

**What's It Going to Take:
Settlement Value/Monetizing Your Case**

Malinda A. Gaul
Gaul and Dumont
315 East Euclid Avenue
San Antonio, Texas 78212
210.225.0685
malindag@swbell.net

For several years, the late Phil Durst did an extremely popular presentation called *What's it Worth?* Phil developed scenarios that he sent to employee-side and employer-side attorneys with the following instruction:

I seek your *reasoned* but quick-and-dirty inclination. I know all of these could be fleshed out with many additional facts (or years of discovery) which could change all of our opinions, but the idea here is for your *reasoned-but-knee-jerk* answer. No one is holding you to anything and no one will ever know how you answered: the whole idea here is to assist us all in evaluating situations for their value/risk.

Phil passed away on October 1, 2019, at the young age of 62. His last presentation of *What's it Worth?* was on May 11, 2018. The 2024 planning committee wanted to resurrect the presentation and I volunteered knowing that no one can compare to Phil.

To honor what Phil called “an experiment,” I have used the same fact scenarios Phil used in 2018. In addition to comparing employee-side and employer-side responses, we will also be able to see if assessments have changed over the last six years.

Sexual Harassment: Hostile Work Environment

1A. Plaintiff is a 30-year-old female and was hired as the Executive Assistant to the President of a small bank with 45 employees (President is a married male in his 50s). Plaintiff was hired in January of 2023 and says that the President began constantly touching and rubbing against her almost immediately after her employment began. Plaintiff says that at least every week the President would touch or rub-up against her (including her breasts or behind) or summon her to the vault or some other place where he engaged in unwelcome sexual talk. Plaintiff reports that he constantly tried to talk to her about sexual topics, including asking if she was dating anyone, how she felt about sex with an older man, and what sexual positions she preferred. Plaintiff said that she was touched, rubbed or pinched every week, even after asking the President to stop.

Plaintiff says that she never received training on sexual harassment or was told who she could report it to (and that she had repeatedly told the President to stop). Plaintiff also says that the rumor at the bank is that the employee who is in charge of Human Resources is the President's cousin and answers to him. Plaintiff says she was afraid to report the harassment out of fear for her job.

In October of 2023, ten months into her employment, the bank President told her that he had “good news” and that she was such a valuable employee that he selected her to attend the 2023 Trade Show for Small & Regional Banks with him in Las Vegas in November (he said that he usually goes alone but wanted her to learn more about the industry “for her job”). Plaintiff says that she quit because she did not want to go to Las Vegas alone with the President. Plaintiff says she was so traumatized by what she went through (she is taking anxiety medication for the first time after the termination and is seeing a psychologist) that she decided to move back to Missouri, live with her parents and go back to college. Plaintiff thus does not seek lost-wages, but seeks compensation for mental anguish and punitive damages (which are “capped” at \$50,000 for an employer of this size).

The Bank is able to show that the head of Human Resources is *not* related to the President and that the Bank’s Anti Sexual Harassment Policy was posted in the employee break room from the time that the employee started. The policy provides for anonymous or direct reporting to the head of Human Resources.

What is a reasonable amount for the parties to agree upon to settle this dispute without litigation?

Answer: _____

1B. Same facts as 1A, but the Plaintiff signed a document when she began her employment that “all disputes be arbitrated before a single arbitrator under the auspices of American Arbitration Association” (with each side initially bearing half the cost of the arbitration, but that the “prevailing party” shall recovery their attorney’s fees and arbitration costs).

What is a reasonable amount for the parties to agree upon to settle this dispute without arbitration?

Answer: _____

Sexual Harassment: Quid Pro Quo

2A. Plaintiff is a female and a recent college graduate with a degree in Set Design. Plaintiff was hired as a Production Assistant (\$30,000 annual salary) at a motion picture production company (film studio) in Austin. After Plaintiff had been employed in that position for about a year, one evening after work, the Head of Production told her that he thought she was very talented and attractive. The Head of Production (the highest-level creative person at the 150-employee company) told her that he thought that she should be the head of the team that designs sets but that he would really need to trust her “intimately” for her to receive such a promotion (that job pays \$75,000 annually). When Plaintiff asked him “What do you mean?” he says that he recently split-up from his girlfriend and that position was available as a way to “ease into” the new job. Plaintiff explains that she is in a committed relationship and even if she wasn’t she “is not interested in any kind of relationship at work.”

The following month, Plaintiff was terminated because she was told that the Head of Production did not like the “color palette” of the living room set that had just been designed. Plaintiff says that

this was a pretextual reason because as a “lowly Production Assistant” she is not allowed to select colors and that the man who *did* select the colors was not terminated.

Plaintiff was out of work for about 6 months and then was only able to find another job that paid \$30,000 a year. Plaintiff seeks compensation for her lost wages, emotional distress, and punitive damages (she is taking anxiety medication for the first time after the termination and is seeing a psychologist). Mental anguish and punitive damages are capped for an employer of this size at \$100,000.

What is a reasonable amount for the parties to agree upon to settle this dispute without litigation?

Answer: _____

2B. Same facts as 2A, but Plaintiff signed an agreement when she started her employment that states “all disputes be arbitrated before a single arbitrator under the auspices of American Arbitration Association” (with each side initially bearing half the cost of the arbitration, but that the “prevailing party” shall recovery their attorney’s fees and arbitration costs).

What is a reasonable amount for the parties to agree upon to settle this dispute without arbitration?

Answer: _____

Breach of Contract

3A. Plaintiff is Assistant General Counsel at a 150-person medical device company. Plaintiff’s base pay is \$200K per year. Plaintiff is the second highest ranking lawyer out of a total of five lawyers in the company’s legal department. Because the company is relatively small, Plaintiff performs a number of functions: he is often asked to brief the Board of Directors on various issues, he oversees all patent applications, and serves on various corporate committees, such as those dealing with executive compensation, diversity and corporate taxes.

In 2023, the company is bought out by a much larger international medical device company (headquartered in Switzerland). Plaintiff is told by the new entity that they want him to stay and that his pay and benefits will stay the same, that he will still have the title “Assistant General Counsel,” and that he will report to the Chief Patent Attorney for the U.S. in New York. Plaintiff is told that he will be in charge of patent applications and will have several patent clerks to assist him.

Plaintiff objects and says that this is a material diminution of his job duties that triggers an obligation to pay him one year of severance pay. The contract provision at issue says:

Executive [Plaintiff] shall be employed as Assistant General Counsel with the duties and benefits associated with that position. Should Executive’s title, pay or duties be materially diminished without Executive’s consent, such diminution shall be considered a “Resignation for Good Reason” and Executive shall be entitled to receive one (1) year of severance pay.

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