



Damages Discovery

Instructors:
Gary M. Gilbert
Ernest C. Hadley

EXCEL 2009

1

Basics of Discovery

- What you absolutely need:
 - 29 C.F.R. § 1614.109(d);
 - EEOC Management Directive 110, Chapter 7;
 - EEOC Handbook for Administrative Judges, Chapter 4.

Basics of Discovery

- Good things to have:
 - Federal Rules of Civil Procedure;
 - *Compensatory Damages and Other Remedies in Federal Sector Employment Discrimination Cases*, Gary M. Gilbert;
 - *Representing Agencies and Complainants before the EEOC*, Ernest C. Hadley.

Basics of Discovery

- What you absolutely, positively must do:
 - Read the Acknowledgement and Order;
 - Prepare a litigation calendar;
 - Determine whether discovery on damages is bifurcated.

Basics of Discovery

- The Acknowledgment and Order should contain:
 - An authorization for the parties to initiate discovery within 20 days of receipt of the Order;
 - A closing date for discovery.
 - Standard is 90 days, but many AJ's use 45 days.
 - Discovery responses are due 30 days from receipt.

Basics of Discovery

- Discovery devices:
 - Requests for Production of Documents;
 - Written Interrogatories;
 - Requests for Admissions;
 - Depositions;
 - Motion for Medical Examination.

Bifurcation of Discovery

- Unless otherwise specified in Acknowledgement and Order, discovery is not bifurcated.
- Damage discovery must be conducted concurrent with discovery on liability.
- If you want bifurcated discovery, you will need to file a motion requesting it.

Bifurcation of Discovery

- Why bifurcate?
 - Saves parties the time and cost of discovery that is unnecessary unless there is a finding of discrimination.

Bifurcation of Discovery

- Why not bifurcate?
 - Leaves agency with little idea of the extent of liability if there is a finding of discrimination;
 - May allow complainant to maintain an inflated impression of damages award that is a roadblock to settlement;
 - Allows complainant to respond damages discovery as the prevailing party.

Damages Principles

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

Past Pecuniary Damages

- 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).
 - 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.

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).

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.*

Past Pecuniary Damages

- Collateral source rule applies.
- Complainant can collect entire cost of health care instead of co-pay. Exception is meds paid by OWCP.
- But complainant must specifically ask for application of rule.

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.

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).

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.

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.

Nonpecuniary Damages

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

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.

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 tortfeasors takes his victims as he finds them.”

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.

Requests for Production

- MD-110 limits to one set of 30 requests for production.
 - Includes all discrete subparts.
 - Can ask for specific documents or general categories of documents.
 - Can be used in conjunction with interrogatories.

Requests for Production

- Damage documents:
 - Medical records and reports;
 - Medical and prescription bills;
 - Expert witness reports;
 - Statements from witnesses not federal employees;
 - Logs, tapes, notes, videos, diaries, and emails.

Requests for Production

- AJ's have no subpoena authority. Problem of documents in possession/control of third party, mainly health care providers. How to get?
 - Ask complainant to provide, or
 - Signed medical releases.

Requests for Production

- Example:
- Produce any and all documents that relate to your request for past pecuniary damages in this case, including but not limited to any physicians' reports, notes, charts, hospital records, lab reports, test results and treatment records, or any other out-of-pocket expenses that you contend was a result of the Agency's alleged discrimination.

Interrogatories

- MD-110 limits to one set of 30 interrogatories.
 - Includes all discrete subparts.

Interrogatories

- In addition to general description of damages, can inquire about:
 - Past medical conditions and treatment;
 - Potential witnesses;
 - Experts consulted.

Interrogatories

- Examples:
- Describe specifically and in detail each and every expense that you have accrued that you contend constitutes past pecuniary damages in the above-captioned case.
- For each and every expense set forth in response to the interrogatory above, describe specifically and in detail how that expense was caused by the discrimination alleged in the above-captioned complaint.

Requests for Admission

- MD-110 limits to one set of 30 admissions.
 - Excludes admissions on genuineness or authenticity.
- Not very useful in damages discovery.

Depositions

- Why depositions?
 - To discover the full extent of the claimed harm;
 - To lock the witness in on the extent of harm;
 - To discover impeachment evidence;
 - To discover evidence on causation!

Depositions

- Who to depose?
 - Complainant;
 - Friends, family members, etc., who are potential witnesses;
 - Health care professionals and experts.

Depositions

- With subpoenas, right to depose a witness becomes a matter of who has control of the witness.
- Options when witness won't voluntarily appear:
 - Move to exclude witness from testifying;
 - Move to exclude any documentary evidence created by the witness.

Motions for Medical Examinations

- Factors for AJ to consider:
 - Allegation of ongoing harm;
 - Inability to get information through less intrusive means;
 - Whether complainant will be presenting expert testimony.

Motions for Medical Examinations

- EEOC. MD 110 ch. 7.
 - Must designate person(s) conducting exam, time, place, manner and scope.
 - Many AJ's like list of three from which complainant can choose.

Discovery with Experts

- Document requests:
 - All communications between the expert and opposing counsel;
 - All communications with witnesses;
 - All documents concerning any preliminary opinions or conclusions;

Discovery with Experts

- Document requests (cont.):
 - All documents considered or relied upon by the expert in forming his opinions;
 - Copies of all professional publications;
 - All documents relating to other cases in which he has testified as an expert in similar matters.

Discovery with Experts

- Depositions. Main purposes:
 - Test competence of witness to testify;
 - Develop evidence of bias on the part of the expert;
 - Test expert's knowledge of the facts.

Discovery with Experts

- Depositions. Challenging an expert's credentials generally is not effective; it merely serves to reinforce the expert's qualification. But in discovery, you can test the expert's credentials without this risk.
- "Is it fair to say that a psychiatrist would generally be more familiar with the causes of atypical psychosis than a psychologist such as yourself?"

Discovery with Experts

- Depositions. Use to determine if the witness has a thorough grasp of the topic:
- “Have any of your writings explored specifically whether PTSD can result from threats of discipline in the workplace?”

Discovery with Experts

- Presenting alternative hypothetical fact patterns is an effective method of discrediting an expert's testimony.
- But, consider that by testing the knowledge of the facts, the witness may be better prepared at hearing.

Discovery with Experts

- Use the deposition to learn what assumptions (*i.e.*, facts of the case) the expert has relied upon.
- Ask general questions, calculated to allow the expert witness to volunteer as much information about his/her presumption of facts.

Discovery with Experts

- Use deposition to develop evidence of bias:
 - Personal relationship with a party;
 - Frequent expert testimony but always on behalf of only one side: plaintiffs or defendants;
 - Payment for services (bonus for success?) But beware, the more the expert is paid, the more time the expert may have devoted to becoming familiar with the matter and this may merely bolster the expert's credentials.



Federal Employment Law Training Group, Inc.

Open enrollment seminars
Customized on-site training

www.feltg.com

877-30-FELTG

46

EXCEL 2009

46