

Wickpatrick



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Harold Darefsky

File: B-223670

Date: May 4, 1987

DIGEST

An Army employee who had filed a religious discrimination complaint returned from Europe to the United States and resigned. To resolve the complaint, the Army negotiated a settlement agreement providing for reinstatement to an overseas position without a break in service, and backpay retroactive from the date of resignation to the date of reinstatement. The backpay award may include an overseas living quarters allowance between the date the employee left Europe and the date of his reinstatement.

DECISION

The issue presented in this matter is whether the United States Army, to resolve a complaint of religious discrimination, may properly provide in a settlement agreement with Mr. Harold Darefsky a backpay award which includes an overseas living quarters allowance for the period following his return to the United States from his overseas duty station and his resignation from his overseas position.^{1/} We conclude that inclusion of the allowance in the award is proper.

BACKGROUND

Mr. Darefsky was employed in a civilian position with the Army in Europe. Apparently, while in that position he filed a complaint against his employer of religious discrimination. In an administrative report the Chief Counsel, United States Army Troop Support Agency, stated that Mr. Darefsky returned to the United States and resigned from his position after he had been informed that an extension of his overseas tour would not be granted. The Chief Counsel reported further that the Army Civilian Appellate Review Agency, European Region, found that religious

^{1/} An official of the United States Army Troop Support Agency, Fort Lee, Virginia, requested our decision.

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discrimination had occurred against Mr. Darefsky and that reprisal had occurred against him for engaging in a protected activity, which we understand to be his prosecution of his discrimination complaint. The Appellate Review Agency also recommended that remedial action be taken.

The Commander, United States Army Troop Support Agency, concurred in the Appellate Review Agency's findings and recommendations. As a remedy, the Troop Support Agency negotiated an informal settlement agreement with Mr. Darefsky. The agreement provides that he is to be reinstated without a break in service to a position within the European Commissary Region, and that he is to receive retroactive backpay and allowances from the date he resigned from the Army to the date of reinstatement. The agreement also provides that an overseas living quarters allowance is to be included in the backpay award under the agreement if the Comptroller General of the United States determines that the living quarters allowance can lawfully be paid. The recommended living quarters allowance is in the amount that would have been paid had Mr. Darefsky stayed in Europe and is for the period between the date he left Europe and his reinstatement.

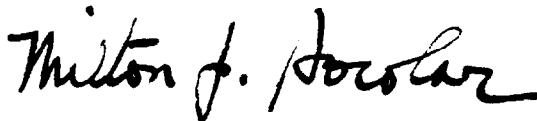
The United States Army Troop Support Agency submitted the question of whether the living quarters allowance should be included in the backpay award because of the factual distinctions between Mr. Darefsky's case and the circumstances in our decision Norma J. Raymond, 59 Comp. Gen. 261 (1980), and the United States Court of Claims' decision in Urbina v. United States, 428 F.2d 1280 (Ct. Cl. 1970). In both of those decisions backpay awards which included overseas living quarters allowances were approved as remedies under the Back Pay Act, 5 U.S.C. § 5596, for unjustified and unwarranted personnel actions in discharging the employees stationed overseas, even though they subsequently returned to the United States. The Chief Counsel points out that in the present case, Mr. Darefsky was not discharged but instead left Europe and resigned after he returned to the United States. He further notes however that the backpay agreement in this case is to settle a discrimination complaint where there has been a finding of discrimination and reprisal.

DISCUSSION

As the Army notes, it has been held that an overseas living quarters allowance is properly included in the backpay award of a reinstated overseas employee who was wrongfully discharged even though the employee returns to the United States from his or her overseas position after the

discharge. The reason for this is that living quarters allowances are payable to employees stationed overseas and under the Back Pay Act, 5 U.S.C. § 5596, the employee is to receive an amount equal to the pay, allowances, or differentials that he or she would have received had the unjustified personnel action not occurred. See Norma J. Raymond, 59 Comp. Gen. 261, and Urbina v. United States, 428 F.2d 1280, supra. Those cases differ from Mr. Darefsky's situation in that he was not formally discharged, but instead he returned to the United States and resigned after being informed that his overseas tour would not be extended. The Army processed Mr. Darefsky's discrimination complaint under section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16. The Equal Employment Opportunity Commission has held that if an employee resigns, reinstatement and backpay are inappropriate remedies for Title VII discrimination unless the resignation is, in effect, involuntary because of a constructive discharge by the employer. See Equal Employment Opportunity Commission Decision 84-1, November 28, 1983, 33 Fair Employment Practice Cases 1887. The Commission has found that a constructive discharge occurs where the employee's resignation was precipitated by the employer's unlawful employment practices. Equal Employment Opportunity Commission Decision 84-1, supra. Compare Young v. Southwestern Savings Association, 509 F.2d 140 (5th Cir. 1975), involving a constructive discharge based on religious discrimination.

In this case in reaching the settlement agreement which includes reinstatement with back pay retroactive to the date of discharge, we assume that the Army considered that Mr. Darefsky's return to the United States and resignation could be considered involuntary and precipitated by unlawful employment practices. In this event, we have no objection to including an overseas living quarters allowance in the back-pay award since payment of this allowance is consistent with the "make whole" purpose of backpay.



Acting Comptroller General
of the United States