

Remedies Available to Complainants

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Remedies: Overview

- "When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief." 29 CFR 1614.501(a).

Remedies: Overview

- Principle Rule in discrimination law is:
 - As nearly as possible, to place the victim of discrimination in the position that person would have occupied but for the discrimination.

29 CFR 1614.501(a)(3)

Remedies: Overview

- The Commission gives its administrative judges broad discretion in fashioning corrective remedies, noting that, “we recognize that precise measurement cannot always be used to reduce the wrong inflicted, . . .”
- “The burden of limiting the remedy rests with the agency.”

Reasor v. U.S. Postal Serv.,
EEOC Appeal No. 0720070004 (2009).

Equitable Relief

- Remedies in place before 1991 Civil Rights Act are “equitable remedies,” are not compensatory damages, and are not subject to a statutory cap.
- Types of equitable relief include:
 - Injunctive and other related relief;
 - Restoration of leave;
 - Back pay and related benefits; and
 - Front pay.

Equitable Relief: Injunctive Relief

- Injunctive relief is available whenever there is a finding of unlawful discrimination. Agencies found to be engaging in acts of unlawful discrimination are always required to stop the discrimination.
- “The agency is **enjoined** from acts of reprisal against complainant for pursuing this EEO complaint.”

Ryals v. Dep't Of Veterans Affairs,
EEOC Appeal No. 07A50051 (2005)

Equitable Relief: Notice

- When discrimination is found, full relief includes, “Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular type of discrimination found will not recur.” 29 CFR 1614.501(a)(1).

Equitable Relief: Notice

- Notice must be posted in conspicuous places, including all places where notices to employees are customarily posted. The agency is required to take reasonable steps to ensure the notices are not altered, defaced or covered.

Equitable Relief: Notice

- The EEOC found the complainant's argument that the notice should have been "posted" by e-mail "to be of interest, and not without merit," but reiterated that the agency had met its current requirements of posting in the workplace.

Tilden v. Dep't of Veterans Affairs,
EEOC Appeal No. 04980021 (1999).

Equitable Relief: Training

- The EEOC is authorized, under 29 CFR 1614.501(a)(2), to direct an agency which has been found to have discriminated against one of its employees to take "corrective, curative or preventive action[s]. . .to ensure that violations of the law similar to those found will not recur."

Equitable Relief: Discipline & Training

- The Commission does not have authority to order discipline but may recommend the agency consider disciplinary action.
- The Commission may order an agency to provide relevant EEO training to employees as a measure to prevent future occurrences of discrimination.
- “We advise the agency that the purpose of such training is not to punish individuals for past discriminatory conduct, but rather, it is meant to educate employees concerning the requirements of the law in order to avoid future violations.”

Wade v. Dep't of Justice,
EEOC Appeal No. 07A60057 (2006)

Equitable Relief: Placement

- Placement must be in a substantially equivalent position. The burden is on the agency to show this. A successful complainant is not, however, entitled to be placed in a better position than he would have occupied absent the discrimination.

Equitable Relief: Tax Consequences

- Tax Consequences: With appropriate documentation, complainants may be entitled to reimbursement for adverse tax consequences from lump sum back payments.

Van Hoose v. Department of the Navy,
EEOC Appeal Nos.01982628, 01990455 (2001).

Back Pay

- Monetary equitable relief is the money damages a successful complaint receives for loss of earnings, including all fringe benefits. This includes back pay and interest on back pay. *See, 42 USC 2000e-(5)(g).*

Back Pay

- **A complainant is entitled to back pay from the time of loss through appointment or promotion, or through the date of resolution.**
 - **There is a presumption of back pay, and the agency must prove failure to mitigate.**
 - **May include step increases.**
 - **Interest on back pay.**

Back Pay: Computation

- The EEOC has recognized that “the computation of a back pay award is inherently speculative. Consequently, unrealistic exactitude is not required.” Nevertheless, uncertainties should be resolved against the agency.

Cotton v. Dep't of the Air Force,
EEOC Appeal No. 01932096 (1994).

Back Pay: Computation

- Agencies are required to issue back pay calculations that are clear and in “plain English.”

Sands v. Dep't of Defense,
EEOC Petition No. 04990001 (2000).

Back Pay: Computation

- Back pay for overtime is calculated by using the “average amount of overtime worked by similarly situated employees,” at the time the complainant was prevented from working.

Adesanya v. U.S. Postal Serv.,
EEOC Petition No. 04980016 (1999).

Back Pay: Computation

- Under 29 CFR 1614.501(b)(3), back pay “may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant.”
- However, back pay can extend forward until the date of resolution.

Back Pay: Offsets

- An award of damages should not be offset by sources that are reasonably unrelated to the employer.

Back Pay: Offsets

- If the payments represent lost wages, the collateral source rule will not apply and the complainant's back pay can be offset by the workers' compensation received.

Sands v. Dep't of Defense,
EEOC Petition No.04990001 (2000).

Back Pay: Offsets

- General rule is that agency may not offset unemployment compensation in a back pay award.
- Employee may, however, have to repay state.

Back Pay: Offsets

- Disability retirement payments cannot be used to offset a back pay award.

Savage v. U.S. Postal Serv.,
EEOC Petition No. 04990044 (2000).

Back Pay: Mitigation

- The complainant is required to mitigate damages.
- However, the burden is on the agency to show the victim of discrimination failed to mitigate damages.

Back Pay: Mitigation

- The agency must show:
 1. That the complainant failed to use reasonable care and diligence in seeking a suitable position; and
 2. There were suitable positions available that the complainant could have discovered and for which the complainant was qualified.

Back Pay: After-Acquired Evidence

- After-acquired evidence of wrongdoing does not preclude all relief but can substantially limit relief. Back pay would be available only from the date of the discriminatory discharge until the date the misconduct was discovered.

McKennon v. Nashville Banner Publishing Co.,
513 U.S. 352 (1995).

Front Pay

- Front pay can be awarded in only very limited circumstances -- when the complainant is ready and available to work but cannot for reasons beyond the complainant's control.

Stoll v. U.S. Postal Service,
EEOC Appeal No. 01944793 (1996).

Front Pay

- Front pay is issued:
 - Where reinstatement to the previously held position or a substantially similar position is not possible;
 - Where hostility would result or preclude a satisfactory employment relationship; or
 - Where the employer has a record of long-term resistance to anti-discrimination efforts.

Front Pay

- The complainant was awarded \$116,733 in front pay, reflecting the loss in projected pay from the agency less the projected pay from complainant's new employment, because he could not return to work at the agency due to the unabated hostility of agency officials.

VanDesande v. U.S. Postal Serv.,
EEOC Appeal No. 07A40037 (2004).

Compensatory Damages: Availability

- Available in cases of intentional discrimination under Title VII and the Rehabilitation Act.
- As of November 2009, compensatory damages are available under the Genetic Information Nondiscrimination Act of 2008.

Compensatory Damages: Limitations

- Agency has potential good faith defense if it has made a good faith effort to provide reasonable accommodation.
- Hostile environment harassment is a form of intentional discrimination.
- No compensatory damages in age discrimination cases.
- Not available in retaliation case when only underlying claim is age discrimination.

Compensatory Damages: Limitations

- Statutory caps limit the size of an award based upon the size of the employer.
- Maximum award under the caps is \$300,000, with some exceptions.

Compensatory Damages: Proof

- Complainant must show:
 - Proof of Injury, i.e., that some injury was suffered.
 - Proof of Causation, i.e., that the injury was caused by the agency's discrimination

Compensatory Damages: Types

- There are three types of compensatory damages:
 - Past pecuniary damages;
 - Future pecuniary damages; and
 - Nonpecuniary damages.

Past Pecuniary Damages

- Out-of-pocket costs that the complainant incurred as a result of discrimination, *e.g.*, medical expenses, job-hunting expenses, relocation costs.
- Losses incurred prior to resolution of a complaint via a finding of discrimination.

Past Pecuniary Damages

- Must be proven by bills or invoices from doctors, hospitals, psychiatrists, psychologists or any other health care provider he or she has received treatment from.
- Claims for pecuniary damages must be properly documented. Failure to document the claimed expenses will result in a denial of pecuniary damages.

Past Pecuniary Damages

- The failure to properly document pecuniary damages does not bar an award for emotional distress damages.

Glockner v. Secretary of Veterans Affairs,
EEOC Appeal No. 07A30105 (2004)

Past Pecuniary Damages

- Past pecuniary damages are not included within the \$300,000 cap on compensatory damages.
- The cap on damages applies only to those types of damages that cannot be precisely quantified, such as future pecuniary damages and nonpecuniary damages.

Id.

Past Pecuniary Damages

- The collateral source rule applies.
- For example, Complainant can collect entire cost of health care instead of co-pay. An exception is medication paid by OWCP.

Past Pecuniary Damages

- Job-hunting expenses:
 - Money spent on resumes and other job search costs, such as, job search services and mileage for attending interviews;
 - In some cases, expenses of looking for work in different geographic area are included but complainant generally must also produce evidence that work was not available in area where complainant resides.

Past Pecuniary Damages

- Childcare during medical treatment or job hunting efforts.
- Interest on loans secured to pay expenses because of lost income.
- Health insurance premiums paid during period of unemployment.

Past Pecuniary Damages

- No duty to mitigate past pecuniary damages.

Future Pecuniary Damages

- Out-of-pocket costs that the complainant will incur in the future as a result of discrimination, e.g., future medical treatment, lost earning potential.
- Subject to the statutory cap.

Future Pecuniary Damages

- Generally requires medical or other expert testimonial evidence.
- Future medical expense claims must be supported by:
 - Evidence of diagnosis;
 - Prognosis of injury; and
 - Duration of planned course of treatment.

Carpenter v. Secretary of Transp.,
EEOC Appeal No. 01971161 (2000)

Nonpecuniary Damages

- These are damages for emotional distress, pain and suffering, humiliation, embarrassment, injury to professional reputation, etc.
 - May be proven without any medical or other expert evidence.
 - Absence of such evidence may affect size of an award of nonpecuniary damages.

Nonpecuniary Damages

- An award of nonpecuniary damages should take into account the *nature of the harm*, the *severity of the harm* and the *duration of time* the injured party has suffered from the harm.
- A proper compensatory damages award must meet two goals: “that it not be ‘monstrously excessive’ standing alone, and that it be consistent with awards made in similar cases.”

Winston v. Dep’t of Agriculture,
EEOC Appeal No. 01972099 (2000).

Nonpecuniary Damages: Proof

- Evidence can take form of:
 - Detailed statements from the complainant, family members, friends, religious leaders and health care providers;
 - Medical documentation;
 - Journals and other personal notes.

Nonpecuniary Damages: Proof

- Needs specifics, not generalities:
 - How did depression/anxiety affect relationships, activities and interactions?
 - How often and to what extent did sleeplessness occur?
 - Did condition affect ability to work or to enjoy life?
 - Credibility of witnesses may affect entitlement to or amount of award.

Nonpecuniary Damages: Proof

- “The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action.”

*Williamson v. U.S. Postal Serv.,
EEOC Appeal No. 0120130887 (2013)*

Nonpecuniary Damages

- The “eggshell skull” rule:
 - The victim of discrimination may recover for all actual harm or injury, even though the results may not have been foreseeable and even though the injury to an average person would not have been as severe.

Nonpecuniary Damages

- Preexisting injury rule:
 - Individual with a preexisting injury may recover only for the aggravation of the preexisting condition or disability, not the sum that would compensate her for her total disability.
 - Where the preexisting condition would have worsened even absent the unlawful conduct, an award should be limited to the accelerated worsening.

Nonpecuniary Damages

- Multiple causes of harm:
 - Where an employee is already seeking medical care, it may be appropriate to allocate the costs so as to not unreasonably punish the employer.
 - Where the emotional harm was caused by multiple factors, but the discrimination was the primary cause, the employer may be liable for all emotional harm.

Nonpecuniary Damages: Parameters

- A Large range of awards exist within EEOC decisions, but generally:
 - \$75,000+ = the evidence of record tends to show that the emotional or psychological injuries that resulted from the discrimination either had permanent or substantially-long term effects, or were so catastrophic that no inquiry into long-term effects was necessary.
 - Around \$50,000 = permanent or long-lasting harm is less severe.
 - Around \$25,000 = harm suffered is severe, but of limited duration.

Five Damages Principles

1. Compensatory damages are intended to compensate for actual harm. Unlike punitive damages, the heinousness of the conduct should not determine the award of damages.
2. There must be evidence of actual harm or loss. Although the victim's testimony alone may be sufficient to establish entitlement to compensatory damages, it must be sufficient and credible to prove such harm or loss.

Five Damages Principles

3. In calculating an appropriate award, consideration is given to the nature, severity, and duration of the harm.
4. The amount awarded should reflect the extent to which the agency's discriminatory action directly or proximately caused harm to the complainant and the extent to which other factors may have played a part.

Five Damages Principles

5. An award must be consistent with awards in other cases evidencing similar kinds of harm. In addition, the award must not be unreasonably excessive.