IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HOWARD P. STRAIN,	)	
	)	
Plaintiff,	)	**Civ. Action No.: 04-1581**
	)	
	)	**Judge: Gary L. Lancaster**
vs.	)	
	)	**Magistrate: Francis X. Caiazza**
BOROURGH OF SHARPSBURG, PENNSYLVANIA, a Municipal Entity, and RICHARD C. PANZA, JOSEPH P. PANZA, LARRY STELITANO, EILEEN RAPINO, VINCENT F. SACCO, ALBERT "PAT" ASTORINO, MARIO FERRARO, ROXANE MAGNELLI and ROBERT STAPF, in their official and individual capacities,	)	**Jury Trial Demanded**
	)	
Defendants.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION IN LIMINE TO PRECLUDE PLAINTIFF AND HIS EXPERT FROM OFFERING ANY EVIDENCE OF TAX CONSEQUENCES AT TRIAL

I. Introduction

This is an action under 42 U.S.C. § 1983. Plaintiff Howard P. Strain alleges that the Borough terminated Plaintiff's employment on the basis of trumped up personnel violations and trumped up criminal charges, and engaged in other acts of discrimination that denied him the equal protection of the law and abused process.

In his Second Amended Complaint, Mr. Strain alleged that Defendants' unconstitutional conduct caused him to incur past and future losses of wages and benefits. To make him whole, Mr. Strain requested damages for the additional tax liabilities he would incur from recovering damages for Defendants' discrimination in a single tax year. (SAC at Wherefore Clause, p. 13).

Plaintiff's expert calculated that Mr. Strain will require an additional $232,612.00 in compensation to offset the additional taxes Mr. Strain will owe solely as the result of the "bunching" of his wages and benefits into a single tax year. Plaintiff's loss expert will testify that in the absence of an upward adjustment to offset the increase in Plaintiff's tax liability from bunching, a damages award will not fully compensate Mr. Strain for his economic losses, and he will remain worse off because of Defendants' discrimination.

Defendants now seek to preclude Plaintiff from recovering a tax adjustment as part of Plaintiff's make-whole relief. Defendants contend that as a matter of Pennsylvania law, a jury is not allowed to consider income tax consequences. (Motion in Limine, ¶¶ 5-6). Defendants' motion in limine is legally unsound and should be denied. Plaintiff explains why below.

II. Argument

A. Federal law, not state law, determines damages in a § 1983 case.

"Compensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. § 1988." Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239-40, 90 S.Ct. 400, 406 (U.S. 1969); Gordon v. Norman, 788 F.2d 1194, 1199 (6th Cir. 1986). § 1988 provides that:

> The jurisdiction in civil *** matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, *and for their vindication*, *shall be exercised and enforced in conformity with the laws of the United States*….

Id. See also, 3 Devitt, Blackmar and Wolff, Federal Jury Practice and Instructions, § 85.19. Because federal law prescribes the remedies for Plaintiff's § 1983 claims, Defendants' motion in

limine, which is grounded entirely on state law, should be denied.[1]

B. Federal law permits an upward damages adjustment to compensate for additional tax liabilities.

1. Federal courts have broad equitable powers to award full make whole relief under § 1983.

It is settled beyond argument that district courts have broad powers under § 1983 and §1988 to fashion appropriate equitable remedies to make a victim whole. Squires v. Bonser, 54 F.3d 168, 172 (3rd Cir. 1995). There is no distinction in the law of equitable remedies between suits brought under Title VII and suits brought under § 1983. Gurmankin v. Costanzo, 626 F.2d 1115, 1120 (3rd Cir. 1980). Indeed, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S. 678, 684, 66 S.Ct. 773, 777 (1946); Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 392, 91 S.Ct. 1999, 2002 (1971).

2. Federal courts routinely make upward adjustments to damage awards for lost back and front pay to compensate for the additional tax liability from bunching.

In Gelof v. Papineau, 829 F.2d 452, 455-56 (3rd Cir. 1987), the Third Circuit affirmed the district court's award of additional damages to compensate the plaintiff for the increased income tax burden that would result from a lump sum payment of her back pay in a single tax year.

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[1] Plaintiff pauses to note that Defendants' abjectly miscite the inapposite state law cases referred to in ¶¶ 5-6 of their motion. Those cases address whether a state court judge should instruct a state court jury that damages awarded in a personal injury action are not subject to federal income tax. The cases are inapposite because personal injury plaintiffs do not pay *any* tax on the damages they receive, and so the issue whether an equitable *additur* is necessary to fully compensate the plaintiff for her lost wages and benefits never arises. Therefore, even if Defendants' correctly cited the state court cases listed in their Motion, those cases would remain totally irrelevant.

Outside the Third Circuit, the leading case supporting gross ups to compensate for the adverse tax consequences of bunching is the 10th Circuit's decision in Sears v. Atchison, Topeka & Santa Fe Railway Co.. In that case, the trial court had awarded seventeen years of back pay to a class of train porters to remedy a long-running race-based violation of Title VII. Topeka, 749 F.2d 1451, 1456 (10th Cir. 1984). The payment of this award in a lump sum placed most of the members of the class in the highest income tax bracket for the year of receipt. Noting the wide discretion that courts have in fashioning remedies to make victims of discrimination whole, and the extraordinary "bunching" that resulted from compressing wages that would have been earned over 17 years into a single year, the Tenth Circuit held that the trial court did not abuse its discretion "when it included a tax component in the back pay award to compensate class members for their additional tax liability." Id.

The Eastern District of Pennsylvania's decision in O'Neill v. Sears, Roebuck and Co. is also highly instructive. The district court in that case awarded back pay, front pay, and liquidated damages under the ADEA as well as compensatory damages under the Pennsylvania Human Relations Act. 108 F.Supp.2nd 443 (E.D.Pa. 2000). Upon the plaintiff's motion, the court enhanced the back pay and front pay awards to compensate for the negative tax consequences of the lump-sum award. Id. at 446. The court explained:

> As the television advertisement of a few years ago said: "It's not how much you make, it is how much you keep." The goal of the ADEA is to allow plaintiff to *keep* the same amount of money as if he had not been unlawfully terminated. Compliance with this goal requires reimbursement for the reduced amount of front pay money that the plaintiff has to invest as a result of higher taxes, as well as reimbursement for the higher taxes he must pay on his back wages by getting this money in a lump sum.

O'Neill, 108 F.Supp.2d at 447. Because the plaintiff, due to bunching, would have received fewer after-tax dollars than had he earned the wages in due course, the court determined that a

gross up was appropriate. See also, Memorandum from the NLRB General Counsel on Reimbursement for Excess Federal and State Taxes which Discriminatees Owe as a Result of Receiving a Lump-Sum Backpay Award, Memorandum GC 00-07, 2000 WL 33420197 (Sept. 22, 2000) (memorandum from General Counsel advising regional directors to seek a tax component to reimburse discriminatees for excess tax liability resulting from a lump sum back pay award).

3. To make Mr. Strain whole and deter future discrimination, this Court must exercise its equitable power to compensate Mr. Strain for the additional taxes he will owe from bunching.

The well known purpose of § 1983 "is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." Wyatt v. Cole, 504 U.S. 158, 161, 112 S.Ct. 1827, 1830, 118 L.Ed.2d 504 (1992). In this case, it is a mathematical fact that Mr. Strain will require an additional $232,612.00 in damages to compensate him for the additional taxes he will owe solely as the result of bunching. Had Defendants not terminated Mr. Strain's employment, and had he been allowed to earn his wages in the normal course, he would not have incurred this additional tax liability. Unless this additional sum is awarded, Mr. Strain will not be made whole, and will instead be paying a penalty for having been the victim of discrimination. As well, the Defendants will not bear the full cost of their discrimination and will be underdeterred from future acts of discrimination. Under such circumstances, the required equitable remedy is manifest; the Court must upwardly adjust Mr. Strain's damages for lost back and front pay to compensate him for the additional taxes he will owe solely as the result of bunching. For all the foregoing reasons, Defendants' motion should be denied.

Respectfully submitted,

s/ Charles A. Lamberton
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CERTIFICATE OF SERVICE: I, Charles A. Lamberton, certify that a copy of this paper has been served electronically upon counsel for the Defendants via the Court's ECF/CM system as of the date this paper was filed.

s/ Charles A. Lamberton