

September 10, 2008

RE: Economic and Vocational Issues in Economic Damages

Our business has now evolved into two service areas: forensic economic analysis and testimony on economic damages in personal injury, commercial, labor, and other cases and forensic vocational analyses and testimony. This second and newer area involves George Barrett's work with attorneys in personal injury and adverse employment litigation. This newsletter attempts to provide some useful information to attorney clients in both the economic and vocational areas.

In economic damages calculations, it is important to remember why and how demographic characteristics of a particular plaintiff are so important, in conjunction with earnings histories and other facts of the case. For example, women as a statistical class earn less than men and they participate in work at a much lower rate. This female participation rate was only 28 percent at the end of World War II, versus the much higher male participation rate. By 2000, this rate had climbed to 60 percent for females. Since 2000, however, the growth rate of the female participation rate has stopped, and the continuing 15-20 point difference below male rates means that worklife expectancy for females will be significantly lower than for males. This difference is particularly important because a significant minority of forensic economists (see Brookshire, Luthy, and Slesnick, 2006 survey) choose not to use the available data that are disaggregated by gender and/or by race.

In predicting lost earning capacity, education is everything. Unless an established earnings history makes it less important, the actual or predicted educational attainment of a minor child or an adult affects the growth path of earnings--a topic called age-earnings profiles--and worklife expectancy. As education goes up, average earnings, earnings growth rates, participation rates, and employment rates also go up. Forensic economists therefore read and contribute to the literature on variables that affect the educational attainment of children. It is important to know that an opposing economist has used data that ignore education levels. As a final example, the age of a deceased plaintiff may be very important given the facts of a particular case. If the last five years of earnings were relatively low or sporadic, it means less in predicting the future for a person age 25 at death, versus 35, or 45, or 55. In our office, we change our method of estimating worklife expectancy for persons killed or injured after age 50, because one data set comes to have net advantages over the model that we otherwise feel is more accurate. The method for valuing retirement benefits losses may also change as persons are older and nearing retirement. So, demographics are important to the calculation of economic damages, and one role of a forensic economist is to properly blend demographic data with specific case facts (see website Vitae for recent publications on special cases and economic damages).

Turning to the forensic vocational area, we have noticed an increase in the number of adverse employment litigation cases in which our services have been retained. Until recently, our consulting services and/or expert testimony has been largely limited to the economic aspects related to damages in these disputed labor cases. In such instances, many parallels existed between these cases and their personal injury counterparts. Issues including the establishment of the proper earnings base and growth rate, work-life expectancy, and present value discount rates in the "but-for" scenario are very common between personal injury and wrongful termination cases. However, labor cases present unique aspects which must be fully explored in order for economic damages to be properly assessed. Due to these unique aspects and the increase in demand for our services in these cases, George has researched the issues related to forensic vocational rehabilitation and the forensic economics of adverse employment litigation. His research findings were recently shared with his peers at the May 2008 Annual Conference of the American Rehabilitation Economics Association (AREA) in Pittsburgh, Pennsylvania.

In our experience, the most unique aspect of adverse employment litigation is related to the responsibility of the plaintiff to mitigate damages by seeking employment which can be considered comparable to the pre-termination occupation. George has now been asked to conduct vocational evaluations in many employment tort cases. His work typically culminates in labor market surveys regarding the availability of comparable post-termination employment opportunities that the plaintiff has or has not pursued since the date of termination. Plaintiff attorneys are typically pleased to learn that few comparable job openings have been available since the date of termination and that their clients have made diligent efforts to obtain employment in these occupations. Defense attorneys often find that the defense of damages in these cases benefits from labor market survey results showing large numbers of comparable jobs in which the plaintiff made little, or no, effort to obtain following termination.

Given that our forensic practice extends across multiple states, we have noticed jurisdictional differences regarding the acceptable expectations of mitigation placed upon plaintiffs in these employment cases. George's research presented at AREA's conference offered some guidance to practitioners engaged in varying jurisdictions. The following illustrates his findings for some of the states in which we currently practice.

Indiana

In *Clark v. Metro Health Foundation, In.*, 90 F.Supp.2d 976; N.D.Ind. 2000, the Court outlined its position by stating that to establish affirmative defense of plaintiff's failure to mitigate damages in wrongful termination action, defendant must show that: (1) plaintiff failed to exercise reasonable diligence to mitigate her damages, and (2) there was reasonable likelihood that plaintiff might have found comparable work by exercising reasonable diligence. The Court further explained in *Gaffney v. Riverboat Services of Indiana, Inc.*, 451 F.3d 424; C.A.7 (Ind.) 2006 that because lack of mitigation is an affirmative defense, the burden of proof for this issue falls on employer.

Kentucky

In *Dollar General Partners v. Upchurch*, 214 S.W.3d 910; Ky.App. 2006, the Court found the duty to mitigate damages will not permit recovery for the wages lost during the period when the employee made a voluntary choice to be unemployed. Also, the Court ruled that employee's admission that he was not actively ready, willing, and available for employment defeated any claim for front pay in his workers' compensation retaliation action.

Ohio

In *Berge v. Columbus Community Cable Access*, 736 N.E.2d 57, 136 Ohio App.3d 281; Ohio App. 10 Dist. 1999, the Court found that One who has been wrongfully discharged must minimize his or her damages by seeking further employment. Wrongfully discharged employee is not required, for purposes of mitigating damages, to accept employment that is in a different locale or dissimilar to the job he or she had previously held; however, duty to mitigate damages requires that the employee use ordinary diligence to obtain similar employment in the same vicinity. The Court made a more recent decision regarding these issues in *Stacy v. Batavia Local School District Board of Education*, 829 N.E.2d 298; Ohio 2005 by stating that mitigation of damages is an affirmative defense, and the burden of proof on that issue resides upon the employer responsible for the wrongful discharge of employee.

Pennsylvania

In *Delliponti v. DeAngelis*, 681 A.2d 1261, 545 Pa. 434; Pa. 1996, the Court found that in breach of employment contract case, the measure of damages is the wages which were to be paid less any amount actually earned or which might have been earned through the exercise of reasonable diligence in seeking other similar employment. Burden is on the breaching party to show that the losses could have been avoided and this burden can be established by proving that other substantially equivalent positions were available to the party who suffered loss as result of the breach and that that party failed to use reasonable diligence in attempting to secure those positions. This position was also taken by the Court in *Nicholas v. Pennsylvania State University*, 227 F.3d 133; C.A.3 (Pa.) 2000, when it stated that under Pennsylvania law, in an employment case, the measure of damages for breach of contract is the wages which were to be paid less any amount actually earned or which might have been earned through the exercise of reasonable diligence.

Tennessee

In *Frye v. Memphis State University*, 806 S.W.2d 170; Tenn. 1991, the Court stated that when employee has been wrongfully terminated, measure of damages is amount employee would have earned had employer not dismissed him, less what would have been earned, or might have been earned, in some other employment by the exercise of reasonable diligence. While wrongfully terminated employee may recover loss of wages, there is duty to minimize this loss by seeking other employment but, to mitigate damages, employee is not required to accept any offer of employment, or abandon his home or place of residence to seek other employment, but is only required to exercise reasonable diligence in seeking other employment of a similar or comparable nature. In a more recent case, the Court reaffirmed its previous position on this matter. In *Cantrell v. Knox County Bd. Of Educ.*, 53 S.W.3d 659; Tenn. 2001, the Court held that when a contract of employment is breached, the proper measure of damages is the salary that would have been

earned had the contract not been breached, less any amount the employee earned or should have earned in the exercise of reasonable diligence in some other employment during the unexpired contract term.

West Virginia

In *Seymour v. Pendleton Community Care*, 549 S.E.2d 662; W.Va. 2001, the Court stated that unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award. Former employee made a reasonable effort to mitigate her damages for purposes of her retaliatory discharge claim against employer; employee stated that she had watched the paper and had kept her "eye on things," that she had gone to job placement, and that she had started a stained glass business which she planned to continue unless she could find other work, and this testimony suggested that she did not make a voluntary decision not to work. Process of showing mitigation of damages in wrongful discharge case entails showing two things: (1) that the injured employee did not make a voluntary decision not to work; and (2) that the employee used reasonable and diligent efforts to secure acceptable employment.

The preceding research findings provide a sampling of what the jurisdictional guidelines appear to be regarding the establishment of damages mitigation in adverse employment litigation. George's research included the appellate court decisions across the nation and will soon be submitted for peer-reviewed publication. In the meantime, George would enjoy discussing any vocational rehabilitation and economic aspects of adverse employment litigation matters with you.

As always, please give us an email or call if we can be of help, and we are always happy to participate in CLE and related programs.

Sincerely,

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