

Outside Counsel

Effect of Recession on Damage Awards In Employment Cases

The existing economic recession has caused not only high rates of unemployment across the country, but an overall shortage of jobs resulting in increased periods of unemployment for job seekers. One issue that courts will likely need to examine is the impact that the state of the current job market should have on the calculation of damages in employment discrimination actions. Given that damage awards in such cases are designed to make the plaintiff “whole,” attorneys representing employers and employees alike should take into account the state of the current job market, both in formulating their arguments to courts as to the appropriate amount of damages to be awarded, and in analyzing potential liability for settlement purposes.

“Make whole” relief, available to victims of employment discrimination, includes all actions and monetary awards necessary to make a victim of discrimination whole, by placing the individual, as nearly as possible, in the situation he or she would have occupied if the wrong had not been committed. In order to make a victim of employment discrimination whole, courts may award “back pay,” being the amount that the employee would have earned to judgment date in the absence of discrimination.

In addition to looking backward, however, to make an employment plaintiff truly whole, courts are empowered to award equitable relief on a prospective basis. Specifically, courts can reinstate the victim to the position from which he



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or she was discharged, thereby negating the effect of the unlawful termination. Because reinstatement may not always be feasible, however, either because the position is no longer available or a subsequent working relationship between the parties would be antagonistic, courts can award the equitable remedy of “front pay” in lieu of reinstatement. Front pay is an award of future wages that the employee would have received absent the discriminatory conduct, less any income to be derived from other employment or unemployment compensation.

Establishing damages can prove to be a difficult task given the uncertain future of the employment market.

A major challenge that a court faces in awarding front pay is determining how far into the future the victim should be compensated by his or her past employer. Because front pay is necessarily speculative in nature, it can only be calculated through what courts have labeled “intelligent guesswork.” As such, courts have wide latitude in determining front pay awards and may consider factors such

as the length of the prior employment, the permanency of the position held, the nature of the work, the age and physical condition of the employee, and other non-discriminatory factors. Also among the factors courts can consider are the state of the job market and other economic conditions that may affect the claimant’s future employment prospects.

The current economic recession, therefore, will necessarily impact the front pay analysis because of the effect that it is having on the length of time that it reasonably takes most employment discrimination victims to locate appropriate substitute employment. According to the U.S. Bureau of Labor Statistics, from January 2007 through December 2009, 6.9 million workers were displaced from jobs they had held for at least three years. In addition, the average period of official unemployment has increased to 24.5 weeks, the longest since the government began tracking this data in 1948.¹

Furthermore, not only has the unemployment rate increased at a faster annual rate for minorities than for white Americans, but finding alternate employment may be especially difficult for minorities. The Bureau of Labor Statistics reports that the unemployment rate for African-American in February 2011 was nearly twice the unemployment rate for white Americans. Whether or not current discriminatory practices are deliberate, minorities appear to be facing disparate treatment in the employment markets.

Additionally, it is widely acknowledged that, given the impact that the collapse in the financial markets has had on many nest eggs, much of the aging population has been forced to defer retirement longer than they otherwise would have. Accord-

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ing to a 2009 national survey by the Pew Research Center's Social & Demographic Trends Project, more than half of all working adults ages 50 to 64 say they may delay their retirement, and another 16 percent say they never expect to stop working. Moreover, the age at which full Social Security benefits may be received has gradually increased. While previous generations attained their full Social Security benefits at age 65, under current law, 2002 was the last year anyone age 65 could receive full benefits. Those born after 1959 must now wait until age 67 to receive full benefits. Accordingly, employees are remaining in the work force longer.

Effect on Awards

These statistics suggest that the state of the job market, the difficulty that members of legally protected classes are having in finding new employment when terminated, and the longer work-life for most working Americans may directly influence the award of economic damages in employment cases. As a result of the current state of the job market, front pay awards may create increased monetary liability in discrimination lawsuits.

For example, at least one court has specifically premised an award of front pay upon the recognition that the plaintiff had "no reasonable prospect of obtaining comparable alternative employment at least in the near future owing to the downturn in the economy."² Additionally, the U.S. Court of Appeals for the Sixth Circuit, in affirming an award of front pay has explicitly noted that "these recent economic conditions make it highly unlikely that [the plaintiff] would have retired at age 58."³ Thus, courts are clearly sympathetic to the challenges that job seekers face during economic downturns in making damage awards in employment cases.

On the other hand, front pay awards, while often speculative, cannot be unduly so. When a party fails to provide the court with the essential data necessary to calculate a reasonably certain front pay award, the court may deny any such award. Such data may be difficult to provide in light of the uncertain future of the job market. Perhaps it is this dichotomy between the impact of the current recession on a claimant's ability to mitigate damages and the difficulty in predicting the future

of the economy that has caused some courts to hesitate in awarding long-term front pay damages, even in light of the economic downturn.

In recent years, while courts have acknowledged the state of the job market as a factor to be considered in determining front pay damages, thus far, only rarely have courts explicitly weighed it as a factor in determining such damages in published opinions.⁴ In instances where courts have explicitly discussed the impact of the job market on front pay damages, they have held plaintiffs to their burden of proof in establishing an appropriate damage award.

For example, in *Garner v. Grenadier Lounge*,⁵ a federal court sitting in Michigan granted the plaintiff, a former waitress, summary judgment on her pregnancy discrimination claims. The court considered the state of the economy in awarding back pay only, holding that the plaintiff's "diligence in seeking employment is assessed in view of the individual characteristics of the claimant and the job market" and that the fact that she was unable to find a job was not surprising given that since 2005, the economy has continued to decline.

However, in denying front pay, the court concluded that, notwithstanding the plaintiff's difficulty in mitigating damages, there comes a point where, as bad as the economy and the general job market may be, a part-time waitress or bartender can reasonably be expected to find comparable employment, particularly given the generally high turnover rate in this line of work. As such, as a result of the uncertainty of the job market in the future, especially in the plaintiff's line of work, the court found it inappropriate to speculate as to the length of time that the plaintiff would remain unemployed.

A lesson that plaintiffs' counsel should take away from the *Garner* decision is that, in the current economic and legal climate, when seeking an award of front pay damages, a plaintiff must provide the court with detailed information as to the effect that the recession will continue to have upon his or her particular industry. This may be accomplished through the use of expert reports and/or testimony.

Employers, on the other hand, should focus on establishing the speculative nature of the future of the job market, in

order to attempt to avoid the potential for front pay damages that reflect the downturn in the economy. Counsel for employers should be cognizant that the burden to prove that the plaintiff failed to mitigate damages and that a front pay award should be reduced lies with the defendant.⁶

Conclusion

As damages in employment discrimination cases are designed to make a victim of discrimination "whole" they must necessarily take into account the state of the job market and the challenges that discrimination victims will face in seeking alternate employment. These factors must be weighed against the fact that plaintiffs carry the burden of establishing the amount of their damages, and this may prove to be a difficult task given the uncertain future of the employment market and the economy generally.

The first cases addressing these issues in the current economic recession are only now making their way through the court systems, and thus, many questions have yet to be addressed by judicial decisions. However, counsel for employers and employees alike should be aware of these issues in representing their clients, both in judicial proceedings and with respect to settlement of employment discrimination claims.



1. Zuckerman, Mortimer, "The Economy Is Worse Than You Think," Wall Street Journal, July 14, 2009.

2. *Brenlla v. LaSorsa Buick Pontiac Chevrolet, Inc.*, 2002 U.S. Dist. LEXIS 9358, 36-37 (S.D.N.Y. May 28, 2002).

3. *Pollard v. E.I. DuPont De Nemours, Inc.*, 412 F.3d 657, 668 (6th Cir., 2005).

4. See e.g., *Jackson v. Bauxite Sch. Dist.*, 2010 U.S. Dist. LEXIS 92425 (E.D. Ark. Aug. 5, 2010) (Awarding front pay in part because plaintiff "now faces significant obstacles in the job market, especially during the current recession.")

5. 2008 U.S. Dist. LEXIS 54976, 20-4 (E.D. Mich. July 15, 2008).

6. *Jackson v. Host Int'l*, 2011 U.S. App. LEXIS 2077 (5th Cir., 2011).