Georgetown University Law Center -- Continuing Legal Education

Litigating Employment Cases: Views from the Bench

October 15-16, 1999
Washington, D.C.

Remedies in Employment Litigation

By

Alan R. Kabat and Debra S. Katz
Bernabei & Katz
Washington, D.C.

---

* Alan R. Kabat is an Associate with the law firm of Bernabei & Katz. He received his J.D. from Georgetown University Law Center in 1998.

** Debra S. Katz is a name partner with Bernabei & Katz, a civil rights firm based in Washington, D.C. The firm specializes in the representation of plaintiffs in employment law, civil rights and civil liberties matters.

TABLE OF CONTENTS*

* Page numbers refer to numbers at bottom of pages.

---

* Alan R. Kabat is an Associate with the law firm of Bernabei & Katz. He received his J.D. from Georgetown University Law Center in 1998.

** Debra S. Katz is a name partner with Bernabei & Katz, a civil rights firm based in Washington, D.C. The firm specializes in the representation of plaintiffs in employment law, civil rights and civil liberties matters.

Remedies in Employment Litigation

by

Alan R. Kabat*
Debra S. Katz**

Bernabei & Katz
1773 T Street, N.W.
Washington, D.C. 20009
(202) 745-1942

4. INTRODUCTION

This chapter provides an overview of the key remedies available to employment discrimination plaintiffs under Section 1981 and Title VII. For further discussion of these issues, including the complex law governing the taxation of monetary remedies, see Seymour & Brown, Equal Employment Law Update, Chapters 44-56 (Fall 1998).

The courts and commentators have long recognized that for every right there must be a remedy. Chief Justice Marshall concluded, almost two centuries ago, that: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Marbury v. Madison, 1 Cranch 137, 163 (1803). Blackstone stated that it is "a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 William Blackstone, Commentaries *23.

II. THE STATUTES: SECTION 1981 AND TITLE VII

Most employment discrimination and harassment claims are brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; racial discrimination and harassment claims can also be brought under the Reconstruction-Era civil rights statute, 42 U.S.C. § 1981. There are also companion state, county, and city anti-discrimination statutes, which are not discussed herein, although some of them are modeled on Title VII.

Section 1981.

---

* Alan R. Kabat is an Associate with the law firm of Bernabei & Katz. He received his J.D. from Georgetown University Law Center in 1998.

** Debra S. Katz is a name partner with Bernabei & Katz, a civil rights firm based in Washington, D.C. The firm specializes in the representation of plaintiffs in employment law, civil rights and civil liberties matters.

Section 1981, part of the Civil Rights Act of 1866, was enacted pursuant to the Thirteenth Amendment and bars racial discrimination. 42 U.S.C. § 1981. In 1989, the Supreme Court interpreted Section 1981 as excluding claims arising during the employment context from its protection. Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989). In response, the Civil Rights Act of 1991 expressly amended Section 1981 to add subsections (b) and (c), which provide for a broader reading of the right to "make and enforce contracts" and reaffirm the applicability of Section 1981 to private employers. Thus, courts now recognize that racial discrimination and harassment claims by employees lie within the statutory protection of Section 1981. See, e.g., Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1033-34 (7th Cir. 1998).

Section 1981 provides, in relevant part, that:

> (a) All persons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (emphasis added). The statute of limitations for Section 1981 actions is governed by "the most appropriate one provided by state law." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975). It must be emphasized that Section 1981a, which sets forth certain remedies, applies to Title VII actions, but not to Section 1981 actions.

Title VII.

Title VII was enacted through the Civil Rights Act of 1964, pursuant to the Fourteenth Amendment, and applies to employers with "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year." 42 U.S.C. § 2000e(b). Thus, employees of certain small or seasonal businesses are not protected by Title VII, although they may be able to obtain recourse for employment discrimination through Section 1981 or state or local anti-discrimination statutes.

Section 703 of Title VII, as amended, provides in relevant part, that:

> (a) It shall be an unlawful employment practice for an employer — (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a)(1) (emphasis added).

Section 704 of Title VII protects employees from retaliation for opposing racial or sexual harassment or participating in an inquiry into racial or sexual harassment. The "opposition" clause makes it unlawful to discriminate against a person who "has opposed any practice made an unlawful employment practice by this subchapter," and the "participation" clause similarly makes it unlawful to discriminate against a person who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added).

The references to "this subchapter" means that the anti-retaliation statute protects only those who have opposed or participated in any matter under Title VII; equivalent statutory protections are available under the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA") and the Equal Pay Act ("EPA") but not under other anti-discrimination statutes, including Section 1981. Nonetheless, several federal courts have allowed plaintiffs to allege retaliation under Section 1981. See, e.g., Carney v. American Univ., 151 F.3d 1090, 1094-95 (D.C. Cir. 1998) (collecting cases); Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684, 693 (2d Cir. 1998) (same). The Section 1981 plaintiff must allege retaliation "in response to the claimant's assertion of rights that were protected by § 1981." Hawkins, 163 F.3d at 693.

Public employees may also be able to invoke the First Amendment, through a Section 1983 claim (42 U.S.C. § 1983), to protect their workplace speech or conduct from retaliatory actions. Whistleblower statutes, state or federal, may provide yet another remedy for public or private employees. Discussion of these topics is beyond the scope of this chapter, but practitioners should determine their availability for any given plaintiff.

The statute of limitations for Title VII actions is governed by 42 U.S.C. § 2000e-5(e)(1), which requires that a charge "shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred" unless the charge is also filed with a state or local agency, which extends the filing period to 300 days. See Delaware State College v. Ricks, 449 U.S. 250, 256-59 (1980); see also 29 C.F.R. § 1601, subpart B (procedural requirements).

Title VII also includes a "mixed motive" element whereby the plaintiff can recover when she "demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). See, e.g., Excel Corp. v. Bosley, 165 F.3d 635, 639 (8th Cir. 1999) ("When an employee is fired because he acted to defend himself against harassment, which supervisors failed to take reasonable measures to prevent or correct, the termination process cannot be said to be free from discrimination."). This "mixed motive" element is limited to discrimination or harassment claims, not retaliation claims. Tanca v. Nordberg, 98 F.3d 680, 682-85 (1st Cir. 1996), cert. denied, 520 U.S. 1119 (1997). This "mixed motive" element does not apply to Section 1981 claims. Mabra v. United Food & Commercial Workers Local Union No. 1996, 176 F.3d 1357, 1358 (11th Cir. 1999).

III. REMEDIES UNDER SECTION 1981 AND TITLE VII

Statutory Remedies.

Section 1981 does <u>not</u> have statutory remedies, other than the award of attorney's fees to prevailing parties (discussed <u>infra</u>, III.F); nor does it have statutory caps on remedies. Thus, the courts have drawn upon the common law to provide legal and equitable relief to the successful Section 1981 plaintiff.

The Title VII remedies are set forth in 42 U.S.C. §§ 1981a and 2000e-5(g), (k). Section 1981a is applicable <u>only</u> when the plaintiff cannot recover under Section 1981, and does <u>not</u> limit the recovery available under Section 1981 itself. For racial discrimination and harassment plaintiffs, the limitations of Section 1981a will only arise in those (few) cases which are brought solely under Title VII, and not simultaneously under Section 1981. The general statutory remedy provisions under Title VII are:

> In an action brought by a complaining party under [Title VII] . . . against a respondent who engaged in unlawful intentional discrimination . . . and provided that the complaining cannot recover under section 1981 of this title, the complaining party may recover <u>compensatory</u> and <u>punitive damages</u> as allowed in subsection (b) of this section in addition to any relief authorized by . . . [42 U.S.C. § 2000e-5(g)], from the respondent.

42 U.S.C. § 1981a(a)(1) (emphasis added).

> If the court finds that the respondent has <u>intentionally engaged</u> in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may <u>enjoin</u> the respondent from engaging in such unlawful conduct, and order such affirmative action as may be appropriate, which may include, but is not limited to, <u>reinstatement</u> or hiring of employees, with or without <u>back pay</u> . . . or any other <u>equitable relief</u> as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1) (emphasis added).

Section 1981a sets forth a sliding scale of compensatory and punitive damages based on the employer's size: (a) $50,000 for 15 to 100 employees; (b) $100,000 for 101 to 200 employees; (c) $200,000 for 201 to 500 employees; and (d) $300,000 for more than 500 employees; with all four contingent upon having the requisite number of employees "in each of 20 or more calendar weeks in the current or preceding calendar year," thus excluding certain seasonal employers. 42 U.S.C. § 1981a(b)(3)(A) - (D). This cap is per plaintiff, not per claim, although the plaintiff can file multiple cases based upon separate actions. <u>Smith v. Chicago Sch. Reform Bd. of Trustees</u>, 165 F.3d 1142, 1150 (7th Cir. 1999) ("Litigants may not split into multiple packages different claims arising out of the same transaction. . . . Multiple discriminatory transactions or episodes may be pursued in multiple suits and yield cumulative recoveries; but multiple claims in a single suit (even if based on multiple transactions) may not."). It must be emphasized that there is <u>no</u> such statutory cap for Section 1981 damages.

Several circuit courts have recently held that this statutory cap does not apply to other damages available under Title VII, such as back pay or front pay. <u>See</u> <u>Martini v. Federal Nat'l</u>

Mortgage Ass'n, 178 F.3d 1336, 1349 (D.C. Cir. 1999) (front pay is excluded "from the range of compensatory damages subject to the damages cap"); accord Medlock v. Ortho Biotech Inc., 164 F.3d 545, 556 (10th Cir. 1999); Kramer v. Logan County Sch. Dist. No. R-1, 157 F.3d 620, 626 (8th Cir. 1998) ("front pay is an equitable remedy excluded from the statutory limit on compensatory damages"). The Martini court "respectfully disagree[d] with the Sixth Circuit's contrary holding . . . since its assertion that front pay 'is not authorized by the plain language of [the statute]' conflicts with our precedent. Martini, 178 F.3d at 1349 (citing Hudson v. Reno, 130 F.3d 1193, 1203-04 (6th Cir. 1997)).

Although the Title VII plaintiff is entitled to a jury trial if she demands compensatory or punitive damages, 42 U.S.C. § 1981a(c)(1), "the court shall not inform the jury of the limitations" to compensatory or punitive damage awards based upon the employer's size. 42 U.S.C. § 1981a(c)(2). If a jury should award the plaintiff compensatory or punitive damages in excess of the applicable cap, then the court ordinarily will reduce the damage award to an appropriate level, unless the plaintiff was also successful on a state or local statutory claim that was based on the same standards of liability as for Title VII. Martini, 178 F.3d at 1349-50 (excess jury award should be reallocated to plaintiff's District of Columbia Human Rights Act claim).

B. Back Pay.

The rationale for back pay is "to make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). Under Title VII, there is a two-year limitation for the recovery of back pay, coupled with a requirement that the plaintiff reasonably mitigate the economic damages:

> Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission [EEOC]. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

42 U.S.C. § 2000e-5(g)(1) (emphasis added). The Supreme Court has recognized that mitigation need only be reasonable, and not extraordinary; although the plaintiff "need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied." Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32 (1982). Accordingly, the Supreme Court subsequently noted that "if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided." Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

The lower courts have similarly recognized the obligation of the plaintiff to mitigate her damages in order to obtain back pay. See, e.g., Carey v. Mt. Desert Island Hosp., 156 F.3d 31, 41 (1st Cir. 1998) (back pay award reduced because plaintiff "did not exercise reasonable diligence in seeking comparable employment" and had received or earned money while unemployed); Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 591 (5th Cir. 1998) ("back pay is an equitable remedy designed to make the injured party whole," thus plaintiff can obtain back pay for the period subsequent to her resignation), aff'd on reh'g, 182 F.3d 333 (5th Cir. 1999) (per curiam).

The back pay award should not be reduced by non-employment related earnings, such as lottery winnings, welfare benefits, or Medicaid reimbursements. See, e.g., EEOC v. Joe's Stone Crab Inc., 15 F. Supp. 2d 1364, 1374 n.22, 77 FEP Cases 897, 903 n.22 (S.D. Fla. 1998) ("under the collateral source doctrine, funds unrelated to the conduct at issue and received from third parties are not counted as mitigating earnings"); Ruiz v. Cookies on Melrose Inc., 77 FEP Cases 138, 139 (S.D.N.Y. 1998) ("Unlike employment benefits, an employer makes no direct contribution to an employee's public assistance benefits. Reducing a backpay award by the amount of public assistance benefits received would result in a windfall to the employer who committed the illegal discrimination.").

A defendant employer may have increased liability for back pay for having taken retaliatory and discriminatory actions against a former employee subsequent to her constructive discharge. See, e.g., Durham Life Ins. Co. v. Evans, 166 F.3d 139, 157-58 (3d Cir. 1999) (defendant discriminated against former employee by filing lawsuit against her and encouraging complaints from her former clients; these acts "at the very least prevent Durham from arguing that Evans unreasonably failed to mitigate her damages, which is the only way Durham could avoid a back pay award under these circumstances").

The constructive discharge of a plaintiff can be a predicate for an award of back pay. See, e.g., Durham, 166 F.3d at 155 ("Title VII allows back pay awards when an employee does not leave her employment voluntarily."). However, if the jury or the court should reject plaintiff's constructive discharge claim, then the plaintiff is no longer entitled to back pay, while remaining eligible for compensatory damages. Coffman v. Tracker Marine L.P., 141 F.3d 1241, 1248 (8th Cir. 1998) (damage award to be reduced by the amount of back pay, since plaintiff was not constructively discharged).

The back pay award is ordinarily augmented by prejudgment interest, based on the elapsed time from the discriminatory act to the judgment. Thomas v. National Football League Players Ass'n, 131 F.3d 198, 207 (D.C. Cir. 1997) ("presumption strongly favors prejudgment interest" on back pay). A reasonable delay in filing the lawsuit, such as when the plaintiff "awaited the EEOC's disposition of her request for a right to sue letter, which was delayed through no fault of her own," need not affect her entitlement to prejudgment interest, but an unreasonable delay in prosecuting the lawsuit can. Id. (remanding grant of prejudgment interest because plaintiffs "repeatedly amended their complaint" during a three year period, thus needlessly delaying the judgment).

Reinstatement and Front Pay.

For the plaintiff who was demoted or discharged (constructively or directly), from her position, the court can order equitable relief in the form of reinstatement to her former job, or payment of front pay reflecting the future lost earnings from the difference between her current earnings and what she would have earned had she remained with the defendant. Reinstatement is limited by the availability of comparable positions and the suitability of defendant's work environment for the plaintiff, including the continued presence of harassers and plaintiff's own limitations in terms of her ability to continue working at that site. See, e.g., Kelley v. Airborne Freight Corp., 140 F.3d 335, 353 (1st Cir.) ("future damages should not be awarded unless reinstatement is impractical or impossible"), cert. denied, 119 S. Ct. 341 (1998); Thomas v. National Football League Players Ass'n, 131 F.3d 198, 207 (D.C. Cir. 1997) (reinstatement inappropriate due to "acrimony of litigation" and "the employee engaged in behavior that could conceivably have given rise to a legitimate discharge under other circumstances").

Front pay is an equitable award under federal anti-discrimination statutes, since it is an alternative to reinstatement. Kramer v. Logan County Sch. Dist. No. R-1, 157 F.3d 620, 626 (8th Cir. 1998) ("front pay is not so much a monetary award for the salary that the employee would have received but for the discrimination, but rather [is] the monetary equivalent of reinstatement, to be given in situations where reinstatement is impracticable or impossible"). As an equitable remedy, the availability and amount of front pay is to be determined by the judge, not the jury. Excel Corp. v. Bosley, 165 F.3d 635, 639 (8th Cir. 1999) ("issue of front pay is not an issue for the jury to decide, rather it is a form of equitable relief which must be determined by the district court after considering all aspects of the case."); McCue v. Kansas Dep't of Human Resources, 165 F.3d 784, 791 (10th Cir. 1999) (vacating jury's award of front pay, since this was province of court, not jury). However, front pay may be a legal award under some state statutory schemes, in which case the jury will have to be instructed on the method for calculating front pay. Kelley, 140 F.3d at 354.

As for back pay, the plaintiff is under an obligation to mitigate her damages to justify an award of front pay. Excel Corp., 165 F.3d at 639 ("A Title VII claimant seeking either back pay or front pay damages has a duty to mitigate those damages by exercising reasonable diligence to locate other suitable employment and maintain a suitable job once it is located.").

The fact that a jury awarded the plaintiff back pay does not require that the court make a comparable front pay award, since the two awards are based on differing circumstances, and it can be easier for the plaintiff to mitigate her damages during the front pay award period than during the back pay award period. Excel Corp., 165 F.3d at 640 (affirming denial of front pay award since plaintiff failed to find comparable employment during relevant period while awarding back pay since plaintiff had mitigated her damages). At the same time, the court cannot consider evidence that was excluded at trial in making its determination of the front pay award. Gumbhir v. Curators of Univ. of Mo., 157 F.3d 1141, 1145 (8th Cir. 1998) ("district court did not abuse its discretion in refusing to consider in fashioning equitable relief evidence it had excluded from the jury's consideration at trial").

The courts have recognized that numerous facts and circumstances exist for determining whether reinstatement is an appropriate or available remedy. A district court has recently enumerated nine such factors as recognized by various circuit courts. See Ogden v. Wax Works, Inc., 29 F. Supp. 2d 1003, 1010, 78 FEP Cases 973, 977-78 (N.D. Iowa 1998). This helpful analysis is set forth below:

> However, to the extent a framework of potentially applicable factors will assist in the analysis, a synthesis of the [circuit court] decisions discussed above suggest the following pertinent considerations:
> (1) whether the employer is still in business;

> (2) whether there is a comparable position available for the plaintiff to assume;
> (3) whether an innocent employee would be displaced by reinstatement;
> (4) whether the parties agree that reinstatement is a viable remedy;
> (5) whether the degree of hostility or animosity between the parties — caused not only by the underlying offense but also by the litigation process — would undermine reinstatement;
> (6) whether reinstatement would arose hostility in the workplace;
> (7) whether the plaintiff has since acquired similar work;
> (8) whether the plaintiff's career goals have changed since the unlawful termination; and
> (9) whether the plaintiff has the ability to return to work for the defendant employer — including consideration of the effect of the dismissal on the plaintiff's self-worth.

Id. (internal citations omitted). In Ogden, the court then discussed the even more complex analytical process for determining whether front pay should be awarded, and elaborated eleven factors as set forth below:

> A synthesis of the [circuit court] cases discussed above suggest that the following factors may assist the district court in calculating a front pay award:
> (1) the plaintiff's age;
> (2) the length of time the plaintiff was employed by the defendant employer;
> (3) the likelihood the employment would have continued absent the discrimination;
> (4) the length of time it will take the plaintiff, using reasonable effort, to secure comparable employment;
> (5) the plaintiff's work and life expectancy;
> (6) the plaintiff's status as an at-will employee;
> (7) the length of time other employees typically held the position lost;
> (8) the plaintiff's ability to work;
> (9) the plaintiff's ability to work for the defendant-employer;
> (10) the employee's efforts to mitigate damages; and
> (11) the amount of any liquidated or punitive damage award made to the plaintiff.

Id. at 1014-15, 78 FEP Cases at 981-82 (internal citations omitted). The court, in Ogden, recognized that these lists were neither "all-inclusive" nor "a uniform litany of pertinent considerations," since the reinstatement and front pay analyses are highly fact-specific. Id. Nonetheless, the compilations of factors and circumstances set forth in Ogden provide a useful starting point for employment discrimination practitioners.

The courts have used various economic methods for calculating front pay to factor in the effect of inflation on the award, i.e., to discount to the present value the award of future damages, since the plaintiff, by receiving an up-front award of front pay, can immediately earn interest on that amount. Chonich v. Wayne Comm. Coll., 874 F.2d 359, 369 (6th Cir. 1989) ("The failure to instruct the jury to reduce to present value any reasonably demonstrated loss of future earnings fatally infects this jury award."). The D.C. Circuit stated, in a Section 1981 case, that:

> The plaintiff bears the initial burden of providing the district court with the essential data necessary to calculate a reasonably certain front pay award, including the amount of the proposed award, the length of time the plaintiff expects to work for the defendant, and <u>the applicable discount rate</u>.

<u>Barbour v. Merrill</u>, 48 F.3d 1270, 1279 (D.C. Cir. 1995) (emphasis added; internal quotation marks omitted).

One generally accepted factor for front pay calculations is the discount rate of the 52-week U.S. Treasury Bills, which are auctioned on a monthly basis. The latest rates are posted online by the Bureau of Public Debt, at: <http://www.publicdebt.treas.gov/of/ofbills.htm>. After the economic expert witness has calculated the expected future earnings for each year, then each annual figure should be discounted to its present value by using the formula $1 / (1 + r)^t$ where r = discount rate, and t = number of years in the future. The discounted annual figures can then be summed to arrive at the total amount of front pay.

An increasingly important issue in calculating front pay is determining the value of stock options ("call options"), which allow an employee to buy the employer's stock at a specified future date at a price (the "strike price") fixed on the date that the stock is granted. Stock options are granted with the expectation that the stock will increase in price during the intervening period, thus allowing the grantee the right to buy the stock significantly below its market price. Traditionally the preserve of corporate executives, stock options are now becoming more widely available to employees throughout a corporation, and may be given as a long-term bonus, often not vesting (becoming available) for several years into the future. If an employee is terminated or constructively discharged prior to the vesting of her stock options, then she may argue that the value of these stock options should be included in the front pay award. When the scheduled date of vesting of the former employee's stock options occurs prior to trial or settlement, then their value can be readily determined by reference to the actual market price of the stock on that date.

However, when the stock options will not vest until some time <u>after</u> the trial, then it is necessary to obtain expert testimony to calculate their value, assuming that the employer is unwilling to allow the former employee to have the right to vest her options at the future date. The inherent problem is that the value of a stock option is a function of the <u>difference</u> between the strike price, or the face price of the stock option, and the actual market price of the stock on that future date. Although the former is given on the stock option certificate itself, the latter price can be difficult to predict, given the current volatility of the many stocks, especially those of "Internet start-up" companies, high technology firms, and other "dot.com" corporations where stock options have become a popular employee benefit.

A number of mathematical formulas, using complex differential equations, are available for the calculation of the future value of stock options. <u>See generally</u> Gordon Gemmill, Options Pricing: An International Perspective (1993); Fischer Black, "Fact and Fantasy In the Use of Options," Financial Analysts J., July/Aug. 1975, at 36. These models recognize that the following factors determine the value of future stock options: "[1] the current market price, [2] the strike price, [3] the duration of the option, [4] the interest rate, and [5] the volatility of the underlying stock." Regier v. Rhone-Poulenc Rorer, Inc., C.A. No. 93-4821, 1995 U.S. Dist. LEXIS 9384, at *10, 2 Wage & Hour Cas. 2d 1345 (E.D. Pa. July 3, 1995) (citing Gemmill, supra). The first three factors are readily ascertainable, and the fourth factor relates to the dividends (if any) and the market interest rate over the applicable time period. It is the fifth factor, the volatility of the stock itself, that can be highly speculative. For a traditional "blue chip" corporation with a steady, consistent increase in its stock price, the volatility will be low in relation to the price. In contrast, for a start-up company, whose stock price may gyrate on a frequent and unpredictable basis, the volatility can be high in relation to the price. Thus, the employee of a start-up company might argue, e.g., that since the price of the company's stock has doubled over the past year, it should keep on doubling every year into the future, while the employer will argue that such past increases are no guarantee of future increases.

One such formula, the Black-Scholes formula, calculates the theoretical value of the stock (call) option as a function of the strike price, the elapsed time period, the interest rate multiplied by the strike price, and the volatility component. The actual formula requires two differential equations (Black, supra, at 65), but independent judgment is necessary to determine the volatility component, since past volatility may not accurately predict future volatility. In other words, the output of the Black-Scholes formula depends upon the input, and dueling expert economist witnesses may arrive at highly divergent estimates for the volatility component.

Injunctive and Declaratory Relief.

If the plaintiff is still employed by the defendant employer, or is to be reinstated, then the plaintiff should be protected from contact with the alleged discriminating or harassing persons, if they have not already been fired or transferred because of their conduct. Injunctive relief is critical in such circumstances. However, the plaintiff should timely request such relief, as an unreasonable delay undermines the plaintiff's claim of irreparable harm or injury. See, e.g., Ahmad v. Long Island Univ., 18 F. Supp. 2d 245, 249, 78 FEP Cases 151, 153-54 (E.D.N.Y. 1998) (plaintiff unreasonably waited 15 months to request temporary restraining order).

When the plaintiff is no longer employed by the defendant and is not seeking reinstatement, then an injunction is appropriate only if the plaintiff has proven that the alleged pattern and practice of discrimination continues to exist at defendant's workplace. See, e.g., Stevens v. Gravette Med. Ctr. Hosp., 998 F. Supp. 1011, 1016, 78 FEP Cases 926, 930 (W.D. Ark. 1998) (no injunctive relief warranted since plaintiff "made no attempt to prove that the discriminatory pattern, or systematic practice of discriminatory conduct he contended existed, continued after his resignation. Nor did he show any lingering effects of any discriminatory practice. There is also no reasonable expectation that the discriminatory conduct will recur").

Declaratory relief only, and not injunctive relief, is the appropriate remedy where the plaintiffs have alleged discriminatory hiring practices but the defendant employer is no longer hiring for the project for which the plaintiffs had unsuccessfully applied. Griffis v. Emory Univ., 76 FEP Cases 959, 962 (N.D. Ga. 1998) ("defendants have represented that they are no longer making employment decisions for The Atlanta Project, and plaintiff has offered no evidence to the contrary. The injunctive relief requested by plaintiff is thus not available.").

An important federalism issue involves the remedies available to state government employees. The Supreme Court held, in Seminole, that state governments are usually immune to suits in federal courts brought under federal statutes absent a clear intent by Congress to abrogate the Eleventh Amendment immunity of states. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); see also Kimel v. State of Fla. Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998) (holding that ADEA did not abrogate state immunity; so plaintiff could not sue state government in federal court), cert. granted, 119 S. Ct. 901 (1999) (oral arguments on Oct. 13, 1999). The Supreme Court has held that the enactment of Title VII, pursuant to the Fourteenth Amendment, abrogated this immunity. Fitzpatrick v. Bitzer, 427 U.S. 445, 453 & n.9 (1976). In contrast, the lower federal courts have generally held that the enactment of Section 1981, pursuant to the Thirteenth Amendment, did not abrogate state sovereign immunity in federal courts. See Freeman v. Michigan Dep't of State, 808 F.2d 1174, 1178-80 (6th Cir. 1987) (collecting cases); accord Hafford v. Seidner, 183 F.3d 506, 512 (6th Cir. 1999) (Section 1981 racial harassment claims of state prison guard "barred by the Eleventh Amendment").

For the federal employment statutes lacking this clear intent, including Section 1981, the only recourse of aggrieved state government employees will be the state courts. However, the state courts, in turn, may decline to hear their federal statutory claim(s), on the ground of state sovereign immunity. Thus, state employees may be left without any forum for certain federal claims. See, e.g., Alden v. Maine, 1998 ME 200, ¶ 13, 715 A.2d 172 (Me.) (upholding Maine trial court's dismissal, on sovereignty grounds, of state employee's FLSA overtime pay claim), cert. granted, 119 S. Ct. 443 (1998). On June 23, 1999, the Supreme Court affirmed the decision of the Supreme Judicial Court of Maine. Alden v. Maine, 527 U.S. ___, 119 S. Ct. 2240 (1999). Justice Kennedy's opinion for the Court, joined by four other justices (Rehnquist, O'Connor, Scalia and Thomas), held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." Alden, 119 S. Ct. at 2246. The Alden Court based its reasoning on an extensive analysis of Eleventh Amendment jurisprudence through Seminole, but ultimately concluded that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." Id. at 2254. Thus, the Court concluded that: "In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation." Id. at 2266.

The Alden Court recognized that (1) the States could consent to such suits, either voluntarily or in response to Congressional encouragement through its spending power; (2) "that Congress may authorize private suits against nonconsenting states pursuant to its [Fourteenth Amendment] § 5 enforcement powers;" and (3) individual state officers could still be sued, either for injunctive or declaratory relief, or for money damages if sued in an "individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." Id. at 2267-68. Furthermore, the federal government itself could bring suit against the state government to obtain compliance with federal statutes, e.g., the Department of Labor could have sued Maine to enforce the FLSA overtime statute. Id. at 2269.

The outcome of Alden is that, absent the extenuating circumstances as outlined in the previous paragraph, the primary recourse available to state government employees will be through state anti-discrimination statute(s). This will not bar Title VII claims, but racial discrimination plaintiffs who are state employees will usually have a claim under Section 1981 and may also have claims under other federal statutes for which state immunity could apply. Similarly, sexual discrimination plaintiffs who work for a state government may have a Section 1983 claim. In light of the Seminole and Alden precedents, the upcoming Kimel decision will probably affirm the Eleventh Circuit's denial of the ADEA plaintiff's ability to sue the state government in federal court.

Attorney's Fees Under Title VII.

Title VII provides for statutory attorney's fees to prevailing parties:

> In any action or proceeding under this subchapter the court in its discretion, may allow the prevailing party, other than the Commission [EEOC] or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k) (emphasis added). A sizable case law discussing the availability and calculation of attorney fees has developed; this is ably summarized in Seymour & Brown, Equal Employment Law Update, Chapter 55 (Fall 1998).

There is an important distinction between "prevailing plaintiffs" and "prevailing defendants" whereby the former "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Newman v. Piggie Park. Enter., Inc., 390 U.S. 400, 402 (1968) (per curiam). Prevailing defendants, however, should receive attorney fees only if the plaintiff's "claim was frivolous, unreasonable, or groundless . . . . [or plaintiff] brought or continued such a claim in *bad faith*." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).

That the plaintiff was not successful on all of her claims does not undercut her position as a prevailing party entitled to attorney's fees. O'Neal v. Ferguson Constr. Co., 35 F. Supp. 2d 832, 839 (D.N.M. 1999) ("in prevailing on two counts of retaliation despite failing to convince the jury on his hostile environment claim, [plaintiff] was a prevailing party" and is entitled to the totality of requested attorney's fees, since plaintiff's "claims of discrimination and retaliation involve a common core of facts and are based on related legal theories"). If the defendant has prevailed on all counts, the court must determine the defendant's entitlement to attorney's fees based upon the merits of the plaintiff's claim when it was first brought. Tang v. Rhode Island Dep't of Elderly Affairs, 163 F.3d 7, 13 (1st Cir. 1998) ("the court must assess the claim at the time the complaint was filed, and must avoid the post-hoc reasoning that, because the plaintiff did not ultimately prevail, the claim must have been frivolous, unreasonable or without foundation").

Attorney's Fees Under Section 1981.

Attorney's fees for Section 1981 claims are governed by Section 1988, which provides, in relevant part, that:

> (b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial

> capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.
>
> (c) Expert fees. In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

42 U.S.C. § 1988 (emphasis added). This statute was enacted as part of the "Civil Rights Attorney's Fees Awards Act of 1976," Pub. L. 94-559, § 1 (1976). The purpose of Section 1988 "is to ensure effective access to the judicial process for persons with civil rights claims, and to encourage litigation to enforce the provisions of the civil rights acts and constitutional civil rights provisions." Hernandez v. Kalinowski, 146 F.3d 196, 199 (3d Cir. 1998); see also Trimper v. City of Norfolk, Va., 58 F.3d 68, 73 (4th Cir. 1995) ("the underlying purpose of Section 1988, which must always guide the awarding of fees, is to ensure effective access to the judicial process for persons with civil rights grievances without simultaneously producing windfalls to the attorneys").

The courts have frequently applied the 12-factor Johnson test established by the Fifth Circuit for determining the appropriate level of the "reasonable attorney's fee" under Section 1988. See, e.g., Trimper, 58 F.3d at 73. These factors are:

> (1) the time and labor required;
> (2) the novelty and difficulty of the questions;
> (3) the skill requisite to perform the legal service properly;
> (4) the preclusion of other employment by the attorney due to acceptance of the case;
> (5) the customary fee;
> (6) whether the fee is fixed or contingent;
> (7) time limitations imposed by the client or the circumstances;
> (8) the amount involved and the results obtained;
> (9) the experience, reputation, and ability of the attorneys;
> (10) the "undesirability" of the case;
> (11) the nature and length of the professional relationship with the client; and
> (12) awards in similar cases.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).

Section 1988, as does Title VII, requires that the party awarded attorney's fees be the "prevailing party." The case law under Section 1988 also recognizes that the plaintiff has a lower threshold to meet than does the defendant in order to be considered the prevailing party. The Supreme Court has summarized its case law on prevailing plaintiffs as follows:

> Therefore, to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or

> settlement. Otherwise, the judgment or settlement cannot be said to affect the behavior of the defendant towards the plaintiff. Only under these circumstances can civil rights litigation effect the material alteration of the legal relationship of the parties and thereby transform the plaintiff into a prevailing party. In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Farrar v. Hobby, 506 U.S. 103, 111-12 (1992) (internal citations and quotation marks omitted). Thus, even nominal damages alone qualifies the plaintiff as a prevailing party for attorney's fees under Section 1988. Id. at 112. As for Title VII, the defendant does not qualify for Section 1988 attorney's fees solely because the plaintiff lost her claim(s). See, e.g., Vernon v. City of Los Angeles, 27 F.3d 1385, 1402 (9th Cir. 1994) ("However, a prevailing defendant should not routinely be awarded attorneys' fees simply because he has succeeded, but rather only where the action is found to be unreasonable, frivolous, meritless, or vexatious. Thus, the mere fact that a defendant prevails does not automatically support an award of fees") (internal citations and quotation marks omitted).

Compensatory Damages Under Title VII.

Section 1981a, applicable to Title VII claims, provides for several important statutory exclusions from, and limitations to, the award of compensatory damages:

> Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under . . . [42 U.S.C. § 2000e-5(g)].

42 U.S.C. § 1981a(b)(2) (emphasis added). Thus, the Title VII plaintiff will need to make separate claims for back pay and compensatory damages. Compensatory damages include "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3). The aforementioned statutory caps to damages, based on the employer's size, must be incorporated into the jury's award of compensatory damages.

Compensatory damages are available under Title VII against state government agencies, in contrast to the statutory exclusion of government agencies from liability for punitive damages. Varner v. Illinois State Univ., 150 F.3d 706, 718 (7th Cir. 1998) ("When Congress authorized compensatory damages claims against Title VII respondents (who may be sued in federal court), it expressed its intent to authorize such claims against the States"); Joyner v. Fillion, 17 F. Supp. 2d 519, 529 (E.D. Va. 1998) (dismissing punitive damages claim since Section 1981a exempts defendant, a government agency, from punitive damages liability).

The amount of evidence that the plaintiff must present to justify an award of compensatory damages is a function of the strength of the underlying facts. The general rule "is that courts may properly infer emotional distress from factual circumstances — and award damages to compensate for that distress — but may not presume [compensatory] damages from a bare violation of a statutory or constitutional right." Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1138 (D.C. Cir. 1999) (per curiam). Some courts have allowed compensatory damages based solely upon non-expert testimony while others have required a higher level of evidentiary support. Compare Curry v. District of Columbia, 9 F. Supp. 2d 1, 4, 77 FEP Cases 445, 447 (D.D.C. 1998) (upholding compensatory damage award based upon testimony by plaintiff, family members and friends, even though plaintiff "did not prove any lost wages or medical bills") and Hollis v. City of Buffalo, 28 F. Supp. 2d 812, 826, 78 FEP Cases 1677, 1689 (W.D.N.Y. 1998) (awarding compensatory damages based on plaintiff's testimony, even though she "did not produce any medical evidence of her emotional distress nor did she seek psychiatric or psychological treatment") with Blakey v. Continental Airlines, Inc., 992 F. Supp. 731, 735-36, 76 FEP Cases 280, 283-84 (D.N.J. 1998) (reducing jury's award of compensatory damages since plaintiff did not obtain psychiatric treatment until "nearly three years after the harassing incidents began;" she only met once with her forensic psychiatrist; and her treating psychologist did not even testify at trial) and Carter v. Rosenberg & Estis, P.C., 77 FEP Cases 925, 942 (S.D.N.Y. 1998) ("absent further corroborating testimony regarding [plaintiff's] mental anguish from family members, co-workers, or treating physicians, her own limited statements on this subject are entirely insufficient to support a $75,000 award").

Compensatory damages can also include lost future earnings on the grounds that an injury to plaintiff's reputation or professional standing constitutes "a nonpecuniary injury for which plaintiffs may be compensated under Title VII." Williams v. Pharmacia, Inc., 137 F.3d 944, 953 (7th Cir. 1998) ("When reputational injury caused by an employer's unlawful discrimination diminishes a plaintiff's future earnings capacity, she cannot be made whole without compensation for the lost future earnings she would have received absent to employer's unlawful activity."). Compensatory damages based on lost future earnings are entirely distinct from front pay. Front pay is an equitable remedy, limited in duration, and intended to compensate the plaintiff "for the immediate effects of [defendant's] unlawful termination of her employment." Id. Lost future earnings, however, represents a legal (compensatory) remedy, not limited in duration, and intended to compensate the plaintiff "for a lifetime of diminished earnings resulting from the reputational harms she suffered as a result of [defendant's] discrimination." Id. Given the potential for confusion by the jury regarding these two types of remedies, the Seventh Circuit "caution[ed] lower courts to take care to separate the equitable remedy of front pay from the compensatory remedy of lost future earnings." Id. at 954 ("Properly understood, the two types of damages compensate for different injuries and require the court to make different kinds of calculations and factual findings.").

Another category of compensatory damages are what is known as "hedonic damages." Hedonic damages are designed to compensate a plaintiff for his or her loss of enjoyment of life as a proximate result of defendant's unlawful acts. The term "hedonic damages" is derived from the Greek word "hedonikos," meaning pleasure. Judicial opinions in this country citing claims for damages for loss of enjoyment of life date back to the late 1800's. See generally L.A. Bradshaw, "Loss of Enjoyment of Life as An Element of, or Factor in Determining Damages for Bodily Injury," 15 A.L.R. 3d 506 (1967). However, the term "hedonic damages" did not appear in a published federal court opinion until 1985. Sherrod v. Berry, 629 F. Supp. 159 (N.D. Ill. 1985), aff'd, 827 F.2d 195 (7th Cir. 1987), vacated, 835 F.2d 1222 (7th Cir. 1987), rev'd on other grounds and remanded, 856 F.2d 802 (7th Cir. 1988).

Hedonic damages have most often been discussed in the context of personal injury and wrongful death cases. See Patricia A. Murphy & John M. Myers, Assessment of Rehabilitative and Quality of Life Issues in Litigation (1999); John O. Ward & Thomas R. Ireland, The New Hedonics Primer for Economists and Attorneys (2d ed. 1996); M. Tabacchi, "Hedonic Damages: A New Trend in Compensation?" 52 Ohio St. L. J. 331, 331 n.3 (1991) (discussing early cases using the term "hedonic damages").

Until recently, the availability of hedonic damages in employment discrimination cases was uncertain. Recent statutory enactments and Supreme Court decisions have made clear that hedonic damages are available in cases of intentional employment discrimination. Permissible methods of proving hedonic damages, however, remain controversial.

The passage of the Civil Rights Act of 1991 eliminated any doubt regarding the availability of hedonic damages in cases of intentional employment discrimination. Section 1981a includes "loss of enjoyment of life" within the scope of compensatory damages under Title VII. 42 U.S.C. § 1981a(b)(3). Although Section 1981a discusses damages for loss of enjoyment of life in the context of limiting the amount of compensatory and punitive damages a plaintiff may recover, the Supreme Court has interpreted this statute as expressly authorizing such damages for victims of intentional discrimination. See Landgraf v. USI Film Prods., 511 U.S. 244, 253 (1994); United States v. Burke, 504 U.S. 229, 241 (1992). In addition to Title VII cases, such damages are also available to plaintiffs in cases brought pursuant to the Americans with Disabilities Act of 1990. 42 U.S.C. § 1981a(a)(2); see also Cline v. Wal-Mart Stores, 144 F.3d 294, 304 (4th Cir. 1998).

In attempting to arrive at a hedonic value for human life, economists have typically used "willingness-to-pay" or "WTP" studies, in which participants are asked how much they would pay to reduce the risk of premature death by a certain percentage. Based on these responses, economists create mathematical models designed to provide insight into the hedonic value of life. Kyle R. Crowe, "The Semantical Bifurcation of Noneconomic Loss: Should Hedonic Damage Be Recognized Independently of Pain and Suffering Damage?" 75 Iowa L. Rev. 1275, 1295 & n.168 (1990). Damages in particular cases are then estimated based on the approximate percentage of the enjoyment of life the plaintiff has lost. Joseph A. Kuiper, "The Courts, Daubert, and Willingness-To-Pay: The Doubtful Future of Hedonic Damages Testimony Under the Federal Rules of Evidence," 1996 U. Ill. L. Rev. 1197, 1213.

Sherrod v. Berry, the first reported federal case to use the term "hedonic damages," was also the first case where expert economic testimony regarding hedonic damages was admitted. In that case, brought by a father (on his own behalf and as administrator of his son's estate) to recover for the shooting death of his son at the hands of a police officer, the court allowed testimony by economist Stanley Smith regarding the hedonic value of human life. Smith's basic premise was unassailable: that "human life has a value separate from the economic productive value that a human being would have." Sherrod, 629 F. Supp. at 162. Smith's next assertion was more problematic: that economists could, at least to some extent, quantify the hedonic value of human life. Id. at 162-63. Smith, who holds a master's degree in economics from the University of Chicago, testified that economic studies had placed the hedonic value of human life at between three and thirty times the value of a person's economic productive income. Id. at 163. The district court, in Sherrod, held Smith's testimony admissible, stating:

> The fact that the hedonic value of a human life is difficult to measure did not make either Smith's testimony or the damages speculative. . . . The testimony of Stanley Smith as an expert in economics enabled the jury to perform its function in determining the proper measure of damages in this case.

Id. at 163.

Most courts, however, have been less receptive to expert economic testimony concerning hedonic damages. See Reuben E. Slesinger, "The Demise of Hedonic Damages Claims in Tort Litigation," 6 J. Legal Econ. 17, 18 (1996) ("To date, there is little recorded evidence of appellate courts admitting this type of testimony; indeed, mostly it has been a matter of excluding it."). See, e.g., McGuire v. City of Santa Fe, 954 F. Supp. 230, 234 (D.N.M. 1996) (excluding testimony of hedonic damages expert); Ayers v. Robinson, 887 F. Supp. 1049, 1064 (N.D. Ill. 1995) (same); Hein v. Merck & Co., 868 F. Supp. 230, 232-34 (M.D. Tenn. 1994) (same and collecting cases that have excluded expert testimony on valuation of hedonic damages). But see Estate of Sinthasomphone v. City of Milwaukee, 878 F. Supp. 147, 152 (E.D. Wis. 1995) (deferring ruling on admissibility of testimony of hedonic damages expert); Wanke v. Lynn's Transp. Co., 836 F. Supp. 587, 591 (N.D. Ind. 1993) (same); Moore v. Kroger Co., 800 F. Supp. 429, 436 (N.D. Miss. 1992) (same), aff'd, 18 F.3d 936 (5th Cir. 1994).

The Supreme Court's Daubert decision established a new test for the admissibility of scientific evidence under the Federal Rules of Evidence. Daubert replaced the "general acceptance" test of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), with a flexible balancing test involving the following factors, in addition to other factors that the courts may find appropriate in particular cases: (1) testability; (2) peer review and publication; (3) known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and (4) general acceptance. Daubert, 509 U.S. 579, 593-94 (1993). The Supreme Court, in Kumho Tire, extended Daubert to cover expert witnesses other than scientific experts. Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167, 1176 (1999) ("trial court should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony").

Thus, it appears that expert economic testimony on hedonic damages is particularly vulnerable to a Daubert/Kumho challenge. See generally Kuiper, supra; Slesinger, supra. See also McGuire, 954 F. Supp. at 234; Ayers, 887 F. Supp. at 1064; Hein, 868 F. Supp. at 232-34; United States v. Starzecpyzel, 880 F. Supp. 1027, 1029 (S.D.N.Y. 1995) (court referred to expert testimony in fields like hedonic damages as a "discredited venture[]") Hedonic damages themselves, however, are alive and well in the employment discrimination context, thanks largely to the Civil Rights Act of 1991.

Compensatory damages under Section 1981 will be governed by the applicable state common or statutory law governing compensatory damages for personal torts and related claims.

Punitive Damages Under Title VII.

Section 1981a, applicable to Title VII claims, provides for statutory punitive damages:

> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b)(1) (emphasis added). The aforementioned sliding scale based upon employer size also applies to punitive damages, i.e., Title VII punitive damages are capped at $50,000 to $300,000 depending upon the employer's size. 42 U.S.C. § 1981a(b)(3)(A) - (D). It must be emphasized that there is no such statutory cap for Section 1981 punitive damages.

Prior to 1999, there was a split in the circuit courts as to the appropriate standard for awarding punitive damages under Title VII. The Second Circuit used the statutory "malice or with reckless indifference" standard while the District of Columbia, First, Fourth, Sixth, Seventh, Eighth and Ninth Circuits imported the common-law "egregiousness" standard into the statutory regime. Kolstad v. American Dental Ass'n, 139 F.3d 958, 968-69 (D.C. Cir.) (en banc) (collecting cases), cert. granted, 119 S. Ct. 401 (1998). The definition of "egregiousness" varied among the courts, but that of the District of Columbia Circuit was representative: "the evidence shows that the defendant engaged in a pervasive pattern of discriminatory acts, or manifested genuine spite and malevolence, or otherwise evinced a criminal indifference to civil obligations." Id. at 965 (internal quotation marks omitted). The Supreme Court, on June 22, 1999, vacated and remanded the D.C. Circuit's decision. Kolstad v. American Dental Ass'n, 527 U.S. ___, 119 S. Ct. 2118 (1999).

The Supreme Court's Kolstad opinion, written by Justice O'Connor, has two distinct components: (1) Part II-A, joined by six other justices (Stevens, Scalia, Kennedy, Souter, Ginsburg and Breyer), held that the appropriate standard of liability for Title VII punitive damages was the statutory malice or reckless indifference standard, thus rejecting the approach taken by several courts in requiring that the plaintiff prove that the employer's conduct be characterized as egregious. Kolstad, 119 S. Ct. at 2124-26. (2) Part II-B, joined by four other justices (Rehnquist, Scalia, Kennedy and Thomas), held that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'" Id. at 2129.

It is Kolstad's second holding that has raised the burden for the plaintiff who seeks punitive damages under Title VII. The Kolstad Court began with the recognition that Title VII was to be interpreted based on agency law principles. Id. at 2127. Section 218C of the Restatement (Second) of Agency "places strict limits on the extent to which an agent's misconduct may be imputed to the principal for purposes of awarding punitive damages." Id. at 2128. The Court noted that, under the Restatement, one of four grounds for employer "liability for punitive awards [was] where an employee serving in a 'managerial capacity' committed the wrong while 'acting in the scope of employment.'" Id. (quoting Restatement (Second) of

Agency, § 218C(c)). According to the Supreme Court, the problem with the Restatement approach is that:

> Holding employers liable for punitive damages when they engage in good faith efforts to comply with Title VII, however, is in some tension with the very principles underlying common law limitations on vicarious liability for punitive damages -- that it is 'improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.'"

Id. at 2128-29 (quoting Restatement (Second) of Torts, § 909, cmt. b).

> Applying the Restatement of Agency's 'scope of employment' rule in the Title VII punitive damages context, moreover, would reduce the incentive for employers to implement antidiscrimination programs. . . . Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII.

Id. at 2129. Therefore, the Kolstad Court rejected the broad application of the "scope of employment" rule, by limiting vicarious liability to those circumstances where the defendant employer did not make "good-faith efforts to comply with Title VII." Id. The Kolstad Court remanded this case for the presentation of further factual evidence regarding these agency principles, and noted that: "It may also be necessary to determine whether the [defendant] had been making good faith efforts to enforce an antidiscrimination policy." Id. at 2130.

Kolstad represents a "pyrrhic victory" for the plaintiff-appellant. On the one hand, the Supreme Court expressly rejected the egregiousness requirement which several courts had imposed on Title VII plaintiffs seeking punitive damages. On the other hand, the reformulation of vicarious liability represents "a significant limitation, and in many foreseeable cases a complete bar, on employer liability for punitive damages." Id. at 2130 (Opinion of Rehnquist, C.J.). For practitioners, Kolstad imposes an additional requirement for pretrial discovery: it will be necessary to determine whether defendant employers have made "good-faith efforts to comply with Title VII." Since the Kolstad Court did not define the scope or minimum baseline for such efforts, the lower courts will struggle to draw the line in this area.

Although Kolstad was decided only three months prior to the completion date of this chapter, several federal courts have already applied its holdings to determine whether the defendant employer would be liable for punitive damages for the conduct of its supervisors.

The Fifth Circuit, in Deffenbaugh-Williams, found that the record evidence was sufficient to allow it to conduct the Kolstad analysis with regard to the trial court's judgment as a matter of law in favor of defendants. Deffenbaugh-Williams v. Wal-Mart Stores, Inc., ____ F.3d ____, 1999 U.S. App. LEXIS 20824 (5th Cir. 1999). First, the harassing supervisor (Gipson) "was a requisite 'managerial agent' [who] had supervisory authority over Deffenbaugh, terminated her on his own authority, and was, as noted, in charge of departments at six stores." Id. at *20. Since the supervisor "had authority to make personnel decisions regarding Deffenbaugh and others in her department and in those of five other stores," the Fifth Circuit concluded that "substantial evidence existed from which a jury could reasonably find that Gipson was a managerial agent, acting in the scope of employment. Id. at *22. Having established the requirement that Gipson was a managerial agent, the Fifth Circuit then turned to the good-faith defense. The first prong was not satisfied, since:

> Wal-Mart's only evidence (elicited in cross-examining Deffenbaugh) was that it (Wal-Mart) encourages employees to contact higher management with grievances. Plainly, such evidence does not suffice to establish, as a matter of law, Wal-Mart's good faith in requiring its managers to obey Title VII. Wal-Mart presented no evidence either of its response to Deffenbaugh's complaint, or of any specific Title VII efforts . . . .

Id. at *23. In contrast, the plaintiff showed that even though she had complained to her regional manager (Norman), Wal-Mart's procedures were ineffective:

> Deffenbaugh, on the other hand, presented substantial evidence that Wal-Mart failed to respond effectively to her complaints about Gipson's racial animus: despite Norman's promise to check into her complaint of hostility to her interracial relationship, she was fired the next month on pretextual grounds. Wal-Mart's minimal presentation left the jury wide latitude to infer that any Wal-Mart policy against discrimination was too poorly enforced to distinguish Wal-Mart's actions from Gipson's.

Id. at *23-24. Therefore, the Fifth Circuit reversed the district court's judgment as to punitive damages and reinstated the jury's award after remittitur. Id. at *24.

The Eighth Circuit, in Blackmon, found that the plaintiff had suffered adverse employment actions in response to her complaints of sexual harassment, and reversed the district court's judgment as a matter of law in favor of defendants on punitive damages. Blackmon v. Pinkerton Sec. & Investigative Serv., 182 F.3d 629, 630 (8th Cir. 1999). The requisite "malice or requisite indifference" standard was met, since:

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

Id. at 636. The good-faith defense was not available to defendants, since their "'investigation' of [plaintiff's] complaint was clearly inadequate and disproportionate to the seriousness of [her] complaints;" defendant's "only remedial action [] did not address the crux of [plaintiff's] complaint;" and the court was skeptical of defendant's "actions to limit its liability by investigating [plaintiff] rather than the harassment and by simultaneously firing a male employee" as a smokescreen for their termination of plaintiff. Id. at 637. The Eighth Circuit concluded that: "However, we do not consider [defendant's] half-hearted responses to [plaintiff's] serious complaints of sexual harassment to satisfy [its] obligation." Id.

In another Eight Circuit case, Kimbrough, the court imputed liability for punitive damages to the employer since the harasser's supervisor [Dall], who was the general manager and executive vice president, knew of the conduct taken by the harasser [Boggs] but failed to act. Kimbrough v. Loma Linda Dev., Inc., 183 F.3d 782, 784 (8th Cir. 1999). The Eighth Circuit concluded that liability was justified since:

> [T]here was evidence that Dall ratified Boggs's abusive conduct and repeatedly ignored detailed and graphic complaints about Boggs's harassment of the plaintiffs. Kimbrough testified that at one point Boggs placed his hands in flour and then grabbed her behind leaving white hand prints on her black pants. When she went to Dall to complain he responded, "Oh, that looks good on you." This evidence of Dall's malice and reckless indifference would permit a jury to find Loma Linda liable for punitive damages because of Dall's own state of mind, or because he ratified Boggs' actions. Therefore, the jury was free to consider Boggs's conduct when it set the punishment for Loma Linda's discriminatory practices.

Id. at 785 (internal citations to Kolstad and the Restatement omitted).

The Tenth Circuit, in Wal-Mart, similarly found that the defendant could not invoke the Kolstad good-faith defense based on its inadequate policies. EEOC v. Wal-Mart Stores, Inc., ___ F.3d ____, 1999 U.S. App. LEXIS 20015 (10th Cir. 1999). Although this case involved the Americans with Disabilities Act ("ADA"), the standard for punitive liability is the same as for Title VII. Wal-Mart claimed that the discriminating supervisors were too low ranking to allow damages to be imputed to Wal-Mart, and "even if they were managerial employees, argues Wal-Mart, their conduct was contrary to company policy and hence provides no ground for vicarious liability." Id. at *4-5. The Tenth Circuit rejected Wal-Mart's vicarious liability and good-faith defenses. First, the discriminating supervisors themselves testified that they had the authority to make hiring and firing decisions or recommendations, thereby occupying "positions of managerial control." Id. at *13-14. Since their responsibilities included suspending or terminating employees, they were acting within the scope of their employment with regard to the complainant [Amaro], "and it is clear from the record that their action against Amaro stemmed from a desire to serve their employer, Wal-Mart." Id. at *15. The Tenth Circuit then turned to the good-faith defense, and concluded that while "Wal-Mart certainly had a written policy against discrimination, [] that alone is not enough. Our review of the record leaves us unconvinced that Wal-Mart made a good faith effort to educate its employees about the ADA's prohibitions." Id. at *17-18. One of the supervisors testified that it was not until "after her deposition, some three years after Amaro's suspension and termination" before she even knew that there was a disability discrimination law, and that "she had received no training about disability discrimination." Id. at *18. The Tenth Circuit concluded that:

> Wal-Mart's assertion of a generalized policy of equality and respect for the individual does not demonstrate an implemented good faith policy of educating employees on the [ADA's] accommodation and nondiscrimination requirements. The evidence demonstrates a broad failure on the part of Wal-Mart to educate its employees, especially its supervisors, on the requirements of the ADA, and to prevent discrimination in the workplace. We therefore conclude that given the facts of this case, Wal-Mart enjoys no protection from vicarious punitive liability for the conduct of its managerial agents against Amaro.

Id. at *18-19. Therefore, the Tenth Circuit upheld the award of punitive damages. Id. at *20-21.

To the extent that state and local fair employment practice statutes are modeled on Title VII, then it is possible that federal and state courts will apply both components of Kolstad to plaintiffs who have brought parallel and local state anti-discrimination law claim(s).

The courts are split as to whether a Title VII plaintiff can obtain punitive damages absent an award of compensatory damages; the Seventh Circuit reasoned that since Section 1981a did not make punitive damages contingent upon "an underlying award of compensatory damages," the former could be obtained independently of the latter. Timm v. Progressive Steel Treating Co., 137 F.3d 1008, 1010 (7th Cir. 1998). As Judge Easterbrook concluded, there is "no reason [that] comes to mind for reading a compensatory-punitive link into Section 1981a." Id.; accord Provencher v. CVS Pharmacy, 145 F.3d 5, 12 (1st Cir. 1998) ("We see no reason to allow punitive damages only where the jury enters an award for compensatory damages and not where the judge enters an award for back pay, given that injury to the plaintiff is addressed in both instances."). In contrast, the Fifth Circuit has insisted that "recovery of [Title VII] punitive damages must necessarily turn on the recovery of compensatory damages" and that punitive damages are "dependent on non-incidental compensatory damages." Allison v. Citgo Petroleum Corp., 151 F.3d 402, 418 (5th Cir. 1998).

To the extent that state and local employment discrimination statutes are modeled on Title VII, then the standards for punitive damages will be congruent. However, there can be individual variations. For example, under the District of Columbia Human Rights Act ("DCHRA"), D.C. Code Ann. § 1-2501 et seq., individuals can be held liable for punitive damages (in addition to the employer), and there are some differences in the burdens of proof.

First, for punitive damages under Title VII and Section 1981, the plaintiff must prove by a preponderance of the evidence that the defendant employer acted with malice or reckless indifference to plaintiff's legal rights; and the trier of facts may conclude that the defendant acted with a state of mind justifying punitive damages based on direct evidence, or based on circumstantial evidence from the facts of the case. Kolstad, 119 S. Ct. at 2124-26; Barbour v. Merrill, 48 F.3d 1270, 1277 (D.C. Cir. 1995). In contrast, for punitive damages under the DCHRA, the plaintiff must prove by clear and convincing evidence that the discrimination, harassment and/or constructive discharge was motivated by intentional, discriminatory conduct that injured plaintiff, that this conduct was willful and outrageous, and that this conduct was aggravated by evil motive, actual malice, or with callous and reckless indifference to plaintiff's legal rights; the trier of facts may conclude that the defendant acted with a state of mind justifying punitive damages based on direct evidence, or based on circumstantial evidence from the facts of the case. Barbour, 48 F.3d at 1277; Arthur Young & Co. v. Sutherland, 631 A.2d 354, 371-73 (D.C. 1993).

Second, for the computation of punitive damages, while the courts have allowed evidence of the defendant's net worth (on the grounds that a wealthy defendant should pay higher punitive damages than a poor defendant for the same conduct), the burden of proof for presenting evidence is diametrically opposed under Title VII and the DCHRA. The federal courts have placed this burden on the defendant, on the grounds that the defendant is best able to present evidence of its own wealth, and that since net worth is a limitation to excessive punitive damages, the defendant should have to justify the use of its own net worth for that purpose. Kemezy v. Peters, 79 F.3d 33, 33-37 (7th Cir. 1996); Hutchinson v. Stuckey, 952 F.2d 1418, 1422 n.4 (D.C. Cir. 1992). In contrast, under the DCHRA, for which the burden of proof is derived from the general common law for punitive damages, the plaintiff bears the burden to present evidence of defendant's net worth, on the grounds that the plaintiff should have to show that the defendant can afford to pay the requested punitive damages. Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 941 n.19 (D.C. 1995). Therefore, in a case which a plaintiff requests punitive damages under both Title VII and the DCHRA, the opposing parties are faced with inherently conflicting motivations. If the defendant is impecunious, then it will want to present evidence of its own net worth, in order to limit the punitive damage award under Title VII. If the plaintiff knows that the defendant is wealthy, then the plaintiff will want to present evidence of defendant's net worth in order to maximize the punitive damages award under the DCHRA.

Punitive Damages Under Section 1981.

The courts are split on the standard for awarding punitive damages under Section 1981. The Fourth, Sixth, Tenth and Eleventh Circuits have required "egregious misconduct beyond mere intent to discriminate." Kolstad, 139 F.3d at 963 (collecting cases). In contrast, the District of Columbia, First and Seventh Circuits "have held that a finding of intentional discrimination, without more, is enough to put the question of punitive damages before the jury in the usual § 1981 case." Id. (collecting cases). This split under Section 1981 was not addressed by the Supreme Court in Kolstad, since that issue was not before it, and Section 1981 does not have a statutory standard for punitive damages. Similarly, Section 1981 plaintiffs should not be affected by the second component of Kolstad, since the Burlington/Faragher affirmative defense to vicarious liability (discussed infra, III.J) only applies to Title VII claims.

The Supreme Court has elaborated several guideposts for determining whether an award of punitive damages is excessive; those most relevant to Section 1981 employment discrimination and harassment cases are the (1) "degree of reprehensibility;" (2) "disparity between the harm or potential harm suffered by [plaintiff] and his punitive damages award;" and (3) "difference between this remedy and the civil penalties authorized or imposed in comparable cases." BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996). The BMW decision, based on state fraud law, indicates the Supreme Court's current skepticism towards high punitive damages awards, and should be carefully considered by practitioners for both sides in this area.

The Fifth Circuit has applied BMW to reduce a Section 1981 punitive damages award, on the grounds that (1) the supervisor's conduct was not representative of the company; (2) "the ratio of punitives to compensatory damages would be approximately 6.5 to 1" while the BMW Court had considered a 4 to 1 ratio as about the highest allowable; and (3) the largest prior award of punitives in that circuit was $50,000, in contrast to the district court's award of $150,000. Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 943 (5th Cir. 1996), cert. denied, 519 U.S. 1091 (1997). A district court in the Seventh Circuit has similarly applied BMW to reduce the jury's award of punitive damages, although it used a 3 to 1 ratio of damages as appropriate. Lawyer v. 84 Lumber Co., 991 F. Supp. 973, 977, 76 FEP Cases 832 (N.D. Ill. 1997).

For state law claims, including those under state anti-discrimination statutes, the practitioner should determine whether there are statutory "caps" to punitive damages, either as part of the anti-discrimination statutes themselves, or pursuant to a more general "tort reform" statute. Although it is beyond the scope of this chapter to collect and analyze all such statutes, some states have (1) banned punitive damages entirely unless provided for by statute (New Hampshire); (2) capped punitive damages, usually in proportion to the compensatory damages award; (3) allocated a percentage of punitive damages to state agencies; and/or (4) required mandatory bifurcation of liability and punitive damages determinations during the trial. BMW, 517 U.S. at 614-19 (1996) (Ginsburg, J., dissenting) (collecting statutes). However, several state supreme courts have recently struck down such "tort reform" statutes on the grounds that the legislature has unconstitutionally interfered with the independence of the judiciary and with the right (under the state constitution) to have a jury decide the amount of damages without being constrained by statutory caps to damages under state law. See, e.g., State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, ___ Ohio St. 3d ___, 1999 Ohio LEXIS 2580 (Ohio Aug. 16, 1999).

The Burlington/Faragher Affirmative Defense to Employer Liability for Damages Under Title VII.

In June of 1998, the Supreme Court set forth a significant clarification and reanalysis of employer liability (respondeat superior) in two sexual harassment cases. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 764-65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). The critical issue faced by the Court was to determine the circumstances in which the defendant employer can be held liable under Title VII for the discriminatory or harassing conduct of its agents or supervisors. The Supreme Court first turned to the Restatement (Second) of Agency, § 219(2)(d), which provides for liability under certain circumstances:

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relationship.

Burlington, 524 U.S. at 758 (quoting Restatement (Second) of Agency, § 219(2)). It is the second element, aided in the agency relationship, that governs most employment cases, since it is unlikely that the employee will erroneously believe that the harasser or discriminating person was her supervisor. Id. at 759.

The "apparent authority" component applies when the alleged harasser is not the titular supervisor of the plaintiff, but has supervisory authority nonetheless. See, e.g., Parkins v. Civil

Constructors of Ill., Inc., 163 F.3d 1027, 1033 (7th Cir. 1998) ("We have consistently distinguished employees who are supervisors merely as a function of nomenclature from thoese who are entrusted with actual supervisory powers."); Quiroz v. Ganna Constr., No. 97 C 0480, 1999 U.S. Dist. LEXIS 1285, at *61 (N.D. Ill. Jan. 27, 1999) ("The fact that Wells' title was not 'supervisor' is irrelevant — nomenclature is not determinative. . . . Defendant could still be vicariously liable for Wells as a 'supervisor' if Wells had apparent authority."). As the Seventh Circuit concluded, "it is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes [of] imputing liability to the employer." Parkins, 163 F.3d at 1034. In contrast, the Eleventh Circuit abandoned the distinction between supervisor and non-supervisors, holding that "If an employee takes a tangible employment action against the plaintiff, the employer will be held liable under Title VII for that action (if the action otherwise violates the statute), regardless of whether the employee taking the action is labeled the plaintiff's 'supervisor.'" Llampallas v. Mini-Circuits, Inc., 163 F.3d 1236, 1247 n.29 (11th Cir. 1998). For that reason, "a Title VII plaintiff, therefore, may establish her entire case simply by showing that she was sexually harassed by a fellow employee, and that the harasser took a tangible employment action against her." Id. at 1247.

Where there is a "tangible employment action [which] constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," Burlington, 524 U.S. at 761, then the employer is strictly liable for the conduct of its supervisor or agent. Id. at 763; accord Faragher, 524 U.S. at 790 (discussing "this apparently unanimous rule"). The rationale for applying strict liability is that only a supervisor or agent of the employer could cause a tangible employment action, through "an official act of the enterprise." Burlington, 524 U.S. at 762. Under agency law, the challenged actions were aided by the agency relationship; which "requirements will always be met when a supervisor takes a tangible employment action against a subordinate." Id. at 762-63.

However, when there is no such tangible employment action (i.e., the employee is still employed with no adverse change in her status), then the Supreme Court turned to principles of vicarious liability to determine whether the employer should be held liable. The Burlington Court was reluctant to impose "automatic liability" for all occurrences of harassment which did not lead to a tangible employment action, given Title VII's statutory goals of "promot[ing] conciliation rather than litigation" and "encouraging employees to report harassing conduct before it becomes severe or pervasive." Id. at 764. Therefore, the Burlington Court held that the "employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Id. at 765. Unlike the strict liability when a tangible employment action has occurred, the employer can raise an affirmative defense to vicarious liability:

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any

> preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Id.; accord Faragher, 524 U.S. at 807 (citing Burlington). The first element can be satisfied by showing that the employer had an effective or reasonable mechanism for deterring and remedying workplace discrimination and harassment; the second element can be satisfied by showing that the plaintiff did not proceed with or exhaust the internal processes before proceeding to litigation. It is probable that the determination of (1) whether the employer's anti-discrimination and anti-harassment policies were "reasonable" and (2) whether the plaintiff was "unreasonable" in failing to invoke these policies will require considerable judicial analysis of the underlying facts. In some cases, it will be obvious that the affirmative defense will fail, e.g., as in Faragher itself, where the employer had "entirely failed to disseminate its policy against sexual harassment among the beach employees" and this "policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints." Faragher, 524 U.S. at 808 ("we hold as a matter of law that the [defendant] could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct").

Therefore, practitioners representing employees should advise their clients to exhaust all internal remedies, unless it is patently obvious that such procedures would be useless, would lead to reprisal, or are nonexistent. Similarly, practitioners representing employers should advise their clients to implement and disseminate effective anti-discrimination and anti-harassment policies. Towards this end, the EEOC provides Technical Assistance Program Seminars ("TAPS") and customized training programs designed to "provide practical, how-to-do-it information and assistance to encourage voluntary compliance with Federal laws prohibiting job discrimination based on race, color, religion, national origin, sex, age or disability." EEOC, "Technical Assistance and Training Programs" <http://www.eeoc.gov/taps.html>. The EEOC has recently issued a comprehensive enforcement guidance document that provides a straightforward application of Burlington/Faragher to the workplace. EEOC, "Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors" (June 18, 1999) <http://www.eeoc.gov/docs/harassment.html>. Private consultants are another source of workplace training.

The Supreme Court also recognized the possibility that discrimination or harassment may occur "where a supervisor engages in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer." Burlington, 524 U.S. at 757. Although seemingly improbable, this has occurred. See, e.g., Miller v. D.F. Zee's, Inc., 31 F. Supp. 2d 792, 802-03, 78 FEP Cases 1402, 1410 (D. Or. 1998) ("Templeton believed that employees who were more relaxed were more productive. Thus, Templeton believed the sexual atmosphere he created benefitted his employer. Stradley also testified that the sexual conduct was designed to 'release tension.' When a management level employee creates a sexualized atmosphere in the workplace as a management technique designed, at least in part, to benefit the employer, the conduct is within the scope of employment.") (internal deposition citations omitted); Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1075, 63 FEP Cases 118, 135 (M.D. Ala. 1991) ("The evidence convinces the court that the department has a policy of discouraging women from remaining in the department and seeking advancement . . . and that sexual harassment was simply a way of furthering that policy."); see generally Durham Life Ins. Co. v. Evans, 166 F.3d

139, 152 (3d Cir. 1999) ("there may be cases in which a harasser thinks that he is doing what is best for his workforce when he deploys sexual harassment as a weapon to drive female workers away. . . . There are other cases in which sexual harassment seems fundamentally connected to the work situation, as when it is part of a campaign against women in nontraditional jobs.") (collecting cases).

After-Acquired Defenses to Remedies.

The after-acquired evidence doctrine, as redefined by the Supreme Court in McKennon, limits the availability of damages to the successful plaintiff, although it is not a defense to the employer's liability. McKennon v. Nashville Banner Publ. Co., 513 U.S. 352 (1995). This doctrine recognizes that the employee herself may have engaged in conduct for which the employer would have terminated or otherwise disciplined the employee, yet the employer did not find out about this conduct until after the occurrence of the alleged discriminatory or harassing events. For example, in McKennon, the plaintiff had "copied several confidential documents bearing upon the company's financial condition" because she thought "she was about to be fired because of her age" and believed that having copies of these documents was useful "for 'insurance' and 'protection.'" Id. at 355. After Ms. McKennon testified about this conduct at her deposition, the defendant employer sent her "a letter declaring that removal and copying of the records was in violation of her job responsibilities . . . . [and] recited that had it known of McKennon's misconduct it would have discharged her at once for that reason." Id.

The McKennon Court, although deciding a case arising under the ADEA, recognized that this statute and Title VII "grants an injured employee a right of action to obtain the authorized relief." Id. at 358. Hence, the after-acquired evidence principle is equally applicable to Title VII litigation. The unanimous McKennon Court rejected, as inconsistent with the statutory scheme of the ADEA and Title VII, the assertion that "after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the Act." Id. The Court did recognize that such evidence "must be taken into account, we conclude, lest the employer's legitimate concerns [about the employee's conduct] be ignored." Id. at 361. Therefore, the relevance of the employee's conduct is "to take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing." Id.

In order for the employer to invoke the after-acquired evidence doctrine, "it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." Id. at 362-63. Once this threshold has been satisfied, then the court can apply this doctrine to limit the availability of front pay, reinstatement, and back pay, as set forth in the following two paragraphs.

The major consequence of the after-acquired evidence doctrine is that the plaintiff can no longer obtain reinstatement or front pay. Id. at 361-62 ("We do conclude that here, and as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.").

The McKennon Court recognized that the issue of back pay was more complicated, and concluded that back pay should be limited by using the "calculation of back pay from the date of the unlawful discharge to the date the new information was discovered." Id. at 362.

The lower courts have recognized the importance of the threshold issue of McKennon — whether the employer would have discharged the employee had it known of the acts at the time — in determining the applicability of the after-acquired evidence doctrine. See, e.g., Sheehan v. Donlen Corp., 173 F.3d 1039, 1047-48 (7th Cir. 1999) (although plaintiff had falsified her resume, "it was not disputed that no one in the history of Donlen had ever been fired for falsification of a resume," so its policy of discharging employees for falsification was not supported by "further evidence that the policy actually would have been applied"); Red Deer v. Cherokee County, Iowa, 183 F.R.D. 642, 648, 78 FEP Cases 1463, 1467 (D. Iowa 1999) ("The question under McKennon is not whether the County actually relied on the evidence in making its decision, but what the County would have done had the evidence come to light at the time of [plaintiff's] applications."); Roalson v. Wal-Mart Stores, Inc., 10 F. Supp. 2d 1234, 1237, 77 FEP Cases 1157, 1160 (D. Kan. 1998) (denying summary judgment since "genuine issues of material fact exist regarding whether Wal-Mart indeed would have refused to hire plaintiff had it known about the alleged misrepresentation at the time of the hiring decision").

Taxation of Damages

Section 104(a) of the Internal Revenue Code excludes from taxable gross income certain compensation received for physical injuries and sickness. As amended in 1996, this statute now provides in relevant part that:

> Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses), for any prior taxable year, gross income does not include —
> . . . .
> (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness.

I.R.C. (26 U.S.C.) § 104(a) (emphasis added). The statutory notes explain that:

> For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care . . . attributable to emotional distress.

Id. (emphasis added). The consequences of this statute are threefold: (1) punitive damages are fully taxable income; (2) compensatory damages based upon emotional distress are fully taxable income after subtracting the costs of medical care; while (3) damages arising in tort for physical injuries or sickness remain excluded from taxable income. This statute, as amended, applies to "any amount received under a written binding agreement, court decree, or mediation award" issued or in effect on or after September 14, 1995. Small Business Job Protection Act of 1996, Pub. L. 104-188, § 1605(d) (1996).

Prior to 1996, the courts have required the satisfaction of two prongs to exclude damage payments from taxable gross income under this section. See, e.g., Commissioner v. Schleier, 515 U.S. 323, 337 (1995) ("First, the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is based upon tort or tort type rights; and second, the taxpayer must show that the damages were received on account of personal injuries or sickness."). The 1996 amendments have added the threshold limitation that emotional distress damages (not arising in tort) in excess of medical costs and all punitive damages are outside the scope of this statute.

To address this disparity in compensatory damages between personal injury and medical malpractice litigation (for which such damages remain tax-free) and employment discrimination litigation (for which most such damages are now taxable), Rep. Price (R.-Ohio) introduced, on May 27, 1999, the "Civil Rights Tax Fairness Act of 1999" (H.R. 1997). This bill would exclude from gross income "amounts received by a claimant (whether by suit or agreement and whether as lump sums or periodic payments) on account of a claim of unlawful discrimination." H.R. 1997, § 2(a). At the same time, this bill would not cover backpay, front pay, or punitive damages. Id. It would allow for income averaging for back pay and front pay, thereby mitigating the tax consequences of receiving a large award covering several years' work during a single tax year. Id., § 3. However, as of September 14, 1999, this bill only had six cosponsors, and is still in the House Committee on Ways and Means.[1]

Since back pay ordinarily constitutes taxable income, Title VII litigants, during settlement negotiations, will sometimes "include an amount to offset the plaintiff/taxpayer's increased liability." EEOC v. Joe's Stone Crab Inc., 15 F. Supp. 2d 1364, 1380, 77 FEP Cases 897, 907 (S.D. Fla. 1998). For that reason, "a district court, in the exercise of its discretion, may include a tax component in a lump sum back pay award to compensate prevailing Title VII plaintiffs." Id. (since EEOC "failed to provide competent foundation evidence to permit the court to make these calculations," the court refused to award additional offset damages for "increased tax liability a claimant will experience by receiving a lump sum award").

A distinction must be made between taxable income (wages) subject to withholding and taxable income (non-wages) not subject to withholding. Ordinarily, back pay and front pay are taxable wage income. However, the Eighth Circuit held that where the plaintiff, an unsuccessful job applicant, had alleged discrimination based upon refusal to hire, then there was no employment relationship between the parties, so the back pay and front pay awards, while taxable, were not subject to withholding. Newhouse v. McCormick & Co., 157 F.3d 582, 587 (8th Cir. 1998) (also recognizing that these awards "are income and must be included in Newhouse's gross income and reported as required by the IRS").

---

1 The National Employment Lawyers Association website provides several documents describing the rationales for this legislation. See "HR 1997, The Civil Rights Tax Fairness Act: Tax Equity for Targets of Discrimination," <http://www.nela.org/nela/billsummary.html>.

In a case arising under the Family Medical and Leave Act, the plaintiff was awarded compensatory and liquidated damages, but the defendant insisted on withholding income taxes and social security contributions from the damages. Churchill v. Star Enterprises, 3 F. Supp. 2d 622, 623-24 (E.D. Pa. 1998), aff'd on other grounds, 183 F.3d 184 (3d Cir. 1999). The district court held that "no withholding is mandated under federal or state law." Id. at 625.

Several recent cases, although involving settlement agreements or awards issued prior to the effective date of the aforementioned 1996 amendment to I.R.C. § 104(a), are still of relevance since their outcome would be the same under the current statute. In particular, where the former employee entered into a settlement agreement that provided for payments equivalent to severance pay, the courts have held these payments to be taxable income absent either specific agreement not to prosecute a legal claim or a justiciable case. See, e.g., Pipitone v. United States, 180 F.3d 859, 864 (7th Cir. 1999) ("settlement agreement lacks express language stating what the settlement amount was paid to settle" and the employer "intended the payment to Pipitone to be severance pay"); Ball v. Commissioner, 163 F.3d 308, 309 (5th Cir. 1998) (I.R.C. § 104(a)(2) "clearly requires the existence of a justiciable claim of the type identified therein and an express settlement and disposition of such an extant claim;" plaintiff signed generic release "at a time when no claims exist[ed], whether or not previously asserted or articulated;" hence "separation" payment was taxable income); Gajda v. Commissioner, 158 F.3d 802, 805 (5th Cir. 1998) ("language of the [settlement] agreement, the nature of the program, and the calculation of the payment itself [show] that IBM intended the payment as compensation of wages lost upon early retirement and not to settle personal injury [ADEA or emotional distress] claims.").

IV. CONCLUSION

The availability of, and limitations to, the remedies discussed in this chapter have an important role in assessing the value of litigating an employment discrimination case and provide a useful framework for pre-trial settlement negotiations. Therefore, it is essential that counsel for both employers and employees be knowledgeable about the full spectrum of legal and equitable remedies under Section 1981 and Title VII.