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Importance of Effective Jury Instructions on Front Pay

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A victim of employment discrimination is entitled to all relief necessary to make him or her whole—that is, to place that individual, as nearly as possible, in the situation he or she would have been in if the discrimination had not occurred.

In order to make a victim of employment discrimination whole, courts may reinstate employees to their jobs but are often reluctant or unable to do so when the position is no longer available or a continued working relationship between the parties would be hostile. When reinstatement is inappropriate and the employee has no reasonable prospect of obtaining comparable alternative employment, a court may instead award front pay. Front pay is designed to account for wages and benefits that the employee would have earned if the employee were reinstated or hired into the higher-paying position from which he or she was illegally rejected.

Front pay is prospective and, therefore, involves a certain degree of speculation. As such, the charge that a court delivers to a jury on the issue of front pay can prove to be highly significant. Accordingly, counsel should pay special attention to the issue of front pay when submitting proposed jury instructions and attending jury charge conferences.

Front Pay: Legal or Equitable?

Under federal discrimination statutes such as Title VII, front pay is considered an equitable remedy to be determined by the judge, not by the jury. However, while the New York State Human Rights Law (NYSHRL) in most instances mirrors federal discrimination statutes in application, determination of an award of front pay is one significant instance in which it does not. Under the NYSHRL, any form of money damage, including front pay, is considered a legal remedy to be decided by a jury.

This presents a unique contradiction, especially in discrimination actions where claims are asserted under both federal and New York law, as is commonplace. In such cases, courts sitting in New York will usually submit the issue of whether to make a front pay award, and in what amount, to a jury for several reasons.

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First, where no distinction is made in the jury instructions or in the verdict between damages under federal, state or local law, courts have held that it is appropriate to consider the entire award of front pay damages as if it were allocated to the claim under the NYSHRL, and thus, a legal remedy properly determined by the jury.[1]

However, even where there is a question as to the jury's right to determine front pay, courts can submit the issue of front pay to the jury pursuant to Fed. R. Civ. P. 39(c).[2] Rule 39 provides that "in all actions not triable of right by a jury, the court upon motion or of its own initiative may try an issue with an advisory jury…" Thus, even without making an initial determination as to whether the jury's determination on front pay will be considered final or advisory, the court can submit the issue to the jury in the first instance. If the judge ultimately agrees with the jury's determination, and would have independently reached the same result, it may prove unnecessary for the court to ever resolve the sticky issue of whether the jury's verdict is more properly considered advisory or determinative.

Furthermore, the U.S. Court of Appeals for the Second Circuit has held that a judge sitting at equity may not render a verdict which is inconsistent with that of a jury sitting at law on a claim involving the same essential elements. This is because "when legal and equitable actions are tried together, the right to a jury in the legal action encompasses the issues common to both."[3] Given the fact that in most employment discrimination cases the plaintiff will seek compensatory damages, and it is common practice to prosecute discrimination claims under both federal and state law in a single action, a jury will likely be sitting and involved in the determination of front pay in New York discrimination actions.

Once the question of front pay is referred to a jury and a determination is made, it will likely be too late to object to the jury's determination. Where a party does not object to the jury's consideration

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of front pay, that party may be viewed as having consented to the jury trial on these issues under Fed. R. Civ. P. 39(c).[4] Even where a party can demonstrate that front pay is an equitable remedy which should not have been referred to the jury, the court may still fall back on Rule 39 (c) by treating the determination of the jury as an advisory verdict which, more often than not, the court will adopt as its own. For example, where the District Court for the Western District of New York permitted the issue of front pay to be decided by a jury, the Second Circuit upheld the verdict because the district court judge had noted that, even "[i]f front pay should be decided by the court, [he would] consider the jury's verdict as an advisory one and adopt the jury's verdict on front pay as the court's." Thus, the Second Circuit held that the alleged error in allowing the jury to determine front pay, if any, "does not affect the substantial rights of the parties" and would be harmless.[5]

Proposing Jury Instructions

Once the court decides to refer the issue of front pay to the jury for consideration, the parties' only recourse may be to propose defensive or alternative jury instructions on the topic of front pay, without waiving objections to the jury being instructed on that issue. If a party fails to object to the jury charge, it will have to demonstrate plain error to obtain judgment as a matter of law or a new trial based on the lack of specific instructions concerning what factors should be considered in determining front pay.[6]

Well-crafted jury instructions by an attorney, if adopted by the court, can focus the jury on the critical issues in the case, ideally in a way that supports his or her client's story. In contrast, deficient instructions will not only make it more likely that the judge will adopt an instruction more in line with what the other party proposes, but, if adopted by the court, can also mislead the jury and leave it to decide the case on issues that have little to do with the law.

From the plaintiff's perspective, jury instructions should ideally inform the jury of how front pay differs from other types of damages. Whereas front pay compensates the plaintiff for lost earnings from the plaintiff's old job for as long as he/she may have been expected to hold it, a lost future earnings award compensates the plaintiff for the diminution in expected earnings in all of her future jobs for as long as the reputational or other injury may be expected to affect his/her prospects.[7]

A plaintiff's counsel should urge the court to instruct the jury that front pay, therefore, does not erase all forward-looking aspects of the injury caused by the discriminatory conduct and that awarding both front pay and the compensatory remedy of lost future earnings is not duplicative. If there is no convincing evidence that the plaintiff will be able to find work commensurate with his or her skills at a salary equal to what he or she received, or would have received if not for discrimination, then an award of front pay until retirement may be appropriate.[8]

Defendant's counsel, on the other hand, should urge the court to emphasize to the jury that the plaintiff bears the initial burden of establishing a claim for front pay, and that an award of front pay cannot be unduly speculative.[9] As part of this charge, defendant's counsel should request that the court direct the jury that an award of front pay requires evidence sufficient to support the conclusion that reinstatement is not viable because of continuing hostility between the plaintiff and the defendant or its workers.[10] If reinstatement is feasible, even if the victim does not want to be reinstated, then front pay is inappropriate.

Furthermore, in calculating the size of a front pay award, the jury must estimate plaintiff's ability to mitigate damages in the future.[11] Any front pay award should be foreclosed if the plaintiff has refused or accepted a job that is substantially equivalent to that from which defendant discharged him or her. Defendant's counsel should further urge the court to instruct the jury that a front pay award should approximate the benefit that the victim would have received had she been able to return to her old job and that this amount, if any, should be limited to only the period of time it believes the victim would have remained in his or her lost position but for the discrimination.

Additionally, in that an award of front pay cannot be unduly speculative, if the jury believes that it is more probable than not that the victim would have been terminated for lawful reasons, or chosen to leave the employer well before he or she attained retirement age (for example—the victim did not get along with management), then the jury should award front pay only for that limited amount of time that it believes the victim would have remained with the employer had the discrimination not occurred.[12] Further, where the defendant later discovers evidence of wrongdoing by its employee of such severity that the employee in fact would have been terminated on those grounds alone if the defendant had known of it at the time of the discharge, the jury should be instructed that an award of front pay is not appropriate.[13]

Conclusion

While it may be futile to object to or appeal a jury verdict on the issue of front pay after it has been rendered on the basis that front pay is an equitable remedy which should be determined by a judge, it is prudent for attorneys to craft and press effective jury instructions which focus the jury's attention on the aspects of the law that support their clients' positions.

1. See *Chisholm v. Mem'l Sloan-Kettering Cancer Ctr.*, 2011 U.S. Dist. LEXIS 130089, ** 3-4 (S.D.N.Y. Nov. 3, 2011).
2. See *Epstein v. Kalvin-Miller Int'l.*, 2000 U.S. Dist. LEXIS 17311 (S.D.N.Y. Nov. 28, 2000).
3. *Song v. Ives Laboratories*, 957 F.2d 1041, 1048 (2d Cir. 1992).
4. See *Howell v. New Haven Bd. of Educ.*, 2005 U.S. Dist. LEXIS 19897 (D. Conn. Sept. 8, 2005).
5. *Tyler v. Bethlehem Steel Corp.,* 958 F.2d 1176, 1190 (2d Cir. 1992).
6. See *Broadnax v. City of New Haven*, 141 Fed. Appx. 18, 24 (2d Cir. 2005).
7. See *Williams v. Pharmacia,* 137 F.3d 944, 953 (7th Cir. 1998).
8. See *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 126 (2d Cir. 1996).
9 See *Press v. Concord Mortgage Corp.*, 2010 U.S. Dist. LEXIS 81952, **5-6 (S.D.N.Y. Aug. 11, 2010); *Murphy v. FedEx National Ltl.,* 2009 U.S. Dist. LEXIS 39772, **14-20 (E.D. Mo. May 11, 2009).
10. See *Broadnax*, 141 Fed. Appx. at 22.
11. See *Fox v. City Univ. of New York*, 1999 U.S. Dist. LEXIS 718 (S.D.N.Y. Jan. 25, 1999).
12. See *Chisholm*, 2011 U.S. Dist. LEXIS 130089, **6.
13. See *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 20 (2d Cir. 1996).