

Appeal History:

Appealed to District Court on 7/20/99

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

SHARON RED DEER and
LYLE GILGEN

Bankruptcy No. 97-01193S

Debtor(s).

Chapter 7

DECISION RE: TRUSTEE'S MOTION TO TURN OVER

Donald H. Molstad, trustee, asks the court to order debtor Sharon Red Deer to turn over \$40,000.00 from the settlement of an employment discrimination action. Red Deer resists the motion. Hearing was held July 14, 1999 in Sioux City. This is a core proceeding under 28 U.S.C. § 157(b)(2)(E). The trustee appeared at the hearing on his own behalf. Sharon Red Deer appeared *pro se*.

During December 1996, Red Deer filed an application with the Cherokee County sheriff to be hired as a deputy. There was a job opening for a deputy in January 1997, but Red Deer was not given an interview. On February 5, 1997, she filed a complaint against the county with the Iowa Civil Rights Commission. Her primary complaint was that the failure to interview her was discriminatory.

Another deputy position became available in February 1997. Again Red Deer was not called for an interview. After a third deputy position opened up in April 1997, Sheriff Al Bofenkamp sent Red Deer a letter on April 23, 1997 offering her an interview. It was on April 23, 1997 also that Red Deer filed her chapter 7 bankruptcy petition.

Red Deer was interviewed by Sheriff Bofenkamp on April 28. On May 20, 1997, he sent Red Deer a letter telling her that he had filled the position with another applicant.

On July 1, 1997, Red Deer filed a complaint against Cherokee County in the United States District Court for the Northern District of Iowa, alleging that the county, in not hiring her, had violated federal and state laws prohibiting employment discrimination on account of age, gender, and race. Red Deer is a female native American who is over the age of 40. She alleged also that the failure to hire was in retaliation for her complaints against county employment practices. The complaint alleged that the discrimination began on or about January 28, 1997. That date was alleged because it was the approximate time that the county had filled the first deputy opening after Red Deer had filed her application.

Although her claims against the county were not shown in her bankruptcy schedules, she disclosed the dispute to the trustee at the meeting of creditors on June 2, 1997. Trustee Molstad corresponded with Martha McMinn, Red Deer's lawyer, in an attempt to assert the bankruptcy estate's rights to all or some of the discrimination claims. McMinn testified that she was never "clear" as to the basis for the trustee's claim. There is no evidence that the trustee contacted the county about his belief that some or all of the claims belonged to Red Deer's bankruptcy estate.

The county denied any discrimination. Red Deer and the county settled the suit in February 1999, entering into a written settlement agreement. The county agreed to pay \$40,000.00 in settlement of all claims. Section 1(a) of the agreement states that Red Deer was releasing the county from all claims "arising out of or in any way relating to [Red Deer's] unsuccessful applications for employment" (emphasis added). The funds were to be delivered to McMinn. The parties agreed to an allocation of the settlement money. A check for \$23,000.00 was to be paid to Red Deer for "alleged damage sustained from emotional distress." (Exhibit 2, ¶ 7). A check for \$3,000.00 was to be paid to Red Deer for back pay. Id. A third check, for \$14,000.00, was to be paid to McMinn for attorney's fees and costs. Id. The money was paid, and the case was dismissed. Red Deer has spent all the money she received.

The trustee filed his turnover motion under 11 U.S.C. § 542. He seeks to recover the settlement money or its value from Red Deer. He is not seeking, in this proceeding, to avoid, under 11 U.S.C. § 549, the transfer of Red Deer's claims. He contends that at least some of the settlement money was attributable to pre-bankruptcy discrimination claims. He concedes that allocation of the settlement payments among the claims is difficult. He argues that all the settlement money should be turned over by Red Deer, and that Red Deer can later file a claim against the estate for any amount attributable to post-petition discrimination. He would put the burden on Red Deer to prove a proper allocation of the settlement money between her pre-petition and post-petition claims.

Red Deer says that despite the allegations in her discrimination complaint, all the settlement monies were attributable to post-petition discrimination. She says this is so because all damages were sustained only after she was notified in writing on May 20, 1997 that she would not be hired for the third deputy position.

The burden of proof in a turnover proceeding is on the trustee. Evans v. Robbins, 897 F.2d 966, 968 (8th Cir. 1990). The burden of going forward with the evidence is also on the trustee. Id. He must establish a *prima facie* case, establishing by clear and convincing evidence that the property is part of the bankruptcy estate. Id. If he does so, the burden of going forward shifts to the other party. Id. The ultimate burden is always on the trustee, but "[t]he quantum of evidence necessary to satisfy the trustee's burden of persuasion will necessarily vary according to the circumstances of individual cases." Id., citing Gorenz v. Illinois Dept. of Agriculture, 653 F.2d 1179, 1184 (7th Cir. 1981).

The trustee has shown by clear and convincing evidence that the debtor compromised two pre-petition claims arising out of Cherokee County's failure to hire her when sheriff's department openings became available in January and February 1997. The debtor settled also a claim for discrimination arising out of the county's failure to hire her in May 1997, after the bankruptcy was filed.

The difficulty is in allocating the settlement among the three claims. The county denied any liability, and the matter was settled without trial. I decline to adopt the trustee's suggestion that the entire settlement be turned over, then leaving the debtor to file a claim against the estate to prove the property is not property of the estate. This is the proceeding to determine what part of the settlement is property of the estate, and the burden of proof for this proceeding is stated above.

I also do not agree with debtor's suggestion that the only claim that had value or that produced a monetary settlement was the claim based on the failure to hire after the April 28 interview. The mere fact that Red Deer was granted an interview and then rejected for the position by letter did not, in and of itself, make the discrimination case stronger for the third incident. There were three hiring decisions involving Red Deer that were made by the county. The civil action filed by her was based on all three. The county settled all three. The evidence is insufficient to allocate precisely the settlement to the three claims. There is no basis for allocating the entire settlement to either the first two, pre-petition incidents, or the third, the post-petition incident. I will, therefore, allocate the settlement equally among the three incidents.

Red Deer received \$26,000.00 in settlement monies. I allocate \$17,333.32 to the two pre-petition claims and \$8,666.68 to the post-petition claim. She will not be required to turn over money that was paid to her attorney rather than to her. As Red Deer spent the settlement money, the court may order her to turn over the value of the money, which is \$17,333.32. 11 U.S.C. § 542(a). The clerk will enter judgment for the turnover of that amount.

IT IS ORDERED that the trustee's motion for turnover is granted in part and denied in part. The debtor, Sharon Red Deer, shall within 10 days of the date of this order turn over to the trustee the sum of \$17,333.32. Judgment shall enter accordingly.

SO ORDERED THIS 20TH DAY OF JULY 1999.

William L. Edmonds
Chief Bankruptcy Judge