

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONALD GALLOWAY,)
)
 Plaintiff,)
)
 v.) Civil Action No. 91-0644
) (JHG)
 SUPERIOR COURT OF THE DISTRICT)
 OF COLUMBIA)
)
 and)
)
 THE DISTRICT OF COLUMBIA,)
)
 Defendants.)
)

**MEMORANDUM OF THE UNITED STATES, AS AMICUS CURIAE, IN OPPOSITION
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM
FOR COMPENSATORY DAMAGES**

I. Introduction

On March 16, 1993, this Court granted plaintiff's motion for declaratory and injunctive relief, ruling that the District of Columbia's policy of excluding persons who are blind from jury service violates section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131 et seq. Now before the Court are the remaining issues relating to relief.

In its previous memorandum, the United States, as amicus

curiae, urged the Court to hold that compensatory damages are available forms of relief under both statutes. In response to an argument raised by the defendants in their motion for summary judgment, we demonstrate below that neither an overt nor physical manifestation of emotional injury is necessary to support an emotional distress claim for compensatory damages.

II. Argument

Defendants argue that the emotional distress incurred by Plaintiff Galloway as a result of being excluded from jury duty on account of his disability is insufficient to warrant an award of compensatory damages.¹ The crux of the defendants' argument appears to be that absent some overt or physical manifestation of emotional injury, the injury is not "substantial" enough to justify a compensatory damage award.

This argument is without merit. As we have argued,² compensatory damages are available under both section 504 of the Rehabilitation Act and title II of the ADA. Such damages include compensation for the mental and emotional distress that has resulted from defendants' violation of these civil rights statutes. This distress need not be evidenced by any physical manifestation of injury. Testimony describing significant emotional pain and mental anguish, such as that detailed in Galloway's affidavit in support of his motion for summary judgment, is sufficient to warrant a compensatory damage award.

¹ Def.'s Mem. Supp. Summ. J. at 8.

² Mem. of the United States, as Amicus Curiae, at 5.

This Court recently held that the type of emotional distress endured by Galloway warrants monetary compensation. In Doe v. District of Columbia, 796 F. Supp. 559, 573 (D.D.C. 1992), a section 504 case, the Court noted that the plaintiff's "testimony [] established the emotional pain he endured from his rejection and the sense of isolation he felt from being singled out on the basis of his [disability]." Based on the plaintiff's testimony, compensatory damages were awarded. See also Tanberg v. Weld County Sheriff, 787 F. Supp. 970, 973 (D.Colo. 1992) (money damages warranted to compensate plaintiff for mental anguish where the plaintiff was discriminated against on the basis of his disability).

Similarly, in Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1238 (D.C. Cir. 1984), the District of Columbia Circuit Court of Appeals affirmed a jury award of compensatory damages for the humiliation and other emotional harm that the plaintiff had endured after being discriminated against on the basis of her race. The court noted that feelings of humiliation and isolation, albeit intangible, are cognizable and compensable injuries. Id. The plaintiff's testimony that she "felt isolated," that her "mind just flew out" when she heard a racist anecdote, and that she was shocked by an accusation of incompetence was sufficient evidence to justify the jury award. Id.

The decisions in Doe and Carter are fully consistent with other courts' interpretations of various civil rights laws. A number of circuit courts have held that emotional distress

damages may be awarded in civil rights cases where the sole evidence of emotional injury is the plaintiff's testimony, and where there has been no overt or physical manifestation of such injury. See, e.g., United States v. Balistrieri, 981 F.2d 916, 931 (7th Cir. 1992) (plaintiffs' testimony that they felt "angry and upset," "hurt and disappointed," "disbelief and kind of a hurt feeling like feeling real sorry," and "surprised" sufficient to support emotional distress damage awards in Fair Housing Act case); Johnson v. Hale, 940 F.2d 1192, 1193-94 (9th Cir. 1991) (testimony that plaintiffs were acutely upset because they had been denied the opportunity to rent or inspect advertised rental units on the basis of their race and that they had begun to suspect that their white friends were racist sufficient to support emotional distress damage award in housing discrimination case); Marable v. Walker, 704 F.2d 1219, 1220-21 (11th Cir. 1983) (plaintiff's testimony in Fair Housing Act case that he had been embarrassed and humiliated by defendant's refusal to rent an apartment to him on the basis of his race sufficient to establish right to an evidentiary hearing regarding the amount of emotional distress damages that should be awarded); Williams v. Trans World Airlines, 660 F.2d 1267, 1272-73 (8th Cir. 1981) (specific proof of out-of-pocket losses or medical testimony not necessary to establish humiliation or mental distress in employment

discrimination case arising under 42 U.S.C. § 1981; plaintiff's own testimony may be sufficient) Seaton v. Sky Realty Co., 491 F.2d 634, 636 (7th Cir. 1974) (award for emotional distress upheld in housing discrimination case where only direct evidence of emotional distress was plaintiff's testimony that "I was humiliated. I was intimidated, not only as a person but as a man. He stripped me of my right as a father to my kids."). Indeed, as the District of Columbia Circuit Court of Appeals stated in Hobson v. Wilson, 737 F.2d 1, 62 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985), a case arising under the civil rights conspiracy statute, 42 U.S.C. § 1985(3):

the factfinder may measure plaintiff's testimony in light of the surrounding circumstances, and in proper circumstances award damages on the basis of plaintiff's testimony. In reaching its conclusion, the court or jury may consider, as elements of compensable injury for emotional distress, humiliation and personal indignity, emotional pain, embarrassment, fear, anxiety, and anguish. (footnotes omitted)

Moreover, the defendants' argument that there must be an overt or physical manifestation of emotional injury to warrant compensatory damages rests on an incorrect reading of Carey v. Piphus, 435 U.S. 247 (1978). In Carey, the Supreme Court held that mental anguish and emotional distress are compensable injuries under § 1983. 435 U.S. at 263-64. The Court further held that substantial damages may be recovered only for the actual injury suffered, and that the plaintiff must demonstrate injury to secure more than a nominal recovery. Id. at 266. Nevertheless, although the Court noted in a footnote that mental and emotional distress "may be evidenced by one's

conduct and observed by others," id. at 264 n.20 (emphasis added), nowhere did it require an overt or physical manifestation of emotional distress. Rather, the Court stated that, although a showing of actual injury is necessary, such injury can be proven by "showing the nature and circumstances of the wrong and its effect on the plaintiff."³ Id. at 263-64. See also Balistrieri, 981 F.2d at 930, 931-932, citing Carey v. Piphus:

[A] court may not presume emotional distress from the fact of discrimination. A plaintiff must actually prove that he suffers from emotional distress and that the discrimination caused that distress.

. . .

[I]n determining whether the evidence of emotional distress is sufficient to support an award of damages, we must look at both the direct evidence of emotional distress and the circumstances of the act that allegedly caused that distress.

Defendants also cite two civil rights cases and suggest that because emotional distress damages were not awarded in these two cases, they should not be awarded in the instant case. However, these cases are readily distinguishable. In Dougherty v. Barry, 604 F. Supp. 1424 (D.D.C. 1985), and Spence v. Board of Educ. of Christina Sch. Dist., 806 F.2d 1198 (3d Cir. 1986), both First Amendment cases, the courts noted that the plaintiff's testimony was "brief" and "limited" and that the courts would have had to speculate as to the extent of the injury suffered. Dougherty, 604 F. Supp. at 1443; Spence, 806 F.2d at 1201. Indeed, the Spence

³ The Court also noted that "an award of damages must be supported by competent evidence concerning the injury." 435 U.S. at 264 n.20.

court specifically noted that it was not deciding whether a verdict for emotional distress may ever be supported solely by a plaintiff's own testimony, but rather, it had merely decided that on the facts of the case before it, the evidence was insufficient to justify the jury's award. 806 F.2d at 1201.

In this case, however, the facts detailed in Galloway's affidavit are neither brief nor limited. No speculation is required to reach the conclusion that Galloway was substantially injured. For example, Galloway explains:

My feelings of rejection and dejection lasted many weeks....I felt that the Court was telling me that I was not worthy of participating as a citizen, that I was incapable and incompetent to make judgments. I felt the same denial of self worth and sense of alienation that I experienced as a young person in a segregated society when I was denied access to restaurants and movie theaters because I am black. I realized that I was considered not as a person, but solely as a member of a minority group, judged on the basis of a single physical trait.

For weeks, I was fixated on the incident and became irritable, hostile, and aggressive. It became my sole topic of conversation. My family and personal relationships suffered.⁴

Moreover, as discussed above, many circuit courts have held that the type of emotional distress and mental anguish described in Galloway's affidavit is sufficient to support an award of compensatory damages in civil rights cases.

Galloway's affidavit amply demonstrates that he endured substantial emotional pain and mental anguish. Neither in this case, nor in any other under section 504 or title II of the ADA,

⁴ Galloway aff. at 2.

should the overt or physical manifestation of emotional injury be required before emotional distress damages are awarded. Galloway should be compensated for the indignity, humiliation, stigmatization, and emotional distress of being prohibited, because of his disability, from exercising one of the most important privileges and duties this country asks of its citizens.

III. Conclusion

The Court should hold that neither an overt nor physical manifestation of emotional injury is necessary to establish an emotional distress claim under Section 504 or title II of the ADA.

Dated: Washington, D.C.

May __ , 1993

Respectfully submitted,

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