

FSM SUPREME COURT TRIAL DIVISION

ELIAS SANDY,) CIVIL ACTION NO. 2008-1073
)
Plaintiff,)
)
vs.)
)
JESSE MORI, in his official capacity as)
Director of the Department of)
Administrative Services, DEPARTMENT OF)
ADMINISTRATIVE SERVICES, and STATE)
OF CHUUK,)
)
Defendants.)
_____)

ORDER DETERMINING DAMAGES AND REMEDIES

Ready E. Johnny
Associate Justice

Hearing: February 15, 2010
Submitted: March 2, 2010
Decided: March 25, 2010

APPEARANCES:

For the Plaintiffs: Derensio S. Konman
Micronesia Legal Services Corporation
P.O. Box D
Weno, Chuuk FM 96942

For the Defendants: Joses Gallen, Esq.
Attorney General
Office of the Chuuk Attorney General
P.O. Box 1050
Weno, Chuuk FM 96942

* * * *

HEADNOTES

Employer-Employee - Wrongful Discharge; Public Officers and Employees - Chuuk

The remedies generally available to a state public service system employee who has shown that he was wrongfully discharged are reinstatement to his former position and back pay to the date of his termination. Sandy v. Mori, 17 FSM Intrm. 92, 94 (Chk. 2010).

Public Officers and Employees - Chuuk; Torts - Damages - Mitigation of

A wrongfully discharged government employee has a duty to mitigate his damages by actively looking for and accepting any reasonable offer of employment; otherwise back pay damages cannot be

awarded. If the former government employee obtains other employment, the amount he is awarded in back pay must be reduced by the amount he mitigated his damages – by the amount he received from the other employment – since otherwise he could recover a windfall, which would violate the principles of compensatory damages. Sandy v. Mori, 17 FSM Intrm. 92, 94 (Chk. 2010).

Evidence – Burden of Proof; Public Officers and Employees – Chuuk; Torts – Damages – Mitigation of

When the discharged employee has not presented any evidence about whether and where he sought employment during a certain time period, he has introduced no evidence of his efforts to mitigate his damages by attempting to secure a job during his periods of unemployment, and he is thus precluded from recovery of damages for those periods since it is the plaintiff's burden to prove every element of his case, including all of his damages. Sandy v. Mori, 17 FSM Intrm. 92, 95 (Chk. 2010).

Civil Procedure

There is no requirement that a civil plaintiff appear in person at trial. Sandy v. Mori, 17 FSM Intrm. 92, 95 n.2 (Chk. 2010).

Employer-Employee – Wrongful Discharge; Public Officers and Employees – Chuuk; Torts – Damages

Back pay compensatory damages are the measure of compensatory damages for wrongful discharge. Compensation for an injury is not doubled just because the plaintiff has two different causes of action on which to base that recovery because only the injury itself is compensated. Sandy v. Mori, 17 FSM Intrm. 92, 95-96 (Chk. 2010).

Employer-Employee – Wrongful Discharge; Public Officers and Employees – Chuuk; Torts – Damages

From awards of back pay damages the employer must deduct the applicable wage and salary taxes and social security taxes, which must then be remitted to the appropriate tax authorities. Sandy v. Mori, 17 FSM Intrm. 92, 96 (Chk. 2010).

Public Officers and Employees – Chuuk

Reinstatement to his former position (or its equivalent) is the usual remedy for a state public service system employee who has shown that he was wrongfully discharged. This is true even though the former position has been filled by another employee since if the existence of a replacement constituted a complete defense against reinstatement, then reinstatement could be effectively blocked in every case simply by immediately hiring an innocent third-party after the unlawful discharge has occurred, thus rendering the reinstatement remedy's deterrent effect a nullity. Sandy v. Mori, 17 FSM Intrm. 92, 96 (Chk. 2010).

Civil Rights; Torts – Governmental Liability

Since the FSM civil rights statute is based on the U.S. model, the FSM Supreme Court should consider U.S. jurisprudence under 42 U.S.C. § 1983 and § 1988 for assistance in determining the intended meaning of, and governmental liability under 11 F.S.M.C. 701(3). Sandy v. Mori, 17 FSM Intrm. 92, 96 n.3 (Chk. 2010).

Public Officers and Employees – Chuuk

Since the appropriateness of an equitable remedy of reinstatement is determined by current conditions rather than past conditions, the court may reinstate a wrongfully-discharged state employee provided that the former employee is ready, willing, and able to work and is ready for assignment. Sandy v. Mori, 17 FSM Intrm. 92, 96 (Chk. 2010).

Attorney's Fees – Court-Awarded – Statutory; Civil Rights

A prevailing party in a civil rights lawsuit is, under 11 F.S.M.C. 701(3), entitled to costs and reasonable attorney's fees even when the attorneys are from a non-profit legal services corporation

since the right to a reasonable attorneys' fees award is the client's not the attorney's, and the amount that the client actually pays (or whether the client actually pays) his attorney is irrelevant. Sandy v. Mori, 17 FSM Intrm. 92, 96-97 (Chk. 2010).

* * * *

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

On May 8, 2009, the court granted the plaintiff, Elias H. Sandy, partial summary judgment. The court held that, since the statute that was used as the basis for his termination had previously been held unconstitutional,¹ Olap v. Chuuk State Election Comm'n, 9 FSM Intrm. 531, 534 (Chk. S. Ct. Tr. 2000), Sandy was wrongfully terminated from his state public service system employment when the State of Chuuk ended his employment on December 4, 2002 because he sought to run for a seat in the Chuuk House of Representatives in the March 2003 election.

Although the parties spent some time after the partial summary judgment trying to reach a settlement, they were unable to. This therefore came before the court on February 15, 2010, for a hearing on damages and remedies. After the hearing, the court gave each party until March 1, 2010, to submit a brief, if the party wished, on any aspect of the issue of the remedy of Sandy's (possible) reinstatement to a Chuuk Public Service System position. No briefs were submitted. Thus, on March 2, 2010, the matter was considered submitted to the court for its decision.

I. BACK PAY DAMAGES

The remedies generally available to a state public service system employee who has shown that he was wrongfully discharged are reinstatement to his former position and back pay to the date of his termination. Kimeuo v. Simina, 15 FSM Intrm. 664, 666 (Chk. 2008), *aff'd*, 16 FSM Intrm. 616, 624 (App. 2009); Reg v. Falan, 14 FSM Intrm. 426, 436-37 (Yap 2006). A wrongfully discharged government employee has a duty to mitigate his damages by actively looking for and accepting any reasonable offer of employment; otherwise back pay damages cannot be awarded. Robert v. Simina, 14 FSM Intrm. 438, 443 (Chk. 2006). If the former government employee obtains other employment, the amount he is awarded in back pay must be reduced by the amount he mitigated his damages – by the amount he received from the other employment, Reg, 14 FSM Intrm. at 437, "since otherwise the plaintiff could recover a windfall, which would violate the principles of compensatory damages," Robert, 14 FSM Intrm. at 443.

When Sandy was terminated, he was actively seeking employment as an elected state representative (that is, he was campaigning for election to the Chuuk House of Representatives). Although this may not strictly comply with the duty to actively seek and accept *any* reasonable employment offer, it would seem unjust to not consider it compliance since it was the ground for his unlawful termination. The electorate did not fulfill Sandy's expectation. He was not elected.

Sandy's compensation before his wrongful discharge was \$307.52 biweekly. There were six biweekly periods between Sandy's termination and the March election. His compensatory damages for this period would thus total \$1,845.12.

¹ Although not relied upon, a similar executive order had also been held unconstitutional. Lokopwe v. Walter, 10 FSM Intrm. 303, 306 (Chk. S. Ct. Tr. 2001).

No evidence was presented about what Sandy did between March 2003 and September 2003 – whether and where he sought employment. When a plaintiff has introduced no evidence of his efforts to mitigate his damages by attempting to secure a job during his periods of unemployment, he is precluded from recovery of damages for those periods. Reg, 14 FSM Intrm. at 437. It is the plaintiff's burden to prove every element of his case, including all of his damages. See Ponape Island Transp. Co. v. Fonoton Municipality, 13 FSM Intrm. 510, 519 (App. 2005). No compensatory damages can be awarded for March 2003 to September 2003.

In September 2003, Sandy was hired as a part-time instructor at the College of Micronesia, Chuuk campus. Sandy was employed at the College of Micronesia under a succession of contracts until May 12, 2008. From September 24, 2003, until May 14, 2004, Sandy received a total of \$8,462.13 in compensation from the College of Micronesia. This time period was equal to 16½ state employment biweekly pay periods. If Sandy had been working for the state during that period he would have earned \$5,074.08. Sandy suffered no damages for this period. In fact, he benefitted during this period from his termination because his College pay was higher.

Sandy did not work for the College between May 14, 2004 and August 23, 2004. There is no evidence before the court that Sandy sought other gainful employment during this period of unemployment so he is precluded from recovery of damages for this period. Reg, 14 FSM Intrm. at 437. From August 23, 2004, to December 16, 2004, Sandy's contract with the College paid him \$5,916.60. This is more than the \$2,460.16 he would have earned during that period from state employment (eight biweekly pay periods x \$307.52). No damages were incurred or can be recovered for this period.

Starting on January 10, 2005, Sandy became a full-time instructor with a biweekly base salary of \$590, raised to \$619, effective January 10, 2006. This was considerably higher than his state employment biweekly pay of \$307.52, so again Sandy did not suffer any damages. Sandy was laid off from the College on May 19, 2006. Again, there is no evidence before the court that Sandy tried to mitigate his damages after that date. So no damages can be awarded for the time period that Sandy was laid off. Sandy resumed teaching at the College on August 11, 2006. From then until July 18, 2007, the College paid Sandy \$11,081.76. This is substantially more than the \$7,380.48 Sandy would have earned from state employment during this time period. Sandy's next employment with the College ran from January 10, 2008, to May 12, 2008, for which he was paid \$5,916.60, considerably more than the \$2,460.16 he would have earned from state employment for that time period.

Again, there is no evidence before the court of any attempt by Sandy to mitigate his damages between July 2007 and January 2008. There is also no evidence before the court that Sandy made any attempt to mitigate his damages after his employment at the College of Micronesia ended in May 2008. Sandy's counsel represented to the court that Sandy² is no longer present in the Federated States of Micronesia. No evidence before the court indicates whether Sandy is currently employed or unemployed or even employable. Sandy is therefore precluded from recovering any damages for anytime between July 2007 and January 2008 and for anytime after May 2008. Reg, 14 FSM Intrm. at 437.

Sandy's requests for separate awards for violation of Chuuk laws, violations of Sandy's fundamental and civil rights, for additional annual leave and sick leave are all subsumed within his back pay claim and are not separately awardable. Back pay compensatory damages are the measure of

² Sandy did not appear personally at the February 15, 2010 hearing. He appeared only through counsel. There is no requirement that a civil plaintiff appear in person at trial.

compensatory damages for wrongful discharge. Compensation for an injury is not doubled just because the plaintiff has two different causes of action on which to base that recovery because only the injury itself is compensated. People of Rull ex rel. Rucpong v. M/V Kyowa Violet, 14 FSM Intrm. 403, 418 (Yap 2006), *aff'd*, 16 FSM Intrm. 49, 62 (App. 2008); Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 50 (Chk. 2001).

The court therefore awards Sandy \$1,845.12 in back pay damages from which the state shall deduct the applicable wage and salary taxes and social security taxes, and which the state shall remit to the appropriate tax authorities. Reg., 14 FSM Intrm. at 435; Pohl v. Chuuk Public Utility Corp., 13 FSM Intrm. 550, 556 (Chk. 2005); Ponape Transfer & Storage, Inc. v. Wade, 5 FSM Intrm. 354, 356 (Pon. 1992) (payments to appropriate tax authorities to be made from back pay awards).

II. REINSTATEMENT

Sandy also asks to be reinstated in his former public service system position. Reinstatement to his former position (or its equivalent) is the usual remedy for a state public service system employee who has shown that he was wrongfully discharged. Kimeuo, 15 FSM Intrm. at 666, *aff'd*, 16 FSM Intrm. at 624; Reg., 14 FSM Intrm. at 436-37. This is true even though the former position has been filled by another employee since if the existence of a replacement constituted a complete defense against reinstatement, then reinstatement could be effectively blocked in every case simply by immediately hiring an innocent third-party after the unlawful discharge has occurred, thus rendering the reinstatement remedy's deterrent effect a nullity. *See, e.g., Reeves v. Clairborne County Bd. of Educ.*, 828 F.2d 1096, 1102 (5th Cir. 1987); Jones v. Rivers, 732 F. Supp. 176, 179-80 (D.D.C. 1990); *cf. Rivera v. Rios*, 652 F. Supp. 410, 411 (D.P.R. 1987).³

The appropriateness of an equitable remedy of reinstatement is determined by current conditions rather than past conditions. Patterson v. Portch, 853 F.2d 1399, 1408 (7th Cir. 1988) (reinstatement would not be ordered when plaintiff emotionally unfit to resume teaching duties); *cf. Byron v. Clay*, 867 F.2d 1049 (7th Cir. 1989) (fired patronage employee would not be reinstated because, among other reasons, he was currently in jail). As mentioned above, there is no evidence before the court whether Sandy is currently employed or unemployed or is even fit to resume his duties. The court will therefore order Sandy's conditional reinstatement. Sandy is hereby reinstated to his former Chuuk public service system position provided that he, no later than May 7, 2010, presents himself to the Chuuk Department of Education ready, willing, and able to work and ready for assignment.

III. ATTORNEY'S FEES AND COSTS

Sandy also asks for his attorney's fees and costs. As the prevailing party, Sandy is entitled to his taxable costs. FSM Civ. R. 54(d). Under 11 F.S.M.C. 701(3), a prevailing party in a civil rights lawsuit, as this is, is entitled to costs and reasonable attorney's fees. Attorney's fees can be awarded under 11 F.S.M.C. 701(3) even when the attorneys are from a non-profit legal services corporation. Plais v. Panuelo, 5 FSM Intrm. 319, 321 (Pon. 1992). The right to a reasonable attorneys' fees award is the client's not the attorney's, and the amount that the client actually pays (or whether the client

³ Since the FSM civil rights statute is based on the U.S. model, the FSM Supreme Court should consider U.S. jurisprudence under 42 U.S.C. § 1983 and § 1988 for assistance in determining the intended meaning of, and governmental liability under 11 F.S.M.C. 701(3). Robert v. Simina, 14 FSM Intrm. 438, 443 n.1 (Chk. 2006); Annes v. Primo, 14 FSM Intrm. 196, 206 n.6 (Pon. 2006); Estate of Mori v. Chuuk, 10 FSM Intrm. 123, 124 (Chk. 2001); Bank of Guam v. O'Sonis, 9 FSM Intrm. 106, 113 (Chk. 1999); Plais v. Panuelo, 5 FSM Intrm. 179, 204 (Pon. 1991).

actually pays) his attorney is irrelevant. Bank of the FSM v. Truk Trading Co., 16 FSM Intrm. 467, 471 (Chk. 2009).

Sandy shall therefore submit his attorney fees and costs request by April 15, 2010. The state may submit its response by April 26, 2010.

IV. CONCLUSION

Compensatory damages of \$1,845.12 are awarded in Elias Sandy's favor against the State of Chuuk, from which the state shall make the appropriate tax deductions and payments. Sandy is hereby reinstated to his former Chuuk public service system position provided that he, no later than May 7, 2010, presents himself to the Chuuk Department of Education ready, willing, and able to work and ready for assignment. Sandy shall submit his costs and attorney's fees request by April 15, 2010, to which the state may respond by April 26, 2010. No liability by either Jesse Mori or the Department of Administrative Services having been shown, these defendants are dismissed.

The clerk shall enter judgment accordingly.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

STATE OF KOSRAE,)	APPEAL CASE NO. K4-2009
)	
Appellant,)	
)	
vs.)	
)	
SMEHL D. JIM,)	
)	
Appellee.)	
_____)	

ORDER OF DISMISSAL

Decided: March 26, 2010

BEFORE:

Hon. Martin G. Yinug, Associate Justice, FSM Supreme Court
Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court

APPEARANCES:

For the Appellant: Snyder H. Simon, Esq.
Assistant Attorney General
Office of the Kosrae Attorney General
P.O. Box 870
Tofol, Kosrae FM 96944