Damages In Employment Cases

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ECONOMIC DAMAGES

Availability of Economic Damages

Collazo v. Nicholson, 535 F.3d 41, 44-45 (1st Cir. 2008) held that although a claim may be asserted under the ADEA for a hostile work environment, the statute does not allow for recovery of emotional distress damages and so when that is the only alleged damage, the complaint does not even state a claim for which relief may be granted.

In *Sturgull v. United Parcel Service, Inc.,* 512 F.3d 1024, 1034-35 (8th Cir. 2008), the employee was found not to have been terminated because of religious discrimination, but was fired for leaving his job duties after a failure to provide a reasonable accommodation left him with a choice of violating his religious convictions or stopping work. The court concluded that an award of damages for discharge-related damages was proper under these circumstances.

The standards for assessing lost income may be relaxed in class cases where individualized showing of lost income due to lost promotional or hiring opportunities is ambiguous, for instance, where there are a limited number of positions and it is not possible to state with certainty which employee would have received which promotions. In such cases, the "quagmire of hypothetical judgments should be avoided in favor or apportioning damages by calculating the aggregate lost wages and dividing the value among class members, *McClain v. Lufkin Industries, Inc.,* 519 F.3d 264, 280-282 (5th Cir. 2008).

Alden Management Services, Inc. v. Chao, 532 F.3d 578, 581 (7th Cir. 2008) confirmed that back pay can reach backwards to the start of the limitations period, but that statutes of limitations do not apply to restrict awards of back pay accruing after suit is commenced.

Negron-Almeda v. Santiago, 528 F.3d 15 (1st Cir. 2008) held that in a 1983 action against a governmental individual defendant, liability does not directly extend to back pay, since the governmental employer is the one who is party to the contractual relationship with the employee. The court observed, however, that individual defendants can be held liable for compensatory damages which, properly proven, can include aggregate lost wages. The difference is that back pay is an equitable remedy provided by the court, while compensatory damages are assessed by the jury, if there is one.

Franzen v. Ellis Corp., 2008 WL 4149698 (7th Cir. 2008), at *4 concluded that while back pay awards under Title VII are an equitable remedy to be decided by the court, in FMLA cases, they are to be determined by the jury.

Mitigation of Damages—Job Search

One would expect that courts would require plaintiffs seeking awards of lost income to present documented information to support their claims, but in *Gaffney v. Riverboat*

Services of Indiana, 451 F.3d 424 (7th Cir. 2006), the court was satisfied with damages calculated based on offhand remarks about interim income such as "about $30,000 a year" and "probably around the same." On the other hand, discovery does provide the defense with an opportunity to obtain specific documented information.

Awards of back pay are offset by any wages that could have been earned with reasonable diligence and the failure to mitigate can take the form of not looking for new employment, finding new employment and quitting or being discharged for misconduct from new employment. *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368 (1st Cir. 2004) There is an ongoing undercurrent in the case law that treats mitigation of damages not as an element of offset, but as a moral obligation that the employee fails to satisfy at his peril. One simply does not see cases, for instance, in which the employee argues that while he did not seek employment, he would not have found new employment for more than 75% of his pay rate working for the former employer, thus entitling him to recover 25% of his old pay rate without lifting a finger to find a new job.

The standard for proving failure to mitigate, which is an affirmative defense on which the employer has the burden of proof, is not as exacting as it first appears. The employer must establish that there were substantially equivalent positions available and that the plaintiff did not use reasonable care and diligence in seeking such positions. *Killian v. Yorozu Automotive Tennessee, Inc.*, 454 F.3d 549 (6th Cir. 2006). The standard is "reasonable efforts…and the plaintiff is not held to the highest standards of diligence." The judgment is made based on the individual characteristics of the claimant and the job market. Thus, in *Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245 (10th Cir. 2005), the court rejected the defendant's calculation of what the employee should have been expected to earn from proper mitigation in favor of a calculation that acceped that her efforts (several applications, searching classified advertisements and monthly visits to the State job service) were sufficient. In *Killian v. Yorozu Automotive Tennessee, Inc.*, 454 F.3d 549 (6th Cir. 2006), the court was similarly satisfied with testimony that the plaintiff, a factory worker, inquired at the unemployment office, checked the classified ads and asked her friends about job openings in the area.

But while the court in *Broadnax v. City of New Haven,* 415 F.3d 265 (2d Cir. 2005), confirmed that the burden of proof is on the employer to show lack of mitigation, it also noted that an alternate way to satisfy this burden without showing available positions is to prove that the employee made "no reasonable efforts to seek such [suitable] employment," citing *Greenway v. Buffalo Hilton Hotel,* 143 F.3d 47 (2d Cir. 1998). If the employer satisfies its burden, the employee may still recover by showing that compensation for the employment that was available was not comparable to the former position, permitting the plaintiff to recover the difference.

Benson v. Thompson Cadillac-Oldsmobile, Inc., 2008 WL 2824887 (4th Cir. 2008)(unpublished), at *4-5, found mitigation sufficient where the employee submitted 82 applications for positions over a period of just under a year, but affirmed denial of back pay for any other period for lack of evidence.

The court recited a similar formulation in *West v. Nabors Drilling USA, Inc.,* 330 F.3d 379 (5th Cir. 2003), which also imposed the burden of proof on the employer to show both that substantially equivalent work was available and that the former employee did not exercise reasonable diligence in seeking it. The employer is relieved of any obligation to prove substantially equivalent work was available where it proves that the employee has not made reasonable efforts to obtain work, since an employee cannot simply abandon his job search and continue to receive back pay. The court defined substantially equivalent employment as "that employment which affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions and status as the position from which the employee was terminated."

But not necessarily, it would seem. The Seventh Circuit holds that a highly paid individual in a specialized field will be required to move outside that field in seeking employment to satisfy mitigation requirements. In denying front pay in *Mattenson v. Baxter Healthcare Corp.,* 438 F.3d 763 (7th Cir. 2006), the court rejected the notion that plaintiff, a medical devices patent attorney, had satisfied his obligation to mitigate damages by applying to all of the local companies and law firms that prosecute patents on medical devices and found none that would hire him. "Mattenson probably won't be able to find another job that pays him $240,000 a year. But he can't insist on Baxter's paying him that amount each year until he turns 65 in order that he can play golf eight hours a day. …[H]e should be able to find a job in a law firm, or in a business firm involved in medical products. He was required to present persuasive evidence of inability to find a substitute job [and did]not satisfy that burden, given the range of opportunities open to someone with his background and experience."

Fogg v. Gonzales, 492 F.3d 447 (D.C. Cir. June 29, 2007) permitted recovery of ten years of back pay, finding that the question was within the discretion of the District Judge. The plaintiff was a deputy U.S. Marshall who missed work for two years due to severe psychological stress from alleged racial discrimination and retaliation. When he did not show up for fitness-for-duty examinations, he was fired, and a jury found that termination to be actionable. The District Court denied his motion for reinstatement and front pay but allowed back pay for the ten years from his termination until judgment. The court rejected the argument that if reinstatement was denied, back pay for such an extended period was improper, finding it to be within the court's discretion. It also rejected an argument that the plaintiff's failure to seek other employment represented a failure to mitigate, accepting the District Court's conclusion that seeking other work in law enforcement would be futile because the plaintiff had been fired by the U.S. Marshall's Service for cause, and holding that a claimant need not go into another line of work or accept a demotion to mitigate damages.

Stremple v. Nicholson, 2008 WL 3919376 (3d Cir. 2008) found mitigation sufficient where the former employee, a doctor, had applied for positions at the only two hospitals where his termination and non-compete agreement allowed him to apply. He was out of work for 6.25 years and allowed his medical license to lapse because of the cost of malpractice insurance. Holding that the employer must demonstrate that substantially

equivalent work was available and the claimant did not exercise reasonable diligence, the court upheld a finding of sufficient mitigation due to the specialized position plaintiff had held.

In *Le v. University of Pennsylvania,* 321 F.3d 403 (3d Cir. 2003), the jury's finding of a failure to mitigate was supported by evidence that laid off employees generally found other positions at the University, by the employee's refusal to accept an offer of a paid leave of absence during which he could seek other employment at the University, and by the employee's inability to produce more than two rejection letters for a fifteen month job search.

The Same Compensation Deal Is Not Necessarily Full Mitigation

Palasota v. Haggar Clothing Co., --- F.3d ---, 7002 WL 2503997 (5th Cir. Sept. 6, 2007) reviewed a jury verdict for a sales representative whose compensation was commission-based, finding that the jury was entitled to award continuing backpay where the compensation arrangement at the new employer was the same as it had been while the plaintiff worked for the defendant. The jury could properly find that the plaintiff would have earned a total of $175,000 in his former employment. The court observed that the employer bears the burden of showing that a former employee failed to mitigate damages, although the burden shifts to the employee where "substantially similar" employment is found but later lost. Upon a showing that the former employee exercised reasonable diligence in maintaining the new employment, and a reasonably diligent search for new substitute employment, backpay is treated as tolled during the period the former employee holds the new position, not cut off.

To establish that new employment is substantially equivalent, the defendant was required to show that the new employment was comparable in promotional opportunities, job responsibilities, working conditions, or status, which the court found defendant did not do. Most significantly for this case, the court found that the defendant failed to show that the plaintiff had actually realized the commission potential of the new position, so the shortfall was recoverable.

Application To Former Employer

Grace v. City of Detroit, 2007 WL 328687 (6th Cir. Jan. 31, 2007)(unpublished) considered whether a plaintiff who was not hired and sues for discriminatory refusal to hire in precluded from back pay because he did not reapply for work with the defendant after it eliminated its discriminatory practices. The case arose from a residency requirement that was later eliminated by the Defendant. The decision begins from the premise that once the plaintiff presents evidence of damages, the employer bears the burden of showing that substantially equivalent positions were available and that the plaintiff failed to exercise reasonable diligence in seeking those positions. In that instance, a Special Master had determined that the only positions that were substantially equivalent to that of a Detroit police officer were—positions as a Detroit police officer.

Distinguishing cases involving "personal characteristics" such as race, in which re-application to the discriminating employer, is not required, *e.g., Nagarajan v. Tennessee State University,* 1999 WL 551360 (6th Cir. 1999)(unpublished), the court held that because the basis of the refusal to hire was a residency requirement, the former employees were indeed required to re-apply after it was eliminated in order to recover backpay.

Going To School

In *Peyton v. DiMario,* 287 F.3d 1121 (D.C. Cir. 2002), the court found sufficient efforts to mitigate damages even during a three-month period when the plaintiff was attending school. The court found, following *Dailey v. Societe Generale,* 108 F.3d 451 (2d Cir. 1997), that going to school was not incompatible with the duty to mitigate. The Plaintiff was not even attending school full-time and had not withdrawn from the labor market, the court concluded. *Accord, Killian v. Yorozu Automotive Tennessee, Inc.,* 454 F.3d 549 (6th Cir. 2006)(after being unable to find factory employment for eight months, plaintiff could reasonably enter cosmetology school); *Miller v. AT&T Corp.,* 250 F.3d 820 (4th Cir. 2001); *Smith v. American Serv. Co of Atlanta, Inc.,* 769 F.2d 1430 (11th Cir. 1986); *Hanna v. General Motors Corp.,* 724 F.2d 1300 (7th Cir. 1984); *Gaffney v. Riverboat Services of Indiana,* 451 F.3d 424 (7th Cir. 2006)(court also found that sporadic participation in a picket line did not mean that the employees were not also seeking other employment).

Impact of Other Employment

The court in *Minshall v. McGraw Hill Broadcasting Co.,* 323 F.3d 1273 (10th Cir. 2003) found mitigation efforts of the plaintiff to have been sufficient when, after being unable to locate work as an investigative reporter in his market, he chose not to move to another City but to seek work in the related field of media training, and then to leave that employment to work as a self-employed media trainer.

Quitting the job working for the defendant when denied a promotion normally is not justified, but one court had held that it is not necessarily a failure to mitigate, depending on the circumstances. In *Dennis v. Columbia Colleton Medical Center, Inc.,* 290 F.3d 639 (4th Cir. 2002), the employee who believed, correctly as it turned out, that she had been discriminated against, resigned her position and sought employment elsewhere. But she sought other employment immediately and over the next three years, because she was leaving a low-paying job, she made more than she would have made if she remained working for the defendant. This was sufficient mitigation and she could recover the loss during the period until she exceeded her prior pay level. The employer in *Gaffney v. Riverboat Services of Indiana,* 451 F.3d 424 (7th Cir. 2006) argued that excess earnings of the former employees after their income exceeded what they would have made during employment with the former employer should be deducted from their recovery, but the court rejected that argument and upheld a cutoff of damages when the moment arrived that the employees made as much as they had while employed.

In *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379 (5th Cir. 2003), the employee sought employment working in comparable jobs for a period of time, during which period the court concluded that he had mitigated his damages. Then he obtained employment as a truck driver, and while he worked those low-paying jobs, he did not seek employment in his formerly more lucrative field of work. This, said the court, sufficed to support the jury's conclusion that he had not mitigated his damages after he started driving a truck.

In *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368 (1st Cir. 2004), the court rejected the view that being fired for misconduct from a job mitigating damages cuts off back pay. Not so, said the court, since the right to recover back pay was not permanently ended under the cognate provision of the National Labor Relations Act, on which the Title VII back pay provision was modeled. Rather, the effect of either being fired for misconduct or quitting the mitigating job continues until the employee is working another mitigating job. Damages are cut off when the pay level reaches the level of the job for the discriminating employer. In support of its conclusion, the court cited EEOC v, Delight Wholesale Co., *973 F.2d 664 (8th Cir. 1992) and* Brady v. Thurston Motor Lines, Inc., 753 F.2d 1369 (4th Cir. 1985). *See Gaffney v. Riverboat Services of Indiana,* 451 F.3d 424 (7th Cir. 2006)(adopting, without comment, District Court's decision to cut off damages when one employee had a job for 34 days making more money than in the former employment)

This is still not a strictly economic model for measuring damages. If the employee is fired unlawfully from Employer A where pay was at $15 per hour, and he then takes a mitigating job at Employer B making $10 an hour, then the employee should be receiving back pay at the rate of $5 per hour, assuming for the sake of simplicity no differences in working hours. When fired from Employer B for misconduct, the result should be that the employee continues to receive that $5 per hour differential, but since his unemployment is the result of his own misconduct, he does not receive the other $10 per hour. But the model of the *Johnson* court forfeits the difference the employee would still have lost had he not committed misconduct—which is the only justification for reducing back pay. So it is not accurate to say that there is no moral element to this calculation.

After-Acquired Evidence: Post-Termination Misconduct

The familiar holding of *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995) is that discovery after termination of employee misconduct that occurred during the employment allows for a damage defense, effectively cutting off back pay as of the date of discovery—even if the lawsuit is the only reason the past misconduct was discovered. *Sellers v. Mineta,* 358 F.3d 1058 (8th Cir. 2004) decided that *post-termination* misconduct can have the same effect in formulating back or front pay. In that case, the employee, in a subsequent job, attempted to process a loan application in the name of her spouse's ex-wife in an effort to obtain her credit history. Reasoning that forfeiture of the equitable remedy of reinstatement can be justified by such misconduct, the court held that front pay could also be affected, but it emphasized that the burden of

establishing that the wrongdoing is of such severity that it would have resulted in termination of employment is on the employer.

Impact of Disability

Johnson v. Spencer Press of Maine, Inc., 364 F.3d 368 (1st Cir. 2004) assumed that that where an employee is unable to work due to a disability, back pay ends if the cause of the disability is unrelated to the defendant employer's conduct. *Accord Lathem v. Dep't of Children and Youth Services,* 172 F.3d 786 (11th Cir. 1999); *Starceski v. Wsetinghouse Electric Corp.,* 54 F.3d 1089 (3d Cir. 1995). But, the court said, back pay may be available where the former employer's conduct is the cause of the disability, citing *Blockel v. J.C. Penney Co.,* 337 F.3d 17 (1st Cir. 2003); *Durham Life Ins. Co. v. Evans,* 166 F.3d 139 (3d Cir. 1999); *Lathem v. Dep't of Children and Youth Services,* 172 F.3d 786 (11th Cir. 1999). In that case, however, the employee could not make out the required showing.

EEOC v. E. I. duPont de Nemours & Co., 480 F.3d 724 (5th Cir. March 1, 2007) reviewed an objection to the award of backpay to a plaintiff whose physician testified that he was medically unable to work after a particular date because of evidence that the plaintiff had a high threshold of pain and the a modest amount awarded and adjusted for disability compensation received, the back pay award was affirmed.

Franzen v. Ellis Corp., 2008 WL 4149698 (7th Cir. 2008), at *5-8 allowed recovery for the 12-week period of FMLA eligibility because the employer provided short-term disability to employees on leave. But the court denied back and front pay because the employee was disabled from his job by the time of his termination. The court also noted that even if the plaintiff had not been disabled, his failure to seek work during that period would have disqualified him from recovery on the basis of a failure to mitigate damages.

Front Pay—Loss of Future Income--Reinstatement

Peyton v. DiMario, 287 F.3d 1121 (D.C. Cir. 2002) rejected a 26-year front pay award by the District Court for a GPO proofreader apprentice who the court had found would have been employed through retirement at age 60, and who was later employed in the private sector making about $500 per month less. Restating its position in *Barhour v. Merrill,* 48 F.3d 1270 (D.C.Cir. 1995), the D.C. Circuit concluded that the court failed to consider the required variables in making what it found to be a speculative front pay award. Among the factors that it should have considered were the length of time other employees remained in the job with the defendant and other employers, variations in pay between private and public sector, and whether the private sector rate of pay increases was similar to those in the public sector. Acknowledging that "some speculation is necessary to determine front pay," the court cited other District Court decisions frowning on the notion of awarding pay through retirement to employees in their forties, while citing with approval decisions allowing 59 year-old employees to be awarded front pay to retirement age, citing *Casinno v. Reichold Chemicals, Inc.*,817 F.3d

1338 (9th Cir. 1987)(eleven year award to 59 year-old) and *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916 (6th Cir. 1984)(front pay to retirement for 59 year-old employee). The award was vacated and remanded.

Giles v. General Electric Co., 245 F.3d 474 (5th Cir. 2001) allowed the District Court, which had denied back pay for failure to mitigate, to award front pay despite disputed mitigation evidence with respect to future losses because the evidence on that point was 'inconclusive"—the court said it would have upheld denial of front pay as well. It also permitted disability pay from the former employer to be treated as an offset against the front pay.

The court in *Killian v. Yorozu Automotive Tennessee, Inc.*, 454 F.3d 549 (6th Cir. 2006) outlined a list of factors considered in the Sixth Circuit: (1) the employee's future in the position from which she was terminated; (2) her work and life expectancies; (3) her obligation to mitigate damages; (4) the availability of comparable employment opportunities and the time required to find a substitute job; (5) the present value of future damages as calculated through an appropriate discount rate. Regarding the fifth factor, the court said that failure to reduce to present value was, in that case, offset by the court's omission of anticipated pay raised in the calculation it did.

By contrast, in *Mathieu v. Gopher News Co.*, 273 F.3d 769 (8th Cir. 2001), the court upheld an award of eight years' pay to a fifty-seven year-old employee with minimal education and 34 years working for the defendant despite the employer's argument that the employee was at-will and no mitigation AMOUNT was deducted from the award. The court noted the plaintiff's unsuccessful attempts to mitigate and found that it was unlikely that he would achieve the level of compensation and benefits he had held. The court noted its earlier decision in *United Paperworkers Int'l Union Local 274 v. Champions Int'l Corp.*, 81 F.3d 798 (8th Cir. 1996) caution that mitigation should normally be charged against the front pay component but decided that the particular circumstances justified charging none.

Benson v. Thompson Cadillac-Oldsmobile, Inc., 2008 WL 2824887 (4th Cir. 2008)(unpublished), at *6-7 affirmed denial of front pay because the employee did not prove up work expectancy or either her success or prospects for success in the business she started after termination.

Chalfant v. Titan Distribution, Inc., --- F.3d ---, 2007 WL 136324 (8th Cir. Jan. 22, 2007) permitted the court to impose one year of front pay representing the differential between the employee's former salary and his current salary on the judge's presumption that the employee should be able to find a comparable job in a year. In support of the award of front pay, the court relied on the employee's testimony that he continued to seek employment by reviewing the newspaper classifieds, satisfying the requirement of reasonable efforts at mitigation.

A front pay award that included compensation for time when the plaintiff was incarcerated was held erroneous as a matter of law in *Shick v. Illinois Dept. of Human Services,* 307 F.3d 605 (7th Cir. 2002).

*Lulaj v. Wackenhut Corp.,*512 F.3d 760 (6th Cir. 2008) recognized that, under the Seventh Amendment, a court seeking to reduce a damage award must offer the plaintiff the option of a new trial or accepting a reduced award, or remittitur, but held that where the plaintiff failed to show a constructive discharge as a matter of law, no front pay could be awarded and thus that award could be reduced to zero. *EEOC v. E. I. duPont de Nemours & Co.,* 480 F.3d 724 (5th Cir. March 1, 2007) overturned an award of front pay based on an advisory jury verdict, after upholding a modest backpay award in light of his deteriorating medical condition, rejecting a finding that the plaintiff could continue working for an additional ten years.

Fogg v. Gonzales, 492 F.3d 447 (D.C. Cir. June 29, 2007) noted that front pay may be awarded to a Title VII plaintiff who cannot work because of "psychological injuries suffered … as a result of discrimination" or where reinstatement is not viable due to hostility of the employer or co-workers, citing *Pollard v. E.I. DuPont de Nemours & Co.,* 532 U.S. 843 (2001), but held that the plaintiff in that case failed to establish the causal link. It further relied on the employee's actions after termination of employment, in representing himself to a Congressional committee as still a member of the U.S. Marshall's Service, finding that this gave rise to an unclean hands defense. Both were viewed as proper grounds for denial of the equitable relief of front pay.

Palasota v. Haggar Clothing Co., --- F.3d ---, 2007 WL 2503997 (5th Cir. Sept. 6, 2007) found that an order of reinstatement was improper where the employer's structure for the position in question had been modified and cut back since the plaintiff was terminated. The court said that reinstatement is "by far the preferred remedy in an ADEA case," but that exceptions were recognized where there is hostility and animosity and where the employee has changed careers. It recognized that reinstatement was not feasible because there was no sales position comparable to the one formerly occupied by the plaintiff and his rehiring would result in termination of an existing sales representative or loss of other representatives' sales territory and compensation. The company had not hired any new representatives in the several years since a layoff, did not plan to hire more, was likely to institute further reductions and could not guarantee the plaintiff a compensation level akin to what he had formerly earned in the job.

The accompanying award of front pay was also vacated, although not because liquidated double damages had been awarded—a consideration the court viewed as playing only a small role in the front pay determination. Rather, the District Court had not provided sufficient reasoning to support the award and the Court of Appeals believed a more thorough evaluation of the issue was appropriate, with a caution that front pay awards must be carefully crafted to avoid a windfall to the plaintiff.

Prejudgment Interest

State law in Illinois is quite restrictive on recoveries of prejudgment interest, particularly in tort cases, for fear of deterring defendants from exercising their right to defend litigation, but federal courts appreciate the time value of money. Prejudgment interest is presumptively available not only for economic losses but for emotional distress as well. While future losses are subject to discounting to present value, that is generally offset by the impact of inflation.

Tax Bump

When an award of damages is made to replace a stream of payments in a lump sum, the result can be an increase in the marginal income tax rate that is applied to the recovery. Instead of five years of $20,000 in additional income being taxed at a taxpayer's marginal rate for that year of, say, 20%, the first $20,000 of the lump sum payment will be taxed at that rate and a larger percentage of remainder of the award will be taken, as the payment pushes total income into progressively higher marginal rate tax brackets.

Fogg v. Gonzales, 492 F.3d 447 (D.C. Cir. June 29, 2007) refused to permit a request to "gross up" back pay to relieve the plaintiff of the adverse tax consequences associated with recovering multiple years of pay in a single year, acknowledging that as a result, most of the award will be taxed at a higher marginal tax rate. The court cited and relied on *Dashaw v. Pena,* 12 F.3d 1112 (D.C. Cir. 1994), which denied such relief absent a voluntary settlement agreement among the parties based strictly on the absence of any case law being cited to support Plaintiff's request. The plaintiff argued that the trial judge had been a member of the *Dashaw* panel and had relied on a decision permitting such relief, *Sears v. Atchison, Topeka & Santa Fe Railway Co.,* 749 F.2d 1451 (10th Cir. 1984), that was obviously overlooked in *Dashaw*. The court nevertheless reversed, in reliance on *Dashaw,* despite the fact that the Tenth Circuit decision articulated a policy justification for such relief (placing the plaintiffs in the same position they would have occupied had there been no discrimination).

None of these decisions discuss or appear to be aware of the U.S. Supreme Court's decision addressing this issue in the context of a Federal Employer's Liability Act ("FELA") case, *Norfolk & Western Railway Co. v. Liepelt,* 444 U.S. 490 (1980). In that case, the plaintiff's recovery was non-taxable, although it was based in part on an estimate of future income that, but for the wrongful death, would have been wages and subject to taxation. So in that case, the employer and employee were on opposite sides of this legal question of whether taxability is an appropriate consideration in damage calculations. Citing the FELA damage standard ("the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received . . "), the Court concluded:

> The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax income, rather than his gross income before taxes, that provides the only

> realistic measure of his ability to support his family. It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies. *Norfolk & Western,* 444 U.S. at 493-94.

Another concern was that the jury might incorrectly assume that its award was taxable and hence "gross up" its award accordingly without any instruction to do so. In that case, the difference between an award taking taxes into consideration and one ignoring them was substantial, and the Court concluded that the tax effect should be presented to the jury in making its damage assessment. Explaining this decision, the Court observed: "…it surely is not proper for the Judiciary to ignore the demonstrably relevant factor of income tax in measuring damages . . ." *Id.,* at 495-96.

The only significant difference between this holding and those cited above is whose ox is being gored by the Internal Revenue Code. If there is something to be said for ensuring that a defendant is not improperly punished by a jury's misconceptions about taxes in a personal injury award, there is also much to be said for ensuring that none of what the discrimination laws and a jury give to provide full compensation is not taken away by the IRS. The calculations of tax impact are no more complex and confusing than other damage calculations such as valuing stock options and discounting future loss to present value.

In *Gelof v. Papijneau,* 829 F.2d 452 (3d Cir. 1987), the court allowed this element to be included where the defendant did not object, and in that case it represented an increase in the award of $85,000. The court approved remand to allow the plaintiff to calculate prejudgment interest on that sum, but noted that it was not deciding whether the element of damage itself would be recoverable in every back pay case. A request for recovery of the tax bump was denied in *Hukkanen v. I.U.O.E Local 101,* 3 F.3d 281 (8th Cir. 1993), but only because the plaintiff presented no evidence in support of this theory and provided the court with no convenient way to calculate the amount.

Barbour v. Medlantic Management Corp., 952 F.Supp. 857 (D. D.C. 1997) spelled out what must be done to satisfy this evidentiary burden. The court rejected the plaintiff's proposed $700,000 element of damages because it represented the full tax impact of the award, rather than calculating the difference between the tax on the lump sum award and the tax that would have been imposed on the stream of payments for which compensation was being given.

EMOTIONAL DISTRESS DAMAGES

DSM-IV

Disclaimer: I am not a therapist and recite the following information absorbed from working with those who are expert in the field. What follows here may not be technically stated in terms that a professional would accept and it could be either out of

date or misstated. This is an attempt to explain what mental health professionals around bring to the litigation party.

The Diagnostic & Statistical Manual IV (DSM-IV) is a standard reference tool for mental health professionals. Although therapists differ may significantly over causative factors, treatment and interpretation of patient reports of their problems, DSM-IV serves the important function of classifying and organizing the many "natural shocks that flesh is heir to." The conditions it describes and the symptoms it identifies for each have been statistically validated, according to the APA. DSM-IV teaches that human mental illness falls into distinct, definable categories, even if those who treat it differ over cause and treatment. For litigation, it validates as objectively as can be done the collection of symptoms that are reported as a defined mental condition, identifies the characteristics of the illness and provides some predictive information about the condition. Not coincidently, the diagnostic categories are relied upon by the insurance industry as a tool for establishing some limits on length and cost treatment that will be compensated.

A common dispute among mental health experts is whether to diagnose an individual's response to a termination as "adjustment disorder" or major depression. Adjustment disorder is a common response to a loss like termination of employment, with symptoms lasting two or three months that have been experienced by any juror who has lost a close family member, marriage or job. But major depression, something much more devastating than "the blues," can be an acute condition of exquisite mental pain equivalent to feeling the most intense emotional pain you have experienced in your life—and feeling it at that level, every day, for most of the day, for a year. This is a typical dispute among mental health experts, with different experts evaluating the reported symptoms and actions of the patient differently.

DSM-IV also teaches that there are mental illnesses and there are personality disorders, which are described in similar terms, but which differ in ways that matter for purposes of litigation. A mental illness is a condition, as the name suggests, which has a cause or triggering event, which may be susceptible of improvement when treated, and which inflicts specified harms while it is at work. A personality disorder, on the other hand, is something that is a collection of characteristics of the individual. It is not caused by some outside source (although it may be more evident and difficult to deal with depending on the individual's circumstances), but it can wreak havoc in an individual's life. As it does for mental illnesses, DSM-IV describes what to expect will be experienced by someone with the personality disorder and what a person with the disorder will do in interacting with the world.

For litigation, what is important here is first that someone with a personality disorder cannot blame someone else (the former employer) for it. You're not a bad person, it's who you are, but it's not what someone else did that is the problem, either. The symptoms you have, the difficulties you encounter in life, by definition cannot be the fault of the employer or any legal wrong that has been done to you.

Second, the personality disorder diagnosis will say important things to the jury about how you interact with others, things that may be harmful to your lawsuit. You may be prone to exaggerate or have a fantasy life that makes it difficult from you to distinguish between what really happened and what you wish happened. You may be someone who is likely to engage in specified forms of antisocial behavior—perhaps the very behavior that the employer is presenting as a legitimate non-discriminatory reason for your firing, or that would explain innocently why you have difficulty in getting along with the boss who you claim is racist or sexist.

There is a nasty surprise for plaintiff's counsel buried in DSM-IV, a special diagnosis called "malingering." It means just what it sounds like it means—the plaintiff faking it to get money. It is not a mental illness or disorder. There will be a basis for the mental health expert to describe your client as showing signs of this if s/he is in a lawsuit and was referred for treatment by the lawyer.

These are the kinds of dangers plaintiffs face in making claims of emotional distress if the case gets into an expert witness duel. The door is open for the defense expert to take a damage issue and use it as a tool to help the defense on the merits. It invites the jury to begin thinking about what is wrong with the plaintiff, rather than what is wrong with the employer's treatment of the plaintiff.

"Garden Variety" Emotional Distress Theory Rejected

Doe v. Oberweis Dairy, 456 F.3d 704 (7th Cir. 2006), a sexual harassment which concluded that State law age-of-consent statutes were applicable to cases involving minor victims, also concluded that plaintiffs in sexual harassment cases effectively waive their psychotherapist-patient privilege by asserting such claims, even if the plaintiff disclaims reliance on expert psychiatric testimony. The court also observed that under Rule 35, the defendant would be entitled to an independent medical examination, without noting the discretion that rule grants to the District Court to decide if such an examination will be permitted. The court did add that the judge can seal the records and limit their use at trial to the extent that plaintiff's privacy interest outweighs the probative value of the information. On the other hand, the court observed, where the plaintiff has participated in family or group therapy, in which persons other than the plaintiff participate, those other persons are entitled to insist on exclusion of portions of the records that "refer exclusively to them" and to intervene in a case where such records might be disclosed to protect their substantial privacy interest.

Duplicative Damages

The court in *Moysis v. DTG Datanet,* 278 F.3d 819 (8th Cir. 2002) allowed recovery of emotional distress damages for discriminatory discharge and also a separate recovery for emotional distress damages for intentional infliction of emotional distress arising from the severe depression resulting from the manner of termination. This is logical

where there is a distinct consequence of this kind, but breaking down different aspects of a series of events in this way will not always be possible.

Past Emotional Distress and Future Emotional Distress

One strategic approach to emphasize emotional distress damage lies in treating it in the same distinct way that back pay and front pay are treated. This was done in *Thomas v. Texas Dept. of Criminal Justice,* 297 F.3d 361 (5th Cir. 2002), although as a result of unexpected retrials, the result was a reduction of future emotional distress damages, discussed below. The approach could get the jury thinking about both pain that has already occurred and pain that will continue into the future, and by so treating them, encourage a larger award. However, where heavy reliance is placed on a psychological diagnosis such as major depression, which tends to resolve in a defined period of time, this may not be a helpful approach.

Excessive or Supported Damages

First Circuit

In an ADA hostile work environment case, the court sustained an award of $200,000 in compensatory damages based on the plaintiff's anxiety, severe depression, and worsening of his already fragile physical condition resulting from the humiliation and harassment from his supervisors. The award was supported by the corroborating testimony of the plaintiff's treating neurologist and psychiatrist, which plainly impressed the court. It cited the right to recover for "emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life." The court cited a similar award in another ADA case, *Hogan v. Bangor & Aroostook R.R. Co.,* 61 F.3d 1034 (1st Cir. 1995).

McDonough v. City of Quincy, 452 F.3d 8 (1st Cir. 2006) upheld an award of $300,000 in emotional distress damages to McDonough, a 30-year veteran and head of the drug unit, after he was retaliated against for assisting another employee with her sexual harassment claim. McDonough had previously given management a page of allegations concerning the sexual harassment. The City took no action, and he later provided her with the document, which the other employee used at the hearing on her claim. The City subsequently reassigned him, reducing his pay and essentially stripped him of his supervisory duties. When he complained, he was placed on leave and relieved of his weapon.

The testimony supporting his claim for emotional distress was that he had loved his job and was humiliated as a result of his termination; his relationships with family members suffered as a result—he made his wife and sisters cry on occasion; and he could no longer see his grandchildren because he became so easily enraged. This was found sufficient to support a $300,000 in emotional distress damages.

Second Circuit

Patrolmen's Benevolent Ass'n. of City of New York v. City of New York, 310 F.3d 43 (2nd Cir. 2002) asserted in *dicta* that an individual plaintiff's testimony alone is "generally insufficient" to establish a recovery for emotional distress. Below are a host of cases, including Second Circuit decisions citing New York law, holding that the plaintiff's testimony alone can be sufficient. While courts prefer to see physical manifestations, corroborative testimony or medical evidence that the *PBA* court sought—and found—in the record, affirming awards of $50,000 each to a group of officers who were discriminatorily transferred, the court's *dicta* is unreliable. The exception has virtually swallowed the rule.

Cross v. New York City Transit Auth., 417 F.3d 241 (2d Cir. 2005) upheld awards of $50,000 in emotional distress damages to two plaintiffs under their pendant State law claims, finding they did not deviate substantially from verdicts in similar cases—inn part because, as the court had noted before, there is little consistency in the New York decisions reviewing such awards. The lack of medical treatment or concrete evidence of duration, extent and consequences was not an obstacle because one plaintiff testified to humiliation, shame over the demotion and fear of discussing it with his wife, losing interest in family activities, additional blood pressure checks, and in the other, to anger, depression, snapping at family members and being in a state of anxiety due to his sense of powerlessness. The court relied on similar conclusions in *Meachum v. Knolls Atomic Power Lab.,* 381 F.3d 56 (2d Cir. 2004), where an award of $125,000 was upheld because it also did not deviate substantially from New York State decisions upholding emotional distress damages, and an award of $100,000 was upheld against a complaint that the claim was for "garden variety" emotional distress unsupported by medical evidence or other corroboration in *Patterson v. Balsamico,* 440 F.3d 104 (2d Cir. 2006).

Third Circuit

Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565 (3rd Cir. 2002) upheld a $1.55 million emotional distress verdict, although the Title VII damage caps resulted in a recovery of just $300,000 of that verdict. The Plaintiff in that case suffered from MS, a condition that can be exacerbated by stress, although the court did not emphasize this. The court required a showing from the Plaintiff of a reasonable probability that emotional distress resulting from the violation.

Without comparing the verdict to those reached in other cases in the Circuit, the court examined and relied on the evidence presented by the Plaintiff and corroboration by her family and co-workers. The showing focused on the impact of Plaintiff's work problems on her life, showing pain and suffering resulting from her early employment problems, and noting in particular the testimony that she went from being happy and confident to being withdrawn and indecisive.

Another $1.5 million emotional distress verdict in a refusal to promote case was reduced to $375,000 and upheld in the Court of Appeals in *Evans v. Port Authority of New York And New Jersey,* 273 F.3d 346 (3rd Cir. 2001). The Plaintiff testified to having

chest pains and elevated blood pressure, to being moody (a "grouch"); that the discrimination affected her relationships with her children; that she began to question her own ability; and that she had been in "bad shape" and was still angry. The court found corroboration not in testimony of friends and family, but in the callous and arrogant attitude of defendant's witnesses during the trial. The court found that these provided the jury with a "glimpse" of what the Plaintiff had been subjected to that caused the distress, and that the jury's reaction to that was not passion or prejudice.

Ridley v. Costco Wholesale Corp., 2007 WL 328852 (3rd Cir. Feb. 5, 2007)(unpublished) upheld a $200,000 jury verdict for emotional distress despite the jury's finding that there was no constructive discharge; other retaliatory actions were sufficient to satisfy the *Burlington Northern* standard of materially adverse actions which could dissuade a reasonable worker from making or supporting a charge of discrimination. Defendant contended that the claim for emotional distress was associated with the demotion that plaintiff claimed was a constructive discharge, but the award was upheld because the court concluded that the emotional distress evidence concerned not only the demotion, but also the other actions defendant took. The court quoted testimony that elaborated on the emotional distress and referred to some of those other actions. The court presumed, without discussing it, that the jury awarded the emotional distress strictly based on the acts it found actionable and only fro the distress proximately caused by those acts. It upheld the amount of the award, citing the employee's feelings of betrayal, the financial hardship, disrupted sleep, weight loss, social withdrawal, changed family relationships and loss of self-esteem.

Fourth Circuit

The lack of corroboration and detail was fatal to the employee's emotional distress recovery in *Dennis v. Columbia Colleton Medical Center, Inc.,* 290 F.3d 639 (4th Cir. 2002). There, the employee testified that she was devastated and humiliated, that she had relied significantly on the expected promotion, and after that she had been able to spend less time with her children. Acknowledging that uncorroborated testimony could be sufficient, the court insisted that the testimony be scrupulously scrutinized; that conclusory statements were insufficient; and that the plaintiff must show a causal connection between the discrimination and the distress. It found that there was no demonstrable testimony of a physical symptom or doctor's diagnosis, and that much of the distress claimed was not directly attributable to the discrimination itself.

The court in *Knussman v. Maryland,* 272 F.3d 625 (4th Cir. 2001) reduced a $375,000 damage award for emotional distress resulting from a constitutional violation based on a perverse doctrine holding that emotional distress resulting from litigation, as opposed to the underlying constitutional wrong, is not compensable. The court deconstructed the testimony on emotional distress and determined that the damage claimed resulted in substantial part from the litigation process itself. In support of its conclusion, the court cited *Stoleson v. United States,* 708 F.2d 1217 (7th Cir. 1983), which observed that it would be "strange" for a defendant exercising its constitutional right to defend its

action to be charged for aggravating the damages merely because it defended itself. *As opposed to the plaintiff, who must endure the emotional distress inherent in litigation or give up her own constitutional right – even when the defendant, not the plaintiff, is proven wrong?* As long as the law clings to this one-sided proposition, this trap for the unwary remains.

DePaoli v. Vacation Sales Associates, L.L.C., 489 F.3d 615 (4th Cir. June 12, 2007) dealt with a situation in which a jury's potentially excessive award was reduced by operation of the Title VII caps on damages. The jury had awarded $2.5 million in compensatory damages and $5 million in punitive damages. The court determined that it needed only consider whether the award, as reduced by the District Court to reflect the caps, was excessive. The Court of Appeals found that after the District Court's reduction of the emotional distress award to $200,000, the award was supported by the evidence of emotional distress. In that case, the plaintiff was denied multiple promotions, allegedly based on her sex, and terminated after she complained to the EEOC.

Fifth Circuit

In a challenge to the amount awarded as emotional distress damages, the court in *Thomas v. Texas Dept. of Criminal Justice,* 297 F.3d 361 (5th Cir. 2002) surveyed the past cases in the Circuit to compare them to the case before it in deciding if a recovery was so excessive that the court would require a remitter. The rhetoric in these cases, using phrases like "monstrously excessive" and emphasizing the wide discretion afforded the jury's verdict, often belies the actual approach taken by the court. The court noted that it had upheld a number of $100,000 verdicts, and that it had adopted an approach that applied a 50% multiplier to verdicts upheld in past cases. It reviewed the evidence of emotional distress presented in those cases as compared to that presented in the case at bar. Ultimately, the *Thomas* court noted that the emotional distress damages had been broken down between past emotional distress and future emotional distress and that only $30,000 was awarded for past emotional distress, which was described by Plaintiff and his corroborating witnesses as more serious than the continuing emotional distress. As a result, the court reduced the future emotional distress damage award to $50,000.

Some of the past cases canvassed were:

- *Forsyth v. City of Dallas,* 91 F.3d 769 (5th Cir. 1996)(evidence of depression, weight loss, intestinal troubles and marital problems were sufficient to support a $100,000 recovery).
- *Rizzo v. Children's World Learning Centers, Inc.*, 173 F.3d 254 (5th Cir. 1999) ($100,000 recovery permitted in an ADA case).
- *Williams v. Trader Publ. Co.,* 218 F.3d 481 (5th Cir. 2000), where the court expressly held that the testimony of the Plaintiff alone could be sufficient to support a substantial emotional distress recovery, and severe emotional distress, sleep loss, severe weight loss, and starting smoking were cited as evidence.

- *Giles v. General Electric Co.*, 245 F.3d 474 (5th Cir. 2001), where sleep troubles, headaches, marital difficulties, loss of prestige and social connections, and co-worker testimony that the plaintiff was depressed, despondent, down and "absolutely utterly discouraged," supported a $150,000 award, reducing the $300,000 allowed at trial (based on Title VII caps). The court insisted on specificity about the injury and more than vague allegations to support it.

- *Salinas v. O'Neill,* 286 F.3d 827 (5th Cir. 2002)(court remitted $300,000 recovery to $150,000 where plaintiff and wife testified that he was paranoid, used excessive sick leave, made doctor visits, and the emotional toll had a significant impact on his relationship with his wife and son)

- *Flowers v. S. Reg'l Physicians Services, Inc.,* 247 F.3d 229 (5th Cir. 2001) vacated a $100,000 recovery where the plaintiff's testimony was uncorroborated and he showed no symptoms during the period of harassment, but only later when employment was terminated.

- *Vadie v. Mississippi State,* 208 F.3d 375 (5th Cir. 2000)(uncorroborated testimony that plaintiff was "destroyed, totally ruined, totally ill" and went to too many doctors and took too many pills led court to remit $300,000 emotional distress recovery to $10,000)

- *Patterson v. P.H.P. Healthcare Corp.,* 90 F.3d 927 (5th Cir. 1996)(court reduced emotional distress award from $150,000 to $40,000 where uncorroborated testimony of Plaintiff was to feelings of frustration, low self-esteem, paranoia, and that he was emotionally scarred)

Yet the same court that so carefully canvassed other decisions upheld an award of $300,000 in compensatory damages in a sexual harassment case with hardly any discussion and no similar analysis in *Green v. Administrators of the Tulane Educational Fund,* 284 F.33d 642 (5th Cir. 2002).

EEOC v. WC&M Enterprises, Inc., --- F.3d ---, 2007 WL 2285320 (5th Cir. Aug. 10, 2007) held that the Texas law limitation on recovery of emotional distress damages unless the mental anguish was "so severe it disrupted the plaintiff's daily routine" could not be applied to a case under Title VII, where the decision must be based on federal law. To be entitled to emotional distress damages, said the court, a plaintiff must show a discernable injury to the victim's mental state and submit evidence regarding the nature and extent of the alleged harm. The plaintiff's testimony that the alleged harassment caused problems with his family life that led him repeatedly to seek counseling, loss of sleep, weight loss of 30 pounds and gastrointestinal problems were sufficient to require that the issue be submitted to the jury.

DeCorte v. Jordan, --- F.3d ---, 2007 WL 2319107 (5th Cir. 2007) notes that §1981(a) permits recovery of compensatory damages not just for emotional distress, but for "future

pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses. The awards in *DeCorte* ranged between $250 and $13,500 individually for the 35 plaintiffs. The court held that specific individualized proof was required, including how each individual was personally affected by the discriminatory conduct and the nature and extent of the harm. The court recognized that "in many cases, a claimant's testimony alone may not be sufficient to support anything more than a nominal damage award," but that "corroborating testimony and medical evidence is not required in every case..." The complaints to which the Plaintiffs testified included stress, sleeplessness, strained relationships with family members, loss of appetite, weight loss or gain, loss of self-confidence, and worsening physical problems. This, along with the testimony of a psychologist that such symptoms were common to people who lose jobs was sufficient to support the awards, which were lower in amount that other amounts previously upheld in the Circuit.

Sixth Circuit

A $250,000 emotional damage award in an ADA case was upheld in *Moorer v. Baptist Memorial Health Care System,* 398 F.3d 469 (6th Cir. 2005) where an employee sent to alcohol rehabilitation with a threat of termination if he did not and a promise that his job would be waiting afterwards was fired upon his return. The award came after a bench trial, and was supported by the plaintiff's testimony that termination was devastating and made him depressed; his wife's testimony that he had depression, isolated himself and suffered from insomnia; and his psychologist's opinion that he was devastated, had feelings of betrayal, anger, depression, loss of self-esteem, increased anxiety and that his marriage suffered. The District Court was also impressed by the fact that his alcoholism became common knowledge in the small community in which he lived. This was "ample evidence" to support the award, concluded the Court of Appeals, and the award also represented less than half of the economic damages.

Bailey v. USF Holland, Inc., 526 F.3d 880, 888 (6th Cir. 2008) upheld emotional distress awards of $350,000 each to two employees who were victims of racial harassment rising to the level of a hostile work environment where management did nothing when they complained.

Seventh Circuit

Although the Seventh Circuit has often conducted a review of past cases to decide whether an award of emotional distress damages was excessive, it articulates a three-part test: whether the award is "monstrously excessive," whether there is a rational connection between the award and the evidence and whether the award is roughly comparable to awards made in similar cases. After articulating this standard in *Worth v. Tyer,* 276 F.3d 249 (7th Cir. 2001), the court had no difficulty in upholding awards of $20,000 and $2,500 based on evidence that the sexual harassment in the case caused lack

of sleep, humiliation, distress and lost wages. These amounts were found to be neither monstrous nor excessive.

Eighth Circuit

In *Mathieu v. Gopher News Co.,* 273 F.3d 769 (8th Cir. 2001), an award of $165,000 was upheld on the testimony of the plaintiff alone, who lost a job of 34 years, was forced to reduce his standard of living, and who had become depressed (without a medical diagnosis). In *Oden v. Oktibbeha County, Miss.,* 246 F.3d 458 (5th Cir. 2001), the court conducted a cursory review of the evidence in a case where $20,000 was awarded, and found the evidence sufficient where the plaintiff testified that he experienced stress, sleeplessness, and feelings of betrayal and shame.

Conduct giving rise to liability can be so outrageous as to remove all restraints on emotional distress recoveries. *Rowe v. Hussmann Corp.,* 381 F.3d 775 (8th Cir. 2004) upheld an award of $500,000 for a four year campaign of persistent verbal and physical sexual harassment, accompanied by credible threats of rape and murder and a rock through the windshield of plaintiff's car that likely was thrown by the harasser. In that case, the plaintiff testified to being in constant fear, to experiencing panic attacks accompanied by nausea, headaches, sweating and hyperventilation. She moved her home, obtained a gun card, purchased mace and took her lunch and coffee breaks in the restroom to avoid the harasser. She testified that her relationship with her children was affected, and her treating psychologist testified that she suffered from an anxiety disorder and that her prognosis was poor. Because there was liability under State law, the Title VII caps did not come into play.

An award of $266,750 in emotional distress damages was upheld in *Madison v. IBP, Inc.,* 257 F.3d 780 (8th Cir. 2001) in a race, sexual harassment and retaliation case where the employee testified to great anguish, humiliation, and feeling degraded. She frequently left her work station in tears, had severely strained relations with her husband (including multiple separations) and several friend and family witnesses corroborated her descriptions.

The importance of corroborating evidence was shown in *Warren v. Prejean,* 301 F.3d 893 (8th Cir. 2002), where an award of $150,000 for emotional distress resulting from claims for discrimination, retaliation and intentional infliction of emotional distress was upheld on the strength of the testimony of the plaintiff, her aunt and her treating counselor. It was important to the court that the testimony showed the relationship between the distress and the time of the wrongs complained of and the impact those events had on the plaintiff physically and emotionally.

Tureaud v. Grambling State Univ., 2008 WL 4411438 (5th Cir. 2008)(unpublished) allowed a recovery of $140,000 in compensatory damages based on the plaintiff's testimony that his discharge was emotionally embarrassing and a painful experience. He testified that he was deeply hurt because he had never been fired before, he became the subject of

gossip in his tightly-knit law enforcement community, he was repeatedly questioned about it by peers and subsequent employers and was jobless. He testified to gaining "quite a bit" of weight and being stressed and down.

In *Heaton v. The Weitz Company,* 534 F.3d 882, 891-92 (8th Cir. 2008), the court held that emotional distress may be sufficiently proven by testimony from the plaintiff where specific facts concerning the nature of the emotional distress are provided. Where the employee testified to feeling inadequate, losing his sense of identity and reputation among his peers, and took anti depressants with unpleasant side effects, this was sufficient to support a $137,000 emotional distress recovery.

There appears to be a less-exacting standard for more modest awards of emotional distress. In *Brown v. Cox,* 286 F.3d 1040 (8th Cir. 2002) the court upheld a $50,000 award where the plaintiff and his daughter testified about the embarrassment and demoralization he suffered as a result of a the challenged reassignment. Citing similar amounts permitted with similar evidence, the court allowed the award, *Webnar v. Titan Distributing, Inc.,* 267 F.3d 828 (8th Cir. 2001)($25,000 where plaintiff told his termination was because of his disability and he said he was scared, frustrated and felt empty); *Farzier v. Iowa Beef Processors, Inc.,* 200 F.3d 1190 (8th Cir. 2000)(plaintiff felt empty and lost, dignity and self-esteem were taken away and ex-wife called him a "broken man").

Similarly, in *Kucia v. Southeast Arkansas Community Action Corp.,* 284 F.3d 944, (8th Cir. 2002) the court upheld a $50,000 award on strictly on the Plaintiff's testimony that "It's hard for me to hold my head up…I'm on edge, I can't be pleasant." While she averted to marital problems and felt she should not be left alone with children, her deposition testimony had been that what she suffered was "just personal insult, I guess."

This is not to say there is no review at all. The court in *Forshee v. Waterloo Indistries, Inc.,* 178 F.3d 527 (8th Cir. 1999) disallowed a $9,000 award where the plaintiff went home from being fired and cried all afternoon, then found a new job, albeit at lower pay, almost immediately.

An award of $75,000 was upheld in *Foster v. Time Warner Entertainment Company, L.P.,* 250 F.3d 1189 (8th Cir. 2001) over the employer's objection that there was no physical injury, no medical treatment and the plaintiff had no difficulty finding a new job. The court looked to the plaintiff's husband's testimony that she became withdrawn, could not eat, and experienced back pain, muscle stress and stomach problems, and her own testimony that she was devastated by the false accusation, that she withdrew and that she feared that she would be unable to find a new job.

Ninth Circuit

The Ninth Circuit appears to apply a more jury-deferential standard for reviewing emotional distress damage claims, as evidenced by its willingness to uphold a $1 million emotional distress damage award in a single employee case of retaliation for

complaining of sex discrimination, *Passantino v. Johnson & Johnson Consumer Products, Inc.,* 212 F.2d 493 (9th Cir. 2000). In *Zhang v. American Gem Seafoods, Inc.,* 339 F.3d 1020 (9th Cir. 2003), the court upheld what it concluded was a $100,000 award where the employee's testimony focused on the humiliation of being having what he perceived as accusations of wrongdoing circulated in his hometown in China, which hurt his dignity and reputation. The court did not show concern for a lack of evidence of objective symptoms, a lack of corroboration by others, and the lack of medical or psychological evidence; indeed, the court noted that unlike other Circuits, it does not require objective evidence to support an emotional distress award.

Tenth Circuit

Nieto v. Kapoor, 268 F.3d 1208 (10th Cir. 2001) affirmed an award of $1,875,000 to a group of six nurses for deprivation by a doctor of their constitutional rights. However, the doctor did not cite the record of case law on appeal, and the court was satisfied with the evidence and unidentified case law relied upon by the plaintiffs, so there is little elaboration on the basis for affirming. The court upheld an award of $50,000 in emotional distress based on testimony of the plaintiff's psychiatrist that she suffered from major depressive disorder, causing her to lose sleep and have suicidal thoughts in *Praseuth v. Rubbermaid, Inc.,* 406 F.3d 1245 (10th Cir. 2005).

Eleventh Circuit

In *Bogle v. McClure,* 332 F.3d 1347 (11th Cir. 2003), the court affirmed awards of $500,000 in emotional distress damages to each of seven Caucasian librarians transferred from their supervisory positions to "dead-end, non-managerial jobs" because of their race, in the face of warnings about the potential legal consequences. Without individualized treatment, the court cited their testimony of having destroyed careers, which caused some to resign, made them upset, embarrassed, humiliated and ashamed. Some became depressed and one even became suicidal. With no medical evidence of mental or physical harm, the court nevertheless sustained the awards, which had been remitted from $1 million each, finding "no reason to substitute our judgment for that of the jury or the district court…"

D.C. Circuit

A hostile work environment that included lewd comments and gestures as well as threats and intimidation led to a jury verdict of $482,000 in compensatory damages, which was reduced to the $300,000 Title VII cap in *Peyton v. DiMario,* 287 F.3d 1121 (D.C. Cir. 2002). Moreover, the court expressed a reluctance to engage in comparing one case to another because of "the unique circumstances of each case." The court was satisfied from the testimony of the plaintiff and her co-workers that there was enough evidence that the harassment had a material effect on her ability to perform and her quality of life in the workplace. It was satisfied that the jury concluded that she was

distressed, fearful in her work environment, and experienced "feelings of depression and sadness typical of plaintiffs in Title VII cases."

PUNITIVE DAMAGES

Kolstad v. American Dental Association, 527 U.S. 526 (1999) has substantially increased the willingness of the federal courts to permit awards of punitive damages, because it is now difficult to identify much conduct that is actionable but is not potentially a ground for punitive damages. Employers can no longer avoid punitive damages by recounting that some notice of firing or severance pay was offered or that the wrongdoer did something nice for the plaintiff at some point in the past.

*Abner v. Kansas City Southern RR Co.,*513 F.3d 154, 159-63 (5th Cir. 2008) allowed recovery of punitive damages without an award of compensatory damages. The court approached the problem as one of the federal common law of damages and agreed with the First and Third Circuits, while noting that an award of nominal compensatory damages (which had been made in the case) may be required. The court relied upon the language of §1981a, which authorized and caps punitive damage awards and the need for the incentive to compliance provided by the remedy.

Pollard v. E.I. DuPont de Nemours , Inc., 412 F.3d 657 (6th Cir. 2005) upheld a $2.5 million punitive damage award for intentional infliction of emotional distress under Tennessee law for a year and a half of sexual harassment of a woman in a male-dominated factory setting, where her direct supervisor either participated or turned a blind eye, and managers at higher levels took no actions to stop the harassment when they learned of it.

Hemmings v. Tidyman's Inc., 285 F.3d 1174 (9th Cir. 2002) reaffirmed that intentional discrimination, absent a "novel theory of discrimination," was sufficient to impose punitive damages.

McDonough v. City of Quincy, 452 F.3d 8 (1st Cir. 2006) found that it was error to refuse to submit the punitive damage claim to the jury where there was sufficient evidence of intentional retaliation and high-ranking officials of the police department responsible for personnel decisions were the retaliating officials. Proof of a published anti-discrimination policy and anti-discrimination training was relied on by the court as evidence that the officials must have been aware that retaliation was unlawful. The court noted that the situations in which punitive damages will not be permitted identified in *Kolstad,* were not present. These situations include employers who believe they may discriminate, novel theories of discrimination and belief that a statutory exception applies.

The court also considered the problem of whether remand would be for punitive damages only, or whether the emotional distress claim was also to be retried. Citing *Hardin v. Caterpillar, Inc.,* 227 F.3d 268 (5th Cir. 2000), the court recognized that where

emotional distress damages were substantial and the evidence of physical symptoms was limited, the emotional distress damage award may reflect a jury's assessment of the reprehensibility of the defendant's conduct. That question was left to the District Court to determine on remand, allowing plaintiff to accept the emotional distress award made and waive punitive damages if it was determined both were to be retried.

Hardman v. Autozone, Inc., 2007 WL 182535 (10th Cir. Jan. 25, 2007)(unpublished) upheld the District Court's grant of a new trial because the jury instruction on punitive damages had not properly addressed the employer's "good faith" defense under *Kolstad.* The lower court's decision to order retrial of the full case, not just punitive damages, was sustained on appeal.

The Tenth Circuit first rejected the plaintiff's argument that the policies presented by the employer were insufficient under *Kolstad* because they did not specifically ban racial harassment and retaliation. The policy prohibited racial discrimination "in all aspects of employment," prohibited harassment generally and stated that "any form of retaliation" was prohibited. The plaintiff also contended that the employer's failure to take corrective action and its "sham" investigation called for punitive damages. The court concluded that the employer had promptly investigated the complaint, including by having human resources quickly take written statements, firing the perpetrator of the racial harassment, re-administering diversity training and requiring all employees to re-sign the company policy.

EEOC v. Harris Farms, 2008 WL 1776532 (9th Cir. 2008)(unpublished) allowed recovery of punitive damages where the employee was criticized for raising past harassment in a discrimination complaint, was discouraged from making the complaint, was told that such complaints cost the company time and money and was recommended for suspension for making the complaint.

Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565 (3rd Cir. 2002) found the evidence sufficient to satisfy *Kolstad.* The showing that the defendant acted with malice or reckless indifference and that it discriminated in the face of a perceived risk that it was violating federal law was satisfied by proof that: (1) the employer was aware of plaintiff's disability; (2) the employee advised the employer of the limitations imposed by the disability; (3) the employee requested an accommodation; (4) the employer refused to act; and (5) the employer was aware of the employee's federal disabilities rights, in a general way.

This points up the importance of asking the decision-makers the ultimate no-win question—whether they knew of the federal prohibitions on discrimination implicated in the case, *e.g., Bruso v. United Airlines, Inc.,* 239 F.3d 848 (7th Cir. 2001); *Romano v. U-Haul International,* 233 F.3d 655 (1st Cir. 2000); *Lowery v. Circuit City Stores, Inc.,* 206 F.3d 431 (4th Cir. 2000); *EEOC v, Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999). Denials will be either not credible or support an argument that the employer disregards the law, or both. *See Parker v. Sony Pictures Entertainment, Inc.*, 260 F.3d 100 (2nd Cir. 2001)(finding

employer's claimed good faith belief that plaintiff was unable to perform the job even with a reasonable accommodation was no defense to liability, and "at best" a defense to punitive damages). In *Hemmings v. Tidyman's Inc.,* 285 F.3d 1174 (9th Cir. 2002), the court considered, for instance, evidence that the employer hired additional women because of concerns about potential discrimination liability and that the employer excluded the complaining employees from decision-making and took retaliatory actions after being accused of discrimination.

In *Heaton v. The Weitz Company,* 534 F.3d 882, 890 (8th Cir. 2008), awareness of the risk that the employer was violating discrimination laws could inferred from the manager's twenty years in human resources work and his assignment to investigate discrimination complaints. Training in equal employment opportunity law is also proof of such awareness.

For intentional discrimination to give rise to punitive damages, the employer must at a minimum act in the face of a perceived risk that its actions violate federal law, and actions by a managerial agent contrary to the employer's good faith efforts to comply with the law will not be sufficient. *EEOC v. Federal Express Corp.,*513 F.3d 360, 371-72 (4th Cir. 2008) In the Fourth Circuit, the court examines the perceived risk of a violation; whether the decision-maker is a principal or manager; whether the decision-maker is an agent acting within the scope of his authority; and whether there has simply been a failure to follow good faith efforts. Punitive damage liability could be imposed in a disability discrimination case where the manager believed that the accommodation was sufficient because it was shown that the manager was aware of the company's ADA compliance policy; had responsibility for all personnel matters at the facility;. was aware of the deaf employee; employees he supervised denied several requests for reasonable accommodation; and the manager denied requests for training in reasonable accommodation from one of the subordinates. *Id.,* 373.

The requirement of awareness of illegality was satisfied in *Goldsmith v. Bagby Elevator Co.,* 513 F.3d 1261, 1281-82 (11th Cir. 2008) because the employer admitted anticipating the possibility that the complaint could lead to litigation. The actions included telling an employee to tolerate conduct despite knowing it was illegal and failing to act on threats against employees for making similar complaints, use of racial slurs and inclusion of the person complained against in making a decision involving the employee. This also established that the stated policy against discrimination was "totally ineffective" and did not represent a good faith attempt to comply with the law.

In a harassment case, the problem of imputed or vicarious liability for punitive damages is presented. *Anderson v. G.D.C, Inc.,* 281 F.3d 452 (4th Cir. 2002) found sufficient evidence to justify sending punitive damages to a jury. The employee whose conduct was at issue was plaintiff's supervisor, and thereby presumptively a manager within the scope of his authority, even if sexual harassment was not expressly authorized. His reckless disregard could be found in his admission that he had seen an EEOC Poster on harassment, or simply in the rank offensiveness of the harassment or

his high-handed responses to plaintiff's complaints ("Get used to it."). The employer failed to show good faith efforts to comply with Title VII in that it had no policy and did no training—and the EEOC Poster was not sufficient standing alone.

In *Zimmermann v. Associates First Capital Corp.,* 251 F.3d 376 (2nd Cir. 2001), the court found sufficient evidence that the defendant knew of the requirements of Title VII as a result of attending training in "equal opportunity," and noted that some courts had concluded that perhaps all managers are today chargeable with knowledge of Title VII's clear requirements, citing *DiMarco-Zappa v. Cabanillas,* 238 F.3d 25 (1st Cir. 2001) and *Molnar v. Booth,* 229 F.3d 593 (7th Cir. 2000).

Chalfant v. Titan Distribution, Inc., --- F.3d ---, 2007 WL 136324 (8th Cir. Jan. 22, 2007) found the required awareness of federal prohibition on disability discrimination through both testimony of managers that they knew disability discrimination was illegal and because the company had been a defendant in two other disability discrimination cases appealed to that Court of Appeals. Awareness of illegality was also found in the unexplained conversion of a "passing" mark on a physical examination to a "failing" mark and in the unwillingness of any manager to step forward and claim responsibility for the disputed decision. An award of $100,000 in punitive damages was upheld. *Accord, Juarez v. ACS Government Solutions Group, Inc.,* 314 F.3d 1243 (10th Cir. 2003)(awareness of federal law could be inferred from the fact of supervisory EEO training and guilt was corroborated by attempt to cover up).

Another approach to defending against punitive damage awards is suggested by the Seventh Circuit's *en banc* decision in *E.E.O.C. v. Indiana Bell Telephone Co.,* 256 F.3d 516 (7th Cir. 2001). There, the court held that the employer, who it said could not defend a sexual harassment case by showing the restrictions on its power to discipline resulting from a collective bargaining agreement, *could* present that explanation as part of a defense against punitive damages, to show that it did not endorse the wrongdoing, but merely took inadequate steps because of labor relations considerations. The court emphasized that while punitive damages may be available for intentional discrimination, they are not mandated, that employers should be permitted to explain their actions and that it is within the discretion of a jury to decline to award them. In commenting on what Judge Easterbrook characterized as the "general thoughtlessness" of defendant's actions, he suggested that this might be something that falls short of the "reckless disregard' required for punitive damage liability.

In *Le v. University of Pennsylvania,* 321 F.3d 403 (3d Cir. 2003), punitive damages were upheld because of an unconventional justification for selecting a substitute supervisor for the employee who complained of discrimination, management's cursory treatment of the employee's rebuttal to charges of poor performance and the administration's failure to counsel his supervisors about discrimination and retaliation when investigating the original complaint.

But in *Webner v. Titan Distribution, Inc.,* 267 F.3d 828 (8th Cir.2001), the court allowed an employer to escape punitive damages where the stated reason for termination was the employee's physical condition, which the court found sufficient to impose liability under the ADA. The court's explanation was that the employer's actions were consistent with an employer acting to protect itself from possible sporadic absences and potential for reinjury because it genuinely believed the employee was unable to do other than light duty work.

Along the same lines, the court in *Praseuth v. Rubbermaid, Inc.,* 406 F.3d 1245 (10th Cir. 2005) upheld dismissal of the punitive damage claim in a disability discrimination case in which the court concluded that liability was supported because there was some evidence that the plaintiff, who was let go because management believed that she could not work some of the jobs in the hourly work rotation due to her disability, *could have* worked them. It is evident that the court viewed the evidence of liability as tenuous and upheld rejection of the punitive damage claim on that basis.

Harsco Corp. v. Renner, 475 F.3d 1179 (10th Cir. Jan. 31, 2007) upheld the District Court's action vacating punitive damages, citing the principle that a showing that the defendant acted in the face of a perceived risk that its actions would violate federal law as a "more demanding standard than that required for ordinary liability." It agreed with the District Court that under *Kolstad,* it was necessary to show that the company, not just its managerial employees, failed to make good faith efforts to comply with Title VII. The court cited the employer's comprehensive policies and training procedures and noted that the only evidence that the supervisors in this case were not sufficiently trained was the actions on which liability was based. "If failure of supervisors to comply with company policy were sufficient evidence to prove the lack of a good-faith effort to train, the *Kolstad* defense would be effectively eliminated." The court did not consider plaintiff's argument that the good-faith defense did not apply where liability was based on actions of managerial level employees, as recognized in *Deters v. Equifax Credit Information Services, Inc.,* 202 F.3d 1262 (10th Cir. 2000), because the argument was not made in the District Court, in opposition to jury instructions, or in the initial brief on appeal.

Allen v. Tobacco Superstore, Inc., 475 F.3d 931 (8th Cir. Feb. 2, 2007) upheld a District Court finding of discrimination and retaliation based on an advisory jury verdict, but overturned the award of punitive damages. The District Court relied on the defendant's lack of employment policies, its failure to hire any African American managers until after employee complaints, its failure to promote plaintiff, the filing of discrimination charges, which it viewed as sufficient to notify the employer of the risk of discrimination liability, its continued practice of not posting vacancies and the EEOC finding of discrimination. The Court of Appeals relied on the fact that the plaintiff's insubordination, which not sufficient to defeat liability, was activity for which termination was the normal response for the employer. It also cited the rapid growth of the defendant's business as a reason to conclude that its conduct towards the plaintiff was the result of inadequate, rather than malicious, employment policies.

Ridley v. Costco Wholesale Corp., 2007 WL 328852 (3rd Cir. Feb. 5, 2007)(unpublished) upheld the entry of summary judgment on punitive damages despite the inadequacy of the investigation of the plaintiff's complaints and a failure to investigate subsequent complaints of retaliation. The employer's showing of good faith included policies against discrimination and harassment, an Open Door policy for reporting complaints, training of new supervisors with detailed materials for supervisors on their obligation to address discrimination issues and training of warehouse and staff managers in handling complaints of discrimination.

EEOC v. E. I. duPont de Nemours & Co., 480 F.3d 724 (5th Cir. March 1, 2007) found sufficient disputed evidence to support an award of punitive damages where a disabled employee's work was made more difficult and a supervisor said he no longer wanted to "see her crippled crooked self, going down the hall hugging the walls," which the jury was entitled to believe he said despite his denial. The jury was also entitled to disregard DuPont's good faith defense based on conclusory assertions by two of its employees. Finally, the court agreed with decisions in other circuits holding that punitive damages are recoverable in the absence of backpay or front pay. *Hennessy v. Penril Datacomm Networks, Inc.,* 64 F.3d 1344 (7th Cir. 1995); *Corti v. Storage Tech Corp.,* 304 F.3d 336 (4th Cir. 2002);. The court cited, without endorsing, decisions allowing recovery of punitive damages in the absence of any compensatory award at all: *Cush-Crawford v. Adchem Corp.,* 271 F.3d 352 (2nd Cir. 2001); *Timm v. Progressive Steel Treating, Inc.,* 137 F.3d 1008 (7th Cir. 1998).

EEOC v. Stocks, Inc., 2007 WL 1119186 (5th Cir. April 16, 2007)(unpublished) found error in the District Court's failure to submit a punitive damage claim to the jury where the EEOC showed retaliatory actions by management level employees. All of the owners of defendant knew of the complaints of sexual harassment, knew of the laws against discrimination and jointly they made the decision to limit her work shifts. The company had no anti-discrimination policy in effect. The court cited other Circuits' holdings that awareness of the anti-discrimination laws is sufficient to establish reckless indifference, *Brusco v. United Airlines, Inc.,* 239 F.3d 848 (7th Cir. 2001); *Zimmerman v. Associates First Capital Corp.,* 251 F.3d 376 (2nd Cir. 2001); *Ogden v. wax Works, Inc.,* 214 F.3d 999 (8th Cir. 2000). The court acknowledged that management did have an exculpatory explanation that would be sufficient to defeat punitive damages—that it was believed that the complaint was an attempt to extort better treatment for a fellow employee—but concluded that the jury was entitled to disbelieve this explanation from the evidence in the case.

Parker v. General Extrusions, Inc., 491 F.3d 596 (6th Cir. June 27, 2007) upheld an award of punitive damages under *Kolstad* and explained the three required elements and how they were satisfied in that case. The first element is a showing that the individuals perpetrating the discrimination acted with malice or in reckless indifference of the plaintiff's rights, or at least in the face of a risk that the actions violated federal law. In *Parker*, the actions of a managerial agent met this requirement based on the facts giving rise to liability, by taking sides against the plaintiff without any investigation and

chuckling at a sexually offensive remark about the plaintiff. This also satisfied the second element, that the common law agency requirements for punitive damages are satisfied, since a managerial agent need not be part of top management or an officer to subject the employer to punitive damage liability.

Nor was the defendant saved from punitive damages by a "good faith" showing, which generally consists of proof of an anti-discrimination policy that has been effectively publicized and enforced, in spite of proof of modifications of the policy and training sessions, because there was evidence from some individuals that they did not recall any training until after the case arose and that in their experience, the policy against harassment was not enforced, which made the issue a jury question.

Dominic v. DeVilbliss Air Power Co., 493 F.3d 968 (July 20, 2007) found the good faith requirement satisfied because the employer sponsored four investigations into plaintiff's complaints, none of which produced evidence that would have justified termination of the alleged harasser. Neutral, open-ended questions were asked and the company even hired outside specialists to review its internal investigations and hired them to conduct subsequent investigations. It attempted to prevent retaliation by giving warnings with specific examples of improper retaliation, warning the alleged harasser that she would be fired if she committed any of those acts. It interviewed co-workers to guage the success of its efforts, required that assignments be put in writing so they could be reviewed, mandated additional supervisor training and encouraged the plaintiff to report any incidents of retaliation.

Flitton v. Primary Residential Mortgage, Inc., 2007 WL 2218886 (10th Cir. Aug. 3, 2007) (unpublished) reversed the District Court's award of judgment as a matter of law against the plaintiff on punitive damages. The court relied on earlier decisions holding that a punitive damage claim should proceed where there is sufficient evidence of intentional unlawful discrimination and evidence that the employer knew the applicable legal requirements, *EEOC v. Heartway Corp.,* 466 F.3d 1156 (10th Cir. 2006); *EEOC v. Wal-Mart Stores, Inc.,* 187 F.3d 1241 (10th Cir. 1999); *McInnis v. Fairfield Cmtys., Inc.,* 458 F.3d 1129 (10th Cir. 2006); *Juarez v. ACS Government Solutions Group,* 314 F.3d 1243 (10th Cir. 2003)(evidence that supervisors were trained permitted inference that their discriminatory actions were deliberate). In *Flitton,* the CEO admitted that the employee's e-mail complaint about conduct by the CFO and the strained relationship between the plaintiff and the CFO to whom she reported motivated the decision to terminate her employment.

In *Farias v. Instructional Systems, Inc.,* 259 F.3d 91 (2d Cir. 2001), the court upheld denial of punitive damages for denial of severance pay where the employer consulted counsel and received advice that justified denial of severance pay which, although in error, was sufficient to establish that the employer did not act with reckless indifference.

Beard v. Flying J, Inc., 266 F.3d 792 (8th Cir. 2001) permitted an award of punitive damages in a hostile work environment case based on numerous incidents in which

plaintiff's breasts were touched. Where the investigating employee testified that he believed the allegations against the harasser, but the company did not discipline him, the court found the evidence sufficient to support a punitive damage award. The jury awarded $12,500 against the company under Title VII, and an additional $10,000 against the harasser on a companion count for battery, both of which were upheld.

In a case in which the plaintiff reasonably feared for her personal safety, the court upheld an award of $1 million in punitive damages in *Rowe v. Hussmann Corp.,* 381 F.3d 775 (8th Cir. 2004) because the company did nothing to address this alarming situation.

For procedural reasons, *Winarto v. Toshiba America Electronics Components, Inc.,* 274 F.3d 1276 (9th Cir. 2001) remanded the punitive damage issue, but it alerted the District Court that *Kolstad's* good faith defense to punitive damages is not a cakewalk for the defense. Noting facts already in the record suggesting that the defendant had not adequately enforced its antidiscrimination policy, it cited to *Cadena v. Pacesetter Corp.,* 224 F.3d 1203 (10th Cir. 2000) and pointed out that the employer must show (1) that it had such a policy; (2) that it made a good faith effort to educate its employees about the policy; and (3) that it made good efforts to enforce the policy. Obviously, the most critical devil in the details is the third element, which can authorize a plaintiff seeking punitive damages to conduct discovery and present evidence on other instances in which the employer has failed to detect and remedy discrimination or retaliation.

Thomas v. Alabama Home Construction, 2008 WL 819288 (11th Cir. 2008)(unpublished) found no good faith effort to comply with the discrimination laws where the employer had no policies or procedures for dealing with sexual harassment and failed to take action in the face of repeated complaints.

Madison v. IBP, Inc., 257 F.3d 780 (8th Cir. 2001) confirms that written policies and training programs will not suffice to ward off punitive damages if the employer's antidiscrimination policy is not being followed in the ordinary course of business. Multiple reports of harassment were not investigated, no record was made of counseling of employees for such problems when it had occurred, and an unsubstantiated report that an employee complaining of sexual harassment had "joined in" resulted in a finding of no harassment where physical acts were involved. On these facts, the court had no difficulty rejecting a *Kolstad* defense.

Vicarious liability for punitive damages is not imposed where the decisions of managerial agents are contrary to the employer's good faith efforts to comply with federal discrimination law obligations. A quick response to a complaint was not sufficient where the managers later retaliated against the complaining employee, using a racial epithet and requiring the employee to apologize for a confrontation that resulted from the epithet. *Heaton v. The Weitz Company,* 534 F.3d 882, 889-90 (8th Cir. 2008). A "good faith" defense to punitive damages was defeated where the manager assigned the individual against whom the complaint was made to perform the initial

investigation of the complaint and then failed to take steps to follow up personally to investigate disputed points.

EEOC v. Federal Express Corp.,513 F.3d 360, 374-75 (4th Cir. 2008) held that the jury is not required to find good faith where the sincerity of the employer or its commitment to the policy is called into question. The evidence that the commitment was lacking was provided because three higher-ups knew of the accommodations being sought and no "alarm bells" were sounded. The company's grievance system did not provide a viable defense argument because the employee was not advised of it.

In *Green v. Administrators of the Tulane Educational Fund,* 284 F.33d 642 (5th Cir. 2002), the court noted the employer's policy against discrimination and harassment and reviewed a series of actions by the defendant, concluding that it had acted in good faith, even though its actions had been insufficient to stop the harassment of which the plaintiff complained.

Similarly, the court in *Sturgull v. United Parcel Service, Inc.,* 512 F.3d 1024, 1035-36 (8th Cir. 2008) held that punitive damages were inappropriate because the company had a multi-step national protocol for responding to requests for reasonable accommodation on religious grounds and the employee in that case was not provided an accommodation due to lack of communication between local managers and the corporate decision-makers.

Kant v. Seaton Hall University, 2008 WL 2212006 (3d Cir. 2008),(unpublished), at *5-6 found that the employer satisfied the good faith standard as a matter of law because, other than showing that her own grievances were incorrectly denied, the employee did not show any substantial evidence suggesting that the University's anti-discrimination policies and council against discrimination were, as claimed, "merely pro-forma measures."

Constitutional Limitations on Punitive Damages

The court in *EEOC v. Federal Express Corp.*,513 F.3d 360, 376-79 (4th Cir. 2008) noted that the constitutionality of a punitive damage award depends on (1) the degree of reprehensibility of the conduct; (2) the disparity between the actual or potential harm and the award; and (3) the difference between the award and civil penalties authorized or imposed in similar cases. Reprehensibility is measured by (1) whether the harm of physical or economic; (2) whether there has been indifference to health or safety; (3) whether an economic harm has been inflicted on a financially vulnerable individual; (4) whether the conduct was repeated or isolated; and (5) whether the conduct was known or suspected to be illegal. Where the conduct was repeated, included a safety concern and was known to be illegal, punitive damages were appropriate. A proportion of 12.5 to 1 is permissible, especially where the recovery is below the statutory "cap," which is deemed to define a civil penalty.

In *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), the defendant's failure to object timely—that is before the jury retired—to the insufficiency of evidence to support sending punitive damages to the jury precluded making that challenge by post-trial motion. The court did consider a constitutionality attack, but had no difficulty concluding that the $2.6 million in punitive damages was proper under *BMW* standards: (1) the court deemed discrimination particularly reprehensible conduct; (2) the ration of compensatory to punitive damages was 1 to 7, well below the level that was deemed problematic; and (3) there were no applicable criminal remedies.

Similarly, the court in *Bogle v. McClure,* 332 F.3d 1347 (11th Cir. 2003) upheld punitive damage awards of $2 million each to seven supervisory librarians transferred to dead-end jobs because of their race. First, the court concluded that there was ample evidence of intentional discrimination, as defense counsel admitted that the defendants knew it was a violation of federal law to transfer people on the basis of race, and because the defendants had been warned of the potential consequences by the County Attorney. In addressing the constitutionality of the awards, the court also concluded under *BMW* that discrimination is reprehensible conduct and that the ratio between compensatory and punitive damages was not such as to suggest a constitutional problem. The court rejected the notion that it should be guided in awarding damages under §1983 by the $300,000 caps imposed under Title VII.

Patterson v. Balsamico, 440 F.3d 104 (2d Cir. 2006) found that a $20,000 punitive damage award against an individual for race-based assault met the *BMW* standards: the physical element made the discriminatory character of the act even more reprehensible; the punitive damages were less than the $100,000 in compensatory damages; and the defendant, a corrections officer, could not claim lack of fair notice of the risk on the theory that criminal penalties were nominal. But the court nevertheless reduced the award to $10,000 in consideration of the defendant's financial situation. He earned $45,000 including overtime, owned a $87,000 home that had been recently refinanced and was married with children of 14 and 11, with personal debt of $5,000. The court distinguished other cases where larger awards had been upheld by noting that indemnification agreements had been in place in those cases, and observed that punitive damage awards are not supposed to "result in the financial ruin of the defendant" or "constitute a disproportionate percentage of the defendant's new worth."

Patterson placed on the defendant the burden of showing that punitive damages are financially inappropriate. But in tort actions, the defendant's net worth is normally the centerpiece of the argument for punitive damages, as the basis for seeking a substantial award is that wealthy companies will only be deterred by large awards.

In *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1293-84 (11th Cir. 2008), the court found reprehensibility in proof of a company policy or practice of discrimination, which is repeated conduct and relied upon the economic and emotional harm against a financially vulnerable individual. A ratio of 9.2 to 1 was not sufficient to render a

punitive damage award excessive where the compensatory damages were relatively small and there was a substantial need for deterrence in light of the reprehensibility.

Abner v. Kansas City Southern RR Co.,513 F.3d 154, 165 (5th Cir. 2008) concluded that an award of punitive damages where there was only a nominal compensatory damage award was not excessive because the award was less than the statutory "cap."

Gaffney v. Riverboat Services of Indiana, 451 F.3d 424 (7th Cir. 2006) upheld awards of $25,000 in punitive damages as properly calculated to provide a deterrent to retaliation and rejected the employer's request to reduce the award, noting that the punitive damages were less than the compensatory damages in most instances.

Admissibility of Defendant's Net Worth

The proof of the defendant's net worth has long been a central element of a punitive damage case, on the logic that there is no other viable basis on which the jury can determine what punitive damages are appropriate—how else can the jury determine how much it needs to award to "teach a lesson" to this or other defendants? Defendants rightly are concerned that the emphasis this places on corporate wealth bleeds over to liability determinations, prompting arguments in the jury room like "This is a big company, they can afford to pay this plaintiff some money." Where the defendant's net worth provides the yardstick for deciding what punishment is appropriate, awards of a massive size can follow, too.

In *StateFarm Mutual Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003), the Court addressed the propriety of reliance on the net worth of the defendant to support a claim for punitive damages, which had formed a significant part of the Utah Supreme Court's justification for allowing the award being reviewed for constitutional Due Process. The claim arose out of aggressive claims handling conduct by the insurance carrier. The Court observed that "fair notice" of both the conduct that will subject a party to punishment and the severity of the punishment are essential to Due Process. In expressing its concerns with the lack of procedural safeguards associated with punitive damages that prompt Constitutional review, the Court repeated this observation from *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994):

> Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.

The central problem with the award overturned in *StateFarm* was the reliance on claims handling conduct in other jurisdictions that was not illegal where it took place. The Court concluded that such conduct could be presented to show that the behavior in Utah, the forum State, was intentional, but a special instruction was required to assure

that the jury did not impose liability for acts that were legal where performed. It also insisted that the conduct be similar conduct and that it occur within a limited time period, not the 20 years of activity presented.

The Court also emphasized that the punishment associated with punitive damages must pertain to the wrong committed against the plaintiff in the case, not others, holding that a close relationship between the amount of compensatory damages and the punitive damages awarded was crucial except where a particularly egregious act results in only a small amount of economic damages. Commenting in particular on the Utah court's reliance on StateFarm's wealth, the Court concluded that rather than justifying punitive damages, it "bore no relation to the award's reasonableness or proportionality to the harm." Thus, said the Court,

> Here the argument that State Farm will be punished only in the rare case, coupled with reference to its assets (which, of course, are what other insured parties in Utah and other States must rely on for payment of claims) had little to do with the actual harm sustained by the Campbells. *The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.*

The Court then quoted from Justice Breyer's observation in his concurring opinion in *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 591 (1996):

> Wealth provides an open-ended basis for inflating awards when the defendant is wealthy … That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as reprehensibility, to constrain significantly an award that purports to punish a defendant's conduct.

What does this mean? The inclusion of Justice Breyer's comment suggests that the Court has not ruled out wealth as a consideration in every case, at least not yet. It *has* laid the groundwork to address that question head-on in a subsequent decision by articulating reasoning that is completely inconsistent with Justice Bryer's *dictum*. It has said that that wealth is not relevant to the factors that do govern the constitutionality of punitive damage awards, it has highlighted the need for procedural safeguards for preventing arbitrary jury awards and it has emphasized the improper impact that evidence of the defendant's wealth can have on the outcome. In short, no probative value and clear prejudicial effect. Defendants would be wise to oppose the admission of net worth on this theory, while plaintiffs would be wise to limit its use while ensuring that the jury's award is not out of proportion to the compensatory damages and that the evidence supports a finding of deliberate, serious misconduct.

Punitive Damages and "Me Too" Evidence

Punitive damage claims can open the door for "me too" evidence, as is illustrated by *Goldsmith v. Bagby Elevator Co.,* 513 F.3d 1261, 1285-87 (11th Cir. 2008). There the court concluded that evidence of other incidents of similar violations of discrimination laws (retaliation against employees who complained about racial epithets) was not admissible as "habit" evidence under FRE 406, but it was proper on a number of other grounds (a) it tended to show intent to discriminate and retaliate under Rule 404(b); (b) it was relevant to whether there was a hostile work environment; (c) it answered specific denials of retaliation in the employer's case; and (d) it was relevant to the employer's "good faith" policy against discrimination defense to punitive damages.

DAMAGE CAPS

Pollard v. E.I. DuPont de Nemours & Co., 532 U.S. 843 (2001) held that front pay, an equitable substitute for reinstatement, is not subject to the 42 U.S.C. §1981a caps and is not included in the calculation of the amount to be capped.

When the jury comes back with a verdict above the damage caps imposed by Title VII, the court's mandate is to reduce the verdict to something within the cap. But this can present problems. The first problem confronted was presented by the case in which the plaintiff has multiple claims, say, one claim for discriminatory refusal to promote and a second claim for retaliatory termination. Does the cap apply on a claim-by-claim basis, or does it apply to the case as a whole? The answer is that it applies to the case, *Smith v. Chicago Reform School Board,* 165 F.3d 1142 (7th Cir. 1999); *Hudson v. Reno,* 130 F.3d 1193, (6th Cir. 1997).

When there is a federal claim to which a cap applies, and a cognate State law claim without such a limitation, things work differently, according to *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565 (3rd Cir. 2002). In such cases, the correct approach is to allocate the damages between State and federal claims so as to maximize the plaintiff's recovery, on the rationale that the outcome would otherwise be contrary to the statutory intent not to displace or limit State remedies. In *Gagliardo,* the plaintiff prevailed on both the State and federal claims and recovered both compensatory damages and punitive damages. The State law claim permitted recovery of unlimited compensatory damages but no punitive damages. The court permitted full recovery of the compensatory damages, as mandated by the State law, but treated the entire federal recovery as being punitive damages and none of it as duplicative (and non-recoverable) compensatory damages. *See also Hemmings v. Tidyman's Inc.,* 285 F.3d 1174 (9th Cir. 2002)(holding that Title VII caps cannot be applied to amounts recoverable under State laws); *Madison v. IBP, Inc.*, 257 F.3d 780 (8th Cir. 2001)(allowing full recovery of compensatory damages under State law and thereby obviating application of the cap to punitive damage recovery); *Martini v. Federal National Mortgage Ass'n,* 178 F.3d 1336 (D.C. Cir. 1999); *Passantino v. Johnson & Johnson Consumer Products, Inc.,* 212 F.2d 493 (9th Cir. 2000).

DePaoli v. Vacation Sales Associates, L.L.C., 489 F.3d 615 (4th Cir. June 12, 2007) held that the damage caps were properly applied where the employer's workforce shrank to a point below a cap threshold between the time of the action complained of and the time of the damage award. The court rejected the defendants' argument that the caps at the time of the award should be applied because, among other reasons, this would mean that no cap at all applied if the employer's workforce shrank to less than fifteen employees. Rather, the court found, the caps applicable based on the size of the employer's workforce in the year of the violation or the preceding year should be applied, based on the language of §1981(a).

Where there is an award of both compensatory and punitive damages and one of the two awards exceeds the cap all by itself, the effect is to make the other award a moot question if the award exceeding the cap can be sustained. By the same token, if both awards exceed the cap, the award can be upheld by the court sustaining either of the two. *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368 (1st Cir. 2004); *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1 (1st Cir. 1999); *Hogan v. Bangor & Aroostook R.R. Co.*, 61 F.3d 1034 (1st Cir. 1995).

The court in *Peyton v. DiMario,* 287 F.3d 1121 (D.C. Cir. 2002) rejected the argument that recovery of compensatory damages at the statutory cap level should only be permitted in the most egregious cases. To the contrary, said the court, the plain language of the statute calls for reduction only to the statutory levels spelled out and it did not evidence a Congressional intent to reduce any verdict below those maximum amounts.

Even rule of the proportionality of punitive damage recoveries within the caps is applied in a manner deferential to the jury and district court. In *Fine v. Ryan Intern. Airlines,* 305 F.3d 746 (7th Cir. 2002), the court rejected a claim that the punitive damages were excessive because the evidence of retaliatory intent was clear—the person assigned to investigate the discrimination claim did not do so, but brought about termination based on the complaint—and the decision was approved by top management. Knowledge of the wrongfulness of the action could be inferred, said the court, from the advancing of a pretextual justification for the termination in the company's records. Said the court, "This was not a case where there was a 'smidgen' of retaliation…[n]or could Ryan argue that its actions were the result of a rogue supervisor," so barring imposition of the statutory maximum punitive award would be the equivalent of holding that the maximum could never be awarded, which was not the intention of Congress."

TRIAL & POST-TRIAL ISSUES

Damage Instructions

In *Thomas v. Texas Dept. of Criminal Justice,* 297 F.3d 361 (5th Cir. 2002), the employer complained that the court had instructed the jury that it would be deciding the issue of back pay and that they should not award anything on that ground, but did not similarly

inform the jury that it was also deciding front pay. The court concluded that it was not necessary for the District Judge to "refute every impermissible inference" that the jury might draw from instructions.

Remittur

"Remittitur," observed the court in *Cross v. New York City Transit Auth.*, 417 F.3d 241 (2d Cir. 2005), "is the process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial." Under the heading of "You can always try to wear them down," is the rule that when the court decides that the jury's award was too high, you always have the option of thumbing your nose at the court and going back to a jury again, courtesy of the Seventh Amendment. This was confirmed in *Hetzel v. Prince William County,* 523 U.S. 208 (1998). If a judge could not do it in 1789, a judge cannot do it today. But beware of the trial lawyer's folklore: the defense always does better in a retrial.

Shocking The Appellate Court's Conscience

Under the heading of "too good to be true" is the case of *Shick v. Illinois Dept. of Human Services,* 307 F.3d 605 (7th Cir. 2002), where the jury award of $5 million in compensatory damages for an employee who claimed that the disability and sex discrimination he suffered at work caused him to hold up a Seven Eleven store with a sawed-off shotgun. As Judge Rovner's dissent shows, the theory was not as far-fetched as it sounded: the plaintiff had a long and spotless military record, a thirty year stable marriage and no prior problems with the law, a diagnosis of disassociative disorder and a jury verdict supporting his claim. Against him was the seventh Circuit's ruling that the defendant had sovereign immunity to the ADA claim, which drove the jury verdict (the evidence of sex discrimination was more spotty) and the high verdict suggesting a runaway jury.