



## Compensatory Damages

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## 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.

*Albemarle Paper Co. v. Moody*,  
422 U.S. 405 (1975); 29 CFR 1614.501(a)(3)



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## Appropriate remedy may require displacing an innocent third party

- *Hicks v. Forest Preserve Dist. Of Cook County Ill.*, No. 09C261, 2010 U.S. Dist. LEXIS 134557 at \*6-7 (N.D. Ill Dec. 17, 2010) (“... making the victim of discrimination whole ordinarily requires reinstating him, even if that requires bumping an incumbent who was hired to fill the position.”)



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## 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. Postmaster General,*  
EEOC Appeal No. 0720070004 (2009).



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## Remedies - Overview

- Remedies in place before 1991 Civil Rights act are “equitable remedies” and are not compensatory damages.
- Three general types of equitable remedies:
  - Injunctive relief;
  - Back pay; and
  - Front pay.



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## Compensatory Damages Overview

- 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.



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## Compensatory Damages Overview

- 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.



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## Compensatory Damages Compensate for Actual Harm, Don't Punish Employers

- But, it is simply not possible to consider the merits of a claim of employment discrimination without considering the remedies available if the claim is successful. The merits of EEO claims do not exist in a vacuum that excludes damages, regardless of how much one wishes it were so.



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## Pollard v. E.I. DuPont de Nemours, Inc., 338 F. Supp.2d 865, 884 (W.D. Tenn. 2003)

- “Defendant has taken away Plaintiff’s sense of self-esteem. Plaintiff, formerly an outgoing, confident, self-assured, and professionally successful individual, has to a large degree lost each of these attributes due to the humiliating and degrading sexual harassment she suffered at DuPont and which her supervisors repeatedly failed to stop despite her requests for help.”



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### Pollard, cont'd.

- “The Court must compensate her for this mental destruction and quantify in dollars the loss of Plaintiff’s sense of self worth.”



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### Compensatory Damages Trilogy

- *Rountree v. Secretary of Agriculture*, EEOC Appeal No. 01941906 (1995);
- *Carpenter v. Secretary of Agriculture*, EEOC Appeal No. 01945652 (1995); and
- *Wallis v. Postmaster General*, EEOC Appeal No. 01950510 (1995).



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### Compensatory Damages Statutory Caps

- Caps limit the size of an award based upon the size of the employer.
- Maximum award under the caps is \$300,000.
- Statute limits an award to the sum of future pecuniary losses and nonpecuniary losses 42 USC 1981a(b)(3)



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## Compensatory Damages Overview

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



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## 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.

*Androvich v. Secretary of Agriculture,*  
EEOC Appeal No. 01950531 (1996)



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## Past Pecuniary Damages

- May include costs associated with a job search, including stationary and postage, telephone expenses, resume service fees, referral or "headhunter" fees, costs of transportation (air, auto, parking etc.) in interviewing for jobs and other job search fees. See, for example, *Schroer v. Billington*, 2009 U.S. Dist. LEXIS 43903 at \*10 (D.D.C. Apr. 28, 2009)



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### Past Pecuniary Damages

- Includes costs incurred due to relocating to another geographic area to accept employment, but generally must produce evidence that work was not available in area complainant resides.
- May include losses associated with sale of residence, including foreclosure costs, *Scott v. Bodman*, 0720070018 (April 24, 2007), costs of securing alternative living arrangements and increased commuting expenses.



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### Past Pecuniary Damages

- Must be proven by bills or invoices from doctors, hospitals, psychiatrists, psychologists or any other health care provided 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.

*See, e.g., Jones v. Secretary of Commerce, EEOC Appeal No. 01A13671 (2002)*



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### Past Pecuniary Damages

- Pecuniary losses include the actual cost of medical care, such as for a doctor, psychiatrist, social worker, physical therapist or laboratory technician. It also includes transportation costs to and from a health care provider, as well as the cost of prescriptions and other medications.



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## Past Pecuniary Damages

- But 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)



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## Past Pecuniary Damages

- Past pecuniary damages are not included within the \$300,000 cap on compensatory damages.
- See EEOC Notice N-915.002, "Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991," (July 14, 1992), at 7.
- 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.*



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## Past Pecuniary Damages

- Collateral source rule applies.
- Complainant can collect entire cost of health care instead of co-pay. Exception is medical care paid by OWCP.



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## Past Pecuniary Damages

Job-hunting expenses...

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



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## 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.



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## Past Pecuniary Damages

- No duty to mitigate past pecuniary damages.



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## 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.



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## 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;
  - Duration of planned course of treatment.

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



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## 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.
  - But absence of such evidence may effect size of an award of nonpecuniary damages.



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## 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.



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## Nonpecuniary Damages

- Two elements to nonpecuniary damages:
  - Must have proof of actual harm or injury;
  - Proof of causation.



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## Nonpecuniary Damages

- Evidence can take form of:
  - Testimony of complainant;
  - Complainant's spouse and family members;
  - Complainant's friends and co-workers;
  - Health care professionals.



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### Nonpecuniary Damages

- General descriptions such as depression, anxiety, sleeplessness are of little help in determining damages. Get specifics:
  - How did depression/anxiety affect complainant on day-to-day basis at home, in marital and family relations, at work, in interactions with co-workers, in leisure activities?
  - How often did sleeplessness occur? Daily? Several times a week? Occasionally?
  - Did condition affect ability to work or to enjoy life?
- Credibility of witnesses may affect entitlement to or amount of award.



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### 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.
- “A tortfeasor takes his victims as he finds them.”



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### 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.



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## 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.



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## Five Damage 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.



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## Five Damage 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.



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## Five Damage 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.



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## Recent Cases of Interest

Evans v. DOJ, BOP, Appeal No. 0120080335 (June 22, 2012).  
-Sufficiency of Relief & Actions Preventing Future Discrimination

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## Recent Cases of Interest

Malekpour v. DOT, FAA, Request No. 0520120340 (June 21, 2012)  
-Upheld Original Compensatory Damages Award and Ordered Agency to Consider Discipline of Manager

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**Thayer v. USPS, Request No.  
0520120218 (June 13, 2012)**

-No Compensatory Damages for  
Breach of Settlement, Need a Finding  
of Discrimination

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**Recent Cases of Interest**

Cerge v. DHS, Appeal No.  
0120100102 (June 19, 2012)

- Commission reversed FAD that  
awarded no compensatory damages  
and awarded \$25,000 plus attorneys'  
fees for filing of appeal

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**Recent Cases of Interest**

Guess v. EPA, Appeal No.  
0720110029 (June 12, 2012)

- Affirmed AJ's Award of \$100,000  
"Other than not wanting to pay the  
amount ordered, we find that the  
Agency has not provided a persuasive  
argument..."

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### Recent Cases of Interest

Fivecoat v. Air Force, Appeal No.  
0720110035 (May 15, 2012)

- Affirmed award of \$100,000 for  
complainant who became anti-social,  
anxious and hopeless, but who did  
not present medical evidence

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