

## *Vocational Expert an Important Witness in Employment Case*

**W**elcome to Expert Advice, a new Advocate feature series attempting to serve readers as a resource in the selection of case appropriate expert witness assistance. The focus of this inaugural column is the vocational expert assisting counsel with employment litigation. Employment litigation often requires proof of vocational loss, limitation, or damage in the workplace. The same is true with respect to personal-injury litigation. Some call the vocational expert a “vocational economist.” Some use the name “rehabilitation expert.” Still some prefer to be called a “vocational economic analyst.” Whatever your or your expert’s preference of nomenclature may be, the expert should be able to help you effectively quantify and explain your client’s wage loss, vocational loss, workforce limitation, vocational disability, or vocational ability, to a judge and jury.

**By Timothy D. Lange**  
Expert Editor

### **Economic Losses: ‘Front Pay,’ ‘Back Pay,’ and ‘Lost Benefits’**

Choosing an expert for vocational proof is a critical decision affecting the credibility, and often the very viability, of your case. In the “language” of employment litigation, the vocational expert may be called upon to establish “front pay” and/or “back pay” losses. “Front pay” represents your client’s lost earnings from trial forward, through the end of the period of claimed wage loss. “Back pay” essentially constitutes the wage loss from the date of commencement (i.e., the date of the missed promotion, the demotion, termination...) through trial.<sup>1</sup>

In federal employment discrimination cases, the evaluation and testimony of a vocational expert is needed to address work life expectancy of the plaintiff and the present value of future earnings. Bear in mind, however, that in such cases, this expert is needed before you ever get to submit the issue of lost “front pay” to the jury. You must first prove to the satisfaction of the court that your plaintiff is entitled to “front pay.” This principle is affirmed in *Roush v. KFC Nat. Management Co.*, 10 F.3d 392, 398-400 (6th Cir. 1993), wherein the Court identifies the proof needed with regard to these damages:

The jury must be instructed on what factors to consider in determining the amount of front pay, assuming that the court finds such an award is in order. We have

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**Editor’s Note:** Expert Advice will feature fields of expertise relevant to a trial practice. Your ideas, suggestions and references are requested and welcome for future topics of interest in your practice.

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previously stated that awards of front pay must be guided by consideration of certain factors including “an employee’s duty to mitigate, the availability of employment opportunities, the period within which one by reasonable efforts may be re-employed, the employee’s work and life expectancy, the discounts tables to determine the present value of future damages and other factors that are pertinent on prospective damage awards.”  
*Id.*

Your vocational expert also is available to professionally present your argument as to the amount of “back pay” to which your client is entitled. This witness should be able to use your plaintiff’s historical earnings (or a calculation otherwise based on the plaintiff’s employment terms or contract if the historical earnings should for some reason be inaccurate) to supply the jury with a guide for quantifying wages lost through the date of trial. The vocational economist should also be able to help quantify and present “lost benefit” damages to your jury. These include lost pension plan benefits, lost stock options, and damages from the loss of health and dental insurance benefits. These benefits are often economically significant additions to a plaintiff’s damage calculation.

Another employment litigation context in which a vocational expert may be utilized is the bolstering of one’s vocational loss proof with testimony as to the hurdles faced by involuntarily displaced workers attempting to return to the work force and their pre-termination level of earnings. These workers can be argued to statistically face a longer length of unemployment following their involuntary termination than persons otherwise unemployed. It can be argued that these involuntarily terminated

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workers, from a statistical point of view, face re-entrance into the workforce at lower wages than historically earned. Your vocational expert may be able to help you prove these seemingly subtle losses by referencing U.S. Census data from surveyed displaced workers.

### **The Vocational Expert and the ADA Claim**

In the context of the ADA claim (the Americans with Disabilities Act of 1990), a vocational expert can help you beyond presenting proof of lost earnings and benefits damages. Other elements of a successful ADA claim can be met with the help of a vocational expert. For instance, the vocational expert can help you define the “essential elements” of the job in issue. The essential elements or functions of a job are the basic functions that the employee/plaintiff must be able to perform with or without “reasonable accommodation.” Once the “essential elements” are identified, the expert may be able to offer testimony as to the manner in which an employer may “reasonably accommodate” the employee’s disability. Both of these functions are critical to the ordinary ADA claim.

In the ADA claim setting, your vocational expert may perform a “job analysis.” In the “job analysis,” the expert will investigate and document the specifics of the job, including the essential functions of the position and the physical demands of the position (whether the position involves heavy lifting, travel, stairs, weight limits, repetitive motion, etc.). This may be done in conjunction with other experts, such as a physical therapist, physiatrist, or ergonomics expert. The vocational expert further will need to review the plaintiff’s medical record or other documentation of his or her particular disability. Having studied the job in issue and documentation of the plaintiff’s disability, the expert can then

testify as to the plaintiff’s ability to perform the “essential functions” of the job, as well as to specific means by which the employer may make accommodation for the employee to enable him or her to perform effectively in the position in issue.

Please bear in mind that this is a very abbreviated discussion of the role of the vocational expert with respect to litigation.<sup>2</sup> Consultation of a reputable vocational expert is recommended if you have a case involving complex wage loss or other vocational issues. In your selection of the appropriate expert, be advised to seek references from fellow KATA members or other counsel having previously employed the expert under consideration. Always obtain the

expert’s current curriculum vitae, schedule of fees, and document pertinent terms concerning payment and billing before engagement. Conduct as significant a background check as your resources permit, and inquire as to whether the expert has suffered exclusion of his or her testimony in another matter. Remember, your experts can make or break your case. Choose wisely!

<sup>1</sup>In a claim involving bodily injury, these losses are commonly called “future lost wages” and “past lost wages.”

<sup>2</sup>This column gratefully acknowledges the assistance of John Tierney and David Gibson of Vocational Economics, Inc. in its research.



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