INCREASING PLAINTIFF'S DAMAGES BY LIMITING OFFSETS AGAINST BACK AND FRONT PAY AWARDS

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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.

CONCLUSION

Protect your clients' back pay awards by strenuously arguing against any deductions other than actual wages earned from subsequent employment. Precluding testimony regarding these benefits can be achieved through a Motion in Limine. Take the offensive on this issue rather than arguing the issues at Trial, after the evidence of collateral payments has already been introduced.