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WHAT IS MY CASE WORTH

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REMEDIES FOR EMPLOYMENT DISCRIMINATION

I. INTRODUCTION

Employment discrimination laws provide for a variety of remedies for unfair employment practices. This paper focuses on the remedies that are available for violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq., the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq.

Traditionally, relief for employment discrimination under these various laws was limited to equitable relief, including, back pay, lost benefits, reinstatement, and/or front pay. However, the Civil Rights Act of 1991, 42 U.S.C. § 1981a, expanded the relief that is available for intentional violations of Title VII and the ADA to include compensatory and punitive damages. This paper examines the traditional equitable relief that is available under the various statutes as well as compensatory and punitive damages that are available under Section 1981a.

II. EQUITABLE RELIEF

A. BACK PAY

Title VII, the ADA and the ADEA all allow for an award of back pay. 42 U.S.C. § 2000e-5(g); 42 U.S.C. § 12117; and 29 U.S.C. § 626(b). Fringe benefits and all other forms of compensation are included in back pay. EEOC: Policy Guide on Compensatory and Punitive Damages under 1991 Civil Rights Act (July 7, 1992) fn.5. Fringe benefits may include such items as sick pay, disability insurance, health or medical insurance, dental insurance, retirement benefits, pension benefits, annuity benefits, profit sharing benefits, contributions to savings plans, thrift plans, vacation time, stock options, expense accounts, travel allowances, personal use of automobile, relocation expenses, housing allowances, uniform cleaning allowances and

clothing discounts. The employee has the burden of proving the value of the lost benefits. When calculating the value of fringe benefits, the courts are divided on whether to include the cost of the premiums, the actual out-of-pocket costs the employee must pay, or actual losses incurred because of unlawful discrimination.

1. Mitigation of Damages

Title VII and the ADA specifically require claimants to mitigate their damages. See 42 U.S.C. § 2000e-5(g); 42 U.S.C. § 12117 ("Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."). Although the ADEA does not expressly require claimants to mitigate their damages, the courts have routinely imposed such an obligation.

The accrual of back pay, as well as a potential award of front pay, may also be tolled if a defendant makes an unconditional offer of reinstatement to the claimant. In Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32 (1982), the Supreme Court stated:

> An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in § 205(g). This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied. Consequently, an employer charged with unlawful discrimination can toll the accrual of back pay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages.

In this context, an unconditional offer of employment or reemployment means that the defendant cannot condition the offer on a waiver or compromise of the claimant's claims. Id. at n.18.

Failure to mitigate damages is an affirmative defense. Therefore, the defendant has the burden of proving that there were job opportunities for the claimant and that he or she failed to exercise reasonable diligence to obtain alternative employment. This usually means that the

defendant will have to retain an expert to conduct a labor market survey in order to demonstrate that there are suitable employment opportunities for complainant, in a certain geographic region, that are within claimant's experience and vocational skill level.

As a general rule, a claimant must look for a substantially equivalent position, for a reasonable period of time, before discontinuing his or her efforts. Initially, a claimant is not required to accept employment that is not substantially equivalent to the position that he or she previously held. However, after an extended period of time searching for work without success, a claimant may have to seek a position that is not substantially equivalent to the one that he or she previously held. See Ford Motor Company v. EEOC, 458 U.S. 219, 231 n.16 (1982).

The Courts are divided over whether or not back pay is tolled when an employee voluntarily resigns from substantially equivalent employment or is terminated for cause. Compare Brady v. Thurston Motor Lines, 753 F.2d 1269, 1277-1278 (4th Cir. 1985) (back pay tolled) with Johnson v. Spencer Press of Maine, Inc., 364 F.3d 368, 382 (1st Cir. 2004) (back pay not tolled).

2. Collateral Sources of Income

The federal courts are sharply divided over whether or not collateral benefits (i.e., benefits from sources other than defendant) should be subtracted from a back pay award in employment discrimination cases. See e.g., EEOC v. Wyoming Retirement Sys., 771 F.2d 1425, 1431 (10th Cir. 1984) (holding under the ADEA that "[d]eduction of collateral sources of income from a back pay award is a matter within the trial court's discretion"); Orzel v. City of Wauwatosa Fire Dep't., 697 F.2d 743, 756 (7th Cir.) (similar), cert. denied, 464 U.S. 992, 104 S. Ct. 484, 78 L. Ed.2d 680 (1983); Merriweather v. Hercules, Inc., 631 F.2d 1161, 1168 (5th Cir. 1980) (similar in regard to Title VII back pay awards); EEOC v. Enterprise Ass'n. Steamfitters

Local No. 638, 542 F.2d 579, 591-92 (2d Cir. 1976) (allowing district court to offset public assistance payments against a Title VII back pay award), cert. denied, 430 U.S. 911, 97 S. Ct. 1186, 51 L. Ed.2d 588 (1977) with Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 81-85 (3d Cir. 1983) (holding that unemployment compensation should not be deducted from a Title VII back pay award); Brown v. A.J. Gerrard Mfg. Co., 715 F.2d 1549, 1550-51 (11th Cir. 1983) (en banc) (similar); EEOC v. Ford Motor Co., 688 F.2d 951, 952 (4th Cir. 1982) (similar). Three other circuits have shown signs of an internal division Compare Hawley v. Dresser Indus., Inc., 958 F.2d 720, 726 (6th Cir. 1992) (approving the deduction of pension benefits from an ADEA back pay award) with Rasimas v. Michigan Dep't. of Mental Heath, 714 F.2d 614, 627 (6th Dir. 1983) (holding that "[u]nemployment benefits … should not be deducted from backpay awards" under Title VII), cert. denied, 466 U.S. 950, 104 S. Ct. 2151, 80 L. Ed.2d 537 (1984); and compare Glover v. McDonnell Douglas Corp., 12 F.3d 845, 848 (8th Cir.) (holding that the district court erred in refusing to offset pension payments from an award of back pay), cert. denied, 511 U.S. 1070, 114 S. Ct. 1647, 128 L. Ed.2d 366 (1994) with Doyne v. Union Elec. Co., 953 F.2d 447, 451-52 (8th Cir. 1992) (contra); compare Naton v. Bank of Cal., 649 F.2d 591, 700 (9th Cir. 1981) (holding that district courts possess discretion to deduct collateral benefits from back pay awards in ADEA cases) with Kauffman v. Sidereal Corp., 695 F.2d 343, 347 (9th Cir. 1982) (holding in a Title VII case that "unemployment benefits received by a successful plaintiff in an unemployment discrimination action are not offsets against a backpay award").

B. FRONT PAY

Title VII, the ADA, and the ADEA do not specifically provide for front pay as a remedy. However, the courts uniformly award front pay under all of these statutes where appropriate. Front pay is most commonly awarded where (1) reinstatement is not possible (e.g., no vacant

positions), (2) reinstatement would be detrimental to the claimant (e.g., environment has caused depression or anxiety), or (3) reinstatement is otherwise impractical (e.g., ongoing tensions or hostility between the parties that existed prior to the litigation).

Because reinstatement is an equitable remedy, the judge, rather than a jury, decides whether to award reinstatement or front pay. Once the judge determines that reinstatement is not a viable alternative and that front pay should be awarded, the courts are divided over whether the judge or jury decides the amount of front pay to be awarded.

C. REINSTATEMENT

Title VII, the ADA and the ADEA all expressly provide for reinstatement as a remedy to victims of discrimination. 42 U.S.C. § 2000e-5(g); 42 U.S.C. § 12117(a); 29 U.S.C. § 626(b). Because reinstatement is an equitable remedy, the judge, rather than a jury, decides whether reinstatement is warranted.

As previously discussed, where reinstatement is impossible or impractical, front pay may be awarded instead of reinstatement. However, a claimant is not entitled to choose between reinstatement and front pay. See Wildmam v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985) (front pay should not be awarded unless reinstatement is impracticable or impossible).

III. REMEDIES UNDER THE CIVIL RIGHTS ACT OF 1991

A. COMPENSATORY DAMAGES

Pursuant to the Civil Rights Act of 1991, compensatory damages are available in disparate treatment claims brought under Title VII and ADA. However, compensatory damages are not available for disparate impact claims under Title VII or the ADA. 42 U.S.C. 1981a(a)(1). Likewise, compensatory damages are not available for mixed motive claims. 42 U.S.C. § 2000e-5(g)(2)(B). In addition, compensatory damages are not available under the ADEA.

The Civil Rights Act of 1991, 42 U.S.C. Section 1981a(b)(3), defines compensatory damages to include future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoinment of life and other non-pecuniary losses. The EEOC Policy Guide on Compensatory and Punitive Damages under 1991 Civil Rights Act (July 7, 1992) (the "EEOC Policy Guide"), explains that pecuniary losses may include, without limitation, moving expense, job search expenses, medical expenses, psychiatric expenses, and other quantifiable out-of-pocket expenses. Id. at II A.1. The EEOC Policy Guide further explains that non-pecuniary losses may include, without limitation, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. Id. at II A.2. Emotional harm may manifest itself as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue or nervous breakdown. Physical manifestation of emotional harm may consist of ulcers, gastrointestinal disorders, hair loss, and/or headaches. Id.

Compensatory damages and punitive damages are capped based on the number of employees employed by the employer at the time of the adverse employment action. 42 U.S.C. Section 1981a(b)(3) limits compensatory and punitive damages as follows:

15 to 100 employees	$50,000
101 to 200 employees	$100,000
201 to 500 employees	$200,000
501 or more employees	$300,000

Courts have uniformly held that the caps apply to the lawsuit as a whole rather than to individual claims asserted in the complaint. However, the caps do not include awards of back pay, lost benefits, front pay, or attorney's fees.

B. PUNITIVE DAMAGES

Pursuant to the Civil Rights Act of 1991, punitive damages are available in disparate treatment claims brought under Title VII and the ADA and are subject to the same caps as compensatory damages.[1] However, punitive damages are not available for disparate impact claims under Title VII or the ADA. 42 U.S.C. § 1981a(a)(1). Likewise, punitive damages are not available for mixed motive claims. 42 U.S.C. Section 2000e-5(g)(2)(B). Furthermore, punitive damages are not available under the ADEA.

Under the Civil Rights Act of 1991, punitive damages are available only if the defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981(a)(b)(3). In 1999, the Supreme Court issued an opinion in which it addressed the standard for proof necessary to obtain punitive damages. Kolstad v. American Dental Ass'n., 527 U.S. 526, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999). In Kolstad, the court concluded that the defendant's state of mind, rather than the egregiousness of the discriminatory conduct, determines whether punitive damages may be awarded under the Civil Rights Act of 1991. Id. at 535. Thus punitive damages are available in cases in which the employer has, at a minimum, engaged in discriminatory action "in the face of a perceived risk that that actions will violate federal law." Id., at 536.

Accordingly, in order to obtain an award of punitive damages, a plaintiff must prove, by a preponderance of the evidence, that the defendant acted "with malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981 a(b)(1). See also,

[1] Punitive damages are not available against a government, government agency or political subdivision regardless of whether the claim is based on a theory of disparate treatment or disparate impact. 42 U.S.C. § 1981a(b)(1).

EEOC v. Indiana Bell Tel. Co., 214 F.3d 813 (7th Cir. 2001) (a showing of malice or reckless indifference requires proof that the defendant almost certainly knew that what he was doing was wrong); Hardin v. Caterpillar, Inc., 227 F.3d 268 (5th Cir. 2000) (noting that proof of pretext and discrimination is not necessarily sufficient to prove malice or reckless indifference); Romano v. U-Haul Intern., 233 F.3d 655 (1st Cir. 2000)(punitive damages are available in Title VII cases in which the employer engaged in discriminatory conduct in the face of a perceived risk); see also, Weissman v. Dawn Joy Fashion, 214 F.3d 224 (2nd Cir. 2000) (finding that the employer's actions may support a finding of discrimination, but not that the employer acted "in the face of a perceived risk that its actions will violate federal law").

In Kolstad, the court also created an affirmative defense to punitive damages for employers who made good faith efforts to comply with the requirements of Title VII.[2] Kolstad, 527 U.S. at 545-46. More specifically, the court concluded that an employer who could demonstrate that it had made good faith efforts to comply with Title VII could not have acted with "malice or reckless indifference" to the rights protected by Title VII and, therefore, the employer could not be held liable for punitive damages.

The court in Kolstad did not articulate any specific evidence necessary for a finding of good-faith efforts. However, courts since Kolstad have considered a number of factors when deciding whether or not an employer has engaged in good faith efforts to comply with federal anti-discrimination laws. See Ogden v. Wax Works, Inc., 214 F.3d 999, 1010 (8th Cir. 2000); EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1248 (10th Cir. 1999); Romano, 233 F.3d at 670

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[2] Although Kolstad does not state specifically which party must establish good-faith efforts (or the lack thereof), courts have subsequently characterized it as an affirmative defense. See Romano v. U-Haul Intern., 233 F.3d 655, 670 (1st Cir. 2000); Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 516 (9th Cir. 2000); Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 286 (5th Cir. 1999).

Some of the factors that courts are likely to consider include, without limitation, whether or not the employer: 1) has a formal written policy prohibiting unlawful discrimination; (2) distributes copies of the policy prohibiting discrimination to all employees; (3) trains all employees regarding the anti-discrimination policy; (4) promptly and thoroughly investigates all reported violations of the policy; and (5) enforces the policy by taking prompt and effective remedial action.

IV. LIQUIDATED DAMAGES

Liquidated damages are available under the ADEA. They are not available under Title VII or the ADA. Liquidated damages under the ADEA are "punitive in nature." See Trans World Airlines v. Thurston, 469 U.S. 111, 125-26 (1984).

Under the ADEA, liquidated damages are only available for willful violations and are equal to the amount of the back pay award. 29 U.S.C. § 626(b). In order to establish that a defendant's conduct was willful, the plaintiff must prove that the defendant knew that its conduct was prohibited by the ADEA or showed a "reckless disregard" for whether its conduct was prohibited by the ADEA. Thurston, 469 U.S. at 113 and 127 - 128.

V. ATTORNEYS' FEES

Title VII, the ADA, and the ADEA all provide for reasonable attorney's fees. 42 U.S.C. § 2000e-5(k); 42 U.S.C. §§ 12117 and 12205; 29 U.S.C. § 626. Title VII and the ADA both provide for attorney's fees to the prevailing party. However, it is extremely unusual for the courts to award attorney's fees to a prevailing defendant. In Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978), the court stated that a prevailing defendant may recover attorney's fees "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."