

What's the Harm? - Evaluating and Proving Damages

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“What’s the Harm? Some Perspective on Evaluating and Proving Damages”

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I. INTRODUCTION.

There is no standard formula for applying remedy and damage analysis to employment claims; however, there are some concepts and rules that generally apply. Although there are employment claims based in tort and contract, these materials focus on damages in statutory employment law claims, focusing on federal and Minnesota statutes. Specifically, the claims discussed include the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Equal Pay Act (EPA), the Family Medical Leave Act (FMLA), Section 1981, Title VII, the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Minnesota Human Rights Act (MHRA), the Minnesota Parental Leave Act (MPLA), and the Minnesota Whistleblower Act (MWA). The available damages vary depending on the type of claim and can vary depending on forum as well.

II. BACK PAY.

A. Generally.

Back pay refers to lost compensation from the time of the alleged illegal act (such as a termination or denial of a promotion) to the time of trial. Back pay is available under the ADEA, ADA, EPA, FMLA, Section 1981, Title VII, USERRA, MHRA, MPLA, and MWA. The strong presumption of entitlement to back pay can only be overcome “for reasons, which if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injury suffered through past discrimination.” *E.E.O.C. v. Rath Packing Co.*, 787 F.2d 318, 329 (8th Cir. 1986) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)). Back pay includes all lost economic compensation (e.g., base salary, raises, commissions, bonuses) and fringe benefits (e.g., health insurance, pension and retirement benefits, profit-sharing, unused vacation days, life insurance,

sick pay, cafeteria plan benefits, and stock options). The existence and amount of a back pay award must be based on reasonable expectations and not merely speculation. *See Neufeld v. Searle Lab.*, 884 F.2d 335, 342 (8th Cir. 1991) (denying recovery of bonuses as part of back pay award as speculative).

Prejudgment interest is part of the back pay remedy in employment discrimination cases. *See, e.g., Loeffler v. Frank*, 486 U.S. 549, 557-58 (1988) (Title VII claim).

B. Potential reductions.

An employer may potentially limit the back pay award in various ways, including by demonstrating the employee failed to mitigate damages, giving an offer of reinstatement, proving the “after-acquired evidence” defense, establishing that plaintiff would have lost his job for reasons unrelated to its allegedly illegal motive, and/or showing the plaintiff received non-collateral sources of income.

i. Mitigation

A plaintiff’s post-termination earnings are subtracted from any back pay award. Plaintiffs in employment law cases have a duty to attempt to mitigate damages. *Newhouse v. McCormick*, 110 F. 3d 635, 641 (8th Cir. 1997) (ADEA claim). “This duty to mitigate requires a plaintiff to use reasonable diligence in finding other suitable employment and not to refuse a job that is substantially equivalent to the one at issue.” *Id.* at 641; *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). It is well established that a plaintiff is not required to “go into another line of work, accept a demotion, or take a demeaning position.” *Ford Motor Co.*, 458 U.S. at 231. Nor is a plaintiff required to relocate to a new community. *Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983). The burden is on the employer to demonstrate that the plaintiff has not fulfilled this mitigation requirement. *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095, 1106 (8th Cir. 1996).

A plaintiff's entitlement to back pay usually ceases as of the date when the plaintiff obtains a substantially equivalent position making as much or more than he did with the defendant or when the fact-finder concludes the plaintiff should reasonably have secured alternate employment.

Additionally, back pay liability may be cut off if the plaintiff quits or is terminated from subsequent employment. It may be reduced during periods that the plaintiff is unavailable for work or has voluntarily left the job market.

Many courts have adopted the periodic approach to calculating a back pay award. *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 693-94 (8th Cir. 1983) (using year-by-year method). The periodic method compares a plaintiff's anticipated wages for certain periods with her actual earnings during those periods, without any offset for periods when her actual earnings exceeded her anticipated earnings. *See e.g., Lopez v. Aramark Uniform & Career Apparel, Inc.*, 426 F. Supp. 2d 914, 953-54 (N.D. Iowa 2006) (constructively discharged employee was entitled to back pay under Title VII for seven-month period of unemployment).

ii. Offer of reinstatement.

The accrual of back pay liability may cease if the employer makes an unconditional offer of reinstatement which the plaintiff refuses. *Ford Motor Co.*, 458 U.S. at 238-39; *E.E.O.C. v. Blue & White Serv. Corp.*, 674 F. Supp. 1579, 1583 (D. Minn. 1987), *aff'd sub nom. E.E.O.C. v. Milavetz & Associates, P.A.*, 863 F.2d 613 (8th Cir. 1988). Normally, an employee is required to accept an employer's good faith offer to re-employ him in the same or similar capacity at the same salary. But an employee is not required to accept the offer if "further association between the parties would be offensive or degrading to the employee because of the wrongful act of the employer." *Schisler v. Perfection Milker Co.*, 193 Minn. 160, 161 (Minn. 1934).

iii. After-acquired evidence.

If an employer learns during discovery that the plaintiff committed wrongdoing of such severity that the employee would have been terminated on those grounds anyway, the employer may assert the “after-acquired evidence” defense. If proven, this defense does not completely bar the plaintiff’s claims; however, it serves to limit the back pay period from the date of the unlawful termination until the time the misconduct was discovered. *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 362 (1995) (stating that back-pay period should be “from the date of the unlawful discharge to the date the new information was discovered”); *Seegert v. Monson Trucking, Inc.*, 717 F. Supp. 2d 863, 868-69 (D. Minn. 2010).

iv. Other non-discriminatory reason that job would have ended.

A prevailing plaintiff may not recover damages for the period after which he would have been terminated for a non-discriminatory reason. “In some cases, the defendant will assert some independent post-discharge reason - such as a plant closing or sweeping reduction in force - as to why the plaintiff would have been terminated in any event before trial.” 8th Cir. Civil Jury Instr. § 5.02A, n. 4 (citing *Cleverly v. Western Elec. Co.*, 450 F. Supp. 507, 511 (W.D. Mo. 1978), *aff’d*, 594 F.2d 638 (8th Cir. 1979) (continued reduction in force by defendant from the date of plaintiff’s discharge to present)); *see e.g.*, *Mennen v. Easter Stores*, 951 F. Supp. 838, 862 (N.D. Iowa 1997) (subsequent sale of store where all employees were terminated). It is then up to the plaintiff to prove that the employer would have transferred him to another position within its company; in other words, that the company’s articulated reason for denying him damages for the period after the plant closing is pretextual. *See Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 n.7 (8th Cir. 1982).

Likewise, an employee's back pay award may be reduced if the employer can show that employees in the plaintiff's position usually do not have a long tenure with the company.

v. Non-collateral sources of income.

“Under the collateral source rule, an employer is entitled to no credit for moneys paid to the injured employee by third parties.” *Salitros v. Chrysler Corp.*, 306 F.3d 562, 573-74 (8th Cir. 2002) (citing *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1112-14 (8th Cir. 1994)). Although there is some disagreement, most courts hold that unemployment benefits, social security payments, and pension benefits are collateral and, hence, do not offset the back pay award in discrimination cases under federal law. *Id.*; *Doyne v. Union Elec. Co.*, 953 F.2d 447 (8th Cir. 1992) (finding that pension payments are from a collateral source and should not be deducted from front and back pay awards). Disability benefits and workers compensation benefits may be considered collateral source payments. *See Salitros*, 306 F.3d at 573-74 (noting in ADA cases, disability insurance payments may be collateral source payments, depending on circumstances, including whether the disability resulted from the employer's conduct); *Arneson v. Callahan*, 128 F.3d 1243, 1248 (8th Cir. 1997) (treating plaintiff's disability payments as collateral payments and affirming district court's refusal to deduct them from his Title VII back pay award); *Hamlin v. Super 8 Motel of Fosston, Inc.*, No. C3-99-1284, 2000 WL 622264 (Minn. Ct. App. May 16, 2000) (finding no abuse of discretion in the trial court's refusal to deduct plaintiff's disability benefits from her MHRA back pay award.); *Moysis v. DTG Datanet*, 278 F.3d 819, 828 (8th Cir. 2002) (workers compensation benefits considered a collateral source for purposes of claims under the ADA); *E.E.O.C. v. Blue & White Serv. Corp.*, 674 F. Supp. at 1583 (concluding plaintiff's workers compensation benefits paid for physical impairment should not be offset from a Title VII back pay award, but the sum representing lost wages should be offset to avoid double recovery).

Severance payments, on the other hand, are typically offset against a back pay award. 8th Cir. Civil Jury Instr. § 5.70, committee comments.

III. REINSTATEMENT AND FRONT PAY.

Front pay refers to the plaintiff's anticipated losses after trial. Future wages are available under the ADEA, ADA, FMLA,¹ Section 1981, Title VII, USERRA,² MHRA, MPLA, and MWA. Front pay is not available under the EPA.

Under federal law, front pay is an equitable remedy "given in situations where reinstatement is impracticable or impossible." *Kramer v. Logan County School District No. R-1*, 157 F.3d 620, 626 (8th Cir. 1998); *see Salitros*, 306 F.3d at 573 (affirming district court's conclusion that front pay was appropriate where reinstatement of plaintiff was illusory because he was unable to return to work as a result of defendant's harassment). However, under the MHRA, front pay is not a substitute for reinstatement, but is a distinct category of damages. *Ray v. Miller Meester Advert., Inc.*, 684 N.W.2d 404, 409 (Minn. 2004) ("The United States Supreme Court has held that front pay is included within equitable remedies and is intended under Title VII as an alternative remedy to reinstatement. In contrast, the plain language of the MHRA not only allows a court to multiply a compensatory damage award, it also gives a court the power to 'order the hiring, reinstatement or upgrading of an aggrieved party, who has suffered discrimination, with or without back pay ... or any other relief the [court] deems just and equitable' ... we conclude that

¹ *Hite v. Vermeer Mfg. Co.*, 361 F. Supp. 2d 935, 944 (S.D. Iowa 2005), *aff'd*, 446 F.3d 858 (8th Cir. 2006) (rejecting employer's argument that front pay is not recoverable in FMLA claims).

² *Carpenter v. Tyler Indep. Sch. Dist.*, 226 F. App'x 400 (5th Cir. 2007) (holding district court did not abuse its discretion in awarding plaintiff front-pay damages under USERRA).

the scope of damages under the MHRA is not similar to those provided under Title VII and we decline to adopt Title VII damages principles for the MHRA.”).

Courts consider various factors in determining the amount of front pay, including the plaintiff’s age, the plaintiff’s work and life expectancy, how long it should reasonably take for the plaintiff to find comparable work, plaintiff’s length of tenure at the defendant and prior employers, and how long similar employees worked at the employer. *See Neufeld v. Searle Lab.*, 884 F.2d 335, 341 (8th Cir. 1989) (in age discrimination cases, if reinstatement is deemed by the court in its equitable powers to be inappropriate, the plaintiff is presumptively entitled to front pay through normal retirement age unless employer proves evidence to the contrary); *see e.g., EEOC v. HBE Corp.*, 135 F.3d 543, 555 (8th Cir. 1998) (reducing five-year front pay to one year due to short time in position and high turnover of predecessors).

Front pay damages may be upheld for estimated wage loss for a number of years in the future. *See e.g., Salitros*, 306 F.3d at 573 (upholding a front pay award of seven years); *Curtis v. Electronics & Space Corp.*, 113 F.3d 1498, 1505 (8th Cir. 1997) (three years), *Ryther v. KARE 11*, 864 F. Supp. 1510, 1525 (D. Minn. 1994) (six years); *Hansen v. Regency Corp.*, No. C8-96-1640, 1997 WL 30695, at *2 (Minn. Ct. App. Jan. 28, 1997) (twelve years).

IV. EMOTIONAL DISTRESS.

Emotional distress or mental anguish damages are available under the ADA, Section 1981, Title VII, MHRA, MPLA, and MWA, but not the ADEA, EPA, FMLA, or USERRA. Generally, emotional distress damages are recoverable in discrimination claims. A plaintiff does not have to demonstrate that her mental distress is severe or accompanied by a physical injury, nor does she have to have proof of medical treatment. *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1272 (8th Cir. 1981); *Gillson v. State Dep’t of Natural Res.*, 492 N.W.2d 835, 842 (Minn. Ct. App.

1992). However, an award of emotional-distress damages must still be supported by “competent evidence of ‘genuine injury.’” *Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 531 (8th Cir. 1999). “Awards for pain and suffering are highly subjective and the assessment of damages is within the sound discretion of the jury, especially when the jury must determine how to compensate an individual for an injury not easily calculable in economic terms.” *Jenkins v. McLean Hotels, Inc.*, 859 F.2d 598, 600 (8th Cir. 1988) (internal citations and quotations omitted). A plaintiff’s own testimony is a sufficient basis for emotional distress or mental anguish, and such an award need not be supported by expert testimony. *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065 (8th Cir. 1997); *Gillson*, 492 N.W.2d at 842 (noting damages may be awarded solely on the basis of a plaintiff’s subjective testimony).

V. LIQUIDATED DAMAGES.

Liquidated damages are available under the ADEA, EPA, FMLA and USERRA.

Under the FMLA, liquidated damages (plus interest) are available for violations not in good faith. 29 U.S.C. § 2617(a)(1)(A)(i)(III). There is a “strong presumption under the [FMLA] in favor of doubling.” *Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 868-69 (8th Cir. 2006).

For EPA and ADEA claims, liquidated damages are available upon a showing of willful violations. 18 U.S.C. § 216(b) (listing FLSA damages); 29 U.S.C. § 626(b) (incorporating FLSA damages into ADEA). Liquidated damages should not be awarded if the employer proves that the act or omission giving rise to such action was made in good faith and that it had reasonable grounds for believing that it was not violating the law. 29 U.S.C. § 260; *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 616 (1993) (noting in ADEA case, “If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated

damages should not be imposed.”). In this Circuit, double damages are mandatory after a finding of willfulness. *Spencer v. Stuart Hall Co., Inc.*, 173 F.3d 1124, 1129 (8th Cir. 1999) (ADEA).

USERRA provides that the court may require the employer to pay an aggrieved party liquidated damages if the court determines that the employer’s violation was willful. 38 U.S.C. § 4323(d)(1)(A)-(C).

VI. TREBLE DAMAGES.

The Minnesota Human Rights Act permits the trial court to award compensatory damages in “an amount up to three times the actual damage sustained.” Minn. Stat. § 363A.29, subd. 4(a); *Kohn v. City of Minneapolis Fire Dept.*, 583 N.W.2d 7, 14 (Minn. Ct. App. 1998). Front pay is a component of actual damages under the MHRA and is subject to a multiplier. *Ray v. Miller Meester Advert., Inc.*, 684 N.W.2d 404, 406 (Minn. 2004).

There is some question whether emotional distress damages may be considered actual damages subject to multiplication. In 2001, the Eighth Circuit held that emotional distress damages could be trebled. *Mathieu v. Gopher News Co.*, 273 F.3d 769, 781 (8th Cir. 2001) (citing *Huffman v. Pepsi-Cola Bottling Co. of Minneapolis & St. Paul*, No. C7-94-2404, 1995 WL 434467, at *5 (July 25, 1995)). However, in 2003, the Minnesota Court of Appeals held that damages for emotional distress are not actual damages under the MHRA because they are not “specifically” included “within the damages permitted to be trebled. *Ray v. Miller Meester Advert., Inc.*, 664 N.W.2d 355, 370 (Minn. Ct. App. 2003) *aff’d*, 684 N.W.2d 404 (Minn. 2004). The Court of Appeals’ decision in *Miller Meester* was upheld by the Supreme Court—however, the question of whether emotional distress damages are trebled was not appealed. Thus, the Minnesota Supreme Court has not addressed the issue.

There is good reason to believe that the Minnesota Supreme Court would overrule the conclusion in *Miller Meester*. The Court of Appeals' reasoning in *Miller Meester* is flawed. First, it is that the first canon of statutory construction is to interpret words according to their "common and approved usage." Minn. Stat. § 645.08(2). The common and approved usage of "actual damages" includes damages for emotional distress under well settled Minnesota law.

In *Phelps v. Commonwealth Land Title Ins. Co.*, the Minnesota Supreme Court held that "compensatory damages" under the MHRA are synonymous with "actual damages." 537 N.W.2d 271, 275 (Minn. 1995). That holding has not been overruled. Moreover, Black's Law Dictionary's definition of actual damages includes an "amount awarded ... to compensate for a proven injury or loss." DAMAGES, Black's Law Dictionary (10th ed. 2014). See also *Mathieu*, 273 F.3d at 781 (citing *see Phelps*, 537 N.W.2d at 275 n. 2); *Minneapolis Police Dept. v. Minneapolis Comm'n on Civil Rights*, 402 N.W.2d 125, 132 (Minn. Ct. App. 1987) ("An actual compensable injury means physical injury, monetary expenses, lost earnings, impairment of reputation, personal humiliation, or mental anguish."), *aff'd* 425 N.W.2d 235, 238 (Minn. 1988); *Huffman v. Pepsi-Cola Bottling Co. of Minneapolis & St. Paul*, No. C7-94-2404, 1995 WL 434467, at *5 (Minn. App. July 25, 1995).

Second, *Miller Meester* ignores the MHRA's rule of construction that courts construe its provisions "liberally" to accomplish its purposes. Minn. Stat. § 363A.04. Third, the holding is internally inconsistent. There is no sound reason to distinguish between front pay and emotional distress damages according to *Miller Meester's* own reasoning. The court relied on *Phelps* to conclude that front pay is an "actual loss;" but the MHRA's trebling provision "specifically does not include" front pay—just like emotional distress.

In spite of *Miller Meester*, Minnesota courts still include damages for emotional distress in the amounts they multiply under the MHRA's trebling provision. *See, e.g., Wenigar*, 712 N.W.2d 190 (Minn. Ct. App. 2006); *Fields v. Strom Engineering*, 21 27-CV-14-7795 (June 18, 2015); *Abrahamson v. National Pawn Co.*, 55-CV-11-5630 (Minn. Dist. Ct. Apr. 21, 2014); *Lemmon v. Minneapolis Fire Dept.*, 27-CV-08-11976 (Minn. Dist. Ct. Dec. 1, 2009).

VII. PUNITIVE DAMAGES.

Punitive damages are available for disparate treatment cases under Title VII, the ADA and Section 1981 when the employer is found to discriminate against the plaintiff "with malice or with reckless indifference." 42 U.S.C. § 1981a(b); *see Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). Compensatory and punitive damages are capped under Title VII and the ADA as follows:

- 15-100 employees: \$50,000;
- 101-200 employees: \$100,000;
- 201-500 employees: \$200,000;
- more than 500 employees: \$300,000.

42 U.S.C. § 1981a(b)(3)(A)–(D).³

There are no statutory caps on the damages applicable to the amount of compensatory or punitive damages that can be recovered under Section 1981. 42 U.S.C. § 1981a(b)(4).

Punitive damages are available under the MHRA but are capped at \$25,000. Minn. Stat. § 363A.29 subd. 4(a). However, unlike Title VII and ADA, the MHRA's cap does not include emotional distress damages. *Luu v. Seagate Tech., Inc.*, No. 99-220, 2001 WL 920013, at *7 (D.

³ Back pay is excluded from the definition of compensatory damages. 42 U.S.C. § 1981a(b)(2)). In the Eighth Circuit, front pay damages are exempt from statutory caps set by 42 U.S.C. § 1981a(b)(3). *Kramer v. Logan County School Dist. No. R-1*, 157 F.3d 620, 625-26 (8th Cir. 1998).

Minn. July 5, 2001). Punitive damages under the MHRA are awarded under the substantive guidelines in Minn. Stat. § 549.20. *Evans v. Ford Motor Co.*, 768 F. Supp. 1318, 1327 (D. Minn. 1991).⁴

Punitive damages are also available under the MPLA and the MWA. *Esget v. Adecco USA, Inc.*, No. 12-2164, 2012 WL 4856302, at *1 n.3 (D. Minn. Oct. 12, 2012) (“It is undisputed that [plaintiff] may recover punitive damages if successful on his Whistleblower Act claim.”); Minn. Stat. § 181.944 (available damages under MPLA include “any and all damages recoverable at law”).

VIII. CIVIL PENALTIES.

Under the MHRA, the court may order defendants to pay a civil penalty to the state in addition to other damages. Minn. Stat. § 363A.29 subd. 4(a).

IX. ATTORNEYS’ FEES AND COSTS.

Reasonable attorneys’ fees and costs are available to prevailing plaintiffs pursuant to the ADEA, ADA, EPA, FMLA, Section 1981, Title VII, USERRA, MHRA, MPLA, and MWA. Courts consider numerous factors in determining the reasonableness of the fee, including the plaintiff’s degree of success. While strict proportionality is not required, the amount of damages recovered is relevant. *Hensel v. City of Little Falls, MN*, No. 12-1160, 2014 WL 229195, at *14 n.18 (D. Minn. Jan. 8, 2014); *Green v. BMW of N. Am., LLC*, 826 N.W.2d 530, 538 (Minn. 2013). Courts measure success “also by looking at the significance of the legal issues on which the

⁴ Notably, plaintiffs are not required to follow the motion and affidavit requirements of Minn. Stat. § 549.191 to plead punitive damages under the MHRA. *Ulrich v. City of Crosby*, supra at 876; *Daines v. City of Mankato*, 754 F.Supp. 681, 704 (D. Minn. 1990); *Engel v. Independent School District No. 91*, 846 F. Supp. 760, 768 (D. Minn. 1994); *Backlund v. City of Duluth, Minn.*, 176 F.R.D. 316, 322 (D. Minn. 1997).

plaintiff prevailed and the public purpose served by the litigation.” *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 623 (Minn. 2008); *Farrar v. Hobby*, 506 U.S. 103, 121–22, (O’Connor, J., concurring). Thus, in employment claims, the attorneys’ fees and costs awarded may be greater than the damages awarded to plaintiff.

X. CONCLUSION.

Being able to accurately value an employment claim is critical for plaintiff’s counsel, defense counsel, and in-house counsel. Without a solid assessment of damages, strategic mistakes and unforeseen verdicts are inevitable. The sooner one can undertake this assessment for their client, the better!