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Asserting or Defending Back Pay Claims

by

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A. One-Day Reinstatement to Qualify for Benefits

Gilbert v. Monsanto Co., 216 F.3d 695, 700–02, 83 FEP Cases 531, 25 EB Cases 1284 (**8th Cir.** 2000), affirmed the lower court's compensation of the plaintiff for the defendant's failure to pay pension benefits pursuant to an oral settlement agreement by ordering him reinstated for one day to enable him to take advantage of a more generous change in the plan, which will result in his getting more money than if he had been paid pursuant to the agreement. The court held that the defendant was equitably estopped to rely on the parol evidence rule by its attorney's representation to plaintiff's counsel that there was no need for a pension benefits provision in the settlement agreement because the plaintiff already had immediate access to his pension benefits. In reliance on the representation, plaintiff's counsel "reasonably and detrimentally relied on" the statement, which was not accurate. The plaintiff was not awarded the lost pension benefits, however, because the lower court ordered him reinstated for one day so that he could receive the benefits of an intervening change in the plan, which resulted in his receiving more than he would have received if he had received the lost benefits on time. *Id.* at 700–01.

B. Back Pay

1. Entitlement

a. General Principles

Albemarle Paper Co. v. Moody, 422 **U.S.** 405, 421, 10 FEP Cases 1181 (1975), stated that, "given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." The employer's good faith is not an acceptable reason for the denial of back pay.

Ford Motor Co. v. EEOC, 458 **U.S.** 219, 231–32, 29 FEP Cases 121 (1982), stated:

> An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in § 706(g). This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied. Consequently, an employer charged with unlawful discrimination often can toll the accrual of backpay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages.

(Footnotes omitted.)

"Finally, the ingredients of back pay should include more than 'straight salary.' Interest, overtime, shift differentials, and fringe benefits such as vacation and sick pay are among the items which should be included in back pay. Adjustment to the pension plan for members of

the class who retired during this time should also be considered on remand." *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 263, 7 FEP Cases 1115 (**5th Cir.** 1974).

NLRB v. Gullet Gin Co., 340 **U.S.** 361, 364–65, 27 LRRM 2230 (1951), held that, generally, collateral public benefits such as unemployment compensation benefits, welfare, Food Stamps, etc., are not included in "interim earnings" and are not used as partial offsets to an award of back pay under the National Labor Relations Act.

b. Undocumented Aliens

Hoffman Plastics Compounds, Inc. v. N.L.R.B., 535 **U.S.** 137, 122 S. Ct. 1275, 169 L.R.R.M. (BNA) 2769 (2002), reversed the Board's grant of back pay to Jose Castro, an undocumented alien who had never been authorized to work in the United States. Castro testified that he had used a friend's birth certificate fraudulently to obtain a Social Security card, and a California driver's license, and he had used these to obtain employment. There was no evidence that he had applied or intended to apply for legal authorization to work in the United States. The Court held that the legal landscape of prior decisions was altered by enactment of the Immigration Reform and Control Act of 1986. Speaking of the fact that "it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies," such as by the employee's tender of fraudulent documentation or the employer's knowing hiring of an undocumented alien, the Court stated:

> The Board asks that we overlook this fact and allow it to award backpay to an illegal alien years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud. We find, however, that awarding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer.

The Court pointed out that Castro could not satisfy his duty to mitigate his earnings loss without committing further violations of IRCA. Justice Breyer, joined by Justices Stevens, Souterm and Ginsburg, dissented.

The logic of this decision would seem to apply to back pay awards under all of the antidiscrimination statutes, but not necessarily to awards of compensatory and punitive damages. It is not clear that this decision would bar minimum-wage and overtime awards under the FLSA for work already performed.

The Court's caveat—that there was no evidence that Castro had applied or intended to apply for legal authorization to work in the United States—raises the question whether Castro could have rehabilitated himself for purposes of a back pay award by applying for such authorization.

Some courts have held that *Hoffman Plastics* does not affect a plaintiff's right under FLSA or State wage and hour law to obtain back pay or overtime compensation for work actually performed, and/or have for this reason barred discovery into the plaintiff's immigration status. *Flores v. Amigon*, 233 F. Supp. 2d 462, 463–65 (**E.D. N.Y.** 2002); *Zeng Liu v. Donna*

Karan Int'l, Inc., 207 F.Supp.2d 191, 192–93 (**S.D. N.Y.** 2002); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 8 WH Cases 2d 165 (**N.D. Calif.** 2002).

c. Effect of Omitting or Losing the Discharge Claim

Hertzberg v. SRAM Corp., 261 F.3d 651 (**7th Cir.** 2001), *cert. denied*, 534 **U.S.** 1130 (2002), reversed the lower court's award of back pay and front pay in a sexual harassment case in which the jury found for the plaintiff on sexual harassment but found for the defendant on the issue of retaliatory discharge, and in which the plaintiff never presented a claim of constructive discharge. The plaintiff had resigned because of the company's failure to address her complaints, and then thought better of it and tried to withdraw her resignation. The defendant held her to her resignation. The lower court had awarded back pay and front pay on the theory that the plaintiff's resignation/termination would not have happened but for the harassment. The court of appeals held that this approach improperly ignored the distinction between harassment and termination claims. "A victim of discrimination that leaves his or her employment as a result of the discrimination must show either an actual or constructive discharge in order to receive the equitable remedy of reinstatement, or back and front pay in lieu of reinstatement. In the absence of such a showing, a plaintiff's exclusive remedies are those set forth in 42 U.S.C. § 1981a." *Id.* at 659. The court stated:

> We agree with the district court that Ms. Hertzberg's lawyers, "in the nature of their presentation, may have shot themselves or their client in the foot on the retaliation claim by the instruction that limited adverse employment action to a termination of plaintiff's employment by defendant," Tr. of Dec. 16, 1999, at 6-7; that is, Ms. Hertzberg may well have convinced a jury that she had been constructively discharged. However, Ms. Hertzberg presented only two bases of relief to the jury: sexual harassment and retaliatory discharge. The jury rejected Ms. Hertzberg's retaliatory discharge claim. Consequently, there was no discriminatory discharge on which the award of lost pay could be based, and we must reverse the lost pay award.

Id. at 660–61.

Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1236–37, 83 FEP Cases 1746 (**10th Cir.** 2000), affirmed the judgment for the Title VII sexual harassment plaintiffs, and affirmed the denial of back pay because the plaintiffs had resigned from the jobs, and the jury had rejected their constructive-discharge claim. The court rejected the plaintiffs' argument that 42 U.S.C. § 1981a now allows the recovery of back and front pay even if they had not been constructively discharged. It held that, under the statute, back pay is and front pay are governed exclusively by § 706(g) of Title VII.

d. Presumptions of Entitlement

EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1273–74, 84 FEP Cases 195 (**11th Cir.** 2000), reversed the finding of disparate-impact discrimination and vacated and remanded the dismissal of the EEOC's intentional-discrimination claim. The court stated that "in determining pattern or practice liability, the government is not required to prove that any particular employee was a victim of the pattern or practice; it need only establish a prima facie

case that such a policy existed." *Id.* at 1287 (footnote omitted). It stated that proof of such a pattern and practice creates a rebuttable presumption of discrimination and entitlement to relief. "The employer may overcome this presumption only with clear and convincing evidence that job decisions made when the discriminatory policy was in force were not made in pursuit of that policy." *Id.* at 1287 n.22. Judge Hull concurred in part and dissented in part. *Id.* at 1287–97.

2. Start of the Back Pay Period

Broadus v. O.K. Industries, Inc., 226 F.3d 937, 944, 83 FEP Cases 1537 (**8th Cir.** 2000), affirmed the judgment for the Equal Pay Act and State-law defendant. The court rejected defendant's contention that plaintiff's back pay award should have been limited to when a higher-paid male worked alongside her, because the court had approved the use of successor comparators.

3. End of the Back Pay Period

Banks v. Travelers Companies, 180 F.3d 358, 363–64, 80 FEP Cases 30 (**2d Cir.** 1999), reversed the trial court's limitation of the ADEA plaintiff's back pay period to April 1, 1996, and before. The plaintiff had been fired in January 1994. The trial court had held that the question whether the plaintiff would have survived the April 1, 1996, RIF, if she had still been working on that date, was too speculative to support an award of back pay for the period after April 1, 1996. The court held that the evidence was sufficient to support a jury inference that the plaintiff would have survived the RIF. Chapter 15 (Comparators) described the court's conclusion that the jury could have found that the plaintiff was better qualified than Dvorachek who had been retained when the plaintiff was fired. The fact that Dvorachek received a pay-grade promotion in surviving the RIF in 1996 was not dispositive, because "the record is silent as to whether the only remaining positions were for that higher pay grade." *Id.* at 363. The court continued: "Travelers may argue to the jury that Banks would not have been retained in April 1996 for example, because her skills would not have rendered her as well suited as Dvorachek to fill any of the remaining positions. But we do not see the evidence in this case commanding such an inference in Travelers' favor." *Id.* at 363–64. While the case needed to be retried on back pay, the court held that there was no reason to retry liability, because the back pay issue was distinct and separable from the issues of liability. *Id.* at 364 n.4. The court stated that a plaintiff is generally entitled to back pay from the date of discharge until the date of judgment, but the jury is not able to anticipate the date of judgment. "Accordingly, any lag time between the jury's verdict and the district court's ultimate judgment ordinarily should be remedied by the court, in the form of a pro rata increase of the back pay award." *Id.* at 364.

Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 591, 77 FEP Cases 1699 (**5th Cir.** 1998), *vacated on grant of reh'g en banc*, 169 F.3d 215, 79 FEP Cases 1770 (**5th Cir.**), *reinstated in relevant part*, 182 F.3d 333, 80 FEP Cases 704 (**5th Cir.** 1999), affirmed the back pay judgment based on the jury verdict. The court rejected the argument of the Title VII and § 1981 defendant that the plaintiff's back pay period should have ended when she quit her subsequent employment. She testified that when she obtained the new job, she moved to her in-laws' residence in a lower-income area because of her reduced earnings. When she was sexually assaulted at her new residence, she resigned. She sought $34,000 in lost earnings, and the jury awarded $19,000. The defendant argued that her lost earnings should be no more than $10,000,

reflecting its contended end of the back pay period caused by the plaintiff's asserted failure to mitigate her losses. The plaintiff testified as to her efforts to obtain a job after her resignation from the interim employer. The court held that mitigation is a question of fact turning on "reasonableness, similarity, and diligence," and that a reasonable jury could have found that the plaintiff had satisfied her duty of mitigation. *Id.*

Cook v. City of Chicago, 192 F.3d 693 (**7th Cir.** 1999), affirmed the district court's limitation of the plaintiff's back pay award to four years, instead of the ten claimed for violation of a consent decree delaying his promotion, because of the plaintiff's laches in failing for a decade to enquire into the existence of vacancies in the position for which he was entitled to priority consideration. The court held that one of the purposes of a period of limitations is to enable the defendant to cap its liability. Because this purpose, unlike the staleness of evidence, does not affect the accuracy of the factfinding process, the court suggested that it supported the truncation, rather than the elimination, of liability. *Id.* at 696. The court held that the application of laches to end the back pay period is not rendered inappropriate by the plaintiff's argument that she had a full-time job throughout and thus satisfied her duty of mitigation. The court explained:

> The doctrine is more flexible than that. It requires the victim of the breach to take reasonable efforts to minimize the cost to him. . . . If a large corporation wrongfully terminated its CEO, to whom it had been paying $1 million in salary and bonus per year, he would not be performing his duty of mitigation if he took a full-time job as an adoption counselor in a no-kill cat shelter at a salary of $15,000 a year.

Id. at 697–98 (citations omitted).

Forshee v. Waterloo Industries, Inc., 178 F.3d 527, 530–31, 87 FEP Cases 1671 (**8th Cir.** 1999), affirmed the judgment for the $10,369 in back pay awarded by the jury to the plaintiff, who had been fired from her temporary position on June 19, 1995. The court rejected the defendant's argument that the plaintiff would have been laid off along with other temporary employees in December 1995 because of the cyclical nature of its business. The court stated, regardless of whether the plaintiff would have been hired as a permanent employee, the defendant's re-hiring of former temporary workers in May or in the last half of each year belied its contention. The court stated that the modest amount of back pay awarded was not undercut by the company's argument. Moreover, the argument "was not properly preserved because Waterloo did not include in the record on appeal whatever portion of the trial record, such as Forshee's damage exhibits or closing argument, would permit us to infer how the jury might have calculated this portion of its damage award." *Id.* at 531.

Caudle v. Bristow Optical Co., Inc., 224 F.3d 1014, 1020–21 (**9th Cir.** 2000), affirmed the lower court's decision ending the pregnancy discrimination plaintiff's back pay period in September 1995, because the plaintiff voluntarily withdrew from the workforce then to care for her young child, and this decision was unaffected by the defendant's discrimination.

4. Elements of Back Pay

a. Lost Pension Benefits

Sharkey v. Lasmo (AUL Ltd.), 214 F.3d 371, 374–75, 84 FEP Cases 967 (**2d Cir.** 2000), reversed the denial of the successful ADEA plaintiff's lost pension benefits, holding that relief without such benefits did not make him whole. Such benefits are compensation for past economic loss, not prospective relief. The court held that there are two ways to provide the plaintiff with the appropriate relief. In addition to restoring his lost service and salary credits to his pension plan, "it is also possible to award money damages to compensate the plaintiff for the value of the pension benefits that were lost. This form of legal relief is proper for a jury to award." *Id.* at 375 (citation omitted). The court held that the record was unclear as to whether the jury's award of $1,427,200 in damages included the lost pension benefits, and remanded the issue so that the lower court could address it and either award the relief or withhold it so as to avoid duplicative relief. While the plaintiff did not attempt to quantify his lost benefits to the jury, the evidence presented to the jury contained references to pension provisions, and plaintiff's closing argument referred to pension benefits. The lower court had instructed the jury that the plaintiff's "economic loss" should be the measure of damages, and had referred four times in its instructions to the plaintiff's right to recover salary and benefits, or pension benefits, or financial losses. *Id.* Judge Hall concurred in part and dissented in part. *Id.* at 376–77.

b. Unrealized Appreciation in Value of Stock Options

Greene v. Safeway Stores, Inc., 210 F.3d 1237, 1243–44, 82 FEP Cases 1306, 24 EB Cases 1417 (**10th Cir.** 2000), affirmed the judgment on a jury verdict for the ADEA plaintiff, who had been fired at the age of 53, about two years before the plaintiff's interest in the defendant's Supplemental Executive Pension Plan and new stock options vested. The judgment included $4.4 million for unrealized stock option appreciation, including both the options that had not yet vested and the difference in the value of the already-vested options at the time of plaintiff's termination, when he exercised them and sold the stock to pay his IRS bills, and their value if he had been able to execute his plan of retiring at 55, exercising them, and selling the stock. The court discussed the importance of stock options in executive compensation, *id.* at 1243, and held that stock option appreciation is compensable under the ADEA, but that it was not subject to liquidated damages. Moreover, the court upheld the inclusion in the judgment of the $3 million difference between the value of the options in 1993, when the plaintiff was forced to exercise them, and the value the options would have had if he had been able to exercise them two years later, as he had planned. The court rejected the defendant's argument that this difference was compensatory damages not allowable under the ADEA:

> Safeway argues that the unrealized stock option appreciation constituted "consequential damages" because Safeway had no control over the market price of its stock and Greene opted to sell his stock a short time after exercising his options. Safeway's argument is unpersuasive because Safeway conferred on Greene the right to buy shares of its stock at a set price. The value of that right to buy stock at a prefixed price went up and down with the market price of the stock. In forcing Greene to exercise the options earlier than he otherwise would have, Safeway curtailed Greene's right to choose the date on which he would exercise his right to buy stock in order to maximize his profit on the sale of the

shares acquired.

Id. at 1244. The court rejected the defendant's argument that the lower court erred in failing to instruct the jury on mitigation, and that mitigation required the plaintiff to hold onto his stock and hope that the market value would not decrease. The court observed that the defendant had consented to a proximate cause instruction in lieu of a mitigation instruction, so that the plain error rule applied. The court held that the lower court's instruction on proximate cause sufficed under the plain error rule. *Id.* at 1244–45. The court also rejected the defendant's argument that the award was too speculative, because the award was close to the amount calculated by plaintiff's damages expert, Leslie Patten.

c. Other Fringe Benefits

Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1348, 88 FEP Cases 628 (**11th Cir.** 2000), affirmed the judgment on a jury verdict for the discharged ADEA plaintiff. The court rejected the defendant's argument that the award improperly included fringe benefits such as the reduced cost of meals, health insurance coverage, and vacation pay. "This circuit repeatedly has held that such benefits should be recouped in a back pay award." (Citation omitted.)

5. Calculation

a. "Lost Chance" Method

Bishop v. Gainer, 272 F.3d 1009, 1016–17, 87 FEP Cases 920 (**7th Cir.** 2001), *cert. denied*, 535 **U.S.** 1055 (2002), affirmed the calculation of back pay based on the "lost chance" method described hypothetically in *Doll v. Brown*, 75 F.3d 1200, 5 AD Cases 369 (**7th Cir.** 1996):

> Here, Hanford and Robert were competing against each other--as well as the person who actually was promoted. The judge turned to our decision in *Doll* and took us up on our invitation to apportion damages under a lost-chance theory, borrowed from tort law, which we said "recognizes the inescapably probabilistic character of many injuries." We analogized by saying that if a patient was entitled to 25 percent of his full damages because he had only a 25 percent chance of survival, he should be entitled to 75 percent of his damages if he had a 75 percent chance of survival--not 100 percent of his damages on the theory that by establishing a 75 percent chance he proved injury by a preponderance of the evidence.
>
> At 1206. Using the tort approach, the judge proceeded to calculate the plaintiffs' damages by assessing what the chances were that each would have received the promotion he sought. For this promotion, Hanford placed third and Robert fourth on the promotion list. The person who was first received a different promotion and the person who placed second had been out of the particular district for several years, and for that reason the judge reasoned that his chances of getting the promotion would be reduced to 25 percent. Then the judge assessed that Hanford had a 45 percent chance and Robert had a 30 percent chance to receive the promotion. The other appellant, Volle, was

competing for a promotion with two other white males who placed higher than he did on the list, so his chances were assessed at 15 percent.

The approach obviously involves more art than science. But as we said in Doll, that is true in all comparative negligence calculations as well. It strikes us that in this particular situation, it was the likeliest way to arrive at a just result. We think the judge (Judge Harry Leinenweber here) did a wonderful job of cutting this Gordian knot. We have examined the evidence and find no reason to disturb the thoughtful calculations he has made and the result they have produced.

b. "Make-Whole" Relief When There are More Complainants than Vacancies

United States v. City of Miami, 195 F.3d 1292, 1300–02, 81 FEP Cases 397 (**11th Cir.** 1999), *cert. denied sub nom. Fraternal Order of Police v. United States*, 531 **U.S.** 815 (2000), vacated and remanded the remedy the lower court had ordered after a finding that the City was in contempt of the Consent Decree by issuing unwarranted "Special Certifications" that allowed it to promote one additional black candidate to the rank of Sergeant, and one to the rank of Lieutenant. The court held that the lower court impermissibly ordered make-whole relief for all of the 35 bypassed officers on the promotional certificates. It held that "make-whole" relief should instead be limited to one promotion for each rank, from among the pools on the regular Certificates. *Id.* at 1299. The court approved the lower court's decision to use a classwide approach, because the promotional process was highly subjective and there was no means to determine which of the 23 bypassed candidates for Sergeant, and which of the 12 bypassed candidates for Lieutenant, would have been promoted in the absence of the Special Certifications. "We have explained in the context of remedial backpay relief that a classwide remedy is appropriate when fashioning an individualized remedy would create a 'quagmire of hypothetical judgment[s]' as to which individuals, out of a large class, should receive remedial relief. . . . In endorsing this approach, we have recognized that the only other relief alternatives would be unpalatable: either (1) randomly selecting several individuals from a large class for full 'make-whole' relief, or (2) awarding no relief at all because specific individuals deserving of a 'make-whole' remedy could not be identified from a victim class." *Id.* (citations omitted; some internal quotation marks omitted). The court stressed that equity for both sides is important. *Id.* at 1299–1300. The court held that the district court's error was in treating each bypassed candidate as if he had been deprived of a 100% chance of promotion, whereas "each lieutenant candidate stood only a one in twenty-three (or four percent) chance of promotion, and each sergeant candidate stood only a one in twelve (or eight percent) chance of promotion." *Id.* at 1300. The court held that a *pro rata* approach should be used, with the value of the promotion for each rank divided among the eligible pool for that rank. *Id.* at 1300–01. It stated that the district court's approach was punitive in nature because of its excessiveness. *Id.* at 1301–02. Moreover, the sheer number of promotions "could radically restructure the City's police force by creating many more lieutenants and sergeants than the City sought fit to create under its own promotion policies. The very magnitude of this remedy risks reshaping the Police Department in a variety of ways unforseen and unintended by the district court." *Id.* at 1302. The court vacated the remedy and remanded the case for the entry of *pro rata* relief. *Id.*

c. Collateral Benefits

Skalka v. Fernald Environmental Restoration Management Corp., 178 F.3d 414, 426, 86 FEP Cases 1327 (**6th Cir.** 1999), *cert. denied sub nom. Conover v. Fernald Environmental Restoration Management Corp.*, 530 **U.S.** 1242 (2000), reversed the judgment for ADEA plaintiff Skalka and remanded it for a remittitur or new trial on damages. The court stated that the district court should consider on remand whether the plaintiff's receipt of early retirement benefits prior to the trial should be considered as payments from a collateral source not to be subtracted from the back pay award, or as interim earnings to be subtracted from the award.

Hamlin v. Charter Township of Flint, 165 F.3d 426, 432–36, 8 AD Cases 1688 (**6th Cir.** 1999), reversed the lower court's deduction of collateral pension benefits from the plaintiff's undifferentiated damages award, reducing the $500,000 verdict to zero. The court rejected an abuse-of-discretion standard of review because such a standard fails to take into account "the general policy considerations that form the basis of the collateral source rule," and held that the decision is a "policy determination that should not be left to the individual discretion of each district court." *Id.* at 433. The Sixth Circuit disagreed with the lower court's evaluation of Sixth Circuit precedent on the collateral source rule as unclear, confusing, inconsistent, and contradictory. The court found its own precedent "reasonably consistent" in discrimination cases. *Id.* It stated the general rule: "Applying the collateral source rule in the employment discrimination context prevents the discriminatory employer from avoiding liability and experiencing a windfall, and also promotes the deterrence functions of discrimination statutes." *Id.* at 434 (citation omitted). The court approved the test set out in *Phillips v. Western Company of North America*, 953 F.2d 923, 932 (**5th Cir.** 1992), for determining whether pension benefits are collateral source benefits:

> "(1) whether the employee makes any contribution to funding of the disability payment; (2) whether the benefit plan arises as the result of a collective bargaining agreement; (3) whether the plan and payments thereunder cover both work-related and nonwork-related injuries; (4) whether payments from the plan are contingent upon length of service of the employee; and (5) whether the plan contains any specific language contemplating a set-off of benefits received under the plan against a judgment received in a tort action."

Hamlin, *id.* at 435. The court stated that each of these factors favored the plaintiff. "The plan arises pursuant to the Michigan statute and a collective bargaining agreement. A disability pension under the plan is available to cover both work-related and non-work-related disabilities, payments are contingent upon length of service, and the only language contemplating the offsetting of other payments pertains specifically to workers' compensation benefits stemming from the same injury." *Id.* The court approved the first three of the four rules on which the district court relied: "'First, employer defendants in employment discrimination cases are subject to the rule that tortfeasors should not benefit by way of offset from payments made to employees from collateral sources. Second, under the collateral source rule, payments from an entity that is separate and distinct from an employer generally should not be used to offset damage awards in Title VII and ADEA cases. Third, also under the collateral source rule, payments which employers incur pursuant to a State or Federal social policy, as opposed to an independent, voluntary obligation of the employer, should not offset damage awards in Title VII and ADEA

cases.'" *Id.* The court disapproved the lower court's fourth and final rule—that "'any benefits that a plaintiff would not have earned had he or she continued working should be offset'"—because that "directly contradicts the first three rules." *Id.* Judge Nelson concurred in the judgment. *Id.* at 439–41.

Flowers v. Komatsu Mining Systems, Inc., 165 F.3d 554, 558, 8 AD Cases 1769 (**7th Cir.** 1999), vacated and remanded the award of back pay to the ADA plaintiff. The court stated in *dictum*: "The purpose of the collateral source rule is 'not to prevent the plaintiff from being overcompensated but rather to prevent the tortfeasor from paying twice.' . . . In an employment case, if the employer is the source of the funds at issue, then the payments can be deducted from the award." (Citation omitted.) The court stated that the lower courts have discretion whether or not to deduct collateral source benefits from a back pay award, and held that the trial court did not abuse its discretion in deducting the plaintiff's Social Security disability benefits from his award. However, the benefits should be deducted only for the periods of time in which the plaintiff was able to work and is this able to receive back pay.

McLean v. Runyon, 222 F.3d 1150, 1155–57, 10 AD Cases 1569 (**9th Cir.** 2000), affirmed the lower court's reduction of the Federal-sector Rehabilitation Act plaintiff's back pay and front pay awards by his benefits under the Federal Employees Compensation Act. The court stated that Rehabilitation Act awards "must comport with" Title VII standards, *id.* at 1155, but that the collateral source rule did not apply because the Postal Service pays both the workers' compensation award and the monetary damages in the case. The source of the FECA benefits is the USPS, not collateral to it. *Id.* at 1156.

Gotthardt v. National R.R. Passenger Corp., 191 F.3d 1148, 1156–57, 80 FEP Cases 1528 (**9th Cir.** 1999), affirmed the district court's refusal to reduce the Title VII sexual harassment plaintiff's $603,928.37 front pay award (the present value) by the present value of disability benefits for which she might become eligible in the future. Recognizing the conflict among the Circuits, the court held that it was unnecessary to decide the legal question because the defendant had offered only speculation as to whether the plaintiff might receive such benefits in the future.

Fredenburg v. Contra Costa County Dept. of Health Services, 172 F.3d 1176, 1181, 9 AD Cases 385 (**9th Cir.** 1999), reversed the grant of summary judgment to the defendant. The court held that the plaintiff was not judicially estopped from maintaining her ADA claim because of the representations she had made on her application for State disability benefits, but that the plaintiff could not retain her disability benefits while also receiving back pay. "Our ruling relieves Fredenburg of an untenable choice between disability benefits and an ADA claim . . . but it does not permit a double recovery based on inconsistent positions." (Citation omitted.)

d. Reduction of Front Pay Award to Present Value

Skalka v. Fernald Environmental Restoration Management Corp., 178 F.3d 414, 426, 86 FEP Cases 1327 (**6th Cir.** 1999), *cert. denied sub nom. Conover v. Fernald Environmental Restoration Management Corp.*, 530 **U.S.** 1242 (2000), reversed the judgment for ADEA plaintiff Skalka and remanded it for a remittitur or new trial on damages. The court held

that the award of Skalka's pension benefits must be reduced to present value.

Gotthardt v. National R.R. Passenger Corp., 191 F.3d 1148, 1152–53, 80 FEP Cases 1528 (**9th Cir.** 1999), affirmed the district court's award of $603,928.37 in front pay (the present value) to the Title VII sexual harassment plaintiff.

6. Manner of Calculation

a. Proof by Plaintiff's Own Testimony

Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 510–11 (**9th Cir.** 2000), affirmed under Washington law the jury's award of $100,000 in back pay, because the plaintiff testified that she would have received between $130,000 and $200,000 more in salary if she had been promoted to one of the positions denied to her, and the jury could reasonably have determined that she was denied promotions in retaliation for her complaints.

b. Claim That Back Pay is Too Speculative

Durham Life Insurance Co. v. Evans, 166 F.3d 139, 156, 78 FEP Cases 1434, 79 FEP Cases 160 (**3d Cir.** 1999), affirmed the Title VII sexual harassment judgment for Evans after a bench trial. The court stated that back pay may be awarded even if the figures are inexact. "The court may estimate what a claimant's earnings would have been without discrimination, and uncertainties are resolved against a discriminating employer." The court rejected the company's argument that the base salary to use in calculating Evans' back pay should have been her salary in 1993, which was $53,000 a year less than her salary in 1992, because her 1993 salary was affected by substantial discrimination. The court distinguished other precedents because they did not involve harassment with a tangible effect on compensation. "If Durham's argument were to be accepted, then it would be to a discriminator's advantage to increase its mistreatment from a hostile environment to a decrease in pay, so that any ultimate penalty would be minimized. Evans's attempts to deal with the discrimination without quitting, despite the negative effects on her salary, should not be held against her." *Id.* Because the company used the wrong base period for Evans' back pay, the court rejected as unfounded the company's argument that she temporarily made more in her new job, thus mooting Durham's argument that Evans was not entitled to back pay. *Id.* Moreover, held the court, Evans' success at her new employer was short-lived, and her earnings sank rapidly. "Significantly, the court found that her decline was caused by Durham's actions against her, which ultimately led her to take disability leave from Paul Revere. Because Durham's conduct affirmatively impaired her ability to mitigate her damages, it would be inequitable to reduce her back pay award in this case." *Id.* at 157. The court held that the post-employment actions constituted a continuation of the earlier discrimination and harassment, as well as retaliation. *Id.*

Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495, 499–501, 10 AD Cases 1345 (**7th Cir.** 2000), affirmed the judgment for the ADA plaintiff on a jury verdict of $1,050,000 in "compensatory damages," although the cap on compensatory damages for the defendant was $100,000, because the award included back pay and front pay, the plaintiff claimed $2,050,000 for past and future financial loss and unspecified other damages, the defendant did nothing to challenge the plaintiff's calculations, and without objection by the

defendant the court charged the jury on all of these monetary claims and used a general verdict form.

Greene v. Safeway Stores, Inc., 210 F.3d 1237, 82 FEP Cases 1306, 24 EB Cases 1417 (**10th Cir.** 2000), rejected defendant's argument that the award was too speculative, because the award was close to the amount calculated by plaintiff's damages expert, Leslie Patten.

7. Interim Earnings

Wilson v. Pena, 79 F.3d 154, 166–67 n.13, 72 FEP Cases 67 (**D.C. Cir.** 1996), held that moonlighting earnings need not be from a permanent job to be excluded from interim earnings for purposes of the calculation of a back pay award. What matters is whether the plaintiff can show she or he could have held both the supplemental job and the job in question simultaneously, not whether the plaintiff held the supplemental job prior to the back pay period.

Rhodes v. Guiberson Oil Tools, 82 F.3d 615, 620, 71 FEP Cases 83 (**5th Cir.** 1996), held that the district court erred in failing to deduct from plaintiff's back pay award the $30,372 plaintiff had received in severance pay. Rhodes would not have received this severance pay if he had remained employed.

EEOC v. Kentucky State Police Department, 80 F.3d 1086, 1100, 71 FEP Cases 1495, 20 EB Cases 1078 (**6th Cir.**), *cert. denied*, 519 **U.S.** 963 (1996), held that the district court properly refused to deduct from back pay the amounts the troopers would have owed for taxes. Citing the Supreme Court decision in *NLRB v. Gullett Gin Co.*, 340 **U.S.** 361, 27 LRRM 2230 (1951), the court also held that the district court properly deducted the claimants' net income from their interim employment, rather than their gross earnings from such employment.

Smith v. World Insurance Co., 38 F.3d 1456, 1466, 66 FEP Cases 13, 18 EB Cases 2408 (**8th Cir.** 1994), held that the plaintiff's back pay was to be reduced by the amount of his severance package, including the amount the employer paid to the job placement agency to assist the former employee in finding another job.

Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1111–12, 64 FEP Cases 382 (**8th Cir.**), *cert. denied*, 513 **U.S.** 946 (1994), upheld the district court's holding that plaintiff's $7,345 in self-empoyment income as a consultant should not be set off as interim earnings against his back pay award, because the district court found that this was "moonlighting" income he could have earned even if he had remained employed with the defendant. "ITT had the burden of proving that Gaworski could not have earned the income had he not been terminated." Id. at 1112. However, the district court erred in failing to enforce the parties' stipulation that pension payments should be deducted from plaintiff's back pay, after enforcing the part of the stipulation covering future pension payments. The plaintiff had filed a letter brief with the lower court requesting that pension payments should not be deducted from his back pay award, but did not move for relief from the stipulation. "The court erred in not enforcing both sides of the parties' bargain."

Virgo v. Riviera Beach Associates, Ltd., 30 F.3d 1350, 1364, 65 FEP Cases 1317 (**11th Cir.** 1994), upheld an award of back pay where plaintiff's expert calculated minimum-wage earnings of $12,480 a year as plaintiff's earning capacity, and used this figure as her interim earnings during periods when she was not employed.

8. Mitigation

Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1133–34, 79 FEP Cases 1018 (**D.C. Cir.** 1999) (*per curiam*), affirmed in part, and reversed in part, the lower court's award of back pay to a class of African-American rodmen discriminatorily denied membership in the union. The court stressed the dilemma faced by a claimant trying to satisfy the mitigation doctrine:

> A claimant "forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied." . . . But "the unemployed or underemployed claimant need not go into another line of work, accept a demotion or take a demeaning position." . . . Nor is he "required to accept employment at a great distance from his home." . . . On the other hand, a claimant may reasonably conclude that he should lower his sights and seek other work, including work outside the industry. . . . "The claimant," after all, "cannot afford to stand aside while the wheels of justice grind slowly toward the ultimate resolution of the lawsuit. The claimant needs work that will feed a family and restore self-respect." . . . Indeed, a claimant "may be required . . . to 'lower his sights' by seeking less remunerative work after he has unsuccessfully attempted for a reasonable period of time to locate interim employment comparable with his improperly denied position." . . .
>
> As the above discussion suggests, the elements of the mitigation doctrine can create a dilemma for a claimant. As we said in [a 1972 decision],
>
> > If the discriminatee accepts significantly lower paying work too soon after the discrimination in question, he may be subject to a reduction in back pay on the ground that he willfully incurred a loss by accepting an unsuitably low paying position. On the other hand . . . if he fails to 'lower his sights' after the passage of a reasonable period of unsuccessful employment searching, he may be held to have forfeited his right to reimbursement on the ground that he failed to make the requisite effort to mitigate his losses.
>
> Id. Because of this dilemma, we held that "courts must be careful when applying" the mitigation doctrine, and that "it would not be unreasonable . . . to resolve doubts in this area in favor of the innocent discriminatee." . . . "[T]he burden of establishing facts in mitigation of the back pay liability" is therefore upon the violator.

Id. at 1133–34. The court rejected the defendants' argument that O.C. Brown failed to mitigate his injuries by routinely leaving the jobs to which he was referred after a short time, because Brown was frequently fired at the request of the union business agent because he was a permit man rather than a member. While he did leave one job prematurely but voluntarily, he obtained other work immediately thereafter. The court nevertheless remanded his award for a new determination because he was unavailable for work during the winters, this must be considered along with the availability of work during the winters, and the Special Master had failed to consider the matter at all. *Id.* at 1134. The court remanded the backpay claims of two other

claimants for a determination whether their decisions to continue working in non-union jobs, during times in which Local 201 had more than enough work, constituted a failure of mitigation. The court held that the determination depends on the reasons they had for taking other work: "it may be reasonable for a claimant to decline an interim job from his employer (other, of course, than the very job at issue in his lawsuit) in favor of a lower-paying but more permanent job from someone else. . . . *A fortiori*, it may be reasonable to decline to leave an existing job when doing so would only make oneself available for *possible* referral to a better-paid one." Because the Special Master failed to address the issue, a remand was necessary. *Id.* at 1135 (emphasis in original). The court rejected the unions' argument that James Brown failed to mitigate his damages by failing to seek work through other locals or other unions, because the unions were simultaneously arguing that they had more than enough work for permit men in several years and because the unions failed to prove that there would have been a better chance of obtaining union work in other cities. *Id.* at 1135–36. The court rejected their argument that Sherman Johnson sought no other work in 1975 because this contradicted their simultaneous argument as to other claimants that any claimant who sought any work outside the local failed to mitigate damages. *Id.* at 1136. The court rejected a number of other speculative and inconsistent arguments by the unions, remanding only parts of three claims, each as to a period of a year or less. *Id.* at 1136–37. Turning to the claimants' appeals, the court remanded the claims of James Brown and Ronald Tucker, whose back pay awards were truncated because they obtained non-union employment and ceased to seek referrals. The court held that "the Master's decision to truncate the awards solely because the claimants chose to keep working at alternative employment, rather than constantly to seek new union referrals, misapplies those doctrines and requires a remand." *Id.* at 1137. The court stated that this created a "Catch-22" situation for the claimants:

> To infer a breach of the duty to mitigate solely from a claimant's acceptance of other work implicates the dilemma noted at the beginning of this Part, and creates a Catch-22 situation for the claimant. . . . Here, claimants did not even choose work in an unrelated field . . . . Rather, they did just what the unions have asserted they were obligated to do: when unable to fill their hours with Local 201 work, they sought and successfully obtained non-union work instead. *See supra* Part V.B. To cut off their back pay now would truly be to apply a Catch-22: claimants would have been ineligible for back pay had they not tried to obtain non-union work, and would now be ineligible precisely because they succeeded in obtaining it.

Id. (citation and quotation omitted). The court noted that constant checking with the unions for referrals would have caused tardiness at the claimants' non-union employer and jeopardized their jobs. The Special Master made no findings as to their interest in working on union referrals, and the court remanded the awards for such determinations. *Id.* at 1137–38. Conversely, the court affirmed the truncation of two awards where the Special Master made findings that the claimants could no longer perform the work required. *Id.* at 1138.

Quint v. A.E. Staley Mfg. Co., 172 F.3d 1, 15–16, 9 AD Cases 242 (**1st Cir.** 1999), affirmed the lower court's reduction of the back pay award from $125,580 to $45,917, representing only 18 months of back pay, because the plaintiff made no efforts to find a job during the forty-odd months since her discharge. Under these circumstances, held the court, the defendant was not required to prove the existence of substantially equivalent jobs in the relevant geographic area. "We believe it will be the extraordinary case in which an ADA claimant's decision to withdraw from the job market can be found to have been justifiable, given that

virtually all reemployment prospects are plainly precluded absent some effort to reenter the job market. Thus, we believe the mitigation policy fostered by the ADA will be better served by the approach we adopt today, since it affords reasonable inducements for ADA claimants to attempt to secure alternative employment." *Id.* at 16. The court did not explain why the plaintiff was awarded 18 months of back pay, but noted that the district court had found that the plaintiff should have been able to find substantially equivalent employment within 18 months if she had exercised due diligence. *Id.* at 8.

Carey v. Mount Desert Island Hospital, 156 F.3d 31, 41, 77 FEP Cases 861 (**1st Cir.** 1998), affirmed the lower court's decision to reduce the plaintiff's back pay by $100,000, leaving him with an award of $110,070, because of his failure to mitigate his loss. The lower court properly weighed the testimony of the competing experts and concluded that the plaintiff did not exercise reasonable diligence in seeking comparable employment.

Hawkins v. 1115 Legal Service Care, 163 F.3d 684, 695–96, 78 FEP Cases 882 (**2d Cir.** 1998), affirmed the jury's award of $125,000 in back pay, rejecting the defendants' argument that the plaintiff had failed to mitigate her damages. Describing the plaintiff's duty of mitigation, the court stated: "This obligation is not onerous and does not require her to be successful." *Id.* at 695. The court described the plaintiff's obligation as one of acting reasonably. "For example, although an unemployed claimant would generally forfeit her right to backpay if she refused a job substantially equivalent to the one she was denied, she 'need not go into another line of work, accept a demotion, or take a demeaning position. . . . Similarly, a claimant who voluntarily resigned from comparable employment for personal reasons would not have adequately mitigated damages, but 'a voluntary quit does not toll the back pay period when it is motivated by unreasonable working conditions or an earnest search for better employment.' . . . Self-employment, if it is undertaken in good faith and is a reasonable alternative to seeking other comparable employment, may be considered permissible mitigation." *Id.* at 695–96. The court held that the plaintiff's delay of a couple of months in scheduling her starting date for a new job, and her delay of that date by two or three weeks because of the death of her mother, "was hardly so long as to be unreasonable as a matter of law." *Id.* at 696. The court also rejected the defendant's argument that the plaintiff failed to mitigate her damages while she was self-employed. It accepted the lower court's determination that the jury could reasonably have concluded that the plaintiff's working conditions in her new job were unsatisfactory, with longer hours, fewer fringe benefits, and more stressful work. *Id.*

Rutherford v. Harris County, 197 F.3d 173, 191, 81 FEP Cases 1775 (**5th Cir.** 1999), vacated and remanded the Title VII award of back pay and prejudgment interest because it was made after the defendant filed its notice of appeal, when the lower court had been divested of jurisdiction. *Id.* at 189–90. Because the issue may arise again on remand, the court directed the lower court to determine whether the plaintiff failed to mitigate her damages when, following the denial of her promotion to full-time status, she requested a transfer to a reserve deputy position. "If on remand the district court decides to award back pay, it must either deduct the amount (if any) that Rutherford could reasonably have mitigated—determined according to the applicable burden of proof and legal standards—or award the full amount and enter supporting findings for doing so." *Id.*

Skalka v. Fernald Environmental Restoration Management Corp., 178 F.3d 414,

426, 86 FEP Cases 1327 (**6th Cir.** 1999), *cert. denied sub nom. Conover v. Fernald Environmental Restoration Management Corp.*, 530 **U.S.** 1242 (2000), reversed the judgment for ADEA plaintiff Skalka and remanded it for a remittitur or new trial on damages. The court stated that, on remand, the remittitur should reflect Skalka's new, higher-paying job "to the extent that any rational jury would have found this income to be proven." It pointed out that the defendant had the burden of proving reductions in the plaintiff's damages. It continued: "We note that Skalka is not entitled to back pay for any period in which he earned an equal or higher salary than he would have earned at FERMCO . . . but that his 'excess' earnings are not to be subtracted from the back-pay award for the period of unemployment." (Citations omitted.)

EEOC v. Bd. of Regents of University of Wisconsin System, 288 F.3d 296, 304, 88 FEP Cases 1133 (**7th Cir.** 2002), affirmed the judgment for the EEOC. The court rejected defendant's argument that it was entitled to a new trial on mitigation, because the charging parties failed to apply for employment with the defendant. The court stated: "But they had explanations for their failure to apply to the very organization which just terminated them. For one thing, after just being terminated for alleged deficiencies in their performance and skills, they had no reason to believe they would be hired if they did apply." Finally, the court noted that two charging parties had re-applied with the defendant, and had not been hired.

Sheehan v. Donlen Corp., 173 F.3d 1039, 1048–49, 79 FEP Cases 540 (**7th Cir.** 1999), affirmed the jury's implicit finding that the plaintiff failed to mitigate her uncontroverted $98,000 in damages, in light of the fact that it awarded only $30,000. The court placed on the defendant the burden of persuasion, and held that the burden was met. "Sheehan found no other employment in the three years between her termination at Donlen and the trial. She was an undisputedly qualified employee with a long and hitherto substantially unbroken work history. Evidence was given that comparable jobs were available. A rational jury had a legally sufficient basis to conclude that Sheehan failed to mitigate her damages. It might rationally have believed that she had done so, but it apparently did reasonably believe that she had not." *Id.* at 1049.

Henderson v. Simmons Foods, Inc., 217 F.3d 612, 617–18, 83 FEP Cases 279 (**8th Cir.** 2000), affirmed the judgment on a jury verdict for the Title VII sexual harassment and constructive-discharge plaintiff. The plaintiff left her job at a chicken processing plant because the defendant did not take adequate corrective action despite her repeated complaints of hostile-environment harassment. She applied for employment with more than thirty non-poultry employers, although she had no training or experience outside the poultry industry. The court rejected the defendant's argument that her $15,000 back pay award was improper because her failure to apply for poultry-related jobs meant that she had failed to mitigate her damages. It held that she had tried to obtain numerous positions commensurate with her education and skill levels. "Simmons has proffered no evidence that Henderson refused a position that was substantially similar to her previous employment or that she failed to use reasonable care in obtaining a suitable position." *Id.* at 618.

Caudle v. Bristow Optical Co., Inc., 224 F.3d 1014, 1021 n.3 (**9th Cir.** 2000), affirmed the lower court's decision ending the pregnancy discrimination plaintiff's back pay period in September 1995, because the plaintiff voluntarily withdrew from the workforce then to care for her young child, and this decision was unaffected by the defendant's discrimination. The court held that the lower court properly relied on "of classified employment advertisements

with large numbers of postings for positions facially comparable to Caudle's. Other circuits have upheld determinations that comparable work was available on similar evidence."

McClure v. Independent School District No. 16, 228 F.3d 1205, 1214 (**10th Cir.** 2000), reversed the limitation of plaintiff's back pay to the 1996–97 school year. The lower court found that plaintiff had failed to mitigate her damages. After her discharge, plaintiff "applied for employment in public school systems within an eighty mile radius of Salina, sending out fifty to seventy resumes." These applications were all unsuccessful, and plaintiff took early retirement. *Id.* at 1210. The court of appeals held that the duty to mitigate is not the same as a duty to succeed in mitigation, and that only an "'honest good faith effort'" is required. *Id.* at 1214 (citation omitted). It held that plaintiff had made an adequate effort.

Greene v. Safeway Stores, Inc., 210 F.3d 1237, 1244–45, 82 FEP Cases 1306, 24 EB Cases 1417 (**10th Cir.** 2000), rejected the defendant's argument that the lower court erred in failing to instruct the jury on mitigation, and that mitigation required the plaintiff to hold onto his stock and hope that the market value would not decrease. The court observed that the defendant had consented to a proximate cause instruction in lieu of a mitigation instruction, so that the plain error rule applied. The court held that the lower court's instruction on proximate cause sufficed under the plain error rule.

Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1347–48, 88 FEP Cases 628 (**11th Cir.** 2000), affirmed the judgment on a jury verdict for the discharged ADEA plaintiff. The court rejected the defendant's argument that the plaintiff failed to mitigate his earnings losses after he started receiving Social Security benefits, because the plaintiff testified that he continued seeking employment throughout the back pay period, but had only ceased recording his efforts after he started getting Social Security benefits. The court noted that the defendant bore the burden of proving a failure to mitigate, and held that a reasonable jury could have found adequate mitigation.

Lathem v. Department of Children and Youth Services, 172 F.3d 786, 794, 79 FEP Cases 1267 (**11th Cir.** 1999), affirmed the award of back pay to the plaintiff notwithstanding the defendant's argument that she failed to mitigate her damages adequately. The plaintiff testified that she had applied for comparable employment with a number of private employers. The defendant argued that she would have obtained employment if she had applied at other State government agencies. "In a back pay dispute, the burden is on the defendant to prove that the plaintiff did not use reasonable diligence to obtain comparable work. . . . In addition, we hold that the mitigation requirement does not apply to a Title VII plaintiff where the defendant's discriminatory conduct resulted in the disability that prevents the plaintiff from finding other employment." *Id.* (citations omitted).

9. Procedural Questions

Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495, 500–01, 10 AD Cases 1345 (**7th Cir.** 2000), affirmed the judgment on a jury verdict for the ADA plaintiff. The court held that a jury can determine both back pay and front pay under the ADA, although no party is entitled to a jury. Rule 39(c), FED. R. CIV. PRO., allows matters "not triable of right by a jury" to be tried to a jury "with the consent of both parties," and held that back pay and front pay are not

beyond the scope of the parties' consent under the rule. The Complaint demanded jury trial as to all issues, the Answer did not object, and the defendant never objected to the submission of all claims to the jury. "For purposes such as this, implied consent is as good as express consent—for pleadings may be amended by implied consent, see FED. R. CIV. P. 15(b), which means that when both sides are content to have an issue decided by the jury, the pleadings are deemed amended to give permission." *Id.* at 501.

C. Prejudgment Interest

1. General Principles

Loeffler v. Frank, 486 **U.S.** 549, 554–56, 46 FEP Cases 1659 (1988), held that prejudgment interest was available in Title VII awards of back pay against the U.S. Postal Service, because Congress had waived the Postal Service's sovereign immunity to suit by its provision that the Postal Service can "sue and be sued," and the principle that such waivers are to be liberally construed. The Court concluded:

> Respondent concedes, and apparently all the United States Courts of Appeals that have considered the question agree, that Title VII authorizes prejudgment interest as part of the backpay remedy in suits against private employers. This conclusion surely is correct. The backpay award authorized by § 706(g) of Title VII, as amended, 42 USC § 2000e-5(g), is a manifestation of Congress' intent to make "persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 **U.S.** 405, 421, 10 FEP Cases 1181 (1975). Prejudgment interest, of course, is "an element of complete compensation." *West Virginia v. United States*, 479 **U.S.** 305, 310, 55 FEP Cases 353 (1987). Thus, since Title VII authorizes interest awards as a normal incident of suits against private parties, and since Congress has waived the Postal Service's immunity from such awards, it follows that respondent may be subjected to an interest award in this case.

Id. at 557–58 (parallel citations omitted; FEP Cases citations added; citation format corrected). Justice White dissented, joined by the Chief Justice and Justice O'Connor. *Id.* at 566.

West Virginia v. United States, 479 **U.S.** 305, 310 (1987), stated: "Prejudgment interest is an element of complete compensation," and explained in footnote 2: "Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress."

2. ADEA, EPA, and FLSA Cases

Sharkey v. Lasmo (AUL Ltd.), 214 F.3d 371, 375–76, 84 FEP Cases 967 (**2d Cir.** 2000), reversed in part the denial of the successful ADEA plaintiff's claims for prejudgment interest, stating that it is ordinarily an abuse of discretion not to include prejudgment interest in the award. The lower court denied prejudgment interest in part because the jury's award was already generous. Rejecting this rationale, the court of appeals stated that this consideration is impermissible. "If the award was excessive, the court might have exercised the power of

remittitur. But it had no basis to deny prejudgment interest as a substitute for reducing an excessive award." *Id.* Similarly, the court of appeals rejected the lower court's reliance on the plaintiff's receipt of a substantial settlement of his severance claims, and its reliance on the desultory nature of the plaintiff's mitigation efforts. The court held that, depending on the manner of calculation, it may be appropriate to deny prejudgment interest on the restricted stock and stock options the plaintiff was denied, as well as on the value of his lost pension benefits. The court stated that on remand the lower court will need to apportion the jury's award, award prejudgment interest on the lost wages, and make a determination of the propriety of an award of prejudgment interest on the stock rights, options, and lost pension benefits. *Id.* at 376. Judge Hall concurred in part and dissented in part. *Id.* at 376–77.

Greene v. Safeway Stores, Inc., 210 F.3d 1237, 1245, 82 FEP Cases 1306, 24 EB Cases 1417 (**10th Cir.** 2000), affirmed the judgment on a jury verdict for the ADEA plaintiff, who had been fired at the age of 53. The plaintiff was awarded liquidated damages on parts of his recovery other than the award of the unrealized value of the appreciate of his stock options, and the court followed 1984 Circuit precedent that prejudgment interest is not available where liquidated damages are awarded, without considering intervening Supreme Court decisions on the nature of liquidated damages.

3. ERISA Cases

Ford v. Uniroyal Pension Plan, 154 F.3d 613, 620, 22 EB Cases 1681 (**6th Cir.** 1998), affirmed the district court's denial of prejudgment interest on the present value of future disability benefits. The lower court's decision to award prejudgment interest on past benefits unlawfully denied had been affirmed in an earlier decision. *Id.* at 615. "When a plaintiff is not yet entitled to the benefit, however, there is no lost opportunity to use or invest the benefit payment. Consequently, awarding interest on future benefits is not necessary to make the plaintiff whole and would only overcompensate the plaintiff." *Id.* at 620. The court stated that such an award would penalize the defendant, "in violation of ERISA's purely compensatory remedial scheme." *Id.*

4. All Other Cases

Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1139, 79 FEP Cases 1018 (**D.C. Cir.** 1999) (*per curiam*), affirmed the lower court's award of prejudgment interest on back pay to a class of African-American rodmen discriminatorily denied membership in the union. The case had been prolonged greatly by judicial inactivity; Judge Silberman's concurrence stated: "As our background section indicates, the district court's interminable delays are inexcusable and have caused a great hardship to the parties, particularly the class. I am terribly concerned that our remand to this district judge is equivalent to dropping the case into a well, and, therefore, we should be prepared to grant extraordinary relief if there is further unjustified delay." *Id.* at 1140. The court held that this factor did not excuse the unions from the obligation to pay prejudgment interest going back to October 21, 1972. "The unions are wrong in arguing that delays for which they are not responsible mandate tolling of prejudgment interest." *Id.* at 1139.

Ramos v. Davis & Geck, Inc., 167 F.3d 727, 734–35 (**1st Cir.** 1999), affirmed the

denial of prejudgment interest on the plaintiff's $150,000 damages award under Puerto Rico Law 100, doubled under that law to $300,000, because Puerto Rico law conditions the award of prejudgment interest on the defendant's having "acted in an obstinate manner during the litigation." The court held that the lower court did not abuse its discretion in finding that, while the defense was justifiably robust (in that it had defeated several claims) it was not obstinate.

Gierlinger v. Gleason, 160 F.3d 858, 873–75, 78 FEP Cases 988 (**2d Cir.** 1998), reversed the denial of prejudgment interest on plaintiff's award of $117,739 in damages. "In a suit to enforce a federal right, the question of whether or not to award prejudgment interest is ordinarily left to the discretion of the district court . . . which is to take into consideration '(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court.'" *Id.* at 873 (citations omitted). "To the extent, however, that the damages awarded to the plaintiff represent compensation for lost wages, 'it is ordinarily an abuse of discretion *not* to include pre-judgment interest.'" *Id.* (emphasis in original; citations omitted). The court held that the lower court erred in concluding that the jury's award of "financial damages for loss of past and future income" necessarily included prejudgment interest. "The natural reading of this language does not require the jury to engage in complicated computations of interest, but merely asks it to find the amount of the 'income' that Gierlinger lost as a result of her termination. In the absence of specific instructions, neither the word 'financial' nor the word 'damages' meaningfully alters that natural reading." *Id.* at 874. Not even the concept of prejudgment interest had been mentioned to the jury. "Although instructed that it would be required to reduce to present value any amounts that it found Gleason's conduct would cause Gierlinger to lose in the future, the jury was not instructed that its duties included the calculation of interest on wages lost in the past." *Id.* The court also stated that the amount of the award approximated the amount of the plaintiff's lost pay, less the amounts she had earned at other employment, for the eight years since her discharge. *Id.* at 874–75. The court also held that the lower court erred in denying prejudgment interest because of its conclusion that the plaintiff had failed to mitigate her damages, holding that such a basis for the denial invaded the province of the jury.

Frazier v. Iowa Beef Processors, Inc., 200 F.3d 1190, 1194, 5 WH Cases 2d 1445 (**8th Cir.** 2000), relied on Federal law to uphold the award of prejudgment interest on an Iowa-law retaliatory discharge claim. The court stated the general rule under Circuit precedent: "'[a]s a general rule, prejudgment interest is to be awarded when the amount of the underlying liability is reasonably capable of ascertainment and the relief granted would otherwise fall short of making the claimant whole because he or she has been denied the use of money which was legally due.'" (Citation omitted.) The court added: "Generally, prejudgment interest should be awarded "unless exceptional or unusual circumstances exist making the award of interest inequitable." *Id.* (citation omitted).

Matter of Aurecchione v. New York State Division of Human Rights, 98 N.Y.2d 21, 25, 771 N.E.2d 231, 744 N.Y.S.2d 349 (**N.Y.** 2002), reversed the denial of 11 years of pre-determination interest as an abuse of discretion, where the delay was caused by an administrative backlog and neither the Commissioner nor the Appellate Division provided any reasons justifying a discretionary denial of interest. The court rejected the employer's argument that

interest would be a penalty in this situation, and held that the denial of interest would in effect require the victim to provide an interest-free loan to the defendant.

5. Amount

Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1139, 79 FEP Cases 1018 (**D.C. Cir.** 1999) (*per curiam*), affirmed the use of a 6% annual rate of prejudgment interest, compounded annually since October 21, 1972, on back pay to a class of African-American rodmen discriminatorily denied membership in the union. The court rejected plaintiffs' argument that they should have had the benefit of a variable or larger rate, because they had earlier conceded that such a rate would make them whole.

Gierlinger v. Gleason, 160 F.3d 858, 875, 78 FEP Cases 988 (**2d Cir.** 1998), reversed the denial of prejudgment interest on plaintiff's award of $117,739 in damages. The court held that interest should be awarded on the entire amount because the court inferred that the jury did not award any amount for future loss of income. At the suggestion of the defendant, the jury had been told to request further instructions if it desired to award anything for lost future income, and it never did so.

Williams v. Trader Publishing Co., 218 F.3d 481, 488, 83 FEP Cases 668 (**5th Cir.** 2000), affirmed the judgment on liability for the Title VII gender discrimination plaintiff, and upheld the awards of prejudgment and postjudgment interest. The lower court awarded prejudgment interest at the rate of 10%, and postjudgment interest at the rate of 5.407%. *Id.* at 484. Because the defendant did not challenge the rate of interest below, the court reviewed the award for plain error. The court stated that it had previously approved the Federal rate of interest as making the plaintiff whole, but that this was not the exclusive rate that can be used for this purpose. "Considering the total circumstances of this case, we conclude that the district court's imposition of a somewhat higher rate of interest (apparently based on the state interest rate), even if error, was not plain error affecting the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 488.

Ford v. Uniroyal Pension Plan, 154 F.3d 613, 22 EB Cases 1681 (**6th Cir.** 1998), affirmed the district court's use of a simple 9% rate of prejudgment interest on disability benefits denied in violation of ERISA, rather than the 12% rate mandated by Michigan law. The court held that there was no obligation to follow State law because "the calculation of prejudgment interest is not an area 'primarily of state concern' for which there does not exist a substantial body of federal law. We therefore are not faced with a situation where the development of a federal common law rule governing the award of prejudgment interest divests the states of authority over a matter which they traditionally have regulated." *Id.* at 617. Moreover, too high a rate would not serve the compensatory purpose of prejudgment interest under ERISA, and would in effect constitute punitive damages not contemplated by ERISA. *Id.* at 618–19. The court accepted the district court's determination that the average 52-week Treasury-bill rate for the period at issue. *Id.* at 619. The court affirmed the lower court's calculation of a simple 9% rate to avoid the complexity of compounding interest. *Id.*

D. Reinstatement and Front Pay

1. What the Law Covers

Pollard v. E.I. du Pont De Nemours & Company, 532 **U.S.** 843, 853, 85 FEP Cases 1217 (2001), held that § 706(g) of Title VII authorizes front pay awards through the subsequent reinstatement of the employee, and continued:

> As to front pay awards that are made in lieu of reinstatement, we construe § 706(g) as authorizing these awards as well. We see no logical difference between front pay awards made when there eventually is reinstatement and those made when there is not. Moreover, to distinguish between the two cases would lead to the strange result that employees could receive front pay when reinstatement eventually is available but not when reinstatement is not an option—whether because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries that the discrimination has caused the plaintiff.

(Footnote omitted.) The court stated that any other holding would make "the most egregious offenders . . . subject to the least sanctions." *Id.*

2. Eligibility for Reinstatement or Front Pay

Slayton v. Ohio Department of Youth Services, 206 F.3d 669, 680, 82 FEP Cases 289 (**6th Cir.** 2000), affirmed the lower court's order reinstating the Title VII sexual harassment plaintiff. The plaintiff was a former probationary juvenile corrections officer who had been stationed at the Indian River School, a maximum-security unit for young male offenders. She sued for gender discrimination and sexual harassment, and the jury awarded her $125,000 in damages on the sexual harassment claim but found for the defendant on the gender discrimination claim. The sexual harassment claim involved the actions of Corry Appline, a male correctional officer who brought sexually-oriented music videos and other materials to the offenders, encouraged them to call her repulsive verbal epithets, and encouraged them to expose themselves to her. The plaintiff complained repeatedly, to no avail, and was ultimately fired for slapping an inmate who had shouted profanities at her. The court rejected the defendant's argument that reinstatement was inappropriate because the jury had rejected plaintiff's gender discrimination claim. It recognized that reinstatement may not be appropriate when an employer is "genuinely dissatisfied with a plaintiff's actual job performance," but stated that the principle was inapplicable because "the jury explicitly found in an interrogatory that the hostile environment adversely affected Slayton's job performance." *Id.* The court pointed out that "a hostile environment finding necessarily recognizes that 'sufficiently abusive harassment adversely affects a 'term, condition, or privilege' of employment'" (citation omitted). It concluded: "Thus, reinstatement is an appropriate remedy when a hostile environment prevented an employee from adequately performing her job." *Id.*

Dalal v. Alliant Techsystems, Inc., 182 F.3d 757, 760 n.2 (**10th Cir.** 1999), affirmed the denial of front pay where the lower court found that the plaintiff would have been legitimately laid off before the trial.

Nance v. Maxwell Federal Credit Union (MAX), 186 F.3d 1338, 1341–42, 80 FEP Cases 960 (**11th Cir.** 1999), reversed the back pay, front pay, and fee awards for the ADEA plaintiff because the defendant rescinded its discriminatory decision before it took any action on it, and before the plaintiff was harmed. Her subsequent decision not to return from her leave status (which was paid leave for several weeks after the defendant rescinded its decision and invited her to return), rather than any action of the defendant, caused her injury. This aspect of the case is discussed in more detail in Chapter 14 (The *McDonnell Douglas* / *Burdine* / *Hicks* Model), Part C, in the section on "Whether the Challenged Action is Adverse."

3. Reinstatement vs. Front Pay

Banks v. Travelers Companies, 180 F.3d 358, 364–65, 80 FEP Cases 30 (**2d Cir.** 1999), reversed the trial court's denial of both reinstatement and front pay, for the reasons discussed below. The court stated that, while animosity between the employer and employee may bar reinstatement, it is "not a ground on which to deny front pay." *Id.* at 365 n.5.

Rutherford v. Harris County, 197 F.3d 173, 188–89, 81 FEP Cases 1775 (**5th Cir.** 1999), vacated and remanded the Title VII front pay award because the lower court did not adequately articulate its findings on why instatement to the promotional position at issue was inappropriate and front pay should be awarded. The court distinguished between the reinstatement of discharged employees, which was not involved in this case, and the instatement of the plaintiff into a promotional position discriminatorily denied her. It stated that the considerations may differ for these two types of actions.

Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 512–13 (**9th Cir.** 2000), affirmed under Washington law the jury's award of $2,000,000 in front pay to the still-employed plaintiff, relying in part on Federal law, as the courts of Washington do. The court explained that the defendant's failure to seek a jury instruction on the subject had waived its argument that the plaintiff was barred as a matter of law from receiving front pay because she had not quit and thus had not been constructively discharged. Indeed, the defendant had presented its own jury instruction on front pay. At trial, it objected to the plaintiff's testimony of future losses only on foundation/opinion grounds, and did not object after a foundation was laid. It's closing argument mentioned front pay. *Id.* at 512. The court held in the alternative that there was "ample basis on which to support the jury's award" even if the objection were considered. The court held that there was evidence of hostility substantial enough to warrant a front pay award. *Id.* at 512–13. It explained that the plaintiff felt constrained to stay in her job because she was the primary breadwinner for her family, and continued: "Nonetheless, she made it clear that she could not remain in her job much longer. Thus, the evidence also permitted the jury to find that, as a result of the hostile atmosphere, Passantino would be forced to actually terminate her employment. Accordingly, the jury could properly award front pay on the ground that Passantino was entitled to compensation for the difference between what she would have earned had she been promoted (in the absence of retaliation) and what she is able to earn at a new job." *Id.* at 513 (citation omitted).

Gotthardt v. National R.R. Passenger Corp., 191 F.3d 1148, 1155–56, 80 FEP Cases 1528 (**9th Cir.** 1999), affirmed the award of front pay to the plaintiff. The court held that the plaintiff had shown sufficient evidence of a causal connection between the sexually hostile

working environment to which the plaintiff was subject and her post-traumatic stress disorder ("PTSD") rendering her unable to work. The court recognized that the plaintiff had been treated for PTSD prior to the harassment, after a train on which she had been working as fireman hit and killed four young people. Although the train crew was not at fault, the plaintiff received treatment for PTSD for eleven months. *Id.* at 1156 n.8. The court stated that "the district court's finding of causation is plausible in light of the extensive testimony of Dr. Jeanne Rivoire, Gotthardt's treating psychologist and psychological expert, that the hostile environment at Amtrak caused Gotthardt's disability." *Id.* at 1156. Because the plaintiff's expert was qualified as an expert and there was no evidence showing that she was less credible than the defendant's expert, the court rejected the defendant's argument that the district court should have credited the defendant's expert instead of the plaintiff's expert. *Id.* at 1156 n.9. The court approved the trial court's finding, based on Dr. Rivoire's testimony, that the plaintiff's PTSD made her unable to perform any job. It held that the lower court did not abuse its discretion in awarding front pay in lieu of reinstatement. *Id.* at 1156.

EEOC v. W&O, Inc., 213 F.3d 600, 619, 83 FEP Cases 117 (**11th Cir.** 2000), vacated the award of front pay to one of the formerly pregnant women on whose behalf the EEOC had brought suit, because the defendant had stated its willingness to re-employ the woman in question and the district court had not provided any explanation for awarding front pay rather than reinstatement.

Farley v. Nationwide Mutual Insurance Co., 197 F.3d 1322, 1338–40, 10 AD Cases 87 (**11th Cir.** 1999), affirmed the trial court's decision to award the ADA and ADEA plaintiff a year's front pay in lieu of reinstatement. The court recognized the presumption in favor of reinstatement, but stated:

> Farley suffers from several stress-induced long-term disabilities including post-traumatic stress disorder, alcoholism, and depression. Both Farley and his psychologist testified that his symptoms were heavily influenced by his workplace environment. Farley also testified about the debilitating effects on his physical and mental condition that resulted from the pervasive verbal abuse he endured from his former supervisors. According to Farley, colleagues and supervisors would call him one of the "crazies" and demean his mental condition and job performance. In a particularly egregious incident, one of his supervisors posted a cartoon labeling Farley as "Just Plain Nuts" on the company bulletin board for all Nationwide employees to see. On this record, we find that Farley's hostile work environment, coupled with his stress-induced disabilities, created sufficient special circumstances to support the trial court's award of front pay in lieu of reinstatement.

Id. at 1339. The court stated that the presence of "some hostility" attendant to many lawsuits "should not normally preclude a plaintiff from receiving reinstatement," and added: "Defendants found liable of intentional discrimination may not profit from their conduct by preventing former employees unlawfully terminated from returning to work on the grounds that there is hostility between the parties. . . . To deny reinstatement on these grounds is to assist a defendant in obtaining his discriminatory goals." *Id.* at 1339–40 (citations omitted). The court stated that the facts here were unusual. *Id.* at 1340.

4. Front Pay and the Caps on Damages under the 1991 Civil Rights Act

Pollard v. E.I. du Pont De Nemours & Company, 532 **U.S.** 843, 854, 85 FEP Cases 1217 (2001), held that front pay is not an element of compensatory damages under the 1991 Act, and is not subject to the damages caps.

5. Front Pay and Liquidated Damages

Farley v. Nationwide Mutual Insurance Co., 197 F.3d 1322, 1340, 10 AD Cases 87 (**11th Cir.** 1999), affirmed the award of front pay in lieu of reinstatement and did not disturb the award of liquidated damages on the plaintiff's ADEA claim. The court held that the amount of the front pay award should not be doubled in liquidated damages.

6. Determination of the Amount of Front Pay

Skalka v. Fernald Environmental Restoration Management Corp., 178 F.3d 414, 425, 86 FEP Cases 1327 (**6th Cir.** 1999), *cert. denied sub nom. Conover v. Fernald Environmental Restoration Management Corp.*, 530 **U.S.** 1242 (2000), reversed the judgment for ADEA plaintiff Skalka and remanded it for a remittitur or new trial on damages. The court held that future pension payments cannot be included in back pay and subjected to doubling as liquidated damages, but must be treated as front pay. The court held that the defendant had not waived the issue by failing to object to the jury instruction defining back pay as including "'pension benefits which a plaintiff would have received'" but for the discrimination, because it was possible to construe the language as referring only to 401(k) payments that the plaintiff would have received before the trial.

Fine v. Ryan International Airlines, 305 F.3d 746, 756, 89 FEP Cases 1543 (**7th Cir.** 2002), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff, and denied plaintiff's cross-appeal from the denial of reinstatement. The court held that plaintiff's stipulation that all damages ceased as of a certain post-employment date waived any claim for reinstatement. Plaintiff had entered into the stipulation in order to avoid discovery into the circumstances of her resignation from a subsequent employer. The court explained:

> Fine argues that her stipulation was intended to apply only to money damages, not to equitable remedies such as reinstatement. That is not, however, what the stipulation says. It refers to "any damages" without drawing a distinction between legal and equitable relief. Even more importantly, Fine herself created the endpoint for Ryan's responsibility when she took the new job. It makes no sense to make Ryan her employer of last resort for life, if it bears no responsibility for the actions of later employers. Both because of the stipulation and for the latter reason, we agree with the district court's decision to deny reinstatement.

Salitros v. Chrysler Corp., 306 F.3d 562, 570, 13 AD Cases 1057 (**8th Cir.** 2002), affirmed the judgment for the ADA retaliation plaintiff for $445,516 in front pay, "representing seven years worth of wages and benefits, up to September 8, 2007, Salitros's anticipated retirement date." The court held that the award was not an abuse of discretion notwithstanding the jury's determination that plaintiff was not entitled to back pay through the date of the verdict.

The court held that the defendant was not prejudiced by the absence of a hearing on front pay, or by the lower court's reliance on charts that were not received in evidence. It stated that the award of front pay was a matter for the court. It added: "Salitros's expert testified at trial about his sources and the methodology he used in preparing back pay exhibits. Chrysler had the opportunity to cross examine Salitros's expert about the information and assumptions on which the back pay exhibits were based. The front pay exhibits were obviously prepared using the same methodology, simply extended for future years. After Salitros filed the affidavit with the exhibits attached, Chrysler did not move to strike the exhibits or ask the court for an evidentiary hearing, but waited to object until the district court had already ruled on the front pay motion." *Id.* at 571. The court rejected defendant's argument that the award of front pay was an abuse of discretion because defendant had offered to reinstate plaintiff: "In this case, the district court found that the reinstatement Chrysler offered Salitros was illusory, because Salitros was never able to work after he was reinstated, and his inability to work resulted from Chrysler's ill-treatment: 'He remained on medical leave because of physically and psychologically damaging harassment experienced at the worksite.'" *Id.* at 572. Similarly, the court rejected defendant's argument that the award of front pay was an abuse of discretion as to periods in which plaintiff is unable to work, because "Chrysler's argument depends on its assertion that it did nothing to cause Salitros to go on medical leave." *Id.* The court rejected defendant's argument that the front pay award conflicted with the jury verdict that there had been no discrimination. "The district court's finding of animosity between the parties was not based on disability discrimination on Chrysler's part, but on retaliation. Therefore, the district court's reasoning did not conflict with the verdict for Chrysler on Salitros's discrimination claim." *Id.* at 573. The court denied any reduction for the value of plaintiff's sick leave or collateral benefits, because the defendant's actions had made plaintiff sick. *Id.* at 573–74.

Sanders v. Alliance Home Health Care, Inc., 200 F.3d 1174, 1176, 88 FEP Cases 869 (**8th Cir.** 2000), affirmed the award of front pay to the Title VII racial discrimination plaintiff. The plaintiff had been Branch Manager of the Gurdon office of the defendant. The court rejected the defendant's argument—as having "no merit"—that the plaintiff's front pay should have ended with the September 1998 closure of that office because of revenue losses. "While she was working for the defendant, plaintiff did not live in Gurdon. Rather, she lived in Camden. She was already commuting to work. She could have been transferred to a different existing Alliance Home Health Care office, such as the Hope office or the Prescott office. Therefore, the District Court did not abuse its discretion in awarding front pay in a relatively modest amount." *Id.* The combined award of front and back pay was $33,466.84.

Gotthardt v. National R.R. Passenger Corp., 191 F.3d 1148, 1155–56, 80 FEP Cases 1528 (**9th Cir.** 1999), affirmed the district court's calculation of the $603,928.37 front pay award (the present value) awarded to the Title VII sexual harassment plaintiff. The district court had found that the plaintiff, a train engineer, would have qualified for the Capitol Run if it had not been for the sexual harassment she suffered to the point of being diagnosed with Post-Traumatic Stress Disorder and leaving her job just before her check ride on the Capitol Run, that she would have continued to work for eleven years until she reached the mandatory retirement age of 70 on September 15, 2008, and that she had no duty to mitigate her damages. *Id.* at 1155. The court began its discussion of the calculation of front pay by rejecting the defendant's argument that its financial losses might lead to a shutdown of the Capitol Run prior to September 15, 2008, because the defendant had introduced no evidence of its financial prospects. *Id.* at

1155 n.10. The court affirmed the district court's finding that the plaintiff was an experienced engineer who had the necessary skills and abilities to work the Capitol Run. "For example, senior Amtrak engineers who had trained or evaluated Gotthardt testified that she was a highly capable engineer, and there was evidence that the Capitol Run was less challenging than other Amtrak routes." *Id.* at 1156. Although the plaintiff had missed several months of work because of a severely cut finger and because of disciplinary suspensions that were unrelated to the harassment, and although the district court did not take this explicitly into account in making its front pay award, the court held that there was no error in finding that the plaintiff would have worked steadily until the mandatory retirement age because "there was no evidence that Gotthardt was particularly likely to suffer similar injuries or become subject to similar disciplinary suspensions." *Id.* The court also held that the plaintiff had no duty to find other employment because it was unlikely that she would succeed. "Although an eleven-year front pay award seems generous, the district court explicitly found that Gotthardt would be unable to work in the future, taking into account her age (59), her educational and vocational background, and, especially, her health. Dr. Rivoire's testimony supported the court's finding that Gotthardt's medical condition would render her unable to return to work." *Id.*

Davoll v. Webb, 194 F.3d 1116, 1143–45, 9 AD Cases 1533, 24 EB Cases 1088 (**10th Cir.** 1999), affirmed in part, and reversed in part, the judgment on a jury verdict for the ADA plaintiffs. The court reversed the limitation on all plaintiffs' front-pay awards to two years, and remanded the case with instructions that the district court "articulate the specific bases for the end date for each plaintiff, taking into consideration the factors we have outlined above." *Id.* at 1145. The court stated generally:

> Numerous factors are relevant in assessing front pay including work life expectancy, salary and benefits at the time of termination, any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which a plaintiff may become re-employed with reasonable efforts, and methods to discount any award to net present value. . . . A court may also consider a plaintiff's future in the position from which he was terminated. . . . A front pay award should reflect the individualized circumstances of the plaintiff and the employer.

Id. at 1144 (citations omitted). The trial court accepted the testimony of plaintiffs' vocational expert as to the plaintiffs' work life expectancies and earnings capacity based on their educational levels, disabilities, ages, and genders. "He then looked at how much each plaintiff would have earned had he or she been reassigned to a city government position for which he or she was qualified, since those positions pay considerably more than non-city jobs. He took the difference between the annual city salaries and the annual projected future earnings for each plaintiff, accounting for cost of living and merit increases, to determine the amount of front pay each plaintiff deserved per year." *Id.* The court stated that this method "accounts for one's duty to mitigate damages because a plaintiff will receive only the difference between the city salary and his or her earning capacity, not what he or she actually earns." The differences were substantial, and were supported by the trial record. "For example, at the time of trial in late 1996, after a lengthy and extensive job hunt Mr. Davoll had a job that paid $24,000 a year, and Mr. Escobedo earned $8.50 per hour. Had Mr. Davoll been reassigned to a city position for which he was qualified, his salary and benefits for 1997 would have been worth over $56,000;

Mr. Escobedo's salary and benefits would have been worth over $51,000. Denver presented no evidence to counter Dr. Vogenthaler's assessment." *Id.* The trial court then imposed a two-year ceiling on front pay, however, without citing any information in the record to support the limitation and citing instead to two district court decisions in other cases. Reversing, the court of appeals stated: "Because the purpose of front pay is to make each plaintiff whole, the district court must look at the individualized circumstances of each plaintiff. A flat rule awarding front pay for a specific period, no matter how long or short, would defeat the purpose of the award." *Id.* at 1145. While two years might be appropriate here, the lower court was obligated to show that its decision was based on more than "'mere guesswork.'" *Id.* (citation omitted).

E. Compensatory Damages

Worth v. Tyer, 276 F.3d 249, 268–69, 87 FEP Cases 994 (**7th Cir.** 2001), affirmed the Title VII sexual harassment verdict for the plaintiff. The court held that the plaintiff's evidence of emotional distress—lack of sleep, humiliation, distress, lost wages, etc.—were significant enough to support the jury's award of compensatory damages in the amounts of $20,000 for retaliatory discharge, $2,500 for sexual harassment, and $50,000 for battery.

Bruso v. United Airlines, Inc., 239 F.3d 848, 856–57, 84 FEP Cases 1780 (**7th Cir.** 2001), affirmed the trial court=s refusal to grant the plaintiff a new trial on his compensatory damage claim, because the jury was entitled to discredit his statements of emotional suffering and mental anguish, and because the jury was not required to award reimbursement for his psychologist=s bills just because he had seen a psychologist.

Webner v. Titan Distribution, Inc., 267 F.3d 828, 836, 12 AD Cases 513 (**8th Cir.** 2001), affirmed the award of $12,500 in emotional-distress damages on the plaintiff's ADA claim and the award of an equal amount on his State-law claim. The court stated that medical or other expert evidence is not necessary to support an ADA emotional-distress award. The plaintiff can rely on his or her own testimony, but must introduce specific facts supporting the claim of emotional distress. The court stated:

> Webner testified that he was emotionally devastated by losing his job—a termination Titan told him explicitly was because of his disability. He testified that immediately after he was terminated he felt "empty," like he lost his best friend and that there was "a hole in his chest." . . . He also testified that he was scared that he would be unable to pay his bills and was frustrated with his inability to find other regular work for six months. Titan contends that Webner's self- serving testimony about his reaction after he was terminated is insufficient to sustain the jury's award of emotional distress damages. We disagree. As previously stated a plaintiff's own testimony may provide ample evidence when heard in combination with the circumstances surrounding the plaintiff's termination. Furthermore, "[a]wards for pain and suffering are highly subjective and the assessment of damages is within the sound discretion of the jury, especially when the jury must determine how to compensate an individual for an injury not easily calculable in economic terms." . . . We will not disturb the jury's award of emotional distress damages to Webner on his disability claim.

Id. at 836–37.

Madison v. IBP, Inc., 257 F.3d 780, 802–03, 86 FEP Cases 77 (**8th Cir.** 2001), *vacated and remanded for reconsideration in light of National R.R. Passenger Corp. v. Morgan*, __ **U.S.** __, 122 S. Ct. 2583, 153 L. Ed. 2d 773 (2002), affirmed the award of $266,750 for emotional distress damages, because the evidence supporting the award was much better developed than in cases in which the courts have ordered remittiturs. The court described the evidence:

> Madison presented voluminous evidence that she suffered severe emotional distress as a result of the harassment and discrimination she endured after January 13, 1993. She was subjected to egregious and humiliating conduct which wreaked havoc on her emotional health and caused her great anguish which manifested itself physically. The taunting and harassment made her feel humiliated, hurt, and degraded. The undisputed evidence indicated that Madison was made so distraught by the behavior of fellow employees and managers that she often left her work station in tears. Her family life was affected by what went on in the plant. Her working conditions strained her relationship with her husband and nearly caused the breakup of their marriage. The couple separated several times during the course of her employment at IBP. Madison also testified that as a result of her stressful work environment, she lost weight, had trouble sleeping and frequent headaches, and broke out in hives. The evidence about the physical and emotional effects on Madison was corroborated by her family and several coworkers. Keith Ratliffe, a minister who counseled Madison on at least four occasions during these events, described her as depressed and emotionally drained because of her experiences at IBP.

Id. at 802.

Dodoo v. Seagate Technology, Inc., 235 F.3d 522, 532, 84 FEP Cases 933 (**10th Cir.** 2000), affirmed a judgment for $455,000 on a jury verdict on the 46-year-old plaintiff=s claims of race and age discrimination in promotions. In upholding the award of $125,000 in compensatory damages, the court relied on the plaintiff=s testimony Athat he has trouble sleeping and wakes up with his heart pounding, not knowing where he is,@ that he had worked very hard to position himself well in this country after immigrating here but felt that he was not recognized for his efforts, and that after 18 years at Seagate it was too late for him to start over elsewhere. He had sought the counsel of his wife, minister, and friends. The court held that this was adequate.

Alexander v. Fulton County, 207 F.3d 1303, 1342–43, 82 FEP Cases 858 (**11th Cir.** 2000), affirmed in part and reversed in part the judgment for the ‘ 1983 and Title VII white racial discrimination plaintiffs against the defendant Sheriff. Although the court held that a reasonable jury could have found that Captain Gettis was not promoted to the unclassified Captain position filled by Dorothy Walker because he was white, his testimony that he would not have accepted the position unless he received written assurances of job security doomed any claim for back pay or instatement because no promotee had received such assurances. However, the court upheld his award of $10,000 in compensatory damages for the pain and suffering of not having been offered the promotion because of his race.

F. Liquidated Damages

Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771, 777–78, 87 FEP Cases 219 (**7th Cir.** 2001), affirmed the jury's award of liquidated damages to the ADEA plaintiff. The court rejected the defendant's argument that liquidated damages were improper because the hiring manager was ignorant of the ADEA. "Phillips's general manager did testify that he was not aware that it was illegal to discriminate on the basis of age, but as this circuit has held, leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an 'extraordinary mistake' for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference." *Id.* at 778. The court rejected the defendant's argument that the printed message on its application forms, acknowledging that the ADEA prohibits discriminating against applicants over the age of 40, demonstrates a good-faith effort to comply and bars the imposition of liquidated damages. "However, this evidence appears more harmful to Phillips than helpful, because the jury could easily have concluded that printing this statement on the application but then making no effort to train hiring managers about the ADEA shows that Phillips knew what the law required but was indifferent to whether its managers followed that law." *Id.*

G. Punitive Damages

1. *Kolstad*

a. The Former "Egregious Conduct" Requirement

In *Kolstad v. American Dental Association*, 527 **U.S.** 526, 79 FEP Cases 1697 (1999), the Supreme Court held that punitive damages under the Civil Rights Act of 1991 are available even in the absence of particularly "egregious" facts. The Court held: "The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Id.* at 535. Absent peculiar circumstances, where the employer intentionally selects an employee for adverse action because of that individual's protected characteristics, it will do so with, at a minimum, a "reckless indifference" to the employee's statutory rights.

> There will be circumstances where intentional discrimination does not give rise to punitive damages liability under this standard. In some instances, the employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful. The underlying theory of discrimination may be novel or otherwise poorly recognized, or an employer may reasonably believe that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability.

Id. at 536–37. "While egregious misconduct is evidence of the requisite mental state . . . § 1981a does not limit plaintiffs to this form of evidence, and the section does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind." *Id.* at 535.

Comment by Richard Seymour on *Kolstad* and Egregious Conduct: The most frequent reason for the denial of punitive damages is that the conduct in question was

"garden variety," or "not egregious," or "not outrageous," or "circumstantial," or even "based on inferences." The Court has struck down all of these excuses for denying relief, and given plaintiffs another shot. Even with the restrictions on vicarious liability discussed below, I believe that there will be a substantial increase in punitive-damages awards as a result of this decision.

Comment by Barbara Berish Brown of Paul, Hastings, Janofsky & Walker on *Kolstad* and Egregious Conduct: It is true after *Kolstad* that the type of conduct for which punitive damages may be awarded by the jury is broader than it previously was, when there was in many courts a second tier of egregiousness that was a prerequisite for permitting the jury to award that form of damages. In holding that punitive damages are available for most instances of intentional discrimination, however, the Court did note several types of situations in which discriminatory conduct will not support an award of punitive damages. These include cases where the plaintiff's theory is novel or unrecognized, where the defendant was unaware of the applicable provisions of law, or where, perhaps, there was a good faith belief in the applicability of a defense such as the bona fide occupational qualification defense. With the possibility of punitive damages in far more cases in the future, it is particularly critical that employers take steps to avoid the imposition of employer liability for decisions of lower-level managers. The Court made new law on this issue, favorable to employers, as discussed below. The steps that will likely help to avoid vicarious liability for punitive damages should also help avoid liability in the first instance, as well.

b. Vicarious Liability

Kolstad also held that common law agency principles limit vicarious liability for punitive awards to situations in which 1) the principal authorized the doing of the act and the manner in which it is done; 2) the agent was unfit and the principal was reckless in employing him; 3) the agent was employed in a managerial capacity and was acting in the scope of employment at the time of the conduct giving rise to the punitive damage claim; or 4) the principal or a managerial agent ratified or approved the act. *Id.* at 542–43. The Court explicitly modified the common law rule on "scope of employment" to hold that "an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions were contrary to the employer's 'good-faith efforts to comply with Title VII.'" *Id.* at 545. The goal of the statute is prophylactic, the Court reasoned, and dissuading employers from preventing discrimination, which application of the common law rule might do, is directly contrary to the purposes underlying Title VII.

The Court recognized that the meanings of these terms are not self-evident: "In making this determination, the court should review the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished. . . . Suffice it to say here that the examples provided in the Restatement of Torts suggest that an employee must be 'important,' but perhaps need not be the employer's 'top management, officers, or directors,' to be acting 'in a managerial capacity.'" *Id.* at 543. The Court held that the general "scope of employment" inquiry under the Restatement was not appropriate for purposes of determining the propriety of punitive damages under Title VII. "On this view, even an employer who makes every effort to comply with Title VII would be held liable for the discriminatory acts of agents acting in a 'managerial capacity.'" Id. The Court was

clearly bothered by the idea that the employer's awareness of the antidiscrimination laws which it sought to foster in last Term's decisions in Faragher and Ellerth might increase the employer's exposure to punitive damages, so that employers would have the greatest possible incentive to keep their decisionmakers ignorant of the law.

> Applying the Restatement of Agency's "scope of employment" rule in the Title VII punitive damages context, moreover, would reduce the incentive for employers to implement antidiscrimination programs. In fact, such a rule would likely exacerbate concerns among employers that §1981a's "malice" and "reckless indifference" standard penalizes those employers who educate themselves and their employees on Title VII's prohibitions. See Brief for Equal Employment Advisory Council as Amicus Curiae 12 ("[I]f an employer has made efforts to familiarize itself with Title VII's requirements, then any violation of those requirements by the employer can be inferred to have been committed 'with malice or with reckless indifference'"). Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII. The statute's "primary objective" is "a prophylactic one," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975); it aims, chiefly, "not to provide redress but to avoid harm," *Faragher*, 524 U.S., at 806. With regard to sexual harassment, "[f]or example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Burlington Industries, Inc.*, 524 U.S., at 764. The purposes underlying Title VII are similarly advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions.

Id. at 544–45. The Court then took action to prevent this result:

> In light of the perverse incentives that the Restatement's "scope of employment" rules create, we are compelled to modify these principles to avoid undermining the objectives underlying Title VII. . . . Recognizing Title VII as an effort to promote prevention as well as remediation, and observing the very principles underlying the Restatements' strict limits on vicarious liability for punitive damages, we agree that, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's "good-faith efforts to comply with Title VII." 139 F.3d, at 974 (Tatel, J., dissenting). As the dissent recognized, "[g]iving punitive damages protection to employers who make good-faith efforts to prevent discrimination in the workplace accomplishes" Title VII's objective of "motivat[ing] employers to detect and deter Title VII violations." Ibid.

Id. at 545–46 (citations omitted). The Court then remanded the case for application of the principles it announced. The last paragraph of the decision raises the question of what it means to function in a managerial capacity:

> We have concluded that an employer's conduct need not be independently "egregious" to satisfy §1981a's requirements for a punitive damages award, although evidence of egregious misconduct may be used to meet the plaintiff's burden of proof.

> We leave for remand the question whether petitioner can identify facts sufficient to support an inference that the requisite mental state can be imputed to respondent. The parties have not yet had an opportunity to marshal the record evidence in support of their views on the application of agency principles in the instant case, and the en banc majority had no reason to resolve the issue because it concluded that petitioner had failed to demonstrate the requisite "egregious" misconduct. 139 F.3d, at 968. Although trial testimony established that Allen made the ultimate decision to promote Spangler while serving as petitioner's interim executive director, respondent's highest position, Tr. 159 (Oct. 19, 1995), it remains to be seen whether petitioner can make a sufficient showing that Allen acted with malice or reckless indifference to petitioner's Title VII rights. Even if it could be established that Wheat effectively selected O'Donnell's replacement, moreover, several questions would remain, e.g., whether Wheat was serving in a "managerial capacity" and whether he behaved with malice or reckless indifference to petitioner's rights. It may also be necessary to determine whether the Association had been making good faith efforts to enforce an antidiscrimination policy. We leave these issues for resolution on remand.

Id. at 546.

Comment by Richard Seymour on Vicarious Liability Under *Kolstad*: Four general points seem worth making. First, the restrictions on vicarious liability for punitive damages will not affect claims made directly against the wrongdoer, such as those under 42 U.S.C. §§ 1981 or 1983, or under common-law claims. Second, the Court's decision will place an even higher premium on employers' adoption of antidiscrimination and anti-harassment policies. The Court is sending a clear message, in decision after decision, that the workplace rather than the courts should be where problems under the fair employment laws are to be avoided or, if a problem still arises, resolved. Third, the question of which officials are acting in a managerial capacity seems not to be determinable by reference to job titles or descriptions, but by reference to the official's actual role in the particular situation in question. The Court was certain that William Allen, the interim executive director of the defendant, was serving in a managerial capacity. It was uncertain, however, whether Leonard Wheat, the acting head of the Washington office, was functioning in a managerial capacity even if he "effectively selected O'Donnell's replacement." There is clearly going to be a wave of litigation over the question of who functions in a managerial capacity, and the answer may be more restrictive than the question of who is a "supervisor" under the special liability rules of *Ellerth* and *Faragher*.

As to the correctness of the decision, it is clear that common-law principles impose substantial limitations on the vicarious liability of a principal for the acts or omissions of an agent. When the Civil Rights Act of 1991 was before Congress, its supporters did not argue for any exception to the ordinary rules for the availability of punitive damages, but argued instead that they wanted the same entitlements to punitive damages enjoyed by the victims of other types of violations. I think it noteworthy that Justice Stevens' partial dissent, joined by Justices Souter, Ginsburg and Breyer, did not disagree with the Court's holding, but only with the decision to reach the question of the standards for vicarious liability.

Comment by Barbara Berish Brown on *Kolstad* and Vicarious Liability: The Kolstad majority reached out to modify the common law of agency as it applies to the award of punitive damages against employers for the decisions of their lower-level managers. I agree with Rick that in this decision, as in Faragher and Ellerth last year, the Court is imposing on employers in the first instance the obligation to prevent and deal effectively with harassment or discrimination in their workplaces. If the manager who made the challenged decision was acting counter to the employer's commitment to non-discrimination, the employer may avoid liability for punitive damages. This creates an obligation and an opportunity to adopt, communicate, and implement a non-discrimination policy and complaint procedure similar to the anti-harassment policies and procedures adopted by many employers this year. It also behooves employers to be sure that they train their supervisors and managers in non-discriminatory decision-making, and that they keep records of those training sessions. There should also be records kept of the complaints received through the internal process and the resolution of those concerns.

c. Richard Seymour's Ten Commandments on Punitive Damages after Kolstad

Considering the Comments and cases decided under § 909 of the Restatement of Torts, and under § 217–C of the Restatement of Agency, the strategies and tactics that will maximize the opportunity to obtain punitive damages are as follows:

1. Pursue winnable claims against individual wrongdoers, particularly where the employer has a policy of reimbursing its officials for awards against them: For intentional racial discrimination, this means claims under 42 U.S.C. § 1981 or State law. For intentional race or sex discrimination in the public sector, this means claims under 42 U.S.C. § 1983 that will survive a claim of qualified immunity, or claims under State law. Harassment claims can involve common-law assault or battery causes of action. State-law fair-employment remedies may be superior to remedies under Federal law. There is, of course, a danger that a jury presented with both the employer and the wrongdoer may choose to award damages against the wrongdoer instead of the employer.

2. Do not accept employers' policies that exist only on paper. The purpose of the exception the Court grafted onto agency law was to provide protection for employers that are diligently trying to prevent discrimination. Employers that merely proclaim a policy and do nothing further should not be entitled to the benefit of that protection. Employers that ignore complaints, or that have notice of discrimination and fail to act on it, should not be entitled to the benefit of that protection. Plaintiffs' lawyers should consider using expert testimony on workplace practices. Caution: this type of attack needs to be reserved for cases with strong facts so that we can get the principle established. A flood of weak cases could lead to early and wholesale rejections of this important distinction.

3. Ensure that the plaintiff's complaints are reasonable. The complaints should be limited to nontrivial matters, should be constructive and nonthreatening in tone, should be clear and unambiguous, should be carried higher when there is no response, and should be made as often as necessary to ensure that the employer is aware, at the highest levels, that prior corrective actions have not worked. This is no occasion for coyness.

4. Advise clients to notify the defendant through its own designated channels, or at the highest levels if there are no designated channels, if there is ongoing discrimination bad enough to qualify for punitive damages. Plaintiffs have to prove knowledge in order to prove ratification and approval, or in order to prove reckless retention of a discriminatory official. It is in their interest to make notice incontestable. I have sent pre-suit certified letters or Federal Express packages to any known counsel and to the Chairman of the Board and the CEO of companies, providing full details of the problems, in order to preserve my clients' ability to seek maximum relief.

5. Emphasize employer inaction in the face of complaints or other notice. Inaction is harder for the employer to defend than doing something positive, even if something else would have been more positive. At the same time, plaintiffs' attorneys should not quibble over arguably adequate actions taken by employers in light of the information reasonably available to employers at the time, even if they would have done something else or if hindsight indicates that a stronger course of action would have been more desirable. Employers are clearly going to be allowed some discretion, if the evidence shows that they took reasonable steps to obtain the relevant information and they exercised their discretion reasonably in light of the information reasonably available to them. As in harassment cases, the Court is clearly trying to give employers a greater incentive to prevent and remedy discrimination, in advance of litigation.

6. Emphasize the continuing nature of the discrimination, even after the employer has notice that it is taking place. Clients should be advised of the need to make an ongoing, tamper-proof record of relevant events in the workplace (spiral notebooks in which pages cannot be inserted, all writing is in ink, no erasures or substantial strike-outs are made, all writing is consistently and without exception either on one side of the paper or on two sides, all entries are dated and in chronological order, there are no gaps of more than a line between entries, and all entries are made as contemporaneously as possible but on the employee's own time). Such documents can be a powerful aid to proof, if they record incidents faithfully as matters of fact, without editorializing. They can powerfully aid a plaintiff with a good claim, and can powerfully aid a defendant when the plaintiff does not have a good claim.

7. Do not pin the plaintiff's hopes on deceit alone. Many of the State decisions say that lies sometimes, "garden variety" lies are not enough. If a plaintiff detrimentally relied on a lie and can prove that the defendant intended the plaintiff to do so, the plaintiff may be able to argue fraud. At a high enough level but necessarily above the level of the wrongdoer the plaintiff may be able to argue that deceit constitutes approval and ratification.

8. If one theory does not work, look for another. *Shupak v. New York Life Insurance Co.*, 780 F. Supp. 1328, 1344 (**D. Mont.** 1991), is a good example of a plaintiff who had more than one arrow in the quiver. The second arrow is the one that may get through.

9. Marshall your evidence with these requirements in mind. A number of Federal judges have observed that many plaintiffs' employment discrimination attorneys apparently unlike personal-injury attorneys treat both compensatory and punitive damages as an

afterthought. We cannot do this any more. We have to do the localized research, take the necessary discovery, select our theories, and put on the evidence that will lay the foundation for punitive damages.

10. Prove that the employer had notice that there was wrongdoing, not just notice of a complaint. For purposes of liability as well as for purposes of punitive damages, a good-faith mistake is a defense. It is not clear why many plaintiffs' attorneys spend so much effort proving that the employer made a mistake, when this simply proves a defense. Instead, we need to spend effort seeing if we can prove that the employer knew it was a mistake.

Barbara Berish Brown's Response to Rick's "Ten Commandments": Employer's attorneys reading Rick's ten suggestions for plaintiffs' counsel will readily see what we need to counsel our clients to do in order to try to avoid punitive damages exposure. Review of challenged personnel decisions should be made with an open mind, so that if bias crept into the initial decision, it can be corrected promptly. If the decision was proper, but it was not well communicated or documented, that can be remedied during the complaint and internal appeal process. Obviously, a complaint or open door procedure cannot be so cumbersome that decisions are never implemented and managerial authority is undermined, but the Court is clearly permitting employers to police themselves, at the risk of punitive damages liability if they fail to do so effectively.

2. Recklessness and Malice

Romano v. U-Haul International, 233 F.3d 655, 668–74, 84 FEP Cases 795 (**1st Cir.** 2000), *cert. denied*, 534 **U.S.** 815 (2001), affirmed the award on a jury verdict of $15,000 in compensatory damages and $285,000 in punitive damages (reduced from $624,000, to comply with the cap) against the Title VII defendants, U-Haul International and its wholly-owned U-Haul Co. of Maine. The plaintiff was fired from her job of Customer Service Representative two weeks after she had been hired. The manager told her that her only trouble was that she sat when she had to pee. In rejecting the defendants= argument that the award was excessive, the court stated that the level of reprehensibility of the conduct in question is often the most important factor in determining whether an award of punitive damages is excessive. *Id.* at 673. It stated that the manager=s statement likely came as a humiliating shock to the plaintiff and evidenced a Ablatant disregard@ of the law. It also relied on evidence that the manager had told the plaintiff he would deny making the statement in the event of a discrimination lawsuit. AGiven the testimony that appellants knowingly violated appellee=s federally protected rights and then attempted to conceal this violation, we find that appellants= actions were more reprehensible than would appear in a case involving economic harms only.@ *Id.* at 673 (citation omitted).

Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 445–46, 82 FEP Cases 353 (**4th Cir.**), *cert. denied*, 531 **U.S.** 822 (2000), described the evidence of recklessness or malice:

> Countering Circuit City's evidence of its alleged good-faith efforts to comply with § 1981 is evidence in the record: (1) that two top Circuit City executives harbor racial animosity toward African-Americans;[6] (2) that one of these top executives buried two internal reports reflecting a negative attitude on behalf of Circuit City against racial

minorities and failed to take any remedial action in response to the negative findings in the reports; (3) that African-American employees feared retaliation by Circuit City for use of the Open Door Policy, the Associate Cool Line, and Coffee Conferences to complain about discrimination; and (4) that several African- American employees and former employees of Circuit City felt intimidated by Circuit City in response to their complaints to management about racial animus in promotion procedures. Finally, while the fact that Circuit City had a very subjective and unstructured promotional system in place does not alone suggest a secret corporate policy at Circuit City to keep African-Americans in low level positions, *see Vaughan v. Metrahealth Cos.*, 145 F.3d 197, 204 (4th Cir.1998), when this fact is coupled with the fact that the Circuit City executive responsible for the system harbors racial animus towards African- Americans, a reasonable juror could infer that the system was implemented in an effort to mask such a corporate policy, *see Barnett v. W.T. Grant Co.*, 518 F.2d 543, 550 (4th Cir.1975) (recognizing the capacity of non-objective hiring standards to mask employer's refusal to hire because of race).

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[6] Here, we are referring to Zierden and Ligon. When the following comments by Zierden are viewed in the light most favorable to Lowery, a reasonable juror could find that Zierden harbored racial animus toward African-Americans: (1) Athe caliber of minorities and blacks who are in the company, in Circuit City, would not meet the standards for a corporate headquarters job,@ (J.A. 3145); (2) blacks who worked for Circuit City Ahad a propensity to steal,@ (J.A. 3145-46); (3) Ahe didn't see th[e] situation [of few if any African-Americans in decision making roles at Circuit City] changing anytime soon because . . . those people who would be maybe [sic] eligible to be promoted just weren=t there,@ (J.A. 3148), and (4) Awhen you hire a black store manager, sales go down, customers come in and wonder what's going on,@ (J.A. 2135).

When the following comments by Ligon are viewed in the light most favorable to Lowery, a reasonable juror could find that Ligon harbored racial animus toward African-Americans: (1) Lowery, an African-American, Ashould go to a company that=s more receptive to minorities,@ (J.A.2091-92); and (2) Lowery should go to a company like Pepsi Cola that Aput [minorities] in decision-making roles,@ (J.A. 2091).

Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 80 FEP Cases 1357 (**5th Cir.** 1999), applied the standards of *Faragher* and *Ellerth* in a case involving the racially discriminatory discharge of a white female employee because of her romantic relationship with, and marriage to, a black male employee.

EEOC v. Indiana Bell Telephone Company, Inc., 256 F.3d 516, 521–26, 86 FEP Cases 1 (**7th Cir.** 2001) (*en banc*), reversed the award of punitive damages and remanded it for retrial, holding that the lower court had committed prejudicial error by excluding evidence that Ameritech was reluctant to take action against the harasser because he might use the grievance and arbitration procedure of the collective bargaining agreement to get reinstatement and back pay. The court held that such evidence was relevant on punitive damages issues because it went to the defendant=s state of mind, and that its exclusion may have affected the $650,000 award.

Bruso v. United Airlines, Inc., 239 F.3d 848, 858B61, 84 FEP Cases 1780 (**7th Cir.** 2001), reversed the grant of judgment as a matter of law to the defendant on punitive damages, and held that a reasonable jury could conclude that the defendant had acted with reckless indifference to the plaintiff=s rights. After a confrontation, the male plaintiff had reported abusive conduct by a male supervisor to a female employee, and followed up with a information about a number of similar complaints be female employees. The company=s AIndependent Review Team@ had accused him of exposing the company to liability by relaying the complaints. He was demoted from his supervisory position to ramp serviceman, on company charges that he behaved inappropriately for a supervisor in his confrontation with the asserted harasser, and had either falsely accused a fellow supervisor or sexual harassment or exposed the company to liability by delaying too long in making his reports. The plaintiff pursued his internal appeals, but they were rejected at every level. The lower court held that punitive damages could not be awarded because the company listened to his appeals. The court of appeals reversed. It stated that AMr. Bruso demonstrated at trial that the major players in the decision to demote him were familiar with the antidiscrimination principles of Title VII and United=s zero-tolerance-for-discrimination policy, which was designed to implement Title VII in United=s workplace. . . . Gordon, who was Mr. Bruso=s final appeal in his attempt to challenge his demotion, was herself responsible for educating and training United=s employees about Title VII and United=s antidiscrimination policies.@ *Id.* at 859. The court held that they Amust have been aware of the possibility that demoting Mr. Bruso after he had come forward with allegations of harassment would violate Title VII.@ *Id.* at 860.

Gile v. United Airlines, Inc., 213 F.3d 365, 375B76, 10 AD Cases 968 (**7th Cir.** 2000), established the Achowderhead@ defense to punitive damages. The jury had awarded awarding $200,000 in compensatory damages and $500,000 in punitive damages in this ADA case, the district court limited the total award to $300,000, and the court of appeals threw out the punitive award entirely. The defendant deferred to its medical adviser, who was admittedly negligent in considering the plaintiff=s situation, and held that negligence was not enough to support punitive damages. Judge Wood dissented.

Otting v. J.C. Penney Co., 223 F.3d 704, 711B12, 10 AD Cases 1549 (**8th Cir.** 2000), reversed the grant of judgment as a matter of law to the ADA defendant, and upheld the jury=s award of $100,000 in punitive damages and $28,000 in compensatory damages. The court held that there was enough evidence to support a jury finding of malice or reckless indifference, because of defendant's policy not to allow employees with any restrictions to return to work, and refused to explore reasonable accommodations.

Dhyne v. Meiners Thriftway, Inc., 184 F.3d 983, 988, 80 FEP Cases 1101 (**8th Cir.** 1999), affirmed the lower court=s refusal to submit the Title VII sexual harassment plaintiff=s punitive-damages claim to the jury. The court held that excessive delay in responding to the plaintiff=s uncorroborated complaint against a harassing co-worker, followed by effective action, is not enough to support a claim for punitive damages.

Blackmon v. Pinkerton Security & Investigative Services, 182 F.3d 629, 635B36, 80 FEP Cases 137 (**8th Cir.** 1999), reversed the grant of judgment as a matter of law to the

defendant on the plaintiff=s claim for punitive damages. The court held that the following facts were sufficient to support a finding of malice or reckless disregard:

> To summarize the facts detailed above, appellee acted with malice and reckless indifference to appellant=s federally protected rights when it: (1) failed to investigate appellant=s complaints and institute prompt remedial action even after appellant complained to three successive levels of supervision; (2) repeatedly retaliated against her for complaining of sexual harassment by reprimanding her, demoting her, fostering an environment in which her co- workers were openly hostile to her, and finally terminating her; (3) attempted to escape legal liability by soliciting information against appellant to prove she caused the harassment; and (4) attempted to escape legal liability for terminating appellant by firing another employee at the same time.

Id. at 636 (footnote omitted.) The court explained its holding about the investigation, *id.* at 636 n.7:

> We do not hold that employers cannot include information about complaining employees in their investigations or consideration of complaints of harassment or discrimination or both. Such information can be helpful in an even-handed, good-faith investigation. However, in this case appellee did not conduct an even-handed, good-faith investigation, in which information about appellant was but a part. Appellee=s investigation consisted almost exclusively of looking for unfavorable information about appellant. Under these circumstances, the collection and use of information against appellant demonstrated malice or reckless indifference to her federally protected right to be free from retaliation.

The court held that a punitive-damages claim does not require proof of a physical injury, *id.*, or of some minimum period in which the harassment occurred. *Id.* at 637. The court observed, *id.*:

> Furthermore, a durational requirement i[s] inappropriate, particularly where retaliation is also alleged; here, under such a standard, appellee could escape punitive damages because it cut Ashort@ the harassment by firing appellant. Appellant testified that the sexually explicit conversations continued up until the day she was terminated, despite her complaints to three levels of supervisory employees. . . . Appellee=s decision to Aget rid@ of appellant in March 1996, rather than at a later date, should not protect it from punitive damages liability.

Dodoo v. Seagate Technology, Inc., 235 F.3d 522, 532, 84 FEP Cases 933 (**10th Cir.** 2000), affirmed a judgment for $455,000 on a jury verdict on the 46-year-old plaintiff=s claims of race and age discrimination in promotions. The court upheld the award of punitive damages as well as the other relief, based on evidence that the Human Resource Manager lied about the bases of his personnel decisions and manipulated the plaintiff=s promotional opportunities to his detriment. The court held that *Kolstad* was inapplicable because the award here was under a direct liability theory, because the plaintiff showed Amalice or reckless indifference to his federally protected rights on the part of the managers whom Seagate

designated to implement the company=s anti-discrimination policy.@ (Citation omitted.) The court explained:

> In that respect Dodoo produced evidence that manager Johnson in Seagate=s Human Resource Department—the department charged with enforcing that policy—was guilty of reckless indifference. For one thing, after Johnson initially suggested that Dodoo take advantage of Seagate=s job posting system, he then approved the promotion of Koelsch over Dodoo in the face of the Seagate Handbook=s prohibition against the promotion of an employee such as Koelsch, who had been in his current position for just two months--far less than the one year Handbook requirement.
>
> As for the other denied promotion—the Product Line Manager position—when Vice President of Product Line Management Kelly decided to withdraw that job for what the jury found to be unlawful discriminatory reasons, the Human Resources Department sent Dodoo a letter notifying him of the withdrawal. Its knowledge of that withdrawal was coupled with Johnson=s acknowledgment that he was told the reason was because the Product Line Manager position was Afrozen@ and that he understood that no other promotions were Afrozen@ at that time. Taken together, that evidence supports a jury finding that Johnson acted at least with reckless indifference to Dodoo=s protected rights, so that punitive damages were warranted.

Id.

Deters v. Equifax Credit Information Services, Inc., 202 F.3d 1262, 1269, 81 FEP Cases 1577 (**10th Cir.** 2000), upheld an award of punitive damages. The court held that the jury could reasonably have found that the plaintiff was subjected to gross forms of sexual harassment, including unwanted touching, demands for sexual favors, and was daily subjected to grossly offensive epithets. The court held that Arecklessness and malice are to be inferred when a manager responsible for setting or enforcing policy in the area of discrimination does not respond to complaints, despite knowledge of serious harassment.@ It explained:

In the instant case, Ms. Deters introduced evidence that entitled the jury to believe that she persistently complained to Mr. Taylor, describing to him in excruciating detail, the nature of the sexual harassment to which she was subjected. Moreover, she introduced evidence, including the testimony of two witnesses, that Mr. Taylor personally observed instances in which Ms. Deters was verbally abused with vulgar language, and lewd jokes and comments were made in her presence. According to this evidence, Mr. Taylor was wholly unresponsive. When Ms. Deters complained about co-workers insulting her using vulgar sexual language, Mr. Taylor responded that these men were Ahardcore@ and reminded Ms. Deters that they were revenue producers, and that she was not. On another occasion when Ms. Deters complained about being groped and fondled by a co-worker, Mr. Taylor responded that he was just friendly, and that she was reading too much into it. By his own testimony, Mr. Taylor stated that he knew that this type of conduct constitutes sexual harassment. Thus, Ms. Deters presented evidence from which a reasonable jury could have inferred that management not only did not respond to her complaints, but also minimized and disregarded them so as to protect the Arevenue producers@ in the operation. On this evidence a jury could reasonably conclude that Equifax acted with malice

or reckless indifference with respect to sexual harassment, entitling Ms. Deters to punitive damages.

Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1187, 80 FEP Cases 1062 (**10th Cir.** 1999), reversed the grant of a directed verdict to the defendant on punitive damages, and remanded the case for trial. The court held that management=s knowledge of Neihart=s sexual harassment of the plaintiff, its failure to take prompt and effective remedial action, and the fact that "management=s reaction to Knowlton=s complaint was unresponsive because she was assured continued contact with Neihart," provided sufficient evidence "from which a jury could make a reasonable inference that Teltrust acted recklessly and with disregard for Knowlton=s federally protected civil rights."

Lambert v. Fulton County, 253 F.3d 588, 86 FEP Cases 1471 (**11th Cir.** 2001), *cert. denied*, 528 **U.S.** 1116 (2000), stated: AWhere, as here, (1) there is no argument or evidence that Cooper or Regus genuinely believed that racial discrimination in the context of this case was permissible, and (2) there is ample evidence that both Regus and Cooper intentionally discriminated against Appellants because of their race, nothing more is required to support an award of punitive damages. *See Alexander v. Fulton County*, Ga., 207 F.3d 1303, 1337–38 (**11th Cir.** 2000) (holding that defendant=s knowledge that it is illegal to treat employees differently on account of race, coupled with credible evidence that defendant intentionally did so, is sufficient for a reasonable jury to conclude that the Kolstad standard for punitive damages has been satisfied).@

3. Misplaced Protective Intentions Do Not Bar a Punitive Award

EEOC v. W&O, Inc., 213 F.3d 600, 611–12, 83 FEP Cases 117 (**11th Cir.** 2000), held that the Pregnancy Discrimination Act defendants could not defend against an award of punitive damages because they thought it was Anot right@ that pregnant employees would wait on tables and carry heavy trays. The court explained:

> We conclude that there was sufficient evidence for the jury to find that W&O acted with reckless indifference to the civil rights of its pregnant employees. Donlin was told by the Labor Board that W&O must permit pregnant women to keep their jobs as long as they could fulfill their duties. Diascro researched the proposed policy, including calling Wage and Labor, and, while he could have used the FMLA regulations as the model for W&O=s pregnancy policy, instead chose to draft this policy. Comments from various managers, including H. Oreal=s statement that Ano one is going to run around here pregnant and big like that [and n]o pregnant women are going to tell me how long they=ll stay,@ R8-174-323, could be interpreted as showing an unwillingness to accede to the law. The jury would be entitled to find that W&O maintained the policy in the face of challenges until it was affirmatively found that it was illegal. Finally, while Diascro claimed that the five month benchmark in the policy was only a guideline, Donlin=s testimony, as well as the experience of the three women in this case, belied that claim. If the jury chose to believe Nuesse, McDevitt, and Grossman, then the jury would be entitled to find that their employment was ended solely because of pregnancy and that each of the three women was capable of fulfilling her job duties. This

evidence is sufficient, when considered with the evidence tending to show that Donlin and Diascro knew that pregnancy discrimination violated federal law, to justify a finding of reckless indifference.

(Citation omitted.)

4. Persons Whose Knowledge is Imputed to the Defendant

Williams v. Trader Pub. Co., 218 F.3d 481, 487B88, 83 FEP Cases 668 (**5th Cir.** 2000), reversed the award of punitive damages because the decision to fire the plaintiff was made by an official, Sunny Sonner, who conducted her own investigation and did not rely on any input from the discriminatory official, Ron Haas. AAlthough Haas delivered the message of termination to Williams and may have taken credit for it, he was not the company=s decisionmaker.@ *Id.* at 487. The court held that the plaintiff did not give notice of discrimination to Sonner: ASecond, there was no evidence that Sonner=s decision was motivated in any way by gender bias or that she ratified or approved Haas=s discriminatory treatment. . . . On the contrary, Williams had the opportunity to confide in Sonner about Haas=s discrimination, but she never did so. As Williams was herself a managerial employee, it would be incongruous, absent most unusual circumstances, to infer that she could not or need not resort to in-house means to address her discrimination complaints. Under these circumstances, the line supervisor=s misconduct cannot be imputed to Trader. . . .@ *Id.* at 487–88.

Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 80 FEP Cases 1357 (**5th Cir.** 1999), held that District Manager Gipson was high enough in the corporate hierarchy to qualify as a Amanagerial agent.@ It explained: AHe had supervisory authority over Deffenbaugh, terminated her on his own authority, and was, as noted, in charge of departments at six stores.@ *Id.* at 285.

Bruso v. United Airlines, Inc., 239 F.3d 848, 860, 84 FEP Cases 1780 (**7th Cir.** 2001), reversed the grant of judgment as a matter of law to the defendant on punitive damages, and held that a reasonable jury could conclude that the defendant had acted with reckless indifference to the plaintiff=s rights. The court held that the three officials who participated in the decision to demote the plaintiff after he informed them of another supervisor=s sexual harassment of women were all managerial agents acting within the scope of their employment with respect to the demotion. King was the defendant=s manager of cabin service at O=Hare Airport, Strickland was the defendant=s General Manager at O=Hare Airport, and Gorden was Senior Litigation Counsel responsible for preparing materials and training employees with respect to sexual harassment, who was given final decisionmaking authority over the plaintiff=s internal appeals.

Dodoo v. Seagate Technology, Inc., 235 F.3d 522, 532, 84 FEP Cases 933 (**10th Cir.** 2000), affirmed a judgment for $455,000 on a jury verdict on the 46-year-old plaintiff=s claims of race and age discrimination in promotions. The court upheld the award of punitive damages as well as the other relief, based on evidence that the Human Resource Manager lied about the bases of his personnel decisions and manipulated the plaintiff=s promotional

opportunities to his detriment. In addition, a senior official—the Vice President of Product Line Management—was responsible for another instance of promotional discrimination.

Deters v. Equifax Credit Information Services, Inc., 202 F.3d 1262, 1270, 81 FEP Cases 1577 (**10th Cir.** 2000), upheld an award of punitive damages. The court held that Awe need not decide whether Mr. Taylor was a sufficiently highly ranked managerial or policy-making employee such that his knowledge of the harassment Ms. Deters suffered would be imputed as a matter of law to Equifax. It is sufficient here that Equifax had specifically designated Mr. Taylor as a final representative of the company to implement the sexual harassment policy in its Lenexa branch, and to process complaints of sexual harassment.@ It held that information provided to an employee so designated was Aknowledge to the company.@ *Id.* at 1270–71.

5. Other Notice to the Defendant

Deters v. Equifax Credit Information Services, Inc., 202 F.3d 1262, 1271, 81 FEP Cases 1577 (**10th Cir.** 2000), upheld an award of punitive damages. The court stated that another employee was being harassed at the same time, by one of the Assistant District Managers who was also harassing the plaintiff. The court held that the other employee=s complaints to TaylorCthe designated recipient of such complaints in that officeCand to corporate headquarters benefited the plaintiff as well as the complainant.

6. Entitlement Where No Compensatory or Nominal Damages Are Awarded

Cush-Crawford v. Adchem Corp., 271 F.3d 352, 87 FEP Cases 456 (**2nd Cir.** 2001), affirmed the judgment on a jury verdict for the Title VII hostile-environment plaintiff. The jury did not award any compensatory or nominal damages, but did award the statutory maximum of $100,000 in punitive damages. The court summarized the law of the Circuits:

> The plain language of the statute does not expressly state whether punitive damages are available absent an award of actual damages, and the Courts of Appeals that have considered the question have reached different results. The Seventh Circuit holds that punitive damages may be awarded in a Title VII case absent an award of actual or compensatory damages. See *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010–11 (**7th Cir.** 1998) (Easterbrook, J.) (affirming jury award of punitive damages without actual damages and apparently without nominal damages). And, under an analogous provision of the Fair Housing Act, the Third Circuit has held that punitive damages are available absent awards of actual or nominal damages. See *Alexander v. Riga*, 208 F.3d 419, 430-34 (**3d Cir.** 2000), *cert. denied*, 531 **U.S.** 1069, 121 S. Ct. 757, 148 L. Ed. 2d 660 (2001). By contrast, under the First Circuit's rule, "punitive damages award must be vacated absent either a compensatory damages award, or a timely request for nominal damages." *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205, 1215 (**1st Cir.** 1995). Similarly, on the question of punitive damages under the Fair Housing Act, the Fourth and Fifth Circuits have held that punitive damages are not available absent a compensatory damages award. See *Louisiana ACORN Fair Hous. v. LeBlanc*, 211 F.3d

298, 303 (**5th Cir**. 2000) (recognizing that punitive damages are not available in absence of actual damages unless there has been a constitutional violation), *cert. denied*, 532 **U.S.** 904 (2001); *People Helpers Found., Inc. v. City of Richmond*, 12 F.3d 1321, 1327 (**4th Cir.** 1993).

Id. at 357 (internal citation updated). Further surveying the law, the court found that there was no consensus on the common-law rule. "The requirement of actual damages has been described by commentators as the majority rule, see PROSSER & KEETON ON THE LAW OF TORTS § 2, at 14 (5th ed. 1984), but it has also been sharply criticized, see *id*; see also RESTATEMENT (SECOND) OF TORTS § 908 cmt. (c) (1979) ('[I]t is not essential to the recovery of punitive damages that the plaintiff should have suffered any harm, either pecuniary or physical.')." *Id.* at 358. The court distinguished the general concerns about allowing awards of punitive damages without proof of actual harm: "In Title VII cases, however, the statutory maxima capping punitive damage awards strongly undermine the concerns that underlie the reluctance to award punitive damages without proof of actual harm." *Id.* at 359. The court continued:

> Furthermore, the objectives of punitive damages by definition differ from the objectives of compensatory damages. There is some unseemliness for a defendant who engages in malicious or reckless violations of legal duty to escape either the punitive or deterrent goal of punitive damages merely because either good fortune or a plaintiff's unusual strength or resilience protected the plaintiff from suffering harm. It is often "precisely [in the cases where no actual harm is shown] that the policy of providing an incentive for plaintiffs to bring petty outrages into court comes into play." PROSSER & KEETON ON TORTS § 2, at 14; see also RESTATEMENT (SECOND) OF TORTS § 908 cmt. (c).
>
> As for nominal damages, they are generally no more than symbolic. The need for such a symbol of opprobrium in the absence of compensatory damages disappears where the factfinder has signified its opprobrium by making an express award of punitive damages. And to make enforcement of the jury's award of punitive damages turn on whether the jury also awarded purely symbolic nominal damages carries a likelihood of defeating the jury's intention as the result of confusion.
>
> In conclusion, in Title VII cases, we see no reason to make award of actual or nominal damages a prerequisite to the award of punitive damages. We hold that in Title VII cases, where the factfinder has found in a plaintiff's favor that the defendant engaged in the prohibited discrimination, punitive damages may be awarded within the limits of the statutory caps if the defendant has been shown to have acted with a state of mind that makes punitive damages appropriate, regardless whether the plaintiff also receives an award of compensatory or nominal damages.

Hertzberg v. SRAM Corp., 261 F.3d 651, 656 n.3 (**7th Cir.** 2001), *cert. denied*, 534 **U.S.** 1130 (2002), affirmed the award of $20,000 in punitive damages to the Title VII sexual harassment plaintiff in a case in which no compensatory damages were awarded, and in which the awards of back pay and front pay were reversed.

7. Action Taken Pursuant to Legal Advice

Farias v. Instructional Systems, Inc., 259 F.3d 91, 102 (**2nd Cir.** 2001), affirmed the judgment of liability on a jury verdict for Title VII retaliation plaintiff Robinson, and affirmed the denial of punitive damages. Defense counsel had advised the defendant not to offer a severance payment because the plaintiff had filed an EEOC charge. The court held that "whether or not the advice was appropriate, action taken pursuant to advice that the action is consistent with the law is insufficient to support an award of punitive damages under the standard articulated in *Kolstad.*"

8. Other Questions of Entitlement

Cush-Crawford v. Adchem Corp., 271 F.3d 352, 359, 87 FEP Cases 456 (**2nd Cir.** 2001), affirmed the judgment on a jury verdict for $100,000 in punitive damages for the Title VII hostile-environment plaintiff. The court stated:

> Plaintiff testified not just that she was the victim of persistent egregious sexual harassment by a supervisor, but also that she notified company officials about the harassment as early as September 1993—just two months into her employment and over one year before Adchem took any remedial action. Adchem's theory of the case, to be sure, was that plaintiff did not effectively notify company officials of the sexual harassment until November 1994, and that the earlier complaints had really only been complaints about other problems that were only tangentially related to plaintiff's relationship with Collin Mars. Nonetheless, the jury could rationally have credited plaintiff's version that, in spite of her complaints to company officials, the company did nothing to protect her from the abuse for many months.

Worth v. Tyer, 276 F.3d 249, 269, 87 FEP Cases 994 (**7th Cir.** 2001), affirmed the Title VII sexual harassment verdict for the plaintiff. The court affirmed the punitive-damages awards of $5,000 for Title VII sexual harassment, $25,000 for retaliatory discharge, and $50,000 for battery in a case involving improper touching for two days, including touching the plaintiff's breast near the nipple and maintaining the contact for several seconds, lying to police investigators about the incident, and lying in court papers about the incident for three years and not amending the papers until 13 days before the trial.

EEOC v. Indiana Bell Telephone Co., 256 F.3d 516, 526–28, 86 FEP Cases 1 (**7th Cir.** 2001) (*en banc*), affirmed the judgment of liability for sexual harassment, holding that the employer's asserted reason for not taking effective action against the alleged harasser—that he would file a grievance under the collective bargaining agreement and be reinstated—was irrelevant on liability but was relevant to the issue of the employer's state of mind with respect to a punitive damages award. The court held that its exclusion was prejudicial error, and remanded the case for a new trial on punitive damages.

Webner v. Titan Distribution, Inc., 267 F.3d 828, 837–38, 12 AD Cases 513 (**8th Cir.** 2001), reversed the award of $100,000 in punitive damages on the plaintiff's ADA claim and the award of an equal amount on his State-law claim. The plaintiff had twice injured his back on the job, and been off for long periods. At the time of his termination, he was working in

a different job with an accommodation that eased the strain on his back, and was meeting his production target. When his attorney filed a proceeding to require the company to allow videotaping of his work station for purposes of a workers' compensation claim, the defendant fired the plaintiff and stated it was because of his "disability." The court held that there was insufficient evidence of malice or reckless disregard:

> Titan's stated reasons for terminating Webner—that his back injury precluded him from performing all but light duty tasks, Titan was fearful that Webner would reinjure his back, and Titan did not have a job suited to his disability—while culpable, do not rise to the level of maliciousness required to sustain the jury's award of punitive damages. Instead, Titan's actions are consistent with an employer acting to protect itself against the possible sporadic absence of an employee.

Id. at 837.

Beard v. Flying J, Inc., 266 F.3d 792, 799, 87 FEP Cases 1836 (**8th Cir.** 2001), affirmed the award of $12,500 in punitive damages for sexual harassment because "Flying J did nothing to discipline Mr. Krout despite the fact that Mr. Snider testified that he believed the allegations of harassment made against Mr. Krout. Flying J's management, furthermore, stated that Mr. Krout did nothing wrong, and even accused the women of conspiring to remove Mr. Krout, again despite the fact that the manager responsible for investigating the allegations thought that they were credible."

Madison v. IBP, Inc., 257 F.3d 780, 795, 86 FEP Cases 77 (**8th Cir.** 2001), *vacated and remanded for reconsideration in light of National R.R. Passenger Corp. v. Morgan*, __ **U.S.** __, 122 S. Ct. 2583, 153 L. Ed. 2d 773 (2002), held that the plaintiff had shown enough evidence to support an award of punitive damages by showing egregious harassment, repeated complaints, and repeated failures to act on the complaints. The court rejected the company's argument that it was entitled to the defense for good-faith efforts to comply, inasmuch as it had adopted a policy and engaged in regular training of its managers. The court stated:

> Madison presented a great deal of evidence from which the jury could find that IBP employees in a managerial capacity acted with malice or reckless disregard to her civil rights in failing to protect her from illegal conduct or to promote her. The evidence indicated that supervisors and managers were among those who harassed and abused her. High level employees such as Personnel Director Alberto Olguin and Plant Manager Larry Moser, both of whom had authority to terminate employees, ignored her complaints about illegal harassment and discrimination, failed to investigate whether her civil rights were being violated, and did not document illegal behavior or discipline perpetrators. The company's EEO Coordinator, Bernielle Ott, was present at a mediation session at which Madison told Ott and other IBP representatives that she was being physically and verbally harassed almost daily and that she had been repeatedly denied promotions because of her sex. Neither Ott nor any other company representative took action to investigate these allegations or to ensure that Madison's civil rights were not being violated.
>
> IBP contends that it should escape liability for punitive damages because

> it made good faith efforts to comply with federal employment laws. The company presented evidence at trial that it had a corporate policy prohibiting racial and sexual discrimination and harassment, that it maintained an affirmative action plan, and that it put on an annual two hour training session for plant managers on the "Legal Aspects of Supervision." There was also evidence, however, that the written corporate policies were not carried out at the Perry plant and that the company did not make good faith efforts to comply with federal civil rights laws.
>
> Employers have an "affirmative obligation" to prevent civil rights violations in the workplace. . . . There was evidence that IBP did not have effective procedures in place to encourage employees to come forward with employment complaints or to protect them from retaliation. Madison and other employees complained to management on many occasions that their civil rights were being violated, but management did not take reasonable care to investigate or stop such behavior. There was evidence that Personnel Director Olguin, the manager charged with addressing employee grievances, conflicts, and disciplinary matters, did not investigate many complaints of harassment and discrimination. On at least fourteen occasions, an employee was counseled for engaging in harassing conduct, but nothing was recorded in his personnel file. Training Coordinator Mike Miller ignored Madison's reports that male line workers were grabbing and fondling her, did nothing to discipline her harassers, and relied on an unsubstantiated report from one line worker that Madison had willingly engaged in horseplay on the line. When Madison informed Assistant Personnel Director Sue Menhusen that she was being harassed, Menhusen's response was that many of the Hispanic males working at the plant "haven't been in the country for very long" and "don't take direction very well from females." There was also evidence that IBP maintained policies which actually served to punish victims and discourage them from reporting illegal behavior, such as telling an alleged harasser the identity of a complainant and putting "counseling for sexual harassment" notations in the personnel files of any complaining employee.

Id. at 795–96 (citation omitted).

9. Actions of Defense Counsel Warranting Punitive Damages

Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 73 FEP Cases 87 (**8th Cir.** 1997), reduced the punitive damages award to $350,000. The district court had already reduced the award from the $50 million awarded by the jury to $5 million. The court seems to have accepted that punitive damages may be based in part on defense counsel's litigation conduct.

10. Vicarious Liability

Hertzberg v. SRAM Corp., 261 F.3d 651, 661–62 (**7th Cir.** 2001), *cert. denied*, 534 **U.S.** 1130 (2002), affirmed the award of $20,000 in punitive damages to the Title VII sexual harassment plaintiff, rejecting the defendant's argument that it could not be held liable for punitive damages because the plaintiff had complained unsuccessfully to her supervisor and to the plant manager, but had not complained to the company President, the last step in the

company's internal complaint procedure. The court first described Circuit precedent applying *Kolstad* on the question of vicarious liability. In pertinent part, including its footnote 9, it stated:

> This court applied the *Kolstad* standard in *Bruso v. United Airlines, Inc.*, 239 F.3d 848 (**7th Cir.** 2001). In *Bruso*, we discussed *Kolstad*'s "three-part framework for determining whether an award of punitive damages is proper under the statutory standard." 239 F.3d at 857. The first step requires the plaintiff to "demonstrate that the employer acted with the requisite mental state." *Id.* However, we continued,
>
> > [t]he employer need not be aware that it is engaging in discrimination. Instead, it need only act in the face of a perceived risk that its actions will violate federal law. A plaintiff may satisfy this element by demonstrating that the relevant individuals knew of or were familiar with the antidiscrimination laws and the employer's policies for implementing those laws.
>
> *Id.* at 857-58 (internal quotation marks and citations omitted).[9] Once the plaintiff has met this burden, the plaintiff "must demonstrate that the employees who discriminated against him are managerial agents acting within the scope of their employment." *Id.* However, even if the plaintiff meets these burdens, "the employer may avoid liability for punitive damages if it can show that it engaged in good faith efforts to implement an antidiscrimination policy." *Id.*
>
> ———
>
> [9] Another way a plaintiff may meet this burden is "by showing that the defendant's employees lied, either to the plaintiff or to the jury, in order to cover up their discriminatory actions." *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858 (**7th Cir.** 2001).

The court held that there was evidence that the plaintiff's supervisor and plant manager knew about the antidiscrimination laws. *Id.* at 662–63. It held that Lester was not a managerial agent for purposes of punitive damages liability, because he "had little discretion in hiring, disciplining or terminating employees that reported to him." *Id.* at 663. It held that the jury could reasonably find that Plant Manager Margelos was a managerial agent because he "hired the staff for the Elk Grove Village plant, he took care of personnel issues and he had the authority to discipline and terminate the employment of those who worked for him, directly or indirectly." *Id.* Finally, the court held that a reasonable jury could reject the defendant's "good faith" defense because the plaintiff's co-worker made over a hundred demeaning comments about women in four months, the plaintiff's supervisor told her she was being too emotional and put his hand on her knee, and the Plant Manager failed to follow the company's policy by failing to put the complaint in writing, and never did take meaningful action. *Id.* at 655, 663–64.

Swinton v. Potomac Corp., 270 F.3d 794, 810, 87 FEP Cases 65 (**9th Cir.** 2001), *cert. denied*, 535 **U.S.** 1018 (2002), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. The plaintiff was subjected to a frequent barrage of racist slurs and jokes, some of them in the presence of a member of management. The court agreed with other Circuits that "the inaction of even relatively low-level supervisors may be imputed to the employer if the supervisors are made responsible, pursuant to company policy, for receiving and acting on complaints of harassment." Here, such an official not only listened to the racist slurs but laughed at the jokes and told some himself.

Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1280, 87 FEP Cases 1209 (**11th Cir.** 2002), reversed the award of $50,000 in punitive damages against the Title VII and § 1981 racial and ethnic harassment defendant because the plaintiff had not complained and the defendant's constructive knowledge of the harassment, while sufficient for liability, was not sufficient for punitive damages.

11. Direct vs. Vicarious Employer Liability for Punitive Damages

Dodoo v. Seagate Technology, Inc., 235 F.3d 522, 532, 84 FEP Cases 933 (**10th Cir.** 2000), affirmed a judgment for $455,000 on a jury verdict on the 46-year-old plaintiff=s claims of race and age discrimination in promotions. The court upheld the award of punitive damages as well as the other relief, based on evidence that the Human Resource Manager lied about the bases of his personnel decisions and manipulated the plaintiff=s promotional opportunities to his detriment. The facts of this case are described in greater detail at p. 45 above. The court held that *Kolstad* was inapplicable because the award here was under a direct liability theory, because the plaintiff showed Amalice or reckless indifference to his federally protected rights on the part of the managers whom Seagate designated to implement the company=s anti-discrimination policy.@ (Citation omitted.) The court=s explanation of the conduct giving rise to direct liability is set forth above.

Deters v. Equifax Credit Information Services, Inc., 202 F.3d 1262, 1270B71, 81 FEP Cases 1577 (**10th Cir.** 2000), held that the Agood faith@ defense is not available in cases of direct corporate liability for punitive damages. In footnote 3, the court explained that Avicarious liability applies to situations in which a supervisor perpetrates harassment himself, whereas a theory of direct liability is more appropriate where an employer fails to respond adequately to harassment of which a management-level employee knew or should have known. This distinction is subtle, but proves to be crucial to our discussion of Equifax=s invocation of a >good-faith= defense.@ *Id.* at 1270 n.3.

12. Good-Faith Defense

Romano v. U-Haul International, 233 F.3d 655, 668–74, 84 FEP Cases 795 (**1st Cir.** 2000), *cert. denied*, 534 **U.S.** 815 (2001), affirmed the award on a jury verdict of $15,000 in compensatory damages and $285,000 in punitive damages (reduced from $624,000, to comply with the cap) against the Title VII defendants, U-Haul International and its wholly-owned U-Haul Co. of Maine. The plaintiff was fired from her job of Customer Service Representative two weeks after she had been hired. The manager told her that her only trouble was that she sat when she had to pee. The court rejected the defendants= efforts to show that they had made a good-faith effort to comply with the law, holding that it was not enough just to have a written policy. The defendants did not show that they had specific education programs, or disseminated or revised written materials, or trained supervisors, or that there were any examples of compliance. The court stated that it was not holding that evidence on all of these factors was essential, but only that the jury=s rejection of the defense was reasonable.

See the discussion of *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 445–46, 82 FEP Cases 353 (**4th Cir.**), *cert. denied*, 531 **U.S.** 822 (2000), above.

Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 80 FEP Cases 1357 (**5th Cir.** 1999), held that the defendant was liable for punitive damages because an open-door policy is not enough to qualify for the Agood faith attempt to comply@ defense under *Kolstad*. *Id.* at 266.

Bruso v. United Airlines, Inc., 239 F.3d 848, 858, 84 FEP Cases 1780 (**7th Cir.** 2001), stated: AEvery court to have addressed this issue thus far has concluded that, although the implementation of a written or formal antidiscrimination policy is relevant to evaluating an employer=s good faith efforts at Title VII compliance, it is not sufficient in and of itself to insulate an employer from a punitive damages award. Otherwise, employers would have an incentive to adopt formal policies in order to escape liability for punitive damages, but they would have no incentive to enforce those policies.@ (Footnote and citation omitted.) Turning to the facts of the case, the court stated:

> Lastly, Mr. Bruso presented sufficient evidence to allow a reasonable jury to conclude that United did not engage in a good faith effort to comply with Title VII. Although United did have a formal zero-tolerance-for-discrimination policy in place and it did educate its employees about that policy, Mr. Bruso introduced evidence at trial that suggested that United=s top management officials disregarded the policy by refusing to remedy Sporer=s harassment even though they knew about it. From the evidence at trial, the jury could have concluded that the IRT investigation into Sporer=s conduct was a sham designed to discredit Mr. Bruso and to protect the managers who should have taken action to correct Sporer=s harassment sooner. If the jury accepted this evidence, which its verdict in Mr. Bruso=s favor suggests it might have, then it could have concluded that United did not make a good faith effort to comply with Title VII despite its formal antidiscrimination policy.

Id. at 860B61 (citation omitted).

Blackmon v. Pinkerton Security & Investigative Services, 182 F.3d 629, 635–36, 80 FEP Cases 137 (**8th Cir.** 1999), reversed the grant of judgment as a matter of law to the defendant on the plaintiff=s claim for punitive damages. The court rejected the defendant=s arguments for an affirmative defense:

> We also disagree with the district court=s assessment that appellee=s minimal action to address appellant=s concerns was sufficient to overturn the jury=s determination that appellee=s actions warranted punitive damages. Rodriguez=s Ainvestigation@ of appellant=s complaint was clearly inadequate and disproportionate to the seriousness of appellant=s complaints. Appellee=s only remedial actionCthe abusive and blasphemous language memoCdid not address the crux of appellant=s complaintCthat her co-workers were sexually harassing her by engaging in constant, lurid, sexually-explicit conversations in her presence. Furthermore, we take note of appellee=s actions to limit its liability by investigating appellant rather than the harassment and by simultaneously firing a male employee, Eichhorn. Once again we recite the well-established principle that an employer can escape legal liability for sexual harassment by promptly investigating complaints and instituting effective remedial

> action. . . . However, we do not consider appellee=s half-hearted responses to appellant=s serious complaints of sexual harassment to satisfy this obligation.

(Citation omitted.)

Swinton v. Potomac Corp., 270 F.3d 794, 810–11, 87 FEP Cases 65 (**9th Cir.** 2001), *cert. denied*, 535 **U.S.** 1018 (2002), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. The plaintiff prevailed on a negligence theory of liability, rather than vicarious liability, because his chief harasser, while a supervisor, was not in the chain of command over the plaintiff. As described above, the affirmative defense was not available to the defendant. The court rejected the defendant's argument that punitive damages were inappropriate because of its "written materials forbidding harassment and putting in place anti-harassment procedures." *Id.* at 810. The court seemed to treat the unavailability of the affirmative defense to liability in a harassment case as tantamount to the unavailability of a good-faith defense to punitive damages, but any such suggestion would be *dictum* because it also relied on the ineffectiveness of the policy:

> Surely, U.S. Mat cannot claim to have implemented its anti-harassment policy in good faith (even if it were conceived in good faith) when the very employee (Stewart) charged with carrying it out vis-a-vis Swinton laughed along with the "nigger" jokes, did nothing to stop them, and never reported the repeated incidents to higher management. U.S. Mat made a considered judgment to place responsibility for reporting on an employee's direct supervisor. It could well have required some other supervisor or manager further up the chain to be the point of contact. And it could have impressed upon its supervisors, like Stewart, whom it tasked with accepting complaints of harassment, the (we would hope) obvious point that repeatedly subjecting a black employee to "nigger" jokes is wholly unacceptable, and at odds with basic anti-discrimination principles. But it chose not to, and U.S. Mat cannot now be heard to protest that Stewart's position was too "low-level" to warrant imputation of his actions or inaction to the company.

Id. at 811.

Cadena v. Pacesetter Corp., 224 F.3d 1203, 83 FEP Cases 1645 (**10th Cir.** 2000), affirmed a pre-*Kolstad* award of $300,000 in punitive damages (reduced from $700,000 because of the cap) in a Title VII sexual harassment case, rejecting the defendant=s arguments that the award should be set aside in light of *Kolstad*. The court stated that it was unclear who had the burden of proof with respect to good-faith efforts to comply, but that there was no need to resolve the issue because there was adequate evidence of the lack of such efforts. *Id.* at 1209 n.4. At a minimum, held the court, the employer must adopt antidiscrimination policies, make a good-faith effort to educate its employees about its policies and the statutory prohibitions, and must enforce its policies.

> Contrary to Pacesetter=s contention, there was evidence presented at trial undermining Pacesetter=s claim that it made good faith efforts to educate employees about sexual harassment. For example, Humphrey, the manager responsible for sexual harassment training at the office where Cadena worked, testified that she discussed the topic of sexual harassment at meetings with her co-workers on a monthly basis.

> However, Richard Payne, another telemarketing manager at the Lenexa office, testified that no such monthly training sessions occurred. More significantly, Humphrey conceded that when she gave her deposition testimony, she believed that a male supervisor would not commit sexual harassment if he either exposed his genitalia to a female subordinate or grabbed her breasts, so long as he apologized after the incident. Based on Humphrey=s admitted ignorance about sexual harassment, a jury could reasonably infer that Pacesetter failed to make good faith efforts to adequately educate its employees about its non-discrimination policy and Title VII.
>
> Moreover, *Kolstad* itself suggests that the good-faith-compliance standard requires the employer to make Agood faith efforts to *enforce* an antidiscrimination policy.@ . . . Therefore, even if an employer-defendant adduces evidence showing it maintains on paper a strong non-discrimination policy and makes good faith efforts to educate its employees about that policy and Title VII, a plaintiff may still recover punitive damages if she demonstrates the employer failed to adequately address Title VII violations of which it was aware. As discussed *supra,* Cadena presented substantial evidence suggesting that Pacesetter knew about Bauersfeld=s sexually harassing conduct but failed to take any action to stop it.

Id. at 1210 (citation omitted).

Deters v. Equifax Credit Information Services, Inc., 202 F.3d 1262, 1271, 81 FEP Cases 1577 (**10th Cir.** 2000), upheld an award of punitive damages. Because the official charged with the duty of being the final decisionmaker on sexual harassment complaints decided to take no action, in order to protect the revenue-producers at the firm, the court held that this was a case of direct liability.

> Finally, Equifax argues that even assuming that Mr. Taylor was a management-level employee for purposes of imputing punitive liability, his misconduct is not attributable to Equifax, because it goes against the company=s good-faith policies against sexual harassment. It is certainly true, as the Supreme Court recently stated, that in the context of punitive damages, an employer may not be liable for the discriminatory employment decisions of management-level employees where these acts are contrary to good-faith efforts on the part of the employer to comply with Title VII. . . . This principle is meant to advance the purposes of Title VII by encouraging the remediation and prevention that lie at the heart of the statute=s goals. . . . It would defeat these purposes to hold an employer strictly liable for the acts of rogue managers when it has made every effort to comply with Title VII=s requirements. However, Kolstad was a case involving vicarious liability, unlike this case which is premised on a theory of direct liability. Thus, the good-faith defense does not apply. It is negated by a showing of direct malice or reckless indifference to federally protected rights of Ms. Deters, by Mr. Taylor who was designated by the company as a final decision-making authority responsible for implementing the company anti-discrimination policy in the Lenexa office.

(Citations omitted.)

13. Effect of Post-Event Remediation

Swinton v. Potomac Corp., 270 F.3d 794, 811–17, 87 FEP Cases 65 (**9th Cir.** 2001), *cert. denied*, 535 **U.S.** 1018 (2002), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. The plaintiff was subjected to a frequent barrage of racist slurs and jokes, some of them in the presence of a member of management. The defendant argued that it was entitled to a new trial because the lower court had excluded evidence of one of the post-suit steps it had taken to remedy discrimination. The court stated that evidence of post-charge remediation "would not automatically bar the imposition of punitive damages," that the trial judge acts as a gatekeeper as to the relevance of the evidence, and that the jury can decide that the evidence is either window-dressing designed to avoid an award of punitive damages, or *bona fide* evidence of repentance "lessening the need for additional deterrence in the form of punitive damages." *Id.* at 815 (footnote omitted). In the case at bar, the trial judge allowed evidence of the post-charge investigation conducted by the company, and only barred evidence that the defendant put all of its supervisors and managers through anti-harassment training two months after the plaintiff filed suit. The court held that the trial court did not abuse its discretion in excluding this evidence and explained: "Such evidence, if introduced, would have done little, if anything, to undermine the uncontroverted evidence that, even after everyone in management became fully cognizant of Swinton's allegations, no one—not Pat Stewart, none of those at U.S. Mat who had witnessed the harassment and had done nothing about it, and none of the workers who had actually hurled the epithet 'nigger' at Swinton—was ever fired, demoted, or in any way disciplined." *Id.* at 816 (footnote omitted). Nor was the court persuaded that the exclusion of the evidence was prejudicial in light of the jury argument of plaintiff's counsel, because the company did nothing in response to the harassment, because the defendant made no contemporaneous objection and the "plain error" standard was not satisfied, because the company did introduce evidence of its investigation, and because the argument actually referred to the company's failure to take action prior to the harassment of the plaintiff. *Id.* at 816–17.

14. Amount

Romano v. U-Haul International, 233 F.3d 655, 668B74, 84 FEP Cases 795 (**1st Cir.** 2000), *cert. denied*, 534 **U.S.** 815 (2001), affirmed the award on a jury verdict of $15,000 in compensatory damages and $285,000 in punitive damages (reduced from $624,000, to comply with the cap) against the Title VII defendants, U-Haul International and its wholly-owned U-Haul Co. of Maine. The plaintiff was fired from her job of Customer Service Representative two weeks after she had been hired. The manager told her that her only trouble was that she sat when she had to pee. The court rejected the defendants= argument that the 19 to 1 ratio of punitive to compensatory damages was excessive. The court stated that the level of reprehensibility of the conduct in question is often the most important factor in determining whether an award of punitive damages is excessive. *Id.* at 673. It stated that the manager=s statement likely came as a humiliating shock to the plaintiff and evidenced a Ablatant disregard@ of the law. It also relied on evidence that the manager had told the plaintiff he would deny making the statement in the event of a discrimination lawsuit. AGiven the testimony that appellants knowingly violated appellee=s federally protected rights and then attempted to conceal this violation, we find that appellants= actions were more reprehensible than would appear in a case involving economic

harms only.@ *Id.* at 673 (citation omitted). The court stated that proportionality was not subject to a simple mathematical test:

> As such, Aparticularly egregious@ conduct that results in relatively low actual damages can support a higher ratio than conduct that is less reprehensible. . . . Most ratios will fall within an acceptable range, with only a 500 to 1 disparity being explicitly cited by the Court as A>rais[ing] a suspicious judicial eyebrow.=@ . . . In this case, the ratio between punitive and compensatory damages was 19 to 1. Given the low actual damages due to appellee=s short period of employment and the difficulty in measuring actual damages in a case involving Aprimarily personal@ injury, we hold that this is a constitutionally acceptable ratio between punitive and compensatory damages.

Id. (citations omitted). Finally, the court held that, although there were no civil or criminal penalties, the defendants had adequate notice of the potential consequences of their conduct by virtue of the statutory caps on damages. *Id.* at 673B74. The court noted that the Supreme Court has directed courts to accord substantial deference to legislative judgments on appropriate sanctions, and continued: AAccordingly, a punitive damages award that comports with a statutory cap provides strong evidence that a defendant=s due process rights have not been violated.@ *Id.* at 673 (citation omitted).

Rubinstein v. Administrators of Tulane Educational Fund, 218 F.3d 392, 407–09, 84 FEP Cases 1059 (**5th Cir.** 2000), *cert. denied*, 532 **U.S.** 937 (2001), held that an award of $75,000 in punitive damages was excessive when compared with an award of only $2,500 in compensatory damages, and offered the plaintiff remittitur of the punitive award to $25,000 or a new trial. The court held that the plaintiff=s 3.5% pay raise was prospective relief and could not be considered when examining the punitive award for excessiveness. The court stated that Aspecial consideration must be given to Rubinstein=s failure to respond to the remand or remit issue. He simply offers us no guidance as to whether if we deem the award excessive he is entitled to a new trial on this issue, or whether, as an alternative, we should remit the award or leave it to the district court for further consideration.@ *Id.* at 407. The defendant had retaliated against the plaintiff for seeking redress of discrimination, by denying him a 3.5% pay raise. In considering the degree to which the defendants= conduct was reprehensible, the court stressed that there was only one act of retaliation, and that there were other reasons for denying the plaintiff a pay raise. *Id.* at 408. The second factor is the relationship between punitive and compensatory damages. The court stated:

> While no bright line exists, this award is clearly outside even the gray areas of the demarcation between acceptable levels of damages and unacceptable levels. While we acknowledge Rubinstein=s arguments that he was awarded a 3.5% pay raise in addition to $2500 in compensatory damages, we cannot fairly consider this award in weighing the appropriateness of the punitive damages awarded. The pay-raise is prospective relief to correct a wrong previously committed, while the punitive damages award is properly the tool used to correct the retrospective harm. Accordingly, we must consider the appropriateness of the amount at issue here with reference only to the compensatory damages awarded for the prior harm.

> As previously stated, the punitive damages awarded were in an amount thirty times the compensatory damages. While there is no magical multiplier, a multiplier of thirty is unreasonable on the facts of this case. Rubinstein, while no doubt, and understandably, frustrated and angry as his testimony indicates, did not lose his tenured position at the University, nor was he demoted or otherwise forced to suffer consequences to his status at the university. We find that the employment decision denying Rubinstein a small percentage raise, while illegally made, was not so exceptional as to justify a multiplier of thirty. On the facts of this case the ratio alone of thirty-to-one is so disproportionate as to Araise a suspicious judicial eyebrow,@ and require a remittitur.

Id. at 408 (citation omitted). The court remitted the award to ten times the amount of compensatory damages, stating that Athe Supreme Court has indicated that a ratio of ten to one does not necessarily >jar one=s constitutional sensibilities.=@ *Id.* at 409 (some internal quotation marks omitted.) The court continued:

> Moreover, when considered as an absolute amount as opposed to a comparative ratio, we find that a $25,000 punitive damages award is reasonable given the illegal conduct by the Dean, admitted to on the record and found by the jury to constitute malicious or reckless indifference to Rubinstein=s federal rights. Such an award is appropriate in this case and does not test the boundaries of the Due Process Clause.

Id.

Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 80 FEP Cases 1357 (**5th Cir.** 1999), reinstated the jury award of punitive damages, reduced from $100,000 to $75,000.

Deters v. Equifax Credit Information Services, Inc., 202 F.3d 1262, 81 FEP Cases 1577 (**10th Cir.** 2000), upheld the judgment on a jury verdict for the Title VII sexual harassment plaintiff of $5,000 in compensatory damages and $295,000 in punitive damages (reduced from the jury=s $1 million punitive damages award because of the cap). The court rejected the defendant=s argument that it never had notice of such an exposure to punitive damages:

> Evidence was presented to the jury that Equifax had repeated notice of severe and pervasive sexual harassment. Instead of taking immediate appropriate and corrective action reasonably calculated to end the harassment, Mr. Taylor offered Ms. Deters legally indefensible reasons why the harassment should be overlooked, i.e. the ADMs and the collectors were revenue producers and she was not; the ADMs were Ahard core@ and such an attitude was necessary to a successful collector. Though its responses were wanting, it is evident that Equifax had fair notice that it could be exposed to the statutory maximum for damages under 42 U.S.C.1981a(b)(3).

Id. at 1272. The court rejected the defendant=s argument that the punitive damages were excessive because they were an unreasonable multiple of the compensatory damages:

> However, Equifax misconstrues the relevant precedent. Both *BMW* and *Continental Trend* noted that these firm ratios are most applicable to purely economic injury cases where injury is not hard to detect. See *Continental Trend*, 101 F.3d at 639. Moreover, both the Supreme Court and this court acknowledge that low awards of compensatory damages may support a higher ratio if a particularly egregious act has resulted in a small amount of economic damages. See *id.* (citing *BMW*, 116 S. Ct. at 1602). Additionally, as in cases such as Ms. Deters,= where the injury is primarily personal, a greater ratio may be appropriate. *Id.* at 638. In fact, the Seventh Circuit has held that punitive damages are available for sexual harassment under Title VII, even in the total absence of compensatory damages. See *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (**7th Cir.**1998). Despite Equifax=s arguments to the contrary, the jury certainly could have perceived Equifax=s lack of an effective response as recklessly indifferent. We are not persuaded that the ratio between compensatory and punitive damages in the instant case is unconstitutionally disproportionate. Thus, the district court=s refusal to further reduce the punitive damages was not an abuse of discretion.

Id. at 1272–73. The court emphasized the purpose of punitive damages in punishing and deterring unlawful conduct. AIn this respect, the wealth and size of the defendant are relevant considerations. . . . We agree with the district court that Equifax=s gross operating revenue of $1.8 billion in 1996 could be considered in levying a substantial punitive damages award.@ *Id.* at 1273. Finally, the court agreed with the Second Circuit and rejected the Seventh Circuit=s suggestion that the maximum award of punitive damages should be reserved for the most egregious cases. AThe statutory cap is not the limit of a damages spectrum, within which the judge might recalibrate the award given by the jury. . . . To treat it as such would be to invade the province of the jury, something explicitly contrary to the purposes of 1981a.@ *Id.* (citations omitted).

Swinton v. Potomac Corp., 270 F.3d 794, 817–22, 87 FEP Cases 65 (**9th Cir.** 2001), *cert. denied*, 535 **U.S.** 1018 (2002), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. The plaintiff was subjected to a frequent barrage of racist slurs and jokes, some of them in the presence of a member of management. The verdict affirmed by the court was for $5,612 in back pay, $30,000 in emotional-distress damages, and $1,000,000 in punitive damages. *Id.* at 801. The court rejected the defendant's argument that its failure to stop the racial slurs and jokes was not reprehensible "because it was, at the end of the day, nothing more than 'joking.'" It stated that the plaintiff made clear on the witness stand that he did not consider the language a joke. "The only African-American employee of about 140 at the U.S. Mat plant, he was subject to daily abuse featuring the word "nigger," "perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 784 (10th ed.1993)." *Id.* at 817. The court observed that the jury's verdict did not consider it a laughing matter "and we do not hesitate before agreeing." *Id.* The court also rejected the defendant's argument that the plaintiff had not complained, because the plant official who was the company's "proxy" for receiving complaints observed the harassment and did nothing to stop it. *Id.* at 817–18. The court recognized that verbal slurs and jokes are not as serious as actual violence or the threat of violence, but held that "the highly offensive language directed at

Swinton, coupled by the abject failure of Potomac to combat the harassment, constitutes highly reprehensible conduct justifying a significant punitive damages award." *Id.* at 818. The court combined the back pay and compensatory damages awards to obtain a total compensatory damages package of $35,600, and calculated the ratio of punitive to compensatory damages as 28 to 1. The court stated: "This is precisely the type of case posited by the Court in *BMW*—the low award of compensatory damages supports a higher ratio of punitive damages because of 'particularly egregious' acts and 'noneconomic harm that might have been difficult to determine.'" *Id.* The court emphasized that plaintiff's counsel warned the jury not to go "hog wild," had stated that an award of ten million dollars would be wrong, and that they should be more moderate. In light of these admonitions, the court took the verdict of one million dollars as a verdict calculated to punish unlawful conduct and deter its repetition. *Id.* at 819. The court next turned to the magnitude of the harm, and stated:

> But for Swinton's decision that he couldn't take it any longer and thus had to quit, nothing in the record suggests that U.S. Mat would have done anything to address a workplace replete with racial and ethnic slurs, not only about blacks, but also directed at other minorities and ethnic groups. The fact that the harm from unchecked racial harassment occurring day after day cannot be calculated with any precision does not deflate its magnitude.

Id. The court surveyed the decisions of other Circuits and held that, in light of the low compensatory award, the ratio of 28 to 1 was constitutionally permissible. *Id.* at 819–20. Finally, the court refused to reduce the award in light of the analogous cap on damages for Title VII violations. While the Title VII cap weighs in favor of a reduction, "we also hasten to add that Congress has not seen fit to impose any recovery caps in cases under § 1981 (or § 1983), although it has had ample opportunity to do so since the 1991 amendments to Title VII." *Id.* at 820.

Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1188 n.12, 80 FEP Cases 1062 (**10th Cir.** 1999), reversed the grant of a directed verdict to the Title VII sexual harassment defendant on punitive damages, and remanded the case for trial. The court stated that, inasmuch as the corporate parent and its subsidiary were both liable, the caps should be based on their aggregate number of employees.

EEOC v. W&O, Inc., 213 F.3d 600, 615, 83 FEP Cases 117 (**11th Cir.** 2000), upheld awards of punitive damages at the statutory cap of $100,000 each to three women injured by violations of the Pregnancy Discrimination Act. The court held that the awards were not disproportionate to the affected women=s actual damages:

> The parties also dispute whether the back pay and punitive damage awards should be considered for each employee or in the aggregate. If considered individually, the ratio of punitive damages to back pay is 3.8 to 1 for Nuesse ($100,000 to $26,231.43), 26.3 to 1 for McDevitt ($100,000 to $3,800.24), and 16.1 to 1 for Grossman ($100,000 to $6225.46). If considered in the aggregate, the ratio of punitive damages to back pay is 8.3 to 1 ($300,000 to $36,257.13). Because the award of punitive damages was reasonable regardless of whether considered individually or in the aggregate, we need not resolve this issue.

Id. at 616 (footnote discussing the effect of including front pay in Aactual damages@ omitted). The court drew attention to the Supreme Court=s statement in *BMW v. Gore* that the punitive damages should be compared to actual and potential damages, and pointed out that, were it not for the lawsuit, the defendant would have continued to harm pregnant women by its violations of the PDA. *Id.*

15. Role of the Statutory Caps in Determining Excessiveness

Romano v. U-Haul International, 233 F.3d 655, 668–74, 84 FEP Cases 795 (**1st Cir.** 2000), *cert. denied*, 534 **U.S.** 815 (2001), affirmed the award on a jury verdict of $15,000 in compensatory damages and $285,000 in punitive damages (reduced from $624,000, to comply with the cap) against the Title VII defendants, U-Haul International and its wholly-owned U-Haul Co. of Maine. The plaintiff was fired from her job of Customer Service Representative two weeks after she had been hired. The manager told her that her only trouble was that she sat when she had to pee. The court held that, although there were no civil or criminal penalties, the defendants had adequate notice of the potential consequences of their conduct by virtue of the statutory caps on damages. *Id.* at 673–74. The court noted that the Supreme Court has directed courts to accord substantial deference to legislative judgments on appropriate sanctions, and continued: AAccordingly, a punitive damages award that comports with a statutory cap provides strong evidence that a defendant=s due process rights have not been violated.@ *Id.* at 673 (citation omitted).

EEOC v. W&O, Inc., 213 F.3d 600, 615, 83 FEP Cases 117 (**11th Cir.** 2000), upheld awards of punitive damages at the statutory cap of $100,000 each to three women injured by violations of the Pregnancy Discrimination Act, stating: Awe agree with the Seventh Circuit that where a plaintiff suffers an adverse employment action that >was not an isolated instance of discrimination by a single supervisor, but the predictable outcome of not-so-secret company practice,= such that the defendant >maintained a policy of intentional disregard for the statutory rights of its female employees, we cannot say the maximum punitive damage award was inappropriate.=@ The court rejected the suggestion of the Seventh Circuit, and adopted that of the Second and Tenth Circuits, with respect to awards of punitive damages within the caps:

> We find that the reasoning of *Luciano* and *Deters*, based on the plain language of ‘‘ 1981a, is persuasive and, thus, hold that it is only appropriate for a judge to reduce a punitive damages award to below the maximum allowed under the ‘‘ 1981a statutory cap if the award is unreasonable or otherwise A>shock[s] the judicial conscience and constitute[s] a denial of justice,=@ *Luciano*, 110 F.3d at 221 (quoting *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir.1992)) (alteration in original). Because the punitive damages award was reasonable and because ‘‘ 1981a put W&O on notice that it could be liable for punitive damages up to the statutory cap, we find that the district court did not err in refusing to reduce the punitive damages below the statutory maximum.

Id. at 617 (footnote omitted).

H. Common-Law Damages for ADEA, EPA, and FLSA Retaliation Claims?

29 U.S.C. § 215(a)(3), a provision applicable to the Fair Labor Standards Act, the Equal Pay Act, and the ADEA, states that it is unlawful for any person "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding. . . ." Sec. 216(b) of the Act was amended in 1977 to state that employers that violate § 215(a)(3) "shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatements, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." Pub. L. No. 95-151, § 10(a), 91 Stat. 1245, 1252 (1977). 29 U.S.C. § 626(b) in the ADEA provides in part: "Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title." Thus, both provisions can apply to retaliation in violation of the ADEA.

The Seventh Circuit has held that compensatory damages for non-economic injuries and punitive damages are available for retaliation in violation of the Equal Pay Act, *Soto v. Adams Elevator Equipment Co.*, 941 F.2d 543, 551, 56 FEP Cases 1270 (**7th Cir.** 1991), the ADEA, *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 283, 64 FEP Cases 1013 (**7th Cir.** 1993), and the FLSA, *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1226, 2 WH Cases 2d 993 (**7th Cir.** 1995).

Lambert v. Ackerley, 180 F.3d 997, 1011, 5 WH Cases 2d 677 (**9th Cir.** 1999) (*en banc*), *cert. denied*, 528 **U.S.** 1116 (2000), described the Seventh Circuit's reasoning in *Travis* as "persuasive," but held that there was no need to decide the availability of punitive damages under § 215(a)(3) because defendant had waived the issue by failing to preserve it below. The retaliation award for the six plaintiffs was substantial:

> Following a three-week trial, the jury returned a verdict for the plaintiffs on both the federal and state causes of action and awarded $697,000 for lost wages, and $75,000 to each plaintiff for emotional distress. The jury further awarded $12 million in punitive damages on the FLSA claim. The defendants moved for judgment as a matter of law, or in the alternative for a new trial and/or a remittitur of damages. The district court remitted the punitive damages award to $4,182,000, but denied all other defense motions. The district court also awarded the plaintiffs $389,117.50 in attorneys' fees, and later awarded them an additional $44,075 in supplemental fees in connection with the post-trial motions

Id. at 1002.

Villescas v. Abraham, 311 F.3d 1253, 1259–61, 90 FEP Cases 730 (**10th Cir.** 2002), held that the Seventh Circuit line of authority has no application to Federal-sector cases, which are governed by separate statutory provisions that have no counterpart to § 215(a)(3).

Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 933–39, 5 WH Cases 2d 1761 (**11th Cir.** 2000), *cert. denied*, 532 **U.S.** 975 (2001), rejected the Seventh Circuit's reasoning and held that punitive damages are not authorized by § 215(a)(3). Judge Carnes concurred. *Id.* at 939–40.

I. The Damages Caps in the 1991 Act

Madison v. IBP, Inc., 257 F.3d 780, 804–05, 86 FEP Cases 77 (**8th Cir.** 2001), *vacated and remanded for reconsideration in light of National R.R. Passenger Corp. v. Morgan*, __ **U.S.** __, 122 S. Ct. 2583, 153 L. Ed. 2d 773 (2002), held that the caps on damages in the Civil Rights Act of 1991 are constitutional. However, the court refused to apply the caps to plaintiff's § 1981 and State-law claims. *Id.* at 803–04. The court affirmed the lower court's decision to allocate all of the plaintiff's compensatory damages to her State-law claim so that they would not count under the caps. It explained:

> In granting Madison's motion for reallocation of her sex based damages, the district court observed that the verdict had not tied the question of damages to a particular statute, that the standard of liability under all three statutes was the same, and that allocation would permit Madison to recover more of the damages awarded by the jury. Appellate courts have approved the allocation of damages between state and federal claims in cases such as this where the standards of liability are the same and the jury has not been asked to distinguish between statutes in assessing damages. The D.C. Circuit concluded in a similar situation that there was no reason why the plaintiff could not recover her judgment under the local Human Rights Act, "since the local law contains the same standards of liability as Title VII but imposes no cap on damages." *Martini v. Federal National Mortgage Ass'n*, 178 F.3d 1336, 1349 (**D.C. Cir.** 1999). The *Martini* court noted that the standards of liability for the plaintiff's local and federal claims were the same, and it reasoned that if courts were not permitted "to treat damages under federal and local law as fungible where the standards of liability are the same, [it] would effectively limit the local jurisdiction's prerogative to provide greater remedies for employment discrimination than those Congress has afforded under Title VII." *Id.* at 1349–50.
>
> The Ninth Circuit has also approved allocation of compensatory damages to a plaintiff's state law claims where the verdict form permitted the jury to award damages on state and federal civil rights claims without specifically distinguishing them. See *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493 (**9th Cir.** 2000). Since "the jury had awarded damages without differentiating between the claims, the awards were effectively fungible, and the district court's action was entirely within its discretion and consistent with the jury's verdict." *Id.* at 509.
>
> We find the reasoning in *Martini* and *Passantino* persuasive and consistent with federal policy. Title VII states that nothing in its provisions "shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State ..." 42 U.S.C. § 2000e–7. To prohibit courts from allocating damages after a jury verdict finding liability under both federal and state law would conflict with the statutory framework of Title VII and the congressional policy to deter discrimination and harassment. See *Kimzey*, 107 F.3d at 576 ("no language in Title VII indicat[es] that its upper limit is to be placed on awards under state anti-discrimination statutes"). The jury in this case found for Madison on both her state and federal sexual harassment and discrimination claims, and no persuasive reason has been

shown why she should be prevented from receiving her award for compensatory damages under ICRA instead of under the federal statutes. The trial court did not err in its allocation of Madison's compensatory damages for sex based violations to her state law claims.

Id. at 801–02. The full citation to *Martini* is *Martini v. Federal National Mortgage Ass'n*, 178 F.3d 1336, 1349, 80 FEP Cases 1 (**D.C. Cir.** 1999), *cert. dismissed*, 528 **U.S.** 1147 (2000). The full citation to *Kimzey* is *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 73 FEP Cases 87 (**8th Cir.** 1997).

J. Fees and Expenses

Buckhannon Board and Care Home, Inc., v. West Virginia Department of Health and Human Resources, 530 **U.S.** 1304, 121 S. Ct. 1835, 11 AD Cases 1300 (2001), rejected the "catalyst" theory as a basis for entitlement to a fee award under 42 U.S.C. § 1988. The court held that obtaining relief pursuant to a court order or approval of a settlement that changes the legal relationship of the parties is essential requirement for "prevailing party" status and thus for entitlement to fees under the wording of this statute, which parallels the wording of many fee-award provisions. The court rejected as far-fetched petitioners' argument that defendants would avoid their fee obligations by voluntarily tendering full relief, and thus mooting the action before judgment. "And petitioners' fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case. Even then, it is not clear how often courts will find a case mooted: 'It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 1842–43.

Farias v. Instructional Systems, Inc., 259 F.3d 91, 102–03 (**2nd Cir.** 2001), affirmed the judgment of liability on a jury verdict for Title VII retaliation plaintiff Robinson, affirmed the denial of punitive damages, and vacated and remanded the fee award. The lower court had awarded $37,194.97 in attorneys' fees and costs instead of the $132,193.75 in attorney's and paralegal fees $3,406.59 in costs that had been sought. "To arrive at that amount, the court (i) cited several grounds for reducing the number of hours reasonably expended in the litigation for purposes of calculating the lodestar, and (ii) adjusted the lodestar further downward to reflect Robinson's limited success." *Id.* at 103. The court of appeals held that the lower court's opinion did not make clear whether it had doubly discounted plaintiffs' fees for limited success, and remanded the award for clarification, with leave to revisit the entire award, and directed that any new appeal be resolved by the same panel.

Mota v. University of Texas Houston Health Science Center, 261 F.3d 512, 530, 86 FEP Cases 1140 (**5th Cir.** 2001), held that investigation fees were recoverable under Title VII, that the costs of videotaped depositions were not recoverable, and that mediation fees were not recoverable.

Bishop v. Gainer, 272 F.3d 1009, 1020, 87 FEP Cases 920 (**7th Cir.** 2001), *cert. denied*, 535 **U.S.** 1055 (2002), affirmed the denial of part of the attorneys' fees sought by

plaintiffs: "The district court awarded plaintiffs over $238,000 in attorneys fees and costs. He denied a request for additional fees arising out of hundreds of hours of long-distance telephone calls. He said he could not assess the reasonableness of the request because counsel refused to describe in general terms the substance of the calls. We fail to see an abuse of discretion in this decision."

Webner v. Titan Distribution, Inc., 267 F.3d 828, 838, 12 AD Cases 513 (**8th Cir.** 2001), affirmed the award of attorneys' fees. The court rejected the defendant's argument that it was unreasonable to require it to pay for two attorneys at depositions, because the workers' compensation and ADA issues were intertwined, and it was reasonable to have attorneys specializing in workers' compensation and fair-employment litigation each present at the depositions. "Titan further contends that the district court should have reduced the attorneys' fees by 50% because Iowa law does not provide for an award of attorneys' fees in a wrongful termination case. The district court agreed in part and reduced the amount of fees Webner sought but by only 10%. The court concluded that the evidence Webner submitted was interrelated and overlapped between the two claims, therefore further reduction was not appropriate." The court of appeals agreed, stating that the most important factor is that the plaintiff won.

K. Sanctions

Parker v. Sony Pictures Entertainment, Inc., 260 F.3d 100, 111–14, 12 AD Cases 1 (**2nd Cir.** 2001), affirmed the grant of judgment as a matter of law to the ADA defendant but reversed the award of attorneys' fees to the defendant. The court held that the sanction of a fee award to the defendant was improper where the plaintiff proceeded in good faith to trial, based on the same evidence that had held the court on an earlier appeal to reverse the grant of summary judgment to the defendant. There were no intervening factors that would have deprived of its good-faith character a decision to proceed to good faith on a claim previously adjudged trialworthy. The court rejected the lower court's distinction between summary judgment and trial, to the effect that on summary judgment a defendant is required to prove a negative and at trial the plaintiff is required to prove a positive. The court cited *Reeves* and held that the standards for summary judgment and judgment as a matter of law were the same.

B.K.B. v. Maui Police Department, 276 F.3d 1091, 1106–09, 87 FEP Cases 1306 (**9th Cir.** 2001), affirmed the award of $5,000 in attorney's fee sanctions against both the defendant and its counsel under 28 U.S.C. § 1927 and the court's inherent power for knowing and reckless violation of Rule 412 and having misled the court about the testimony after plaintiff's counsel had made an anticipatory objection. The court also affirmed the sanction of $5,000 in emotional-distress damages for the plaintiff because of the emotional stress caused by the humiliation of hearing this evidence come in. The nature of the violation is discussed above in the section on Rule 412. The court held that the lower court "clearly erred in stopping short of explicitly finding that the defendant's lawyers acted in bad faith," and that the violation was "knowing and intentional." *Id.* at 1106–07. The court held that § 1927 was satisfied because the defense counsel's misconduct caused a mistrial and a sanctions proceeding, and thus multiplied proceedings, and because the lower court's finding of recklessness was sufficient to support sanctions under the statute. *Id.* at 1107. The court stated that § 1927 sanctions could also be based on the frivolous nature of the defendant's Rule 412 argument. *Id.* at 1107 n.8. Turning to

the second award, the court stated: "Here, regardless of whether defense counsel's behavior constituted bad faith *per se*, we readily find that counsel's reckless *and* knowing conduct in this case was tantamount to bad faith and therefore sanctionable under the court's inherent power." *Id.* at 1108. The court held that the fees and emotional-distress damages assessed by the lower court were proper sanctions. *Id.* at 1108–09.