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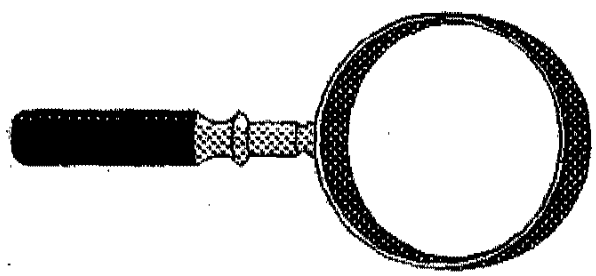

Expert Assistance in Wrongful Termination Litigation

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Wrongful termination cases often involve accounting, financial and economic issues. Expert assistance offered by certified public accountants ("CPAs") can be essential in preparing and defending these claims. In this article we discuss some of the issues which have arisen in our experience as expert witnesses and consultants in wrongful termination litigation.

LIABILITY ANALYSIS

Attorneys usually consult with CPAs only for calculating economic damages. However, we also can be helpful in the liability phase of trial. An effective way to present or rebut the case for liability is to utilize CPAs to perform quantitative analyses of the plaintiff's performance.

CPAs can compare the plaintiff's performance to objective standards such as contractual goals or quotas, company standards or the performance of co-workers. In defense of a claim by a terminated telephone operator, for example, we prepared a statistical analysis demonstrating that the calls handled per day by the plaintiff were below the company-set standard and less than those handled by other operators of equivalent training and experience. The case was settled with a *de minimis* payment.

When evaluating an executive's job performance, the CPA may analyze the operating results of the particular division directed by the executive. The analysis should isolate the executive's performance from other factors. For example, in a recent case on behalf of the plaintiff, testimony was presented at trial regarding our accounting analysis, which showed that the defendant's financial statements did not depict accurately the plaintiff's performance as manager of a joint venture. Inappropriately allocated corporate overhead made the venture appear unprofitable, when in fact its performance was outstanding. The plaintiff prevailed and was awarded compensatory and punitive damages.

DAMAGES ANALYSIS

CPAs are used both by plaintiffs and defendants to determine appropriate economic damages and present their findings at trial. Important factors normally considered include:

- Lost earnings
- Damage period
- Mitigating income.

Lost Earnings

Plaintiffs are entitled to recover the difference between actual income and income which would have been earned had there been no wrongful termination. These damages may include both actual and future lost earnings.

When available, it is preferable to use the historical earnings history of the plaintiff, rather than statistical averages, as the basis for projecting future income. Historical earnings information may be obtained from a variety of sources, including those shown in Table 1.

Table 1
Historical Earnings Data

Information	Source
Past employment earnings, promotions and pay raises	Forms W-4, tax returns, payroll ledgers, personnel files
Average historical hours worked and sick time taken	Timesheets, payroll ledgers
Commission and bonus arrangements	Personnel files, employment contract
Employer's policies on salary	Employee manual
Pay raises for similar employees	Payroll ledgers
Value of stock options or warrants	Employment contract
Retirement benefits	Employee manual, employment contract

Assumptions regarding lost earnings should be realistic. We may research, for example, whether or not it is appropriate to assume that past large bonuses would have continued in the future, promotions would have continued at the same frequency or that company-paid benefits would continue. These benefits may include health insurance, life insurance, pension benefits and employer contributions on investment or retirement plans.

Damage Period

The damage period is usually determined by the worklife expectancy of the plaintiff. The assumed damage period typically will have a significant impact on calculated damages.

A good source for worklife expectancy information are studies prepared by the Bureau of Labor Statistics of the U.S. Department of Labor. These studies provide information broken down by age, sex, education and whether or not the individual is currently active in the work force.

We often supplement worklife expectancy averages taken from government publications with research on the facts and circumstances of the plaintiff's employment situation. We compile such information by:

- Researching company or industry statistics
- Documenting terminations of similar employees
- Reviewing the plaintiff's retirement plans, medical records and personnel file
- Interviewing personnel and retirement specialists at the plaintiff's company.

In a recent case the opposing expert retained by a 61-year-old ironworker testified that the ironworker would have worked until age 67, based on national worklife expectancy tables.

To rebut this claim, we interviewed union representatives, who told us that most union members retired at age 62 and virtually all by age 65. Review of the union's pension program confirmed these observations. From an interview of the jury, which found in favor of the defendant, the defendant's attorney learned that the jury was favorably impressed by this "go to the horse's mouth" approach.

Once the damage period is determined, assumed future lost income must be discounted to present value. The discount rate used significantly impacts the present value of a damage claim. To determine the discount rate we review the current yields on low risk or no risk investments such as A-rated bonds or U.S. Treasury notes. We also assess the risk associated with future receipts of income, which may depend on projections of future employment and economic trends.

Mitigating Income

In most cases the plaintiff has the obligation to mitigate losses. That the plaintiff was unemployed or underemployed subsequent to termination does not mean necessarily that these earnings are the fair measure of mitigation. Important factors to be considered when calculating mitigating income may include the plaintiff's occupation, age, educational level, sex and race. We also look at the current and forecasted economic climate in the plaintiff's occupation and related fields. These factors often are also important considerations in determining how long the plaintiff reasonably should have taken before finding alternative employment.

We frequently compile information regarding appropriate mitigating income by:

- Reviewing the plaintiff's previous employment
- Using income tables from government and industry publications
- Surveying the experience of similar employees.

An interesting factor to consider may be the potential economic advantages of working less. The plaintiff may have more time available to devote to a family business, supervise investments or attend to household chores for which the plaintiff formerly employed someone else. Staying at home may allow the plaintiff's spouse to work or may allow the plaintiff to reduce expenses such as child care, travel and home maintenance.

Analyzing the Opposition's Damage Claim

CPAs retained by either plaintiff or defendant should analyze thoroughly the opposition's claim and point out errors and overreaching assumptions. This remains true whether or not you agree with the opposition's methodologies. Critical analysis of the opposition's damages claim may convince the judge or jury to adjust the amount of the damage award in your client's favor.

Table 2 lists several errors often found in wrongful termination damages analyses. In our experience such errors are occasionally deliberate.

Table 2
Common Errors in Wrongful Termination Damage Claims

Mathematical Errors
- Arithmetic and rounding errors
- Incorrect formulas

Errors of Fact
- Wage rates
- Pension benefits
- Hours worked per year
- Retirement date
- Birth date
- Available alternative occupation
- Extent of "disabilities" caused by termination

Incorrect Assumptions
- Wage growth
- Damage period
- Discount rate
- Future commissions or bonuses
- Profitability of relevant companies

Incorrect Methodology
- Interpreting or using tables incorrectly
- Not including mitigating income
- Failing to discount assumed future losses
- Claiming inappropriate items in lost earnings
- Claiming lost revenue without subtracting costs

SUMMARY

CPAs offer valuable assistance in wrongful termination litigation. CPAs can help attorneys establish or refute liability and determine the amount of damage award. In preparing their analyses CPAs normally should supplement statistical averages regarding factors such as worklife expectancy, fringe benefits and alternative employment by reviewing the plaintiff's individual work history, company and industry.

***Thomas M. Neches, CPA and Peter D. Wrobel, MBA, CPA** are partners at Simpson & Company, located in Los Angeles, California. Simpson & Company specializes in litigation services, which include investigative accounting, damage claims and expert witness testimony. Mr. Neches and Mr. Wrobel have been retained as expert witnesses and consultants on numerous wrongful termination cases.