

Chapter 2: Valuing Your Case.

I. The Proper Way to Consider A Case

As an attorney, I look at a case from two aspects: (1) money damages and then (2) liability. Most clients look at liability first, and then sometimes move on to damages.

I look at money damages first because this allows me to see if the case is worth pursuing. If I determine a case is worth \$5,000 at best, then I'm going to tell a potential client it's not worth it to pursue the case. If the client's expenses are going to be \$12,000, why pay \$12,000 to get \$5,000? You will lose \$7,000 if you get the best result and lose \$12,000 if you get the worst. This is a business decision for both the client and the attorney, and I'm determining whether to bring suit by looking at the potential results versus the potential expenses. An attorney who fails to do this does you no favors.

II. Liability

Many potential clients see only one aspect of the case - liability - and never evaluate what damages they can obtain as a result of that liability. These people can't get past the fact that they have been wronged by the former employer. They are stuck in a rut of indignation from being ill-used and can't see beyond this.

Just because you can prove your former employer violated the law does not mean your case is worth pursuing. If you didn't have any points on your license, would you hire a lawyer to contest a speeding ticket for which the prosecutor only wants \$45.00? Would you take a day off work to go down and fight the thing? What if your legal fees were going to be \$5,000 to do so? Now would you fight it? The point is that you may invest more money and time in your case then you will get if everything goes in your favor.

A. Risk

Notice that I said, "If everything goes in your favor." Risk is the second aspect that a potential client fails to take into account. This stems from inability to focus on other aspects of the case and concentrating only on the wrong instead.

Clients often assume a jury will see everything the same way as they do. Objectivity is lost in the stress and emotion of being terminated. Rarely will a judge or jury see everything as you do. There are two sides to every story, and your employer is going to tell its side through a very talented lawyer. Once the trial is over, the jury will be sent off to come up with a third side to the story which usually is a result of parts of your story and parts of the employer's story.

Let's look at an example. In a typical wrongful termination case, you have different types of monetary damages available including lost back pay, emotional distress damages and punitive damages.

Notice that I said, "monetary damages." Courts award money to compensate you for a wrongful termination that is in violation of the law. If you are seeking an apology from your former employer, or you want your termination changed to a resignation, you won't get those remedies through a court. In fact, an apology is one of the most difficult things to obtain.

III. Calculation of Money Damages

A. Lost Back Pay

When evaluating a case, I like to look at the most straightforward form of damages first, back pay. If you were earning a salary of \$40,000 a year and it's been six months since your termination date then you've lost approximately \$20,000. If you've collected \$5,000 in unemployment compensation then you've lost \$15,000 in back pay. If you've worked part-time during this period and earned another \$8,000 then you've lost only \$7,000.

Generally, you have to subtract your interim earnings and unemployment compensation from your lost back pay. The employer's lawyer is going to be asking you all about this subject during the proceedings. Anything you earned since your termination is generally counted against lost back pay. After being terminated, you also have a duty to seek out similar employment. You cannot just sit back and do nothing towards obtaining another job.

B. Lost Future Back Pay

After determining your lost back pay to date, you need to determine how much more back pay you will lose into the future. In other words, you need to determine what your job prospects are. Generally, terminated employees cannot afford to live off unemployment compensation and savings, and most people find other work within six months of being terminated if not sooner.

So if you've been off work for six months and believe you can find similar work in, at most, another two months then you'll have eight months of lost back pay. Eight months of lost back pay for a \$40,000 salary would be about \$26,700 in lost back pay minus unemployment compensation and any interim earnings. Initially, we had used \$5,000 for unemployment compensation and \$8,000 in interim earnings. Lost back pay would then equal \$26,700 minus \$13,000 (\$5,000 + \$8,000) or \$13,700.

IV. Calculation of Non Monetary Damages Should Not Factor in Your Decision

Other types of damages exist for an illegal wrongful termination such as emotional distress damages and punitive damages. I generally do not factor these in when evaluating a case (unless the facts of the case are very compelling and lend themselves to such damages) because these types of damages are almost always too

speculative to gauge with any accuracy. Back pay damages are much more definite and give you a quick idea of what a case may be worth.

V. Discounting For Outcome Risk

Outcome Risk takes into account what might happen at trial. You can either win or lose. In our example above, we are looking at a potential back pay recovery of \$13,700. Every case is different, but I will suggest that for your purposes you simply do a 50/50 risk analysis. Your case may be better or worse but generally if a case goes to trial, you've got about a 50/50 shot at it. In fact, some think even less. There is an old saying among trial lawyers that you settle your winners and you try your losers.

That analysis may seem arbitrary, but juries do the same thing. Juries can be arbitrary. The foregoing assumes that you even make it to a jury. An employer's attorneys have many devices at their disposal to attempt to dismiss your case long before it gets to a jury, so a 50/50 analysis may be about right or may even be better odds than you really have.

After factoring the risk involved, the value of our hypothetical case becomes \$6,850 (50% of \$13,700).

A. Risk of Partial Victory

Another aspect of Outcome Risk is partial victory. What if the jury only awards you a percentage of what you ask for? For instance, the jury finds that the employer terminated you because you were male (a violation), but that the plant would have closed six months later anyway. Instead of getting a year's pay, you may only get half of that.

VI. Litigation Expenses

Bringing a lawsuit is not free. There are attorneys fees to consider, filing fees, expert witness fees, and other miscellaneous charges for such things as simple as postage and printing and copying costs. You need to consider the expenses involved in litigating your case.

A. Attorneys Fees

Most employment law attorneys will not take your case on a strict contingency basis despite what personal injury attorneys say in their advertisements. You can expect to pay a retainer of at least \$5,000 as part of the contingency agreement (see section on contingency agreements and fees). Lawyers take clients who pay a retainer up front a lot more seriously than clients whose case might or might not pay off at sometime in the future. If you pay a retainer fee up front then it demonstrates to the lawyer that you are serious about your case.