DEFENDING THE PLAINTIFF FROM OVERREACHING DISCOVERY

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I. PREVENTING UNNECESSARY MEDICAL/PSYCHOLOGICAL EXAMS

Federal Rule of Civil Procedure 35(a)

Physical and Mental Examinations of Persons

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Two Requirements for compelling physical or psychological exam:
(1) The Plaintiff's mental or physical condition must be "in controversy"
(2) The party seeking discovery must show "good cause"

The Seminal Case - Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964)

"Rule 35, therefore, requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause,' which requirements, as the Court of Appeals in this case itself recognized, are necessarily related. 321 F.2d, at 51. This does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination. Nor does it mean that an evidentiary hearing is required in all cases. This may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing. It does mean, though, that the movant must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule." Schlagenhauf, 379 U.S. at 119.

A. The "In Controversy" Requirement

· The burden of proving that the Plaintiff's mental state is "in controversy" in upon the Defendant. Womack v. Stevens Transport, Inc., 205 F.R.D. 445, 447 (E.D.Pa.2001).

There are two primary ways in which the mental or physical condition of a plaintiff can be placed "in controversy" in the context of Rule 35. The plaintiff can place his or her mental or physical condition in controversy through representations made during the course of the

litigation. Bowen v. Parking Authority of City of Camden, 214 F.R.D. 188 (D.N.J. 2003). Although what is contained in the pleadings may be sufficient, it is not necessarily so. *See* Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). Another party may also place the plaintiff's mental or physical condition in controversy by way of defense to the underlying action. "In cases where the defendant seeks to make the plaintiff's mental state an issue, the defendant bears the burden of showing that the plaintiff's mental state is in controversy." Womack v. Stevens Transport, Inc., 205 F.R.D. 445, 447 (E.D.Pa.2001).

Courts that have ordered plaintiffs to undergo mental examinations, in addition to a claim of emotional distress, have found one or more of the following:

1. a cause of action for intentional or negligent infliction of emotional distress;
2. an allegation of a specific mental or psychiatric injury or disorder;
3. a claim of unusually severe emotional distress;
4. plaintiff's offer of expert testimony to support a claim of emotional distress; and/or
5. plaintiff's concession that his or her mental condition is "in controversy" within the meaning of Rule 35(a). *See* Turner v. Imperial Stores, 161 F.R.D. 89 (S.D. Cal. 1995)(case attached).

Cases holding that Plaintiff did not put mental state into controversy

Bowen v. Parking Authority of the City of Camden, 214 F.R.D. 188 (D.N.J. 2003)

Because Plaintiff did not assert an ongoing mental injury, nor a psychiatric disorder, and because Plaintiff did not assert an independent cause of action for intentional or negligent infliction of emotional distress, the Plaintiff has not placed his mental status “in controversy.” (This Court did order the production of psychological records (*see below*).

Turner v. Imperial Stores, 161 F.R.D. 89 (S.D. Cal. 1995)

Employee merely claimed damages for emotional distress allegedly suffered as result of employer's actions alleged in complaint, and employee did not bring cause of action for intentional or negligent infliction of emotional distress, did not allege specific psychiatric injury or disorder resulting from employer's conduct, did not claim to suffer from unusually severe emotional distress, and did not intend to offer expert testimony regarding her emotional distress.

Bridges v. Eastman Kodak Co., 850 F. Supp. 216 (S.D.N.Y. 1994)

Requirements for mental or physical examination of party, that party's mental or physical condition be in controversy and that good cause exist for issuance of order, are not met by mere relevance of mental examination to issues in case; rather, movant must make affirmative showing that each condition as to which examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination. (This Court did permit limited depositions of treating psychologist).

B. Good Cause - Automatically follows “In Controversy”

Although Courts have enunciated two requirements - “In Controversy” and “Good Cause”, Courts who have found mental state to be “in controversy” have all found “good cause”, and courts who have found mental state not to be “in controversy” and not found the need to examine “good cause” since the matter was not in controversy. Thus, in actually, the “ in

controversy" question is the *sine qua non* for deciding the issue of mental examination. The issue of "good cause", as distinguished from "in controversy" was discussed in an unpublished case"

LeFave v. Symbios, Inc., 2000 WL 1644154 (D. Colo. 2000).

Here, plaintiff has asked for damages for pain and suffering, embarrassment and humiliation. Plaintiff has not asserted a separate cause of action for intentional or negligent infliction of emotional distress. Plaintiff does not allege a specific mental or psychiatric injury or disorder, nor does she claim unusually severe emotional distress. Plaintiff has not indicated that expert testimony will be offered to support her emotional distress claims and, plaintiff has not conceded that her mental condition is "in controversy" within the meaning of Fed.R.Civ.P. 35(a). Accordingly, even if defendants had been able to show that plaintiff placed her mental or psychological condition in controversy, defendants cannot meet the good cause requirement of Rule 35.

Practice tips

- Before bringing suit, decide to what extent it will be desirable to introduce evidence of the Plaintiff's injuries and/or treatment;

- An action for intentional infliction of emotional distress may result in insurance coverage, but will permit Defendants total access to psychological records and exam;

- Does the Plaintiff truly have "garden variety" emotional distress, or is their ongoing and permanent psychological injury?

A. TAPE RECORDING AND ATTORNEY ATTENDANCE AT EXAMINATION

Tape Recording and Transcription

Although it is still a minority view, numerous Courts have permitted the Plaintiff to tape record the psychological examination by Defendant's expert. Even fewer have permitted the Plaintiff's counsel to attend the examination. Because the Defendant's expert is not neutral, there is considerable risk that the exam will become a *de facto* deposition, where privileged and irrelevant subjects may be discussed and reported without any knowledge of Plaintiff's counsel. Some courts that have permitted tape recordings:

Zabkowicz v. West Bend Co., 585 F.Supp. 635 (D.C.Wis.1984)

The defendants expert is being engaged to advance the interests of the defendants clearly the doctor cannot be considered a neutral in the case There are numerous advantages unrelated to the emotional damage issue which the defendants might unfairly derive from an unsupervised examination In sum I do not believe that the role of the defendants expert in the truth seeking process is sufficiently impartial to justify the license sought by the defendants Accordingly the plaintiffs at their option are entitled to have a third party including counsel or a recording device at the examination

B.D. v. Carley, 307 N.J. Super. 259, 704 A.2d 979 (App. Div. 1998)

We can well understand that in a psychological or psychiatric examination the presence of counsel could be distracting. But plaintiff has not sought to have her attorney present. She has requested only that a recording device be used.

We determine here that the defense psychologist does not have the right to dictate the terms under which the examination shall be held. This is a discovery psychological examination, not one in which plaintiff is being treated. Plaintiff's right to preserve evidence of the nature of the examination, the accuracy of the examiner's notes or recollections, the tones of voice and the like outweigh the examiner's preference that there be no recording device.

Murray v. Specialty Chemicals Co., 100 Misc.2d 658, 418 N.Y.S.2d 748 (N.Y. Sup., 1979).

Court permitted a stenographer to transcribe the interview with Defendant's psychological expert.

Attorney Attendance

Most Federal cases have not permitted tape recording or attorney attendance The reasons given follow several arguments 1 the need for one on one communication between the doctor and the examinee 2 Rule 35 examinations are not meant to be adversarial 3 if opposing counsel cannot be present when the examinee is being examined by his or her own expert then it is unfair to allow the examinee s counsel to be present at the Rule 35 exam and 4 any concerns about the truthfulness or methodology of the examination may be addressed in cross examination Baba Ali v City of New York 1995 WL 753904 at 3 S D N Y Dec 19 1995

Cases permitting attendance or tape recording have recognized the adversarial nature of the interview the Plaintiff s right to preserve evidence the accuracy of the examiner s nnotes and recollections the tone of voice A psychiatrist s ability to violate the attorney client privilege has not been specifically addressed but may provide another compelling argument for permitted attendance and or tape recording

Jakubowski v. Lengen, 86 A.D.2d 398, 450 N.Y.S.2d 612 (1982), a case involving a physical as opposed to a psychological examination, the court noted:

The presence of plaintiff's attorney at such examination may well be as important as his presence at an oral deposition. A physician selected by defendant to examine plaintiff is not necessarily a disinterested, impartial medical expert, indifferent to the conflicting interests of the parties. The possible adversary status of the examining doctor for the defense is, under ordinary circumstances, a compelling reason to permit plaintiff's counsel to be present to guarantee, for example, that the doctor does not interrogate the plaintiff on liability questions in order to seek damaging admissions ... [i]f the attorney's participation intrudes upon the examination, appropriate steps may be taken by the court to provide the doctor with a reasonable opportunity to complete his examination.

A number of states allow a party s attorney to observe a Rule 35 examination *See e g Ragge v MCA Universal Studios* 165 F R D 605 C D Cal 1995 referencing California Code of Civil Procedure 2032 g 1 Jacob v Chaplin 639 N E 2d 1010 Ind 1994 *Langfeldt Haaland v Saupe Enter* 768 P 2d 1144 Alaska 1989 *Rochen v Huang* 558 A 2d 1108 Del Sup Ct 1988

II. PREVENTING DEFENDANTS FROM DISCOVERY MEDICAL/PSYCHOLOGICAL RECORDS

· Discovery of medical and psychological records is governed by Rule 26(b), and not by Rule 35(a), *see* Bowen v. Parking Authority of City of Camden, 214 F.R.D. 188, 195 (D.N.J. 2003). Therefore, the legal analysis relating to discovery of these records is governed by issues of (1) relevance and (2) privilege.

Cases in which Courts have denied access to medical/psychological records

Fitzgerald v. Cassil, 216 F.R.D. 632 (N.D.Cal. 2003).

"a waiver of the psychotherapist-patient privilege should not be narrowly construed, particularly in civil rights cases where Congress has placed much importance on litigants' access to the courts and the remedial nature of such suits."

"Plaintiffs have stipulated that they will not affirmatively rely on any treating psychotherapist or other expert to prove the emotional distress damages suffered by Mr. Fitzgerald and Mr. Yu. The Court notes that, even if the middle ground approach to waiver (i.e., "garden-variety" emotional distress) were applied, no waiver would be found in the instant case. Plaintiffs have not pled a cause of action for intentional or negligent infliction of emotional distress and have not alleged a specific psychiatric injury or disorder or unusually severe emotional distress extraordinary in light of the allegations. Nor have they conceded their mental condition as revealed in the records sought is "in controversy."

Burrell v. Crown Cent. Petroleum, Inc., 177 F.R.D. 376 (E.D. Tex.1997).

Without showing that the mental condition of a plaintiff is somehow at the crux of the case, records reflecting the mental condition are not relevant so as to fall under mandatory disclosure of Rule 26(a)(1)(B). Patterson and Farpella-Crosby allow recovery for emotional harm based on corroborating evidence that may include, but does not have to include, medical records or testimony. If plaintiffs are not going to use medical records or medical testimony at trial in order to prove up the claims for mental anguish, then the court sees no reason why the records must be disclosed. See Farpella-Crosby, 97 F.3d at 809. Accordingly, the court declines to follow the reasoning of Bridges v. Eastman Kodak, 850 F.Supp. 216, 223 (S.D.N.Y.1994), and Ferrell v. Brick, 678 F.Supp. 111, 113 (E.D.Pa.1987).
The plaintiffs have represented to the court that they will not be presenting medical evidence and will not be relying on medical records to pursue or prove their claim. Accepting that as true, the court does not believe the relevance of the plaintiff's medical records justifies voluminous disclosure by the plaintiffs for records not required to be a part of their case. The court is convinced that, under these facts and circumstances, disclosure of the medical records does not fall under the mandatory disclosure provisions of Rule 26(a)(1)(B) or the initial disclosure provisions of Local Rule CV-26(c)(1)(F)(i). Accordingly, Crown's motion to compel signed medical and psychological authorizations is hereby DENIED.

Fritsch v City of Chula Vista 187 F R D 614 S D Cal 1999
(1) psychotherapist-patient privilege is waived only where the patient either calls his or her therapist as a witness, or introduces in evidence the substance of any therapist-patient communication; (2) plaintiff did not waive the psychotherapist-patient privilege by claiming damages for emotional distress; (3) defendants' discovery request for plaintiff's medical records was overbroad; and (4) plaintiff did not place her mental or physical condition"in issue" within the meaning of section of the California Confidentiality of Medical Information Act allowing employer to disclose relevant employee medical information in a suit to which the employer and employee are parties and in which the patient has placed in issue his or her mental or physical condition.

Practice Tips
1. Try to settle the issue of "in controversy" prior to Plaintiff's deposition, as the Plaintiff's testimony alone can provide the basis for production of records and mental exam. *See e.g.*
Thiessen v General Electric Capital Corp 178 F R D 568 D Kan 1998

III. PREVENTING THE PRODUCTION OF PLAINTIFF'S TAX RETURNS

Congress has guaranteed that federal income tax returns will be treated as confidential communications between a tax payer and the government. I.R.C. §6103; DeMasi v Weiss,669 F.2d 114, 119(3d Cir. 1982); Payne v Howard, 75 F.R.D. 465, 469 (D.D.C. 1977); Federal Sav. & Loan Insurance Ins., Corp. v Krueger,55 F.R.D. 512, 514 (N.D.Ill. 1972). Indeed, "public policy favors the nondisclosure of income tax returns." DeMassi v Weiss**,** *supra*; Cooper v Hallgarten & Co. 34 F.R.D. 482, 483 (S.D.N.Y. 1964).

In the case of Payne v Howard, *supra*, the court explained as follows:

> The reason for this protection is straightforward. Unless tax payers are assured that the personal information contained in their tax returns will be kept confidential, they likely will be discouraged from reporting all of their taxable income to the detriment of the government. The opposite is also true. Unless confidentiality is guaranteed, tax payers will likely refrain from using all of the tax-saving measures to which they are lawfully entitled. Payne,*supra* at 469.

A Plaintiff's joint tax returns are discoverable if: (1) it clearly appears they are relevant to the subject matter of the action or to the issues raised thereunder, and (2) there is a compelling need therefor because the information contained therein is not otherwise readily obtainable. Gattegno v. Pricewaterhousecoopers, LLP, 205 F.R.D. 70 (D.Conn. 2001).

"Of course, plaintiff's tax returns include more information than plaintiff's W-2 forms, such as the amount of plaintiff's and her husband's taxable interest, dividend income, tax credits, real estate rental income, deductions and partnership and other income. However, defendant has not shown--nor even argued--that income other than plaintiff's wages and salaries is relevant to this action. Therefore, with respect to plaintiff's wages and salaries, the court finds that defendant

is not entitled to plaintiff's tax returns because plaintiff has shown that such information is available to defendant from other sources, and therefore the second prong of the two-part Cooper test is not satisfied. Moreover, with respect to other types of income, the court finds that defendant is not entitled to plaintiff's tax returns because defendant has not shown that such information is relevant to this action, and therefore the first prong of the two-part Cooper test is not satisfied. Consequently, the motion to compel is denied." *Id.*

See also, Flores v. Albertsons, Inc., Not Reported in F.Supp.2d, 2002 WL 1163623 (C.D.Cal. 2002); Aliotti v. Vessel Senora, 217 F.R.D. 496, 498 (N.D.Cal. 2003); Campione v. Soden 150 N.J. 163, 695 A.2d 1364, (N.J. 1997).

IV. LIMITING DISCOVERY OF INCOME FROM COLLATERAL SOURCES

Employer's attorneys routinely argue that back pay awards should be reduced by unemployment benefits, severance pay and other income received by the employee from collateral sources. Very often, in the absence of a strenuous argument from Employee's counsel, the Trial Judge slashes the award by deducting from back pay the income received from sources other than subsequent employment. Plaintiff's attorneys should never concede mitigation damages, unless the post-employment is truly the result of subsequent employment. The most common reduction occurs from unemployment benefits.

Unemployment Benefits

In a wrongful termination case, there is usually a period of unemployment. The Plaintiff often relies upon this period as the primary source of his or her back pay claim. During the period of unemployment, the employment is usually entitled to, and usually collects unemployment benefits. The Defendant invariably argues that unemployment benefits should be deducted from the back pay award, and Judges nod their head in approval. But unemployment benefits should not be deducted from back pay, and the Plaintiff's attorney should take the offense in limiting the deduction from the Plaintiff's award. There is ample legal authority for this proposition.

U.S. SUPREME COURT

The United States Supreme Court has addressed this issue once, and has ruled that unemployment benefits may not be deducted from back pay awards. In NLRB v. Gullett Gin Co., 340 U.S. 361 (1951), the Supreme Court affirmed the NLRB's decision not to deduct unemployment compensation payments from a back pay award obtained from an employer found to have discriminated on the basis of union membership. In concluding that the NLRB's refusal to deduct the unemployment benefits was permissible, the Supreme Court rejected arguments that such benefits were collateral to the recovery obtained from the employer, and hence, need not be deducted. The Court explained:

> To decline to deduct state unemployment compensation benefits in computing back pay is not to make employees more than whole . . . . Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received. Id. at 364; *see also* Dailey v. Societe Generale, 108 F.3d 451, 459 (2d Cir. 1997).

Unfortunately, Courts have not uniformly followed the Supreme Court's decision for two reasons: (1) confusion as to the applicability of the collateral source doctrine; and (2) failure of Plaintiff's attorneys to property brief and argue against its application.

COLLATERAL SOURCE DOCTRINE

The Collateral Source Doctrine is a common law doctrine that holds that a tortfeasor may not gain a windfall from the reduction from damages of monies received by a Plaintiff from a collateral source. Under the common law, the "collateral source rule" precludes reducing a personal injury award by the amount of any compensation received from a source other than the tortfeasor. Bryant v. New York City Health & Hosps. Corp., 93 N.Y. 2d 592, 605 (1999); Rametta v. Stella, 214 Conn. 484, 489-90 (1990); Sporn v. Celebrity, Inc., 129 N.J. Super. 449 (Law Div. 1974).

In recent years there has been a backlash against the collateral source rule, primarily driven by insurance companies arguing their rights of subrogation. There have ben anti-collateral source statutes in several states including Connecticut, Conn. Gen. Stat. § 52-225a, and New Jersey, N.J.S.A. 2A:15-97. These statutes, however, explicitly only refer to personal injury and malpractice actions, and therefore have no application in a discrimination or wrongful termination action.

The Court in Sporn v. Celebrity, Inc., *supra,* set forth seven reasons why unemployment benefits should not be used by the Defendant to offset back pay awards. The seven reasons listed by the Sporn court are as follows:

> 1. That in addition to providing compensation, there is a "punitive" aspect where a defendant has wrongfully, though not necessarily willfully, breached a contact and that defendant must pay, rather than the general public. This is an aspect of the collateral source rule which recognizes as one of the consequences a punitive aspect, but not necessarily considered as punitive damages.
>
> 2. That to allow mitigation would result in a windfall to defendant and that it is better to allow plaintiff to profit than to lighten the obligation of a defendant by the reduction of his liability.
>
> 3. That defendant should not profit from a benefit administered by the State as a socially desirable program.
>
> 4. That even in workmen's compensation a tortfeasor cannot obtain reduction for benefits paid under a state compensation plan, although by statute the employer's workmen's compensation insurance carrier may get subrogation in any third-party action.
>
> 5. It would be inconsistent to relieve the contract-breaking employer of responsibility for his actions. (It could be argued, however, that once the discharged employee has received the benefits to which he is entitled, the liability of the employer for wrongful discharge should be tried at the suit of either the employer or the compensation fund, and the judgment applied to

> reimbursement of the fund with any excess of recovery going to the employee. This would be a policy question for the legislature.)
>
> 6. That to allow such mitigation would vitiate the purpose of unemployment compensation legislation in New Jersey, and since there is no provision for subrogation in New Jersey, this would make it less expensive for employers to breach a contract as to persons covered by such program, than it would for those not covered by unemployment compensation.
>
> 7. That payments from the unemployment compensation fund should not be regarded as wages received from employment. (Sporn at 455-56.)

The Sporn decision was expressly ratified by the New Jersey Supreme Court in N.J. Ind. Properties v. Y.C.& V.L., Inc., 100 N.J. 432-33. The New Jersey Supreme Court has also expressly included the prohibition against deduction of unemployment benefits in its Model Jury Instructions. The New Jersey Model Jury Instructions for employment law, section 2.33(A)(8), states in its entirety:

> Although the back pay award should be reduced from any actual earnings, it should not be reduced by any unemployment benefits or other unearned income the Plaintiff may have received. [Cases: *Sporn v. Celebrity, Inc.,* 129 *N. J. Super.* 449, 453-60(Law Div. 1974): *Craig v. Y&Y Snacks, Inc.,* 721 *F. 2d 77* (3rd Cir. 1983).]

The Model Jury Instructions follow the case law of both New Jersey State and Federal cases. The New Jersey Supreme Court, in N.J. Industrial Properties, Inc. v. Y.C.& V.L., Inc., 110 N. J. 432 (1985), explained that New Jersey courts have tended to permit what might appear as a form of double recovery by a Plaintiff under such circumstances rather than allow reduction of damages to be paid by the Defendant wrongdoer. N. J. Industrial Properties at 448.

As noted by the Model Jury Instructions, Federal courts have also ruled that unemployment benefits may not be deducted from back pay awards. The Third Circuit addressed this matter in detail in Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 81-85, (3rd Cir.

1983). This policy by federal courts to disallow the deduction of unemployment from discrimination awards was reaffirmed by the District Court of New Jersey in Davis v. Rutgers Casualty Ins. Co., 964 F.Supp. 560, 574 (D.N.J.1997). (*Also citing* Abrams v. Lightolier, Inc. 841 F.Supp. 584, (3rd. Cir. 1995); Gelof v.Papineao,829 F.2d 452, 454-55 (3rd. Cir. 1987).

The Second Circuit has not quite been as clear on the issue. In Dailey v. Societe Generale, 108 F. 3d 451 (2d Cir. 1997), the Second Circuit squarely addressed the issue of deductibility of unemployment benefits from back pay awards, and concluded with a definite maybe. The opinion features a scholarly recitation of Federal law and the history of the collateral source doctrine. The Court cites the Supreme Court's decision in Gullett Gin, *supra*, but also cites the contrary opinion by the Second Circuit in EEOC v. Enterprise Ass'n Steamfitters Local No. 638, 542 F.2d 579 (2d Cir. 1976), where the Second Circuit affirmed the Court's deduction of unemployment benefits. Without giving Trial Courts any further guidance other than the confusing and conflicting legal history, the opinion explicitly states that the decision whether or not to deduct unemployment benefits rests in the sound discretion of the Trial Court.

Based upon the legal history and the logical underpinnings of the collateral source rule, Plaintiffs should affirmatively argue in all cases that unemployment benefits should not be deducted from back pay awards.

SEVERANCE PAY

Defendants also often argue that severance pay should be deducted from back pay awards. At first blush, the Defendants' appear persuasive when they argue that collateral source doctrine should not apply to severance pay, since severance is paid by the employer, and not by a collateral source. But severance pay is not earned income - it is either an entitlement or a benefit

earned during years of employment, and therefore it should not be deducted from any back pay awards.

Severance pay is considered a benefits, and it is specifically included as a benefit covered by ERISA. 29 U.S.C. §1002(1)(B)(i). Severance pay has been described by the New Jersey Appellate Division as deferred compensation, in lieu of wages, earned in part each week the employee works, and payable at some later time. Baker v. Department of Labor, 183 N.J. Super. 29, 34 (App. Div. 1982). For this reason, the receipt of severance does not disqualify a New Jersey claimant from receiving unemployment compensation during any of the weeks following the employee's layoff. Dingleberry v. Board of Review, 154 N.J. Super. 415, 418 (App. Div. 1997).

The Third Circuit recently refused to deduct severance payments from a back pay award in a WARN act case. In Ciarlante v. Brown & Williamson Tobacco Co., 143 F. 3d 139 (3d Cir. 1998), the Court stated:

> We find B&W's argument to be without merit. The severance payments made by B&W are not "wages" as contemplated by 29 §2104(a)(2)(A), but rather ERISA payments that the company was already legally obligated to make regardless of the work the sales representatives performed. The fact that these happened to be set at the level of the sales representatives' wages, is irrelevant. The payments made by B&W were not made in exchange for work that the sales representatives would have performed during the period of the violation. Accordingly, they are not "wages" according to 29 U.S.C. §2104(a)(2)(A), and the District Court was correct in refusing to subtract these amounts from the damages award. 143 F. 3d at 152.

The key to making an argument for the non-deductibility of severance is to establish that the employer had a policy, procedure, or practice of paying severance to terminated employees. Thus, you can establish that the employee earned the severance while employed, especially if the amount of severance is in any way tied to the employee's length of service.

Pension benefits, as well as severance benefits, can be considered collateral benefits, even though the benefits are paid by the employer. A test has been enumerated by the Fifth and Sixth Circuits for the determination of whether a benefit is collateral. The five-part test is as follows:

> (1) whether the employee makes any contribution to funding of the payment; (2) whether the benefit plan arises as the result of a collective bargaining agreement; (3) whether the plan and payments thereunder cover both work-related and nonwork-related injuries; (4)whether payments from the plan are contingent upon length of service of the employee; and (5) whether the plan contains any specific language contemplating a set-off of benefits received under the plan against a judgment received in a tort action. Phillips v. Western Company of North America, 953 F. 2d 923, 932 (5th Cir, 1992), *accord.*, Hamlin v. Flint, 165 F.3d 426, 435 (6th Cir. 1999).

Although the Phillips case involved disability benefits, the Hamlin case applied the test for Title VII and ADEA cases. The Hamlin case is included with this outline in its entirety as it is the most comprehensive analysis supporting the proposition that pension and severance benefits should not be deducted from back pay awards.