

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 1 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KELLY O’KELL,

Plaintiff-Appellee,

v.

DEB HAALAND, in her official capacity as
Secretary of the United States Department of
the Interior,

Defendant-Appellant.

No. 22-35701

D.C. No. 2:18-cv-00279-SAB

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Stanley A. Bastian, Chief District Judge, Presiding

Argued and Submitted August 24, 2023
Seattle, Washington

Before: HAWKINS, GRABER, and McKEOWN, Circuit Judges.

Plaintiff Kelly O’Kell sued her employer, the Bureau of Reclamation (“BOR”), alleging age discrimination and retaliation after the BOR hired a younger, external candidate for a project manager position for which she had applied, and later terminated Plaintiff’s employment after Plaintiff complained of

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

age discrimination. Following a bench trial, the district court found in Plaintiff's favor and awarded her back pay, front pay through retirement, and equitable relief. The BOR timely appeals, challenging only the district court's award of back pay and front pay. We review for clear error the district court's findings of fact, Gotthardt v. Nat'l R.R. Passenger Corp., 191 F.3d 1148, 1155 (9th Cir. 1999), and for abuse of discretion the choice to award front pay, id. at 1156. We vacate the award of back pay and front pay, and we remand for the district court to reconsider and recalculate back pay and front pay in conformity with this disposition.

1. The BOR did not waive or forfeit its challenges to the award of front pay and back pay, nor invite error, nor give rise to estoppel, by asking the district court to "give Plaintiff the lotto ticket." In context, that colorful rhetoric merely emphasized the BOR's belief that an award would be a windfall because Plaintiff had not suffered discrimination.

2. The district court clearly erred by awarding back pay and front pay using the GS-12 pay grade, rather than the GS-11 pay grade. The BOR's answer to the complaint admitted only that Plaintiff had applied for the GS-12 pay grade, not that she was entitled to it. Plaintiff's economist relied on the BOR's alleged admission regarding the GS-12 pay grade, and the district court engaged in no analysis beyond accepting that witness's calculations. Plaintiff applied for the newly created position at both pay grades, as the position was listed under both pay

grades. The Human Resources Department found that she was qualified for the position only as a GS-11 but not as a GS-12. Indeed, in her reply brief, Plaintiff concedes that she was certified only for the GS-11 position, not the GS-12 position.

3. The district court abused its discretion by awarding front pay without analyzing Plaintiff's ability to find comparable federal employment.

To the extent that the district court made a finding by adopting the calculation of Plaintiff's economist, the court clearly erred by awarding front pay based on the assumption that Plaintiff would never be able to work for the federal government again. Plaintiff asserted that she wanted, and would seek to accept, federal employment. She applied for federal government positions and, between the date on which she was fired and the date of trial, received two offers for employment comparable to her BOR job. The first offer, made soon after her termination, was rescinded when the employer learned of Plaintiff's disciplinary record; but the district court ordered that her record be wiped clean as part of the equitable relief that it granted, meaning that no future federal employer would be dissuaded by the now-clean disciplinary record. The district court failed to mention, much less consider, either of those factors (the offers and the clean record) when it concluded that Plaintiff could not work for the federal government again. Plaintiff's second offer for employment was not rescinded; she chose to

reject it because she decided that relocation and a 45-minute commute were too onerous.

Although the district court erred, on remand the court should consider the whole record and is not required to come to a particular result.

4. At oral argument, the BOR conceded that the district court did not clearly err by awarding front pay based on the assumption that Plaintiff would retire at age 72 rather than at age 68. Evidence in the record, including Plaintiff's statement to her expert witness about her anticipated retirement date and her testimony about her need to save money for retirement, supports the district court's finding as to Plaintiff's expected age of retirement.

**AWARD OF BACK PAY AND FRONT PAY VACATED;
REMANDED for further proceedings consistent with this disposition. The parties shall bear their own costs on appeal.**