DISPROVING AND LIMITING MONETARY RELIEF IN AN EMPLOYMENT DISCRIMINATION CASE

4th Annual ABA Section of Labor and Employment Law CLE Conference

November 6, 2010
Chicago, IL

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I. INTRODUCTION

A. The focus of employment discrimination litigation is whether the plaintiff will be able to demonstrate that the defendant has engaged in an unlawful employment practice, as a result of which he or she has suffered harm that must be redressed by an award of injunctive, equitable and/or monetary relief.

B. The prospect of recovering monetary relief provides the incentive for most plaintiffs, and their attorneys, to commence litigation.

C. The extent of the monetary remedies available in a particular set of circumstances has a significant influence on litigation strategy, the negotiation of settlements, and, ultimately, the implementation of workplace policies.

D. There are many ways employers can reduce their potential exposure to monetary relief through improved workplace policies, but there are also ways to reduce this exposure once litigation ensues.

E. This outline discusses litigation techniques to limit four main types of monetary relief: back pay, front pay, compensatory damages, and punitive damages.

II. BACK PAY

A. Back pay is the most commonly awarded and available variety of monetary relief in employment cases.


C. Back pay awards can reflect not only lost wages and salary, but other benefits lost due to discrimination, such as insurance, 401(k), accrued vacation pay, and pension plan adjustments. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 421-42 (1975); Hartley v. Dillard's, Inc., 310 F.3d 1054 (8th Cir. 2002) (not error to include in back and front-pay awards such benefits as insurance, 401(k), accrued vacation pay, value of employee discount, COBRA); Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974) ("the ingredients of back pay should include more than 'straight salary.' Interest, overtime, shift differentials, and fringe benefits such as vacation and sick pay are
among items which should be included in back pay. Adjustments to the pension plan for members of the class who retired during this time should also be considered on remand.

D. Once the plaintiff has proven liability, and introduced admissible evidence regarding lost pay, the burden is on the employer to prove offsets from back pay. See *Di Salvo v. Chamber of Commerce*, 568 F.2d 593, 598 (8th Cir. 1978) (in discussing back pay under 42 U.S.C. § 2000e-5, stating that, “[o]nce plaintiff in a Title VII case . . . has proven her case and established what she contends to be her damages, the burden of going forth to mitigate the liability or to rebut the damage claim rests with the defendant”).

E. If the plaintiff introduces admissible evidence regarding salary increases, whether based on merit, contract, cost of living, promotions, or other circumstances, such increases may be factored into an award of back pay; defendant must put forth evidence to contest whether these salary increases would have occurred. See, e.g., *Rhodes v. Guiberson Oil Tools*, 82 F.3d 615 (5th Cir. 1996) (employer did not contest evidence of five percent yearly base salary increase for back pay calculation purpose).

F. In light of the purpose for back pay—to make the plaintiff whole—defendants sometimes argue that back pay awards should reflect net earnings, as opposed to gross earnings. *Caldwell v. Haynes*, 643 A.2d 564 (N.J. 1994). Plaintiffs typically argue in response that because the back pay award is taxable, gross losses constitute the appropriate measure of loss.

G. **Length of Time for Back Pay Awards**

1. Generally, back pay is awarded from the occurrence of the alleged discrimination until the harm suffered by the plaintiff is redressed. See *EEOC v. Joint Apprenticeship Comm. of the Joint Indus. Bd. of the Elec. Indus.*, 186 F.3d 110, 123 (2d Cir. 1998); *Clarke v. Frank*, 960 F.2d 1146, 1151 (2d Cir. 1992).

   a) Exception: Under certain statutes, the back pay period can extend back no further than a specified time. For example, under Title VII, “[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.” 42 U.S.C. § 2000e-5(g)(1).

2. The award is limited by the amount of economic harm that the plaintiff can demonstrate occurred as a result of the alleged discrimination.

3. Back pay period ends when plaintiff’s circumstances have changed such that he or she has ceased suffering from the economic harm that is proximately related to the alleged discrimination, such as when income from self-employment becomes more lucrative than earnings employee would have received from the prior employment. See, e.g., *Denton v. Boilermakers Local 29*, 673 F. Supp. 37 (D. Mass. 1987) (and cases cited therein) (back pay ended when income from self-employment became more lucrative than earnings employee would have received from prior employment).
4. Unconditional Offers of Reinstatement

a) Defendant’s back pay liability ends once the plaintiff receives such an offer, so long as there is substantial equivalence between the position that was lost and the one that has been offered to the plaintiff, and the offer truly is unconditional. See, e.g., Ford Motor Co. v. EEOC, 458 U.S. 219, 238-39 (1982) (“[A]bsent special circumstances, the simple rule that the ongoing accrual of backpay liability is tolled when a Title VII claimant rejects the job he originally sought comports with Title VII’s policy of making discrimination victims whole.”).

b) The offer should

(1) Be phrased in such a way as to disclaim any admission of liability;

(2) Expressly state that the offer is unconditional;

(3) Offer a position that is as close to the plaintiff’s former position in its responsibilities and compensation as possible;

(4) Have plaintiff report to a new supervisor if there were any prior alleged issues of supervisory discrimination or harassment;

(5) Provide information for a person the plaintiff may contact with any questions; and

(6) Be delivered overnight, by certified mail or overnight delivery, with delivery notification. (A copy may be sent by email, but delivery solely by email creates risks.

5. Rule 68 Offers

a) More than 10 days before trial, a defendant may serve the plaintiff with an offer to allow judgment on specified terms, with the costs then accrued. The plaintiff then has 10 days in which to serve written notice of acceptance. Fed. R. Civ. P. 68(a).

b) If the defendant has already been found liable, but the extent of liability remains to be determined by a later proceeding, then the defendant may also make an offer of judgment if done at least 10 days before the hearing to determine the extent of liability. Fed. R. Civ. P. 68(c).

c) Consequence of the plaintiff’s rejection: if the judgment that the plaintiff finally obtains is not more favorable that the unaccepted offer, the plaintiff must pay defendant the taxable costs incurred after the offer was made. Fed. R. Civ. P. 68(d).

d) Most significantly, a plaintiff who rejects a Rule 68 offer and prevails at trial for an amount not exceeding the offer cannot recover any of the costs plaintiff incurred after declining the offer—in a Title VII case this includes not only the
typically modest costs allowed under 28 U.S.C. § 1920 (fees for the clerk, marshal, court reporter, printing, witness, copying, docketing, and court-appointed experts), but also all the attorneys’ fees plaintiff incurred after that date, which the plaintiff otherwise would receive under certain civil rights statutes. Marek v. Chesny, 473 U.S. 1 (including “fees as part of the costs” under 42 U.S.C. § 1988).

H. Back pay should be terminated where the plaintiff’s tenure would have been short or is speculative.

1. Back pay may be denied or limited where defendant establishes that the plaintiff would have been separated from his or her job within a short period of time, even in the absence of the alleged discrimination. See Hennessy v. Pennit Datacomm Networks, Inc., 69 F.3d 1344 (7th Cir. 1995) (to defeat claim for back pay, employer must demonstrate that the employment decision would have occurred absent the impermissible motivating factor).

2. A plaintiff proceeding under the ADEA was not entitled to back pay for periods during which he is unable to work due to poor or declining health, Dix v. Thompson Newspapers GA, Inc., 54 Fair Empl. Prac. Cas. (BNA) 1453 (N.D. Ga. 1991).

3. Back pay was denied under Title VII when a former employee had made plans to quit her job prior to being discharged, EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569, 1579-80 (7th Cir. 1997).

4. Back pay was cut off three years after an employee’s discharge when the sale of the company would have resulted in a lawful termination, Sivell v. Conwed Corp., 666 F. Supp. 23 (D. Conn. 1987).

5. If employees in plaintiff’s position or industry typically do not remain with the same employer for long periods of time, back pay may be limited. See, e.g., EEOC v. Mike Smith Pontiac GMC, Inc., 896 F.2d 524, 530 (11th Cir. 1990), overruled on other grounds by United States v. Weiss, 2010 U.S. Dist. LEXIS 19387, *14 (M.D. Fla. Mar. 4, 2010).

I. Obtain the most complete record of plaintiff’s compensation while working for the defendant, as well as the employer’s applicable compensation practices.

1. Commissions, bonuses, other cash payments, stock shares and stock options, and 401(k) plans
2. W-2 wage and tax statements
3. Salary and grade level information
4. The employer’s salary policies and guidelines
5. Summary plan descriptions for all benefit plans
6. Plaintiff's performance reviews

7. Internal job postings

J. Executive Recruiters

1. An executive recruiter can be an important witness when discussing the plaintiff's duty to mitigate damages. When an unconditional offer of outplacement assistance is made to the plaintiff, it may lead to prompt employment if accepted, and, if rejected, may allow both effective cross-examination regarding the plaintiff's efforts and qualify a headhunter as a fact witness.

2. Defendants can use executive recruiters to provide testimony and information regarding the following:

   a) the ability of a person with plaintiff's credentials to find new, comparable employment within a reasonable amount of time;
   
   b) the increased chances of finding comparable employment at the sacrifice of a relatively small reduction in pay;
   
   c) flaws or shortcomings in the plaintiff's job search methods;
   
   d) the possibility of finding a comparable position following a termination (particularly where the employer has provided only neutral references, a practice which most employers uniformly adopt);
   
   e) the executive recruiter's own ability to find comparable employment opportunities for the plaintiff, in cases where outplacement services have been offered to the plaintiff;
   
   f) a diligent, competent person with plaintiff's qualifications, despite the discharge, normally would be expected after a diligent job search to find comparable employment within a reasonable period of time;
   
   g) the individual almost certainly could find employment in the same general field with some reduction in pay;
   
   h) the individual did not go about the job search in the right way, and should in specific ways have done different things;
   
   i) the executive recruiter has experience in finding jobs for such persons and has found numerous such jobs;
   
   j) the fact of being discharged, while not as good as having resigned, is not a bar to finding another comparable job, because very few employers, particularly when litigation is involved, will give anything but a neutral reference; and
k) discharged persons with lawsuits tend not to search very hard for jobs because they know it will limit their damages, but it is quite common for them to find jobs after their claims are settled

3. Counsel should cover the following points in the examination or preparation for deposition of any executive recruiter:

a) Plaintiff’s preparation of an effective resume—or not

b) Plaintiff’s contacts with recruiters

c) Plaintiff’s contacts with governmental employment agencies

d) Whether plaintiff searched on the internet and, if so, how effectively

e) Plaintiff’s contacts, letters and number of interviews with prospective employers

f) Markets in which plaintiff searched or should have searched

g) Employment offers received

h) Hours per week plaintiff spent on job search

i) Plaintiff’s methods of job search

j) Duration of plaintiff’s subsequent employment

k) Alternate activities during unemployment, i.e., return to school

4. Err on the side of using an appealing human being as opposed to getting the most technically competent expert. Avoid the “Monday Morning Quarterback” syndrome.

K. Limitations on, and Offsets to, Back Pay Recovery

1. Social security disability benefit payments. See, e.g., Acevedo Martinez v. Coatings Inc., 286 F. Supp. 2d 107, 116 (D.P.R. 2003); Flowers v. Komatsu Mining Sys., Inc., 165 F.3d 554, 558 (7th Cir. 1999) (District Court has discretion to deduct social security disability payments from a back pay award); Thornley v. Penton Publ’g, Inc., 104 F.3d 26 (2d Cir. 1997) (holding that, as plaintiff’s private long-term disability benefits required deduction of amounts received from the SSA, his discrimination award must be likewise reduced).

2. Retirement benefits paid by the defendant employer. See, e.g., Giles v. GE, 245 F.3d 474, 494 (5th Cir. 2001) (disability pension and long-term care disability benefits offset front pay, since employer paid for these benefits); Hawley v. Dresser Indus., Inc., 958 F.2d 720 (6th Cir. 1992) (District Court properly granted JNOV and offset pension earnings against back pay award where evidence established that plaintiff would not have received pension benefits if still with employer).
3. Severance payments. See, e.g., Rhodes v. Guiberson Oil Tools, 82 F.3d 615, 622 (5th Cir. 1996) (deduction proper because plaintiff would not have received severance benefits in absence of discharge); Munnelly v. Memorial Sloan Kettering Cancer Ctr., 741 F. Supp. 60, 62 (S.D.N.Y. 1990) (“failure to offset any damage award by the amount of his severance pay would put [the plaintiff] in a better position than he would have been had he not been terminated”).

4. Unemployment compensation: although many courts have held it is a collateral source that should not be deducted, some have given trial courts discretion to deduct, (See Dailey v. Societe Generale, 108 F.3d 451, 459-61 (2d Cir. 1997); Secretary of Labor ex rel. Wamsley v. Mutual Mining, Inc., 80 F.3d 110 (4th Cir. 1996); EEOC v. Kentucky State Police Dep't, 80 F.3d 1086 (6th Cir.) (1996); Lussier v. Runyon, 50 F.3d 1103 (1st Cir.) (1995); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1555 (10th Cir. 1988); Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743 (7th Cir. 1983); Nottelson v. Smith Steel Workers D.A.L.U. 1980, 643 F.2d 445 (7th Cir. 1981) (offsetting back pay by employer contributions to unemployment compensation fund), especially where the benefits are provided from a fund to which the defendant is the sole contributor, since it is effectively the defendant, and not a third party, who is providing the “collateral benefit.” EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579, 591-92 (2d Cir. 1976). But see NLRB v. Gullett Gin Co., 340 U.S. 361, 363 (1951) (rejecting this argument).


b) One who pays for insurance against an accident should not be forced to donate the proceeds to the person who causes the accident. But, in the unemployment compensation context, the employer—not the employee—has paid for the insurance. Id.

c) Disallowing a deduction from a back pay award for unemployment benefits punishes work and rewards leisure. The plaintiff who mitigates damages by getting a new job will have his or her earnings deducted from any back pay award while the plaintiff who simply collects unemployment compensation will not suffer any deduction.

6. When plaintiff would have been unable to work
   a) Plant shutdowns
   b) Unpaid leave periods
   c) Child bearing or family care
   d) Illness, injury, or disability

7. Expenses plaintiff would have incurred if employed should be subtracted from the back pay award: parking fees, commuting expenses, business clothes costs, child care expense. See Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975) (10% deducted for employment-related expenses), vacated and remanded on other grounds, 431 U.S. 951 (1977); Mitchell v. West Feliciana Parish Sch. Bd., 507 F.2d 662, 666 n.7 (5th Cir. 1975) (plaintiff suffered no financial loss because lower travel expenses in commuting offset the lower interim salary).

8. Where a fringe benefit is part of the back pay award, any portion of the cost of that fringe benefit that the employee would have been obligated to pay should be deducted from the award. See Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937 (M.D. Ala. 1974) (defendant may deduct from back pay liability the contributions to pension and other benefits that plaintiff would have been required to make for such benefits).

9. Back pay may be reduced for periods during which the plaintiff is unavailable for work or has voluntarily left the job market. For example, a plaintiff who is unable to work due to a disability that is not attributable to the employer's alleged discrimination will be denied back pay for the period of the disability. See Thornely v. Penton Publ'g, Inc., 104 F.3d 26 (2d Cir. 1997) (back pay denied following date of ADEA plaintiff's admitted total disability). But see Knafel v. Pepsi-Cola Bottlers, Inc., 899 F.2d 1473 (6th Cir. 1990) (employee who was discriminatorily assigned physically difficult work in order to worsen injury would not be subject to back pay offset for workers' compensation time loss benefits where disability was caused by employer's unlawful conduct); Maturo v. Nat'l Graphics, Inc., 722 F. Supp. 916 (D. Conn. 1989) (recovery would not be reduced for leaving interim employment due to stress induced by past sexual harassment).

III. FRONT PAY

A. Front pay may be allowed to redress the loss of future employment beyond the date of judgment as a result of past discrimination.

B. Reinstatement is the preferred first resort of the courts. See Selgas v. American Airlines, Inc., 104 F.3d 9 (1st Cir. 1997). Nevertheless, front pay may be awarded where reinstatement would not be practical, or for the estimated length of the interim period
before plaintiff could return to his or her former position. See, e.g., EEOC v. Century Broad. Corp., 957 F.2d 1446 (7th Cir. 1992) (employer extremely hostile to employee); Preda v. Nissho Iwai Am. Corp., 128 F.3d 789 (2d Cir. 1997) (employee extremely hostile to employer).

C. The plaintiff bears the initial burden of providing the court with the essential data necessary to calculate a reasonably certain front pay award, including the amount of the proposed award, the length of time the plaintiff expects to work for the defendant, and the applicable discount rate. The defendant remains free to challenge the award’s amount, length, or interest rate, or to establish as an affirmative defense that the plaintiff failed to mitigate damages. McKnight v. General Motors Corp., 973 F.2d 1366, 1372 (7th Cir. 1992).

D. Courts will exclude speculative losses from a front pay calculation. See, e.g., Buonanno v. AT&T Broadband, LLC, 313 F. Supp. 2d 1069, 1085-86 (D. Colo. 2004) (rejecting plaintiff’s request for front pay reflecting lost 401(k) matching contributions and labeling as “speculative” plaintiff’s arguments that defendant would have continued to provide the same level of matching contributions until plaintiff’s retirement age, that plaintiff would have continued to invest 10% of his gross pay until retirement age, and that plaintiff would have continued to work in his subsequent field where matching contributions were not common). But see Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1040 (9th Cir. 2003) (affirming award of $25,000 bonus for each of four years based on plaintiff’s “outstanding” work performance as top salesman the year before his termination).

E. The factors used to determine the amount of the front pay award are the same factors that defendants may use to reduce front pay:

1. the age of the plaintiff;
2. the amount of time the plaintiff had worked at the employer, plaintiff’s intent to remain with the employer, and the typical amount of time plaintiff remained with previous employers;
3. how long plaintiff’s replacement remained in the position and the amount of time employees in similar positions typically stay with the employer;
4. plaintiff’s efforts to find comparable employment and otherwise mitigate damages; and
5. any indicators of the stability of the position or plaintiff’s prospects at the employer. See Barbour v. Merrill, 48 F.3d 1270, 1280 (D.C. Cir. 1995).

F. Front pay is subject to deductions, tolling, and cancellation for many of the same reasons back pay may be limited.

1. Front pay is denied where plaintiff has failed to mitigate back pay damages. See Vaughn v. Sabine County, 104 F. App’x 980, 986 (5th Cir. 2004) (stating that “as with back pay, a plaintiff’s right to receive front pay is subject to her duty to mitigate
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"damages" and that a plaintiff “must use reasonable diligence” to obtain “substantially equivalent” work to justify the award); Excel Corp. v. Bosley, 165 F.3d 635, 639 (8th Cir. 1999); Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 54 (2d Cir. 1998).

2. Awards should be consistent with expectations regarding the length of time that the plaintiff would have remained with the employer. See EEOC v. HBE Corp., 135 F.3d 543, 555 (8th Cir. 1998) (five-year front pay award reduced to one year due to high turnover of predecessors).

3. Damages may be limited by showing that plaintiff’s employment would have been limited by nondiscriminatory factors such as reorganization, wrongdoing, etc. See McKennon v. Nashville Banner Publ’g Co., 513 U.S. 352, 356 (1995) (after-acquired knowledge of misconduct can serve as a basis for denying reinstatement or front pay); Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1182 (2d Cir. 1996) (front pay properly limited to seven-week period upon showing that plaintiff’s department and position would have been eliminated within that time); Williams v. Pharmacia, Inc., 137 F.3d 944, 953 (7th Cir. 1998) (front pay limited to one year where employee would have been laid off for legitimate reasons).

4. Front pay cannot be awarded where plaintiff declined an unconditional offer of reinstatement to his or her former position. Lightfood v. Union Carbide Corp., 110 F.3d 898, 909 (2d Cir. 1997).

G. Other factors that strengthen an argument for reducing front pay as speculative:

1. Short period of plaintiff’s actual employment. Tennes v. Mass. Dep’t of Revenue, 944 F.2d 372, 381 (7th Cir. 1991) (given plaintiff's short period of employment with defendant, plaintiff’s general weak employment history, and defendant’s high turnover rate, front pay would be too speculative an award).

2. Plaintiff’s general poor employment history. Id.

3. Employer’s high turnover rate. Id.

4. Lack of job security in occupation.

5. Average tenure of comparable employees.

H. Courts generally hold that the amount of front pay is for the court’s determination. See, e.g., EEOC v. W&O, Inc., 213 F.3d 600, 618 (11th Cir. 2000) (front pay is a form of equitable relief; as such, the decision to grant it, and, if granted, what form is should take, lies in the discretion of the court).
IV. MITIGATION

A. A plaintiff has an affirmative duty to mitigate lost wages by taking reasonable measures to locate comparable or substantially equivalent employment. See Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982) (the duty of a plaintiff in a job discrimination case to mitigate damages “requires the claimant to use reasonable diligence in finding other suitable employment”; this includes jobs with the same employer).

B. When the plaintiff assumes a comparable position or a higher-paying position, the back pay accrual period typically will end. See, e.g., Hammond v. Northland Counseling Ctr., 218 F.3d 886, 891 (8th Cir. 2000) (plaintiff who suffered no lost earnings and was immediately employed was not entitled to recovery of back-pay damages).

C. When the plaintiff abandons the search for new employment or fails to pursue new employment with reasonable diligence, courts hold that the employee has cut off his or her rights to any further recovery of back pay. See, e.g., Kirsch v. Fleet St., Ltd., 148 F.3d 149, 168 (2d Cir. 1998) (employment discrimination plaintiff may not simply abandon his job search and continue to recover back pay); Tubari Ltd. v. NLRB, 959 F.2d 451, 454 (3d Cir. 1992) (absent a showing that employee exercised diligence to find comparable employment, evidence of a scarcity of work and the possibility that none would have been found even with the use of diligence is irrelevant).

D. Burden of Proof

1. Failure of plaintiff to mitigate damages can reduce or completely cancel out a back pay award. Income that plaintiff could have earned if plaintiff exercised reasonable diligence in seeking new employment can be deducted from the back pay damages that would otherwise be recoverable. See 42 U.S.C. § 2000e-5(g).

2. Defendant must prove failure to mitigate, and cannot rely on weaknesses or gaps in plaintiff’s demonstration of his or her economic losses. See Dailey v. Socite Generale, 108 F.3d 451, 456 (2d Cir. 1997) (“While it is the plaintiff’s duty to mitigate, it is the defendant who has the evidentiary burden of demonstrating at trial that a plaintiff has failed to satisfy this duty.”).

3. Defendant must show that plaintiff’s economic harm could have been reduced or avoided if he or she had sought suitable employment and that plaintiff also did not exercise reasonable care or diligence in seeking new, suitable employment.

4. Burden may require proof that suitable jobs were available in the appropriate geographic area.

5. If the employer can show plaintiff made either no effort at all, or no effort that could reasonably be expected to yield new employment, the employer may be excused from demonstrating the availability of new and suitable employment. Quint v. A.E. Staley
Mfg. Co., 172 F.3d 1, 16 (1st Cir. 1999) (court relieved employer of burden of demonstrating availability of comparable employment in relevant geographical area where former employee made no effort to obtain employment for more than 40 months following discharge; court observed that employers have successfully invoked this exception to evidentiary burden only where employees are shown to have completely failed to attempt to mitigate damages); see also West v. Nabors Drilling USA, Inc., 330 F.3d 379, 382, 393, 394 (5th Cir. 2003) (once the defendant proves that the plaintiff did not make reasonable efforts to obtain employment, the defendant does not also have to establish the availability of substantially equivalent employment; reversing award of $115,000 in back pay and remanding for further proceedings because trial evidence permitted only the reasonable finding that, but for a short period of time, plaintiff failed to mitigate damages by obtaining employment as a truck driver and “roustabout” rather than attempting to obtain work at another drilling company or work at a “supervisor-type” level); Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 53-54 (2d Cir. 1998) (employer need not establish availability of comparable employment where employee was shown to have made no reasonable efforts to find comparable employment; six months of work at temporary agency and machinist training, without looking for work in previous line of work, constitutes failure to mitigate damages); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527 (11th Cir. 1991).

E. If plaintiff resigns or is discharged from subsequent employment, back pay liability will be cut off where the loss of employment is the direct result of plaintiff’s misconduct or decision to stop working, or where the plaintiff voluntarily left a position comparable to the one he or she occupied with the defendant employer. See Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269 (4th Cir. 1985) (termination for violation of employer policies or voluntary resignation does not fulfill plaintiff’s duty to mitigate; resignation would not toll back pay liability, however, where plaintiff faced unreasonable working conditions or sought to undertake a search for better employment).

F. Subsequent Employment

1. Income earned by plaintiff in new employment between the plaintiff’s separation from employment at the defendant employer and judgment in the case is, in most situations, deducted from back pay awards. See, e.g., Vaughn v. Sabine County, 104 F. App’x 980, 985 (5th Cir. 2004).


3. Principal issue in determining whether specific interim earnings should be used to reduce a back pay award is whether the income at issue could have been earned if the plaintiff was still in his or her former position at the time. See Wilson v. Pena, 79 F.3d 154, 167-68 & n.13 (D.C. Cir. 1996).
G. Arguing the Substitute Employment is “Substantially Comparable”

1. A terminated discriminatee has a duty to mitigate damages by taking reasonable measures to locate “substantially comparable” substitute employment. Ford Motor Co. v. EEOC, 458 U.S. 219 (1982); Johnson v. Chapel Hill Indep. Sch. Dist., 853 F.2d 375, 383 (5th Cir. 1988). Note also that some courts have held that after a reasonable search period, a discriminatee must accept the best available position even if it is not substantially comparable. NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1320 (D.C. Cir. 1972); Arline v. School Bd., 692 F. Supp. 1286, 1292 (M.D. Fla. 1988) (plaintiff failed to mitigate damages where she made only minimal efforts to locate employment outside the teaching field).

2. The employer has the burden of demonstrating (1) that comparable work was available and (2) that the claimant did not seek it out. Rasimas v. Mich. Dep't of Mental Health, 714 F.2d 614, 623-24 (6th Cir. 1983).

3. Courts generally consider factors such as compensation, promotional opportunities, job responsibilities, working conditions, and job status. Sellers v. Delgado Community College, 839 F.2d 1132, 1135-38 (5th Cir. 1988).

V. EXPERT TESTIMONY

A. Defendant’s Economic Expert

1. Retain an economic damages consulting expert to form cohesive theories of recovery and formulate credible estimates of monetary losses.

2. An expert is important because the calculation of even a basic back pay award can become exceedingly complex once arguments regarding mitigation, unavailability, estimated length of future employment, or other factors are introduced.

3. Defense counsel generally should avoid calling an expert economist at trial, if possible, because it draws attention to plaintiff’s injuries.

4. If defense counsel must call an expert economist, the focus of the testimony should be discrediting the underlying assumptions of plaintiff’s economist, and placing the smallest reasonable number before the jury.

5. Err on the side of using an appealing human being as opposed to getting the most technically competent expert.

6. Preparation for Plaintiff’s Deposition

   a) Usually, the most effective use of defendant’s economic expert is prior to trial, in preparing for the plaintiff’s deposition, formulating questions regarding the
plaintiff's income and losses, and for analyzing any reports or testimony provided by the plaintiff's expert.

b) Defendant's economic expert should be on hand for the deposition of the plaintiff's expert to provide timely advice and analysis.

c) Defendant's expert can also help reveal ways in which it can be brought out that the plaintiff's expert's conclusions actually support the defendant's position, which reduces the need for defendant to call its own damages expert at trial.

B. Plaintiff's Economic Expert

1. Employers must attempt to undermine the testimony of the plaintiff's expert and show that the plaintiff's concept of the appropriate scope of back pay is incorrect and that the reality is much more limited.

2. Defendant may be able to get plaintiff's expert testimony excluded where it can be shown that flawed methods or assumptions were used in the expert's calculations. See, e.g., Price v. Marshall Erdman & Assoc., Inc., 966 F.2d 320, 327 (7th Cir. 1992) (expert computations using average of salesman's expected earnings, but failed to allow for volatility and risk of plaintiff's occupation, found "unsound" by court).

C. Cross-Examination of Plaintiff's Expert at Trial or in Deposition

1. If liability is proven by plaintiff, the successful cross-examination of the plaintiff's economist is often the difference between a significant jury verdict (when poorly done) and a relatively small jury verdict (when properly done). The key to successful cross-examination at trial is an effective and thorough deposition.

2. Time spent dwelling on the expert's qualifications is generally fruitless unless there are serious issues that should be brought out. Too often such inquiries only help to illustrate that the expert truly has qualifications enabling her to provide reliable opinions on the subject. Do your homework in advance and determine the expert's qualifications before the deposition. If there are issues, bring them out. If not, move on. (Indeed, you may wish to stipulate to the expert's qualifications in order to prevent a litany of plaudits.)

3. Defendant's objectives at the deposition of the plaintiff's economic expert are to cross-examine plaintiff's economist so effectively that

   a) the underlying assumptions of plaintiff's economist are destroyed;

   b) grounds are established to exclude the testimony or vigorously attack it at trial; and/or

   c) plaintiff's economist agrees with the defense counsel's assumptions such that it is not necessary for defense counsel to call an economist at the trial.
4. Focus of examination should be on the assumptions upon which the expert’s conclusions are based.

5. Because plaintiff’s calculations may rely on improper assumptions or facts that do not in reality support the award sought, these assumptions should be the focus of the examination. Assumptions that should be questioned include:

   a) the windfall that plaintiff would receive if the plaintiff found new employment immediately after the judgment if an award was issued, based on the expert’s front pay estimates;

   b) the chances of the plaintiff being laid off or terminated, even in the absence of the termination at issue in the litigation (admissions should be extracted from the expert regarding the possibility of such an event, particularly during an economic downturn or period of difficulty for the employer);

   c) why low discount rates were used by the expert to determine the present value of plaintiff’s future earnings (a point that can be emphasized by presenting evidence regarding typical interest rates found in the market);

   d) return on savings or investments claimed by plaintiff;

   e) the plaintiff’s true life expectancy, including any health or other considerations that might not have been factored in by the expert;

   f) the percentage of persons in the plaintiff’s position, and at the plaintiff’s age, who continue to work until age 65 or 70;

   g) any mathematical errors that appear in the expert’s charts, report, or calculations (either creating the appearance of sloppiness, or further undermining the expert’s credibility in the event he chooses to defend a clear mistake);

   h) the source of plaintiff’s compensation information and data (if all of the expert’s information was obtained through plaintiff’s counsel, the expert’s information, and the assumptions based on it, might be shown to be incomplete or wrong);

   i) whether the expert has formulated damages figures based upon various compensation scenarios, such as plaintiff finding new employment within six months, receiving a reduction in pay, unavailability of promotions or raises, or the like;

   j) whether the calculations take into account fluctuations in income from sources such as tips or commissions, rather than merely extrapolating a relatively high amount of income from these sources throughout the back pay period.
VI. COMPENSATORY & PUNITIVE DAMAGES

A. Compensatory damages may be awarded to a Title VII or ADA plaintiff for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3).

B. These damages are subject to caps on the total amount of compensatory and punitive damages. The cap is implemented retrospectively, if necessary, as the jury is not informed of the applicable cap. 42 U.S.C. § 1981a(c)(2). Because the cap varies with the size of the defendant employer, it is important to put forth evidence disproving any of plaintiff's erroneous calculations concerning the number of employees.

1. $50,000 for employers of 15 to 100 employees in the current calendar year;

2. $100,000 for employers of 101 to 200 employees in each of 20 or more calendar weeks in the current or preceding year;

3. $200,000 for employers of 201 to 500 employees in each of 20 or more calendar weeks in the current or preceding year; and

4. $300,000 for employers with 501 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 1981a(b)(3).

C. Under the ADEA, compensatory and punitive damages are unavailable; back pay and an equal amount in liquidated damages may be recovered. 29 U.S.C. § 626(b). When a plaintiff asserts claims under both the ADEA and Title VII and/or the ADA, an award of punitive damages may preclude a concurrent award of liquidated damages. See Reynolds v. Octel Commun'ns Corp., 924 F. Supp. 743, 747 (N.D. Tex. 1995) ("Were [the plaintiff] to receive both liquidated damages under the ADEA and punitive damages under Title VII, [the defendant] would be punished twice for the same conduct (i.e., terminating [plaintiff's] employment), because of the jury's finding that that conduct violated both laws. Since the court has already concluded that [the plaintiff] should receive $300,000 in compensatory and punitive damages, she is not entitled to liquidated damages as well.").

D. Claims made by plaintiffs under duplicative state laws, and other federal statutes, may be challenged by defendants, and are often denied by courts, in order to prevent double recovery. Cf. Reynolds v. Octel Commun'ns Corp., 924 F. Supp. 743 (N.D. Tex. 1995) (punitive damages award under Title VII precluded award of liquidated damages under ADEA); Blum v. Witco Chem. Corp., 829 F.2d 367 (3d Cir. 1987), rev'd in part on other grounds, 829 F.2d 367 (3d Cir. 1987) (jury award of compensatory damages on wrongful discharge claim reversed where plaintiff established claim under ADEA and state courts would not have allowed wrongful discharge claim where state and federal statutes offered adequate remedies).
E. In ADA reasonable accommodation cases, compensatory and punitive damages are unavailable where the employer has conferred with the plaintiff in good faith in an ultimately unsuccessful effort to reasonably accommodate the plaintiff. 42 U.S.C. § 1981a(a)(3).

F. Compensatory damages may be recovered by Title VII and ADA plaintiffs only in cases in which “intentional discrimination” has been demonstrated. 42 U.S.C. § 1981a(a).

1. Plaintiff must prove that he or she sustained noneconomic injuries, such as emotional distress, pain and suffering, harm to reputation, and other consequential injury, caused by the defendant’s unlawful conduct. See Salinas v. O’Neill, 286 F.3d 827, 830 (5th Cir. 2002) (“any award for emotional injury . . . must be supported by evidence of the character and severity of the injury to the plaintiff’s emotional well-being”).

2. Qualified medical, psychological, and other professional testimony can help establish the nonexistence or lesser degree of emotional injury. See Keenan v. City of Philadelphia, 983 F.2d 459, 469 (3d Cir. 1992) (affirming compensatory damages; in addition to lay testimony, “an expert witness[] stated that each plaintiff suffered emotional stress related to the transfer out of the Homicide Unit. [One plaintiff] required continuing therapy.”); Brady v. Gebbie, 859 F.2d 1543, 1558 (9th Cir. 1988) (affirming compensatory damages; a psychiatrist testified that plaintiff’s symptoms—including “severe and malignant insomnia, anxiety, suicidal fantasies, quiet and severe depression and anxiety” and permanent psychological damage—resulted from the plaintiff’s failure to get a hearing and the events surrounding his termination).

3. Defense counsel should examine the plaintiff concerning the nature and severity of any claimed emotional distress, possible alternate sources of stress in the plaintiff’s life, whether the distress began after the complained-of incident, the effect of the distress on the plaintiff’s life, and similar issues.

4. If the plaintiff has consulted any physician or therapist, defense counsel should examine such individual to establish either that the claimed distress is not severe or that it was caused by an event unrelated to the defendant’s alleged conduct.

5. A jury’s award of compensatory damages is subject to review for both adequacy and, more commonly, excessiveness.

G. Punitive damages are awarded only where the defendant has been found to have “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. § 1981a(b).

1. Like compensatory damages, punitive damages may be recovered by Title VII and ADA plaintiffs only in cases in which “intentional discrimination” has been demonstrated. 42 U.S.C. § 1981a(a)(1).

3. Instructions that, if given to a jury considering an award of punitive damages, aid in ensuring awards of punitive damages are not violative of the Due Process Clause of the Fourteenth Amendment:
   a) Description of the goals of retribution and deterrence behind punitive damages;
   b) Requirement that the character and severity of the violation be closely evaluated; and

H. Bifurcation of Issues

1. In actions in which there is a risk of large amounts of damages being awarded, defense counsel should consider seeking to bifurcate the action.

2. Courts have discretion to bifurcate the issues to be litigated at trial under FRCP 42(b). See Athey v. Farmers Ins. Exch., 234 F.3d 357, 362 (8th Cir. 2000) (stating that a court’s denial of a motion to bifurcate is reviewed for abuse of discretion); Treece v. Hochstetler, 213 F.3d 360, 364-65 (7th Cir. 2000) (same); EEOC v. HBE Corp., 135 F.3d 543, 550 (8th Cir. 1998) (trial court’s ruling on motion to bifurcate reviewed on abuse of discretion standard); Am. Nat’l Red Cross v. Travelers Indem. Co., 924 F. Supp. 304, 306 (D.D.C. 1996).


4. A strong argument may be made that evidence that may be relevant only to the potential extent of a punitive damages award, such as the size and wealth of the defendant employer, should only be litigated after the plaintiff has succeeded in establishing an entitlement to such damages at trial, in order to avoid prejudice to the defendant.

5. Caveat: if plaintiff’s damages claims are either so exaggerated or weak as to possibly suggest overreaching to the jury, it might be advantageous to the defendant to allow the issues of liability and damages to be considered together in a single trial.
I. Defenses and Challenges

1. Mixed-Motive Defense

   a) Present evidence that the same action would have been taken regarding the plaintiff's employment even in the absence of a discriminatory motive.


   c) Misconduct, plant shutdowns, and similar events may limit a plaintiff's compensatory and punitive damages because the resulting job loss or other adverse consequences would have been suffered by the plaintiff regardless of any discriminatory animus.

2. The Kolstad Good Faith Anti-Discrimination Compliance Efforts Defense

   a) Demonstrate the defendant employer made good faith efforts to comply with anti-discrimination laws and regulations.

   b) This builds upon the Ellerth affirmative defense where the employer pleads and proves that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

   c) Employer may successfully avoid exposure to punitive damages if the wrongdoer's conduct cannot be sufficiently connected to some fault on the part of the employer. Wilbur v. Correctional Servs. Corp., 393 F.3d 1192, 1205 (11th Cir. 2004) (rejecting plaintiff's claim for punitive damages where plaintiff had "offered nothing to establish that [defendant's] management had 'counterenanced or approved' the offending behavior of plaintiff's supervisors," and noting further that liability for punitive damages would not lie where defendant had only constructive knowledge of the harassment or discrimination); Williams v. Trader Publ. Co., 218 F.3d 481, 488 (5th Cir. 2000) (discrimination could not be imputed to employer where decision to fire plaintiff was made by manager without discriminatory bias, despite recommendation to fire plaintiff made by manager with discriminatory bias, but who did not have authority to discharge employees); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317 (11th Cir. 1999) (punitive damage award overturned where the demotion of the plaintiff by two low-level store managers could not be connected to any high-ranking manager or officer, nor could knowledge of the decision be expected of upper management to a degree sufficient to find malice or reckless disregard for the rights violated by the demotion).