Evidence and Jury Instruction Issues: Damages

Michael J. Leech
Talk Sense Mediation
101 North Wacker
Suite 2012
Chicago, IL 60606
(312) 250-8123
mleech@talk-sense.com

Jury Trial Issues

Bifurcation

It perhaps goes without saying that District Courts have discretion to order bifurcation of a trial between liability and damage issues under Rule 42(b), *M2 Software, Inc v. Madacy Entertainment,* 421 F.3d 1073, 1088 (9th Cir. 2005). One cannot complain of the court's failure to order bifurcation if one did not request bifurcation, *Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275 (10th Cir. 1999).

Plaintiffs' usual reason for resisting bifurcation is because it presents the jury with just half of the reality of the case, holding back from consideration the impact of the firing on the employee—and plaintiffs seeking substantial damages would prefer for the jury to decide what happened knowing how the decision affected the plaintiff. While defendants usually offer up the economy of not delving into damage questions when it may not be necessary to do so, the principal reason for resisting bifurcation is that the sympathy generated by the damage part of the case can infect the jury's objectivity in deciding facts at the liability stage.

There are a host of other circumstances that might appropriately prompt bifurcation, most frequently involving potentially prejudicial facts that are relevant to damages but not to liability. After-acquired evidence, for instance, could prompt a jury to rule against a plaintiff on liability although it is supposed to be considered strictly for damages purposes.

A bifurcated trial means that if the case gets to the damage phase, the lawyers on both sides will know what the jury is thinking about when trying damages; the defense is unlikely to drop out any damage defenses, for instance, once it knows that liability is determined.

Inconsistent Verdicts

When the jury comes in on a case with something other than a general verdict, we often sit at the counsel table trying to figure out what the jury could have been thinking to reach the conclusion reflected in the verdict. If ever there was a time when it was important to be on your toes, this is it. In *Wennik v. Polygram Group Distribution, Inc.*, 304 F.3d 123 (1st Cir. 2002), tried in federal court under the Massachusetts anti-discrimination statute, the court refused to consider a contention that a jury verdict was inconsistent because such objections must be immediately asserted, before the jury is dismissed by the court.

What happens if you are quick enough to point out the inconsistency? Not necessarily a new trial; the court has discretion to point out the inconsistency to the jury and resubmit the issues to the jury with a request for clarification. That happened in *Patrolmen's Benevolent Ass'n. of City of New York v. City of New York,* 310 F.3d 43 (2nd Cir.

2002), where the court noted that the finding that only one plaintiff suffered an adverse employment action was inconsistent with the finding of $50,000 damages per plaintiff.

All of which argues the case for a general verdict form.

The court in *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003) discussed the different types of inconsistencies in a verdict that can occur, and noted that the most common situation is one in which there is a specific factual finding by the jury that is inconsistent with the legal finding—in which case, the inconsistency is to be resolved by conforming the legal finding to the factual finding, which the court has discretion to do. In that case, however, there appeared to be an inconsistency between one factual finding, that "lost wages" was $86,000, and another, that the amount of compensation that was illegally withheld was $87,500. The court resolved the inconsistency by parsing through the instructions and noting that the jury was told to omit from "lost wages" payments that were already included in the discrimination damages. The court undertook this exercise because irreconcilable inconsistency would invalidate the verdict, and this is why the burden of showing an irreconcilable inconsistency is high.

Damage Instructions Generally

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.

Jury Coercion

Late on Friday afternoon of the second day of deliberation, the jury notified the judge in *Ross v. Garner Printing Co.,* 285 F.3d 1106 (8th Cir. 2002) that it had resolved two of the three questions in the case but was unable to resolve the third issue, which was the damage award. They also said it would be a hardship for one of them to come in to continue deliberations on Monday. In court, they were even more assertive: three jurors indicated that continuing deliberations Monday would be a problem for them. After thinking it over, the judge told them to come back on Monday anyway. At this point, the jurors asked for another ten minutes to deliberate, and the judge allowed it. Within a half hour, they had a verdict. Rejecting a complaint that the judge had coerced a verdict, the Eighth Circuit noted that there had been no objection to the judge's approach at the time it was taken, and commented that this indicated that the potential for coercion "was not evident to one on the spot."

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.

Economic Damages

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.

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."

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.

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.

Front Pay—Loss of Future Income

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.

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).

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.

Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490 (1980) required that juries be instructed that FELA awards are non-taxable to guard against mistakenly inflating their awards to account for the taxes that would have to be paid. Applying that principle to this situation, one would expect that in keeping with the objective of full relief, courts would permit plaintiffs to include the tax bump as an element of damages.

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.

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).

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.

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.

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).

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.

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.

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.

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.

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 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.

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.

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.

In *Green v. Administrators of the Tulane Educational Fund,* 284 F.33d 642 (5th Cir. 2002)m, 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.

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.

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.

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).

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."