# Federal Remedies in Employment Discrimination Actions

## IICLE Supplement & Case Law Update[i]
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## I. Backpay Damages

The Seventh Circuit recently reversed an award of back pay when the award was based on a verdict form that allowed the jury to grant separate back pay awards to an aggrieved plaintiff for a claim under the Age Discrimination in Employment Act ("ADEA") and a claim the Labor Management Relations Act ("LMRA") where the plaintiff was seeking back pay under the two statues for the same wrong. *Burger v. Int'l Union of Elevator Constructors Local No. 2,* 498 F.3d 750, 754 (7th Cir. 2008). In *Burger*, the court noted that the single alleged wrong – denial of plaintiff's union card preventing him from working – could only be compensated once regardless of whether the alleged wrong violated the ADEA's anti-retaliation provision or was in violation of the LMRA. *Id.* ("The damages for lost back pay would be the same regardless of whether he prevailed on count one, count two or both counts, because the lost wages all stemmed from losing his union card, regardless of whether he lost it for retaliation for his age discrimination complaint or for the union's failure to represent his interests.").

Remitting an award of back pay to the reflect an amount for the time period between the denial of a promotion and the time the plaintiff quit her position was a proper reduction in a back pay award. *Lulaj v. Wackenhut Corp.*, 512 F.3d 760, 767 (6th Cir. 2008). In addition, the court held that the failure to include other benefits, such as medical insurance, into the back pay calculation was proper because the district court found that there was no evidence presented to support the value of the claimed benefits. *Id.* (reducing back pay award to $960).

Relying on the principle that "as a general rule [an employment discrimination plaintiff] will not be allowed back pay during any periods of disability" and "an employer who has discriminated need not reimburse the plaintiff for salary loss attributable to the plaintiff and unrelated to the employment", the court granted summary judgment for an employer on a former employee's claim for back pay under the ADA when there was no genuine issue of disputed fact that the employee was totally disabled and could not have worked during the period for which back pay was sought. *Schomide v. ILC Dover, Inc.,* 521 F.Supp.2d 324, 334-35 (D. Del. 2007) (granting summary judgment for the defendant on back pay and front pay claims). *See also Wilson v. Phoenix Specialty Mfg. Co., Inc.,* 513 F.3d 378, 388 (4th Cir. 2008) (holding that plaintiff was not entitled to front pay when, six months prior to judgment, he was deemed by his own doctor to be comparatively unemployable).

## II. Compensatory Damages

Applying the statutory cap to compensatory damage awards to claims brought for violations of 42 U.S.C. 1981a, the court in *Chapin v. Mid-States Motors, Inc.*, 2007 WL 2164527, at *1, No. 06-CV-34-TS, (N.D. Ind., July 25, 2007), [1] held that, although a compensatory award of $100,000 that reached the statutory cap was not "montrously excessive", the plaintiff woul not be entitled to an award of an additional $98,000 to compensate for alleged actual damages. *Id.* at *2. The court considered the plaintiff's argument based on the text of § 1981 noting that the argument "seems somewhat plausible." *Id.* Nonetheless, the court rejected the plaintiff's argument because the plaintiff failed to raise this issue to the jury or propose separate damages on the verdict form and only raised the issue for the first time in its response to the defendant's motion for remittitur. *Id.*

The court held that an award of the statutory cap of $300,000 for retaliation in violation of the ADEA, in addition to another award of $300,000 in compensatory damages for a violation of the ADA, must be remitted because the two awards were based on largely the same evidence. *Tomao v. Abbott Laboratories, Inc.*, 2007 WL 2225905, at *13-14, No. 04 C 3470, (N.D. Ill., July 31, 2007). The court found that only a small portion of the plaintiff's emotional harm resulted from the defendant's retaliation and reduced the compensatory award to $9,230.80 to reflect this finding. *Id.*

## III. Punitive Damages

Punitive damages are not warranted under Title VII when the plaintiff fails to present sufficient evidence to show that his former employer's investigations into claims of discrimination and harassment were cursory or biased. *Dominic v. DeVilbiss Air Power Co.*, 493 F.3d 968, 974-76 (8th Cir. 2007). The court in *Dominic* reversed an award of punitive damages noting that the defendant demonstrated good faith efforts to investigate complaints of harassment that the plaintiff failed to rebuff. *Id.* The plaintiff presented insufficient evidence that the employer acted with the requisite malice or reckless indifference warranting an award of punitive damages. *Id.* at 976 *citing Kolstad v. American Dental Ass'n*, 527 U.S. 526, 541 (1999). *See also Sturgill v. United Parcel Service, Inc.*, 512 F.3d 1024, 1035 (8th Cir. 2008) (reversing award of punitive damages in Title VII action when there was no evidence that the employer acted with malice or reckless indifference to the plaintiff's rights).

Although a request for punitive damages is "largely within the province of the jury", a jury may not be instructed on the applicable statutory caps on punitive (or compensatory) damages. *Tomao v. Abbott Laboratories, Inc.*, 2007 WL 141909, at *2, No. 04 C 3470, (N.D. Ill., Jan. 16, 2007) *quoting Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 755 (7th Cir. 2002). *See also* 42 U.S.C. §1981(b)(3); 42 U.S.C. §1981a(c)(2).

[1] Although unpublished decisions may not be cited for precedential value in many jurisdictions, the decision is illustrative of the court's reasoning.

## IV. Front Pay Damages

The Seventh Circuit affirmed the district court's decision to deny front pay when the plaintiff failed to present persuasive evidence that he was unable to find a substitute job. *Matteson v. Baxter Healthcare Corp.*, 438 F.3d 763, 771 (7th Cir. 2006). The jury entered a verdict for the plaintiff on his age discrimination claim under the ADEA. *Id.* at 766. The plaintiff, a patent attorney, submitted evidence that he applied for positions with law firms and companies that patent medical devices, but none would offer him a position. *Id.* at 771. Based on this, the plaintiff's economic expert calculated his front pay on the assumption that the plaintiff would not acquire another job until his retirement at age 65. *Id.* In rejecting the request for front pay, the Seventh Circuit noted: "Even if he can't find another job prosecuting patent applications for dialysis machines, or even another job as a patent lawyer in the medical-products industry . . . he should be able to find a job in a law firm, or in a business firm involved in medical products . . . ." *Id.*(noting also that the plaintiff cannot insist that his former employer pay him his salary, $240,000, per year until he reaches retirement age "in order that he can play golf eight hours a day.").

An employee's mere assertion that she would have worked in her position until the age of 75, without evidence that individuals in the position generally work until age 75, is insufficient to support an award of front pay. *Tomao v. Abbott Laboratories, Inc.*, 2007 WL 2225905, at *28, No. 04 C 3470, (N.D. Ill., July 31, 2007) *contrasting Pierce v. Atchinson, Topeka and Santa Fe Railway Co.*, 65 F.3d 562 (7th Cir. 1995) (awarding ten years of front pay where there was evidence that the normal retirement age from the position was 65).

An employee who is found to be completely disabled and no longer able to work is not entitled to front pay under the ADA. *Wilson v. Phoenix Specialty Mfg. Co., Inc.*, 513 F.3d 378, 388 (4th Cir. 2008) (holding that plaintiff was not entitled to front pay when, six months prior to judgment, he was deemed by his own doctor to be comparatively unemployable); *Schomide v. ILC Dover, Inc.*, 521 F.Supp.2d 324, 334-35 (D. Del. 2007) (granting summary judgment on plaintiff's claim for front pay when the plaintiff was totally disabled and not able to work).

## V. Mitigation of Damages

Summary judgment for an employer is appropriate on damages when an employee is unable to present sufficient evidence to demonstrate that she mitigated her damages by seeking out comparable employment. *Hutton v. Sally Beauty Co.*, 2004 WL 2397606, at *4, No. 02-CV-00190-SEB-WG, (N.D. Ind., Oct. 22, 2004). In *Hutton*, the plaintiff, a former store manager for a beauty supply store, claimed that she was terminated because of her age in violation of the ADEA. *Id.* at *1. After her termination, the plaintiff increased her hours as a bartender and applied for one position at a beauty salon, but was not hired for the position. *Id.* at *2. In moving for summary judgment on damages, the plaintiff's former employer argued that she could not present a genuine issue of material fact that she met her burden to mitigate her damages by finding comparable work. *Id.* The court noted that to prevail on its motion, the former employer must show that the plaintiff did not take advantage of substantially equivalent opportunities that were available after she was discharged. *Id.* at *3. In support of its motion, the former employer submitted a collection of classified ads from local newspapers showing that there were a number of similar jobs available and cited to testimony from its expert stating that these jobs were within the plaintiff's capabilities. *Id.* This evidence was not rebutted by the plaintiff. *Id.* The court

found that the undisputed evidence showed that the plaintiff failed to advantage of these opportunities. *Id*. at *4. Therefore, the court granted summary judgment in favor of the defendant on damages due to the plaintiff's failure to mitigate her damages. *Id.*

## VI. Attorneys Fees

A plaintiff who files a frivolous appeal of a decision granting a defendant summary judgment when it is obvious that there is no genuine issue of material fact as to discrimination may be ordered to pay the defendant's attorneys fees to defend the appeal. *Springer v. Durflinger,* 2008 WL 540220, at *7 (7th Cir., Feb. 29, 2008) (ordering plaintiffs to show cause as to why they should not be required to pay the defendant's attorneys fees and costs). This follows the general rule that a defendant may be awarded its attorneys fees for defending a frivolous claim of discrimination or retaliation brought by a plaintiff. *See El-Molsolamy v. Loma Linda Univ. Med. Center,* 32 Fed. Appx. 483, 483-84 (9th Cir. 2002) (affirming an award of attorneys fees to defendant for plaintiff's frivolous Title VII claim) *citing Christiansburg Garment Co. v. E.E.O.C.,* 434 U.S. 412, 420-22 (1978). *See also* 42 U.S.C. § 2000e-5(k).

Indeed, after granting summary judgment for the defendant on the plaintiff's Title VII claims, the court in *Mankowski v. Men's Wearhouse*, 2006 WL 208714, at *8-9, No. 04 C 6603, (N.D. Ill., Jan. 24, 2006) pointed out that a successful defendant may be entitled to attorneys fees "where the plaintiff proceeds in the face of an unambiguous adverse previous ruling or where a plaintiff is aware with some degree of certainty of the factual or legal infirmity of his claim." *Id.* at *9 *quoting Badillo v. Cent. Steel & Wire Co.,* 717 F.2d 1160, 1163 (7th Cir. 1983) (internal quotation omitted). Attorneys fees may be awarded to a defendant and taxed against the plaintiff under 28 U.S.C. §1927 or against plaintiff's counsel under 42 U.S.C. §2000e-5(k). The court, however, deferred the decision as to whether to grant the defendant attorneys fees to allow the plaintiff's counsel an opportunity to brief the issue. *Mankowski,* 2006 WL 208714, at *9.

Following the Seventh Circuit's decision in *McNutt v. Bd. of Trustees of the Univ. of Ill.,* 141 F.3d 706, 709 (7th Cir. 1998) and four other Circuits, the Eighth Circuit affirmed a district court's ruling that attorneys fees are not permitted in dual motive retaliation cases. *Garner v. Missouri Dept. of Health,* 439 F.3d 958, 961 (8th Cir. 2006). The court in *Garner* rejected the plaintiff's argument that the Supreme Court's decision in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) undermined this conclusion noting that the decision in *Jackson* did not decide the issue and did not overrule this conclusion. *Garner*, 439 F.3d at 961.

## VII. Injunctive Relief

A vague remedial injunction entered on a verdict finding racial discrimination in violation of Title VII will be unenforceable. *McClain v. Lufkin Industries, Inc.,* 2008 WL 542165, at *14, No. 05-41417, (5th Cir., Feb. 29, 2008). In *McClain*, the district court entered an injunction on a verdict in favor of the plaintiff class holding that the employer's practice of delegating subjective decision-making authority to white managers with respect to assignments and promotions resulted in a disparate impact on African-American employees. *Id.* at *2. The injunction ordered the defendant to "cease and desist all racially biased assignment and promotion practices", to "create and implement a program to ensure that black employees receive an equitable proportion of promotions", and to "take all necessary steps to remedy the effects of past discrimination." *Id.* at *14. Citing this language, the Fifth Circuit held that

injunctive relief stated with such "broad generalities" fails to provide notice to the defendant of the proscribed conduct. *Id.* Therefore, the injunction was held unenforceable. *Id. See also Strugill v. United Parcel Service, Inc.*, 512 F.3d 1024, 1036 (8th Cir. 2008) (holding that injunctive relief requiring the employer "to accommodate plaintiff's religious observation of the Sabbath in the future" was overbroad and unenforceable).

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