

WITHOUT Imaging or Vendor Coding				WITH Imaging and Vendor Coding			
Task	Work Description	Responsible Party	Cost Estimate	Task	Work Description	Responsible Party	Cost Estimate
Research	100 searches	Paralegal	16,700 In Dollars	Research	100 searches	Paralegal	2,800 Paralegal In Dollars
	Execute search/sort - 5 min				Execute search: date sort - 5 min retrieve/save list - 5 min @ \$80/hr = \$13		
	Print Bates number list - 15 min				Assume printing for 1/3 of results.		
	Put documents - 30 min				can review tag lists instead, Filing not always necessary, @ \$.05/page		
	Sort by date/assemble - 30 min				+ 10 min paralegal time = \$15		
	Relife - 30 min				Total 1 search:		\$28
	@ \$80/tr = \$67						
	Photocopy 100 pages						
	@ \$.20/page = \$20						
	Total 1 search:						
	\$167						
Total Without Imaging			1,257,866 In Dollars	Total With Imaging			438,867

The above chart is based on the following assumptions:

- 500,000 pages imaged.
- 300,000 pages coded (150,000 pages privileged; 150,000 pages produced).
- Other services are available.
- Cost estimates are determined based on vendors and experience.

1945 1946 1947 1948 1949 1950 1951 1952 1953
 1954 1955 1956 1957 1958 1959 1960 1961 1962
 1963 1964 1965 1966 1967 1968 1969 1970 1971

Determining Lost Earnings in Age Discrimination Cases

Daniel Burns

With an appropriate framework for computation, you can determine damages with accuracy.

% % % % % %
 10 20 30 40 50 60

THE PAST SEVERAL YEARS have lost their jobs. Middle and upper management personnel in their 40s, 50s and 60s have borne a greater burden of job losses than in previous economic downturns.

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conomic contractions. But whatever the causes may be, one effect has been undeniable: a surge in wrongful termination litigation alleging age discrimination.

This litigation can wind up costing the defendant every bit as much as it would have saved by terminating the plaintiff in the first place. On average, factfinders in age discrimination cases award appreciably more to aggrieved plaintiffs than do factfinders in gender, race, or disability discrimination cases.

Given the great potential for high damage awards in these cases, counsel for both the plaintiff and the defendant stand to benefit from retaining a skilled expert to determine the value of economic damages that may arise from termination.

FRAMWORK TO COMPUTE LOST EARNINGS • Defining lost earnings in age discrimination litigation is similar to loss of earning calculations for personal injury. Both involve determining a level of lost earnings and benefits; ascertaining the duration of the loss period; and applying a time value of money factor to value the loss as of the approximate trial date.

The Appropriate

Amount of Damages

The appropriate amount of damages is the amount which leaves the plaintiff whole. However, the plaintiff may have a duty to mitigate damages, usually by taking all reasonable steps

to locate substitute employment. You may wish to discuss with the expert the effect of relevant jurisdictional considerations concerning mitigation, unemployment benefits received, pre-judgment interest, discounting, tax effects, and other issues.

WORKSTEPS FOR COMPUTING LOST EARNINGS • In determining lost earnings, experts who follow organized work plans with individual worksteps are more likely to produce meaningful and accurate work product on a timely and cost-effective basis. Insisting that your economic consultant communicate the steps to you makes it more likely that you will not only know what the expert has done, but also what the underlying assumptions were. You are also likely to gain greater control over the conduct of the damages case.

The Basic Steps

Though circumstances may vary from case to case, your economic consultant will have to perform certain worksteps:

- Obtaining *basic information* about key variables affecting the computation;
- Identifying the *duration of the loss*, usually ending at the hypothetical date of retirement;
- Determining the appropriate levels of *base earnings and earnings growth*;

- Determining the *value of lost benefits*; and
- Applying *time value of money factors*, as appropriate.

OBTAINING THE BASIC INFORMATION • The abundance or paucity of information will vary with the circumstances of each case, but the expert should make every reasonable effort to nail down certain basic information. Additional information can always be helpful, but the following is generally necessary to provide the expert with sufficient background to form well-founded opinions:

- Date of birth;
- Date of termination;
- Date(s) of re-employment, if any;
- Educational history of plaintiff;
- Health history of plaintiff;
- Work history;
- Income history (tax returns, W-2's);
- Work performance (performance reviews, if available);
- Current compensation paid by defendant to comparable employees, if any;
- Relevant company documents regarding employee benefits;
- An interview with the plaintiff, or a review of the plaintiff's deposition; and

- Relevant deposition testimony of others (industry employment expert, company personnel, and so on).

It may be possible to prepare accurate computations of lost earnings without certain pieces of the above information, or by using substitute information, but the task may be more complicated, and the computations potentially more difficult to defend.

IDENTIFYING THE DURATION OF

LOSS PERIOD • The loss period usually begins at the date of alleged termination and continues to the date the plaintiff would have retired but for the termination. If the plaintiff has found satisfactory substitute employment by the date of trial, the loss period may have ended. If, however, plaintiff has not found satisfactory substitute employment by the date of trial it will be necessary to project damages through to a hypothetical end-of-loss date. Generally, this date may correspond to plaintiff's anticipated retirement from the workforce. However, the projected loss period may be argued to differ from plaintiff's anticipated retirement date if, for example, plaintiff had changed jobs frequently or was occasionally absent from the workforce. Additionally, the plaintiff may have spoken to others about his or her retirement plans or plans to pursue other interests.

Worklife Estimates

The expert must pay heed to the circumstances of the case in evaluating the period of loss. The expert should consider Bureau of Labor Statistics Worklife Estimates Data (February 1986, Bulletin 2254) which suggest that, on average, individuals do not participate in the workforce on a full-time basis over the span of their working lives. You may wish to consider retaining an industry employment expert to offer an opinion about the appropriate duration of the plaintiff's loss period.

DETERMINING BASE EARNINGS AND EARNINGS GROWTH • In many cases, an appropriate level of base earnings (at the beginning of the damages period) may be determined by what plaintiff had been earning at the time of alleged termination. Help the expert to obtain earnings history as far into the past as possible. Generally, information going back five years before the termination will allow the expert to gain an understanding of the stability of plaintiff's earnings before termination.

Earnings History

Earnings history may be a useful indicator of earnings potential at the time of termination, especially if a consistent pattern emerges. The causes of any material inconsistency in earnings in the years before termination must be understood if the expert is to make a meaningful projection of lost earnings. Job changes, promotions, or pay structures involv-

ing commission or bonus payments are reasons which may give rise to earnings fluctuations, and which may complicate the task of developing a prudent projection of lost earnings.

Determining Growth Rates for Lost Earnings

To assist in determining the appropriate rate of growth for lost earnings, the expert may be able to look to amounts paid contemporaneously to comparable former co-workers, or to comparable employees of similar companies. When job descriptions and pay rates are sufficiently comparable, the actual experience of others remaining in the defendant company's employ after plaintiff's alleged termination may be an especially useful indicator of amounts plaintiff would have received but for the termination.

What Constitutes "Lost Earnings"?

Note that the definition of lost earnings may be broad and that plaintiff may in some circumstances be entitled to lost earnings from part-time jobs, consulting income, or hobby or rental income that also may be shown to have been lost as a result of the alleged termination which caused plaintiff to lose his or her primary source of income. When the plaintiff enjoyed multiple sources of income before the alleged termination, the expert should avoid using plaintiff's individual tax return exclusively to measure lost earnings; use W-2s instead, if they are available.

Don't Forget the Tax Man

Discuss taxation aspects of the award with the expert. Generally, the plaintiff will be taxed on the award. Thus, the award should be computed on a pre-tax basis. However, the purpose of the award is to make the plaintiff whole, and not to provide plaintiff with an amount greater than that which would make him whole. Therefore FICA, Medicare, and unemployment insurance (among others) which would have been paid had plaintiff been employed may need to be "pulled out" to prescribed levels for periods between the termination and the date of trial. The expert should consult the Social Security Administration to determine pre-set maximum levels for FICA and Medicare withholding in the year of trial and over the anticipated loss period, reducing the amount of lost earnings for such taxes over the projection, except for the amount of the liability in the year of the award.

Check the Rates

In certain cases, particularly those in which several years have elapsed between the alleged termination and the date of trial, you and your expert will need to consider whether changes in marginal income tax rates should be accounted for in computing lost earnings.

DETERMINING THE VALUE OF LOST BENEFITS • The amount of salary an individual receives is rarely the only form of economic loss associated with an alleged wrongful termination.

Many employees, especially highly compensated individuals, enjoy comprehensive benefits packages that contain components not easily replaced after termination. Your expert should consider these benefits in the determination of damages.

What To Look For

Though many types of benefit exist, employer sponsored savings plans, pension plans, employee stock option plans, and life and medical insurance are frequently part of a comprehensive benefits package.

Computing damages associated with the loss of these or other benefits will be much easier if you obtain company documents which set forth the terms and conditions of each type of benefit. Regardless of the components of the package, there are several issues you should consider along with your expert before attempting to value the benefits lost.

Was the Employee Entitled to the Benefit?

First, benefits represent a large and rapidly growing form of expense for many companies. It is therefore reasonable to expect the company to react in some manner to this tendency. You will need to find out about any actual or intended alterations to the various forms of available employee benefits through interrogatories or deposition testimony. The mere existence of a benefit may not mean that the plaintiff is entitled to it if the plaintiff was not a participant while he or she was em-

played. Damages related to the loss of insurance may be equal to the excess amount the plaintiff pays out of pocket after termination (over that paid while the plaintiff was employed) to obtain comparable coverage.

Distributions and Sums Received

There are at least two other issues you and your expert should consider with respect to decisions the plaintiff may have had to make at the time of alleged termination. If the plaintiff took a lump sum pension distribution at the date of alleged termination, that amount should be subtracted from total damages if they include the lump sum distribution the plaintiff should have received at the hypothetical date of retirement. In addition, the plaintiff may have taken the early retirement provision of Social Security upon termination to supplant lost cash flow. In the periods between termination and the hypothetical date of retirement, amounts received from Social Security should be treated as mitigation. In the years after the hypothetical date of retirement, the additional increment of Social Security payment plaintiff should have received but for the termination should be counted as an element of damages. Note that the Social Security Administration will calculate the "should have been" monthly payment; but give them at least two months' notice to do so.

APPLYING TIME VALUE OF MONEY FACTORS • Historical and prospective lost earnings must be adjusted to the date of trial to account for time value of money considerations. Discuss with the expert the availability and any statutory requirements for and any judgment requirements for earnings should be discounted to the approximate date of trial using an appropriate interest rate.

Determining the discount rate is frequently an issue of considerable dispute between the parties, owing to the dramatic effects that seemingly modest differences in interest rates can have on present value calculations. If there is no jurisdictional impasse affecting the selection of a discount rate, the expert should select a rate that reflects the circumstances of the case.

CONCLUSION • Wrongful termination litigation alleging age discrimination is here to stay. Factfinders have in the past awarded appreciably greater damages to successful age discrimination plaintiffs than in other kinds of discrimination cases. As with any damages case, an objective and conservative approach to damages determination is crucial to establish and maintain credibility.

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