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Litigating Front-Pay Claims in Employment Discrimination Cases

By Kevin J. O'Connor

In the words of noted playwright Oscar Wilde, "[i]n this world there are only two tragedies. One is not getting what one wants, and the other is getting it." When litigating statutory claims of harassment or discrimination, the question of remedies arises: "Should I seek reinstatement or front pay, or both?" Some jurisdictions may require the employee to pursue both during the litigation, and to ultimately show that reinstatement is simply not feasible before being awarded front pay. When seeking front pay, there are numerous factors that must be considered in formulating one's litigation strategy in preparation for trial, including whether to shoot for the stars and seek an enormous amount of front pay, or to follow a more reasonable approach and draw less scrutiny. From a practical standpoint, the choice could have an enormous impact on the trajectory of an employment-discrimination case and the length of time before it will be resolved.

The availability of front pay and an amount one can expect to reasonably recover at trial may differ considerably depending upon the jurisdiction. In most jurisdictions, front pay is regarded as an equitable remedy permitted by the courts in lieu of reinstatement, where reinstatement is proven by the plaintiff to be completely infeasible. *See generally* Brian H. Redmond, "Award of Front Pay Under State Job Discrimination Statutes," 74 ALR 4th 746 (1989) (Supp. 2012).

Front pay is intended to represent future (i.e., post-trial) wages and benefits that an employee claims he or she would have earned in the absence of harassment/termination. A Tenth Circuit case summarized certain factors it viewed as relevant in assessing an award of front pay:

- work-life expectancy
- salary and benefits at the time of termination
- any potential increase in salary through regular promotions and cost-of-living adjustment
- the reasonable availability of other work opportunities
- the period within which the plaintiff may become re-employed with reasonable efforts
- methods to discount any award to net present value

Whittington v. Nordam Group, Inc., 429 F.3d 986, 1000 (10th Cir. 2005).

With the present backlog of cases found in many jurisdictions and an overall lagging economy, front-pay claims have a tendency to grow, as a case slowly winds its way through the court system and the employee endures a longer period of underemployment or unemployment. Where

an employee decides to demand an enormous amount of front pay extending many years into the future as part of his or her litigation strategy, it can even protract the litigation and make it difficult to settle. A greater demand in this area can cause the employer to become more entrenched in its position and fight harder to defend its position.

In some states, the entire issue of whether to award front pay, and the amount, is left to the jury. Even in federal courts, one can see a completely different approach depending upon the jurisdiction. For instance, the Eighth and Ninth Circuits have held that front pay is a wholly equitable remedy distinct from other compensation damages that are more appropriately awarded by a judge. Not all courts agree, and the circuits are split on whether the issue of quantifying front pay goes to the jury. Some circuits put a great deal of discretion in the hands of the trial judge, while others give it to the jury. *See, e.g.*, *Cummings v. Standard Register Co.*, 265 F.3d 56, 66 (1st Cir. 2001) (issue is for jury; affirming 14-year front-pay claim in age-discrimination case); *Dominic v. Consolidated Edison Co.*, 822 F.2d 1249, 1257 (2d Cir. 1987) (award of front pay should be made by the court); *Newhouse v. McCormick & Co., Inc.*, 110 F.3d 635, 641 (8th Cir. 1997) (holding that determination of whether to award front pay, and amount, is for judge); *Traxler v. Mutnomah Cty.*, 596 F.3d 1007 (9th Cir. 2010) (holding that the question of whether to award front pay, and amount, is for judge); *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1449 (11th Cir. 1985) (selection of remedies is discretionary with the district court).

Several other circuit courts, on the other hand, have determined that the amount of front pay to be awarded is for the jury to determine. *See, e.g.*, *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985) (the amount of damages available as front pay is a jury question); *Hansard v. Pepsi-Cola Metro Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir. 1989) (the jury should determine the amount of front pay); *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1333 n.4 (7th Cir. 1987) (authority and reason suggest that amount of front pay is a jury question), *vacated on other grounds*, 486 U.S. 1020 (1988). In the Fifth and Sixth Circuits, the courts bifurcate the claim with the court first determining entitlement, and the jury then being instructed on the law and asked to determine the award amount. The decision to submit the claim to the jury is within the discretion of the judge. *Hansard, 865 F.2d at 1470; Arban v. West Publishing Corp.*, 345 F.3d 390 (6th Cir. 2003).

Where the employee's counsel decides to recommend a strategy of seeking recovery of front pay that is decades in length (a strategy that is becoming more common), it should be done with the realization that it can have a dramatic impact on the litigation and can even stand in the way of early resolution. Defense counsel faced with a front-pay claim of, for example 15–20 years' duration, will want to remove the perceived leverage generated by such a claim by way of pretrial motion practice, particularly in a jurisdiction where the front-pay question is given to the jury. Additionally, if an employee has stated an objective to recover hundreds of thousands of dollars (and, in some cases, in excess of $1 million) in front pay, it is sometimes difficult for the employee's counsel to turn around and convince the client to consider a settlement for a fraction of the numbers included in written damage summaries given in discovery or through expert economist reports, at least until a judge explains through a pretrial motion decision that the front-pay claim is not going anywhere.

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The law in many jurisdictions has developed to recognize that an employee can only seek front pay where there are sufficient facts in the record to support the claim on a non-speculative basis. No employee is entitled to a "lifetime front pay award." *Dominic*, 822 F.2d at 1258. In an age-discrimination case, say, for instance, where an older worker is fired and has five years left in what could be considered his or her normal working life, a court will be more receptive to a claim that the employee cannot find a job that pays anything close to what he or she was making before termination and that the employee has a high probability of remaining unemployed or underemployed.

In the context of age-discrimination cases, the courts will typically look at the employee's earning history, the likelihood of remaining employed in that position, and the likelihood of having received pay increases had the employee remained, all in an attempt to fashion a non-speculative front-pay remedy. The court will also look at issues of mitigation and overall employability. *See, e.g.*, *Maxfield v. Sinclair Int'l*, 766 F.2d 788 (3d Cir. 1985). The proper role of a qualified employability expert or economist has long been recognized even in age-discrimination cases where an employee is claiming long-term unemployability. *See, e.g.*, *Cassino v. Reichhold Chem.*, 817 F.2d 1338, 1346 (9th Cir. 1987); *Cummings*, 265 F.3d at 61; *Donelson v. DuPont Chambers Works*, 206 N.J. 243 (2011) (employee presented expert testimony that "his employer's harassing conduct caused him a psychological illness that rendered him incapable of working and therefore entitled him to lost wages," and that it was "unlikely [he] would ever recover" resulting in extensive front-pay award).

Sometimes, however, front-pay claims are made in harassment cases where employees are terminated, and they claim that, due to psychiatric problems resulting from the harassment, they are unable to return to the workforce at all. It is that class of cases that sees the most litigation directed at limiting the claims and arguing that the claims need to be supported by expert testimony (through a psychiatrist or employability expert) to reach a jury on a non-speculative basis. Where a plaintiff has no employability expert nor a psychiatrist, where there is a claim of permanent psychiatric impairment, a claim for front pay can be ripe for attack.

Precedents extend back decades from both federal and state courts recognizing the importance of expert testimony in employment cases where front pay is sought. In *Kolb v. Goldring*, 694 F.2d 869 (1st Cir. 1982), for instance, the court held that the jury must not be encouraged to "pull figures out of a hat," and that front-pay projections must be "based on expert testimony, patterns of pay increases, or similar evidence." The court in *Gotthardt v. National R.R. Passenger Corp.*, 191 F.3d 1148 (9th Cir. 1999), sustained a front-pay award only where the plaintiff put on "extensive testimony" from her treating psychological expert of the severity of her psychiatric problems and overall conclusion that her "ongoing impairment would render her unable to perform any job." In the gender-based discrimination case of *Haddad v. Wal-Mart Stores*, 455 Mass. 91 (2009), expert testimony supported an award of $733,000 for 19 years of front pay where the employee claimed that her reputation had been harmed and that she would never regain her prior economic status. Finally, in *Salveson v. Douglas Cty. & Wisc. Cty. Mut. Ins. Co.*, 610 N.W.2d 184 (Wis. Ct. App. 2000), a front-pay award was reversed and reduced to one year,

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even in the face of expert testimony, where a jury was essentially left to "speculate as to the extent that Salveson's psychological injuries could be expected to affect her future earning capacity." *Id.*at 190.

In sum, an employee who eschews reinstatement and seeks the equivalent of a "lifetime annuity" can expect to draw fire from the defense and scrutiny by the court in advance of trial. Defense counsel in employment matters need to aggressively take discovery on the expert proofs that a plaintiff intends to present at trial and prepare to challenge that testimony well before the trial date arrives, and that is particularly so where experts are involved. This requires extensive work months before the expert witness is even identified. As shown in several recent high-profile cases, front-pay claims can constitute a substantial portion of a jury's award if the jury rules in favor of the employee on liability.

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