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1. *Hobby v. Ga. Power Co., 2006 U.S. Dist. LEXIS 9720*

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Hobby v. Ga. Power Co.

United States District Court for the Northern District of Georgia, Atlanta Division

February 15, 2006, Decided ; February 15, 2006, Filed

CIVIL ACTION NO. 1:01-cv-1407-GET

Reporter
2006 U.S. Dist. LEXIS 9720 *; 2006 WL 355256

MARVIN B. HOBBY, Plaintiff, v. GEORGIA POWER COMPANY, Defendant.

Core Terms

options, stock option, stock, restoration, summary judgment motion, summary judgment, expiration, parties, exercise price, reinstatement, discounted, benefits, issuance, genuine, missed, motion to strike, defense motion, cash value, calculated, compensate, employees, dividend, Damages

Counsel: **[*1]** For Marvin B. Hobby, Plaintiff: Daniel Mark Jennings, Jennings Sparwath & Satcher. Marietta, GA; Michael D. Kohn, Stephen M. ***Kohn, Kohn Kohn*** & ***Colapinto***, Washington, DC.

For Georgia Power Company, Defendant: James Earl Joiner, Laura H. Kriteman, Troutman Sanders, Bank of America Plaza, Atlanta, GA.

Judges: G. ERNEST TIDWELL, JUDGE.

Opinion by: G. ERNEST TIDWELL

Opinion

ORDER

The above-styled matter is presently before the court on:

(1) defendant Georgia Power Company's motion for summary judgment [docket no. 48];

(2) plaintiff's motion for partial summary judgment [docket no. 49];

(3) plaintiff's motion to strike [docket no. 55];

(4) plaintiff's second motion for summary judgment [docket no. 78].

On June 1, 2001, plaintiff filed this action seeking enforcement of a Final Decision and Order on Damages ("FDOD") issued by the Labor Department's Administrative Review Board ("ARB") on February 9, 2001. On July 2, 2001, plaintiff filed a motion for preliminary injunction seeking immediate reinstatement of plaintiff while defendant appealed the FDOD to the Eleventh Circuit Court of Appeals. On July 11, 2001, this court issued an order pursuant to which plaintiff was "placed back on **[*2]** active payroll status at [defendant] effective June 1, 2001 which will entitle him to fully receive all compensation and benefits available to someone in his position." The order further stated that "[i]f the appeal is decided in favor of [plaintiff], the parties will effectuate the remedies set forth in the Administrative Review Board's Final Order and Decision on Damages unless otherwise modified."

The enforcement proceeding was stayed pending the appeal of the merits. The Eleventh Circuit affirmed the administrative decision in favor of plaintiff on September 30, 2002.

On October 6, 2003, this court issued an order lifting the stay and directing the parties to file any pleadings necessary to resolve this matter. On October 27, 2003, defendant filed a motion to dismiss the complaint.

Plaintiff filed an amended complaint that same day. On November 7, 2003, defendant filed a motion to dismiss the amended complaint.

On January 12, 2004, this court issued an order granting in part and denying in part defendant's motion to dismiss [docket no. 16]. The motion was denied as to plaintiff's claims related to the ESP and ESOP accounts, as well as interest on the $ 250,000 compensation **[*3]** award. The motion was granted as to all other claims. On appeal, the Eleventh Circuit Court of Appeals vacated the decision, citing a failure to adequately notify of the court's intention to convert the defendant's motion to dismiss into a motion for summary judgment, and remanded the action for further proceedings. On February 9, 2005, defendant filed its answer to the amended complaint.

The original discovery period ended on March 25, 2005 and the parties both filed motions for summary judgment on April 14, 2005. On May 5, 2005, plaintiff filed a motion to strike certain evidence of defendant presented in support of defendant's motion for summary judgment.

On May 23, 2005, this court issued an order granting in part and denying in part plaintiff's motion to compel and for sanctions. The May 23 Order also extended discovery for an additional thirty days. On June 9, 2005, this court issued an order granting the parties' joint motion to extend discovery until July 29, 2005. On July 21, 2005, the court granted defendant's motion to amend its Answer to Plaintiff's First Amended Complaint for the purpose of adding the affirmative defense of impossibility with respect to its inability **[*4]** to grant discounted stock options to plaintiff. The order further directed the parties to file any additional motions, evidence or other pleadings the parties deemed necessary to achieve a final resolution of the issues before the court.

On October 7, 2005, plaintiff filed a second motion for summary judgment. On October 11, 2005, defendant filed a supplemental pleading and response to plaintiff's second motion for summary judgment. All motions are now ripe for consideration.

Motion to strike

Plaintiff moves to strike certain evidence submitted by defendant in support of its motion for summary judgment. According to plaintiff, portions of the deposition testimony of Steve Harris, Jean Horstman and Steve Wilkinson are inadmissible. Specifically, plaintiff argues that certain expert testimony has no reliable basis and "consists of mere ipse dixit,'" and other testimony is either not based on personal knowledge or is otherwise inadmissible hearsay.

Having reviewed the arguments of the parties, the court finds that plaintiff's criticisms of defendant's proffered testimony are directed more toward the weight to be given the testimony rather than the admissibility of the **[*5]** evidence. Therefore, plaintiff's motion to strike [docket no. 55] is DENIED and the testimony will be considered for the purpose of resolving the motions for summary judgment.

Motions for summary judgment

Defendant moves for summary judgment arguing that there is no issue of fact as to whether defendant complied with the FDOD and fully restored plaintiff's option benefits. Plaintiff originally moved for partial summary judgment, arguing that defendant failed to comply with the FDOD to the extent that it required defendant to restore fully plaintiff's stock option benefits. Plaintiff also filed a second motion for summary judgment with additional arguments related to defendant's affirmative defense of impossibility.

Standard

Courts should grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The moving party must "always bear the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and **[*6]** admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. That burden is discharged by showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Id. at 325*; see also *U.S. v. Four Parcels of Real Property, 941 F.2d 1428, 1437 (11th Cir. 1991)*.

Once the movant has met this burden, the opposing party must then present evidence establishing that there is a genuine issue of material fact. *Celotex, 477 U.S. at 325*. The nonmoving party must go beyond the pleadings and submit evidence such as affidavits, depositions and admissions that are sufficient to

demonstrate that if allowed to proceed to trial, a jury might return a verdict in his favor. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. If he does so, there is a genuine issue of fact that requires a trial. In making a determination of whether there is a material issue of fact, the evidence of the non-movant is to *be* believed and all **[*7]** justifiable inferences are to be drawn in his favor. *Id. at 255*; *Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987)*. However, an issue is not genuine if it *is* unsupported by evidence or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Anderson, 477 U.S. at 249-50*. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. *Id. at 248*. Thus, to create a genuine issue of material fact for trial, the party opposing the summary judgment must come forward with specific evidence of every element essential to his case with respect to which (1) he has the burden of proof, and (2) the summary judgment movant has made a plausible showing of the absence of evidence of the necessary element. *Celotex, 477 U.S. at 323*.

Facts

In light of the foregoing standard, the court finds the following relevant facts for the purpose of resolving these motions for summary judgment only. Beginning in 1987, Southern Company adopted the Executive Stock Plan, under which certain **[*8]** employees at Georgia Power Company were eligible to receive stock options. The Executive Stock Plan became the Performance Stock Plan in 1997. Both the Executive Stock Plan and the Performance Stock Plan expressly prohibited the granting of stock options at an option price less than the fair market value of Southern Company stock on the date the option was granted.

Effective May 23, 2001, the Southern Company established a new incentive compensation plan known as the Southern Company Omnibus Incentive Compensation Plan, Amended and Restated ("Omnibus Plan"). The Omnibus Plan's objectives look to "provide flexibility to the Company in its ability to motivate, attract, and retain the services of Employees and Directors who make significant contributions to the Company's success. . . ." As part of this "flexibility," the Omnibus Plan states that option prices for each grant shall be determined by the Compensation Committee. Because the Omnibus Plan is general in terms and does not reveal either the types of programs being used or their design characteristics, detailed design and administrative specifications ("specs") provide documentation of how programs are used, including the stock **[*9]** option program. The specs represent the shared understanding of management and the Compensation and Management Succession Committee of the Board of Directors. The specs also represent the parameters that the Compensation Committee established for the Omnibus Plan.

The specs provide that the Compensation Committee delegates day-to-day administration of stock option grants to Southern Company management as long as the administrative guidelines are met. The specs also communicate to participants the terms and conditions of how the Omnibus Plan works. The specs indicate that the Omnibus Plan "allows the Committee to set the exercise price,[and] [t]he Committee has committed to setting the exercise price of Southern options equal to or higher than the common stock price on the date of the grant. In practice, the Committee usually sets the exercise price equal to the common stock price on the date of the grant." In fifteen years, Steve Wilkinson, as SCS Compensation Manager and advisor/consultant to the Compensation Committee, has never seen the Committee approve options at less than the fair market value on the date of the grant.

International Shareholder Services ("ISS"), a powerful **[*10]** shareholder advocacy group, reviewed the proposed Omnibus Plan and indicated that it would recommend a "no" vote against the plan to shareholders unless Southern Company agreed to certain conditions. Therefore, in a letter dated May 11, 2001, Southern Company committed in writing to ISS that Southern Company would not grant stock options with exercise prices that are less than 100% of the fair market value of Southern Company common stock on the date granted. According to defendant, ISS takes the position that using discounted stock options is detrimental to a company. ISS is not a regulatory agency and has no legal authority with respect to whether a company can or cannot do something.

At all relevant times, only employees and directors from participating companies, including Georgia Power, were eligible to participate in the stock option plans. Retirees are not eligible to participate.

Southern Company implemented its first Performance Dividend Plan ("PDP Plan") effective January 1, 1997. The purposes of the PDP Plan include providing financial incentive to focus the efforts of certain key

employees on areas which will have a direct and significant influence on corporate performance, **[*11]** and providing levels of compensation to attract, retain and motivate certain key employees. In order to achieve its objectives, "the Plan will be based upon corporate performance as measured by total shareholder return [TSR] or such other performance measure which the Committee may determine under the terms of the Plan." For the payout periods ending December 31, 1997 through December 31, 2000, the payout for each year was: (1) zero; (2) 51.5% of a full year's dividend; (3) 68.75% of a full year's dividend; and (4) 67.5% of a full year's dividend, respectively. In 2001 the PDP plan document was terminated, and the Performance Dividend Program became governed by the Omnibus Plan and its design and administrative specifications.

In February 1990, plaintiff filed two complaints with the United States Department of Labor alleging that he was wrongfully discharged in violation of *Section 210* of the Energy Reorganization Act and related regulations. A full evidentiary hearing was held before the DOL Administrative Law Judge in October 1990. On August 4, 1995, the Secretary of Labor issued a decision as to liability ordering that plaintiff be reinstated and remanding the matter to the **[*12]** ALJ for further proceedings "as may be necessary to establish [plaintiff]'s complete remedy."

On remand, plaintiff argued that he was entitled to the recreation and restoration of the stock options he was denied as a result of his termination. Defendant did not assert that it would be unable to fully restore plaintiff's lost stock options. On September 17, 1998, the ALJ issued a Recommended Decision and Order on Damages ("RDOD") outlining the full remedy. The RDOD states that plaintiff is "entitled to full restoration of . . . any stock option plans that were adversely affected by the discriminatory conduct" and that he was "entitled to [the] recreation of [his] . . . stock option accounts."

Georgia Power appealed the decision. On February 9, 2001, the ARB issued a Final Decision and Order on Damages ("FDOD") observing that the restoration of plaintiff's stock options was one of "[s]everal elements of the ALJ's recommended damage award [that] were not challenged by either party in their appeals to the ARB" and that "[w]e adopt the ALJ's recommendation that Hobby shall be restored fully to all . . . stock option benefits that were adversely affected by Georgia Power's **[*13]** discriminatory conduct."

Plaintiff was reinstated as an employee as of June 2001. He was placed in the Level 10 position of Assistant to Western Region Vice President Jim Sykes.

Steve Wilkinson is the plan administrator for the stock option plan. Through discussion with legal counsel, Steve Wilkinson determined that the relevant stock plans and accompanying specs did not allow plaintiff to receive make-up stock option grants.

Mr. Wilkinson and Ms. Jean Horstman, a member of Wilkinson's staff, believed that plaintiff could not receive a grant of options with strike prices set at prices from 1995 through 2001. Furthermore, they believed that the prohibition against issuing options to non-employees, contained in the Omnibus Plan, applied to plaintiff because they assumed that he was not an employee. The FDOD, however, had required plaintiff's reinstatement.

Therefore, Wilkinson decided to "determine an economic value for the stock options and to use that for the restoration." According to defendant, a value derived from a "Black-Scholes analysis" was used to find the economic value of the options as of the date of the original grant. Because no stock options were being issued, Mr. **[*14]** Wilkinson did not take the matter to the Compensation Committee.

In November 2002, Horstman conducted the relevant calculations and concluded that plaintiff would have received 56,216 options during the period in question, a number which reflects an extra grant made to individuals in 2001 to compensate for the Mirant spin-off and which reflects the number of original grants multiplied by 1.584681 to account for the spin-off. According to Horstman, she then used a rounded Black-Scholes value of 10% to determine the amount due for the options.

On November 14, 2002, Georgia Power, unilaterally and without prior notice to or participation by plaintiff, issued a lump sum payment totaling $ 2,360,458.12 to compensate plaintiff for back pay, all lost benefits, retirement, employee savings plan, employee stock option plan, and stock option accounts, plus interest. Defendant also issued a second check payable to plaintiff in the amount of $ 299,679.48 reflecting other damages owed to him. The accompanying letter, however, did not explain how defendant valued the stock options. According to Wilkinson's affidavit," $ 94,056 equals the Black-Scholes value of options not granted and $ 89,380 **[*15]** equals the actual value of the PDP payments Hobby would have received if he had been granted the stock options, assuming he never

exercised any of such options." Interest on the PDP equaled $ 5,843.

Plaintiff's expert, Michael M. Beeghley, however, disputes that the "10% assumption" has any economic relevance to the value of the stock options that had to be restored. Furthermore, Beeghley states that the PDP payments were calculated based on an assumption that plaintiff would have exercised all of his options in 2002. Plaintiff has repeatedly stated that he would have held the options until their expiration.

Plaintiff voluntarily retired effective April 1, 2003, receiving the 2003 stock option grants and an additional $ 364,000.00 from an early retirement package.

Discussion

Defendant contends that it was not possible to actually restore plaintiff's stock options by issuing a "catch-up" grant because of a company policy against issuing discounted options. Defendant further asserts, however, that it has fully complied with the FDOD by paying plaintiff a cash value for the missed stock options, pursuant to defendant's company policy.

To prevail on an impossibility defense, defendant **[*16]** must "go beyond a mere assertion of inability" to demonstrate that it has made "in good faith all reasonable efforts." *In re Lawrence, 279 F.3d 1294, 1297 (11th Cir. 2002)*. Defendant points the court to considerable evidence to explain why its decision to substitute a cash value for a missed stock option grant might be a reasonable business decision, absent a court order. However, defendant fails to point the court to any factual or legal authority which would support a finding that defendant was prohibited from issuing the discounted options where such restoration had been ordered as a remedy for discrimination.

Furthermore, while extreme impracticability of performance may be regarded as having the same effect as impossibility, See *United Steelworkers of Am. v. Metropolitan Distributing Co., 2005 U.S. Dist. LEXIS 19913, 2005 WL 2233477, at *4 (N.D. Ohio September 13, 2005)*, the evidence cited by defendant is insufficient to create a question of fact as to the impracticability of the issuance of the discounted stock options at the time restoration was ordered.

Even assuming that the issuance of discounted options was impossible for defendant to achieve, defendant fails to present **[*17]** sufficient evidence to create a question of fact that the valuation method used by it to determine the cash value of the missed options was sufficient to satisfy the requirements of the FDOD.

The "[f]ailure to compensate [a plaintiff] for his unrealized stock option appreciation would be a failure to return []him as nearly as possible to the economic situation he would have enjoyed but for defendant's illegal conduct." *Greene v. Safeway Stores, Inc., 210 F.3d 1237, 1244 (10th Cir. 2000)*; *Scully v. US WATS, Inc., 238 F.3d 497, 507 (3rd Cir. 2001)*. Although defendant argues that plaintiff's proposed valuation "artificially appreciate[s] the value of [plaintiff's] missed options, using the advantage of hindsight and the preposterous self-serving notion that he would have never exercised his options before their full term," the court finds that "[t]he injury that plaintiff suffers is the deprivation of his range of elective action." *Haft v. Dart Group Corp., 877 F. Supp. 896, 902 (D. Del. 1995)*.

The FDOD specifically required defendant to fully restore plaintiff to all stock option benefits. The RDOD stated that plaintiff **[*18]** was "entitled to [the] recreation of . . . stock option accounts." At no time in the proceedings did defendant assert that actual issuance of the "catch-up" grant could be problematic.

Therefore, the court finds that defendant's unilateral decision to make a cash payment rather than an actual option grant, did not satisfy the FDOD. Furthermore, the court finds that defendant's method of calculating the cash grant was insufficient to fully restore plaintiff's stock option benefits. Accordingly, the court hereby DENIES defendant's motion for summary judgment [docket no. 48] and GRANTS plaintiff's motion for partial summary judgment [docket no. 49] and motion for summary judgment [docket no. 78].

While acknowledging that plaintiff has yet to be fully compensated under the FDOD, the court notes that this lengthy litigation makes issuance of a strict "catch-up" grant somewhat problematic, considering that at least some of the earliest options at issue would have now expired. In order for plaintiff to be fully compensated, the court orders the following relief:

(1) With regard to the missed options plaintiff should have received which have already expired, defendant is DIRECTED **[*19]** to pay to plaintiff the actual cash value of those options calculated as if plaintiff had been issued the option in a timely manner and exercised the option only at the time of expiration of the option. In other words, the difference between the original grant price and the price of the stock on the date of the

expiration of the option.

(2) With regard to those options which have not yet expired, defendant is directed to issue an equal number of options to plaintiff with an exercise price equal to the current market price, plus a cash payment representing the difference between the grant price of the original options that were to be restored and the current market exercise price.

The parties are DIRECTED to work together to reach consensus as to the actual amount owed within thirty (30) days from the date of this order. Should the parties fail to reach agreement, the court will appoint a special master to perform the computation.

Furthermore, the court finds that plaintiff's retirement status does not preclude defendant from issuing the options because defendant failed to object to plaintiff's proposal regarding temporary reinstatement. Therefore, if plaintiff's current employment **[*20]** status presents an obstacle to the issuance of the options, defendant is DIRECTED to reinstate plaintiff for the purpose of issuing the options.

Summary

(1) defendant Georgia Power Company's motion for summary judgment [docket no. 48] is **DENIED;**

(2) plaintiff's motion for partial summary judgment [docket no. 49] is **GRANTED;**

(3) plaintiff's motion to strike [docket no. 55] is **DENIED;**

(4) plaintiff's second motion for summary judgment [docket no. 78] is **GRANTED.**

With regard to the missed options plaintiff should have received which have already expired, defendant is **DIRECTED** to pay to plaintiff the actual cash value of those options calculated as if plaintiff had been issued the option in a timely manner and exercised the option only at the time of expiration of the option. In other words, the difference between the original grant price and the price of the stock on the date of the expiration of the option.

With regard to those options which have not yet expired, defendant is **DIRECTED** to issue an equivalent number of options to plaintiff with an exercise price equal to the current market price, plus a cash payment representing the **[*21]** difference between the grant price of the original options that were to be restored and the current market exercise price.

If plaintiff's current employment status presents an obstacle to the issuance of the options, defendant is **DIRECTED** to reinstate plaintiff for the purpose of issuing the options.

SO ORDERED, this 15 day of February, 2006.

G. ERNEST TIDWELL, JUDGE

UNITED STATES DISTRICT JUDGE

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