ALI-ABA

Current Developments in Employment Law

Santa Fe, New Mexico
July 30, 2005

Damages and Taxes

by

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I am grateful to my former firm, Lieff, Cabraser, Heimann & Bernstein LLP, for the assistance needed to prepare this paper. LCHB's web site is www.lchb.com.

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A. Verdicts and Verdict Forms

Bains LLC v. Arco Products Co., 405 F.3d 76 (**9th Cir.** 2005), affirmed the judgment of liability and the award of compensatory damages, but held that the award of $5 million in punitive damages to the Sikh-owned plaintiff was excessive and that the most that could be allowed was between $300,000 and $450,000. The court rejected defendant's challenge to the verdict form as inconsistent, holding that the $1 awarded in nominal damages did not necessarily mean that there was no harm, but that the extent of the harm had not been proven. The court was required to adopt the latter interpretation because it made sense out of the verdict, considering the evidence.

Wilbur v. Correctional Services Corp., 393 F.3d 1192, 1200 n.4 (**11th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury's answers to the special interrogatories removed any basis for the award of damages. The court held that defendant did not waive its Rule 49(b) challenge to the inconsistency of the verdict despite its failure to raise the issue before the jury was discharged. The court held it would have been futile, because plaintiff's counsel had raised the issue of inconsistency prior to discharge of the jury, and the trial court had refused to resubmit the question. "To find otherwise means that CSC was required, solely for the sake of formality, to challenge the same matter that the district court had expressly ruled on an instant before."

B. Back Pay

1. Entitlement

a. Defendant's Lowering of Pay Scale in the Job at Issue

Dodoo v. Seagate Technology, Inc., 235 F.3d 522, 531, 84 FEP Cases 933 (**10th Cir.** 2000), affirmed the judgment on a jury verdict for the ADEA and Title VII plaintiff as to a promotion to Product Line Manager and Program Line Manager positions. The court rejected defendant's argument that plaintiff suffered no actual loss justifying the $15,000 back pay award for the Program Line Manager position in light of the fact that defendant had reduced the pay grade for the job to a figure $15,000 lower than plaintiff's then-current salary. The court explained:

> As for the remaining backpay award (for Seagate's failure to promote Dodoo to the Program Manager position), the evidence sufficed for a jury finding that but for Seagate's unlawful discrimination the position would not have been downgraded to grade 30 (it will be recalled that downgrading took place in the context of awarding the position to newcomer Koelsch, for whom grade 30 was a step *up* from grade 28). It was surely reasonable for the jury to infer that if Dodoo had gotten the spot instead, that job would have remained at grade 32 (as originally posted), with Dodoo receiving the corresponding increase in salary.

Id. (emphasis in original).

b. Undocumented Aliens

Hoffman Plastics Compounds, Inc. v. N.L.R.B., 535 **U.S.** 137, 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," *id.* at 148, 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.

Id. at 148–49. 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, Souter, 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. Pattern and Practice Finding Creates Presumption

In re Employment Discrimination Litigation Against State of Alabama, 198 F.3d 1305, 1315–16, 81 FEP Cases 950 (**11th Cir.** 1999), stated in *dicta* that, when the plaintiff shows that an employment practice has disparate impact against a protected group and the defendant fails to demonstrate that it is lawful, the principal relief should be an injunction. It

stated that determinations must then be made as to individual equitable remedies: "As for individual relief, if an individual plaintiff has shown that he or she was within the class of persons negatively impacted by the unlawful employment practice, then the employer must be given an opportunity to demonstrate a legitimate nondiscriminatory reason why, absent the offending practice, the individual plaintiff would not have been awarded the job or job benefit at issue anyway. . . . If the employer cannot so demonstrate, then individual relief may be merited."

d. Eleventh Amendment

In re Employment Discrimination Litigation Against State of Alabama, 198 F.3d 1305, 1315–16, 81 FEP Cases 950 (**11th Cir.** 1999), held that Congress validly abrogated the State's Eleventh Amendment immunity to Title VII suits for disparate-impact discrimination.

e. Entitlement When Plaintiff Too Sick to Work

Lathem v. Department of Children and Youth Services, 172 F.3d 786, 793–94, 79 FEP Cases 1267 (**11th Cir.** 1999), affirmed the grant of back pay to the Title VII plaintiff notwithstanding the defendant's argument that she was not eligible for an award because she was disabled and not available for work during the back pay period. "The district court, after reviewing all the evidence, specifically found that DCYS's conduct caused Lathem's disability and that this disability precluded her from obtaining other employment. Accordingly, we hold that a Title VII claimant is entitled to an award of back pay where the defendant's discriminatory conduct caused the disability." *Id.* at 794.

2. Mitigation

Conetta v. National Hair Care Centers, Inc., 236 F.3d 67, 77, 85 FEP Cases 578 (**1st Cir.** 2001), affirmed the lower court's refusal to set aside the entry of default on plaintiffs' retaliatory discharge claim, holding that defendant failed to show good cause. The lower court found that plaintiff's attempts to mitigate were inadequate, and reduced her back pay claim by 25%. Both sides appealed. The court held that defendant showed that some comparable jobs were available, but plaintiff showed that "she pursued at least one application and reviewed newspaper advertisements every day." The court stated: "No one knows exactly what would have happened if Conetta had been more vigorous in her efforts, and the district court's use of a partial discount was a sensible way of resolving the problem." (Citation omitted.)

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.*

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.

3. Elements of Back Pay

Acevedo-Garcia v. Monroig, 351 F.3d 547, 571 (**1st Cir.** 2003), rejected defendants' argument that the jury's awards for back pay were excessive because they exceeded the amounts of lost earnings that had been proven. The court explained:

> As a threshold matter, the magnitude of the claimed discrepancy is sufficiently small (ranging from $2,607.94 to $10,900.00) to preclude a finding that the verdict was "grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand." . . . Furthermore, the jury was entitled to consider any secondary economic injuries flowing from the plaintiffs' loss of earnings and employment benefits. . . . For example, nearly every claimant testified that they relied entirely on their monthly earnings to cover the expenses of running their household, meet their mortgage obligations, pay their childrens' tuition, etc. As a consequence of losing their jobs, plaintiffs were forced to seek additional bank loans, dip into their savings, and make other costly financial adjustments to cover these expenses.

(Citations omitted.)

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.

City of New York v. Local 28, Sheet Metal Workers' International Association, 170 F.3d 279, 285 (**2d Cir.**), affirmed the lower court's order that the fee for reinstatement to active status with the union be waived for nonwhite journeypersons who are entitled to back pay for having been harmed by a practice found to have been in contempt of an earlier order, but modified the order as to the payment of back dues:

> Had there been no discrimination, and had these members never been terminated for inability to pay dues due to lack of work, they would never have been forced to pay the reinstatement fee. However, returning the members to their *ex ante* position does not require a waiver of all back dues. If the nonwhite journeypersons had been working steadily from 1984 to 1991, they would have paid dues in the normal course. As a compensatory contempt remedy, the back pay award should not place the journeypersons in a better financial position than they would have been in if the Union had not discriminated against them. Accordingly, we reverse the order of the district court waiving the payment of back dues from back pay awards, with one caveat. Due to the Union's financial condition, journeypersons discriminated against by the Union are likely to receive only a portion of their lost back pay. . . . Back dues should therefore not be deducted from a back pay award for a given year except to the extent that the actual award for that year exceeds an amount equal to the full back pay for that year minus back dues for the year.

(Citation omitted.)

Skalka v. Fernald Environmental Restoration Management Corp., 178 F.3d 414, 425 (**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.

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. See the discussion below as to mitigation.

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 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.)

4. Calculation

a. "Lost Chance" Method

Bishop v. Gainer, 272 F.3d 1009, 1016–17, 87 FEP Cases 920 (**7th Cir.** 2001), 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*, __ **U.S.** __, 121 S. Ct. 52, 148 L. Ed. 2d 20 (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. Front Pay

1. Entitlement

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 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.

2. Alternative of Reinstatement

Abuan v. Level 3 Communications, Inc., 353 F.3d 1158, 1178, 93 FEP Cases 94 (**10th Cir.** 2003), affirmed the two-year front-pay award for the ADEA and Title VII plaintiff, relying in part on the tone of the parties' court filings as showing too great a level of animosity for reinstatement to be feasible. "The facts surrounding Level 3's treatment of Mr. Abuan, together with its litigation strategy, are persuasive examples of animosity on Level 3's part resulting from Mr. Abuan's prosecution of this litigation." The court added: "Even an unconditional and comparable job offer does not prevent the award of front pay in lieu of reinstatement when hostility renders reinstatement inappropriate." The court held that the lower court abused its discretion in basing plaintiff's rate of pay for front-pay purposes on his salary at time of layoff, and that the jury's back pay award showed that that salary was depressed because of defendant's discriminatory demotions of plaintiff. The court explained, *id.* at 1179:

> We believe the court abused its discretion in failing to adjust Mr. Abuan's front pay to reflect the effects of Level 3's illegal conduct on his failure to receive promotions. The jury's award of back pay clearly reveals its finding that Mr. Abuan had suffered a loss in salary as a result of Level 3's retaliation. The fact that his salary at the time of trial was above that of others in positions comparable to the job he held then is irrelevant if the evidence indicates he would have been in a higher position absent Level 3's retaliation.

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.

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 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.

Caudle v. Bristow Optical Co., Inc., 224 F.3d 1014, 1021 (**9th Cir.** 2000), affirmed the lower court's decision ending the pregnancy discrimination plaintiff's front 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 she suffered no subsequent injury after her return to the workforce in 1997. The defendant had offered her reinstatement, in a different job and under a different supervisor, with only incidental contact with the former supervisor who had discriminated against her. The plaintiff rejected the offer because she felt she would feel awkward there. The court held that this was not sufficient for a finding of excessive hostility between the parties.

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. Its 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 Railroad 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.

Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1349–51, 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 of front pay in lieu of reinstatement was improper. It stated that the district court enjoyed "wide discretion in selecting which remedy to impose." *Id.* at 1349. "Moreover, when age discrimination plaintiffs are near the age of retirement, this court has signaled its comfort with awarding front pay." *Id.* Here, the plaintiff had worked for the defendant for 27 years, and was one year away from retirement as of the close of trial. Awarding a year of front pay was not an abuse of discretion. *Id.*.

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.

3. Awards of Front Pay Where Liquidated Damages Are Awarded

Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1349–51 , 88 FEP Cases 628 (**11th Cir.** 2000), affirmed the judgment on a jury verdict for the discharged ADEA plaintiff. The court held that an award of liquidated damages "does not influence whether or not front pay is also awarded," contrasting the positions of the Seventh and Eleventh Circuits. *Id.* at 1349 n.13.

Farley v. Nationwide Mutual Insurance Co., 197 F.3d 1322, 1340 (**11th Cir.**), 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.

4. Length of Front Pay Award

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."

Belk v. City of Eldon, 228 F.3d 872, 883 (**8th Cir.** 2000), *cert. denied*, 532 U.S. 1008 (2001), affirmed the judgment on a jury verdict for the First Amendment retaliation plaintiff, including $119,000 for ten years of front pay, a reduction from the jury verdict of $310,000. The plaintiff had been the City Clerk and Assistant to the City Administrator. The court explained the lower court's calculation: "The court calculated the difference between Belk's current salary and her salary during her employment with the city of Eldon, multiplied that difference by ten years, and discounted that amount to a present value of $119,000. Nothing in the record suggests that ten years is an unreasonable length of time in this case. In fact, the district court particularly noted that Belk's limited education and Eldon's rural location would make it difficult for Belk to find a job that would compensate her as well as her employment with the city."

Gotthardt v. National Railroad 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).

5. Ability to Work as Condition of Front-Pay Entitlement

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 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.*

6. Necessity of Hearing

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 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.

7. Mitigation

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.

Belk v. City of Eldon, 228 F.3d 872, 883 (**8th Cir.** 2000), *cert. denied*, 532 U.S. 1008 (2001), affirmed the judgment on a jury verdict for the First Amendment retaliation plaintiff, including $119,000 for ten years of front pay, reduced from the jury verdict of $310,000. The court rejected defendant's argument that the front pay should have been mitigated by plaintiff's farming income, because Belk had begun making her agricultural investments while still employed by the City, and farming income was supplemental to her salary. "Because the purpose of awarding front pay is to compensate the plaintiff for what she would have had but for her wrongful termination, the district court was correct in not penalizing Belk for farming income that she would have had in any case."

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.

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.

8. Deduction for Sick Leave or Collateral Benefits

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 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.

Gotthardt v. National Railroad 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.

9. Ending Date

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.

10. Calculation

a. Reduction of Front Pay Award to Present Value

Skalka v. Fernald Environmental Restoration Management Corp., 178 F.3d 414, 426 (**6th Cir.**), 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 (**9th Cir.**), affirmed the district court's award of $603,928.37 in front pay (the present value) to the Title VII sexual harassment plaintiff.

b. 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.

c. 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, 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.

D. Prejudgment Interest

1. Entitlement

O'Rourke v. City of Providence, 235 F.3d 713, 737, 85 FEP Cases 1135 (**1st Cir.** 2001), reversed the lower court's grant of judgment as a matter of law to defendant after the first trial, directed reinstatement of the first jury's verdict for the Title VII sex discrimination and sexual harassment plaintiff, and affirmed the award of prejudgment interest because it was "within the district court's discretion to order make-whole relief." (Citation omitted.)

Fine v. Ryan International Airlines, 305 F.3d 746, 757, 89 FEP Cases 1543 (**7th Cir.** 2002), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff, but held that the lower court erred in calculating prejudgment interest on plaintiff's back pay award only until June 30, 2000, although final judgment was not entered until November 22, 2000. "It is the latter date which is relevant for the calculation." (Citation omitted.) It concluded: "The judgment of the district court is MODIFIED to reflect a prejudgment interest rate of 8.47% on the judgment of backpay, running through the date of judgment, November 22, 2000." *Id.*

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).

2. Rate of Interest

Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1139 (**D.C. Cir.**) (*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.

Conetta v. National Hair Care Centers, Inc., 236 F.3d 67, 77–78, 85 FEP Cases 578 (**1st Cir.** 2001), affirmed the lower court's refusal to set aside the entry of default on plaintiffs' retaliatory discharge claim, holding that defendant failed to show good cause, and affirmed the award of prejudgment interest. Plaintiff had sued under Title VII and Rhode Island law, and the default judgment was undifferentiated. On reconsideration, the lower court used the statutory Rhode Island 12% rate of prejudgment interest. The court stated that defendant did not dispute that the statutory state rate is by virtue of Rhode Island law mandatory on state-law claims, and continued: "Here, however, the applicable federal and state claims appear to be wholly symmetrical so far as Diane Conetta's claims are concerned (at least National does not suggest otherwise). Thus, it is fair to treat the judgment as affording her an option to have it rest

on federal *or* state law, whichever affords her the better interest rate." *Id.* at 78 (emphasis in original; citation omitted). The court distinguished a case in which Massachusetts law gave the judge discretion as to whether to award prejudgment interest. *Id.*

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.

E. Compensatory Damages

Acevedo-Garcia v. Monroig, 351 F.3d 547, 570–72 (**1st Cir.** 2003), involved claims of political discrimination and deprivation of due process brought by 82 former municipal employees. The lower court severed the plaintiffs into four groups, and tried the first 20 plaintiffs, and entered judgment on an award of $6,356,400 in compensatory damages "against a municipality whose entire annual budget in 1996-97 was only $4,529,327," with the claims of 62 plaintiffs left to be tried. *Id.* at 570. The court upheld the award as not excessive. *Id.* at 571–72.

Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565, 570–71, 13 AD Cases 1345 (**3rd Cir.** 2002), affirmed the judgment on a jury verdict for the ADA and Pennsylvania-law plaintiff in the amount of $450,000 in economic damages, and $1.55 million in compensatory damages for emotional distress. See the discussion of this case below. The court affirmed the denial of remittitur:

> To recover emotional damages a plaintiff must show "a reasonable probability rather than a mere possibility that damages due to emotional distress were in fact incurred [as a result of an unlawful act]." . . . . The district court found this standard to be met because Gagliardo produced evidence from her co-workers and family demonstrating the effects her problems with CLI had on her life. This testimony tied Gagliardo's pain and suffering to her early employment problems after she was diagnosed with MS and detailed their subsequent worsening effect on her life. The testimony demonstrated the effects of the mental trauma, transforming Gagliardo from a happy and confident person to one who was withdrawn and indecisive. Because this evidence establishes a reasonable probability that Gagliardo incurred the emotional damages, we hold that the trial court did not abuse its discretion by allowing the jury's verdict to stand. . . . Therefore, we affirm the district court's denial of CLI's motion for a new trial. In addition, in light of this evidence we also hold the trial court did not abuse its discretion in finding the jury's verdict is not so excessive as to be unsupportable or offend the conscience of the court, and therefore denying remittitur.

Bryant v. Aiken Regional Medical Centers Inc., 333 F.3d 536, 546–47, 92 FEP Cases 233 (**4th Cir.** 2003), *cert. denied*, __ **U.S.** __, 124 S. Ct. 1048 (2004), affirmed the Title VII and § 1981 award of $50,000 in compensatory damages for emotional distress. The court held that plaintiff's own testimony provided an adequate basis for the award: "We have held that a plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress. . . . Such testimony must 'establish that the plaintiff suffered demonstrable emotional distress, which must be sufficiently articulated.' . . . The testimony cannot rely on 'conclusory statements that the plaintiff suffered emotional distress' or the mere fact that the plaintiff was wronged. . . . Rather, it must indicate with specificity 'how [the plaintiff's] alleged distress manifested itself.' . . . The plaintiff must also 'show a causal connection between the violation and her emotional distress.'" (Citations omitted.) The court held that plaintiff's testimony was adequate, and that it was not undermined by her decision to rely on faith and prayer instead of seeking professional therapy:

> Bryant was sufficiently specific about the emotional trauma she suffered as a result of ARMC's actions. She explained that she was "embarrassed, frustrated, and angry," "very disgusted," and that she "didn't feel very good about coming to work." She also testified that this distress inflicted a series of specific physical ailments on her: "frequent headaches, insomnia, irregular menstrual cycles, nausea, [and] vomiting." ARMC argues that we should discount her testimony because she did not seek medical attention for the physical symptoms she was suffering. But Bryant testified that she had always been taught to believe that "anything can be handled through prayer and faith" and to "rely on [her family] for strength." She therefore chose to address "the signs and symptoms of what stress could do to a person" through "prayer and faith" and "through talking with [her] family." That was an understandable way for Bryant to respond to the situation in which she found herself. It is also worth noting, as the district court observed, that Bryant "was herself a medical professional whose opinion as to her own condition the jury was entitled to consider."
>
> We further reject ARMC's suggestion that the degree of Bryant's distress was unreasonable. She was working multiple jobs and trying to better herself by pursuing further education in her field. As ARMC's former director of surgical services testified, Bryant was known even outside ARMC as a capable employee. But in applying for jobs that she qualified for, she was stonewalled for almost one year. Her emotional distress was a reasonable reaction to this mystifying frustration of her professional career.

Id. at 547.

McCombs v. Meijer, Inc., 395 F.3d 346, 95 FEP Cases 1 (**6th Cir.** 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. Plaintiff recovered $25,000 in compensatory damages and spent $9,482.00 in expert witness fees, of which she recovered $4,532.50. She thus received $2.64 in damages for every dollar she spent in expert witness fees.

Moore v. Freeman, 355 F.3d 558, 564, 9 WH Cases 2d 321 (**6th Cir.** 2004), an FLSA retaliation case, affirmed an award of $40,000 in emotional-distress damages, stating: "Though the award could be reasonably described as fulsome, we cannot say that it is clearly excessive.

The plaintiff in this case submitted evidence that the stress of losing his job demoralized him, strained his relationships with his wife and children, and negatively affected his sleeping habits and appetite."

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.

Baker v. John Morrell & Co., 382 F.3d 816, 830–32 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment and retaliation plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. Plaintiff filed suit only under Title VII, and after the verdict moved to amend her complaint to add a claim under the Iowa Civil Rights Act, which provides for uncapped compensatory damages but no punitive damages. That would allow her to keep all of her compensatory-damage award, and $300,000 of her punitive-damage award. District Judge Mark Bennett ultimately granted the motion under Rules 15(b) and 54(c), FED. R. CIV. PRO., and the court of appeals affirmed. The court noted the agreement of the parties that the proof and legal standards under Title VII and the ICRA were identical, stated that the amendment was not inconsistent with defendant's position through the litigation, held that an issue can be tried by consent even if the evidence is also relevant to an issue withinb the pleadings, and held that Judge Bennett did not abuse his discretion in holding that the amendment reflected the issues tried by consent, *i.e.*, without objection,. *Id.* at 831. The court held in the alternative that the amendment was also permitted under Rule 54(c), as relief to which the plaintiff was entitled even if she did not demand it in her pleadings. It stated that there are limits on such a use of Rule 54(c), and that the rule cannot be applied so as to prejudice the other side. "For example, if the pleading failure denies the opposing party the 'opportunity to make a 'realistic appraisal of the case, so that [their] settlement and litigation strategy [could be] based on knowledge and not speculation,' the amendment may properly be denied." *Id.* at 831–32 (citations and some internal quotation marks omitted). The court rejected Morrell's claim that it would have settled the case if it had known of its larger exposure:

> Morrell contends it was prejudiced by Baker's failure to plead an ICRA claim because had it known damages would not be capped under Title VII it may have settled the claim instead of risking a verdict in excess of the cap. Morrell, however, has failed to present any evidence to show its settlement strategy was affected by the Title VII cap. Indeed, aside from Morrell's bare assertion, we have no reason to believe it would have been any more inclined to settle this claim irrespective of whether an ICRA claim was pleaded. Furthermore, Morrell was well aware throughout the course of the litigation Baker was demanding an amount to settle the claim well in excess of the Title VII caps. Surely, this fact alone put Morrell on notice Baker was seeking a verdict in excess of $300,000. In light of the liberal policy in favor of Rule 54(c) amendments, and because it is undisputed Baker proved an ICRA claim, we will not permit Morrell's bare assertion of prejudice to thwart the amendment.

Id. at 832. The obduracy of defendant's litigation position—denying a hostile environment even after years of degrading comments, actions, and physical assaults drove plaintiff to a suicide attempt and mental hospitalization—may have contributed to this holding.

Rowe v. Hussmann Corp., 381 F.3d 775, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the jury verdict for the Title VII and Missouri Human Rights Act sexual harassment plaintiff in the amounts of $ 500,000 in compensatory damages and $ 1 million in punitive damages. The court relied on the fact that the harassment had continued over a period of four years, with no more than a seven-month gap. The harasser had repeatedly touched plaintiff's breasts and buttocks, and defendant did nothing for a long period of time although plaintiff complained two or three times a month. The harasser threatened to rape and kill her. Defendant told plaintiff she should be more understanding of the harasser since he only had an eighth-grade education, never fired the harasser, and ultimately transferred plaintiff to a position where the harasser occasionally came into her vicinity.

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, 80 E.P.D. ¶ 40,628 (**8th Cir.** 2001), *vacated and remanded for reconsideration in light of National R.R. Passenger Corp. v. Morgan*, 536 **U.S.** 919 (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.

Sellers v. Mineta, 350 F.3d 706, 712–14, 92 FEP Cases 1665 (**8th Cir.** 2003), upheld the award of $15,000 in compensatory damages from defendant co-worker John Joseph to plaintiff for an incident in which he had pinched her buttocks, and upheld the award of $50,000 in compensatory damages and $50,000 in punitive damages for plaintiff's assault and battery tort claims for his alleged attempt to rape her.

Eich v. Board of Regents for Central Missouri State University, 350 F.3d 752, 762–64, 92 FEP Cases 1812 (**8th Cir.** 2003), held that the award of $200,000 in non-economic damages was proper, and reversed the lower court's order that plaintiff accept a remittitur to $10,000 or that there be a retrial. The court set forth plaintiff's testimony, and held that the $200,000 award did not shock the conscience, at 763–64:

> It's very frustrating to know that that behavior I was subjected to would be allowed to happen for so long, so many times and nothing be done to correct it. They didn't care anything about what I contributed to the university. They put in my job performance or my job performance reviews I am a valuable employee of the university but when I turned to them for help it was like I was nothing. There is just no way to really describe everything that I have been through, the volume, the intense situations, the rejection of my requests for help. There is just, there is really no words to describe how completely and totally devastating everything that has happened to me has been. It's completely destroyed everything.

Judge Smith concurred in part and dissented in part. *Id.* at 764–67.

Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1040, 92 FEP Cases 641 (**9th Cir.** 2003), *cert. denied*, 541 **U.S.** 902 (2004), affirmed the § 1981 jury verdict for $360,000 in compensatory damages and $2,600,000 in punitive damages, $86,000 in lost wages on the on the breach of contract claim, and a remitted $86,000 in double damages for willful withholding of wages and benefits under Washington law. The verdict form for compensatory damages did not distinguish between economic and non-economic damages, and defendant challenged the award

for emotional distress. The court rejected defendants' contention that the jury could not award damages for a discretionary annual $25,000 bonus:

> We hold that the jury reasonably could have awarded bonuses for these years; the evidence in the record demonstrates that in 1998, the year before he was terminated, Zhang exceeded his performance goal and had the highest sales of any American Gem employee. The jury reasonably could have concluded that Zhang would have continued his outstanding work performance, entitling him to bonuses in each of the following four years and an additional $100,000 in economic damages. Thus the jury could have awarded up to $236,845 in economic damages, leaving only $123,155 in compensation for emotional distress.

In any event, the court held, the damages for emotional distress would be proper regardless of whether they amounted to $223,155 or $123,155. The court rejected defendants' argument that emotional distress must be supported by objective evidence and held that a plaintiff's unsupported testimony alone can be sufficient. In the case at bar, plaintiff's testimony was enough to support substantial damages:

> Zhang's testimony alone is enough to substantiate the jury's award of emotional distress damages. Zhang testified that the job at American Gem was "my dream, working in this country," and that when he was terminated, he was "troubled," and "couldn't believe" it. He testified that when American Gem sent letters to his suppliers stating that he had been terminated, the Chinese version of the letters made it seem like "I was either criminal or something very bad." He stated that the termination "very, very hurt my dignity and reputation," because the letters went to suppliers in Dalian, China, his hometown, and "people think there must be something wrong, because Wei is doing something wrong in the States." He testified that people from China called him, concerned about the letters, and that American Gem "ruined my future business.... Because doing business in China, your reputation and your credibility is the key." Despite the fact that his testimony was hampered by language and translation problems, the jury obviously could have gleaned that he was greatly hurt and humiliated by his termination and the manner in which it was carried out. Under *Passantino*, this testimony is more than sufficient to support a substantial compensatory damage award for emotional distress. The award of compensatory damages was not "grossly excessive or monstrous." . . . The district court committed no error, let alone a clear abuse of discretion, in denying the motion for a new trial on this basis.

Id. at 1040–41 (citation omitted).

Hardeman v. City of Albuquerque, 377 F.3d 1106, 21 IER Cases 1096 (**10th Cir.** 2004), affirmed the judgment for $ 3.6 million in favor of the racial discrimination and First Amendment retaliation plaintiff.

F. Liquidated Damages

Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771, 777–78, 87 FEP Cases 219, 81 E.P.D. ¶ 40,807 (**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. State Farm v. Campbell

State Farm Mutual Auto. Ins. Co. v. Campbell, 538 **U.S.** 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), reversed in a 6-3 decision the award of $145 million in punitive damages for bad-faith failure to defend an accident claim, where plaintiffs' post-remittitur award for compensatory was only $1 million. The Court held that the award was excessive and violated the Due Process Clause. Discussing its concerns with punitive damage awards, the Court stated:

> Our concerns are heightened when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded. Vague instructions, or those that merely inform the jury to avoid "passion or prejudice" . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.

Id. at 1520. The Court elaborated on the three standards it had set forth in *BMW v. Gore*, 517 U.S. 559 (1996).

The first factor is the degree of reprehensibility of the defendant's conduct. The Court found that defendant's alteration of records to make its insureds appear less culpable, and its false pretrial assurances to its insureds that their assets would be safe if the case went to trial (contrasting with its post-trial statement that they should put their house up for sale), and the evidence of a pattern of such conduct, justified an award of punitive damages even after taking into account the amount of the compensatory damages. *Id.* at 1521. However, this is only economic harm. The Court took sharp exception to plaintiffs' reliance on evidence that this conduct was part of a nationwide pattern, and that this case was an occasion to punish State Farm for the nationwide pattern, particularly in light of the fact that "much of the out-of-state conduct

was lawful where it occurred." *Id.* at 1522. There was no specific instruction that the evidence could be considered only for background purposes:

> Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.

Id. at 1522–23 (citation omitted). The Court held that there was no link between the award and the injury for which the award was made, and that the absence of such a link created the risk that multiple awards of punitive damages might be made for the same conduct:

> For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. 65 P.3d at 1149 ("Even if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: 'The harm is minor to the individual but massive in the aggregate' "). Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. Gore, supra, at 593, 116 S.Ct. 1589 (BREYER, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover").

Id. at 1523. The Court held that, for the same reasons, the award could not be justified on the ground that the defendant was a recidivist. While recidivism justifies a higher award, and while recidivism need not be shown by identical situations, "the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length." The Court said that these problems were exacerbated by the introduction of "even more tangential" evidence on the personal life of an employee and on the corruption of employees by the practices challenged. *Id.* "In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis." *Id.* at 1524.

The second *Gore* factor is the ratio between harm or potential harm to the plaintiff and the punitive damages award. The Court refused to apply a bright-line rule, but stated:

> Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . The Court further

> referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . or, in this case, of 145 to 1.

Id. at 1524 (citations omitted). The Court stated that there may be exceptions justifying higher awards:

> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." Ibid.; see also ibid. (positing that a higher ratio might be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.
>
> In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio. The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them. The compensatory damages for the injury suffered her, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element. See RESTATEMENT (SECOND) OF TORTS § 908, Comment c, p. 466 (1977) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both").

Id. at 1524–25. The Court held that the defendant's wealth does not justify deviation from these standards.

The third *Gore* standard is the relationship between the punitive damages award and civil penalties authorized or imposed in comparable cases. The Court stated that a criminal penalty

shows that the state regards the conduct as serious, but that it has less utility than other factors in determining the amount of the award. *Id.* at 1526.

2. Punitive-Damage Amounts After *State Farm*: Civil Rights Cases

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 102–03 (**1st Cir.** 2003), *cert. denied*, 541 **U.S.** 972 (2004), a § 1983 case challenging adverse employment actions motivated by political discrimination, the court relied on *Campbell* to uphold the jury's award of $250,000 in punitive damages "given the reprehensibility of defendants' conduct and the resultant injuries inflicted on Rivera and his family," although the employee plaintiff received only $26,400 in economic damages and $125,000 in compensatory damages.

Williams v. Kaufman County, 352 F.3d 994, 1016 (**5th Cir.** 2003), a case involving illegal strip searches of individuals without individualized probable cause, affirmed an award of $100 in nominal damages and $15,000 in punitive damages for each plaintiff. The court stated that the ratio between compensatory and punitive damages is less important in § 1983 civil rights cases than in other cases, and stated that ratios between punitive and compensatory damages do not apply to cases in which nominal damages are awarded.

Lincoln v. Case, 340 F.3d 283, 293 (**5th Cir.** 2003), a Fair Housing act case, affirmed the reduction of a punitive-damage award of $100,000 to $55,000 (the amount of the maximum civil penalty for first-time findings of violations) where the award of compensatory damages was only $500. The court rejected the argument that the $500 award was for nominal damages, and held that it was make-whole relief. The court's discussion of reprehensibility emphasized that greater punitive damages are appropriate where there is a pattern of wrongdoing, or where the defendant falsely stated the apartment was unavailable, or where the defendant has taken advantage "of someone who is relatively unsophisticated or financially vulnerable." (Citation omitted.) False statements to employees are very common, but under *Weaver* may constitute the "trickery or deceit" that will justify a higher award of punitive damages. As to the ratio, the court squarely rejected the argument that that 10 to 1 is the highest permissible ratio.

> Case argues that any ratio of compensatory damages to punitive damages greater than 10:1 requires remittitur. We disagree. In *Watson*, this Court stated that "[t]here is no particular disparity between punitive and actual damages that will automatically result in our declaring a punitive damages award unconstitutional." . . . Although the Supreme Court recently reminded lower courts of appeal that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," it once again declined to impose "a bright- line ratio which a punitive damages award cannot exceed." *Campbell*, 123 S. Ct. at 1524. As we explained in *Watson*, the ratio merely gives the Court "an idea whether the size of the award is suspect."

(Citations omitted.) The court thought that higher ratios may be more common in housing than in employment cases, because the actual injuries can be low in a housing case.

Lust v. Sealy, Inc., 383 F.3d 580, 590, 94 FEP Cases 645 (**7th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII sex discrimination plaintiff, but held that the award

of $273,000 in punitive damages was excessive in light of defendant's remedial efforts, and that $150,000 is the most that could be sustained. The court affirmed the award of $27,000 in compensatory damages, and held that the caps made it unnecessary to address the ratio between the punitive and compensatory damage awards. "When Congress sets a limit, and a low one, on the total amount of damages that may be awarded, the ratio of punitive to compensatory damages in a particular award ceases to be an issue of constitutional dignity . . . ." (Citations omitted.) The court also stated:

> As we emphasized in *Mathias*, moreover, capping the ratio of compensatory and punitive damages makes sense only when the compensatory damages are large, which the statutory cap on total damages in employment discrimination cases precludes. Suppose Lust had been emotionally sturdier and incurred only $10 in emotional injury from the delay in her promotion to Key Account Manager. Would Sealy argue that in that case the maximum award of punitive damages would be $100? So meager an award would accomplish none of the purposes, discussed in *Mathias*, for which punitive damages are validly awarded.

Id. at 591. The case cited is *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 675–78 (7th Cir.2003). The court went on to state that imposing the maximum penalty in a case involving "slight, because quickly rectified, discrimination" would "impair marginal deterrence." *Id.* Its argument is that employers in such a situation would have no incentive to avoid further discrimination "It's as if the punishment for robbery were death; then a robber would be more inclined to kill his victim in order to eliminate a witness and thus reduce the probability of being caught and punished, because if the murdering robber were caught he wouldn't be punished any more severely than if he had spared his victim." *Id.*

Williams v. ConAgra Poultry Co., 378 F.3d 790, 796–97, 94 FEP Cases 266 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII, § 1981, and Arkansas Civil Rights Act racial harassment and termination plaintiff, including the remitted awards of $173,156 in compensatory damages and $500,000 in punitive damages on the termination claim and compensatory damages of $600,000 on the harassment claim, but ordered that the punitive-damage award on the harassment claim be remitted to $600,000 from the jury's verdict of $6,063,750. The court rejected defendant's argument that it should not be liable for punitive damages, relying on incidents affecting the plaintiff, incidents affecting others of which the plaintiff was not aware, and relying on the egregiousness of the harassment. The court held that a reasonable jury could find malice from these facts and from the fact that ConAgra managers were inconsistent in their reasons for firing plaintiff:

> As we noted above, there was substantial evidence of egregious racial harassment at the El Dorado plant, and although Mr. Williams did not testify to being aware of this activity, it could be probative of the state of mind of ConAgra's managers in firing him. Furthermore, at trial there were contradictions in the testimony of ConAgra managers with respect to the basis for Mr. Williams's firing. Thus, in this case the same evidence that the jury used to support its finding of racial motivation in Mr. Williams's discharge also supports an inference of intentional and malicious conduct by ConAgra.

Id. at 796. The court also held that there was sufficient evidence to support a jury determination of reckless indifference on plaintiff's harassment claim, because plaintiff made many complaints to upper management about his supervisor's harassment, over several years, and no meaningful action was taken. The court held that the $6,063,750 punitive-damage award on the harassment claim was unconstitutionally excessive "for three interrelated reasons." "First, in upholding the award the district court improperly relied on evidence of misconduct by ConAgra unrelated to Mr. Williams's claim. Second, the punitive damages award is far in excess of what analogous statutes would allow. Finally, the ratio of punitive damages to compensatory damages far exceeds the levels that the Supreme Court has suggested are consistent with due process." *Id.* at 796. As to the first, the court stated:

> Tying punitive damages to the harm actually suffered by the plaintiff prevents punishing defendants repeatedly for the same conduct: If a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative punitive damages award. Where there has been a pattern of illegal conduct resulting in harm to a large group of people, our system has mechanisms such as class action suits for punishing defendants. Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff, however, deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure.
>
> That does not mean that conduct in other cases is always irrelevant when assessing the defendant's reprehensibility. An incident that is recidivistic can be punished more harshly than an isolated incident. . . . In determining what constitutes a previous example of the same conduct, however, we must be careful not to let the exception swallow the rule. By defining his or her harm at a sufficiently high level of abstraction, a plaintiff can make virtually any prior bad acts of the defendant into evidence of recidivism. . . .
>
> The Supreme Court has therefore emphasized that the relevant behavior must be defined at a low level of generality. "[E]vidence of other acts need not be identical to have relevance in the calculation of punitive damages," *id.*, but the conduct must be closely related.

Id. at 797 (emphasis in original). The question whether particular incidents are sufficiently factually and legally similar is not always simply, as the court's application of the standard shows:

> In upholding the punitive damages award on the harassment claim, we find that the district court improperly relied on evidence of harassment not suffered by Mr. Williams that was insufficiently similar to his experiences to be evidence of recidivism under the narrow exception set forth in *State Farm.* In particular, the district court relied extensively on the testimony of Mr. Johnican who stated that he saw black dolls hung from nooses around the plant. He also reported invitations to KKK barbecues and seeing a long racist joke about keeping black individuals out of heaven posted in the factory. Another black employee, James Atkins, testified that he was invited on KKK hunting

> trips, where he was to serve as the hunted. He also testified to seeing nooses left about the factory. Tasha Moore testified that female black employees who responded favorably to sexually suggestive banter were extended the privileges of white employees, while black women who did not respond favorably were, along with other black employees, given less favorable treatment. Mr. Williams never testified to being aware of these events, let alone being the target of similar behavior. We hold that this misconduct is insufficiently similar to that of which Mr. Williams was the object to count as evidence of its recidivist character.
>
> The district court did, however, identify evidence that would fall within the *State Farm* recidivism exception. Mr. Atkins testified that white managers were extended privileges, like travel at company expense, unavailable to black employees. Ms. Moore testified that black employees were given shorter breaks than white employees. These instances are factually similar to the disparate work assignments that Mr. Williams testified about. Mr. Johnican testified to the widespread use of racist language of the kind that Mr. Williams complained of. Once the evidence has been subject to the winnowing required by *State Farm*, ConAgra's conduct in Mr. Williams's case remains reprehensible, but it is less appalling than the general picture of ConAgra's misconduct that the district court drew.

Id. at 797–98. The court stated that "it would be inappropriate for the courts simply to extend the Title VII limitations to § 1981 cases under the guise of interpreting the Constitution," and continued: "In this case, the award of punitive damages alone on the harassment claim was $6,063,750, more than twenty times the Title VII limit. We do not hold that there is any constitutionally required ratio between § 1981 damages awards and the Title VII cap, but so huge a discrepancy when coupled with the other infirmities that we discern in this award is telling and hard to ignore." *Id.* at 798. The court then addressed the ratio between compensatory and punitive damages, and held that there was no simple test. "Rather, the mathematics alerts the courts to the need for special justification. In the absence of extremely reprehensible conduct against the plaintiff or some special circumstance such as an extraordinarily small compensatory award, awards in excess of ten-to-one cannot stand." *Id.* It held that this case did not present such an extreme, and continued:

> Mr. Williams's large compensatory award also militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 **U.S.** at 425, 123 S. Ct. 1513. Mr. Williams received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on Mr. Williams's harassment claim be remitted to $600,000.

Id. at 799.

Bell v. Clackamas County, 341 F.3d 858, 867–68, 92 FEP Cases 879 (**9th Cir.** 2003), reversed the trial court's reduction of 42 U.S.C. § 1981 and § 1983 punitive-damage awards against defendant deputies who were fellow employees of the plaintiff, and who had retaliated

against him for his complaints of racial discrimination. The court remanded the punitive damages with instructions that the trial court evaluate the individual reprehensibility of each individual defendant's conduct, and that it consider evidence of each defendant's financial net worth to the extent that the deputy would not be reimbursed by the County for the punitive damage award against him.

Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1043–44, 92 FEP Cases 641 (**9th Cir.** 2003), *cert. denied*, 541 **U.S.** 902 (2004), an individual Title VII and § 1981 case involving anti-Asian discrimination, affirmed the award of $2.6 million in punitive damages, $360,000 in compensatory damages for emotional distress, and $193,000 in lost wages and wages unlawfully withheld. The court observed that intentional racial discrimination was far more reprehensible than the mere economic harm involved in *BMW v. Gore* and *Campbell*. It added: "Racial discrimination often results in large punitive damage awards." *Id.* at 1043 (citations omitted). The court found that the seven-to-one ratio was permissible. *Id.* at 1044. The court refused to consider the $300,000 punitive-damages cap in the Civil Rights Act of 1991 as a civil penalty limiting the permissible size of the punitive-damages award under § 1981 because Congress had refused to cap such damages under § 1981. It held that the ratio between the $2.6 million punitive-damages award and the $300,000 cap was reasonable. *Id.* at 1044–45.

Bogle v. McClure, 332 F.3d 1347, 92 FEP Cases 16 (**11th Cir.** 2003), *cert. dismissed*, 124 S. Ct. 1168 (2004), affirmed an award of $500,000 in compensatory damages and $ 2 million in punitive damages to each plaintiff Caucasian librarian harmed by racial discrimination in violation of § 1983. As to reprehensibility, the court stated:

> Appellants' wrongdoing was more than mere accident. There was evidence that, in the face of repeated warnings, Appellants intentionally discriminated against the Librarians on the basis of race and used trickery and deceit to cover it up under the guise of a "reorganization." Furthermore, Appellants intentionally discriminated against the Librarians with full knowledge of recent cases of employment discrimination brought by Caucasian employees against other Fulton County officials which resulted in jury verdicts for the plaintiffs or settlements. A reasonable jury could have concluded from the evidence that Appellants knew that transferring the Librarians on the basis of race was illegal, were warned not to make the transfers, and knew that other Fulton County officials had been caught and punished for making employment decisions on the basis of race; yet Appellants intentionally discriminated against the Librarians and concocted the "reorganization" plan to hide their discriminatory motives. Repeatedly, courts have found intentional discrimination to be reprehensible conduct under *Gore* 's first guidepost.

Id. at 1361 (citation omitted). The court found the 4:1 ratio to be permissible notwithstanding the large compensatory-damage awards, in light of the reprehensibility of the conduct. It rejected the argument that the $300,000 damages cap for Title VII claims should limit the damages awarded under § 1983. The court emphasized that Congress had refused to apply the same caps to § 1983 claims despite the opportunity to do so. "Furthermore, although the punitive damages awarded here are more than the damages available under Title VII for analogous conduct, the difference is not enough, by itself, to suggest that the punitive damages award violates due process." *Id.* at 1362.

3. Punitive-Damage Amounts After *State Farm*: Other Cases

DiSorbo v. Hoy, 343 F.3d 172 (**2d Cir.** 2003), reversed a $400,000 compensatory-damage award to the female plaintiff for her serious injuries, holding that $250,000 would be adequate, and reversed the $1.275 million punitive-damages award and held that a reasonable amount would be $75,000 based on other awards, because only one police officer beat the plaintiff woman, and he stopped beating and choking her when she was about to lose her vision.

Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 678 (**7th Cir.** 2003) (Posner, J.), upheld an award of $186,000 apiece, and $5,000 in compensatory damages apiece, to two plaintiffs bitten by bedbugs. The court held that one of the factors supporting the award was the zealous nature of the defense. It explained:

> And still today one function of punitive-damages awards is to relieve the pressures on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. An example is deliberately spitting in a person's face, a criminal assault but because minor readily deterrable by the levying of what amounts to a civil fine through a suit for damages for the tort of battery. Compensatory damages would not do the trick in such a case, and this for three reasons: because they are difficult to determine in the case of acts that inflict largely dignitary harms; because in the spitting case they would be too slight to give the victim an incentive to sue, and he might decide instead to respond with violence—and an age-old purpose of the law of torts is to provide a substitute for violent retaliation against wrongful injury—and because to limit the plaintiff to compensatory damages would enable the defendant to commit the offensive act with impunity provided that he was willing to pay, and again there would be a danger that his act would incite a breach of the peace by his victim.
>
> When punitive damages are sought for billion-dollar oil spills and other huge economic injuries, the considerations that we have just canvassed fade. As the Court emphasized in Campbell, the fact that the plaintiffs in that case had been awarded very substantial compensatory damages—$1 million for a dispute over insurance coverage—greatly reduced the need for giving them a huge award of punitive damages ($145 million) as well in order to provide an effective remedy. Our case is closer to the spitting case. The defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional. And the defendant may well have profited from its misconduct because by concealing the infestation it was able to keep renting rooms. Refunds were frequent but may have cost less than the cost of closing the hotel for a thorough fumigation. The hotel's attempt to pass off the bedbugs as ticks, which some guests might ignorantly have thought less unhealthful, may have postponed the instituting of litigation to rectify the hotel's misconduct. The award of punitive damages in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is "caught" only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.

> Finally, if the total stakes in the case were capped at $50,000 (2 x [$5,000 + $20,000]), the plaintiffs might well have had difficulty financing this lawsuit. It is here that the defendant's aggregate net worth of $1.6 billion becomes relevant. A defendant's wealth is not a sufficient basis for awarding punitive damages. . . . That would be discriminatory and would violate the rule of law, as we explained earlier, by making punishment depend on status rather than conduct. Where wealth in the sense of resources enters is in enabling the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33–40 percent contingent fee.
>
> In other words, the defendant is investing in developing a reputation intended to deter plaintiffs. It is difficult otherwise to explain the great stubborness with which it has defended this case, making a host of frivolous evidentiary arguments despite the very modest stakes even when the punitive damages awarded by the jury are included.
>
> As a detail (the parties having made nothing of the point), we note that "net worth" is not the correct measure of a corporation's resources. It is an accounting artifact that reflects the allocation of ownership between equity and debt claimants. A firm financed largely by equity investors has a large "net worth" (= the value of the equity claims), while the identical firm financed largely by debt may have only a small net worth because accountants treat debt as a liability.

Id. at 676–78 (citations omitted).

4. Entitlement Where No Compensatory or Nominal Damages Are Awarded

Cush-Crawford v. Adchem Corp., 271 F.3d 352, 87 FEP Cases 456, 81 E.P.D. ¶ 40,800 (**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,* __ **U.S.** __ (2001); *People Helpers Found., Inc. v. City of Richmond,* 12 F.3d 1321, 1327 (**4th Cir.** 1993).

Id. at 357. 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.

Corti v. Storage Technology Corp., 304 F.3d 336, 341–43, 89 FEP Cases 1477 (**4th Cir.** 2002), affirmed the judgment on a Title VII RIF jury verdict for $100,000 in punitive damages, back pay, and prejudgment interest. The court held that punitive damages may be

awarded for a Title VII violation even without an award of compensatory damages, where actual harm is shown by the award of back pay. The court explained:

> Unlike compensatory damages at common law, compensatory damages under §1981a are defined to omit back pay, which is "the most obvious economic damage in a wrongful discharge case." . . . The omission occurs under the 1991 Act to prevent double recovery. . . . For this reason, the court instructed the jury that "[i]n calculating damages, you may not consider any wages or benefits that Ms. Corti may have lost. The award of lost pay or benefits should you find StorageTek liable, will be determined by the Court." . . . We believe that the award of back pay clearly establishes that Corti suffered injury. [FN12] Because back pay awards serve a similar purpose as compensatory damage awards, the "familiar tort mantra" that punitive damages may not be assessed in the absence of compensatory damages will not aid StorageTek in this case. . . . [FN13]. In Title VII cases, a jury's punitive damage award will stand even in the absence of compensatory damages if back pay has been awarded.
>
> FN12. StorageTek has not offered, nor can we find, any reason to disallow punitive damages merely because the court, not the jury, is responsible for awarding back pay under the statutory scheme.
>
> FN13. After *Hennessy*, the Seventh Circuit went further, holding that a punitive damage award survives even without an award of back pay. *See Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (**7th Cir.** 1998); *see also Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 357 (**2d Cir.** 2001). Because back pay was awarded in the case at hand, we need not reach this question today.

Id. at 342–43. Judge Niemayer concurred. *Id.* at 343–45.

Hertzberg v. SRAM Corp., 261 F.3d 651, 656 n.3 (**7th Cir.** 2001), *cert. denied*, 2002 WL 232975, 70 USLW 3395, 70 USLW 3514 (**U.S.**, Feb. 19, 2002) (No. 01–829), 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.

Baker v. John Morrell & Co., 382 F.3d 816, 832 n.4 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment and retaliation plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. Plaintiff filed suit only under Title VII, and after the verdict moved to amend her complaint to add a claim under the Iowa Civil Rights Act, which provides for uncapped compensatory damages but no punitive damages. That would allow her to keep all of her compensatory-damage award, and $300,000 of her punitive-damage award. District Judge Mark Bennett ultimately granted the motion under Rules 15(b) and 54(c), FED. R. CIV. PRO., and the court of appeals affirmed. The court held that it would not consider the permissibility of allocating all $300,000 in Title VII damages to punitive damages, without a compensatory award under Title VII, because defendant did not raise the issue.

Salitros v. Chrysler Corp., 306 F.3d 562, 569, 13 AD Cases 1057 (**8th Cir.** 2002), affirmed the judgment for $100,000 in punitive damages for the ADA retaliation plaintiff where no back pay or compensatory damages were awarded. The court held that the award of front pay served the same function as an award of compensatory damages, in terms of demonstrating injury, and was sufficient to support the punitive-damage award.

Juarez v. ACS Government Solutions Group, Inc., 314 F.3d 1243, 90 FEP Cases 1104 (**10th Cir.** 2003), affirmed the judgment for the plaintiff in the amounts of $22,500 in back pay and $250,000 in punitive damages for racial and national origin discrimination in a RIF.

5. Entitlement Where Defendant Has Tried to Cover Up Its Acts

Fine v. Ryan International Airlines, 305 F.3d 746, 755, 89 FEP Cases 1543 (**7th Cir.** 2002), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff. The court held that plaintiff was entitled to the reduced $300,000 judgment for compensatory and punitive damages, reduced from the jury award of $6,000 in compensatory damages and $3.5 million in punitive damages. The court explained plaintiff's entitlement:

> There is more than sufficient evidence here to sustain the adjusted award of punitive damages. Ryan had an antidiscrimination policy of which all its managers were aware. That policy required employees to refer complaints of discrimination by supervisors to McGoldrick for investigation. McGoldrick, however, did not play her assigned role. Instead of investigating Fine's accusations, she immediately turned Fine's letter over to Looney. In addition, McGoldrick's letter to Fine openly indicated that she was terminated for writing the October 2 letter, but Looney recorded in her personnel file that she was terminated for poor attendance and interpersonal skills. The jury obviously found the latter explanation to be pretextual, which permitted it to infer that Looney was aware that terminating Fine for her report of sex discrimination violated federal law. And there is no argument here that Looney was acting contrary to company policy or outside the bounds of his authority, as President Ron Ryan himself concurred with Looney's decision to fire Fine.

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.

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."

Juarez v. ACS Government Solutions Group, Inc., 314 F.3d 1243, 90 FEP Cases 1104 (**10th Cir.** 2003), affirmed the judgment for the plaintiff in the amounts of $22,500 in back pay and $250,000 in punitive damages for racial and national origin discrimination in a RIF. The court relied heavily on comparative evidence and evidence of bias against Mexicans by Mr. Nesmith. The court stated:

> Applying these standards, we hold that Appellee presented sufficient evidence that ACS terminated Appellee despite a recognized risk of violating Title VII. Appellee presented evidence that Mr. Nesmith and other supervisory employees had received some EEO training and that Mr. Nesmith was the Equal Employment Opportunity Officer at the Fort Sill site. In conjunction, Appellee presented evidence that could lead the jury to conclude that Mr. Nesmith was involved in the RIF decision.

Id. at 1246. The court continued:

> In addition, Appellee presented evidence of cover-up after the discriminatory action. Appellee introduced evidence that the Human Resources Department actively participated with management-level employees to cover up the discriminatory discharge of Appellee by giving a false reason for his discharge. Even though cover-up after the fact does not necessarily import previous evil intent, in the instant case, the jury could infer that the cover- up was planned prior to the discriminatory discharge.
>
> Based on the evidence presented, the jury could determine that the merit spreadsheet was used merely in an attempt to justify the termination of certain individuals. Even though eight categories were supplied by Human Resources, ACS chose to use only six of those categories in rating employees. . . . The two categories supposedly not used in the RIF decision were tenure and past performance evaluation score. The jury could infer that these categories were intentionally excluded in an attempt to justify terminating Appellee.
>
> Appellee also presented proof that ACS's Human Resources Department failed to provide more detailed instructions and guidelines in the RIF or to review and monitor the RIF selection process. The totality of the evidence allowed the jury to determine "that the defendant acted with malicious, willful or gross disregard of a plaintiff's rights over and above intentional discrimination."

Id. at 1247.

6. Entitlement Where Employer Refused Accommodation

Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565, 570–71, 13 AD Cases 1345 (**3rd Cir.** 2002), affirmed the judgment on a jury verdict for the ADA plaintiff in the amount of $300,000 in punitive damages, holding that the defendant's failure to provide a reasonable accommodation for the plaintiff justified the award. The court stated:

> As the trial court concluded, Gagliardo produced sufficient evidence of CLI's reckless indifference toward her statutory disability rights. Gagliardo presented evidence that CLI—through its employees—was aware she had MS. For example,

> Gagliardo produced evidence that her last supervisor, Judith Stout, and CLI's human resources representative, Christine Kirby, discussed Gagliardo's MS prior to Gagliardo's dismissal. Gagliardo also produced evidence that Stout requested information concerning MS. She also offered evidence that she advised CLI of the limitations her condition imposed on her ability to perform her job and that a high level CLI employee—herself an MS sufferer—counseled Gagliardo regarding the impact of the disease. In addition, Gagliardo produced evidence that she had requested accommodation on multiple occasions and that CLI refused to act on any of those requests. Finally, Gagliardo demonstrated that CLI was aware of her federal disability rights, as Christine Kirby testified she was familiar with the ADA and responsible for ensuring CLI followed the ADA. In sum, there was sufficient evidence to support the jury's award of punitive damages.

Id. at 573.

7. Other Questions of Entitlement

Cush-Crawford v. Adchem Corp., 271 F.3d 352, 359, 87 FEP Cases 456, 81 E.P.D. ¶ 40,800 (**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.

EEOC v. Indiana Bell Telephone Co., 256 F.3d 516, 526–28, 86 FEP Cases 1, 80 E.P.D. ¶ 40,590 (**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.

Salitros v. Chrysler Corp., 306 F.3d 562, 569, 13 AD Cases 1057 (**8th Cir.** 2002), affirmed the judgment for the ADA retaliation plaintiff and found that plaintiff had shown an adequate basis for the award of $100,000 in punitive damages:

> Chrysler's manager Richard Haynes was quoted as saying he was going to teach Salitros a lesson, in circumstances that support the inference that the lesson to be learned was either not to file EEOC charges or not to protest work assignments that he thought

> exceeded his medical restrictions. Haynes testified that he had received training on the Americans With Disabilities Act. A jury could conclude that Haynes acted in reckless indifference to whether he was violating Salitros's federally protected rights. Haynes's malice may be imputed to Chrysler because he was serving in a managerial capacity and acting in the scope of his employment.

(Citations omitted.)

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.

Madison v. IBP, Inc., 257 F.3d 780, 795, 86 FEP Cases 77, 80 E.P.D. ¶ 40,628 (**8th Cir.** 2001), *petition for cert. filed*, 70 USLW 3445 (**U.S.**, Dec. 19, 2001) (No. 01–985), 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).

8. <u>Action Taken Pursuant to Legal Advice</u>

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.*"

9. Vicarious Liability

Hertzberg v. SRAM Corp., 261 F.3d 651, 661–62 (**7th Cir.** 2001), *cert. denied*, 2002 WL 232975, 70 USLW 3395, 70 USLW 3514 (**U.S.**, Feb. 19, 2002) (No. 01–829), 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.

Bains LLC v. Arco Products Co., *Bains LLC v. Arco Products Co.*, 405 F.3d 76 (**9th Cir.** 2005), affirmed the judgment of liability and the award of compensatory damages, but held that the award of $5 million in punitive damages to the Sikh-owned plaintiff was excessive and that the most that could be allowed was between $300,000 and $450,000. The court rejected defendant's argument that it could not be held liable for punitive damages because only a low-level attendant had engaged in discrimination:

> The district court reviewed the evidence with care, and concluded, correctly, that the jury could find that Davis was not a mere gas station attendant, but a supervisor. While ARCO claims that Davis had no managerial responsibilities, the evidence demonstrated that Davis had direct control over the daily fuel hauling operation and fuel carriers. Moreover, immediately after the termination of the contract, Davis himself took credit for getting Flying B terminated, bragging to non-Flying B drivers about his part in "kick[ing] those ragheads out" of the facility.
>
> Even were Davis not a supervisor, there can be no question under the evidence that Lawrence was. Lawrence was ARCO's official in charge of the Seattle terminal and, as Tim Reichert testified, Lawrence had full authority over safety issues at the terminal, including the power to lock Flying B out of the facility. The jury could conclude that when Flying B first complained to Lawrence about Davis's racial harassment, Lawrence simply made excuses for Davis's behavior and did nothing about it. And when Flying B repeated its complaints several times, Lawrence did nothing to restrain Davis, but instead terminated Flying B without even the thirty-days notice required by the contract.
>
> Davis testified that Lawrence was present on occasions when he called the Flying B drivers "ragheads." The jury did not have to conclude, as ARCO urges, that Lawrence locked out Flying B only for safety violations. The jury could conclude, to the contrary, that Lawrence perceived a conflict between Flying B and Davis—over Davis's harassment and intentional delays of those he called "ragheads"—and that Lawrence chose to back up Davis. That suffices for corporate liability. If a company official with sufficient authority to subject the company to vicarious liability backs-up a racist employee's racially-motivated conduct instead of protecting the victim from the employee, then the company is liable, even if the supervisor's motivation is non-racial, such as loyalty to his subordinate or a desire to avoid conflict within the company. A written antidiscrimination policy does not insulate a company from liability if it does not enforce the antidiscrimination policy and, by its actions, supports discrimination.

Id. at 774 (footnote omitted).

Swinton v. Potomac Corp., 270 F.3d 794, 810, 87 FEP Cases 65 (**9th Cir.** 2001), 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.

Wilbur v. Correctional Services Corp., 393 F.3d 1192, 1205 (**11th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury's answers to the special interrogatories removed any basis for the award of damages. The court held that, even assuming the claim for punitive damages was not moot, the lower court did not err in dismissing it. It reasoned that, although plaintiff's supervisors may have acted with malice or reckless indifference towards her, "she failed to establish a sufficient basis for imputing their conduct to CSC." (Citation omitted.) The court added:

> And, in this Circuit, "punitive damages will ordinarily not be assessed against employers with only constructive knowledge of harassment." . . . In order to ground liability in an employer, the plaintiff must establish that "the discriminating employee was high[] up the corporate hierarchy" or that "higher management countenanced or approved his behavior." . . . Even if, as Wilbur asserts, CSC's corporate office had notice of the alleged sex discrimination as of February 2002, when she complained to CSC's human resources department, Wilbur has offered nothing to establish that CSC's higher management "countenanced or approved" the offending behavior of Wilbur's supervisors. Moreover, to hold otherwise seems irreconcilable with the jury's finding that CSC had "exercised reasonable care to prevent and correct promptly any sexually harassing behavior in the work place." . . . Therefore, even if the issue is not moot, we conclude that the district court did not err in dismissing Wilbur's punitive damages claim.

(Citation omitted.)

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.

10. Good-Faith Defense

Bryant v. Aiken Regional Medical Centers Inc., 333 F.3d 536, 548–49, 92 FEP Cases 233 (**4th Cir.** 2003), *cert. denied*, __ **U.S.** __, 124 S. Ct. 1048 (2004), reversed the Title VII and § 1981 award of $210,000 in punitive damages. The court held that defendant had made a good-faith attempt to comply with the law:

> . . . ARMC had an extensively implemented organization-wide Equal Employment Opportunity Policy. That policy, a version of which was included in the employee handbook, stated that "all persons are entitled to equal employment opportunity regardless of race" and that "it is and shall continue to be our policy to provide promotion and advancement opportunities in a non- discriminatory fashion." ARMC also created a grievance policy encouraging employees to bring forward claims of harassment, discrimination, or general dissatisfaction, and employees were explicitly informed that they would not be retaliated against for making a complaint. There was also a carefully developed diversity training program that included formal training classes and group exercises for hospital employees. And ARMC voluntarily monitored departmental demographics as part of an ongoing effort to keep the employee base reflective of the

pool of potential employees in the area. These widespread anti-discrimination efforts, the existence of which appellee does not dispute, preclude the award of punitive damages in this case.

Hatley v. Hilton Hotels Corp., 308 F.3d 473, 477, 89 FEP Cases 1861 **(5th Cir.** 2002), reversed the grant of judgment as a matter of law on plaintiffs' Title VII sexual harassment claims but affirmed the denial of punitive damages. The court held that, notwithstanding the inadequacy of the defendant's handling of plaintiffs' internal harassment complaints and earlier complaints filed by others, the defendant made out its affirmative defense:

> Davidson was arguably an agent in a managerial capacity, and she may have acted with malice or reckless indifference to the rights of the plaintiffs within the scope of her employment. However, these actions were contrary to Bally's good faith effort to prevent sexual harassment in the workplace, as is evidenced by the fact that Bally's had a well-publicized policy forbidding sexual harassment, gave training on sexual harassment to new employees, established a grievance procedure for sexual harassment complaints, and initiated an investigation of the plaintiffs' complaints. These actions evidence a good faith effort on the part of Bally's to prevent and punish sexual harassment.

Swinton v. Potomac Corp., 270 F.3d 794, 810–11, 87 FEP Cases 65 (**9th Cir.** 2001), 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.

11. Effect of Post-Event Remediation

Lust v. Sealey, Inc., 383 F.3d 580, 585, 94 FEP Cases 645 (**7th Cir.** 2004), affirmed the judgment for the Title VII promotional discrimination plaintiff except for punitive damages. The court stated in *dictum* that the general tort rule barring evidence of curative actions as showing the steps that could have been taken earlier to avoid injury, is not limited to tort cases and could reasonably be applied in employment discrimination cases as well. It reduced the award of punitive damages from the statutory cap to $150,000, stating:

> We are concerned that to uphold the award of the maximum damages allowed by the statute in a case of relatively slight, because quickly rectified, discrimination would impair marginal deterrence. If Sealy must pay the maximum damages for a relatively minor discriminatory act, it has no monetary disincentive (setting aside liability for back pay) to escalate minor into major discrimination. It's as if the punishment for robbery were death; then a robber would be more inclined to kill his victim in order to eliminate a witness and thus reduce the probability of being caught and punished, because if the murdering robber were caught he wouldn't be punished any more severely than if he had spared his victim. . . . In light of this consideration and this court's treatment of punitive-damages awards in similar cases, we believe that the maximum such award that would be reasonable in this case would be $150,000.

(Citation omitted.)

Swinton v. Potomac Corp., 270 F.3d 794, 811–17, 87 FEP Cases 65 (**9th Cir.** 2001), 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.

12. Amount

McCombs v. Meijer, Inc., 395 F.3d 346, 359, 95 FEP Cases 1 (**6th Cir.** 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. Plaintiff recovered $100,000 in punitive damages. The court rejected defendant's argument that the lower court erroneously admitted evidence of its gross annual sales, because high volume does not mean high profit. The court held that defendant had not shown it was prejudiced, or that it was unable to pay the award. Judge Gilman dissented.

See the discussion of *Lust v. Sealey, Inc.*, 383 F.3d 580, 590-91, 94 FEP Cases 645 (**7th Cir.** 2004), in the section below on "The Damages Caps in the 1991 Act."

Fine v. Ryan International Airlines, 305 F.3d 746, 755–56, 89 FEP Cases 1543 (**7th Cir.** 2002), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff. The court held that plaintiff was entitled to the reduced $300,000 judgment for compensatory and punitive damages, reduced from the jury award of $6,000 in compensatory damages and $3.5 million in punitive damages. The court explained its approval of the amount:

> Ryan's protestations notwithstanding, there was more than enough evidence for the jury to find its conduct sufficiently egregious to justify the maximum legally possible punitive damages award. Indeed, that is what the jury's very high monetary assessment signaled. (It is therefore not necessary for us to consider whether punitive damages awards that must be adjusted because of the statutory cap should simply be lopped off at the maximum, or if they should be reduced to a number less than or equal to the statutory cap based on a proportional assessment of culpability.) This was not a case where there was a "smidgin" of retaliation, such as a temporary suspension or minor loss of pay. Instead, Ryan, having recently informed its female pilots to put complaints of sexual harassment and discrimination in writing, terminated Fine within 24 hours of its receipt of her complaint on these subjects precisely because she had written the letter. Nor can Ryan credibly argue that its actions were the result of a rogue supervisor, since its general counsel and the president of the company both concurred in the decision. To accept Ryan's position here we would essentially have to hold that the statutory maximum for punitive damages could never be awarded in a Title VII complaint where the plaintiff prevailed only on her retaliation claim. We see no evidence that Congress sought to enact such a rule, and we decline to endorse it. The damages award is affirmed.

Rowe v. Hussmann Corp., 381 F.3d 775, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the jury verdict for the Title VII and Missouri Human Rights Act sexual harassment plaintiff in the amounts of $ 500,000 in compensatory damages and $ 1 million in punitive damages. The court relied on the fact that the harassment had continued over a period of four years, with no more than a seven-month gap. The harasser had repeatedly touched plaintiff's breasts and buttocks, and defendant did nothing for a long period of time although plaintiff complained two or three times a month. The harasser threatened to rape and kill her. Defendant told plaintiff she should be more understanding of the harasser since he only had an eighth-grade

education, never fired the harasser, and ultimately transferred plaintiff to a position where the harasser occasionally came into her vicinity.

Swinton v. Potomac Corp., 270 F.3d 794, 817–22, 87 FEP Cases 65 (**9th Cir.** 2001), 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.

Juarez v. ACS Government Solutions Group, Inc., 314 F.3d 1243, 90 FEP Cases 1104 (**10th Cir.** 2003), affirmed the judgment for the plaintiff in the amounts of $22,500 in back pay and $250,000 in punitive damages for racial and national origin discrimination in a RIF.

Hatley v. Hilton Hotels Corp., 308 F.3d 473, 477, 89 FEP Cases 1861 **(5th Cir.** 2002), reversed the grant of judgment as a matter of law on plaintiffs' Title VII sexual harassment claims but affirmed the denial of punitive damages. The court held that, notwithstanding the inadequacy of the defendant's handling of plaintiffs' internal harassment complaints and earlier complaints filed by others, the defendant made out its affirmative defense:

> Davidson was arguably an agent in a managerial capacity, and she may have acted with malice or reckless indifference to the rights of the plaintiffs within the scope of her employment. However, these actions were contrary to Bally's good faith effort to prevent sexual harassment in the workplace, as is evidenced by the fact that Bally's had a well-publicized policy forbidding sexual harassment, gave training on sexual harassmet to new employees, established a grievance procedure for sexual harassment complaints, and initiated an investigation of the plaintiffs' complaints. These actions evidence a good faith effort on the part of Bally's to prevent and punish sexual harassment.

13. Waiver of Challenge to Amount

Local Union No. 38, Sheet Metal Workers' Intern. Ass'n, AFL-CIO v. Pelella, 350 F.3d 73, 89–90, 173 LRRM 2673, 173 LRRM 2843 (**2nd Cir.** 2003), held that the LMRDA defendant waived its right to challenge an award of $25,000 in punitive damages, where only $1 was awarded in nominal damages, because the union had not raised the issue in the lower court. The court held that it made no difference that *State Farm* was not decided until the appeal, because *State Farm* discussed precedents predating the judgment as well as later precedents.

Hardeman v. City of Albuquerque, 377 F.3d 1106, 1122, 21 IER Cases 1096 (**10th Cir.** 2004), affirmed the judgment for $ 3.6 million in favor of the racial discrimination and First Amendment retaliation plaintiff. The court held that defendants waived their right to challenge the constitutionality of the amount of the award of punitive damages by raising it in only a perfunctory fashion below. The court rejected defendants' argument that they preserved the constitutional argument by citing *BMW v. Gore* in a footnote, while disclaiming anything other than discretionary review of the amount of the award.

H. The Damages Caps in the 1991 Act

Lust v. Sealey, Inc., 383 F.3d 580, 590-91, 94 FEP Cases 645 (**7th Cir.** 2004), affirmed the judgment for the Title VII promotional discrimination plaintiff except for punitive damages. The court rejected defendant's argument that the award of punitive damages was unconstitutionally excessive, although it did reduce the amount, holding that the cap on damages eliminates any question of unconstitutional excess. It stated:

> The purpose of placing a constitutional ceiling on punitive damages is to protect defendants against outlandish awards, awards that are not only irrational in themselves because out of whack with any plausible conception of the social function of punitive

> damages but potentially catastrophic for the defendants subjected to them and, in prospect, a means of coercing settlement. That purpose falls out of the picture when the legislature has placed a tight cap on total, including punitive, damages and the courts honor the cap.

Abuan v. Level 3 Communications, Inc., 353 F.3d 1158, 1170, 93 FEP Cases 94 (**10th Cir.** 2003), affirmed the judgment for the ADEA and Title VII plaintiff. The court rejected defendant's argument that allowing liquidated damages under the ADEA, on top of a full $300,000 recovery for compensatory damages under Title VII, violated the 1991 Act's caps on damages.

Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565, 570–71, 13 AD Cases 1345 (**3rd Cir.** 2002), affirmed the judgment on a jury verdict for the ADA plaintiff in the amount of $2.3 million in compensatory and punitive damages, unapportioned as between the State and Federal claims. Plaintiff had a virtually identical claim under Pennsylvania law, which allows uncapped compensatory damages but not punitive damages. The court affirmed the allocation of the punitive damages to the ADA claim, its reduction to $300,000, and the allocation of all $450,000 in economic damages, and all $1.55 million in compensatory damages for emotional distress to the State-law claim. The court explained:

> Importantly, the ADA also contains such a prohibition: "Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter." 42 U.S.C. § 12201(b) (2000). Here, the PHRA, with its similar language and applicability, clearly provides a cause of action nearly identical to that of the ADA. The fact that the PHRA does not contain a damages cap further indicates that it was intended to provide a remedy beyond its federal counterpart, the ADA. As the courts in *Passantino* and *Martini* recognized, subjecting such state law claims to the federal cap would effectively limit a state's ability to provide for greater recovery than allowed under the corresponding federal law. *Passantino,* 212 F.3d at 510; *Martini,* 178 F.3d at 1349–50. Imposing such a limitation would violate the federal law's prohibition on limiting state remedies. *Id.*

The court further upheld the apportionment of damages between the Federal and State claims:

> In this case, given the similarity of the claims and the jury's unapportioned award of damages, it is reasonable to infer that the jury intended to award its entire verdict to Gagliardo. Because there is no cap under the PHRA, it was entirely reasonable for the trial court to apportion the damages so as to allow Gagliardo to recover the entire jury award, as reduced by the district court.

Id. at 571. The court distinguished situations in which a plaintiff sues for the same conduct under multiple Federal statutes. *Id.*

Madison v. IBP, Inc., 257 F.3d 780, 804–05, 86 FEP Cases 77, 80 E.P.D. ¶ 40,628 (**8th Cir.** 2001), *petition for cert. filed*, 70 USLW 3445 (**U.S.**, Dec. 19, 2001) (No. 01–985), 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.

I. 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, 81 E.P.D. ¶ 40,728 (**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.

Mathur v. Board of Trustees of Southern Illinois University, 317 F.3d 738, 90 FEP Cases 1537 (**7th Cir.** 2003), reversed the fee award for two of plaintiffs' attorneys because the lower court erred in using Southern Illinois local rates for their time instead of the Chicago rates they customarily charged. The court held that the out-of-town attorney's rate is presumptively the rate that should be used, unless there is evidence that local attorneys were able to perform as well as visiting counsel and there was no reason why local counsel should not have been engaged.

Fine v. Ryan International Airlines, 305 F.3d 746, 756–57, 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 a 10% reduction in the lodestar for failure to prevail on the discrimination claim. The court observed that the plaintiff was fully successful, in that because

of the cap on damages she received as much relief as she would have been able to receive if she had prevailed on the discrimination claim. The court held that the reduction might have been based on the lower court's view that plaintiff's counsel wasted some time pursuing less promising theories of recovery, and that such a view would not be an abuse of discretion.

EEOC v. Bd. of Regents of University of Wisconsin System, 288 F.3d 296, 302, 88 FEP Cases 1133 (**7th Cir.** 2002), affirmed the judgment for the EEOC. The court affirmed the award of witness fees for the charging parties, holding that the EEOC was the only party filing the suit and the charging parties were merely nonparty witnesses for whom the EEOC was seeking relief.

Bishop v. Gainer, 272 F.3d 1009, 1020, 87 FEP Cases 920 (**7th Cir.** 2001), 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."

Salitros v. Chrysler Corp., 306 F.3d 562, 576–77, 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 affirmed the fee award, holding that plaintiff was entitled to fees because she recovered on her retaliation claim, even if she lost her discrimination claim, and rejecting the defendant's contention that the award should be cut because of issues on which plaintiff did not prevail. "The magistrate judge considered this argument and concluded that the claims shared a common core of facts and therefore the fees should not be reduced for failure to prevail on every theory. Accepting this recommendation was not an abuse of the district court's discretion." *Id.* at 577 (citation omitted).

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.

Staton v. Boeing Co., 313 F.3d 447, 454–45, 90 FEP Cases 641 (**9th Cir.** 2002), reversed the grant of final approval to a settlement for several reasons. One reason was the court's concern about the settlement's provisions on attorneys' fees:

> The parties negotiated the amount of attorneys' fees as part of the settlement between the class and the Company. They included as a term of the proposed decree the amount of attorneys' fees that class counsel would receive. The action falls under the terms of two fee-shifting statutes. By negotiating fees as an integral part of the settlement rather than applying to the district court to award fees from the fund created, Boeing and class counsel employed a procedure permissible if fees can be justified as statutory fees payable by the defendant.
>
> Boeing and class counsel did not, however, seek to justify the attorneys' fees on this basis but instead made a hybrid argument: They maintained that the award is an appropriate percentage of a putative "common fund" created by the decree even though common funds, as opposed to statutory fee-shifting agreements, usually do not isolate attorneys' fees from the class award before an application is made to the court. The district court approved the fee on that common fund basis.
>
> The incorporation of an amount of fees calculated as if there were a common fund as an integral part of the settlement agreement allows too much leeway for lawyers representing a class to spurn a fair, adequate and reasonable settlement for their clients in favor of inflated attorneys' fees. We hold, therefore, that the parties to a class action may not include in a settlement agreement an amount of attorneys' fees measured as a percentage of an actual or putative common fund created for the benefit of the class. Instead, in order to obtain fees justified on a common fund basis, the class's lawyers must ordinarily petition the court for an award of fees, separate from and subsequent to settlement.
>
> In order to assess the reasonableness of the attorneys' fees awarded by the decree, the district court compared the amount of the fees to the amount of the putative common fund and determined what percentage of this fund the fee amount constituted. This comparison is a permissible procedure when a court is determining the reasonableness of fees taken from a genuine common fund. In conducting the comparison, however, the district court included in the value of the putative common fund the inexact and easily manipulable value of injunctive relief. Such relief should generally be excluded from the value of a common fund when calculating the appropriate attorneys' fee award, although the fact that counsel obtained injunctive relief in addition to monetary relief for their clients is a relevant circumstance to consider in determining what percentage of the fund is reasonable as fees. We hold further, therefore, that parties may not include an estimated value of injunctive relief in the amount of an actual or putative common fund for purposes of determining an award of attorneys' fees.

The court held that "there is no preclusion on recovery of common fund fees where a fee-shifting statute applies." *Id.* at 476. It cited the following authority:

> *See* *Brytus v. Spang & Co.*, 203 F.3d 238, 246-247 (3d Cir. 2000) (holding that common fund funds can be appropriate in both settled and litigated cases where statutory fees are available); *Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998) (approving fees measured by common fund rather than statutory principles where statutory fees were available); *Florin v. Nationsbank*, 34 F.3d 560, 564 (7th Cir. 1994) (common fund

> principles "properly control a case which is initiated under a statute with a fee shifting provision, but is settled with the creation of a common fund."); *Skelton v. General Motors Corp.*, 860 F.2d 250, 256 (7th Cir. 1988) ("[W]hen a settlement fund is created in exchange for release of the defendant's liability both for damages and for statutory attorneys' fees, equitable fund principles must govern the court's award of the attorneys' fees."); 1 Mary Francis Derfner and Arthur D. Wolf, *Court Awarded Attorney Fees*, ¶ 2.05[7] at 2-81 (2001) ("[T]he mere fact that a fee-shifting statute is implicated in the action does not ensure that fees will be awarded under that statute.... [F]ees may be taxed against the [settlement] fund under the common fund doctrine." (citing *Skelton* and *Florin*)).

Id. at 476 n.18. The court explained the nature of such a recovery: "In contrast to fee-shifting statutes, which enable a prevailing party to recover attorneys' fees from the vanquished party, the common fund doctrine permits the court to award attorneys' fees from monetary payments that the prevailing party recovered in the lawsuit. Put another way, in common fund cases, a variant of the usual rule applies and the winning party pays his or her own attorneys' fees; in fee-shifting cases, the usual rule is rejected and the losing party covers the bill." *Id.* at 476–77. The court noted that a risk multiplier is allowed in common-fund fee awards, and stated that the Ninth Circuit has generally determined that a reasonable fee would constitute 25% of a common fund. *Id.* at 477. It explained the operation of a common-fund recovery in a fee-shifting case:

> Application of the common fund doctrine to class action settlements does not compromise the purposes underlying fee-shifting statutes. In settlement negotiations, the defendant's determination of the amount it will pay into a common fund will necessarily be informed by the magnitude of its potential liability for fees under the fee-shifting statute, as those fees will have to be paid after successful litigation and could be treated at that point as part of a common fund against which the attorneys' fees are measured. Conversely, the prevailing party will expect that part of any aggregate fund will go toward attorneys' fees and so can insist as a condition of settlement that the defendants contribute a higher amount to the settlement than if the defendants were to pay the fees separately under a fee-shifting statute.

Id. at 478 (footnote omitted). However, "if the parties invoke common fund principles, they must follow common fund procedures and standards, designed to protect class members when common fund fees are awarded." *Id.* The court elaborated, *id.* at 481:

> We hold, therefore, that in a class action involving both a statutory fee-shifting provision and an actual or putative common fund, the parties may negotiate and settle the amount of statutory fees along with the merits of the case, as permitted by *Evans.* In the course of judicial review, the amount of such attorneys' fees can be approved if they meet the reasonableness standard when measured against statutory fee principles. Alternatively, the parties may negotiate and agree to the value of a common fund (which will ordinarily include an amount representing an estimated hypothetical award of statutory fees) and provide that, subsequently, class counsel will apply to the court for an award from the fund, using common fund fee principles. In those circumstances, the agreement as a whole does not stand or fall on the amount of fees.

> Instead, after the court determines the reasonable amount of attorneys' fees, all the remaining value of the fund belongs to the class rather than reverting to the defendant.

Id. at 481. Judge Trott dissented. *Id.* at 487.

J. 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.

Allen v. Chicago Transit Authority, 317 F.3d 696, 702, 90 FEP Cases 1229 (**7th Cir.** 2003), rejected the defendant's argument that plaintiff Leonard's appeal should be dismissed without consideration of the merits because Leonard had not finished paying his $4,000 sanction for having perjured himself in the case. The court held that this was inappropriate because "there has been no determination that Leonard's continuing failure to pay is willful, which it is not if he simply does not have any money." The court also rejected defendant's arguments that the appeal should be dismissed, or none of Leonard's testimony should be believed, because of the perjury. "It undermines the witness's testimony; but obviously there are cases, perhaps the majority, in which a witness's testimony is a compound of truth and falsity. Perjury is a circumstance to be weighed by the jury in determining a witness's credibility rather than a ground for removing the issue of credibility from the jury by treating the witness's entire testimony as unworthy of belief." *Id.* at 703.

EEOC v. Liberal R-II School District, 314 F.3d 920, 90 FEP Cases 1032 (**8th Cir.** 2002), reversed the grant of summary judgment to the defendant, holding that there was direct evidence of discrimination. See the discussion of this case above. The court also reversed the district court's award of $47,333 in fees and expenses to the defendant under the Equal Access to Justice Act, because the defendant has not yet prevailed and because the EEOC's position was, in any event, substantially justified. It did not reach the question whether the EAJA is available to employers who prevail in ADEA cases against the EEOC.

B.K.B. v. Maui Police Department, 276 F.3d 1091, 1106–09, 87 FEP Cases 1306 (**9th Cir.** 2002), *modified in other respects*, __ F.3d __, 2002 WL 237764 (**9th Cir.** Feb. 20, 2002), 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.

K. Taxes

Commissioner v. Banks, __ **U.S.** __, 125 S. Ct. 826, 160 L. Ed. 2d 859, 94 FEP Cases 1793 (2005), held that, when a client's recovery constitutes gross income, the client must pay income tax on the part of the recovery paid directly to the attorney as a contingent fee for services performed in obtaining the taxable income, under a contingent fee arrangement. The Court left some issues open, such as the tax effect of a court-awarded fee. It is important to keep in mind that this rule does not apply to the fees that generated nontaxable income or other nontaxable relief, such as an injunction.

Congress has passed, and the President has signed, the provision of the Civil Rights Tax Relief Act barring the double taxation of attorneys' fees and costs. Sec. 703 of the American Jobs Creation Act of 2004, creates an above-the-line deduction for attorneys' fees and costs. It is not subject to the Alternative Minimum Tax or the 2%-of-adjusted-gross-income exclusion.

The bill applies to a wide variety of civil rights and employment statutes, including Title VII, the ADA, the ADEA, the NLRA, the FLSA, the Rehab Act, § 510 of ERISA, Title IX, the Employee Polygraph Protection Act, WARN, the FMLA, USERRA, §§ 1981, 1983, and 1985, the Fair Housing Act of 1968, Federal whistleblower claims, and a beautiful catch-all: "Any provision of Federal, State, or local law, or common law claims permitted under Federal, state, or local law—(i) providing for the enforcement of civil rights, or (ii) regulating any aspect of the employment relationship . . . ."

It is doubly prospective: "The amendments made by this section shall apply to fees and costs paid after the date of enactment of this Act with respect to any judgment or settlement occurring after such date."