IN PRACTICE

EMPLOYMENT LAW

Untethered NJLAD Front-Pay Claims

By Jeffrey M. Daitz and Kevin J. O'Connor

Like a helium balloon that escapes your grasp, a front-pay claim in an employment case can be particularly difficult to get your hands around when defending a claim brought under New Jersey's Law Against Discrimination (NJLAD). Front-pay claims (similar to back pay) have a tendency to escalate as a case slowly winds its way through the court system. An article published in this journal on June 20 ("Mitigating Front-Pay Damages in NJLAD Cases"), provided a summary of the Appellate Division's groundbreaking April 5 opinion in *Quinlan v. Curtis-Wright Corp.*, 425 N.J. Super. 335 (App. Div. 2012). The *Quinlan* decision serves to both clarify the law on when front pay can be sought, and to provide the precedent needed to challenge an inherently speculative claim for damages.

The need for defense counsel to eliminate a front-pay claim before trial is driven by the fact that the jury is left to decide how much to award a plaintiff in a CEPA or LAD case in state court, unlike the federal courts where such a decision is made by the trial judge, or some bifurcated procedure, depending on the Circuit in which the case is tried.

A plaintiff in an employment discrimination case in New Jersey state court can only seek front pay where there are sufficient facts in the record to support the claim on a non-speculative basis. Where the claim is predicated on the employee being totally disabled and unemployable, expert testimony on that issue is arguably a necessity in order to even present the claim to a jury. Where a plaintiff has no employability expert, or psychiatrist where there is a claim of permanent psychiatric impairment, a claim for front pay is ripe for attack.

Under New Jersey law, expert testimony is required when "the matter under consideration is so esoteric or specialized that jurors of common judgment cannot form a valid conclusion." See *Giantonnio v. Taccard*, 291 N.J. Super. 31 (App. Div. 1996). That is particularly true when the prognosis of an injury and the probability of permanent disability are at issue. See *Clifford v. Opdyke*, 156 N.J. Super. 208, 212 (App. Div. 1978). Even where a plaintiff has an expert, medical opinions as to "possibility" rather than a "certainty" are inadmissible. See *Vuccolo v. Shamrock Chem.*, 240 N.J. Super. 289, 299 (App. Div. 1990). The burden of proving these matters, of course, rests with the employee-plaintiff.

In an employment case, an injured plaintiff has the right to recover damages for diminished-earning capacity only if "there is a basis in the evidence to warrant submission to the jury." *Frugis v. Bracigliano*, 177 N.J. 250, 285 (2003). In *Donelson v. DuPont Chambers Works*, 206 N.J. 243 (2011), the New Jersey Supreme Court resolved the question of whether a front-pay claim can be pursued in a CEPA case even where the plaintiff had not proven actual or constructive discharge. There, the employee took a disability pension due to the emotional distress he allegedly suffered in the workplace, and ultimately recovered $724,000 in economic damages (much of which constituted a front-pay award) as well as $500,000 in punitive damages. The plaintiff in *Donelson* presented expert testimony at trial "that his employer's harassing conduct caused him a psychological illness that rendered him incapable of working and therefore entitled him to lost wages," and that it was "unlikely [he] would ever recover…." *Donelson* cited *Frugis* for the standard that must be met in getting such a claim to the jury.

New Jersey Supreme Court precedent therefore holds that where a front-pay claim is predicated on the plaintiff's inability to work due to psychiatric injury, expert testimony is required to establish the causal connection between the injury and diminution of future earning capacity, permanency and the amount of the alleged future lost income. The standard developed for instructing a jury on such damages mandates that the plaintiff present evidence that: (1) "there is a reasonable probability that his/her injuries will impair future earning capacity"; and (2) "sufficient factual matter upon which the quantum of diminishment can reasonably be determined." *Frugis*, 177 N.J. at 285.

In *Dombroski v. Atlantic City*, 308 N.J. Super. 459 (App. Div. 1998), where the plaintiff tried to offer testimony that he faced future obstacles in remaining employed because of his injuries, the trial court refused to allow him to make those arguments to the jury. The Appellate Division (relying on the test of admissibility set forth in *Coll*) sustained that ruling precisely because the proffered expert had failed to "give the why and wherefore" to support his opinion. See also *Pomerantz Paper Corp. v. New Community Corp.*, 207 N.J. 344, 372 (2011); *Quinlan*, 425 N.J. Super. at 366.

While it is true that the Appellate Division ruled in *Quinlan* that expert testimony is not a per se requirement to proceed to trial on a front-pay claim, the court's holding in that case, as well as the holding in *Donelson*, signal that the courts will closely scrutinize such claims and provide a gatekeeper function to weed out speculative claims in advance of trial. *Quinlan* cited *Frugis*, which held that a front-pay claim by an adult plaintiff must be supported by adequate facts and expert testimony whenever there are claims of psychiatric injury.

In *Frugis*, the plaintiffs' expert offered lukewarm opinions about future impact to earnings, but that was not enough for the Supreme Court, which affirmed dismissal of the claim for future lost earnings:

> On the subject of B.F.'s employment prospects, Dr. Feldman "expected" that B.F. would "have significant problems presenting himself in new situations ... such as at a job interview .... [or in] being assertive or ambitious in terms of his career." …
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> With regard to R.H.'s career future, Dr. Feldman opined that he would "likely ... have difficulties with ... employment or with interviewing if he perceived that the authority figures were people who might be either critical ... or suspicious of him." *Dr. Feldman also offered that R.H.'s psychological distress and depressive disorders would likely "be triggered and recur" at particular milestones in his life, such as "beginning" and "finding work." Dr. Feldman was no more specific on what career opportunities would be lost to R.H. than he was in his testimony concerning B.F.*...
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> ....
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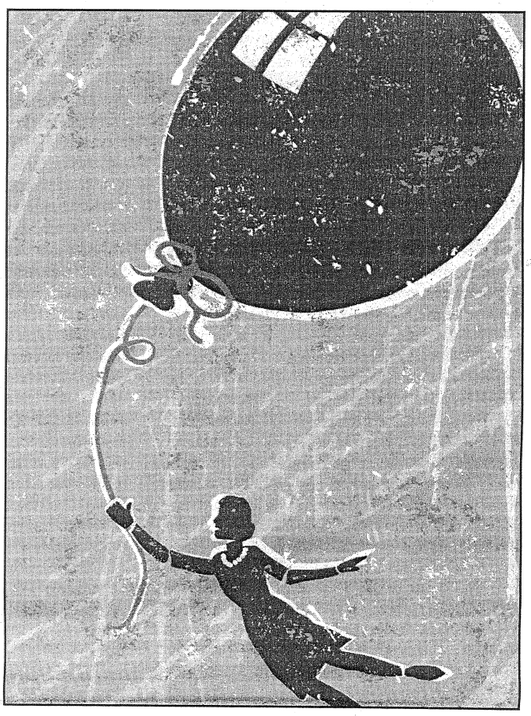
> Dr. Feldman's bare "expectations" that B.F. would "have significant problems presenting himself in new situations ... such as at a job interview .... [or in] being assertive or ambitious in terms of his career," and that R.H. "would be likely to have difficulties with ... employment or with interviewing if he perceived that the authority figures were people who might be either critical ... or suspicious of him," were too speculative for a jury to find impairment of career opportunities and award damages on that basis.

Frugis, 177 N.J. at 286-88 (emphasis added).

In the context of age discrimination cases, where the proofs needed to establish a front-pay claim are somewhat different, the courts will typically look at the employee's earning history, likelihood of remaining employed in that position, and pay increases, all in an attempt to fashion a front-pay remedy. The court will also look at issues of mitigation and overall employability. See, e.g., *Maxfield v. Sinclair Int'l*, 766 F.2d 788 (3d Cir. 1985). The role of an employability expert has long been recognized even in age discrimination cases where an employee is claiming long-term unemployability. See, e.g., *Cassino v. Reichhold Chemicals*, 817 F.2d 1338, 1346 (9th Cir. 1987).

There is an abundance of precedents from both federal and state courts recognizing the importance of expert testimony in employment cases where front pay is sought. In *Kolb v. Goldring*, 694 F.2d 869 (1st Cir. 1982), the court held that the jury must not be encouraged to "pull figures out of a hat," and that front-pay projections must be "based on expert testimony, patterns of pay increases, or similar evidence." The court in *Gotthardt v. National R.R. Passenger Corp.*, 191 F.3d 1148 (9th Cir. 1999), sustained a front-pay award only where the plaintiff put on "extensive testimony" from her treating psychological expert of the severity of her psychiatric problems and overall conclusion that her "ongoing impairment would render her unable to perform any job." In the gender-based discrimination case of *Haddad v. Wal-Mart Stores*, 455 Mass. 91 (2009), expert testimony supported an award of $733,000 for 19 years of front pay. Finally, in *Salveson v. Douglas Cty. & Wisc. Cty. Mut. Ins. Co.*, 610 N.W.2d 184, 190 (Wis. Ct. App. 2000), the front-pay award was reversed and reduced to one year, even in the face of expert testimony, as the jury was left to "speculate as to the extent that Salveson's psychological injuries could be expected to affect her future earning capacity."

Defense counsel in employment matters need to aggressively take discovery on the expert proofs that a plaintiff intends to present at trial and prepare to challenge that testimony well before the trial date arrives. This requires extensive work months before the expert witness is even identified. As shown in the high-profile New Jersey employment cases discussed above (*Donelson* and *Quinlan*), front-pay claims can constitute a substantial portion of a jury's award if the jury rules in favor of the employee on liability. *Quinlan* provides the essential framework for defense counsel seeking to streamline the issues for trial and take out of the jury's consideration a claim that seeks the equivalent of a "lifetime annuity," where such a claim is lacking in substantial proofs in the record. ■



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