FRONT PAY DAMAGES IN EMPLOYMENT CASES: CALCULATING FUTURE LOSS

Robert S. Mantell
Powers, Jodoin, Margolis & Mantell, LLP
111 Devonshire Street
4th Floor
Boston, MA 02109
(617) 742-7010
RMantell@TheEmploymentLaywers.comn

Front pay damages represent a plaintiff's lost salary and benefits, caused by an unlawful discharge or other adverse action, accruing from the time of trial through some point in the future. Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 102 (2009); Cummings v. Standard Register Co., 265 F.3d 56, 66 (1st Cir. 2001); Scarfo v. Cabletron Systems, Inc., 54 F.3d 931, 953 (1st Cir. 1995). The award reflects an estimate of how long the plaintiff would have stayed with the employer into the future but for the termination, and how much that plaintiff would have earned there, as compared to what she actually will earn during that period. Cummings, 265 F.3d at 66; Handrahan v. Red Roof Inns, Inc., 48 Mass. App. 901, 902 (1999).

Such damages are recoverable to compensate the plaintiff and make her whole for a discriminatory or retaliatory job action. Conway v. Electro Switch Corp., 402 Mass. 385, 387-388 (1988); Trainor v. HEI Hospitality, LLC, 699 F.3d 19, 31 (1st Cir. 2012).[1] Front pay does not serve a punitive purpose, and should not generate a windfall for the

[1] Under New Hampshire law, a "'wrongfully discharged employee who has found new employment is generally entitled to recover lost future earnings which represent the difference between what the employee would have earned from his former employer and what he can expect to earn from his new employer, if the future earnings are reasonable ascertainable.'" Porter v. Manchester, 151 N.H. 30, 43 (2004). The amount should restore the plaintiff as nearly as possible to the position she would have been in if she had not been wronged. Id.

plaintiff. Haddad, 455 Mass. at 102; Trainor, 699 F.3d at 31; Thompson v. Sawyer, 678 F.2d 257, 293 (D.C. Cir. 1982) ("Front pay should persist, however, only until the wrongs for which plaintiffs are owed backpay have been righted").

SIGNIFICANT AWARDS

The Supreme Judicial Court acknowledges a long history of upholding liberal front pay awards. Selmark Associates, Inc. v. Ehrlich, 467 Mass. 525, 545 n.36 (2014); Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 104-105 (2009). Many cases uphold awards for very significant front pay periods. Stephens v. Global NAPs, 70 Mass. App. 676, 685 (2007) (33.5 years of front pay); Handrahan v. Red Roof Inns, Inc., 48 Mass. App. 901, 902 (1999) (30 years of front pay); Haddad, 455 Mass. at 103-104 (19 years); Ventresco v. Liberty Mutual Ins. Co., 55 Mass. App. 201 (2002), rev. denied 437 Mass. 1111 (2002) (14 years); Padilla v. Metro-North Commuter Railroad, 92 F.3d 117, 125-126 (2nd Cir. 1996) (20 year award of front pay). Anderson v. UPS, 32 MDLR at 52 (16 years); Cummings v. Standard Register Co., 265 F.3d 56, 66-67 (1st Cir. 2001) (14 years); Selmark Associates, Inc. v. Ehrlich, 467 Mass. 525 (2014) (six years).

Moreover, front pay damages are often awarded in very significant amounts. Haddad, 455 Mass. at 102 ($733,307); Boothby, 414 Mass. at 484 ($1,096,500 in future damages); Stephens, 70 Mass. App. at 686 ($763,340); Scarfo v. Cabletron Sys., 54 F.3d 931, 954-955 (1st Cir. 1995) ($744,744); Kelley v. Airborne Freight Corp., 140 F.3d 335, 355 (1st Cir. 1998) ($1,000,000); Anderson, 32 MDLR at 52 ($603,000).

The First Circuit has commented that it appears that Massachusetts law is more liberal than Federal law with respect to affirming significant front pay period. Cummings, 265 F.3d at 66 ("But the Massachusetts cases, as we read them, are more

open-ended"). Front pay awards may be substantial, as they are not subject to the damages caps contained in Title VII. Pollard v. E. I. du Pont de Neours & Co., 121 S. Ct. 1946, 1951 (2001).

FRONT PAY ADDRESSES A BROAD RANGE OF HARM

Front pay is not just limited to base salary, but may also reflect other types of benefits, bonuses and compensation that the plaintiff would have earned in the future. Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 102 (2009). Front pay may take into account raises that would have accrued. Kolb v. Goldring, Inc., 694 F.2d 869, 872-873 (1st Cir. 1982). Future loss of fringe benefits, such as retirement and health care benefits, may also be recoverable. Boothby v. Texon, Inc., 414 Mass. 468, 486 (1993); Brown v. Mass. Office on Disability, 2013 Mass. App. Unpub. Lexis 996, at 2-3. In one case, the MCAD ordered that the plaintiff be paid $10,000 by his former employer every year, until his death, to compensate for the loss of his retirement benefits. Malone and MCAD v. Boston Public Facilities Dept., 26 MDLR 31 (2004), aff'd 26 MDLR 267 (2004).

However, no award should be based on a lost benefit, unless the plaintiff can show that she would have been entitled to the benefit had she remained an employee. Brown, 2013 Mass. App. Unpub. Lexis 996, at 2-3 (loss of vacation pay not awarded whether the plaintiff was unable to prove that she was entitled to a vacation benefit).

FRONT PAY IN DIFFERENT CONTEXTS

Front pay may be awarded differently, depending on the statutory context and circumstances of the case. For example, front pay may be awarded in breach of contract

cases as part of "benefit of the bargain" damages, or consequential damages.[2] Selmark Associates, Inc. v. Ehrlich, 467 Mass. 525, 545 n.36 (2014); Brown v. Mass. Office on Disability, 2013 Mass. App. Unpub. Lexis 996, at 3-4. In Massachusetts, front pay is generally determined by a jury.[3] Under the FMLA, front pay is an equitable remedy to be determined by the Judge, which may reject a verdict by the jury on that issue. Esler v. Sylvia-Reardon, 2016 Mass. Lexis 99, at 14-15. Likewise, a jury is likely not required under Title VII. 42 U.S.C. § 1981a(b) & (c); Johnson v. Spencer Press of Maine, Inc., 364 F.3d 368, 380 & n.8 (1st Cir. 2004) (while district courts and not juries, generally award front pay, there may be an argument that the jury should determine certain disputes of fact). Some cases stand for the proposition that the jury should determine the amount of front pay, once the court agrees that the threshold showing for front pay has been met. Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1470 (5th Cir. 1989) (citing other cases). The issue of whether the jury calculates front pay damages for strictly federal claims has not been definitively decided in this Circuit. Johnson, 364 F.3d at 380 n.8. According to the First Circuit, front pay is, "in many situations," an equitable remedy as opposed to an element of damages; which leaves open the possibility that a jury trial attaches in some situations. Trainor, 699 F.3d at 31.

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[2] Consequential damages are those that cannot be reasonably prevented and arise naturally from the breach [of contract], or which are reasonably contemplated by the parties. Selmark Assoc., 467 Mass. at 545.

[3] Handrahan v. Red Roof Inns, 43 Mass. App. 13, 24 (1997); Kelley v. Airborne Freight Corp., 140 F.3d 335, 354 (1st Cir. 1998); Griffin v. General Motors Corp., 380 Mass. 362, 366 (1980). Under c. 151B, front pay is a tort-like remedy to which the article 15 right to a jury trial applies. Stonehill College v. MCAD, 441 Mass. 549, 560 (2004) (citing to Conway v. Electro Switch Corp., 402 Mass. 385, 387-388 (1988).

Front pay may be awarded as an alternative to reinstatement. Reinstatement may be a preferred remedy. Selgas v. American Airlines, 104 F.3d 9, 12-13 (1st Cir. 1997). Reinstatement is not an option when not requested by the plaintiff, and when not offered by the Defendant. Roush v. KFC Nat'l Management Co., 10 F.3d 392, 398 (6th Cir. 1993). A plaintiff's refusal to accept reinstatement may preclude the award of front pay. Selgas, 104 F.3d at 13 n.2. Both reinstatement and front pay may be ordered in a case, where they are meant to remedy periods of loss that do not overlap. Selgas, 104 F.3d at 13-15.

Front pay is a proper alternative to reinstatement if reinstatement is impracticable or impossible. Scarfo, 54 F.3d at 954. Continuing hostility between the employee and employer, or damage to innocent coworkers, may render reinstatement to be inappropriate, and indicate the propriety of a front pay award, instead. Selgas, 104 F.3d at 12; Abuan v. Level 3 Comm., 353 F.3d 1158, 1178 (10th Cir. 2003); Farley v. Nationwide Mut. Ins. Co., 297 F.3d 1322, 1338-40 (11th Cir. 1999). Continuing animosity between employer and employee is not a ground on which to deny front pay. Banks v. Travelers Cos., 180 F.3d 358, 365 n.5 (2nd Cir. 1999).

Where front pay is considered an equitable remedy, a judge may have discretion to refuse front pay where a punitive award or liquidated damages are also available. Trainor, 699 F.3d at 30-31; Rodriguez-Torres v. Caribbean Forms Mfr., Inc., 399 F.3d 52, 67 n.15 (1st Cir. 2005).

The jury may use its common sense and common knowledge with respect to calculation of future damages. Griffin v. General Motors Corp., 380 Mass. 362, 366 (1980); Cummings, 265 F.3d, at 66; Kelley v. Airborne Freight Corp., 140 F.3d 335, 355

(1st Cir. 1998). Expert testimony is not required. Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 103 (2009); Boothby, 414 Mass. at 484-486; Cummings v. Standard Register Co., 265 F.3d 56, 66-67 (1st Cir. 2001)); Porter v. City of Manchester, 151 N.H. 30, 45-46 (2004). Mere uncertainty in the award of damages is not a bar to recovery, and the jury may act on likelihood and reasonable expectations based on the evidence. Conway, 385 Mass. at 388; Boothby v. Texon, 414 Mass. 468, 485 (1993); Cummings, 265 F.3d, at 66. Some courts have suggested that lengthy awards of front pay, which are unsupported by expert testimony, are likely to be deemed speculative. Nashawaty v. Winnipesaukee Flagship Corp., 2016 U.S. Dist. Lexis 149754 (D. N.H), at 4-5. To the extent that an expert is utilized, her opinion should affirmed to reflect a "reasonably accurate conclusion." Flebotte, 2000 U.S. Dist. Lexis 19862 (D. Mass.), at 18.

SUPPORTING EVIDENCE

There are five primary factors in calculating a front pay award: [1] the amount of salary and benefits the plaintiff would have received from the time of trial until the end of the front pay period, for the period of time that the plaintiff, absent the unlawful termination, would have continued working for the employer (e.g., from trial until plaintiff's projected retirement); [2] the plaintiff's probable end of the front pay period (e.g., retirement); [3] the amount of earnings that the plaintiff would probably receive from other earned income until her retirement (which would reduce a front pay award); [4] the availability of other employment opportunities; and [5] the possibility of future wage increases and inflation. Haddad, 455 Mass. at 102-103.

The longer the front pay period, the greater the challenge to demonstrate that the later losses to be attributed to the illegal conduct. Haddad, 455 Mass. at 104; Cummings,

265 F.3d at 66; Travers v. Flight Servs. & Sys., 808 F.3d at 545-546 (20 year front pay period not supported by the evidence, but this weak evidence can support a shorter front pay period). Types of evidence that support awards will be discussed in greater depth below.

WORK LIFE EXPECTANCY

The plaintiff should establish how long she would have continued to voluntarily work for the defendant-employer, but for the discrimination. The jury may consider the plaintiff's testimony with respect to the time that she intended to continue working for the defendant.[4] Such stated intentions are not necessarily dispositive. Flebotte v. Dow Jones & Co., 2000 U.S. Dist. Lexis 19862 (D. Mass.), at 6.

The plaintiff's "long-term financial and employment commitment" to the employer may be considered in determining the length of the front pay period. Selmark Associates, Inc. v. Ehrlich, 467 Mass. 525, 545 (2014); see Ventresco, 55 Mass. App. at 210 (24 year tenure with defendant indicated that plaintiff would remain another 14 years). In one case, the fact that the plaintiff had worked ten years at the defendant-employer helped to demonstrate that she would have continued working there for an additional nineteen years. Haddad, 455 Mass. at 103-104.

[4] Ventresco v. Liberty Mut. Inc. Co., 55 Mass. App. 201, 210 (2002) (plaintiff testified to her intention to continue at defendant for 14 additional years); Trainor, 699 F.3d at 31 (statement of intention to work until 65 is sufficient evidence); Travers v. Flight Servs. & Sys., 808 F.3d 525, 545-546 (1st Cir. 2015) (stated intention to work until retirement may support front pay); Kelley, 140 F.3d at 355-356 (plaintiff testified that he intended to work at the defendant-employer for the rest of his life); Haddad, 455 Mass. at 104 (plaintiff testified that she planned to continue working at Wal-Mart for the remainder of her career); Anderson v. UPS, 32 MDLR 45, 52 (2010), aff'd in relevant part 35 MDLR 187 (2013) (intention to work until retirement, permits factfinder to assume retirement at 65).

The plaintiff's life circumstances may also indicate her likelihood that she would remain at the company. For example, the fact that the employee was six years away from becoming fully vested in the company's pension plan, and the plaintiff's likely inability to find a job at a comparable salary, given the plaintiff's lack of a college education, makes it reasonable to conclude that the plaintiff would have remained an employee until her retirement. Kelley, 140 F.3d at 355-356. Retirement at age 65 may be considered likely, as that age was codeterminous with social security eligibility and vesting in the employer's investment funds. Trainor, 699 F.3d at 31. Evidence of the plaintiff's physical condition may be relevant to that the plaintiff is capable of continued employment in future years. Reneau v. Wayne Griffin & Sons, Inc., 945 F.2d 869, 871 (5th Cir. 1991).

Other objective evidence may be considered, such as average work-life expectancy as established by Department of Labor data, or by other retirees from the same company. Flebotte, 2000 U.S. Dist. Lexis 19862 (D. Mass.), at 5-6. To the extent that the plaintiff had worked for the defendant for a lengthy period and/or finds subsequent employment and remains there for a number of years, that has the effect of demonstrating her "tendency to job stability," which would further indicate that she would have remained employed at defendant for a long period, if she had been given that opportunity. Haddad, 455 Mass. at 103.

LIFE EXPECTANCY

Where future retirement benefits are to be calculated, it may be helpful to rely on Table 105 of the United States Statistical Abstract, relating to "Expectation of Life and Expected Deaths by Race, Sex, and Age." Courts commonly take judicial notice of the

U.S. Statistical Abstract. Barber v. Ponte, 772 F.2d 982, 998 (1st Cir. 1985); United States v. Ven-Feul, Inc., 758 F.2d 741, 765 (1st Cir. 1985). The MCAD has relied on the U.S. Statistical Abstract for the purpose of calculating damages. Malone v. Boston Public Facilities Dept., 2004 Mass. Comm. Discrim. Lexis 9, at 26, affirmed 2004 Mass. Comm. Discrim. Lexis 67 (Full Commission). Again, medical information may be relevant to this issue.

LIKELIHOOD THAT DEFENDANT WOULD HAVE RETAINED THE PLAINTIF BUT FOR DISCRIMINATION

Evidence of likely longevity may be buttressed with proof that the employer would likely have continued corporate need for the plaintiff's skills in the future. Trainor, 699 F.3d at 31-32 (evidence that the employer had plans for growth and the capital needed to implement those plans). The fact that others have long tenure with the company is helpful evidence. Travers, 808 F.3d at 545-546. The fact that the employer has had lay-offs and reorganizations in the past does not preclude front pay, especially in the absence of evidence of planned layoffs that would have impacted the plaintiff had she remained. Ventresco, 55 Mass. App. at 210. On the other hand, evidence that the entire office closed, which would have resulted in plaintiff's termination, suffices to curtail the front pay period. Ventresco, 55 Mass. App. at 210; Rodriguez-Torres v. Caribbean Forms Mfr., Inc., 399 F.3d 52, 67 n.15 (1st Cir. 2005).

It is also helpful to show that the plaintiff performed in a satisfactory manner, such that it is reasonable to infer that the employer would continue to employ her, and would not fire her for cause. Haddad, 455 Mass. at 104 (excellent reviews supported 19 year front pay period); Larch v. Mansfield Mun. Elec. Dept., 272 F.3d 63, 74 (1st Cir.

2001) (positive evaluations support award of front pay); Boothby v. Texon, Inc., 414 Mass. 468, 486 (1993) (consider reviews).

DIFFICULTY IN FINDING NEW EMPLOYMENT

A claim for front pay of substantial duration may be supported by evidence that it was difficult for the plaintiff to find comparable work, thus raising the inference that the plaintiff would not have voluntarily resigned employment, and that she will be unlikely to match her old salary in the future.[5]

The plaintiff's ability to find equivalent employment in the future is a relevant factor, both in the decision to award front pay, and its precise calculation. Scarfo, 54 F.3d at 955. The MCAD has found that a complainant's mere high school education made it unlikely to find a comparable job. Anderson, 32 MDLR at 52.

Similarly, front pay may also be justified where the employer makes it difficult for the plaintiff to obtain a new position, as when it circulates disparaging information about the plaintiff. Haddad, 455 Mass. at 103-104; Larch v. Mansfield Mun. Elec. Dept., 272 F.3d 63, 74 (1st Cir. 2001) (rumors of plaintiff's alleged mismanagement may hamper job search and justify front pay award).

CALCULATION OF FUTURE DAMAGE

The Plaintiff must show how much she would have earned during the front pay period had she stayed with the defendant. She may provide evidence of her salary and

[5] Haddad, 455 Mass. at 103-104 (front pay justified where comparable job is difficult to find, and were there are limited opportunities in the plaintiff's geographic area); Cummings, 265 F.3d at 66 (plaintiff introduced evidence of many unsuccessful applications and interviews, and efforts to seek the services of headhunters); Kealy v. Lowell, 21 MDLR 19 (1993), 1999 Mass. Comm. Discrim. Lexis 6, 31-32 (front pay justified where comparable job is difficult to find); Padilla v. Metro-North Commuter Railroad, 92 F.3d 117, 125-126 (2nd Cir. 1996) (narrow, specialized skill set, for which there are few career opportunities, warrants significant front pay).

bonus history at the company, as well as the pay of other similar workers. Boothby, 414 Mass. at 484, 486 (evidence of the pay of other coworkers is not required). In one case, the MCAD determined how much the plaintiff would have earned had she stayed at Defendant by taking the average salary of those remaining in the relevant positions. Anderson, 32 MDLR at 52. In this way, loss of future raises may be calculated. Flebotte, 2000 U.S. Dist. Lexis 19862 (D. Mass.), at 7-8. The jury might take into account the fact that a termination caused the plaintiff to lose seniority, thus displacing her from a track to further promotions and opportunities. Haddad, 455 Mass. at 104. The factfinder should also take into account whether discrimination unlawfully depressed the plaintiff's salary, prior to her termination. Abuan v. Level 3 Comm., 353 F.3d 1158, 1179 (10th Cir. 2003).

With respect to lost future benefits, one court has permitted the admission of a calculation of lost benefits as a function of 25% of lost future salary, relying in part on Chamber of Commerce data. Flebotte, 2000 U.S. Dist. Lexis 19862 (D. Mass.), at 10-11. A chart reflecting the plaintiff's current wages, and comparing them to what the plaintiff would have earned had she been retained, is a sufficient basis for calculating front pay. Porter v. Manchester, 151 N.H. 30, 45 (2004); Haddad, 455 Mass. at 103-104.

DUTY TO MITIGATE DAMAGES

An award of front pay is subject to the plaintiff's duty to mitigate damages. Haddad, 455 Mass. at 102. In this context, that duty usually means that the plaintiff must make reasonable efforts to find a new job that will result in the lowering or elimination of the continuing monetary harm caused by her termination. The burden of proving when plaintiff will find other work as to mitigate future damages is placed on the defendant. Boothby v. Texon, Inc., 414 Mass. at 468, 485 (1993); Cummings, 265 F.3d at 66. In

Cummings, the front pay period continued despite plaintiff's procuring low paid employment, and despite the fact that he lost that job through no fault of his own. 265 F.3d at 66.

There is no obligation to continue to reapply to employers from which the plaintiff has previously been rejected. Haddad, 455 Mass. at 105-106. Moreover, refusing to take a well-paying job may be understandable, if that job requires a taxing commute. Porter v. Cabral, 2007 U.S. Dist. Lexis 12306, at 26-27 (D. Mass.). Taking early retirement can be demonstrated to be the reasonable act of a victim of discrimination, exercising diligence to reduce the monetary losses caused by discrimination. Taking early retirement is not necessarily an act of "giving up" which constitutes a failure to mitigate, especially if the plaintiff takes on other work while receiving retirement benefits. See, e.g., Koster v. Trans World Airlines, Inc., 181 F.3d 24, 29, 34 (1st Cir. 1999) (age discrimination victim who opted for early retirement package as opposed to taking demotion with $26,000 salary, was nevertheless awarded full back and front pay damages); Malone and MCAD v. Boston Public Facilities Dept., 26 MDLR 267 (2004).

A plaintiff's failure to mitigate damages following termination may be justified by the employee's medical incapacity which was caused by the employer's unlawful conduct. Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121, 141-144 (1st Cir. 2009); Salitros v. Chrysler Corp., 306 F.3d 562, 572 (8th Cir. 2002). Front pay may be offset, or reduced, to the extent that the plaintiff becomes injured, and is therefore, not able to work. However, a plaintiff who is disabled at subsequent employment may nevertheless receive front pay during the period of disability, if she proves that the injury occurred

during the course of subsequent employment and the injury was caused by factors unlikely to have been present during the course of employment with Defendant. Adams v. Eastern Fisheries, Inc., 2015 U.S. Dist. Lexis 65846 (D. Mass.).

An expert may calculate a mitigation factor that differs from Census Bureau data, based on the fact that the actual experiences of the plaintiff have already differed from that data. Flebotte, 2000 U.S. Dist. Lexis 19862 (D. Mass.), at 14-15.

REDUCTION TO PRESENT VALUE

Front pay damages must be reduced to present value, to account for the difference in the value of money in the future and the present value. Haddad, 455 Mass. at 103; Travers, 808 F.3d at 544; Conway, 402 Mass. at 388 n.3. An explanation of the calculation is contained at Laurenzano v. Blue Cross & Blue Shield of Mass. Ret. Income Trust, 191 F. Supp. 2d 223, 241-242 (D. Mass 2002).

APPELLATE REVIEW

The trial judge's decision on the refusal to grant a new trial, or remittitur, on an award of front pay, is reviewed under an abuse of discretion standard. Ciccarelli v. Sch. Dept. of Lowell, 70 Mass. App. 787, 791 (2007); Kelley v. Airborne Freight Corp., 140 F.3d 335, 355 (1st Cir. 1998). Because awards of front pay necessarily involve predictions of events yet to come, they are generally afforded more deference than other types of discretionary awards. Serrano Munoz v. Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R., 671 F.3d 49, 62 (1st Cir. 2012). A judge's determination of front pay in a jury-waived trial will not be disturbed unless clearly erroneous. Brown v. Mass. Office on Disability, 2013 Mass. App. Unpub. Lexis 996, at 4.

, and where they are the natural and probable consequence of discrimination. Conway v. Electro Switch Corp., 402 Mass. 385, 387-388 (1988);

Certain information should be provided to form a sufficient basis for awarding front pay: length and pay of her prior employment, her efforts to seek other employment, the permanency of the present position, the nature of the work, her physical condition, and expectation as to the duration of her working life. See Esler v. Sylvia-Reardon, Memorandum of Decision and Order on Defendants' Motion for Judgment Notwithstanding the Verdict, or in the alternative for a New Trial, C.A. No. 2010-01016,

Suffolk, ss., Giles, J., September 24, 2013; Reneau v. Wayne Griffin & Sons, Inc., 945 F.2d 869, 871 (5th Cir. 1991).