PLACING A VALUE ON AN EMPLOYMENT CASE - WHAT IS IT REALLY WORTH

Presented
May 4, 2013
LACBA Labor & Employment Law Section Retreat
Ojai, California

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1. INTRODUCTION

An employment case arrives on your desk. Regardless of whether you represent the employee or the employer, planning a strategy on how to handle the case, i.e. to settle or litigate, necessarily requires an assessment and evaluation of potential trial outcomes and damages. Almost every employee believes that there is no amount of money that can compensate for the injuries s/he has suffered and is certain that a jury of twelve peers will understand and punish the employer. Almost every employer, even if it acknowledges that things could have been done better, believes that a jury will find that no unlawful conduct took place and/or that the plaintiff's damages are exaggerated or fabricated.

The job of counsel is to advise their respective clients as to both liability and potential damages. However, without the benefit of a crystal ball or some magic formula as yet undiscovered, there can be no certainty as to either issue. Essentially, even the most prescient of counsel can only make *predictions* of future outcomes, based on prior experience in similar cases and knowledge of the law and human nature. The *value*[1] of a given case depends on many factors, particularly its procedural status, i.e. pre or post litigation. Other factors include the strength of the evidence, the availability of witnesses, the state of the law, the interests of the parties e.g. the effect of adverse publicity and level of risk aversion, and from whose perspective the evaluation is made.

2. COUNSEL'S PREDICTIONS OF SUCCESS ARE FREQUENTLY INCORRECT

In 2008 an article was published in the Journal of Empirical Legal Studies which studied over 2,000 California civil cases from November 2002 to December 2005 which proceeded to trial or arbitration following unsuccessful settlement negotiations.[2] The results of that study were complemented by a 40 year survey of settlement decisions in adjudicated cases from 1964 to 2004. The settlement decisions were compared with an ultimate award or verdict to determine whether the attorneys correctly predicted the ultimate outcome. Put another way, how often was a decisional error made as to the monetary value of the case?

The study revealed a high incidence of decisionmaking error by attorneys for both plaintiffs and defendants. Indeed, more than 60% of the time, plaintiffs would have been better

[1] The term *value* as used in this article refers to a monetary result. This is not to diminish the "value" of non-monetary results, such as re-characterization of a termination, confidentiality, or peace of mind for example.

[2] "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations" by Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, *Journal of Empirical Legal Studies*, Volume 5, number 3, 551-591, September 2008). A related article may be found in the January 2009 *Advocate* Magazine, "Making the right decision at mediation" by Sanford M. Gage.

off accepting a settlement proposal than going to trial. By comparison, defendants were wrong only about 24% of the time. At first blush, it would seem that plaintiffs are overly optimistic about the potential outcome, while defendants are more realistic. However, the "average cost" of the decisional error tells a different story. The average cost of plaintiff's decisional error was only about $43,000. However, when a defendant was wrong in rejecting the final settlement proposal, they were really wrong – to the tune of over $1.14 million.[3] So what can you do to improve the advice given to your clients?

3. IMPLICIT COGNITIVE BIAS CONTRIBUTES TO MISTAKEN ANALYSIS

To begin the analysis of what a case is worth, the factual and legal strengths and weaknesses of the case must be painstakingly and realistically evaluated. You will never be able to research every case and verdict which may possibly apply to a given case. You may never be able to gather every piece of evidence or interview every witness. The depth of your due diligence will be driven by timing, costs, and the availability of key documents or witnesses. Perforce, you make assumptions, predictions, and even outright guesses in your analysis.

That said, care must be taken to avoid allowing your conclusions to be tainted by *implicit cognitive bias*.[4] The term "bias" is not meant to imply prejudice against a particular group or class, but rather meant to encompass all types of unconscious, unintentional preferences, inferences, and judgments made because of factors other than reliable evidence. Bias are common cognitive processes which may create distortion and inaccurate perception. For example, we tend to perceive ourselves, and those close to us, in an unrealistically positive light. The concept of cognitive biases or information-processing shortcuts called *heuristics* is well documented in contemporary social psychology literature.[5]

Confirmation Bias

More particularly, attorneys and parties frequently make decisional errors because of *confirmation bias*, a type of cognitive bias. Confirmation bias is the unconscious tendency to seek and accept information consistent with one's initial hypothesis of a case and to disregard or minimize inconsistent information. In other words, notwithstanding their best intentions, people

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[3] Please note that these figures only represent the lost settlement opportunity and did not take into consideration the actual costs of litigation or other adverse consequences.

[4] The Implicit Association Tests (IAT) measure biases toward all types of advantaged and disadvantaged groups. The IAT can be taken at https://implicit.harvard.edu. An in-depth discussion of the IAT can be found in "Implicit Bias: Scientific Foundations" by Anthony G. Greenwald and Linda Hamilton Krieger, 94 *California Law Review* 945 (2006).

[5] Linda Hamilton Krieger writes eloquently on this subject and how it applies to proof in discrimination cases. "The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity", 47 *Stanford law Review* 1161 (1995). Two experienced independent investigators, Amy Oppenheimer and Claudia Viera, have written excellent articles, collecting and analyzing numerous studies in this field. Amy Oppenheimer, "The Psychology of Bias: Understanding and Eliminating Bias in Investigations", www.amy opp.com, and Claudia M. Viera, "The Psychology of Implicit Bias: Understanding and Eliminating Bias in Investigations", www.claudiaviera.com.

tend to process information in a way which supports their basic beliefs; they fail to appreciate information supporting an alternate conclusion; and they are reluctant to revise or back down from their initial conclusions or expectations.[6]

Anchoring Bias

After the facts are gathered, the law researched, and the case analyzed, counsel must advise their respective clients how to proceed. "What is the case really worth" is a common question posed by clients. The answer is "it depends". In an employment case, a prevailing plaintiff will be entitled to economic damages, damages for emotion distress, pain and suffering, punitive damages, and attorneys' fees and costs, as determined by the trier of fact. The trier of fact, whether a judge or a jury, is supposed to base an award on the evidence before them, but empirical evidence reveals that neither can completely disregard inadmissible information. Rather, they are influenced as well by a phenomenon known as *anchoring*, another type of cognitive bias which holds that when making numeric estimates, people commonly rely on the initial value given to them and is confirmed in the study's results.

Several studies have focused on how anchoring can impact an award of damages.[7] Two groups of judges were given the same set of facts about damages and asked to determine the amount of money to be awarded. One group was told that plaintiff's counsel "was intent upon collecting a significant monetary payment", while the other was told that plaintiff's counsel demanded "$10 million. The first group awarded a mean amount of $808,000 (a median of $700,000) while the second awarded a mean amount of $2.2 million (a median of $1 million). In another study using the same information, the first group of judges was also told that defendant had moved for dismissal, arguing that the case did not meet the $75,000 jurisdictional requirement; those judges awarded an average of $350,000 less than judges without that information.

Economic Damages

Many practitioners believe that when placing a monetary value on an employment case, one should start by calculating the employee's "hard losses", i.e. what s/he could have earned, minus what in fact the employee did in fact earn had the adverse employment action not taken place. It is commonly held that, a prevailing plaintiff will be entitled to "make whole relief", i.e. to be put in the same position in which she would have been if not for an employer's unlawful

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[6] An interesting article involving criminal settings provides insight into how this works in practice. "Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal investigations" by Barbara O'Brien, *Psychology, Public Policy and Law*, Vol. 15, No. 4, 315 – 334, 2009.

[7] For example, see "Blinking on the Bench: How Judges Decide Cases", 93 *Cornell L. Rev.* 101 (2007) and "Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding", *U. of Penn Law Review* (2005) by Wistrich, Guthrie & Rachlinski.

conduct. That said, there is no commonly held belief as to what "make whole relief" will actually mean in application.

Like judges and juries, attorneys can also fall victim to anchoring bias, particularly after repeatedly hearing from their clients "what this case is really worth". It is therefore imperative to gather as much *objective* data as possible relative to what the employee was earning, realistically anticipated promotions, bonuses, cost of living increases, and retirement age, mitigation efforts (including whether there is in fact comparable employment available), and lost earning capacity in order to predict what a trier of fact might award.[8]

Emotional Distress Damages

Anchoring can cause an attorney to under- or over-value compensatory damages for emotional distress. It is not enough that the plaintiff believes that their "life has been ruined" by defendant or that defendant believes that plaintiff is a "malingering exaggerator". Although many appellate courts have fairly regularly affirmed jury verdicts for emotional distress solely based on the testimony of a plaintiff, without any physical manifestation or treatment; however many regularly reject such verdicts.[9]

Therefore, just as with economic damages, it is important to gather as much evidence as possible to prove or disprove that compensable damages have been incurred and that such damages were caused by defendant's unlawful conduct. Unlike proof of economic damages, there is no formula for calculating emotional distress damages. Jurors are instructed to "use your judgment to decide a reasonable amount based on the evidence and your common sense." (See California Civil Jury Instructions (CACI, 2003 ed.) No. 3095A). Accordingly, the concept of anchoring should not be overlooked in presenting the case to the trier of fact.

Expert Testimony

Expert testimony is not required to prove either economic loss or emotional distress damages. Testimonial evidence from family and friends is often enough and some practitioners say the amount of damages just depends on who the jury likes or dislikes.

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[8] "Lost chance", a theory of recovery borrowed from medical malpractice cases and other cases where the alleged injury is an increased risk of future harm, is gaining ground in employment cases, particularly class action failure to promote cases. Under this theory, an employee's recovery could include "lost chance" damages by multiplying the front pay plaintiff could have earned in a promoted position by the chance s/he had of receiving the promotion. See Bishop v. Gainer (7th Cir. 2001) 272 F3rd 1009, 1015-16, where back pay and front pay were increased to take into account promotion plaintiff was likely to have received.

[9] See for example, Velez v. Roche, 335 F. Supp.2d 1022, 1038 (D. Cal.2004), where a district court awarded $300,000 for emotional distress, stating that guidance from the Ninth Circuit holds that "substantial emotional distress damages awards need not be supported by 'objective' evidence and that the subjective testimony of the plaintiff, corroborated by others (including relatives), may be sufficient."

A 1999 study examined influences on jury decision making regarding on lost wages and benefits and pain and suffering damages in an employment discrimination case.[10] Participants in the study heard excerpts from an age discrimination case in which liability had previously been determined in the plaintiff's favor. All jurors were told that the 54 year old plaintiff had been receiving $62,000 at the time of his termination four years earlier, that he had not worked since that time, that employment prospects were poor, and that he had suffered emotional distress as a result.

The authors provided additional information to some of the jurors. Some heard suggested award amounts from the attorneys. Some participants were also presented with testimony from a plaintiff's expert economist, while others were presented with conflicting testimony from both a plaintiff's and a defense expert economist. The participants were given an individual pre-deliberation questionnaire as well as a jury verdict form to complete. When the questionnaire was completed, jurors were left to deliberate. The deliberations were videotaped. The study reported the award amounts at both the pre-deliberation and post-deliberation stages.

Across all scenarios, the individual pre-deliberation awards for lost wages and benefits ranged from $0 to $967,000.[11] Based on these pre-deliberation awards, the authors concluded that jurors tend to *assimilate* their awards (upward or downward) to an amount that was suggested to them, whether by an attorney or an expert. In that regard, the study results showed that nearly one-third of the jurors were affected by the anchors suggested by attorneys or experts: 17% of the jurors awarded the amount suggested by the defense (the *modal* amount suggested was $321,000), while 15% awarded the amount suggested by or on behalf of the plaintiff (the *modal* amount suggested was $719,000).[12]

Examining the *mean* award, the authors attempted to analyze the impact of economic expert testimony on jurors. Perhaps not surprisingly based on the anchoring literature, jurors who had heard an attorney or expert suggest a proposed amount gave higher awards than jurors who

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[10] "Juror Decisions about Damages in Employment Discrimination Cases" by Edith Greene, Ph.D., Cheryl Downey, Ph.D., and Jane Goodman-Delahunty, J.D., PhD., *Behav. Science Law* 17:107-121 (1999).

[11] The discussion herein focuses on only the findings regarding economic damages, although the study's findings regarding emotional distress damages are equally interesting, most particularly the discussion of the effects of psychological experts on the jurors. No juror was given a suggestion as to amounts to be awarded for pain and suffering, which ranged from $0 to $800,000. The mean pre-deliberation award for emotional distress ranged from $81,000 to $137,000, with the average award being $104,000. The mean post-deliberation award for emotional distress ranged from $10,000 to $150,000, with the average award being $90,000.

[12] Mode, mean, and median are three kinds of "averages". The "mode" is the value that occurs most often. The "mean" is the "average" taken by adding up all the numbers and then dividing by the number of numbers. The "median" is the "middle" value in a list of numbers.

had not heard attorney or expert suggestions. Jurors who heard no suggested amounts from either attorneys or experts made the lowest award - $433,000. Those jurors who had heard from only the plaintiff's expert made the highest award - $575,000 in lost wages and benefits, while jurors who heard conflicting expert testimony awarded only $463,000, a difference that the authors did not find statistically significant. Interestingly, jurors who had heard only attorney suggestions awarded $571.000, almost equivalent to the award of $575,000 made by jurors who had also heard from the plaintiff's expert.

Based on the mean data, the authors concluded that expert economic testimony had little, if any affect on the jurors. The authors also concluded the jurors were not overly influenced by partisan suggestions from attorneys. The $138,000 difference between the amount awarded by jurors who heard only attorney suggestions ($571,000) and the amount awarded by jurors who heard no recommendations whatsoever ($433,000) was not found to be statistically significant.

The post-deliberation awards ranged from $248,000 to $900,000, with a *modal* award across all scenarios of $682,000. Four of the 22 juries found this award, which is the product of plaintiff's salary ($62,000) and the 11 years of employment he would have had to age 65; all four juries heard no recommended amounts from either attorneys or experts. Three of the 22 juries, all of whom only heard from the plaintiff's expert, awarded the amount suggested by the expert. Thus, like the data from both pre-deliberation awards, post-deliberation award data suggests that juries assimilate their verdict to anchors offered during trial.

In the post-deliberation data of *mean* awards, juries who heard testimony only from the plaintiff's expert tended to award more ($719,000) than did juries who heard the same figure when argued by the plaintiff's attorney ($566,000). Juries who heard from conflicting experts awarded about the same amount ($529,000) as juries who heard no recommendations at all ($520,000). The overall mean award pre-deliberation was $511,000 while the mean post deliberation award was $583,000, suggesting that jurors are affected by the process of deliberation itself. Specifically, the authors found that jurors were more likely to discuss requested monetary awards when suggested by experts than by attorneys.[13]

4. CONCLUSION

Keeping in mind these principles from social science and psychology, after you have gathered sufficient information to determine what might have happened, considered the applicable law, learned what is in the best interests of your client, you can begin to "value" the case. Whether you decide to engage in settlement efforts or proceed in litigation, an open mind and flexibility are critical. Consider utilization of an impartial professional factfinder, case

[13] One intriguing question left unexamined by this study because the jurors were told that liability was already established in plaintiff's favor, was some of the complicated ways that during their deliberations jurors may compromise on damages in order to find liability.

evaluator, or mediator, who can examine both sides of a case without the rhetoric and self-interest of the parties and who can often provide valuable input as to how a judge, arbitrator,or jury might ultimately view a case.

At any stage of a case, don't be seduced by concepts of right and wrong, good and evil, or by trying to prove that the other side is lying. Rather, keep looking at the big picture; try to see the case as the judge, jury, or arbitrator might see it. Be willing to listen and evaluate dispassionately the other side's position – there truly are at least two sides to every story. Continually re-assess risk and revise damage calculations and settlement parameters as the case develops.

Finally, remember, there is no one certain outcome. The case is "worth" what one side will offer and the other will accept in settlement, or whatever the ultimate award of a judge or jury or arbitrator says it is.