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Damages and Settlement Agreements

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DAMAGES AND SETTLEMENT AGREEMENTS

This article examines the damages available to plaintiffs in a variety of statutory employment discrimination cases and provides an overview of commonly used provisions in an employment settlement agreement.

DAMAGES

INTRODUCTION

Much of the case law on damages in employment cases has been written in Title VII cases. Under Title VII of the Civil Rights Act of 1964, the plaintiff may recover monetary relief for:

1. Economic Damages, including back pay, front pay, prejudgment interest, and lost employee benefits.
2. Compensatory Damages, including emotional pain, inconvenience, mental anguish, loss of enjoyment of life, “other non-pecuniary losses,” and “other future pecuniary losses.”
3. Punitive Damages, the amount of which is tied to the size of the employer’s workforce.

The remedial purposes of Title VII mandates back pay relief in all but “special” circumstances. *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608 (5th Cir. 1983). Difficulty in calculating the precise amount of back pay does not defeat an injured plaintiff’s right to back pay in a Title VII action. *Salinas v. Roadway Exp., Inc.*, 735 F.2d 1574 (5th Cir. 1984). Because retroactive relief places the victim in the position that he would have occupied but for the discrimination, back pay includes not only salary loss, but also compensation for lost overtime, shift differential, and fringe benefits (e.g., sick pay, annual leave, and vacation pay). *Willett v. Emory & Henry College*, 569 F.2d 212 (4th Cir. 1978).

The same remedial scheme exists for claims under the Texas Labor Code and the Americans with Disabilities Act, but not, of course, for the Age Discrimination in Employment Act, where instead of punitive and compensatory damages, the plaintiff can in appropriate cases, obtain liquidated damages.

In race discrimination claims under 42 U.S.C. § 1981, the difference is that soft damages are not capped. The same is true in employment cases filed under 42 U.S.C. § 1983.

I. ECONOMIC DAMAGES

A. Back Pay

The Supreme Court has held that there is a strong presumption in favor of back pay awards to victims of discrimination. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court reasoned that, because Title VII was designed to “achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees, then the courts can best achieve this goal by making a back pay award a “reasonably certain prospect” of bringing a case. *Id.* at 417-18. *See also Woolridge v. Marlene Industries Corp.*, 875 F.2d 540, 549 (6th Cir. 1989) (“back pay should always be awarded absent the existence of exceedingly rare special circumstances. “).

An award of back pay should include such economic damages as employer pension and profit-sharing contributions, overtime, shift differentials, and the like. Recently, the Fifth Circuit has defined “pay,” as “something paid for a purpose and especially as a salary or wage.” Therefore, “salary, wages, or benefits,” are “the normal components of back pay.” *Nasser v. University of Texas Southwestern Medical Center*, 674 F.3d 448, 455 (5th Cir. 2012) (holding that honoraria normally paid by third parties does not constitute “pay” subject to being included in the backpay calculation). Also, as one Fifth Circuit decision demonstrated, an award of back pay may also include projected increases in pay. *Rhodes v. Guiberson Oil Tools*, 82 F.3d 615 (5th Cir. 1996) (the plaintiff’s uncontradicted testimony at trial was that he received at least a 5% increase in salary every year that he was employed by the company; the district court’s inclusion of these projected increases in the plaintiff’s backpay award was not clearly erroneous). Similarly, a back pay award can include a lost annual Christmas bonus. *See, e.g., Taylor v. CPDASC*, 890 F.Supp. 360, 372 (M.D. Pa. 1995).

Typically, back pay starts with calculation based upon plaintiff’s pay at the time of the termination. However, a jury may use as a baseline, plaintiff’s “peak” earnings that are higher than the rate of pay at the time of the termination, if the jury believes that the difference in pay is the result of illegal discrimination. *Palasota v. Hagggar Clothing Co.*, 499 F.3d 474, 483-485 (5th Cir. 2007).

Subsequent to *Palasota*, it should be noted that the Fifth Circuit has held that the district court itself can decide the amount of back pay or empanel an advisory jury. *Black v. Pan Am. Lab., L.L.C.*, 646 F.3d 254, 263 (5th Cir. 2011).

Post-termination economic benefits that would not have been received by the employee but for the termination should be deducted from a plaintiff’s damages. *Brunnemann v. Terra Int’l. Inc.*, 975 F.2d 175, 178 (5th Cir. 1992). This includes any severance pay that the plaintiff received from his or her employer at the time of the discharge.

One of the most difficult issues for employees is the issue of insurance benefits. Although most former employees have COBRA rights for 18 months, the exercise of these rights requires a payment that can be impossible for the unemployed. In *Lubke v. City of Arlington*, 455 F.3d 489 (5th Cir. 2006), the Fifth Circuit said that the measure of damages for lost insurance

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