



Mediation Trends: Mitigation of Damages in Employment Cases

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As the unemployment rate hits historic lows and employers struggle to fill open positions, one of the consequences is that plaintiffs in employment disputes are finding new jobs quickly and often earning more than they did while working for the defendant.

Back when the job market was tighter, plaintiffs remained out of work for longer periods, which resulted in greater loss of earnings claims. In response, defendants argued that plaintiffs failed to mitigate their damages by making reasonable efforts to find new employment. Both sides also turned to economic experts to weigh in on the job market and plaintiffs' job prospects in order to bolster their positions on loss of earnings damages.

In the current job market, where plaintiffs are able to get back to work more quickly, defendants arguably have the upper hand when it comes to evaluating plaintiffs' economic damages claims. At mediation, defendants contend that the settlement value of the plaintiff's case is lower because plaintiff mitigated his or her economic loss by finding a new job at a higher pay rate. (However, as a mediator, one of my messages to the plaintiff who has quickly secured a new job is that s/he did the right thing, notwithstanding the effect it has on the loss of earnings claim.) If the plaintiff has not found new employment, defendant argues that the plaintiff did not try hard enough in a robust job market.

Plaintiffs facing this trend necessarily have shifted their emphasis to non-economic injury, such as emotional distress. Whereas calculating economic loss is fairly formulaic, emotional distress damages are infinitely more nebulous and unpredictable. If the plaintiff has received

extensive treatment for emotional distress, the value of the emotional distress claim could be higher. Other factors like the length of plaintiff's employment with the defendant and circumstances of plaintiff's termination also have an impact on the value of the emotional distress claim. From the defendant's standpoint, the lack of a standard formula for calculating emotional distress damages can make these claims even more dangerous than a loss of earnings claim.

The ever-increasing costs of litigation, as well as one-way fee shifting in employment cases (whereby a prevailing plaintiff can recover his/her attorneys' fees, but a prevailing defendant cannot), also continue to impact the settlement value of a case significantly, even where the economic damages are at the low end.

With that said, the current unemployment rate is a trend that, like most trends, will swing back and forth like a pendulum. Those who are in tune with the latest trends, and nimble enough to adjust to them when evaluating their cases for settlement, will get the best results at mediation.

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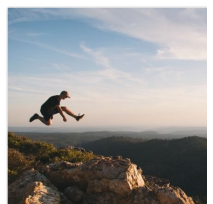
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