

COMPENSATORY DAMAGES

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EEOC AUTHORITY

- The EEOC has the authority to award compensatory damages.



West v. Gibson, 527 U.S. 212 (1999).

When Claim Must Be Made



- The Commission used to hold that a claim for compensatory damages may be made at any time, up through and including on appeal. *Kochhar v. U.S.P.S.*, 01966813 (1998).
- That was reversed in *McLain v. Secy of the Army*, 0120053362 (2007). Claim for damages cannot be raised for first time on appeal.

How to Make a Claim

- The complainant need not specifically ask for compensatory damages in order to be entitled to them as part of the relief. If the employee puts the agency on notice of facts to suggest an entitlement to compensatory damages, e.g., an allegation that the agency's discrimination caused him to seek medical treatment, the complainant has made a claim for compensatory damages. *Lynnette Park v. U.S.P.S.*, 01931280 (1995).

How to Make a Claim (no hearing)

- If the complainant fails to provide objective proof of damages suffered, the agency must request that information. *Caldwell v. Secretary of the Army*, 01934139 (1994).
- It is error for the agency to decide a complaint is moot, where the employee claims compensatory damages but the agency has failed to ask for the objective proof.

Complainant's Obligation

- The failure of a complainant to respond to a request for specific evidence of compensatory damages as a part of a certified offer a full relief can result in dismissal of the complaint. *Lugardo v. Secretary of the Navy*, 01942768 (1994).

Complainant's Obligation

- But, in the absence of a certified offer of full relief, it is error for the agency to dismiss a complaint for compensatory damages because the employee fails to provide evidence prior to a finding of liability. Compensatory damages is a remedy, and does not affect the processing of the case. *Campbell v. Secretary of the Navy*, 01954935 (1996).

Proving Compensatory Damages

- The best source of information is EEOC Notice # N-915.002 (7/14/92): Enforcement Guidance: Compensatory and Punitive Damages Under § 102 of the Civil Rights Act of 1991.



- Comp damages are **additional** to other remedies under Title VII. The maximum or "cap" is \$300,000.

Proving Compensatory Damages

- The standard: Compensatory Damages may be awarded for any proximate consequences which can be established with reasonable certainty. In other words, the employee must prove, within a reasonable certainty, that the employer's discrimination was the cause of the injury/loss.

**Proving Compensatory Damages:
Pecuniary Losses**

Pecuniary loss includes:

- Moving expenses
- Job search expenses
- Medical expenses
- Psychiatric expenses
- Physical therapy
- Other quantifiable out-of-pocket expenses



Androvich v. Secy of Agriculture, 01950531 (1996).

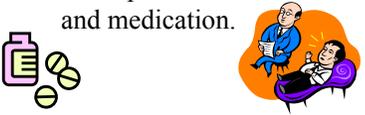
Past vs Future Pecuniary Damages

- Past pecuniary damages refer to those out-of-pocket costs that have been incurred up until the time of resolution of the complaint.
- Future pecuniary damages refer to those out-of-pocket costs likely to be incurred after resolution of a complaint



Past vs Future Pecuniary Damages

- The most common future pecuniary damages are expenses for continued medical treatment and medication.



- An award of future pecuniary damages can also be made for the loss of future earning potential.



Future Pecuniary Damages

- ❑ There is no presumption that emotional distress has ended merely because the discrimination has stopped or the complainant is no longer in the workplace. *Butler v. Secretary of Agriculture*, 01971729 (1999).
- ❑ Complainant must prove nature, extent and duration of future medical treatment. *Smith v. Secretary of Defense*, 01943844 (1996).
- ❑ Mere statement of need for future treatment without explanation is insufficient proof. *Aponte v. DHS*, 0120063532 (2008).

Future Pecuniary Damages

- ❑ Complainant may be entitled to damages for loss of earning capacity. *Cook v. Postmaster General*, 01A02390 (2001).
- ❑ Loss of earning capacity represents a loss in one's future earning; considers the effect that complainant's injury will have on his/her ability in the future to earn a salary comparable with what he/she earned before the injury. *Carpenter v. Department of Agriculture*, 01945652 (1995).

Proving Compensatory Damages: Non Pecuniary Losses

Non Pecuniary Losses Include:

- ❑ Emotional pain and suffering, inconvenience, mental anguish
- ❑ Loss of Enjoyment of Life
- ❑ Injury to Professional Standing
- ❑ Injury to Character and reputation
- ❑ Injury to credit standing
- ❑ Loss of Health



Androvich v. Secy of Agriculture, 01950531 (1996).

**Non Pecuniary Losses:
Emotional Harm**

- Emotional harm will not be presumed simply because the complainant is a victim of discrimination. The existence, nature and severity of harm must be proved.

See *Brown v. Postmaster General*,
EEOC No. 0720070022 (2007)



**Non Pecuniary Losses:
Emotional Harm**

Emotional harm may manifest itself in a variety of ways:

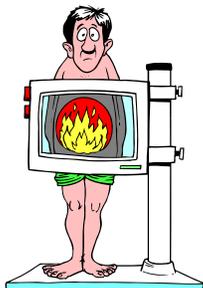


- Sleeplessness
- Anxiety
- Stress
- Depression
- Marital Strain
- Humiliation
- Emotional Distress
- Excessive Fatigue

**Proving Compensatory Damages:
Physical manifestations of emotional harm**

Physical manifestations of emotional harm include:

- Ulcers
- Gastrointestinal Disorders
- Hair Loss
- Skin Conditions



Pre-existing *Physical Injury*

- If discrimination aggravates a pre-existing physical condition that results in increased pain or injury, the EEOC will increase the damage award.



Turner v. Secretary of Interior, EEOC No. 01956390 (1998),

Duty to Mitigate Pecuniary Losses

A complainant cannot recover damages for any harm that could have been avoided or minimized with reasonable effort. This is rarely an issue in federal sector cases as there is no duty to mitigate damages during the administrative process. The duty to mitigate most often arises in termination cases in court.

Duty to Mitigate Pecuniary Losses

The burden is on the employer to establish that the complainant/plaintiff failed to mitigate his/her losses. The complainant can establish efforts to mitigate with evidence of a job search, resumes, newspaper ads, etc.

Duty to Mitigate *Physical* Harm

The Commission has suggested that a complainant has the duty to mitigate physical harm by following medical advice:

“that there is considerable evidence establishing that appellant failed to mitigate her damages because she failed to adhere to the Kaiser treating physicians' advice concerning stress reduction and a change in medication.”

Young v. Social Security Administration, EEOC No. 01955120 (1998)

Pre-existing Mental Disorders

If there are other factors contributing to the emotional harm, the employer is only responsible for the emotional harm *caused* by, or *exacerbated* by, the employer's discriminatory conduct. *See Hogeland v. Secretary of Agriculture*, EEOC No. 01976440 (1999), (award of damages for aggravation of a pre-existing depressive condition).

Pre-existing Mental Disorders

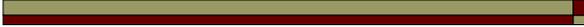
Kaplan's View:

Agencies spend a lot of effort trying to establish that the complainant's mental harm predated the discrimination. (Too much time!). If the employee had a pre-existing mental condition, the employer is still liable for any deterioration in the employee's health caused by the discrimination. In other words, additional harm may be attributed to the employer.

This is an area where expert testimony may prove most useful.



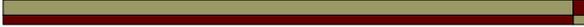
- A preexisting condition does not require a reduction of the damage award. *See Ferrall v. Secretary of Navy*, EEOC No. 07A30054 (2003).



Pre-existing Mental Disorders

- Some agencies spend a lot of time trying to prove that the employee was unusually emotionally sensitive. The fact that a complaining party may be unusually sensitive does not absolve the employer of responsibility for the greater emotional harm. For example, if there are two victims of sexual harassment and one is also the victim of prior sexual abuse and suffers more than the co-worker, the agency is responsible for the greater emotional harm. This is the so-called “eggshell” complainant.





- The general rule is that the discriminator takes his/her victims as he/she finds them. *Finlay v. Postmaster General*, EEOC No. 01942985 (1997).



Proving Emotional Harm

When compensatory damages are claimed for an employee's emotional distress, the agency will normally be entitled to obtain the complainant's medical records through discovery.



Evidence of Emotional Harm

- Medical evidence, such as reports from psychiatrists, psychologists, other therapists.
- The employee's own testimony. [Do not minimize the importance of the employee's own testimony as to emotional harm suffered; it has been held to satisfy the requirements of proof.]



Evidence of Emotional Harm

- Testimony of co-workers to show differences on the job
- Testimony of supervisors
- Performance Appraisals
- Family
- Friends



Evidence of Emotional Harm

- What is the judge looking for? Examples of how the emotional distress affected the employee on a day-to-day basis, on and off the job.



- It is error for the agency to discount the value of corroborative evidence of the employee's spouse, even if the evidence is unsworn. Evidence from a so-called objective third-party is not necessary.

Evidence of Emotional Harm

Where an employee comes forward with evidence of emotional harm resulting from the discrimination, the burden shifts to the employer to prove that other factors caused the harm. The employee does not have to prove the negative -- that is to disprove the possibility of other causes.

How to determine the \$ amount of nonpecuniary loss

- There is no hard and fast rule.
- Standard: Awards must be "limited to the sum necessary to compensate the employee for the actual harm, even if the harm is intangible."
 - The amount should not be "monstrously excessive," and must not be the product of "passion or prejudice." In reality, this standard provides little help!

How to determine the \$ amount of nonpecuniary loss

Consider the following:



- Nature and severity of the harm
- Duration
- Expected duration until recovery
- Monetary awards issued in other similar cases

Where the evidence of emotional harm is sparse or scant, the EEOC has been awarding compensatory damages between \$3,000 - \$5,000!

NonPecuniary Damages in Sexual Harassment Cases

Many victims react differently. The victim's response may be difficult to understand because people have certain expectations about how a woman should react. It may be necessary to get expert testimony on common responses to sex harassment and gender differences in perception about sex in the work place.

Other Thoughts on Comp Damages:

No Compensatory Damages will be awarded for the stress associated with prosecuting an EEO complaint.





Other Thoughts on Comp Damages:

The “Collateral Source Rule” applies. In other words, benefits recovered from a source collateral to the agency, e.g., health insurance provider, may not be used to reduce the agency’s liability for damages. Therefore, do not look to out-of-pocket medicals, but to actual charges.



Other Thoughts on Comp Damages:

Federal Rule of Evidence 412 (the “rape shield” law). The following evidence is generally inadmissible: 1) Evidence offered to prove the victim engaged in other sexual behavior; and 2) Evidence offered to prove sexual predisposition.



Other Thoughts on Comp Damages:

- There are exceptions: 1) where the probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party; and 2) Evidence of reputation is admissible only if it has been placed into controversy by the alleged victim. To determine admissibility, the party intending to introduce the evidence must file a written motion describing the evidence and purpose for which it is offered, and serve the victim’s representative. The Court must conduct an in camera hearing before admitting the evidence and afford all parties the right to be heard.

USING THE EXPERT PSYCHOLOGIST

- Difference between the treating therapist and the forensic expert:
 - Treating psychotherapist's primary obligation is to the patient -- to provide care. (fiduciary/ethical).



USING THE EXPERT PSYCHOLOGIST

- Difference between the treating therapist and the forensic expert:
 - The expert's primary obligation is to the Court / Finder of Fact. To provide truthful and accurate testimony about a matter within his/her expertise.



USING THE EXPERT PSYCHOLOGIST

- There's a difference in the "database"
 - Treating psychotherapist relies primarily on direct contacts and face-to-face information from the client.
 - The expert has broader base of information:
 - Client
 - Test data
 - Friends, family, co-workers
 - Interviews: cross-checks info from client; sometimes more revealing

USING THE EXPERT PSYCHOLOGIST

- The expert has broader base of information (contd):
 - Treater's reports
 - Other relevant documents;
 - Court / AJ's findings if available
- Testing – 2 category of tests
 - Emotional State
 - Cognitive Processes

USING THE EXPERT PSYCHOLOGIST

- The expert also can testify to findings common to victims. *E.G.* 's:
 - Impact of H.W.E. on an individual's psychological and physiological state
 - Symptoms of PTSD and causation
- And, of course, testify to the causal relationship between diagnoses and workplace discrimination

USING THE EXPERT PSYCHOLOGIST

- The expert can also testify as to:
 - Complainant's "credibility"
 - Contribution, or not, of other stressors
 - Need for future treatment

When to Use an Expert?

Many factors may determine whether to bear the expense of a forensic expert. Examples:

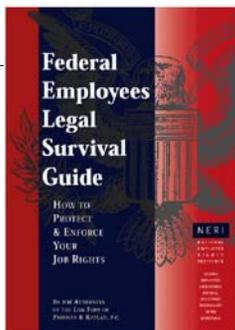
- ❑ Damages have been severe
- ❑ Future medical treatment likely
- ❑ Other Stressors Present
- ❑ Pre-existing conditions present
- ❑ Explanation of client's behavior, if seemingly out of the norm

Final Thoughts on Compensatory Damages

- ❑ Agencies tend to denigrate compensatory damages, especially emotional distress, in settlement discussions. In settlements where agencies agree to pay "proven" compensatory damages, or when ordered to pay an unspecified amount by an administrative judge, agencies tend to minimize the harm and undervalue the employee's claim. This results in more litigation over the amount of compensatory damages, which then leads often to increased attorney fee awards. The EEOC will award interest on delayed payments of compensatory damages.

VALUABLE RESOURCE!

- ❑ *The Federal Employees Legal Survival Guide*, by the attorneys of **Passman & Kaplan, P.C.** (Published by National Employee Rights Institute [NERI]).





THE END
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