Post-Conference Special Session

WHAT’S IT WORTH?

CASE VALUATION WORKSHOP

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As soon as an employment lawsuit is filed, in-house and outside defense counsel are almost immediately faced with a single, fundamental question: what is the case worth? As much art as science, answering this critical question comes down to answering two even more basic questions: what are the chances of losing the case; and what are the potential monetary damages faced if the employer loses?

Evaluating these questions raises an especially high amount of risk for defendants. A 2008 study of thousands of cases which proceeded to trial or arbitration after failed settlement negotiations found high levels of decision-making error on both sides: more than 60% of plaintiffs would have fared better if they had settled rather than gone to trial; while defendants were wrong in their assessments only approximately 24% of the time. See “Let’s Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement negotiations,” Journal of Empirical Legal Studies, vol. 5, no. 3, 551-591 (2008). However, the average cost of a plaintiff’s decisional error was generally under $50,000, while the average cost of a defendant’s decisional error was in the range of almost a million dollars.

The purpose of this paper is to take a hard look at the basic questions involved in case valuation, and to provide a framework for properly valuing the risks involved in single-plaintiff employment litigation.

I. BASIC RISK ASSESSMENT IN SINGLE-PLAINTIFF EMPLOYMENT LITIGATION

Every now and again, an employment case will be filed with a fatal legal flaw, such as a clear violation of the applicable limitations period, or an unrefuted failure to exhaust administrative remedies. In such cases, a motion to dismiss should obviously be pursued. But assuming that a motion to dismiss is unavailable, risk assessment in single-plaintiff employment litigation will require examining two different issues: what is the chance of prevailing on summary judgment; and what is the chance of prevailing at trial (or arbitration)? Answering these two questions for all types of single-plaintiff employment cases would obviously require several tomes of writing, and this type of exhaustive analysis is beyond the scope of this paper. But a few basic suggestions for evaluation can be offered.

Evaluating the chances of prevailing on summary judgment first requires an honest assessment of the facts and evidence upon which an employer will rely. Although this assessment must be constantly updated and revised as discovery proceeds (after a deposition goes unexpectedly poorly, for example), an initial assessment is possible at the outset of a case following review of documents and witness interviews.

Any assessment of the facts for summary judgment purposes, of course, will be tied inextricably with the legal standards ultimately to be applied on summary judgment. For example, in a discrimination case, are there applicable comparators that give rise to any implication of discrimination? In a failure to accommodate case, is there clear evidence of a plaintiff’s refusal to engage in the interactive process, or medical evidence that plaintiff’s limitations prevent him or her from performing the essential functions of the position at issue even with the requested accommodation? The possible legal standards applicable are of course as varied as the type of employment claims which can be brought, but factual assessment should always be matched up with the applicable standards in order to assess the chance of prevailing on summary judgment.
The second issue to consider in evaluating the chances of prevailing on summary judgment is whether disputes of material fact exist. In a classic he-said she-said harassment situation, for example, summary judgment may be extremely difficult to achieve as the competing stories, with nothing more, will require submitting the factual disputes between the two contradictory stories to a jury. In contrast, if there is no question that a plaintiff failed to report the alleged harassment and take advantage of the complaint procedures offered by the employer, however, then summary judgment becomes possible. Once again, the summary judgment assessment ties the facts together to the applicable legal standard.

In evaluating the existence of potential disputes of material fact, the best evidence to rely upon is admissions by plaintiff him-or-herself. Such admissions could be in writing (such as in emails), in a previous sworn statement, or obtained though deposition.

The final issue which must be considered in evaluating the chances of prevailing on summary judgment is an assessment of the forum. In most states, for example, summary judgment is easier to win in federal court than in state court, and certain Judges are more employer friendly (and summary judgment friendly) than others. The identity and jurisdictional location of your Judge can impact the summary judgment assessment tremendously.

In contrast, assessing the likelihood of success at trial (or arbitration) involves a very different evaluation than assessing the chances of prevailing at summary judgment. Likelihood of success at trial will often turn on the credibility and, quite frankly, relative likability of the parties and key witnesses. An old adage says that a jury will rule in favor of an employer that has treated their employee fairly, but will look for a reason to rule against the unfair employer. This assessment is thus a far cry from merely applying legal standards. Data analytics tools can assist with this, and will be discussed in section IV, infra.

II. MONETARY DAMAGES AVAILABLE IN DISCRIMINATION AND RETALIATION CASES

Too often, Defendants focus solely on the liability determination, and fail to assess potential damages fully and honestly until after summary judgment has failed. But assessment of potential monetary damages can help to set the parameters of valuation, and should therefore be analyzed early on, rather than waiting until the courthouse steps.

Other monetary remedies may be available under various state statutes and common law theories, but, for the most part, an examination of monetary damages available under federal employment law will track closely, if not always exactly, most state claims as well.

Defendants should not forget that certain forms of nonmonetary injunctive relief might also be available to prevailing plaintiffs in employment cases, such as reinstatement, return of seniority credit, and the like. The possibility of these nonmonetary injunctive claims should not be ignored in valuing claims, but because they tend to be so case-specific, a discussion of all their implications is beyond the scope of this paper, and we will therefore use the far more common monetary damages in assessing value.

A. Back Pay

Back pay, the most common form of relief, is designed to remedy a plaintiff's economic injury from the date of the discriminatory act (e.g. discharge, failure to hire/promote) to the date of judgment. Back pay consists not only of wages, but can also include bonuses, commissions,
raises, fringe benefits, and even cost-of-living adjustments. See, e.g., EEOC v. Fotios, 671 F. Supp. 454 (W.D. Tex. 1987) (including in back pay award the value of the free room and board the plaintiff would have received had she not been discharged); Meschino v. Int’l Tel. & Tel. Corp., 661 F. Supp. 254, 261 (S.D.N.Y. 1987) (including in back pay award a lost bonus opportunity); Hartley v. Dillard’s, Inc., 310 F.3d 1054 (8th Cir. 2002) (including in back pay award insurance, accrued vacation pay, value of employee discount).

The ending date of a back pay award can be shorter if, for example, the plaintiff secured other employment or removed herself from the job market. For example, in Bergerson v. New York State Office of Mental Health, 853 F. Supp. 2d 238 (N.D.N.Y. 2012), the plaintiff was discriminatorily discharged, secured a new job making less than she made at her previous job, but then voluntarily resigned her new position due to her lengthy commute, time away from her family, and loneliness in a new environment. The court held that she could only recover back pay for the period from when she was discriminatorily discharged until she voluntarily resigned her new employment, since she did not act reasonably in resigning her new position. Similarly, in Floca v. Homcare Health Services, Inc., 845 F.2d 108 (5th Cir. 1988), the Fifth Circuit affirmed that a plaintiff who was wrongfully discharged from her nursing position was not entitled to back or front pay because she left nursing to voluntarily enroll in law school. In continuing-violation cases, back pay cannot extend to more than two years prior to when the charge is filed with the EEOC. See 42 U.S.C. § 2000e-5(g).

In age discrimination cases, another date which may cut off a plaintiff’s damages is the date of normal retirement. For example, in Finch v. Hercules Inc., 941 F. Supp. 1395 (D. Del. 1996), the plaintiff prevailed on his age discrimination claim. However, the jury only awarded him $200,000 in back pay, based in part on an expert witness’s testimony that based on the demographic data, the plaintiff likely would have retired around age 63 — much earlier than plaintiff claimed at trial that he would have retired but for his discriminatory discharge.

Calculating back pay can be complicated. Courts typically apply the “reconstructed history rule” to calculate back pay. The rule requires a court to first reconstruct what job or jobs the plaintiff would have had but for discrimination, and second to compute the amount of back pay the plaintiff would have earned in those jobs. A related method of calculating back pay is the “hypothetical employee” approach, whereby the court constructs a hypothetical employee and follows her as she advances up the employment ladder to the highest position she would have had but for discrimination, taking into account, for example, qualifications and length of time before advancements would have been awarded. Courts also use this method in calculating front pay awards.

The following example illustrates how a court might calculate back pay. Employee is terminated from his position as a sales representative in a call center after he complains to human resources that his supervisor harassed him. At the time of his discharge, he was working 40 hours per week and earning $10.00 per hour with no benefits. One year after his discharge, he found a 40-hour-a-week job earning $9.00 per hour with no benefits. Two years after his discharge, he prevails at trial on his retaliation claim against his former employer. In determining the back pay amount, at a minimum, the plaintiff would be entitled to full back pay for the first year following his discharge when he was unemployed (40 hours x $10 = $400/week x 52 weeks = $20,800). For the second year following his discharge, the plaintiff would be entitled to the wage differential between what he would have earned had he remained employed versus what he earned at his new job. Assuming plaintiff would not have received a raise with his original employer during that time, the plaintiff would be entitled to 40 hours x $1 differential = $40/week x 52 weeks = $2,080). Thus, the plaintiff could potentially recover a total of $22,880 in
back pay.

But, what if the plaintiff can convince the jury that had he not been discharged, he would have been promoted to a management position six months later, where he would earn $15 per hour plus benefits? His back pay calculation would then be more complex. For the first six months after his discharge, he would be entitled to back pay in the amount of $10 per hour for 40 hours per week ($10 x 40 hours = $400 x 26 weeks = $10,400). For the next six months, from when he would have become a manager until he found subsequent employment, he would be entitled to $15 per hour for 40 hours per week, plus the value of the benefits he would have received from the promotion (for example, $50 per week) ($15 x 40 hours = $600/week + $50/week in benefits = $650/week x 26 weeks = $16,900). For the year after he found subsequent employment, the plaintiff would be entitled to the difference between what he would have earned as a manager versus what he earned in his new job ($5 per hour wage differential x 40 hours = $200/week + $50/week in benefits = $250/week x 52 weeks = $13,000). Thus, in this scenario, plaintiff could potentially recover $40,300 in back pay.

B. Front Pay

Courts have held that reinstatement is the preferred remedy to front pay. However, if a court deems reinstatement impractical, which is often the case when there is animosity between the parties, front pay is available as a make-whole monetary remedy to compensate the plaintiff for economic loss between the date of judgment and a future date, and most Plaintiffs seek front pay rather than reinstatement as a practical matter.

In cases where reinstatement is ordered, a plaintiff may still recover front pay for the period from the date of judgment until she returns to her rightful position at work. An award of front pay is meant to compensate the plaintiff for wages and benefits he would have received from the defendant employer in the future if not for the discrimination. Unlike back pay, however, front pay is a prospective remedy that estimates the damage plaintiff will continue to suffer after the date of final judgment as a result of the wrongdoing. Palasota v. Haggar Clothing Co., 499 F.3d 474, 490-91 (5th Cir. 2007). Front pay has emerged as one of the most unpredictable sources of damages in discrimination and retaliation cases and is frequently the largest single amount in an employment discrimination economic damages calculation.

Though once regarded as an extraordinary remedy, today front pay awards are considered equitable in nature and are being awarded even in garden-variety discrimination and retaliation cases where the plaintiff has not obtained replacement employment despite her reasonably diligent efforts to do so. Moreover, even in cases where a plaintiff has found replacement employment, she may still be entitled to a front pay award if she is earning less in her replacement job than she would have earned had she remained employed with her original employer.

Courts have not yet reached consensus on whether a judge or jury should decide front pay awards. In some instances, a judge will ask for the jury’s input on front pay, but will ultimately decide the amount herself. Factors typically considered in determining the amount to be awarded as front pay include: the plaintiff’s age, health status, whether the plaintiff intended to continue employment with the employer, the length of time persons in similar positions have stayed with the employer, how long the replacement employee stayed in the position, plaintiff’s efforts to mitigate damages, the employer’s proof of how long the plaintiff would have remained employed, the availability of other employment opportunities, and the period within which one by reasonable efforts may obtain substantially similar employment.
In age discrimination cases under the ADEA, where liquidated damages are available, many courts have held that a substantial award of back pay and liquidated damages bars an award of front pay. The ADEA provides for liquidated damages, in an amount equal to wages and benefits from the date of termination to the date of trial, in cases of willful violations. 29 U.S.C. § 626(b). See Section I(D) below. The amount of front pay generally is not included in the doubling of back pay as liquidated damages in ADEA cases because front pay does not fall within the meaning of “amount owing” under the statute. See Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544 (10th Cir. 1988). See also Greene v. Safeway Stores, Inc., 210 F.3d 1237, 1247 (10th Cir. 2000) (holding that the damages award of stock options was front pay and not subject to doubling under the ADEA).

C. Compensatory and Punitive Damages

The enactment of the Civil Rights Act of 1991 allowed plaintiffs in employment discrimination and retaliation cases to recover compensatory and punitive damages. These damages are in addition to front and back pay that may be awarded.

Compensatory damages include, but are not limited to: future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. Farpella–Crosby v. Horizon Health Care, 97 F.3d 803, 808 n.6 (5th Cir.1996); EEOC v. WC&M Enters., 496 F.3d 393, 402 (5th Cir. 2007). The EEOC deems “other nonpecuniary losses” to include injury to professional standing or reputation, injury to credit standing, loss of health, and emotional harm. Compensatory damages do not include back pay or front pay.

Discrimination and retaliation plaintiffs typically seek to support their claims for compensatory damages with evidence of their actual injuries. The types of evidence plaintiffs generally rely upon to support compensatory damages claims include evidence of the uncaring or malicious nature of their treatment and defendant’s failure to take remedial action, their unsuccessful attempts to mitigate damages, medical records confirming their depression, anxiety, or symptoms of emotional distress, the plaintiff’s own testimony of their distress, and expert testimony. Damages awarded include cost of medical treatment and compensation for the loss of enjoyment of life and deterioration of plaintiff’s functioning. Some recent verdicts have awarded substantial compensatory damages without an award of back or front pay and allowed the compensatory damage award to serve as the basis for a punitive damages award. See Miller v. Ithaca, No. 3:10-cv-597, 2012 WL 6680381 (N.D.N.Y. Dec. 21, 2012) (calculating costs in reasonable emotional distress awards).

Punitive damages are designed to punish a party for egregious conduct or to set an example for others. Punitive damages are available if the plaintiff demonstrates that the employer “engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual.” 102(b)(1).

As part of the 1991 Act, Congress placed caps on the amount of compensatory and punitive damages a plaintiff can recover, which are tied to the size of the employer’s workforce. Compensatory and punitive damages against employers with 15 to 100 employees are capped at $50,000; for employers with 101-200 employees, the cap is $100,000; for employers with 201-500 employees, the cap is $200,000; and for employers with more than 500 employees, the cap is $300,000. See 42 U.S.C. § 1981A(b)(3). These caps do not include back or front pay damages.
There is no bright-line test for determining the amount of punitive damages to award a plaintiff, subject to the caps. Courts typically require that punitive damages bear some relationship to the other monetary awards a plaintiff recovers. For example, in *EEOC v. AIC Security Investigations, Ltd.*, 823 F. Supp. 571 (N.D. Ill. 1993), an ADA case, the jury awarded $500,000 in punitive damages against the employer and individual defendants. The award was ten times the compensatory award, which the court deemed excessive. As a result, the court reduced the amount to $150,000. Other factors in determining the amount of punitive damages to award include the employer’s net worth, the degree of reprehensibility of the employer’s conduct, the duration of the conduct, any concealment, and the existence and frequency of similar past conduct.

For example, in *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000), the plaintiff alleged sexual harassment by her male supervisor and retaliation in violation of Title VII. The jury awarded the plaintiff $40,000 in compensatory damages, $76,000 in back pay, and $500,000 in punitive damages. The Eighth Circuit upheld the relatively large punitive damages award, in part, because the evidence showed the employer did not do enough to investigate or correct the harassment. The court noted: “Wax Works points to its written sexual harassment policy, and policy of encouraging employees with grievances to contact the home office. Plainly such evidence does not suffice, as a matter of law, to establish good faith efforts in the face of substantial evidence that the company minimized Ogden’s complaints; performed a cursory investigation which focused upon Ogden’s performance, rather than [the male supervisor’s] conduct; and forced Ogden to resign while imposing no discipline upon [the supervisor] for his behavior.”

Various factors must be considered in deciding whether or not punitive damages are appropriate. Perhaps the most important factor is the degree of reprehensibility of the employer’s conduct. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 1599 (1996) (“Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the Defendant’s conduct.”); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S.Ct. 1513, 1521 (2003) (same—“We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.”).

A second factor is the ratio of punitive damages to the harm caused by the employer’s conduct. See *BMW of North America, Inc. v. Gore*, 517 U.S. at 580, 116 S.Ct. at 1601 (“The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.”) *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003) (restricts punitive damages, in all but the most reprehensible cases, to a single digit ratio with compensatory damages). Related to this are comparisons with similar penalties or sanctions for comparable conduct. See *BMW of North America, Inc. v. Gore*, 517 U.S. at 583, 116 S.Ct. at 1603 (“Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness.”)

**D. Liquidated Damages**

Liquidated damages are recoverable in age discrimination cases if the evidence supports a finding of a willful violation. The test for imposing liquidated damages requires proof
the employer “knew or showed reckless disregard” as to whether the conduct was prohibited by the ADEA. *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985). Liquidated damages under federal law are calculated as two times the amount of back pay (but not front pay). Courts do not have discretion to award less than double the amount of back pay as liquidated damages.

E. Reasonable Attorneys’ Fees

While as a general rule, attorneys’ fees are not awarded to the prevailing party in a lawsuit, this is not the case in employment discrimination where specific statutes authorize an award of attorneys’ fees if the plaintiff prevails on their claims. Congress recognized that it would be difficult for plaintiffs in employment discrimination actions to obtain competent counsel unless there was a provision for the payment of reasonable attorney’s fees to the prevailing party. Section 706(k) of Title VII provides that a court, “in its discretion, may allow the prevailing party . . . a reasonable attorneys’ fee as part of the costs . . . .” A prevailing plaintiff will be awarded attorneys’ fees under Title VII, unless special circumstances would render such an award unjust.

In contrast, plaintiffs are rarely required to pay the employer’s attorneys’ fees unless a court finds that the plaintiff’s claim is “frivolous, unreasonable or groundless.” *Christianburg Garment Co v. EEOC*, 434 U.S. 412 (1978). A North Carolina district court awarded an employer over $189,000 in attorneys’ fees based on its determination that the EEOC’s suit against the employer for national origin discrimination was frivolous and unreasonable. *See EEOC v. Propak Logistics, Inc.*, 2013 WL 1232959 (W.D.N.C. Mar. 27, 2013). In defending its award of attorneys’ fees to the employer, the district court laid out a series of missteps by the EEOC in bringing a lawsuit it could not possibly win.

F. Damages in Retaliation Cases

Damages in retaliation cases involving a retaliatory discharge are similar to damages in other Title VII cases; however, retaliation claims are sometimes brought by current employees. While all of the types of remedies discussed herein are equally available to retaliation plaintiffs, as a practical matter any back or front pay awards are likely to be limited by virtue of the fact the plaintiff remains employed by the employer. However, even though a retaliation plaintiff may not recover as much back or front pay as a plaintiff who was discharged, other types of damages — particularly, compensatory and punitive damages — are still available. And at least some circuits recognize that an employee may be awarded damages for a “retaliatory hostile environment” if an employer makes their life miserable and attempts to force their resignation after a Title VII-protected complaint.

III. DEFENSES TO MONETARY DAMAGES

A. Limiting Back and Front Pay Awards

Even in cases where an employer is found to have discriminated or retaliated against an employee, there are numerous tactics an employer can use to limit — or altogether eliminate — the amount of back and/or front pay.

1. Mixed-Motive Cases

In a mixed-motive case, the evidence is sufficient to allow the factfinder to conclude that an employer’s employment decision was motivated by both lawful and unlawful reasons. If the
plaintiff carries that burden, then the burden shifts to the employer to prove that it would have made the same decision absent reliance on the unlawful decision. If the same-decision defense is proven by the employer, the damages available to a plaintiff are severely circumscribed. Declaratory and injunctive relief and attorneys' fees are still available, but the plaintiff cannot be awarded any back pay, front pay, reinstatement, compensatory damages, or punitive damages. See 42 U.S.C. § 2000e-5(g)(2)(B).

The case of Piatt v. City of Austin, 435 Fed. Appx. 408 (5th Cir. 2011), illustrates how the “same decision” defense in a mixed-motive case can cut off a plaintiff’s damages. The plaintiff brought suit against the City of Austin, complaining he was improperly passed over for appointment to Assistant Police Chief because of his race. After a three-day bench trial, the district court found that although the City indeed used race as a factor in its decision, it would have made the same decision even without any impermissible consideration of race. The court awarded the plaintiff attorneys’ fees and costs, but it awarded no damages, finding that the City had established a “same decision” defense.

2. Elimination of Position

The case of Bohannon v. Baptist Memorial Hospital-Tipton, 2010 WL 2569285 (W.D. Tenn. Jun. 21, 2010), illustrates one way in which employers can attempt to limit front pay. The plaintiff asserted multiple discrimination claims against his employer. The employer moved for summary judgment on many of the claims, and also asked the court to cut off the amount of back and front pay the plaintiff could recover on any of the remaining claims, based on the fact the ambulance service at the hospital where plaintiff worked closed just months after his employment was terminated. Based on the evidence, the court granted the employer’s motion and limited the amount of potential front pay so substantially that the employer was eventually able to settle the case for a favorable amount.

3. After-Acquired Evidence

Employers frequently rely on the after-acquired evidence defense to defeat a finding of liability or to bar or otherwise limit relief. In McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 362-63 (1994), the U.S. Supreme Court held that evidence of employee misconduct discovered by an employer after that employee has been discharged, i.e. “after-acquired evidence,” does not excuse the employer from Title VII liability because “[t]he employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason.” However, after-acquired evidence of employee wrongdoing may be admissible to limit back pay up to the date the after-acquired evidence was discovered as long as the employer can establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.

Employers who rely on the after-acquired evidence defense must prove they would have terminated the employee based on the evidence — not simply that it could have terminated the employee or would not have hired the employee in the first place. For example, in McKennon, Shattuck v. Kinetic Concepts, Inc., 1995 U.S. App. LEXIS (5th Cir. 1995), the plaintiff filed an age discrimination claim alleging his employer discharged him because of his age. Just before the trial, the employer learned the plaintiff lied on his application that he was a college graduate. At trial, the employer argued the relevant question was whether it would have hired the plaintiff had it known of the resume fraud. The Fifth Circuit rejected this argument, holding that the proper question was whether the plaintiff would have been discharged — not whether he would
have been hired in the first place.

The case of Miller v. City of Ithaca, 2012 WL 6680380 (N.D.N.Y. Dec. 21, 2012), illustrates how the after-acquired evidence doctrine can limit back and front pay awards. In that case, the plaintiff worked for the City of Ithaca as a police officer. Several years into his employment, the Police Department discovered that the plaintiff intentionally omitted past instances of employment from his application. The omission with respect to one prior employment was particularly egregious because he was terminated by that employer for failure to perform up to the standards of a police officer. The court found that the plaintiff engaged in sufficient misconduct such that he would have been terminated regardless of any retaliatory motive and therefore was barred from recovering any back or front pay.

4. Failure to Mitigate

In employment discrimination and retaliation cases, there is a presumption that back pay is owed to a prevailing plaintiff — but only if the plaintiff adequately mitigates her losses. A plaintiff is only entitled to back pay if he makes a reasonably diligent effort to obtain substantial equivalent employment following an unlawful discharge. The plaintiff must seek interim employment substantially equivalent to the position of which he was unlawfully deprived and that employment must be suitable to a person of similar background and experience. If the plaintiff fails in this duty, back pay can be limited or altogether denied.

A plaintiff is not held to the highest standard of diligence in seeking interim employment, but is only required to have made reasonable exertions. A plaintiff need only follow his regular method of obtaining work. Thus, an employer does not satisfy its burden by showing that no mitigation took place because the claimant was unsuccessful in obtaining interim employment. In determining the reasonableness of the plaintiff’s mitigation efforts, the plaintiff’s skills, experience, qualifications, age, and labor conditions in the area are factors to be considered. The employer’s obligation to satisfy its affirmative defense is to show a clearly unjustifiable refusal to take desirable new employment.

Chisolm v. Liberty Lines Transit Inc., 2013 WL 425408 (S.D.N.Y. Feb. 6, 2013), illustrates how courts analyze mitigation issues. The case involved two plaintiffs, Chisolm and Sharrock, who claimed discriminatory refusal to hire. Both plaintiffs prevailed on their claims, but only Chisolm recovered any back and front pay. The court found that Chisolm adequately mitigated her damages, whereas Sharrock did not. Chisolm sought comparable full-time work as a bus driver with several companies and was on a waiting list for a conductor position with the Metropolitan Transportation Authority. She also submitted other job applications. By contrast, Sharrock made no effort to secure comparable employment, only attempting to obtain additional part-time hours with her employer. Consequently, Chisolm was awarded $161,000 in back and front pay damages, whereas Sharrock recovered none.

5. Unconditional Offer of Reinstatement

In Ford Motor Co. v. EEOC, 458 U.S. 219 (1982), the U.S. Supreme Court made clear that, absent special circumstances, an offer of employment to a rejected applicant or discharged employee tolls the accrual of back (and front) pay if the employer makes an unconditional offer of the job denied, even if all of the relief to which the plaintiff is entitled is not included in the offer. The cutoff date for back and front pay is the date of rejection of the unconditional offer rather than the date the offer is made. For this defense to apply, an employer need only offer
reinstatement to a job substantially equivalent to the one he was denied. *Jernigan v. Dalton Mgmt. Co., LLC*, 819 F. Supp. 2d 282, 291 (S.D.N.Y. 2011). An offer of an interview is not tantamount to an unconditional offer of reinstatement for tolling back and front pay; courts consider it as simply an opportunity to apply for an unspecified number of jobs. See *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1097, n.7 (5th Cir. 1994).

While an unconditional offer of reinstatement can be an effective way to cut off back and front pay damages, it is not the case that a plaintiff who rejects such an offer is automatically prohibited from recovering back and front pay. Courts look to whether a plaintiff’s rejection of the offer of reinstatement was reasonable in light of the circumstances of the case. For example, in *Lewis v. Federal Prison Industries, Inc.*, 953 F.2d 1277 (11th Cir. 1992), the court rejected the argument that the plaintiff in an age-discrimination case would not recover front pay because he rejected the employer’s reinstatement offer. The court found that the plaintiff acted reasonably in rejecting the offer because he could not return to his former position without suffering a relapse of an emotional disturbance that forced him to terminate his employment in the first place. The plaintiff’s emotional distress had been caused by a campaign of harassment by his supervisors in an attempt to force his retirement.

6. **Collateral Sources of Income**

Federal courts are divided over whether collateral benefits, *i.e.*, benefits from sources other than the employer such as unemployment benefits, disability benefits, and social security, should be subtracted from back and front pay award in employment discrimination cases. Some district courts allow such offsets, others strictly prohibit them, and in others it is left up to the discretion of the court.

**B. Emotional Distress and Mental Anguish**

In most wrongful discharge cases, the plaintiff alleges emotional distress, mental anguish, or loss of enjoyment of life. To recover emotional distress damages, a plaintiff is required to prove both that she suffered such emotional distress and that such emotional distress was in fact caused by the action complained of. Several courts have suggested, however, that a finding of discrimination, by itself, permits an inference that the plaintiff suffered emotional distress from the discrimination. Accordingly, in order to defend against a claim of emotional distress in a discrimination case, the employer should seek to establish, through discovery of the plaintiff’s medical or psychiatric records or otherwise, possible pre-existing or alternate sources of the plaintiff’s alleged emotional distress, such as a pre-existing mental or personality disorder. Retaining an expert witness to review and testify about the plaintiff’s medical records is typically the most effective way of defending against mental anguish claims.

Another way for an employer to attack a claim of emotional distress is to request the plaintiff undergo an independent medical examination. Under Federal Rule of Evidence 35, three conditions must exist before a party is under any obligation to submit to such an examination: (1) the condition of the party must be in controversy; (2) the defendant must show good cause for the court to order such an examination; and (3) the court must exercise its discretion as to whether to order the examination.

A third way to attack emotional distress claims is through reliance on damages awards in cases with comparable injury claims. This tactic is generally reserved for post-trial motions or appeals after an unreasonable award by a factfinder. A damages award for emotional distress lies within the jury’s discretion and is generally subject to review only for manifest
unreasonableness; however, some courts have suggested that a comparison to awards made in other cases may be used as a tool in determining whether a particular jury award of emotional distress damages is excessive. Accordingly, employers should be aware of the magnitude of such awards before deciding to take a case to trial.

IV. Case Valuation – Analytic Tools

An increasingly popular tool for valuing cases is the use of data analytics: the process of using large sets of legal data to make predictions. While legal records have always existed – judicial opinions, online case dockets, court caseload reports, etc. – that data was traditionally unstructured, and computers were unable to cost-effectively and efficiently analyze it on a large scale. But with advances in computing and a greater appreciation for Big Data, the data analytics industry in legal has taken off. A growing number of cost-effective data analytics vendors now exist, with several of their tools available through mainstream legal research vendors. Data analytics now allow litigants to quickly glean objective information about judges, courts, juries, and opposing counsel, and answer questions such as:

- How long do FMLA cases tend to last before a judge?
- What percentage of dispositive motions does he or she grant in harassment cases?
- How do the number change when the other side is pro se?
- What is the success rate of the plaintiff’s counsel in Los Angeles on discrimination claims?

Answers to the above questions, while certainly not dispositive, can help to inform the case valuation process. While Ogletree does not endorse any particular data analytics tool or service, a brief summary of some of the more popular data analytics tools available in the market today is below:

A. **Lex Machina**

Lex Machina, a Lexis Nexis company, mines data from federal court litigation dockets and documents. Using a combination of machine learning and legal experts, Lex Machina normalizes and tags raw federal district court data to provide strategic information about a specific venue, judge, counsel, or party, all in chart and graph form.

With regard to judges and venues, Lex Machina provides information on likelihood of success on particular types of motions, damages information, and anticipated duration of case, among other topics. Lex Machina also allows you to analyze an opposing party or counsel’s success rate, volume of cases (by case type), trial success, and damages awarded. Sample screen shots from Lex Machina are below:
B. Monitor Suite

Monitor Suite, a Thomson Reuters company, mines court data to provide insights into the volume and type of cases handled by a particular court, judge, party, or attorney. Judicial analytics on Monitor Suite can help with assessment of the judge’s or counsel’s experience on a particular type of case, as well as strategic information regarding how often attorneys appear before the judge, the volume of cases attorneys handle, their experience in a particular court, and the judge’s experience with opposing counsel.

Monitor Suite contains data from state and federal courts beginning with 2002. Sample screen shots from Monitor Suite are below:
C. Premonition

Premonition uses artificial intelligence technology to mine litigation data from courts around the country, both federal and state, providing insights into attorney wins and losses, litigation history and experience, and average case duration. These statistics are filterable by case type, and per client.

Performance metrics are primarily intended to assist companies in assessing attorney performance as part of the attorney selection process. (Of course, Premonition does not assess case difficulty, treating all cases equally regardless of facts). Besides performance metrics, Premonition provides alerts on court activity, open cases reporting, and a motions analyzer tool.

Premonition covers state and federal court data.

D. Gavelytics

Gavelytics is a judicial analytics tool that provides extensive data on the tendencies of judges in California Superior Courts. Its AI-powered judicial analytics platform helps litigators identify their judge’s tendencies to determine if the judge will be favorable to their client. It highlights the differences between judges by tracking how each judge tends to rule on over 100 types of motions, how quickly judges move through their cases, and how frequently lawyers file CCP § 170.6 filings peremptory challenges against all judges, allowing litigators to tailor their litigation and business development strategies customized to specific judges.
E. Bloomberg Analytics

Bloomberg Law’s Judge Analytics provides valuable insights on all sitting federal district court judges. Using the Litigation Analytics tool, a judge’s profile information, including the judge’s career history, most cited opinions and recent news about the judge can be found. In addition, the analytics how a judge rules on motions to dismiss, motions for summary judgment, and motions for class certification. Bloomberg also provides data on appeal outcomes as well as length of time a case is before a judge.
F. Courtroom Insight

Courtroom Insight is the only online directory featuring attorney and peer reviews of expert witnesses, mediators, arbitrators and judges, enabling users to share information within a firm, or across firms (if that option is selected). Directory profiles are enhanced by self-reported biographical information as well as evaluations by litigators in that venue.

G. Robing Room

The Robing Room is a free site that provides judicial reviews and experiences from attorneys who have appeared in the judge’s courtroom. Of course, as with free sites, those to tend to rate a judge are likely to be those with especially favorable or especially unfavorable experiences with the individual in question. That said, valuable information is often available at
the Robing Room.

**H. Verdictsearch**

Verdict search provides summaries of verdicts and settlements as well as data on the types of verdicts, award amounts, and venue of the decision. Verdictsearch allows quick assessment of potential verdicts amounts. Verdictsearch contains reported verdicts from state and federal courts.

**I. Lexis Verdict Analyzer**

Lexis Verdict Analyzer breaks down data from awards by subject matter and provides analytics by year, award amount, and type of award, allowing award trends to be spotted quickly. Verdict Analyzer contains data from reported verdicts from state and federal courts.
What’s It Worth? Case Valuation Workshop

Presenters
Gary Bunce (Delta Air Lines, Inc.), Marrian S. Chang (Los Angeles), and Robert R. Niccolini (Washington, D.C.)

Moderator
Mark H. Burak (Boston)

Misconstruing the Odds...
Statistics on Valuation Errors

- 2008 Study of CA Cases with Trial/Arbitration Decision after Failed Settlement Effort
- 60% Plaintiff Error
  - But less than $50,000 average cost of decisional error
- Only 24% Defense Error
  - But almost $1 million average cost of decisional error

Today’s Topics

- Basics Risk Assessment in Single Plaintiff Employment Litigation
- Range of Monetary Damages
- Defenses to Monetary Damages
- Analytic Tools Available for Case Valuation
- Limits on the Risk Assessment Model and Communication Strategies
- Valuation Case Studies
Basics Risk Assessment in Single Plaintiff Employment Litigation

Basic Risk Assessment in Single Plaintiff Cases

- Honest Factual Assessment
  - Did the Company do everything the right way?
  - Was the Plaintiff treated fairly?
  - Credibility and likability of the main players
- Importance of Admissions by Plaintiff
- Facts Applied to Applicable Legal Standards
- Evaluating Forum, Judge, and Jury Pool
Basic Risk Assessment in Single Plaintiff Cases

- Evaluating Summary Judgment Probability
  - Are all the material facts truly undisputed?
    - Forums/judges can differ in how they look at Plaintiff’s uncorroborated testimony and what is material
  - If so, are you entitled to judgment as a matter of law under the applicable legal standards?
  - Is the forum/judge good or bad for summary judgment?

- Setting a Probability of Success

Basic Risk Assessment in Single Plaintiff Cases

- Trial Assessment
  - Jury themes and issues
    - Fairness, justice, responsibility, accountability
  - Documentation, documentation, documentation...
  - Credibility and likability
  - Forum assessment and jury focus groups
  - Use of analytics

- Setting a Probability of Success at Two Stages
Example of “Win” Probability

- Two claims after close of discovery
  - Sex harassment and retaliation
- Key Facts
  - Plaintiff emotional and credible in deposition
  - Plaintiff failed to cooperate with harassment investigation
  - Plaintiff let go in RIF only 45 days after close of harassment complaint investigation
  - Federal court with very recently appointed judge

Example of “Win” Probability

- Summary judgment probabilities
  - 80% on sex harassment claim
  - 40% on retaliation
- Trial probabilities
  - 60% on sex harassment
  - 30% on retaliation
Range of Monetary Damages

Monetary Damages Available

- Back pay
- Front pay
- Compensatory damages
- Punitive damages
- Liquidated damages
- Attorneys’ fees
Defenses to Monetary Damages

Limiting Back and Front Pay Awards
- Mixed-Motive Cases
- Elimination of Position
- After-acquired Evidence
- Failure to Mitigate and Vocational Experts
- Unconditional Offer of Reinstatement
- Mitigation and Collateral Sources
Limiting Emotional Distress Awards

- Relation to Economic Award
- Testimony of Plaintiff and Family
- Healthcare Providers vs. Experts
- Pre-existing Causes
- Independent Medical Examinations
- Post-judgment Jury Comparisons

Limiting Punitive Damages Awards

- **Kolstad** Defense: Employee Actions Contrary to Company Policies and Efforts
  - Motion practice and to the jury
- Establishing Absence of Corporate Malice
- Using (or Neutralizing) Financial Information
Example of Damages Assessment

- Discharged employee with claims of sexual harassment and retaliation
- $100,000 annual salary, with benefits worth $20,000 annually
- Found another job in 6 months with reasonable effort
- Earns $80,000 annually at new job with similar benefits
- Depressed, spoke with healthcare provider who referred to psychologist for ongoing therapy, as well as a marriage counselor

Example of Damages Assessment

- Back pay: $60,000
- Front pay: $80,000 (for 5 years)
- Compensatory damages: $200,000 (but subject to $300,000 federal cap)
- Punitive damages: $1,000,000 (but only 5% risk)
- Attorneys’ fees: $250,000 through summary judgment, expect another $200,000 through trial
Reminder: Example of “Win” Probability

- Summary judgment probabilities
  - 80% on sex harassment claim
  - 40% on retaliation
- Trial probabilities
  - 60% on sex harassment
  - 25% on retaliation

What’s It Worth?

- Could use weighted outcomes, but easier to use greater loss expectation when damages of multiple claims overlap
- If use just retaliation loss expectations
  - On summary judgment, 60% chance of loss of $640,000 in damages = $384,000
  - At trial, 75% chance of loss of $840,000 in damages = $630,000
What’s It Worth? Caveats

- As much Art as Science
- Effort to bring some objectivity to inherently subjective assessments with variables that are difficult to fully predict
- Outliers should not be overemphasized but also cannot be ignored
- Use of analytics to double-check “gut”

Analytic Tools Available for Case Valuation
Case Valuation Analytic Tools

- Lex Machina
- Monitor Suite
- Premonition
- Gavelytics
- Bloomberg Analytics
- Courtroom Insight
- Robing Room
- Verdictsearch
- Lexis Verdict Analyzer

Limits on the Risk Assessment Model of Settlement
Non-Economic Considerations

Favoring Settlement
- Actual costs of defense can be calculated, but...
- Distractions/opportunity cost losses, especially for management team
- Reputational issues

Disfavoring Settlement
- Copycat suits
- Support for/morale of decision-makers
- Workplace culture and identity
- Impact on business strategies

Communicating About Settlement With Management or a Board
- Defining “success” in a lawsuit has both economic and non-economic components which must be explained and weighed
- Risk assessment predictions vs. inherent unpredictability of litigation
- Actual costs of defense vs. distraction to management team
- Reputational concerns vs. strategic priorities
Valuation Case Studies

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