

DAMAGES ISSUES: PROVING THE PAST AND PREDICTING THE FUTURE

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I. ECONOMIC DAMAGES

A. Back pay - The amount that Plaintiff would have earned from her employment had s/he not been terminated from the date of termination to the date of trial. Quinlan v. Curtiss-Wright Corp., 425 N.J. Super. 335, 355 (App. Div. 2012).

1. Mitigation of Back Pay - Back pay is reduced by the amount earned or could have earned had s/he used diligent efforts. *Id.* at 356-7.

i. Model Jury Instruction 2.33 (A)(3) - The burden is upon the defendant to prove a failure to mitigate.

ii. When does back pay end? - Good question. Different cases have yielded different results:

Quinlan - All pay the plaintiff would have been earned less actual earnings.

But see Cuevas v. Wentworth Group, 2014 N.J. Super. Unpub. LEXIS 2237 (App. Div. Sept. 15, 2014), where this formula backfired. Plaintiff became re-employed at a lower salary, but in years two and three made more than at former employer. Court held no back at all since employee had earned more in total since leaving than he would have earned if he had stayed.

Gimello v. Agency Rent-A-Car, 250 N.J. Super. 338 (App. Div. 1991) - Plaintiff made less money in years 1, 2 and 3, then more money in year 4, then less money again in year 5. Court held that back pay ends when a comparable or financially better job is obtained.

Model Jury Instruction 2.33 - back pay can also be reduced if plaintiff lowered his/her sights too early and unreasonably took a lower paying job.

- However, unemployment compensation and other unearned income does not cause a reduction in back pay. 2.33(A)(8).

2. Potential Experts for Back Pay. Are they needed?

- Economist to calculate total back pay?

- Vocational expert to opine on quality of mitigation efforts?

B. FRONT PAY

“Front pay” projects and measures the ongoing economic harm, continuing after the final day of trial, which may be experienced by a plaintiff who has been wrongfully discharged in violation of anti-discrimination laws. Donelson v. DuPont Chambers Works, 206 N.J. 243, 251 n. 9 (2011); Quinlan v. Curtiss-Wright Corp., 425 N.J.Super. 335, 350 (App. Div. 2012).

While the defendant has the burden of proving that plaintiff failed to mitigate her back pay, the plaintiff bears the burden of proving by a preponderance of the evidence, (1) what s/he would have earned had s/he not suffered the wrong allegedly committed by [Defendant], (2) how long s/he would have continued to receive those earnings, and (3) a reasonable likelihood that s/he will not be able to earn that amount in the future, such as through alternative employment. Quinlan., Model Jury Instruction 2.34.

Front pay is an alternative remedy to the reinstatement of an employee who has been discharged or forced to resign because of an employer's discrimination, in situations where reinstating that worker to a job with the employer is either not appropriate or not feasible, because of mutual animosity or other factors. Unlike back pay, which is legal in nature, front pay is equitable in nature.

Talking points:

- Front pay may be decided by a jury. Cavuoti v. N.J. Transit Corp., 161 N.J. 107, 135, 735 A.2d 548 (1999); Baker v. Nat'l State Bank, 353 N.J. Super. 145, 161, 801 A.2d 1158 (App.Div.2002). But is a plaintiff better off sometimes presenting front pay to the judge as part of a reinstatement motion? N.J.S.A. 10:5-17; Granzel v. City of Plainfield, 279 N.J. Super. 104 (App. Div. 1995)(reinstatement under LAD); N.J.S.A. 34:19-5(b) (reinstatement under CEPA - mandatory).

- Any really good front pay case is also a good instatement or reinstatement case; What makes for a good front pay case?

Factors

- Plaintiff's age;
- Type of employer;
- Specific circumstances, including circumstances initiating suit.

- Front pay will ultimately be decided by a judge in every case anyway, either by way of remittitur or additur motion or by way of appeal.

- A judge can award front pay where reinstatement is rejected or impractical. If a judge rules that reinstatement is the appropriate remedy, the Judge may be more

amenable to a fairer front pay award.

1. FRONT PAY EXPERTS - Recommended for all “good” front pay cases.

Since plaintiff has the burden of proving the unknown circumstances of the future, and since mathematical factors such as present value must be calculated, only an expert can successfully present these difficult to understand calculations.

Elements that must be considered (Model Jury instructions):

- what plaintiff would have earned had s/he not suffered the wrong allegedly committed by defendant. Plaintiff has the burden to prove, by a preponderance of the evidence, his/her gross income and the probable loss of future earnings;
- how long s/he would have continued to receive those earnings;
- a reasonable likelihood that s/he will not be able to earn that amount in the future;
- In deciding how much your verdict should be to cover future lost earnings, think about those facts discussed regarding past earning losses, including the nature, extent and duration of injury. Consider Plaintiff's age today, the level of Plaintiff's former job with Defendant, the level of compensation that Plaintiff earned from Defendant, Plaintiff's general state of health before his/her employment with Defendant ended, how long you reasonably expect the loss of income to continue, and how much Plaintiff can earn in any available job that he/she physically will be able to work. Obviously, the older the plaintiff is, the higher level the plaintiff's job was, and the more the plaintiff earned, the longer it is likely to take the plaintiff to find comparable replacement employment. However, the time period covering Plaintiff's future lost earnings cannot go beyond that point when it was expected that he/she would stop working because of retirement, had he/she not been injured.

2. UNCERTAIN FUTURE LITIGATING FRONT PAY -

The Quinlan decision set forth factors, but did not explain how those factors can be met, leaving the matter wide open for future litigation.

Regression Analysis: Economist Christopher Baum's scholarly works can be used to create a measurement regarding the likelihood that plaintiff's future employment with the defendant would have ended for other reasons.

The Baum analysis is based upon averages, and can be affected by factors such as the nature of the employment and employer. In other words, not every job is average, and not every

employer is average in terms of attrition and lay-offs.

Other arguments that can be used to increase front pay (no known surveys to date):

- What is the effect on future employment because the employee now has to tell prospective employers that s/he was fired by his/her prior employer?;
- What is the likelihood of getting rehired depending upon age?;
- What is the likelihood that other prospective employers will also discriminate against the employee for the same reasons that the employee was terminated by this employer?;
- Is it unlikely that the employer would discriminate again against an employee who has successfully sued (this argument cuts both ways)?.

II. EMOTIONAL DISTRESS

Damages for emotional distress can be awarded for past and future emotional distress:

N.J.S.A. 10:5-3

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

These emotional distress damages are not “garden variety”. They are emotional damages that are specific to victims of employment discrimination. The term “garden variety” should not be acceptable, and judges using such terms as “garden variety emotional distress” should be corrected and educated. These damages are “statutorily defined”.

An expert is not needed to present emotional distress damages where there has not been treatment and a diagnosis. Tarr v. Ciasulli, 181 N.J. 70, 78-79, 853 A.2d 921 (2004) (citing

Rendine v. Pantzer, 276 N.J. Super. 398, 442, 648 A.2d 223 (App. Div. 1994), *aff'd*, 141 N.J. 292, 661 A.2d 1202 (1995). Emotional distress verdicts in excess of \$500,000 have been affirmed in several cases where there has been no diagnosis or treatment and no expert testimony, beginning with Lockley v. Turner, 344 N.J. Super. 1 (App. Div. 2001)(\$750,000 upheld), and most recently in Cuevas v. Wentworth Group, 2014 N.J. Super. Unpub. LEXIS 2237 (App.Div.Sept. 15, 2014)(\$800,000 and \$600,000 for two plaintiffs upheld).

1. FUTURE EMOTIONAL DISTRESS

“[a]lthough the humiliation, embarrassment and indignity suffered by the LAD plaintiff during the events complained of is obvious, once remedied through a verdict, any claim that those effects will endure so as to support a future award must be proven by credible, competent evidence lest that verdict be the product of speculation.” Battaglia v. United Parcel Service, Inc., 214 N.J. 518 (2013). Essentially, the holding has been interpreted to mean that a plaintiff may only recover an award for future emotional distress if evidence of permanency is offered in the form of an expert opinion.

But see Cuevas v. Wentworth Group, where the Court upheld \$1.4 million in emotional distress without an expert because Plaintiff never raised the issue of Plaintiff’s age or future damages, and therefore the Court would not infer that the jury considered future emotional distress.

Going forward - plaintiffs seeking future emotional distress damages should retain an expert.