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UPDATE: DAMAGES IN EMPLOYMENT  
CASES—A REVIEW OF RECENT MONETARY  
AWARDS AT LAW AND IN EQUITY  
IN THE FEDERAL COURTS

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## TABLE OF CONTENTS

	<u>Page</u>
I. <u>SCOPE OF PAPER</u> .....	1
II. <u>PROCEDURAL ISSUES AFFECTING MONETARY RELIEF</u> .....	1
A. Jury Instructions .....	1
1. Instructions .....	1
2. Verdict Forms .....	2
3. Objections .....	4
B. Standard Of Review .....	5
1. Review Of Jury Award By Trial Court .....	5
2. Appellate Court Review Of Damages Awards .....	6
a. Back and front pay award .....	6
b. Compensatory damages award .....	6
c. Punitive damages award .....	8
III. <u>BACK PAY AWARDS</u> .....	8
A. Elements of Damage .....	8
B. Mitigation .....	9
1. Award Not Reduced .....	9
2. Award Reduced .....	11
IV. <u>FRONT PAY AWARDS</u> .....	12
A. Front Pay In Lieu Of Reinstatement .....	12
B. Factors Influencing Length And Amount Of Front Pay .....	13
C. Mitigation .....	15
1. Award Not Reduced .....	15
2. Award Reduced .....	16
D. Other .....	16
V. <u>COMPENSATORY DAMAGE AWARDS</u> .....	16
A. Elements Of Damage .....	16
B. Focus On Emotional Harm .....	17
1. Conduct, Including Unlawful Discharge, Leading to Emotional Harm ...	17
a. Award Not Reduced .....	17
b. Award Denied or Reduced .....	20
2. Emotional Distress Arising Out Of Unlawful Harassment, Denial Of Promotion Or Disciplinary Action Short of Discharge .....	22
a. Award Not Reduced .....	22
b. Award Denied Or Reduced .....	24

C.	Causation .....	25
D.	Other .....	26
VI.	<u>PUNITIVE DAMAGE AWARDS</u> .....	26
A.	Plaintiff’s Burden .....	27
1.	Burden Satisfied Because The Actor Essentially Is The Defendant .....	27
2.	Burden Satisfied By Conduct Of Managerial Agent .....	27
3.	Burden Not Satisfied .....	30
4.	Award Excessive .....	31
B.	Defendant’s Burden .....	31
1.	Burden Satisfied .....	31
2.	Burden Not Satisfied .....	33
C.	Factors Affecting Award .....	34
1.	Ratio Of Punitive To Compensatory Damages .....	34
2.	Comparison To Other Penalties .....	35
3.	Reprehensibility Of The Conduct .....	35
D.	Exemptions .....	36
E.	Identity of the Defendant .....	36
VII.	<u>RELATED ISSUES</u> .....	37
A.	Tax Treatment .....	37
B.	Effects Of Bankruptcy .....	37
C.	Interest .....	38
1.	Pre-Judgment Interest .....	38
VIII.	<u>CONCLUSION</u> .....	38

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Alexander v. Fulton County</u> , 218 F.3d 749 (11 <sup>th</sup> Cir. 2000) .....	36
<u>Beard v. Flying J Inc.</u> , 116 F. Supp. 2d 1077 (D. Ia. 2000) .....	29
<u>Berger v. Iron Workers Local 201</u> , 170 F.3d 1111, 1131-32 (D.C. Cir. 1999) .....	10
<u>BMW of North American v. Gore</u> , 577 U.S. 559 (1996) .....	8, 27, 31, 33, 35
<u>Bohac v. Department of Agriculture</u> , 239 F.3d 1334 (Fed. Cir. 2001) .....	26
<u>Bossalina v. Lever Bros. Co.</u> , 47 FEP Cases 1264 (D.Md.), aff'd 849 F.2d 1624 (4 <sup>th</sup> Cir. 1986) .....	10
<u>Brown v. Kinney Shoe Corp</u> , 237 F.3d 556 (5 <sup>th</sup> Cir. 2001) .....	2
<u>Bruso v. United Airlines</u> , 239 F.3d 848 (7 <sup>th</sup> Cir. 2001) .....	6, 8, 13, 28
<u>Clark v. Metro Health Foundation</u> , 90 F. Supp. 2d 976 (N. D. Ind. 2000) .....	14, 22
<u>Conetta v. National Hair Care Centers</u> , 236 F.3d 67 (1 <sup>st</sup> Cir. 2001) .....	11, 17
<u>Connor v. Schroeder-Bridgeport Int'l.</u> , 227 F.3d 179 (4 <sup>th</sup> Cir. 2000) .....	35
<u>Cooke v. Stefani Management Services, Inc.</u> , 250 F.3d 564 (7 <sup>th</sup> Cir 2001) .....	31
<u>Copley v. Bax Global, Inc.</u> , 97 F. Supp. 2d 1164 (S. D. Fla. 2000) .....	22, 35
<u>Culinary/Bartender Trust Fund v. Las Vegas Sands</u> , 244 F.3d 1152 (9 <sup>th</sup> Cir. 2001) .....	8
<u>Cush-Crawford v. Adchem Corp.</u> , 94 F. Supp. 2d 294 (E.D. N.Y. 2000) .....	34
<u>Dobrich v. General Dynamics Corp.</u> , 106 F. Supp. 2d 386 (D. Ct. 2000) .....	25, 32
<u>Dodoo v. Seagate Technology</u> , 235 F.3d 522 (10 <sup>th</sup> Cir. 2000) .....	7, 8, 19, 27
<u>Dowd v. USWA Local 286</u> , 253 F.3d 1093 (8 <sup>th</sup> Cir. 2001) .....	26
<u>EEOC v. CEC Entertainment</u> , 10 Am. Disabilities Cas. (BNA) 1593 (W. D. Wis. 2000) ...	19, 29

<u>EEOC v. Gurnee Inn Corp.</u> , 914 F.2d 815, 818 n.4 (7 <sup>th</sup> Cir. 1990) .....	10
<u>EEOC v. W&amp;O, Inc.</u> , 213 F.3d 600 (11 <sup>th</sup> Cir. 2000) .....	6, 35
<u>EEOC v. Wal-Mart</u> , 83 Fair Empl. Prac. Cas. (BNA) 833 (S.D. Ill. 2000) .....	34
<u>Epstein v. Kalvin-Miller Int'l</u> , 11 Am. Disabilities Cas. (BNA) 1471 (S.D. N.Y. 2000) .....	5
<u>Escousse v. State Farm Mut. Ins. Co.</u> , 83 Fair Empl. Prac. Cas. (BNA) 1219 (M. D. La. 2000) .....	12
<u>Farley v. Nationwide Mutual Ins. Co.</u> , 197 F.3d 1322 (11 <sup>th</sup> Cir. 1999) .....	3, 7, 12, 19, 25
<u>Fink v. City of New York</u> , 129 F. Supp. 2d 511 (E.D.N.Y. 2001) .....	21
<u>Flowers v. Southern Regional Physician Services</u> , 247 F.3d 229 (5 <sup>th</sup> Cir. 2001) .....	20
<u>Foster v. Time Warner Entertainment</u> , 250 F.3d 1189 (8 <sup>th</sup> Cir. 2001) .....	5, 18, 33
<u>Fox v. General Motors Corporation</u> , 247 F.3d 169 (4 <sup>th</sup> Cir. 2001) .....	7, 25
<u>Fuller v. Caterpillar Inc.</u> , 124 F. Supp. 2d 610 (N. D. Ill. 2000) .....	32
<u>Giles v. General Electric Co.</u> , 245 F.3d 474 (5 <sup>th</sup> Cir. 2001) .....	6, 15, 20
<u>Gobert v. Babbitt</u> , 84 Fair Empl. Prac. Cas. (BNA) 1437 (E. D. La. 2000) .....	24
<u>Gonzalez v. Bratton</u> , 147 F. Supp. 2d 180 (S.D. N.Y. 2001) .....	15, 17
<u>Greene v. Safeway Stores</u> , 210 F.3d 1237 (10 <sup>th</sup> Cir. 2000) .....	16, 38
<u>Hammond v. Northland Counseling Center</u> , 218 F.3d 886 (8 <sup>th</sup> Cir. 2000) .....	11, 21
<u>Hertzberg v. Sram Corp.</u> , 82 Fair Empl. Prac. Cas. (BNA) 412 (N. D. Ill. 2000) .....	15
<u>Hull v APCOA/Standard Parking Corp.</u> , 82 Fair Empl. Prac. Cas. (BNA) 247 (N. D. Ill. 2000) .....	33
<u>In re Young</u> , 237 F.3d 1168 (10 <sup>th</sup> Cir. 2001) .....	37
<u>Jackson v. City of St. Louis</u> , 220 F.3d 894 (8 <sup>th</sup> Cir. 2000) .....	3

<u>Johnson v. Stone Container</u> , 88 F. Supp. 2d 1295 (N. D. Ala. 2000) .....	24
<u>Kersth v. Commissioner</u> , 82 Fair Empl. Prac. Cas. (BNA) 1572 (U.S. Tax Court 2000) .....	37
<u>Kolstad v. American Rental Association</u> , 527 U.S. 526 (1999) .....	26-32, 34, 35
<u>Lafate v. Chase Manhattan Bank</u> , 123 F. Supp. 2d 773 (D. Del. 2000) .....	23, 31
<u>Lowery v. Circuit City Stores, Inc.</u> , 206 F.3d 431 (4 <sup>th</sup> Cir. 2000) .....	27
<u>Lowery v. Circuit City Stores, Inc.</u> , 119 S.Ct 2388 (1999). .....	28
<u>Marcano-Rivera v. Pueblo Intl.</u> , 232 F.3d 245 (1 <sup>st</sup> Cir. 2000) .....	2, 32
<u>Martyne v. Parkside Medical Services</u> , 10 Am. Disabilities Cas. (BNA) 1279 (N. D. Ill. 2000) .....	9, 10, 19, 25
<u>McLean v. Runyon</u> , 222 F.3d 1150 (9 <sup>th</sup> Cir. 2000) .....	11
<u>Morris v. Lee</u> , 83 Fair Empl. Prac. Cas. (BNA) 1790 (E. D. La. 2000) .....	37
<u>Oden v. Oktibbeha County</u> , 246 F.3d 458 (5 <sup>th</sup> Cir. 2001) .....	36
<u>Ogden v. Wax Works</u> , 214 F.3d 999 (8 <sup>th</sup> Cir. 2000) .....	29, 34
<u>Oliver v. Cole Gift Centers Inc.</u> , 85 F. Supp. 2d 109 (D. Ct. 2000) .....	16
<u>Otting v. J.C. Penny Company</u> , 10 Am. Disabilities Cas. (BNA) 1549 (8 <sup>th</sup> Cir. 2000) .....	27
<u>O’Neal v. Ferguson Construction Co.</u> , 237 F.3d 1248 (10 <sup>th</sup> Cir. 2001) .....	16
<u>O’Rourke v. City of Providence</u> , 235 F.3d 713 (1 <sup>st</sup> Cir. 2001) .....	22, 36
<u>Pals v. Schepel Buick &amp; GMC Truck</u> , 220 F.3d 495 (7 <sup>th</sup> Cir. 2000) .....	4
<u>Passantino v. J&amp;J Consumer Products</u> , 212 F.3d 493 (9 <sup>th</sup> Cir. 2000) .....	13, 23, 30
<u>Pollard v. E.I. du Point de Nemours &amp; Company</u> , ___ U.S. ___, 121 S. Ct. 1946, 150 L.Ed.2d 62 (2001) .....	2, 8, 10
<u>Prine v. Sioux City Comm. School Dist.</u> , 95 F. Supp. 2d 1005 (N. D. Iowa 2000) .....	14

<u>Ross v. Douglas County</u> , 234 F.3d 391 (8 <sup>th</sup> Cir. 2000) .....	18
<u>Rubenstein v. Administrator</u> , 218 F.3d 392 (5 <sup>th</sup> Cir. 2000) .....	20, 28, 34
<u>Salinas v. Rubin</u> , 126 F. Supp. 2d 1026 (S. D. Tex. 2001) .....	20
<u>Sharkey v. Lasmo (AUL Ltd)</u> , 55 F. Supp. 2d 279 (S.D. N.Y. 1999) .....	1
<u>Sharkey v. Lasmo (AUL Ltd)</u> , 214 F.3d 371 (2 <sup>nd</sup> Cir. 2000).....	2, 9, 38
<u>Slayton v. Ohio Dept. of Youth Services</u> , 206 F.3d 669 (6 <sup>th</sup> Cir. 2000) .....	7
<u>Steinhoff v. Upriver Restaurant Joint Venture</u> , 117 F. Supp. 2d 598 (E. D. Ky. 2000) .....	23, 30
<u>Szedlock v. Tenet</u> , 139 F. Supp. 2d 725 (E. D. Va. 2001) .....	11
<u>Taddeo v. Ruggiero Farenga Inc.</u> , 102 F. Supp. 2d 197 (S.D. N.Y. 2000) .....	11
<u>Thorne v. Welk Investment Inc.</u> , 197 F.3d 1205 (8 <sup>th</sup> Cir. 1999) .....	7
<u>Vadie v. Mississippi State University</u> , 218 F.3d 365 (5 <sup>th</sup> Cir. 2000) .....	24
<u>Vance v. Union Planters Corp.</u> , 209 F.3d 438 (5 <sup>th</sup> Cir. 2000) .....	36
<u>Wagner v. Dillard Dept. Stores</u> , 85 Fair Empl. Prac. Cas. (BNA) 295 (M. D. N. C. 2000) .....	2, 8, 10, 33
<u>Watson v. Food Lion, Inc.</u> , 147 F. Supp. 2d 883 (E. D. Tenn. 2000) .....	10, 25
<u>Webner v. Titan Distribution Inc.</u> , 10 Am. Disabilities Cas. (BNA) 1260 (N. D. Iowa 2000) .....	6, 13
<u>Williams v. Trader Publishing Co.</u> , 218 F.3d 481 (5 <sup>th</sup> Cir. 2000) .....	5, 18, 30
<u>Xiao-Yue Gu v. Hughes STX Corp.</u> , 127 F. Supp. 2d 751 (D. Md. 2001) .....	12, 13

## **I. SCOPE OF PAPER.**

This paper provides an update on monetary relief awarded by federal courts in employment cases involving claims of violation of Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), the Age Discrimination in Employment Act (“ADEA”) and the American’s With Disabilities Act (“ADA”). In addition to monetary relief provided by those statutes, relief available pursuant to 42 U.S.C. § 1981a (“§ 1981a”) is discussed. From time to time, reference is made to other sources of liability, but there is no intent to present an exhaustive study of all state employment law or other sources of recovery under federal employment law. Also excluded are the issues of attorneys’ fees and expenses, and court costs. Generally, cases published in 2000 and 2001 are presented.

Periodically, specific practice pointers are provided. More important, the reader should keep in mind that a strong impression comes through the cases that use of advocacy or evidence which the jury or court perceives to be unreasonable adversely affects awards. While raising and fighting every issue regardless of merit may appeal to the client or to counsel’s ego, reasoned, ethical, strong advocacy affects awards in a positive manner.

## **II. PROCEDURAL ISSUES AFFECTING MONETARY RELIEF.**

### **A. Jury Instructions.**

Carefully drafted damages instructions and, perhaps more importantly, jury verdict forms, lead to less error. They also tend to assist counsel in presenting beneficial argument to the jury. Silence can be very detrimental. The record of error must be made. Further, it is clear that obtaining relief from a jury award is very difficult.

#### **1. Instructions.**

In Sharkey v. Lasmo, 55 F. Supp. 2d 279 (S.D. N.Y. 1999) the district court in an ADEA action alleging constructive discharge due to a discriminatory transfer order instructed the jury to:

“determine the amount which he would have received if he had received a comparable non discriminating offer and then worked for such period as you find reasonable.”

the jury also was told:

“the purpose of damages is to make him whole, economically speaking, and to put him in the same position that he would have been in if a non-discriminatory job offer had been made to him.”

The jury verdict form allowed one total sum. The judgment on the \$1,427,2000 verdict was reversed and remanded on appeal to determine whether the jury's lump sum award included lost pension benefits. The district court also was to assess pre-judgment interest on the portion attributable to the value of lost restricted stock, stock options and lost pension benefits. Sharkey v. Lasmo (AUL Ltd), 214 F.3d 371 (2<sup>nd</sup> Cir. 2000).

The district court's job on remand would be considerably easier had it used a jury verdict form separating the elements of damage. Instead, it perhaps faced a new trial on the damages issue. After Pollard, jury verdict forms and instructions should clearly guide the jury through the various elements of potential damages, carefully excluding back and front pay.

In Wagner v. Dillard Dept. Stores, 85 Fair Empl. Prac. Cas. (BNA) 295 (M. D. N. C. 2000), plaintiff claimed that she was denied employment because of her pregnancy. Subsequently, she attempted to find other employment but was unsuccessful. After roughly four months of searching, plaintiff concluded that she had exhausted the employment opportunities in the area, and stopped her search. The employer argued that after plaintiff stopped looking, she failed to meet her mitigation obligation and, accordingly, back pay should stop accruing. The jury was instructed to consider a back pay award for two separate periods: one covering plaintiff's unsuccessful job search; and the second following the conclusion of her search. The jury awarded \$5,120 for the first period, and \$36,600 for the second.

The allocation of backpay awards obviously assisted defendant and the court in analyzing the mitigation issue with respect to the period following plaintiff's cessation of her job search.

## **2. Verdict Forms.**

In Marcano-Rivera v. Pueblo Intl., 232 F.3d 245 (1<sup>st</sup> Cir. 2000), plaintiff and plaintiff's husband sued for disability discrimination. Plaintiff was not accommodated with parking or a wheelchair-accessible work area, resulting in her having to walk on amputated limbs. The jury awarded plaintiff \$225,000 in compensatory damages. The verdict form allowed determination of liability separately under the ADA and local law, but required that damages be awarded without any allocation between the two laws. The district court doubled the damages award pursuant to the remedies provision in the local law. Both parties appealed. Plaintiff argued that separate damages should have been awarded under the ADA; meanwhile, defendant argued that the district court should have doubled only one half of the jury's award. The First Circuit rejected both contentions. It noted that no objection had been made to the verdict form, and therefore any objections were waived. Besides, the court concluded, damages under both the ADA and the state law were one and the same. Therefore, use of the form was not plain error.

In Brown v. Kinney Shoe Corp, 237 F.3d 556 (5<sup>th</sup> Cir. 2001), the Fifth Circuit reviewed a case in which plaintiff claimed unlawful failure to promote and constructive discharge. The district court used a jury verdict form allowing the jury to determine only total damages, without distinction between

those attributable to failure to promote and those attributable to constructive discharge. On appeal, the Fifth Circuit held that the district court erred in not granting defendant's motion for judgment on the constructive discharge claim. It noted that because a new determination of damages attributable only to the failure to promote claim may fundamentally affect the jury's determination, a new trial on damages was required.

The parties could have avoided this result by using a jury verdict form permitting the jury to assess separate damages attributable to each unlawful act, as they were distinct.

In Jackson v. City of St. Louis, 220 F.3d 894 (8<sup>th</sup> Cir. 2000), plaintiff, a health service manager, claimed delay in promotion due to race. The jury verdict was for \$67,621.20 in back pay and other damages against defendant City of St. Louis and \$20,000 against the individual defendant. The verdict form invited the jury to apportion any damages, but did not ask the jury to specify the total amount awarded. Defendants did not object to the form or instructions. The District Court treated the award as an aggregate of \$87,621.20. On appeal, the Eighth Circuit found no plain error. Where a jury's intent to apportion damages can be discerned, or when the parties do not timely raise the issue and there is no obvious plain error, it is appropriate to affirm the award.

Had the jury been asked to also specify the total amount awarded, defendants might have saved \$20,000.

In Farley v. Nationwide Mutual Ins. Co., 197 F.3d 1322 (11<sup>th</sup> Cir. 1999), the Eleventh Circuit noted that damages were available for two claims, one under the ADA and one under the ADEA, and the most egregious conduct clearly was focused on plaintiff's disability. Accordingly, it was not plain error to use a jury verdict form with the following items:

Prior lost earnings:	\$_____
Future lost earnings reduced to present value:	\$_____
Emotional pain, suffering, inconvenience and mental anguish:	\$_____
<b>TOTAL DAMAGES:</b>	<b>\$_____</b>

A clearer form in light of § 1981a, 29 U.S.C. § 626(b) and 29 U.S.C. § 216(b) would have been:

“If you find for plaintiff on [his ADA claim], please state the amount, if any, you are awarding plaintiff for:

Compensatory damages, excluding wages  
and benefits \$ \_\_\_\_\_  
Punitive damages \$ \_\_\_\_\_

If you find for plaintiff on [his ADEA] claim], please state  
the amount, if any, you are awarding plaintiff for:

Past lost earnings \$ \_\_\_\_\_  
Future lost earnings  
reduced to present value \$ \_\_\_\_\_

Back and front pay under the ADA are for the district court to award, as are liquidated damages under the ADEA. The jury instructions should have defined “compensatory damages.” Special interrogatories leading the jury through the bases of a punitive damages award would also have been appropriate.

### 3. Objections.

Rule 46, Fed. R. Civ. Proc., provides that no formal exception to rulings or orders of the court are necessary. However, at the time of the ruling or order, the party must make known to the court the actions the party desires the court to take or the party’s objection to the court’s action, unless the party has no opportunity to object at the time the ruling or order is made. In the later case, the desired action or objection should be brought to the court’s attention as soon as practicable.

The failure to object to jury instructions or verdict forms can result in regrettable waiver. The courts expect counsel to speak up or bear the consequences.

In Pals v. Schepel Buick & GMC Truck, 220 F.3d 495 (7<sup>th</sup> Cir. 2000), the Seventh Circuit spoke loudly about defense counsel’s silence. Plaintiff, a used car manager, was afflicted with muscular dystrophy. He claimed he could still do his job. Plaintiff had an accident at home and was on leave for seven months. His return was denied with the explanation that he was unable to do his job. The case was tried with a Magistrate Judge presiding. The Magistrate gave the jury a general verdict form telling it to determine “total compensatory damages” to which plaintiff was entitled. Plaintiff claimed \$350,000 past financial loss, \$1,700,000 future financial loss and unspecified non-economic loss. The jury verdict was for \$1,050,000. Defendant asked that the verdict be reduced to \$100,000 per the § 1981a cap on compensatory and punitive damages because the form called the award “compensatory” damages. On appeal, the court acknowledged back pay and front pay are not “compensatory damages” described in § 1981a. However, defendant’s lawyers sat silent as the verdict form and jury instructions were approved, failing to draw the trial court’s attention to a preventable problem. Therefore, they must bear the consequences. Though back pay and front pay are equitable remedies left to the discretion of the court, Rule 39(c) allows the court to try any issue with an advisory jury. Further, defendant’s answer to plaintiff’s complaint demanded a trial by jury as to all issues. If one

party demands a jury trial, the other party does not object and the court orders a trial to a jury, this is regarded as a trial to a jury by consent. Therefore, defense counsel's silence must be considered a consent to the jury trying all damages issues. This justified one general verdict.

In Epstein v. Kalvin-Miller Int'l, 11 Am. Disabilities Cas. (BNA) 1471 (S.D. N.Y. 2000), plaintiff tried to a jury his claims alleging age discrimination under the ADEA and age and disability discrimination under state law. The jury charge included an instruction on front pay that read: "If you find that Kalvin-Miller unlawfully discriminated against Mr. Epstein because of his age and/or disabilities, you may award him front pay, that is, the amount of wages and benefits the plaintiff would have earned into the future but lost as the result of the unlawful discrimination." Defendant objected to the front pay charge, arguing the court should determine front pay as an equitable remedy under the ADEA. The court noted that the defendant was correct as to the ADEA, but that state law treated front pay as legal damages to be decided by the jury. The court therefore submitted the front pay issue to the jury and treated its award as advisory in nature as to the ADEA claim.

## **B. Standard Of Review.**

### **1. Review Of Jury Award By Trial Court.**

In the trial court, damages issues are raised by pre-trial motions for summary judgment or partial summary judgment, during trial by a motion for judgment as a matter of law, or after judgment is entered by (a) a motion for judgment as a matter of law, (b) motion for new trial, or (c) motion to alter or amend judgment.

During a jury trial, but before the case is submitted to the jury and after a party has been fully heard on an issue, a motion for judgment as a matter of law may be made. The motion asks that the court determine there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. Rule 50(a)(1), Fed. R. Civ. Proc.

The failure of the court to grant the motion at the close of all the evidence means that the court has decided to submit the case to the jury subject to the court later deciding the legal questions raised by the motion. Therefore, the motion can be renewed, but not more than 10 days after entry of judgment. Rule 50(b). Conditional rulings such as electing between a remittitur or new trial are permitted on a Rule 50 motion. Rule 50(c).

Within 10 days after entry of judgment, a motion for new trial or to alter or amend a judgment can be filed on all or part of the issues tried. Rule 59. The court often conditions an order granting a new trial upon the refusal of a remittitur or addititur.

The district court will uphold a jury award unless it is so excessive or so inadequate as to shock the judicial conscience. The test is variously phrased, but of the same import. See, e.g., Williams v. Trader Publishing Co., 218 F.3d 481 (5<sup>th</sup> Cir. 2000); Foster v. Time Warner Entertainment, 250 F.3d

1189 (8<sup>th</sup> Cir. 2001). Application of the test is influenced predominantly by the atmosphere and evidence at trial, but universally, the jury's verdict is given great deference.

In Webner v. Titan Distribution Inc., 10 Am. Disabilities Cas. (BNA) 1260 (N. D. Iowa 2000), the court explained why deference is given to the jury. The court held that the jury properly awarded damages in the amount of \$12,500 for emotional distress to plaintiff on his ADA claim that he was discharged because of his back condition. Plaintiff's claim was supported solely by his testimony that he was out of work for six months, and during that time he was scared because he did not know where his next pay check would come from or how he would pay his bills. Defendant argued that testimony was insufficient given that plaintiff suffered no physical injury, he was not medically treated for any psychological or emotional injury, and the back pay award to him should have covered his losses following his termination. The court held that there was competent evidence of a "genuine injury," even though the injury was essentially subjective. Pointing out that the jury was asked to determine injuries not easily calculated in economic terms, the court concluded that the jury's award was reasonable and should not be second-guessed. The court opined that "[t]his civil jury with their varied life experiences...embody a collective knowledge and wisdom about the effect of losing a job that is far superior to the vast majority of life tenured Article III trial judges (and I might add appellate judges) who presumably have less life experience, knowledge, or personal concern about losing one's job...."

## **2. Appellate Court Review Of Damages Awards.**

On appeal, challenges to a jury award essentially are considered pursuant to the same standard of review as used by the district court. Challenges to the district court's resolution of motions for judgment as a matter of law or for new trial are considered pursuant to an abuse of discretion standard as to factual issues and pursuant to a *de novo* review standard as to legal issues. The district court preferably will have stated its reasoning, but in many instances, the appellate court will merely search the record presented to it for evidence supporting the district court.

### **a. Back and front pay award.**

The district court's denial of a motion for new trial is reviewed for an abuse of discretion. Bruso v. United Airlines, 239 F.3d 848 (7<sup>th</sup> Cir. 2001). The abuse of discretion standard also is applicable to review of the district court's award of back pay. Giles v. General Electric Co., 245 F.3d 474 (5<sup>th</sup> Cir. 2001). Reinstatement is the presumptive remedy for discrimination. Therefore, the district court must explain the basis for its decision not to reinstate. Failure to do so results in reversal and remand. EEOC v. W&O, Inc., 213 F.3d 600 (11<sup>th</sup> Cir. 2000).

### **b. Compensatory damages award.**

Appellate courts defer to jury awards for intangible harms, such as emotional distress, because the harm is subjective and evaluating it depends considerably on the demeanor of witnesses. As a

result, the jury's award of compensatory damages is considered inviolate unless the award is so excessive or inadequate as to shock the judicial conscience and raise an inference that passion, prejudice or another improper cause invaded the trial. Dodoo v. Seagate Technology, 235 F.3d 522 (10<sup>th</sup> Cir. 2000). Accord Fox v. General Motors Corporation, 247 F.3d 169 (4<sup>th</sup> Cir. 2001) (a jury award of compensatory damages must be affirmed unless it is grossly excessive or shocking to the conscience); Farley v. Nationwide Mutual Ins. Co., *supra* (the court must be deferential to the fact finder because intangible emotional harm is subjective and evaluating it depends considerably on the demeanor of witnesses).

In Slayton v. Ohio Dept. of Youth Services, 206 F.3d 669 (6<sup>th</sup> Cir. 2000), the Circuit Court upheld the denial of a remittitur. Plaintiff, a juvenile corrections officer, was sexually harassed for six months by exposure to sexually provocative CD's, songs, language and conduct, including tolerated exposure and masturbation by inmates. Plaintiff's complaints to several levels of management were ignored and plaintiff was terminated for alleged improper use of force. After trial, the jury awarded plaintiff \$125,000 based on her hostile environment claim. The Sixth Circuit held the award was not so excessive as to shock the conscience, fall outside the bounds supportable by proof, or suggest mistake. Accordingly, the district court did not abuse its discretion in denying remittitur.

By contrast, in Thorne v. Welk Investment Inc., 197 F.3d 1205 (8<sup>th</sup> Cir. 1999), the Circuit Court held remittitur was appropriate in a case where plaintiff, a manager of a local franchise, claimed sexual harassment. Defendant's owner directed sexually suggestive comments and actions towards her. One of his assistants informed plaintiff that she believed the two were having a sexual relationship, and if true, plaintiff would be terminated. Plaintiff filed a charge of discrimination and subsequently was forced to accept a demotion. Thereafter, plaintiff took a two week leave on release by her psychologist and was terminated before returning. Following a trial, the jury awarded \$220,000 in actual damages, \$200,000 of which was for pain and suffering, and \$725,000 in punitive damages. The district court lowered the compensatory damages award to \$135,000 and the punitive damages award to \$135,000. In so doing, the district court considered "the degree of malice, the financial worth of the parties, the injury suffered and all the relevant facts and circumstances." The court also noted plaintiff's sporadic work history and the fact that she was reemployed shortly after her termination. Reviewing the district court's decision for an abuse of discretion, the circuit court affirmed. The circuit court ruled that a verdict is not excessive unless the result is "monstrous" or "shocking." The circuit court agreed that the compensatory award of \$135,000 was not excessive, and that it should not be disturbed. The circuit court also saw no abuse of discretion in the award of punitive damages. It found error, however, in the district court's order of remittitur without conditioning the denial of a new trial on plaintiff's consent to the remittitur. Such a course may run afoul of the Seventh Amendment. However, because plaintiff's counsel represented to the court that she would waive her right to a new trial if given the choice, the circuit court affirmed the district court's judgment as remitted.

### c. Punitive damages award.

The adequacy of evidence to support an award (as opposed to the amount of the award) is a question of law reviewed *de novo* by the appellate court, taking the evidence in the light most favorable to the jury's verdict. Dodoo v. Seagate Technology, *supra*. The amount of the award is reviewed for excessiveness in light of the factors announced in BMW of North American v. Gore, 577 U.S. 559 (1996). See Wagner v. Dillard Dept. Stores, *supra*.

## III. BACK PAY AWARDS.

### A. Elements of Damage.

Back pay and front pay are monetary remedies awarded by the court in equity pursuant to Title VII, section 706(g). Consistent with this, the Supreme Court has confirmed that front pay does not constitute future pecuniary loss awarded by the jury pursuant to §1981a. Pollard v. E.I. du Point de Nemours & Company, \_\_\_ U.S. \_\_\_, 121 S. Ct. 1946, 150 L.Ed.2d 62 (2001). The same reasoning of necessity applies to back pay. This practice should be avoided. Trial courts, before Pollard, permitted juries to lump back pay in with other forms of compensatory injury.

In Bruso v. United Airlines, *supra*, the circuit court considered various elements of back pay in light of a jury award. There, plaintiff, an administrative supervisor, complained of treatment by coworkers. Following an investigation, defendant concluded that no unlawful discrimination had occurred, and plaintiff was demoted to ramp serviceman. At trial, plaintiff provided evidence of a number of forms of compensatory injury. Plaintiff was demoted, he was forced to purchase new uniforms and pay union dues for which he sought damages. He sought the assistance of a psychologist in coping with his distress as a result of the demotion and again sought compensatory damages. Because of the heavy lifting involved in his new position, he did not volunteer for overtime, and was unable to return to work after gall bladder surgery as quickly as he would have as a supervisor. Damages for other alleged injuries also were sought. Following a trial, the jury returned a verdict of \$10,000 for lost wages and direct expenses. Plaintiff moved for a new trial with respect to damages, which the district court denied. Plaintiff appealed, arguing that the uncontested evidence demonstrated he had economic losses amounting to over \$46,000. The Circuit Court affirmed in pertinent part. It held that the amounts established by plaintiff which related to his lost earnings as a result of the demotion, plus his costs associated with uniforms and union dues, rose very close to the amount awarded by the jury. The court noted that the jury was entitled to conclude plaintiff was not entitled to damages for other alleged losses, such as lost pay attributable to his voluntary leave of absence and failure to volunteer for overtime. The jury could have concluded that the surgery was not caused by plaintiff's demotion, and that his testimony that he could have returned sooner as a supervisor was speculative.

In Culinary/Bartender Trust Fund v. Las Vegas Sands, 244 F.3d 1152 (9<sup>th</sup> Cir. 2001), the court held that damages under 29 U.S.C. § 2104 (a)(1)(A) for a WARN Act violation, which are limited to

lost wages, include tips and holiday premium pay the employee proves he would have earned but for the premature closure. Further, no set off was required for amounts paid to nonunion employees on condition that they stay to closure, or to union employees pursuant to a Memorandum of Understanding, because the payments were not “voluntary and unconditional payments” by the employer. To the contrary, the defendant’s offer of severance to nonunion employees created a binding obligation once accepted by the employees’ performance. Similarly, the Memorandum constituted a legally binding collective bargaining agreement. Finally, payments to terminated nonunion employees of accrued vacation time were not to be set off because the payments constituted a form of deferred compensation. The court explained that even those employees who failed to reach their anniversary dates of hire were entitled to accrued vacation pay as a result of the defendant’s preventing them from satisfying that condition for receipt of vacation by closing the workplace.

In Sharkey v. Lasmo (AUL Ltd), supra, the circuit court held that awards of lost pension benefits are compensation for past loss, not a form of prospective relief. Plaintiff, who was retired by the time of trial, was entitled to an equitable order restoring lost service and salary credits on his pension benefits. In addition, the court held that plaintiff was entitled to a lump sum monetary award for lost pension benefits to the date of judgment.

## **B. Mitigation.**

The Defendant bears the burden of proof on mitigation. It must show when back or front pay ceases and the amounts that plaintiff earned, or by the exercise of reasonable diligence could earn.

### **1. Award Not Reduced.**

In Sharkey v. Lasmo, supra, the circuit court ruled that a 59 year old high school graduate with very specialized skills with limited demand, made sufficient mitigation efforts by using defendant’s outplacement services, following tips, and placing approximately 50 calls in the industry saying he was looking for work.

In Martyne v. Parkside Medical Services, 10 Am. Disabilities Cas. (BNA) 1279 (N. D. Ill. 2000), defendant argued that plaintiff in an ADA case was not entitled to back pay and that it was improperly awarded by the jury because of evidence that plaintiff was unable to work. However, the court ruled that the evidence supported the jury’s conclusion that plaintiff’s inability to work itself was caused by defendant’s failure to accommodate her disability. Plaintiff testified that her pre-existing depression had always been controlled by psychiatric treatment. The evidence showed the defendant was unwilling to permit her to have even minimal flexibility in her schedule to allow her to obtain counseling she needed, and it was unwilling to work with her to shift her patient load to reduce extra stress she was experiencing. The evidence also showed that plaintiff’s condition deteriorated significantly over the period in which she requested and was refused these accommodations. From this, the court ruled, the jury could have inferred that if defendant had accommodated her condition

she would have improved rather than becoming unable to work. Therefore, the back pay award of \$302,000 was not disturbed.

A strong argument can be made that the jury's award, as analyzed, should have been considered as pecuniary loss awarded under § 1981a. The courts have long recognized that a plaintiff who is unable to work is entitled to no back or front pay. Berger v. Iron Workers Local 201, 170 F.3d 1111, 1131-32 (D.C. Cir. 1999); Bossalina v. Lever Bros. Co., 47 FEP Cases 1264 (D.Md.), aff'd 849 F.2d 1624 (4<sup>th</sup> Cir. 1986); but see EEOC v. Gurnee Inn Corp., 914 F.2d 815, 818 n.4 (7<sup>th</sup> Cir. 1990). Pollard, supra, does not require a different result. Thus, the economic loss the plaintiff really suffered in Martyne was lost earnings and lost earning capacity. These are traditional compensatory damages. Of course, they would also be subject to the § 1981a cap.

In Wagner v. Dillard Dept. Stores, supra, plaintiff claimed that she was denied employment because of her pregnancy. At trial, the jury awarded backpay for the period after which plaintiff concluded she had exhausted the job prospects in her area and gave up her job search. The defendant argued that the district court should reduce the backpay award during this period in view of plaintiff's failure to mitigate. The court disagreed. It held that the burden was on the defendant to establish plaintiff failed to use diligence in finding employment *and* that there was a reasonable likelihood that the plaintiff might have found comparable work in the area. Here, defendant failed to offer evidence that any jobs were available during the time period at issue. Because it failed to provide such evidence, the award of back pay would not be reduced.

In Watson v. Food Lion, Inc., 147 F. Supp. 2d 883 (E. D. Tenn. 2000), the jury awarded back pay in the amount calculated by plaintiff's expert, as the loss for the two and one third year period between plaintiff's termination and the trial of her claim under the ADEA. Defendant argued that for at least one year of this period, plaintiff did nothing to satisfy his duty to mitigate. It pointed out that after the plaintiff found a part time job at a competitor food store, he ceased looking for alternate employment. It also introduced evidence that suitable positions were available during the time that the plaintiff alleged he was looking for work. However, Plaintiff's spouse testified that his termination affected him psychologically and had affected their marital relationship. She said he suffered a series of setbacks after his termination by defendant that affected his ability to work, including the total destruction of their home by fire, the death of his father, and a bout with colon cancer. The plaintiff similarly testified that he was depressed after his termination and took prescription medication for his depression. Under the circumstances, the court found that the jury's award of back pay without mitigation, was supported by substantial evidence and should not be disturbed.

Here again, the analytical interplay between § 706(g) and § 1981a would lead to a back pay award pursuant to § 706(g) for the period and to the extent plaintiff was able to work, but unable to find comparable employment. The lost earnings caused by plaintiff's inability to work caused by defendant's conduct should have been awarded pursuant to § 1981a.

In Taddeo v. Ruggiero Farenga Inc., 102 F. Supp. 2d 197 (S.D. N.Y. 2000), defendant argued that a terminated employee, who after 19 months of unemployment obtained better paying employment, had no lost earnings by the time of trial because in total, he had made more since the date of his termination than he would have made in his former job. The court rejected that argument, holding that acceptance of more favorable employment only acted to terminate accrual of further back pay, and did not eliminate damages already suffered during the period of unemployment.

## **2. Award Reduced.**

In Conetta v. National Hair Care Centers, 236 F.3d 67 (1<sup>st</sup> Cir. 2001), plaintiff alleged sexual harassment and retaliatory discharge. Plaintiff took default on liability, and the court held a three day bench trial to determine damages. Thereafter, the district court awarded \$35,000 in lost wages and \$25,000 for emotional distress. The original award for lost wages was \$46,500, but was reduced 25% to account for plaintiff's inadequate attempts to mitigate. On appeal, the First Circuit affirmed the decision. The court held that defendant met its burden of proof on mitigation by showing that some comparable jobs were available. By contrast, plaintiff testified that she pursued at least one application and reviewed newspaper ads each day. The circuit court held that the district court's use of a partial discount was a sensible way to resolve the dispute, since no one knows what would have happened if plaintiff had been more vigorous in her job search.

In Hammond v. Northland Counseling Center, 218 F.3d 886 (8<sup>th</sup> Cir. 2000), the plaintiff psychiatrist was a whistleblower regarding alleged Medicare fraud. Upon termination, plaintiff filed suit under the False Claims Act, 31 U.S.C. § 3730(h). Plaintiff was immediately employed at equal compensation thereafter with no lost compensation. The district court granted summary judgment due to lack of injury, and the Eighth Circuit affirmed. Plaintiff proved no back pay loss because of her equal interim earnings.

In McLean v. Runyon, 222 F.3d 1150 (9<sup>th</sup> Cir. 2000), the circuit court held that a worker's compensation award is a proper setoff against back pay because the benefits ultimately are paid by the employer.

In Szedlock v. Tenet, 139 F. Supp. 2d 725 (E. D. Va. 2001), plaintiff alleged that her former employer, the CIA, failed to accommodate her hearing impairment. The defendant argued that its unlawful conduct was not the cause of plaintiff's loss of employment and claim for lost wages, which instead resulted from her medical disability retirement. The court rejected that assertion, noting that plaintiff's acceptance of medical disability retirement was caused by the defendant's failure to accommodate her. However, the court found plaintiff was not totally disabled. Her failure to undertake mitigation efforts justified substantially reducing her entitlement to back pay. The court placed the burden on the defendant to show that plaintiff failed to be reasonably diligent in seeking and accepting new employment substantially equivalent to that from which she was discharged. Defendant met the burden. Plaintiff was not persistent or consistently industrious. Over a two and one half year period, she had applied for 10 positions, placed her resume in a nationwide human

resources database, and periodically searched vacancy announcements. After about eight months of searching, plaintiff curtailed her efforts and virtually abandoned her job search. Back pay therefore was limited to the time it would be reasonable to expect plaintiff would require to find a suitable position. The court determined that period was 24 months given plaintiff's educational credentials and background in science and engineering.

#### **IV. FRONT PAY AWARDS.**

##### **A. Front Pay In Lieu Of Reinstatement.**

In Farley v. Nationwide Mutual Ins. Co., *supra*, the Eleventh Circuit considered a case involving a plaintiff claims adjuster who was discharged due to disability and age. Plaintiff suffered long-term disabilities of alcoholism, post-traumatic stress disorder and depression. For approximately four years, plaintiff was teased and made the subject of cartoons by coworkers, as were other mentally disabled individuals. Plaintiff took a week's stress-related leave. Upon return, he was told defendant did not believe in stress-related disability. He was placed on probation and his files were taken. Plaintiff went on one month's disability leave and filed a claim of discrimination. On return, plaintiff asked for a 40 hour week. He was refused and terminated for poor "technical" performance. The jury returned a very substantial award, and the district court added an award of \$5,600 in front pay. The Eleventh Circuit noted that both the ADA and ADEA authorize an award of equitable relief to make a plaintiff whole. There is a rule of presumptive reinstatement, but extenuating circumstances may warrant front pay in lieu of reinstatement, such as when discord and antagonism would render reinstatement ineffective. The trial court must carefully articulate the reason for awarding reinstatement. Here, the trial court pointed to evidence that plaintiff and his psychologist testified that his symptoms were heavily influenced by the workplace environment. Therefore, the plaintiff's hostile work environment coupled with his stress induced disabilities, created sufficient special circumstances to support a front pay award in lieu of reinstatement.

In Xiao-Yue Gu v. Hughes STX Corp., 127 F. Supp. 2d 751 (D. Md. 2001), plaintiff accepted defendant's offer to accept partial summary judgment in her action under the ADEA, but rejected defendant's simultaneous offer of reinstatement to her former position. The court, noting that the employer had recruited plaintiff's former supervisors to vilify her professional capabilities and that its counsel made the offer of reinstatement almost immediately after she accepted the offer of partial summary judgment, held that plaintiff was reasonable in rejecting the offer of reinstatement and was entitled to front pay.

In Escousse v. State Farm Mut. Ins. Co., 83 Fair Empl. Prac. Cas. (BNA) 1219 (M. D. La. 2000), the court ruled that plaintiff's failure to request reinstatement in her complaint did not waive her right to request front pay.

## **B. Factors Influencing Length And Amount Of Front Pay.**

In Bruso v. United Airlines, *supra*, the Seventh Circuit affirmed the district court's denial of front pay, noting that to recover front pay plaintiff must show reinstatement is not feasible. Plaintiff also must offer evidence of the amount of the proposed award, the length of time plaintiff proposes to work, and the applicable discount rate. Since plaintiff offered none of that evidence, it was appropriate to deny front pay.

In Passantino v. J&J Consumer Products, 212 F.3d 493 (9<sup>th</sup> Cir. 2000), plaintiff claimed sex discrimination and retaliation. The jury returned a retaliation verdict including, among others, a \$2,000,000 award of front pay. Plaintiff was a very successful national account manager until she complained her advancement was limited due to her sex. Plaintiff testified that she was on a developmental path for executive and management positions. The developmental path was marked by progressive "Levels." Plaintiff was a Level 3. Promotion to Level 4 meant about \$50,000 more in salary, and to Level 5 about \$200,000 more. The Ninth Circuit held that the front pay award was supported by the evidence. There was ample evidence to support a finding that because substantial hostility existed between plaintiff and defendant, reinstatement was not appropriate. Plaintiff testified that she was qualified to hold, but did not receive, a job paying \$70,000 a year more than she received, which also included substantial bonuses and stock options. She had an expected working life of 22 years until retirement age. Calculating her income over that period of time resulted in a total in excess of the jury's significant award.

One has to wonder if a plaintiff who is so well qualified can be assumed in equity to be unable to find comparable work for 22 years. See Xiao-Yue Gu, which follows. Again, perhaps defendant should have requested that the back and front pay issues be resolved by the court.

In Xiao-Yue Gu v. Hughes STX Corp., *supra*, plaintiff accepted defendant's offer of partial summary judgment in her action under the ADEA, and submitted the front pay issue to the court. Plaintiff estimated that, at age 55, she would not be able to obtain comparable employment as a senior scientist, and thus her front pay award should end at her anticipated retirement age of 70. Given the fruitless results of her four year search for employment following her termination, the court nevertheless expressed its belief that plaintiff could attain suitable employment before retirement age. In addition, the court noted that the circumstances of plaintiff's employment, which was reliant on a NASA contract bid, strongly suggested that she could not realistically have expected to hold her former position until retirement. Giving consideration to plaintiff's professional expertise, her age, and the results of her job search, the court concluded that four years represented sufficient time for plaintiff to obtain comparable employment.

In Webner v. Titan Distribution Inc., *supra*, the court considered in detail a number of factors influencing a determination of front pay to be awarded to an employee the jury decided was unlawfully discharged due to his back condition. The court first noted that the plaintiff was employed for approximately five years with the defendant before his termination. It pointed out that he was an at-

will employee, but that absent the discrimination, it was likely that the plaintiff would have remained in his position given his recent acceptable performance and his testimony that he enjoyed working for the defendant. The court next relied on evidence that plaintiff obtained alternate employment quickly after his termination, even though he was not receiving the same salary. Next, the plaintiff's ability to return to full time work weighed in favor of front pay. Finally, the court noted that the plaintiff reasonably mitigated his damages by securing the alternate employment. In view of these factors, the court found that two years was an appropriate period for calculation of front pay and accordingly, it based its computation on the difference between what he would have made for the defendant and what he would make in his alternate employment during that time.

In Clark v. Metro Health Foundation, 90 F. Supp. 2d 976 (N. D. Ind. 2000), the jury found two plaintiffs were unlawfully terminated. The court denied the first plaintiff front pay in view of her having found better paying new employment. The second plaintiff sought five years front pay. The court, however, noted that this plaintiff had never retained a job for more than 20 months. It therefore awarded front pay for the difference between 20 months and the length of time plaintiff had been in the position from which she was terminated, leaving a front pay award of 10 months.

In Prine v. Sioux City Comm. School Dist., 95 F. Supp. 2d 1005 (N. D. Iowa 2000), a jury found in favor of a painter in her suit against her school district-employer based on a hostile environment and awarded her \$15,000 in past and future emotional distress damages, back pay in the amount of \$123,545, and past and future medical expenses in the amount of \$20,500. Plaintiff moved for entry of an award of front pay, in view of the fact both parties agreed reinstatement was inappropriate. Plaintiff requested front pay covering 13 years in the amount of \$246,663, on the assumption that she would not work for three years, would work part time the fourth year, and full time from the fifth year until retirement. The court noted that plaintiff's age (48) militated in favor of front pay because it would limit the jobs available to her. In addition, the court viewed as weighing in favor of front pay plaintiff's 19 years of employment with the school district. The court recognized that plaintiff was an at-will employee, but that absent the hostile work environment, it was highly likely that plaintiff would have remained in her position given her history of positive employment evaluations, and her testimony that she found her position to be fulfilling and enjoyable. Next, the court emphasized that plaintiff's expert testified plaintiff was unable to work full time and it would take plaintiff four to five years to be able to reenter the workforce full time. Based on these facts, the court noted that the 13 year front pay period sought by plaintiff was necessarily speculative, particularly since it appeared likely that plaintiff would secure comparable employment in substantially less time. Instead, the court ordered full time front pay for three years and additional part time front pay for three years. The court found that period sufficient to enable plaintiff to reenter the work force.

It is curious that a court can extend a back or front pay period due to age, but it is done. Perhaps a defendant can argue that as a matter of public policy, the court, in equity, cannot assume prospective employers will unlawfully discriminate based on age. This would especially be true if plaintiff offers no evidence on the subject.

In Hertzberg v. Sram Corp., 82 Fair Empl. Prac. Cas. (BNA) 412 (N. D. Ill. 2000), the court awarded five years of front pay to plaintiff following her successful suit alleging constructive discharge based on sexual harassment. In so doing, the court noted that the prolonged front pay period could be considered speculative since plaintiff was employed for only a short time, but was reasonable in view of: (1) the absence of any basis to assert lack of continuity in her employment; (2) her knowledgeable background and interest in the employer's business; (3) and her youthfulness, "such that no departure from the workforce for that or any other reason presents itself as a possibility."

### **C. Mitigation.**

#### **1. Award Not Reduced.**

In Giles v. General Electric Co., *supra*, plaintiff, a machinist, injured his back and eventually was able to perform only medium duty work. Defendant declined to continue plaintiff's employment and plaintiff sued alleging violation of the ADA. After the jury returned a verdict for plaintiff, the district court denied back pay but granted \$141,110 front pay. On appeal, to the Fifth Circuit defendant argued that front pay was inappropriate. Defendant pointed out that the district court properly refused to grant back pay in view of plaintiff's failure to mitigate by pursuing other employment. In that respect, defendant pointed to the Texas Workers' Compensation Commission's decision suspending plaintiff's worker's compensation benefits because he had "not made a good faith effort to obtain employment equal to [his] ability to work." Defendant argued that the same conclusion with respect to back pay should have been reached on the issue of front pay. However, the Fifth Circuit held that the district court did not abuse its discretion in granting front pay. Although plaintiff could not document much of his asserted job search, he did accept a parking attendant job and offered evidence that the Workers' Compensation Commission reversed its decision suspending his benefits. The circuit court also affirmed the district court's decision offsetting from the front pay award an amount equal to the long term disability and disability pension benefits plaintiff received from defendant. The court reasoned that the benefits were not additional, bargained-for compensation but were instead compensation for the injury out of which the plaintiff's claims arose. Failure to set off the benefits paid against the front pay award would result in overcompensating the plaintiff.

In Gonzalez v. Bratton, 147 F. Supp. 2d 180 (S.D. N.Y. 2001), plaintiff sued the City of New York and her former supervisors claiming they engaged in a campaign against her designed to force her to resign from her position as a police officer. The jury entered an award of \$1,250,000, including \$800,000 for lost future earnings. The district court accepted the award, rejecting the defendants' argument that the plaintiff's disciplinary record and evidence of drug and alcohol use undermined her claim of continued ability to work. The court noted that the discipline itself was the result of the alleged retaliatory campaign against the plaintiff. In addition, the court refused to reduce the award in view of the plaintiff's application for disability benefits. The court held that the plaintiff could maintain that she could have worked even though she had to prove complete disability in order to establish her eligibility for benefits in her application.

## **2. Award Reduced.**

In Oliver v. Cole Gift Centers Inc., 85 F. Supp. 2d 109 (D. Ct. 2000), the parties agreed that reinstatement was inappropriate because the store at which plaintiff worked prior to her unlawful discharge was no longer in business. The plaintiff secured alternative employment shortly after her termination at the same salary but without health benefits. The plaintiff therefore sought \$12,000 in front pay to cover the cost of health insurance for five years. The court denied the request, however, pointing out that after accepting the new position, plaintiff ceased her efforts to find suitable employment that included health benefits.

### **D. Other.**

In Greene v. Safeway Stores, 210 F.3d 1237 (10<sup>th</sup> Cir. 2000), plaintiff was promoted over the course of 30 years to a divisional manager position. Seven years later, plaintiff was called to a meeting with the president and fired at age 52. Plaintiff's interest in the Senior Executive Benefit Plan would have vested two years later. The jury awarded (1) \$600,000 for lost salary, bonuses and health insurance benefits, (2) \$1,700,000 for loss of retirement plan benefits, and (3) \$4,400,000 for unrealized stock option appreciation. The district court awarded liquidated damages of \$810,786, an amount equal to lost salary, bonuses and retirement benefits through the date of trial. On appeal, the Tenth Circuit affirmed the jury award of \$4.4 million. Plaintiff testified he was forced to exercise his options in 1993, and that he would not have exercised the option but for the discriminatory conduct. Plaintiff's accountant/expert testified that had plaintiff exercised his option upon retirement he would have recouped an incremental gain of \$3,000,000 and would have become vested in more options and would have gained more than \$1,000,000 on them. The circuit court also affirmed the district court's conclusion that the award of unrealized stock option appreciation was not subject to doubling under the ADEA's provision for liquidated damages. The amount to be liquidated must be an "amount owing at the time of trial." By the time of trial, all dates relevant to the unrealized stock option calculation were in the past. Nevertheless, the court considered the \$4,400,000 jury award more like an award of front pay. Like front pay, damages for unrealized stock option appreciation are too speculative to be considered pecuniary damages under the ADEA, since they are based on the plaintiff's testimony of what he would have done and the accountant's use of an arbitrary date of valuation.

## **V. COMPENSATORY DAMAGE AWARDS.**

### **A. Elements Of Damage.**

In O'Neal v. Ferguson Construction Co., 237 F.3d 1248 (10<sup>th</sup> Cir. 2001), plaintiff was fired after his lawyer wrote a letter to defendant accusing it of reassigning plaintiff for filing EEOC charges. Plaintiff sued for race discrimination and retaliation. The jury awarded plaintiff \$302,721.25 in compensatory damages on his retaliation claims. Those awards were affirmed. Regarding lost employment benefits, evidence offered through the expert economist established that lost benefits

amounted to 15% - 39% depending on the industry. Also, defendant's human resources director testified defendant was very generous to its employees in terms of benefits. That was enough to let the jury select the amount of damages attributable to lost benefits. Regarding future emotional distress damages, plaintiff testified that he saw a psychiatrist until he could no longer afford it. He also testified to a loss of sleep and appetite. Plaintiff's wife corroborated the testimony, stating as well, that plaintiff now was more worried and unhappy. That was enough for the jury to conclude plaintiff would suffer future emotional distress. Presumably reasoning that because this action involved a § 1981 claim, lost earnings and earning capacity were elements of compensatory damages, the Tenth Circuit held it was appropriate to allocate compensatory damages to the § 1981 claim, avoiding the Title VII/§ 1981a cap.

In Gonzalez v. Bratton, *supra*, plaintiff sued the City of New York and her former supervisors for over supervising her, subjecting her performance to intensive scrutiny and repeated instances of discipline, forcing her resignation, and later violating her Fourth Amendment right by engaging in an unjustified strip search and detaining her for 27 hours after a traffic stop. The jury returned an award of \$1,250,000, including \$250,000 for compensatory damages. The district court entered judgment for the award.

## **B. Focus On Emotional Harm.**

The courts generally acknowledge that to recover for emotion harm, the plaintiff must offer proof of actual injury resulting from the illegal conduct. A specific, discernable injury to plaintiff's emotional state must be proven with evidence regarding the nature and extent of harm. Mere conclusory statements are not enough. However, the application of these rules continues to result in a wide array of awards.

### **1. Conduct, Including Unlawful Discharge, Leading to Emotional Harm.**

#### **a. Award Not Reduced.**

In Conetta v. National Hair Care Centers, *supra*, the plaintiff took default against defendant on her sexual harassment and retaliatory discharge case. The district court, sitting without a jury, awarded \$25,000 for emotional harm. The district court did not disaggregate the \$25,000 compensatory damages award attributable to six months of a "depressive state" arising from the wrongful discharge and for nine months of "anxiety" for having to deal with a hostile work environment. On appeal, the First Circuit affirmed the emotional distress damages award. The plaintiff presented psychiatric testimony supporting her allegations regarding the psychological impact of sexual harassment. The award of \$25,000 clearly was not "so grossly disproportionate" to the plaintiff's distress as to be unconscionable.

In Williams v. Trader Publishing Co., *supra*, the plaintiff, a sales representative, became an acting general manager and claimed her supervisor, the office general manager, discriminated against

her by denying progressive discipline and terminating her when similarly situated males were treated more favorably. The jury's verdict included an award for emotional distress of \$100,000. Plaintiff's testimony was the only evidence supporting her damages award for emotional distress. Plaintiff testified that due to her discharge, she suffered sleep loss, began smoking and suffered severe weight loss. The Fifth Circuit held this was sufficient to meet the requirement of specific evidence of actual harm needed to support an emotional distress claim.

In Foster v. Time Warner Entertainment, *supra*, plaintiff, a customer service representative supervisor, sought to accommodate a subordinate with seizures due to epilepsy by modifying the subordinate's work schedule. Because of complaints by the subordinate's coworkers, plaintiff's supervisor changed the defendant's sick leave policy to prohibit employees from making up time missed because of illness. The supervisor told plaintiff that as a result of the change the subordinate "needs to come to work" and "needs to take sick time." The supervisor also told plaintiff to "let [her] worry about the ADA", that it was "none of [plaintiff's] business," that "we don't have to follow the ADA" and "I don't care about the policy [mentioning schedule changes as an example of a reasonable accommodation under the ADA]." Subsequently, plaintiff was terminated for allegedly colluding to falsify the subordinate's time sheets. After her termination, plaintiff sued alleging retaliatory discharge under the ADA. The jury returned a verdict for plaintiff and awarded her \$75,000 emotional distress damages. The district court denied defendant's motions for judgment as a matter of law and for a new trial or remittitur. Defendant appealed arguing that because plaintiff offered no evidence of physical injury, medical treatment or difficulty finding another job, the damages were grossly excessive. The Eighth Circuit affirmed, noting that plaintiff produced evidence in the form of her husband's testimony that she became withdrawn and could not eat and that she experienced back pain, muscle stress and stomach problems as a result of the discharge. Plaintiff testified that she was devastated by being accused of collusion and terminated, that she withdrew, and that she feared she would be unable to locate another job. The court held there was sufficient competent evidence of injury to support the award, and that \$75,000 was not so excessive as to shock the judicial conscience.

In Ross v. Douglas County, 234 F.3d 391 (8<sup>th</sup> Cir. 2000), plaintiff, a correctional officer, was called "nigger" and "black boy," and his wife referred to as "whitey," by a black supervisor. Plaintiff also was referred to as a black radical. Plaintiff's grievance was not successful. Plaintiff was given the most difficult assignment permanently in retaliation for his grievance, forcing him to decide to quit. Plaintiff submitted a resignation letter, then a withdrawal letter. The withdrawal was ignored. Plaintiff suffered physical and emotional injury, and was forced to accept a lower paying job without health benefits. Plaintiff suffered financial strain including repossession of two cars and substantial curtailment of children's activities. On appeal, the Eighth Circuit held that a \$100,000 award for emotional distress was supported by the evidence.

In Dodoo v. Seagate Technology, *supra*, the Tenth Circuit affirmed a \$125,000 award for emotional distress due to race and age discrimination and failure to promote. Only Plaintiff testified about his emotional distress. He testified that he had trouble sleeping and awoke with a pounding

heart not knowing where he was. He worked very hard to succeed and felt it too late to restart a career elsewhere. Plaintiff sought counsel from his wife, ministers and friends.

In Farley v. Nationwide Mutual Ins. Co., *supra*, the Eleventh Circuit upheld the claim of a claims adjuster discharged due to disability and age. Plaintiff suffered long-term disabilities of alcoholism, post traumatic stress disorder and depression. The death of his mother and diagnosis of his daughter with a potentially fatal disease conjoined with the disabilities to cause a decline in performance and mental well-being. Plaintiff told his supervisor of the events and his supervisor responded by criticizing his job performance and saying he would fire plaintiff. Plaintiff collapsed in the office. Plaintiff started seeing a psychiatrist and a psychologist, but maintained his job duties. Plaintiff's mental health was joked about by supervisors and co-workers. Cartoons were posted by a co-worker who later became plaintiff's supervisor. For the next four years, plaintiff was teased and made subject of cartoons, as were other mentally disabled co-workers. Plaintiff took a week stress related leave. Upon return, he was told defendant did not believe in stress related disability. Plaintiff was placed on probation and his files were taken. Plaintiff went on one month's disability leave and filed a claim of discrimination. On return plaintiff asked for a 40 hour week. He was refused and terminated for poor "technical" performance. The district court jury verdict, among others, was for \$450,000 for pain and suffering, reduced to the § 1981a cap to \$300,000 by the district court.

In Martyne v. Parkside Medical Services, *supra*, the court ruled that emotional distress damages in the amount of \$302,000 were warranted in an ADA case in which defendant's failure to accommodate plaintiff led to the deterioration of her condition and eventually to her being unable to work. The jury entered precisely the same award for compensatory damages as it did for back pay. In finding the award was not excessive, the court noted that plaintiff's work was a very large part of her life, and she testified that when she was unable to work, she was "cut off from one of the major defining aspects of [her] life." The court held that the jury could have concluded that the value of plaintiff's loss of her capacity to work, together with the emotional distress of defendant's violation of the ADA, was roughly equivalent to her loss of back pay up to the time of trial.

In EEOC v. CEC Entertainment, 10 Am. Disabilities Cas. (BNA) 1593 (W. D. Wis. 2000), the court held that the jury properly awarded compensatory damages to a mentally retarded former restaurant janitor for emotional distress arising from his discharge. Although the plaintiff did not testify about his emotional distress, and he had a limited ability to appreciate the abstraction of emotional distress, his foster mother's testimony regarding negative changes in his demeanor and behavior after the discharge supported the award of \$70,000 to compensate him for emotional distress. The court ruled that the jury was entitled to conclude that the plaintiff's distress at losing the job, which he held for only three weeks, was much greater than the distress that would be experienced by an average employee. The defendant's expert testimony that plaintiff did not suffer emotional distress did not justify vacating the award, particularly since the defendant failed to call the plaintiff as an adverse witness on the issue or introduce his interview with the expert to support the expert's findings.

In Salinas v. Rubin, 126 F. Supp. 2d 1026 (S. D. Tex. 2001), the court noted the difficulty of quantifying monetary damages to compensate a plaintiff for emotional distress in upholding a jury award of \$300,000 to a U.S. Customs Service agent claiming race discrimination. The plaintiff testified that he “lost a lot of self-esteem,” felt “less like an agent,” lost sleep, began to have “more distant” relationships with his spouse and son, and experienced paranoia about being followed at home and work. In addition, plaintiff claimed that he sought medical attention for high blood pressure and cholesterol resulting from job-related stress. Plaintiff’s wife corroborated plaintiff’s testimony that he appeared depressed, withdrawn, anxious, and paranoid. No expert testimony was offered at the trial. Nevertheless, the court found that the nine pages of testimony from plaintiff describing in detail his emotional distress was sufficient to sustain the award.

**b. Award Denied or Reduced.**

In Flowers v. Southern Regional Physician Services, 247 F.3d 229 (5<sup>th</sup> Cir. 2001), the jury determined that plaintiff, a medical assistant who was HIV positive, was harassed due to her disability and awarded \$350,000 for emotional distress. The district court reduced the award to \$100,000 pursuant to § 1981a. On appeal, the Fifth Circuit found there was sufficient evidence to support the jury’s finding of harassment. However, the court ruled that it was plain error to grant plaintiff any damages for emotional distress. The only evidence of damages adduced by plaintiff at trial related to those resulting from her termination, which the jury decided was not unlawful. The circuit court ruled that evidence of injuries after her termination were irrelevant to any actual injury stemming from the harassment. In addition, plaintiff’s testimony alone that the harassment and subsequent discharge took away her self-respect and her dignity was insufficient to support an emotional distress damages award. Finally, the testimony of plaintiff’s medical expert that stress associated with harassment *can* aggravate HIV did not connect the alleged events with any particular injury to plaintiff.

In Rubenstein v. Administrator, 218 F.3d 392 (5<sup>th</sup> Cir. 2000), the court held that the jury did not err in granting no emotional distress damages based only on plaintiff’s testimony that he was angry and upset, and became moody at home since he felt that no matter what he did he got nowhere. Hurt feelings, anger and frustration are part of life, the court noted.

In Giles v. General Electric Co., *supra*, plaintiff, a machinist, injured his back and eventually was able to perform only medium duty work. Defendant declined to continue plaintiff’s employment and plaintiff sued alleging violation of the ADA. The jury verdict was \$400,000 in emotional distress damages. The district court reduced the award to \$300,000 pursuant to § 1981a, characterizing the damages so reduced as solely compensatory. On appeal, the Fifth Circuit ordered a remittitur of the compensatory damages award. The court began by noting the deference due damage awards based on intangible harm. Nonetheless, the court noted there are two essential requirements to prove emotional distress: specific discernable injury to the claimant’s emotional state, proven with evidence regarding the nature and extent of the harm; and something more than “value allegations” to establish the existence of injury. Hurt feelings, anger and frustration are not the types of harm that support a mental anguish award. By contrast, emotional distress damages may be appropriate where the plaintiff

suffers sleeplessness, anxiety, stress, marital problems and humiliation. Here, plaintiff relied primarily on his own testimony to prove that he had difficulty sleeping, suffered headaches and marital problems, and lost the prestige and social connections associated with his position. He also relied on the testimony of a coworker that he appeared “despondent, depressed, down and absolutely utterly discouraged.” While the court noted that an award of emotional distress predicated exclusively on the plaintiff’s testimony must be scrupulously analyzed, the court found this evidence sufficient to support an award of compensatory damages. Nevertheless, plaintiff’s symptoms did not support the award of \$300,000. In the court’s view \$100,000 would properly compensate plaintiff for his distress. To “avoid substituting our judgment for that of the jury,” however, the court augmented that amount by 50% to reach a maximum recovery. The court allowed plaintiff to accept a remittitur to that amount or receive a new trial on damages.

In Hammond v. Northland Counseling Center, *supra*, the plaintiff psychiatrist was a whistleblower regarding alleged Medicare fraud. Upon termination, plaintiff filed suit under the False Claims Act 31 U.S.C. §3730(h). Plaintiff was immediately employed at equal compensation thereafter with no lost compensation. Plaintiff claimed that defendant pursued a campaign of character assassination before and after the termination. The district court granted summary judgment due to lack of injury, and the Eighth Circuit affirmed. Plaintiff offered some evidence of compensatory damages due to emotional distress, but that portion was not attributable to retaliatory discharge.

One might speculate that the courts are not sympathetic to a psychiatrist’s claim of emotional distress.

In Fink v. City of New York, 129 F. Supp. 2d 511 (E.D.N.Y. 2001), a jury entered a verdict in favor of plaintiff in a case arising under the ADA. The evidence showed that plaintiff was viewed as hearing impaired. As a result, the City forced him to undergo a medical exam, placed him on light duty, limited him to a five day workweek, and retaliated against him when he attempted to protect his rights. The jury awarded \$800,000 in emotional distress damages, which the court reduced to \$300,000 pursuant to §1981a. In addition, the court granted the defendant’s motion for remittitur or new trial on the damages award, which it found was excessive in view of the evidence. That evidence included the plaintiff’s testimony regarding the substantial way his image of the fire department and his self-image as a firefighter were affected by the City’s conduct. In addition, his wife testified that after plaintiff experienced problems at work, he became short tempered and had difficulty sleeping. The plaintiff did not seek medical assistance and presented no expert testimony in support of his request for damages. Accordingly, the court held that an award of \$125,000 would be the maximum that could compensate the plaintiff without shocking the judicial conscience.

In Copley v. Bax Global, Inc., 97 F. Supp. 2d 1164 (S. D. Fla. 2000), plaintiff sued his former employer alleging he was terminated because he was not Hispanic. The jury awarded economic and non-economic damages in a lump sum of \$500,000, \$479,692 of which were attributable to emotional injury. The evidence of this injury consisted solely of the testimony of plaintiff and his wife. In assessing the appropriateness of the award, the court looked to the size of the award, the relationship

between the award and the evidence, and awards in similar cases. In that regard, the court noted that in the 11<sup>th</sup> Circuit, it was very rare for noneconomic compensatory damages awards to exceed \$150,000. The court characterized \$150,000 as the “benchmark figure,” above which awards of compensatory damages for mental anguish become “suspect.” Because there was no extraordinary psychological injury attributable to the termination that would support the award, the court found an award of \$100,000 appropriate.

In Clark v. Metro Health Foundation, *Supra*, awards of \$150,000 and \$100,000 for emotional distress to two plaintiffs were reduced by the district court to \$50,000 and \$35,000, respectively. One plaintiff testified she was unlawfully terminated one week before Christmas, and suffered embarrassment, humiliation, emotional pain of telling her kids there would be no Christmas that year, and telling her daughter she would have to forego her high school senior class trip and that she would be unable to help pay for her college education. In addition, that plaintiff testified that she endured stress, headaches, sleeplessness, and upset stomach as a result of her car being repossessed, being sued by creditors, and losing her credit. She did not seek medical attention because she had no money or health insurance to pay for it. The second plaintiff testified that she was forced to resign because of her color, was ridiculed and embarrassed by her peers, subjected to intense scrutiny, selected for layoff when a less senior white employee retained her job, and was toyed with and lied to regarding a bogus return to work call after her layoff.

**2. Emotional Distress Arising Out Of Unlawful Harassment, Denial Of Promotion Or Disciplinary Action Short of Discharge.**

**a. Award Not Reduced.**

In O’Rourke v. City of Providence, 235 F.3d 713 (1<sup>st</sup> Cir. 2001), the plaintiff, the first and only female firefighter in all of her assignments, claimed sexual harassment. Plaintiff was confronted with sexually explicit pictures, magazines, movies, touching and talk with supervisors present. Plaintiff claimed that as a result of the harassment, she became anxious and had trouble sleeping. She was singled out for criticism by the chief and her lieutenant and eventually was forced to transfer. Plaintiff was subjected to similar conduct and ostracized in her new assignment. As a result, she claimed that she started gaining weight, had difficulty sleeping, became exhausted and was a nervous wreck. After an accident, plaintiff left work on injured duty status and began seeing a psychiatrist. Plaintiff’s stress resulted in an 80 pound weight gain, fear of leaving her house and anxiety around firefighters. Plaintiff returned to fire prevention, but never to a firefighter position. The jury awarded \$275,000 for emotional distress damages. The court of appeals held the award was not grossly excessive or shocking to the conscience. The court noted that the evidence amply supported the jury award. The Plaintiff established her damages through her own testimony and that of her psychiatrists. The Plaintiff testified to such severe distress that she would shake uncontrollably and become unable to function. The psychiatrist concluded that plaintiff was depressed, suffered from post traumatic stress disorder, had tremendous guilt over complaining due to the impact on her family, began to grieve over

the loss of her job and felt embarrassment and shame. He opined that plaintiff's condition was permanent and chronic.

In Passantino v. J&J Consumer Products, *supra*, plaintiff was a very successful national account manager until she complained her advancement was limited due to her sex. Plaintiff was told by her supervisor that his boss and the company were not ready for a woman. Plaintiff complained and was told by her supervisor to get along. Thereafter, plaintiff was not taken seriously, and was denied promotions. She was excluded from meetings. Accounts and duties were removed, and assignments were negative. Thereafter, several demotions were offered to plaintiff and she was told no promotions would follow. Plaintiff testified, and her husband and sister corroborated, that she experienced substantial anxiety as a result of her sense that she could not longer advance within the company. She got rashes, headaches and stomach problems. She sought counseling from her pastor. The jury award included, among others, a \$1,000,000 award for emotional distress. On appeal, the award was upheld by the Ninth Circuit with the observation that no "objective" evidence supporting emotional distress was required. The amount was attributed to state law claims to avoid the § 1981a cap.

In Steinhoff v. Upriver Restaurant Joint Venture, 117 F. Supp. 2d 598 (E. D. Ky. 2000), a server at a Hooter's Restaurant brought an action for sexual harassment caused by a restaurant manager. The jury returned a verdict including an award of \$25,000 in compensatory damages. Although defendant moved for judgment or for a new trial with respect to that award, the court denied it, noting that plaintiff had been subjected to daily sexual comments by the manager and was under continual distress as a result. Specifically, the plaintiff testified that she was subjected by the manager to comments that were nonstop and very offensive, and that those comments made her feel like a piece of meat, degraded, and violated. The manager also engaged in unwelcome touching, and on one occasion, put his hand in her shorts, pulled out her pantyhose, and looked down into them. The court viewed this evidence as sufficient to support the jury's verdict.

In Lafate v. Chase Manhattan Bank, 123 F. Supp. 2d 773 (D. Del. 2000), defendant argued that a \$100,000 award for emotional distress was excessive, since the plaintiff had experienced no economic losses as a result of the retaliation alleged. Nevertheless, the court held that plaintiff's subjective claims that she suffered headaches and an upset stomach, in conjunction with her claim that she saw her family doctor, a therapist and a psychiatrist to deal with the anguish caused by the retaliatory conduct that persisted for approximately two years, justified the award.

#### **b. Award Denied Or Reduced.**

In Vadie v. Mississippi State University, 218 F.3d 365 (5<sup>th</sup> Cir. 2000), the plaintiff's department was closed. He and two others were recommended for another department, but only the two were selected. An outside candidate filled the third. Ten months later, plaintiff was offered a full-time non-tenured position. Plaintiff was passed over for another opening allegedly due to his lack of a chemical engineering doctorate. The jury found unlawful discrimination and retaliation and awarded \$350,000 in compensatory damages for "emotional pain, suffering, inconvenience or mental anguish." The

district court lowered the award to \$300,000 per § 1981a. The district court then set aside the finding of discrimination. Therefore, to stand, the compensatory damages award must be supported by evidence of injury related to retaliation alone. On appeal, the Circuit Court noted that to recover more than nominal damages for emotional harm, there must be proof of actual injury resulting from the illegal conduct. Thus, there must be a specific discernable injury to the plaintiff's emotional state proven with evidence regarding the nature and extent of the harm. Typically, mere conclusory statements of the fact of injury are not enough. There must be genuine injury. Here, plaintiff was the sole source of evidence: "It totally destroyed me. It ruined me. I became sick, totally ill, physically, mentally, everything. I look many doctors and pills. I did not know where to go, whether it was night or day. I couldn't sleep for months at a time; headache, nausea. Still I am under severe doctor surveillance because of what they have done." No one controverted the testimony and no doctors testified. The Fifth Circuit held this testimony was enough to establish injury in fact, but not of the magnitude awarded. An award in excess of \$10,000 would be excessive.

In Gobert v. Babbitt, 84 Fair Empl. Prac. Cas. (BNA) 1437 (E. D. La. 2000), plaintiff sought \$20,000 in compensatory damages due to the emotional upset, stress, mental strain and worry, fatigue and intestinal problems caused by the discriminatory denial of her promotion. Plaintiff explained she sought counseling five times from a social worker in the Employee Assistance Program after she was passed over for the promotion. The court noted that in the Fifth Circuit, plaintiff's testimony alone was sufficient to support an award for emotional distress damages as long as it established a "specific discernable injury to the claimant's emotional state." It also noted that two of the physical manifestations of stress plaintiff experienced (fatigue and intestinal problems) were specifically listed in the EEOC's guidelines. Reviewing awards in other cases involving similar emotional injuries, however, the court ruled that \$10,000 was a more appropriate award to compensate the plaintiff.

In Johnson v. Stone Container, 88 F. Supp. 2d 1295 (N. D. Ala. 2000), the jury awarded plaintiff \$50,000 in compensatory damages based on evidence that defendant improperly considered plaintiff's EEOC charge when it entered a reprimand in his employment file, gave him an unfavorable performance review, and suspended him with pay for one day. The court found the evidence constituted the "bare minimum" of evidence supporting an award of mental anguish, for which \$7,500 was the maximum possible supported by the evidence.

### **C. Causation.**

Defendant's illegal conduct must be a cause of the injury for which plaintiff seeks compensation. For instance, to recover for emotional harm, plaintiff must prove actual injury resulting from the illegal conduct with evidence regarding the nature and extent of the harm. Yet causation, is an issue to date seldom addressed by the courts. However, the causal complexities of mental illness are the subject of extensive trial strategy ranging from selection of witnesses to closing argument. Questions of aggravation, independent intervening cause (poor healthcare treatment), and plaintiff's failure to seek or adhere to treatment, all are at issue. For instance, in Farley v. Nationwide Mutual Ins. Co., supra, neither the district court nor the Eleventh Circuit was presented with an

argument that the defendant merely aggravated plaintiff's pre-existing physical and mental illness depression, post traumatic stress disorder and alcoholism and that only the aggravation injury was compensable. Whether this would have reduced the \$450,000.00 jury award is only speculative. However, the case does raise the question of whether arguing aggravation is a good jury strategy. See also, Martyne v. Parkside Medical Services, *supra*, and Watson v. Food Lion, Inc., *supra*. In those cases, causation issues were addressed in the name of mitigation. Perhaps both approaches would be better.

In Fox v. General Motors Corporation, *supra*, plaintiff was disabled with a back injury, was harassed by co-workers and supervisors when he was restricted to light duty. He was forced to do jobs beyond his restrictions, ridiculed, isolated at a work station which hurt his back, was refused the opportunity to list out of the department and was verbally insulted. Plaintiff testified that the harassment caused emotional injury, such as anxiety and severe depression, and worsened his already fragile physical condition. Plaintiff's neurologist and his psychiatrist offered testimony that supported those claims. Although plaintiff's depression admittedly had other causes, such as plaintiff's health, his divorce and the death of his daughter, the evidence established that it was at least in part attributable to the hostile environment he experienced at work. Furthermore, the worsening of plaintiff's back injury, which led to increased pain and suffering, also appeared to be triggered solely by the harassment plaintiff suffered. The jury found a hostile environment and awarded \$200,000 in emotional distress and paid and suffering. The circuit court refused to overturn the award. In view of the plaintiff's testimony and the corroboration of his expert witnesses, the award was not grossly excessive or shocking to the court's conscience. The jury also awarded \$3,000 for psychiatric expenses related to treatment for depression. The Fourth Circuit likewise refused to overturn that award, noting that the psychiatrist's testimony that the depression was caused by the harassment at work in conjunction with other factors supported the jury's decision to award one half of the total \$6,000 in medical expenses established by the evidence.

In Dobrich v. General Dynamics Corp., 106 F. Supp. 2d 386 (D. Ct. 2000), the jury awarded plaintiff \$650,000 in emotional distress damages in her sexual harassment suit. Plaintiff provided evidence that several years after leaving defendant's employ, she developed shingles, which threatened her vision in her eye. At trial, a medical expert testified that shingles were caused by a virus, and that the mental suffering plaintiff endured while working for defendant caused stress, resulting in the virus becoming active. The court found the connection to be questionable, particularly since plaintiff had additional stressors after leaving defendant's employ. In addition, the standard medical text did not even mention emotional stress as a cause of shingles. At the same time, however, the court noted that defendant had an independent medical examination of plaintiff performed, and had a medical expert listed for trial which it did not call. Consequently, the jury could have concluded that the shingles were proximately caused by the sexual harassment. The court therefore reduced the compensatory damages to \$300,000 under § 1981a, adding that if it were not for the statutory cap, the award would have been remitted to that amount on the basis of excessiveness.

#### **D. Other.**

In Dowd v. USWA Local 286, 253 F.3d 1093 (8<sup>th</sup> Cir. 2001), plaintiffs were subjected to racial harassment by their union when they crossed a picket line during a strike and after the strike ended. The union had 1400 members. Plaintiffs sued the company and the union and settled with the company. Subsequently, the jury awarded each plaintiff \$10,000 compensatory damages. The union argued that it had only 4 employees and therefore the compensatory damages cap should be zero under § 1981a. The Eighth Circuit affirmed the award of compensatory damages. It noted that the literal reading of § 1981a(b) was that compensatory damages and punitive damages are available to plaintiffs with no cap because the union had fewer than 14 employees, and only employers of 14 or more are given the benefit of a cap. The court next noted that Title VII defined coverage of union defendants in terms of members rather than employees. It noted that it was reasonable to interpret “employees” in § 1981a(b)(3) to equate to “members” in that section as to union defendants. In any event, the court ruled, the compensatory damages awarded were below the statutory cap. In affirming the award, the court also concluded that it was unnecessary to setoff the settlement package paid by the employer in view of the district court’s instruction to the jury to award only those damages proximately caused by defendant’s conduct.

In Bohac v. Department of Agriculture, 239 F.3d 1334 (Fed. Cir. 2001), the circuit court held that the Federal Whistleblower Protection Act, 5 U.S.C. §1221 (g)(1)(A) provides for back pay and related benefits, medical costs, travel expenses and other reasonable and foreseeable “consequential” damages. The statute does not provide for “compensatory” damages such as pain and suffering, injury to reputation, and injury to family life.

#### **VI. PUNITIVE DAMAGE AWARDS.**

Kolstad v. American Rental Association, 527 U.S. 526 (1999) continues to be the focus of cases addressing the availability of punitive damages in vicarious liability cases. The courts note its inapplicability in direct liability cases. Delineation of direct and vicarious liability is not precise. Similarly, who is a managerial agent, who is in top management and which actor essentially is the defendant, are yet to be uniformly developed. It is quite clear, however, that defendant, in large measure, proves much of plaintiff’s punitive damages case when proving its affirmative defense.

The amount of the award continues to be measured by the criteria outlined in BMW of North America v. Gore, 517 U.S. 559 (1996).

## **A. Plaintiff's Burden.**

### **1. Burden Satisfied Because The Actor Essentially Is The Defendant.**

In Otting v. J.C. Penny Company, 10 Am. Disabilities Cas. (BNA) 1549 (8<sup>th</sup> Cir. 2000), the Eighth Circuit considered punitive damages in the context of an ADA claim. The plaintiff, a sales clerk, suffered from epileptic seizures known to defendant for two years before her discharge. Plaintiff tried to return to work with a restriction of not climbing ladders, but the defendant store manager declined and terminated her rather than placing her in a job without ladder climbing. The jury awarded plaintiff \$100,000 punitive damages on her ADA claim. The district court granted defendant's motion for judgment on punitive damages. The Eighth Circuit held that because the store manager was enforcing a specific company policy prohibiting return to work with restrictions, thus eliminating accommodation as an alternative to discharge, punitive damages were appropriate. Plaintiff met her burden of offering evidence that the employer acted with reckless indifference to federally protected rights. The company policy took the issue to the level of a "Top Management" pronouncement; therefore, there was no question regarding whether the store manager was a managerial agent or was acting adverse to a good faith implemented anti-discrimination policy.

In Dodoo v. Seagate Technology, *supra*, the Fourth Circuit held the Kolstad test for imposition of vicarious liability is not applicable in direct liability cases where the actor is so highly placed that his conduct is the conduct of the company. The managers designated to implement the anti-discrimination policy acted with reckless indifference to plaintiff's federally protected rights. The Human Resources Manager approved exceptions to the promotion procedure stated in the Handbook to select a young Caucasian. The Vice President in charge of the entire product line, with the Human Resource Manager's knowledge denied plaintiff's promotion, claiming a freeze, but no other job was frozen. The jury awarded a total of \$650,000 in punitive damages, which was reduced to the statutory cap under § 1981a, in combination with a total of \$125,000 in compensatory damages.

The Fourth Circuit seems to equate conduct by Kolstad's "top management" with direct liability, thus avoiding the issue of vicarious liability, as well as removing defendant's good faith policy defense discussed below.

### **2. Burden Satisfied By Conduct Of Managerial Agent.**

In Lowery v. Circuit City Stores, 206 F.3d 431 (4<sup>th</sup> Cir. 2000), plaintiffs were successful account representatives and recruiters who were passed over for promotion. They claimed discrimination under Title VII and § 1981. The jury found for the plaintiffs and awarded one \$225,000 in punitive damages, and the other \$47,000 in punitive damages. On appeal, the circuit court vacated the punitive damages awards on the ground that the record contained insufficient evidence that defendant's conduct was so egregious that the issue of punitive damages should have been submitted to the jury. The Supreme Court granted certiorari, vacated the court of appeals' decision, and remanded for further consideration in light of Kolstad v. American Dental Ass'n. Lowery v. Circuit City Stores, Inc.,

119 S.Ct. 2388 (1999). On remand, the circuit court held that the same punitive damages standards would apply to the claims under Title VII and § 1981. Applying those standards, the Fourth Circuit held that the evidence could support a finding that the decision maker acted in the face of a perceived risk of violating federal law. She knew or should have known that her decision was subject to federal anti-discrimination law because she attended training seminars on that law. She was a managerial agent responsible for recruiting and with authority to hire and organize her department. She acted within the scope of her employment by selecting individuals for promotion.

In Rubinstein v. Administrators, 218 F.3d 392 (5<sup>th</sup> Cir. 2000), plaintiff was a tenured associate professor of engineering at Tulane. Plaintiff received very good raises until 1993 and a change in administration, when he received no raise. A co-professor made anti-Semitic comments. Subsequently, plaintiff was denied a promotion, and given a 2% raise. When plaintiff complained, he was told by the dean of the department “Do you know what happens to people who sue their employer?” Allegedly due to his teaching and good university citizen grades, plaintiff was denied promotion twice again. The jury awarded \$75,000 punitive damages. On appeal, the Fifth Circuit held that under Kolstad v. American Dental Assoc., *supra*, to hold the employer liable for punitive damages, the employer must act with malice or reckless indifference to federally protected rights. Also, the act must be by a managerial agent acting in the scope of employment. Even then the employer is not liable for punitive damages if its agent’s decisions were made contrary to its good faith effort to comply with Title VII. Here, the dean of the department had authority to grant raises and, therefore, was a managerial agent. He acted with malice or reckless disregard since he declared he denied plaintiff a raise because plaintiff dragged colleagues into court to resolve differences.

In Bruso v. United Airlines, *supra*, the Seventh Circuit considered the district court’s refusal to give a punitive damages instruction. Plaintiff complained of treatment of coworkers following a very heated argument with a supervisor. After investigation, defendant concluded no unlawful discrimination had occurred, and plaintiff was demoted. Plaintiff appealed, eventually to the Vice President and President of United. An investigation was ordered and concluded against plaintiff. He was forced to commence work as a baggage handler. Plaintiff sought psychological treatment. The Circuit Court held that a reasonable jury could conclude punitive damages are appropriate. Therefore, it was error for the district court to grant judgment on issue for defendant. Plaintiff must and did offer evidence defendant managers acted with knowledge their acts may have violated federal law. Here, plaintiff demonstrated that the major decision makers were aware of defendant’s anti-discrimination policy; they mentioned it in communications with plaintiff and went to training sessions on the policy. The final decision maker was responsible for training defendant employees on the policy. The jury concluded they knew the policy and must have been aware that demoting plaintiff after he complained of sexual harassment could violate Title VII. The jury could conclude defendant did not engage in good faith efforts to enforce the policy since the decision makers did nothing even though aware of sexual harassment; instead their investigation and action was designed to discredit plaintiff and protect management. Therefore, applying Kolstad, evidence would allow the jury to conclude defendant acted in reckless disregard of plaintiff’s federally protected rights and did not implement its formal anti-discrimination policy in good faith.

In Ogden v. Wax Works, 214 F.3d 999 (8<sup>th</sup> Cir. 2000), plaintiff sales manager's raises were conditioned on submission to sexual advances of the district manager and she suffered additional propositions and mistreatment even when the advances were rejected. Eventually, plaintiff was constructively discharged. The jury's verdict included awards of \$300,000 punitive damages for sexual harassment and \$200,000 punitive damages for retaliation. The district court reduced the total punitive damages award to \$260,000 in accordance with the statutory cap. On appeal, the Eighth Circuit affirmed, applying Kolstad v. American Dental Association, *supra*. The court ruled that the jury could have concluded that the district manager's conduct was sufficiently abusive to manifest malice or reckless disregard for plaintiff's rights. Defendant's policy forbade such conduct and the district manager knew of and was trained in the policy. Thus, the jury could conclude that he acted in the face of a perceived risk that his action would violate federal law. The district manager was a managerial employee with authority to conduct performance evaluations. Because his abuse occurred during store hours, on premises and involved service to defendant, he was acting within the scope of his employment. In addition, defendant failed to establish a "good faith" affirmative defense to punitive damages. Existence of a sexual harassment policy did not establish good faith in the face of substantial evidence that defendant minimized plaintiff's complaints, performed a cursory investigation which focused on plaintiff's performance rather than the alleged harassment, and forced plaintiff to resign while imposing no discipline on the district manager for his misconduct.

In Beard v. Flying J Inc., 116 F. Supp. 2d 1077 (D. Ia. 2000), plaintiff received a jury award in her favor on claims against her employer for supervisor sexual harassment and against her supervisor alleging battery. The court entered judgment including an award of \$12,500 punitive damages. In reviewing the punitive damage award, the court relied on evidence that the employer's district manager was aware of the alleged harassment and yet only issued a warning to the harasser, and evidence that another manager dismissed the harassment allegations as part of an alleged conspiracy by the plaintiff to get the alleged harasser "out of the unit." The evidence reflected a reckless indifference to plaintiff's right to be free from harassment.

In EEOC v. CEC Entertainment, *supra*, the district court held that the jury properly awarded punitive damages to a mentally retarded former restaurant janitor, where the jury could have concluded that the district manager, who supervised plaintiff's supervisor, the restaurant manager, intentionally discriminated against him, the district manager's acts were properly imputed to the company, and the district manager knew of the ADA's prohibitions and the company's policy against discrimination at the time plaintiff was discharged. In addition, the court noted that there was evidence of aggravating circumstances to support the award, such as the company's failure to respond to the restaurant manager's concerns over the district manager's comments about the plaintiff, from which the jury could conclude the defendant did not care whether discrimination was occurring, and the company's continuing employment of the district manager without any discipline. Furthermore, the court held that the award of \$230,000, as reduced by § 1981a, was not excessive given a ratio of punitive to compensatory damages of less than 3:1.

### 3. Burden Not Satisfied.

In Passantino v. J&J Consumer Products, *supra*, the Ninth Circuit found that there was sufficient evidence and the form of the jury's verdict supported a punitive damages award, but remanded for the district court to apply the vicarious liability defense articulated in Kolstad v. American Dental Association, *supra*. Plaintiff was a very successful national account manager until she complained her advancement was limited due to her sex. The promotion system was neither systematic nor fair. Plaintiff was told by her supervisor that his boss and the company were not ready for a woman. Plaintiff complained and was told to get along by her supervisor. Thereafter, plaintiff was not taken seriously, and was denied promotions. The EEO officer told plaintiff she would have to live with her complaint if she made one. False comparative evidence was put in her personnel file and meetings regarding her complaints were very defensive. Plaintiff's training duties were removed and accounts transferred. She was excluded from meetings. Thereafter, several demotions were offered to plaintiff and she was told no promotions would follow. The Ninth Circuit noted that under Kolstad, three circumstances can result in denial of punitive damages when intentional discrimination recurs: (a) the theory of discrimination is sufficiently novel for the defendant to reasonably believe it was acting legally; (b) defendant believed it had a valid BFOQ defense; and (c) defendant was actually unaware of Title VII's prohibition. In addition, under Kolstad a defendant may avoid liability for the conduct of managerial employees by establishing that it has a bona fide policy against discrimination, and that it implemented the policy in good faith. In this case, it was not clear how senior the decision makers were in defendant's management or whether the anti-discrimination policy was implemented in good faith. Remand therefore was appropriate.

In Steinhoff v. Upriver Restaurant Joint Venture, *supra*, the court vacated the jury's \$250,000 award of punitive damages to the plaintiff in a harassment suit. There, a server at a Hooter's Restaurant failed to demonstrate that a "managerial agent" was responsible for any discrimination against her. The court pointed out that the only individual who could have been demonstrated to possess sufficient malice to support a punitive damages award was the alleged harasser. Although the analysis of whether an individual is a "managerial agent" is fact intensive, plaintiff did not provide any evidence of the harasser's authority. Therefore, there was a failure of proof as to an essential element for punitive damages.

In Williams v. Trade Publishing Co., *supra*, plaintiff sales representative became an acting general manager and claimed her supervisor, the office general manager, discriminated against her by denying progressive discipline and terminating her when similarly situated males were treated more favorably. The jury's verdict included a punitive damages award of \$100,000. On appeal, the Fifth Circuit reversed the punitive damages award. The discriminatory general manager did not terminate plaintiff and had no authority to do so. Plaintiff was terminated by the general manager's supervisor who did not discriminate against plaintiff. The general manager was not acting as a managerial agent when he discriminated against plaintiff.

#### **4. Award Excessive.**

In Lafate v. Chase Manhattan Bank, *supra*, plaintiff alleged that after her employer placed her original charge of discrimination in her personnel file, it was seen by at least four managers and resulted in retaliation against her. Specifically, plaintiff testified she received public criticism for non-existent mistakes, was isolated by managers, ignored by her peers and subordinates, switched to an inferior cubicle next to the recipient of a promotion she was denied, and assigned tasks her manager knew she was unqualified to complete. The district court held there was sufficient circumstantial evidence to warrant imposition of punitive damages. However, the court held that the jury's \$500,000 award was excessive. Reviewing the factors outlined in BMW of North America v. Gore, *supra*, the court found that although the plaintiff offered some evidence of intentional retaliation, the malice that was shown barely exceeded the threshold for assessing punitive damages. The court pointed out there was no direct evidence of reprehensible conduct. In addition, while the court noted the 5:1 ratio of punitive to compensatory damages was not disproportionate, the defendant had little actual involvement in retaliation so the award should be lowered. The court reduced the jury's figure to \$100,000.

#### **B. Defendant's Burden.**

##### **1. Burden Satisfied.**

In Cooke v. Stefani Management Services, Inc., 250 F.3d 564 (7<sup>th</sup> Cir 2001), plaintiff, a male bartender, claimed same sex sexual harassment by the restaurant manager. The restaurant was one of a dozen in a chain. Plaintiff alleged he was subjected to sexual proposals, inappropriate touching, and non-verbal gestures of a sexual nature by the manager. Plaintiff claimed he complained several times and eventually was fired when he aggressively opposed the manager's advances. Defendant's case contesting liability consisted of the testimony of plaintiff's coworkers, who claimed they never witnessed any harassment. Plaintiff's girlfriend testified that plaintiff never mentioned any inappropriate conduct by the manager. Additionally, the evidence showed that plaintiff was comfortable at the restaurant, ate and socialized at the restaurant on days off. And on at least one occasion, plaintiff socialized with the manager and gave him a thank you note for a gift of a bottle of wine which read: "Here's looking at many more fun days to come." Defendant also presented evidence of its sexual harassment policy and the manager's training on it. The circuit court noted the case "was not a slam dunk case for either side." The circuit court vacated the award of \$10,000 in punitive damages. In so doing, the court outlined the appropriate standards for punitive damages under Kolstad v. American Dental Ass'n, *supra*. To show malice under Kolstad, the court ruled, the employer must perceive some risk that its actions violate federal law, not just an awareness that its conduct is discriminatory. In a case of vicarious liability, plaintiff also must establish a basis for imputing liability by showing that the individual discriminating was a manager acting within the scope of employment. The employer may escape punitive damages for its managers' acts if it can demonstrate a good faith attempt to establish and enforce an anti-discrimination policy. Here, defendant conceded the manager was a managerial agent. Defendant had anti-harassment policies in

place and provided training that the manager had attended. Furthermore, Plaintiff could not explain why he did not report the manager's acts to his superiors. As a result, there was no evidence that anyone in defendant's upper management actually knew of the manager's acts. Without such knowledge, there was nothing defendant could have done, other than continue its good faith efforts to prevent harassment, to ensure compliance with Title VII.

In Marcano-Rivera v. Pueblo Int'l, *supra*, plaintiff sued for disability discrimination under the ADA and local law. Plaintiff was not accommodated with parking or a wheelchair accessible work area resulting in walking on amputated limbs. The jury awarded plaintiff \$225,000 in compensatory damages. On appeal, plaintiff argued that the district court erred by failing to instruct the jury on punitive damages. The district court had concluded that an instruction was not warranted given the absence of evidence that defendant engaged in discriminatory practices with malice or reckless indifference to the plaintiff's rights. The First Circuit agreed, pointing out that the record was replete with evidence that defendant instituted policies prohibiting any type of discrimination; trained its personnel to ensure equal treatment of employees with disabilities; and took good faith efforts to comply with the ADA. Because plaintiff did not identify any facts that would support an award of punitive damages under Kolstad v. American Dental Assoc., *supra*, the district court properly declined to instruct the jury on punitive damages.

In Dobrich v. General Dynamics Corp., *supra*, the jury awarded the successful plaintiff in a sexual harassment suit \$100,000 in punitive damages. Defendant moved for judgment as a matter of law on the award, claiming it had written procedures in management manuals establishing EEO programs and employee complaint procedures. Defendant also had a staffed EEO office. Employees were familiar with the EEO program and the policy against sexual harassment which were included in the Employee Handbook and Ethics Handbook. Letters and memos regarding the EEO and sexual harassment policies were mailed to employees and posted on employee bulletin boards. All supervisors received four hours of EEO training, including two hours of sexual harassment training. The district court found no support in the record to conclude that the defendant acted with malice or reckless indifference, and concluded that defendant was entitled to judgment as a matter of law on the punitive damage award.

In Fuller v. Caterpillar Inc., 124 F. Supp. 2d 610 (N. D. Ill. 2000), the court granted summary judgment on plaintiff's claim for punitive damages in her sexual harassment suit. The employer had a policy against sexual harassment for at least ten years, copies of which were posted in glass display cases at building entrances. The defendant published two booklets for employees providing guidance on sexual harassment, how to report it, and an explanation of the consequences of harassment. Employees and supervisors received training regarding sexual harassment. In addition, salaried and management employees were required to attend an eight hour diversity training course, which in substantial part, was devoted to sexual harassment. In plaintiff's case, the employer promptly took reasonable steps to rectify the alleged harassment once it was reported. Management talked to employees about sexual harassment, and one manager talked specifically to the coworkers in the plaintiff's immediate work area. In addition, plaintiff was moved to a different work area, presumably

in an effort to stop the harassment by her coworkers. The court found these efforts shielded the defendant from liability for punitive damages.

In Hull v APCOA/Standard Parking Corp., 82 Fair Empl. Prac. Cas. (BNA) 247 (N. D. Ill. 2000), the court held that an employer that had a non-discrimination and anti-harassment policy in effect during plaintiff's employment, and designated the proper steps that could be taken to report harassment and discrimination, could not be liable for punitive damages on plaintiff's sexual harassment claim, where plaintiff received a copy of the policy and attended a training session where the policy was covered, yet never complained about sexual harassment to management or the human resources department. Accordingly, summary judgment was granted with respect to plaintiff's prayer for punitive damages.

## **2. Burden Not Satisfied.**

In Wagner v. Dillard Department Stores, *supra*, the jury assessed \$150,000 in punitive damages after defendant refused to hire the plaintiff because of her pregnancy. The district court denied defendant's motion for a new trial on the issue of punitive damages. First, it held that because the employer's store manager testified she knew that pregnancy discrimination was illegal, and defendant's evidence of its good faith efforts to comply with Title VII were limited to posting a bulletin and to providing short training videos, the issue of punitive damages was properly before the jury. Second, it held that under the factors outlined by the Supreme Court in BMW of North America v. Gore, 517 U.S. 559 (1996), the award was not grossly excessive. As to the degree of reprehensibility of defendant's conduct, the court noted that the evidence demonstrated defendant knowingly violated plaintiff's rights and made inadequate efforts to comply with Title VII. The approximately four to one ratio of actual damages to punitive damages here was within the range of other acceptable jury verdicts. Comparing the relationship between civil remedies and punitive damages, the court noted that punitive damages are capped at \$300,000 against employers of defendant's size. Accordingly, the award here was in line with available civil remedies. Finally, in view of defendant's assets of over \$8 billion and substantial net income, the award did not exceed what was required to serve the objectives of punishment and deterrence.

In Foster v. Time Warner Entertainment, *supra*, plaintiff, a customer service representative supervisor, claimed retaliatory discharge for conduct protected by ADA. Plaintiff sought to accommodate a subordinate with nocturnal seizures due to epilepsy by modifying his work schedule. In response to complaints by the subordinate's coworkers, plaintiff's supervisor changed defendant's sick leave policy to prohibit employees making up time missed. The supervisor told plaintiff that as a result of the change the subordinate "needs to come to work" and "needs to take sick time." The supervisor also told plaintiff to "let [her] worry about the ADA", that it was "none of [plaintiff's] business," that "we don't have to follow the ADA" and "I don't care about the policy [mentioning schedule changes as an example of a reasonable accommodation under the ADA]." Subsequently, plaintiff was terminated by her next two levels of supervisors for allegedly colluding to falsify the subordinate's time sheets. Plaintiff showed both the company disability policy which listed epilepsy

as a protected condition warranting a flexible schedule. Both responded that no accommodation was required. The jury returned a verdict for retaliatory discharge and awarded \$136,000 punitive damages. On appeal, defendant argued punitive damages inappropriate because it “acted with a legitimate business purpose.” The Eighth Circuit affirmed the award applying Kolstad v. American Dental Ass’n, 527 U.S. 526 (1999). The court found that plaintiff’s supervisor admitted the subordinate was protected and the company manual provided that a flexible schedule was a reasonable accommodation. Defendant did not dispute the supervisors were managerial agents acting within the scope of their employment. They were repeatedly reminded by plaintiff of their obligations to the subordinate under the ADA. In addition, the defendant’s ADA policy did not address retaliation. The court reasoned the mere existence of a policy does not establish good faith if managerial agents disregard it, as they chose to do here. As a result, punitive damages were proper. Finally, the court held that the punitive damages awarded were not excessive, given that it was only 1.8 times the actual damages and was not dissimilar to those the court approved in other cases.

### **C. Factors Affecting Award.**

#### **1. Ratio Of Punitive To Compensatory Damages.**

In EEOC v. Wal-Mart, 83 Fair Empl. Prac. Cas. (BNA) 833 (S.D. Ill. 2000), the court held that punitive damages in the amount of \$100,000 were not precluded by the fact that the jury awarded \$7,000 in back pay but no compensatory damages to the plaintiff.

In Cush-Crawford v. Adchem Corp., 94 F. Supp. 2d 294 (E.D. N.Y. 2000), the court held there was no requirement that an award of punitive damages under Title VII be supported by an award of compensatory damages.

In Ogden v. Wax Works, *supra*, plaintiff sales manager’s raises were conditioned on submission to sexual advances by the district manager and she suffered additional propositions and mistreatment when the advances were rejected. Eventually plaintiff was constructively discharged. The jury awarded \$300,000 punitive damages for sexual harassment and \$200,000 punitive damages for retaliation. The district court reduced the total punitive damages to \$260,000. On appeal, the Eighth Circuit held that the amount of punitive damages was appropriate given the abusive conduct and 6.5:1 ratio to compensatory damages.

In Rubenstein v. Administrators, *supra*, plaintiff was a tenured associate professor of engineering. Plaintiff received very good raises until 1993 and a change in administration, when he received no raise. A co-professor made anti-Semitic comments. Plaintiff was denied a promotion, and given a 2% raise. When plaintiff complained, he was told by the dean of the department “Do you know what happens to people who sue their employer?” Allegedly due to his teaching and good university citizen grades, plaintiff was denied promotion twice again. The jury awarded \$75,000 punitive damages. The Fifth Circuit found that punitive damages were appropriate. Among the factors considered in reviewing the size of the punitive damages award was the degree of

reprehensibility, which was high, though for a single event. Also, the relationship to compensatory damages was considered. Though no mathematical bright line applies, the circuit court held this award clearly is outside the grey area of demarcation. Plaintiff was not fired, demoted or subjected to other adverse consequences; he got a low raise. A 30-1 ratio on these facts is enough to “raise a judicial eyebrow.” Therefore, a remittitur to \$25,000 (10-1 ratio) was ordered.

## **2. Comparison To Other Penalties.**

In Copley v. Bax Global, Inc., *supra*, the jury awarded \$1 million in punitive damages under § 1981. The district court, noting the damages caps in § 1981a did not apply to this case, held that they provided guidance under the third Gore factor. Comparing the \$300,000 cap under § 1981a to the punitive damages awarded here, the court found the award excessive and granted a remittitur to \$350,000.

## **3. Reprehensibility Of The Conduct.**

In Connor v. Schroeder-Bridgeport Int'l., 227 F.3d 179 (4<sup>th</sup> Cir. 2000), plaintiff, a machine operator, was subjected to disparate treatment in training and job assignment, and job performance scrutiny. She was subjected to verbal disparagement such as “are you on the rag today?” many times a month. Constant humiliation caused daily headaches and nausea. She feared losing her job since she was the sole support for her son. She was forced to display her bloody pants resulting from uterine bleeding to her supervisor. Her complaints to the personnel manager resulted in his speaking to her supervisors, concluding no disparity existed, and doing nothing more. She was paid less, her breaks were timed and she was threatened by the plant manager with termination due to her discrimination complaints. Finally, she was terminated for excessive absences when she had less than male counterparts. On appeal, the Fourth Circuit held that the punitive damages award of \$500,000 was excessive. Per Kolstad, the reprehensible character of the conduct is not generally considered apart from the requisite state of mind. Employers need not engage in some independent conduct of egregious quality before being subject to a punitive damages award. Under the Kolstad standard, the punitive damages award was proper in this Title VII case, but as a matter of law it was excessive. Therefore, the case was remanded “for factual development.”

In EEOC v. W&O, Inc., *supra*, defendant had a policy prohibiting pregnant women from waiting on tables. Summary judgment was entered on liability for three persons and the following amounts were awarded:

1. \$26,231.43 back pay  
\$350,000 punitive damages
2. \$3,800.24 back pay  
\$200,000 punitive damages

3. \$6,225.46 back pay  
\$200,000 punitive damages

The district court reduced each punitive damage award to \$100,000 per the statutory cap, and defendant appealed. The Eleventh Circuit Court held that punitive damages were appropriate. Defendant's desire to protect unborn children and benefit the women was insufficient to bar punitive damages. Defendant researched its policy. It could have chosen an FMLA leave policy, but did not. This activity could constitute reckless indifference to whether conduct violates federally protected rights.

#### **D. Exemptions.**

Punitive damages pursuant to § 1981a are not available against governmental entities. O'Rourke v. City of Providence, *supra*.

In Oden v. Oktibbeha County, 246 F.3d 458 (5<sup>th</sup> Cir. 2001), the court held that a county sheriff in his official capacity was plaintiff's employer for Title VII purposes, where state law authorizes him to appoint, remove and fix the compensation of deputies such as plaintiff, subject to the county board of supervisors' approval of the sheriff's budget. However, in his official capacity the sheriff is exempt from punitive damages under § 1981a.

However, in Alexander v. Fulton County, 218 F.3d 749 (11<sup>th</sup> Cir. 2000), a punitive damages award was affirmed against the sheriff in her individual capacity. The court noted that punitive damages were not available against the sheriff in her official capacity or against the county. Apparently, her exposure was in her individual capacity pursuant to § 1981. Otherwise, the court would have to conclude the sheriff was the "employer," but was not a governmental agency. Such a conclusion would be problematic.

#### **E. Identity of the Defendant.**

In Vance v. Union Planters Corp., 209 F.3d 438 (5<sup>th</sup> Cir. 2000), plaintiff claimed failure to promote due to sex. Plaintiff was a branch president and applied for the same job at a consolidated branch, but was denied the job due to her sex. She quit. Plaintiff lost bonuses, 401(k) contributions, pay differential, and incurred health expenses due to her inability to obtain insurance. A psychologist interviewed plaintiff and her friends, and concluded the denial of promotion caused her to suffer from depression, agitation, sadness and shock. The jury awarded \$30,000 lost wages, \$20,000 compensatory damages, and \$390,000 punitive damages, which the district court reduced to \$300,000 under the statutory limits based on its conclusion that the employer employed more than 500 employees. On appeal, defendant argued it employed only 140 individuals and that its liability should have been capped at \$100,000. The Fifth Circuit held that the statutory caps must be implemented based on the number of employees employed by the employer in the year the discrimination occurred, not the year of the judgment. In addition, the district court failed to develop the record sufficiently to determine

the relevant employer. The district court's use of a holding company to measure the number of employees for purposes of the cap appeared inconsistent with the court's prior dismissal of that company as a defendant from the action. The district court also failed to determine whether nominally independent entities, such as defendant and the holding company, were in fact a single employer for purposes of Title VII. Finally, the record did not reveal who would have been plaintiff's employer had she been offered the new position. The circuit court therefore remanded the case for a determination of those factors.

## **VII. RELATED ISSUES.**

### **A. Tax Treatment.**

In Morris v. Lee, 83 Fair Empl. Prac. Cas. (BNA) 1790 (E. D. La. 2000), the court refused to increase the jury's \$5,000 compensatory damages award in view of plaintiff's request for an adjustment to reflect tax liability that would have to be paid, since it was not clear the jury had not already considered tax that would have to be paid on the award.

In Kerseth v. Commissioner, 82 Fair Empl. Prac. Cas. (BNA) 1572 (U.S. Tax Court 2000), plaintiff settled his ADEA case and portion of settlement was proceeds was attorneys' fees paid pursuant to a contingent fee agreement. By settlement plaintiff received \$32,476.61 as lost wages and \$197,024.76 "as and for personal injury." The later amount was paid to plaintiff's attorneys, who deducted their fee and remitted the net amount to plaintiff. The Tax Court held that attorneys' fees are an assignment of income and the entire amount of fees is income. Plaintiff is entitled to a deduction for the amount, subject to applicable law.

### **B. Effects Of Bankruptcy.**

In In re Young, 237 F.3d 1168 (10<sup>th</sup> Cir. 2001), plaintiff recovered, among other damages, \$300,000 in a wrongful discharge action (1/2 for § 1983 violation and 1/2 for Oklahoma Public Policy violation). Defendant filed for bankruptcy under Chapter 7 and his debts were discharged. Plaintiff claimed his judgment was non-dischargeable. Defendant then converted the bankruptcy to a Chapter 13 proceeding. The Bankruptcy Court approved a 60 month payment plan resulting in plaintiff and others receiving very little of their debt. The Court of Appeals noted that under Chapter 7 a debtor's assets are liquidated and the proceeds distributed. Under Chapter 13, the assets are not liquidated. Instead, a plan agreed to by a debtor and the court results in payment over a number of years from the debtor's disposable income. A plan may be confirmed despite the most egregious pre-filing conduct where other factors nevertheless suggest the plan represents a good faith effort to satisfy creditors' claims. Here, all of defendant's disposable income for five years (the maximum period allowed) was devoted to payment of debts. Therefore, the plan was affirmed.

## **C. Interest.**

### **1. Pre-Judgment Interest.**

Prejudgment interest is not assessable in the Tenth Circuit if liquidated damages are awarded in an ADEA case. Greene v. Safeway Stores, 82 Fair Empl. Prac. 1306, 1312 (10<sup>th</sup> Cir. 2000).

In Sharkey v. Lasmo, *supra*, an ADEA constructive discharge case (plaintiff declined a discriminatory transfer and elected to retire), the district court declined to award prejudgment interest because in its view plaintiff received a very generous jury award (\$1,427,000), retirement package (\$383,000) and settlement money (\$200,000) on another matter. The district court noted that an award is in the discretion of the court, though it is generally an abuse not to award pre-judgment interest, based upon (a) the need to fully compensate plaintiff, (b) equity and fairness, (c) the remedial purpose of the statute involved, and (d) other general principles deemed relevant. The district court reasoned that purpose of an award is to compensate the plaintiff for loss of use of money plaintiff otherwise would have earned, but not to over compensate the plaintiff. On appeal, the Second Circuit held the district court abused its discretion in refusing prejudgment interest based on the jury's generous award. If excessive, remittitur of a jury award is in order. The Circuit Court noted, however, that prejudgment interest was inappropriate on the portion of the award attributable to restricted stock and stock options plaintiff was denied, and the portion of the award attributable to lost pension benefits, if the jury award included the present value of each.

## **VIII. CONCLUSION.**

Every case involves both liability and damages. Much is said about liability and relatively little about damages. Yet the amount of monetary relief received by a plaintiff is very often the focus of considerable attention not only by the plaintiff, but also by the defendant. Hopefully this paper presents some additional insight and food for thought on the critical issue of monetary relief.