pay for violating the prohibition against discriminatory conduct in the workplace. See Loyola University of Chicago v. Human Rights Comm’n, 149 Ill.App.3d 8, 22, 500 N.E.2d 639, 102 Ill.Dec. 746 (1st Dist. 1986).

Here, Complainant is plainly entitled to an amount of backpay based on the difference between the salary he was earning as a staff dentist and the salary he would have earned as the Director for the period of time between the appointment of Dr. Miller in October, 1992 and his own eventual appointment as Director in May, 1996, a period of 43 months. There is apparently no dispute among the parties that Complainant was being paid a salary of \$64,438.00 per year as a staff dentist in October, 1992. However, there is some difference of interpretation as to the salary paid to Dr. Miller during this period. Complainant suggests the figure of \$87,360.00 as Dr. Miller’s annual salary, while Respondent asserts that this was the gross amount paid to him in his status as an “independent contractor.” This is confirmed in the testimony provided by Dr. Miller. Later, when Dr. Miller became a full-time employee at his request, his direct salary became \$72,800.00, with the difference of \$14,560.00 being used to provide a benefit package to him. In that Complainant was a full-time staff dentist (with benefits) at this time, the more

comparable figures are \$72,800.00 as the salary for the Director's position and \$64,438.00 for Complainant, a difference of \$8,362. These figures also reveal that the direct salary of a full-time employee represents five-sixths of the total compensation package provided to the employee. Thus, Complainant's salary of \$64,438.00 can be extrapolated to a total compensation package of \$77,325.60, or a difference of \$12,887.60. Complainant should also receive the difference between \$14,560.00 and \$12,887.60, or \$1,672.40, as an element of his backpay. Thus, Complainant's backpay will be calculated on a compensation difference of \$10,034.40 per year (\$8,362.00 + \$1,672.40) or \$836.20 per month. This is a reasonable determination under all of the circumstances presented by this record. Accordingly, I recommend the payment of backpay to Complainant in the amount of \$35,956.60, which is the deficit of \$836.20 per month, as defined above multiplied by 43 months. Complainant is also entitled to the payment of prejudgment interest on this amount in accord with Section 5300.1145 of the Commission's Rules of Procedure.

In the original complaint, Complainant also requested compensation for emotional distress and embarrassment. It has long been established that the Commission's statutory authority to award a prevailing complainant his or her actual damages includes the ability to award monetary damages for emotional distress. Village of Bellwood v. Illinois Human Rights Comm'n, 184 Ill.App. 339, 355, 541 N.E.2d 1248, 133 Ill.Dec. 810 (1st Dist. 1989). However, "the mere fact of a civil rights violation, without more, . . . , is insufficient to support an award for emotional distress." Harris and Vinylgrain Industries of Illinois, Ill. H.R.C. Rep. (1996CA1087, August 1, 2001), *citing* Smith and Cook County Sheriff's Office, 19 Ill. H.R.C. Rep. 131, 145 (1985). In this case, Complainant did not introduce any evidence specific to the issue of emotional distress and I find that no circumstances are otherwise revealed in this record that would support an inference that Complainant suffered a degree of emotional distress that

would entitle him to an award of additional monetary damages. Therefore, I recommend that there be no award for emotional distress in this case. Other elements of the award, not requiring additional analysis, are specified in the recommendation summary below.

Recommendation

Complainant has proven his *prima facie* case that he was not promoted by Respondent Department of Corrections to the position of Director of Dentistry at the Pontiac Correctional Center in October, 1992 because of unlawful discrimination based on his race, black. Respondent has failed to articulate a lawful, nondiscriminatory reason for failing to promote Complainant and is therefore liable for an award under the Illinois Human Rights Act. It is therefore recommended that Complainant's claim be sustained and that he be awarded the following relief:

- A. That Respondent pays Complainant back pay in the gross amount of \$35,956.60 for the period October, 1992 to May, 1996, plus interest on this element of this award pursuant to Section 5300.1145 of the Commission's Procedural Rules to accrue until payment in full is made by Respondent;
- B. To the extent that the discriminatory conduct of Respondent adversely affected any seniority, benefit or retirement credit in favor of Complainant, that lost seniority, benefit or retirement credit will be fully restored to Complainant;
- C. That Complainant's personnel file or any other file kept by Respondent concerning Complainant shall be purged of any reference to this discrimination charge and this litigation;
- D. That Respondent cease and desist from discriminating in making promotions among its employees;
- E. That Respondent pay to Complainant the reasonable attorney's fees and costs incurred as a result of the civil rights violation that is recommended to be sustained in this Recommended Liability Decision, that amount to be determined after review of a properly submitted motion with attached affidavits and other supporting documentation meeting the standards set forth in Clark and Champaign National Bank, 4 Ill. H.R.C. Rep. 193 (1982), to be filed within 21 days after the service of this Recommended Liability Determination. If such a motion is not timely filed, it will be taken as a waiver of attorney's fees;
- F. That if Respondent disputes the amount of requested attorney's fees, it must file a written response to Complainant's motion within 21 days of the service of that motion. Failure to do so will be taken as evidence that Respondent does not contest the amount of such fees. Complainant may file a reply within 14 days after service of Respondent's response; and,

- G. The relief recommended in the foregoing Paragraphs A through F shall be stayed pending issuance of a Recommended Order and Decision including resolution of the attorney's fees and costs.
- H. It is not clear from the record if former Respondent PHS was dismissed from this matter in consideration of a settlement involving terms similar to any of those noted above in this section, or, conversely, for other reasons not involving such a settlement. If a settlement was involved, the parties are given leave to submit an appropriate motion or other filing regarding the possibility of a set-off against any of the award terms recommended here. *See Thorne and Illinois Department of Veterans' Affairs*, Ill. H.R.C. Rep. (1990CF1159, March 22, 1996). I would note that it is my view that post-dismissal claims for contribution from a dismissed party (here, PHS) are not permitted in this forum in that the Commission apparently no longer has jurisdiction over PHS, but argument can also be presented on this issue as well. In that Respondent appears to be the natural proponent of either set-off or contribution, if applicable, it will have the opportunity to be the first to raise them, followed by a response from Complainant and a final reply from Respondent. The first submission from Respondent in this regard, if any is to be made, is also due by no later than 21 days after service of this Recommended Liability Determination, with Complainant being given 21 days to respond and Respondent to have 14 days to reply. If no submission is made in accord with this schedule, it will be assumed that Respondent has waived this issue for consideration before the Commission. All documents related to this issue must be separate from those submitted regarding attorney's fees.

HUMAN RIGHTS COMMISSION

ENTERED:

February 5, 2002

BY: _____

DAVID J. BRENT
 ADMINISTRATIVE LAW JUDGE
 ADMINISTRATIVE LAW SECTION

Service List for Mitchell #9488 as of 2/6/02:

Ayesha S. Hakeem
Law Offices of Ayesha S. Hakeem
P.O. Box 19728
Chicago, Illinois 60619

Khalil Cox
Justin D. Smock
Legal Counsel
Illinois Department of Corrections
100 West Randolph Street
Suite 4-200
Chicago, Illinois 60601