

# PROVING AND DEFENDING CLAIMS OF COMPENSATORY DAMAGES

EEOC EXCEL AUGUST 2013

**Joseph V. Kaplan, Esq.**

Passman & Kaplan, P.C.

# Proving Emotional distress Damages

The Goal: Convince the judge that the Complainant suffered emotionally due to the discrimination/retaliation by the Agency

# Proving Emotional distress Damages

▣ How to achieve the goal?

- Largely through testimony of witnesses.
- But which witnesses?



# Proving Emotional distress Damages -- What Witnesses?

- ▣ It's logical -- Who knows the Complainant the best?
  - ▣ Family
  - ▣ Friends
  - ▣ Co-workers

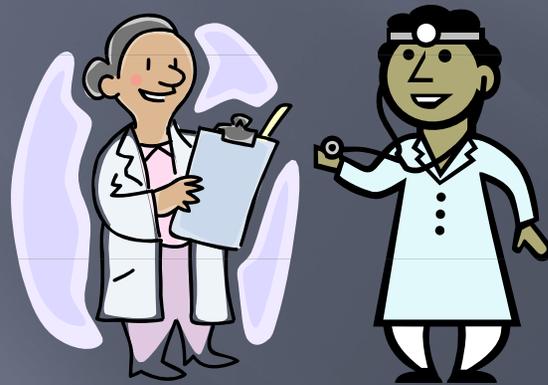
# Proving Emotional distress Damages -- What Witnesses?

The EEOC has long held that evidence from a health care provider is not a prerequisite for recovery of compensatory damages.

*See Carpenter v. USDA*, EEOC Appeal No. 01945652 (July 17, 1995).

# Proving Emotional distress Damages -- What Witnesses?

(Of course, health care providers or experts may still be important to establish diagnoses, symptoms, causality. We'll be discussing a little later).



# Agency's Reaction to Lay Witnesses?

- ❑ All too often, agency representatives have a dismissive knee-jerk reaction to evidence of causal connection or severity presented through lay witnesses
- ❑ This leads to understating the weight and value of this evidence.
- ❑ Often, lay witnesses are not even deposed.

# Agency's Reaction?

This May Be A Costly Mistake!



# Tell a Story:

## “A Tale of Two Cities” Begins:

It was the best of times,  
it was the worst of times,  
it was the age of wisdom,  
it was the age of foolishness,  
it was the epoch of belief,  
it was the epoch of incredulity,  
it was the season of Light,  
it was the season of Darkness,  
it was the spring of hope,  
it was the winter of despair.

- Charles Dickens

# Tell a Story: A Tale of “Two” Complainants

- ▣ Be the “Charles Dickens” to the Complainant
- ▣ Your case is about contrasts
- ▣ Your task: Paint two different pictures of the Complainant

# Tell a Story: A Tale of “Two” Complainants

▣ First picture: Complainant before  
the discrimination / reprisal



▣ Second picture: Complainant after  
the discrimination / reprisal



# Examine The Various Aspects Of The Complainant's Life

There are many aspects to the Complainant's life. Examine each. For example:

- ✓ Work
- ✓ Home
- ✓ Outside activities: hobbies, social, etc.

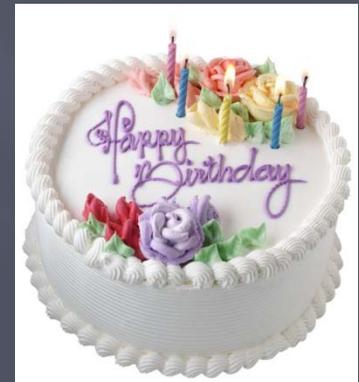
# Examine The Various Aspects Of The Complainant's Life -- Work

- ▣ Have there been changes in --
  - Performance
  - Work Habits
  - Personality Traits; interactions
  
- ▣ Don't forget the seeming trivial behaviors

# Examine The Various Aspects Of The Complainant's Life -- Work

Don't forget the seeming trivial  
behaviors

- ▣ Was the Complainant “the  
birthday cake guy / gal” ? What  
about now?



# Examine The Various Aspects Of The Complainant's Life -- Work

It's the lay CO-WORKERS  
who can testify as to these  
changes in the Complainant



(c) Joseph V. Kaplan, Esq.

# Examine The Various Aspects Of The Complainant's Life -- Home

- ▣ There is much fodder in examining changes in the Complainant's home life.
- ▣ Look at daily routines, though "mundane":
  - Cooking, cleaning
  - Bed-time habits
  - Sartorial interests



# Examine The Various Aspects Of The Complainant's Life -- Home

It's the spouse, family members,  
or roommate who  
who can testify as to these  
changes in the Complainant



# Examine The Various Aspects Of The Complainant's Life -- Home

It's the spouse, family members,  
or roommate who  
who can testify as to these  
changes in the Complainant

# Examine The Various Aspects Of The Complainant's Life -- Outside Activities

- ▣ There is much fodder in examining changes in the Complainant's activities outside the home.
  - Sports (still active on bowling team??)
  - Socializing with friends
  - Movies; theater
  - Church activities
  - Even shopping!

# Examine The Various Aspects Of The Complainant's Life -- Outside Activities

Here's the point: The myriad of activities we take for granted can all be affected by acts of discrimination and retaliation.



# Examine The Various Aspects Of The Complainant's Life -- Outside Activities

It's the family members  
and friends who  
who can testify as to these  
changes in the Complainant

# EXAMPLES OF EEOC DECISIONS AWARDING COMPENSATORY DAMAGES BASED ON LAY TESTIMONY

- ▣ *Bartron Dep't of Defense*, EEOC Appeal No. 0720100054, 2011 -- \$92,500 non-pecuniary, compensatory damages awarded.
- ▣ *Utt v. U.S. Postal Service*, EEOC Appeal No. 0720070001, 2009 -- \$25,000 non-pecuniary, compensatory damages awarded. Seems to not to be based on medical evidence.

# EXAMPLES OF EEOC DECISIONS AWARDING COMPENSATORY DAMAGES BASED ON LAY TESTIMONY (cont'd)

- ▣ *Bad Heart Bull v. Dep't of Health and Human Services*, EEOC Appeal No. 01A12574, 2002 -- \$40,000 non-pecuniary, compensatory damages awarded.

# How to (Attempt to) Discredit Lay Witnesses

- ▣ Examine For Biases:
  - Affinity Bias
    - ▣ You love your [insert relationship here]?
    - ▣ Even though you never saw what happened to him/her at work, you believe him/her because s/he's you [insert relationship here].
    - ▣ You want his/her suffering to end?
    - ▣ His/her suffering is impacting you negatively?
    - ▣ The negative impact on you will lessen or stop if Complainant wins this case?

# How to (Attempt to) Discredit Lay Witnesses

- ▣ Examine For Biases:
  - Financial Bias
    - ▣ Complainant's loss of income has impacted you negatively?
    - ▣ Complainant's out-of-pocket medical fees have impacted you negatively?
    - ▣ Complainant's attorney fees have impacted you negatively?
    - ▣ Have you loaned the Complainant any money associated with his/her case?
    - ▣ Your chances of recovering that money are greater if the Complainant wins this case?

# How to (Attempt to) Discredit Lay Witnesses

- ▣ Examine For Biases:
  - Other Bias
    - ▣ You also work for Complainant's supervisor?
    - ▣ And you think Supervisor has treated you badly too?
    - ▣ You are hoping if Complainant wins this case Supervisor will be disciplined or lose his/her job?
    - ▣ You feel you'd be better off if Supervisor lost his/her job?

# How to (Attempt to) Discredit Lay Witnesses

- ▣ WARNING: Do not assume that just because lay witnesses are relatives or friends of the Complainant, with bias in Complainant's favor, that that means they will be found not to be credible.
- ▣ Agency counsel often draw that knee-jerk reaction. They do so at their (or their Agency's) peril.

# EXPERT WITNESSES

- ▣ In some cases, there may be the desirability, or need, of calling an expert witness.
  - Prove nexus
  - Discuss degree of exacerbation of pre-existing condition
  - Need for future treatment
  - Social science data to explain the complainant's reactions, lack of complaint, etc.

# EXPERT WITNESSES

- ▣ In some cases, there may be the desirability, or need, of calling an expert witness.
  - NEXUS: Is there a causal connection between the discrimination and the harm suffered
  - EXACERBATION: If complainant had a pre-existing condition, to what extent did the discrimination exacerbate that condition

# EXPERT WITNESSES

- ▣ In some cases, there may be the desirability, or need, of calling an expert witness.
  - Need for future treatment: Costs for ongoing / future treatment are a factor in compensatory damages
  - Complainant's action/reaction: Complainant's action may seem at odds with the actions complained of; social science data may explain

# EXPERT WITNESSES

- ▣ Depending on your case, you may have the need for others types of experts:
  - Economic
  - Handwriting
  
- ▣ Each case must be evaluated to make the determination of what kinds of experts, if any, are desired or needed.

# EXPERT WITNESSES

- ▣ How do you overcome alleged bias that your expert is a “gun for hire”?
- ▣ Have the expert explain that the expert’s fidelity is owed to the fact-finder, not the party.
  - ▣ Contrast: The treating expert has built an association or relationship with complainant; has best interests of complainant at heart. Possible stake in the outcome.

# EXPERT WITNESSES

- ▣ How do you overcome alleged bias that your expert is a “gun for hire”?
  - Expert is not paid for the expert’s report or testimony. Rather, expert is paid for the expert’s “time.”
  - Expert has no stake in the outcome.

# EXPERT WITNESSES

- ▣ How do you challenge the expert:
  - Show the expert's report/ testimony was not based on complete information.
  - Show the expert's report/ testimony was based on information only from the complainant.
  - Show the expert cut corners.
  - Show the expert's report/ testimony was inconsistent with prior findings.
  - Historical bias for one side

# In Conclusion: Charles Dickens Revisited

- ▣ Dickens closes out his *A Tale of Two Cities* with this memorable line, “It is a far, far better thing that I do, than I have ever done; it is a far, far better rest that I go to than I have ever known.”
- ▣ By effectively using lay (and if needed, expert) witnesses to paint two pictures of the Complainant -- *before* the discrimination and *after* – the recovery of compensatory damages for emotional distress will be “far far better” than without such testimony! Or, if you are defending a claim, you’ll keep damages from reaching that level.

# QUESTIONS?

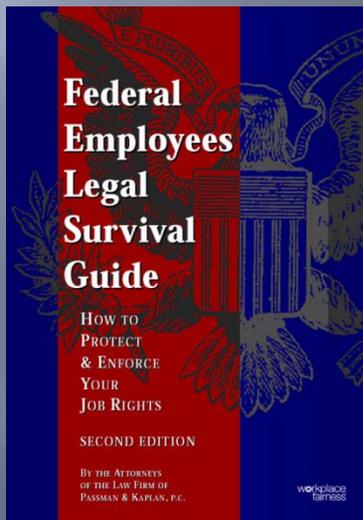


# Valuable Resources

*The Federal Employees Legal Survival Guide, 2d ed*

by the attorneys of  
Passman & Kaplan, P.C.

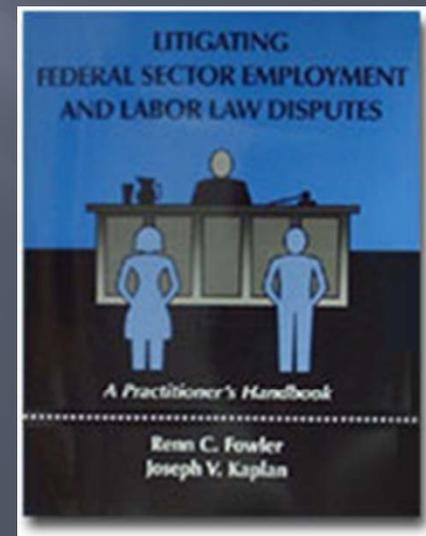
To Order:  
[www.passmanandkaplan.com](http://www.passmanandkaplan.com)



- ▣ *LITIGATING FEDERAL SECTOR EMPLOYMENT AND LABOR LAW DISPUTES: A Practitioners' Handbook*

By Renn C. Fowler and Joseph V. Kaplan

- ▣ Email: [dewey@deweypub.com](mailto:dewey@deweypub.com)
- ▣ Phone: 703.524.1355



(c) Joseph V. Kaplan, Esq.

**THE END**  
**PROVING COMPENSATORY DAMAGES**  
**THROUGH LAY AND EXPERT**  
**WITNESSES**

**Joseph V. Kaplan, Esq.**

**Passman & Kaplan, P.C.**

1828 L Street, N.W.

Suite 600

Washington, DC 20036

[www.passmanandkaplan.com](http://www.passmanandkaplan.com)