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Proving Damages in Litigating Employment Cases

by

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by

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This chapter surveys the key remedies available to racial and sexual harassment plaintiffs under Section 1981, Title VII and the D.C. Human Rights Act ("DCHRA"). For further discussion of these issues, including numerous federal appellate decisions concerning damages, as well as the complex law governing taxation of monetary remedies, see R. Seymour & B.B. Brown, Equal Employment Law Update, Chapters 44-56 (Spring 2000).

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.

I. Statutory Remedy Provisions.

A. Section 1981.

Section 1981 does not have statutory remedies, other than the award of attorney's fees to prevailing parties under 42 U.S.C. § 1988 (discussed *infra*, Part V); nor does it have statutory

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caps on remedies. Thus, the courts have drawn upon the common law in providing legal and equitable relief to the successful Section 1981 plaintiff.

B. Title VII.

Title VII's statutory remedies are set forth in 42 U.S.C. §§ 1981a and 2000e-5(g), (k). Section 1981a is applicable only when the plaintiff cannot recover under Section 1981, and does not 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 **compensatory** and **punitive damages** 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 **intentionally engaged** in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may **enjoin** 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, **reinstatement** or hiring of employees, with or without **back pay** . . . or any other **equitable relief** as the court deems appropriate.

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

Section 1981a sets forth a sliding scale for compensatory and punitive damages under Title VII, 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.

42 U.S.C. § 1981a(b)(3). All four levels are 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. Id. This cap is per plaintiff, not per claim. Fogg v. Ashcroft, 254 F.3d 103, 107-08 (D.C. Cir. 2001). It is possible for the plaintiff to file multiple cases based upon separate discriminatory acts. Smith v. Chicago Sch. Reform Bd. of Trustees,

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."). At the same time, however, if several lawsuits are consolidated for purposes of trial, then the plaintiff can only recover a single award up to the statutory cap. Galliher v. Rubin, 969 F. Supp. 1329, 1331 (S.D. Ga. 1997).

In 2001, the Supreme Court resolved a circuit split, adopting the majority rule that Title VII's statutory cap does not apply to front pay under Title VII. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 848-54 (2001). This rejects the contrary view adopted by the Sixth Circuit. Id. at 847 (citing Hudson v. Reno, 130 F.3d 1193 (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). This statutory bar also precludes the attorney from making any reference to the statutory cap, such as during closing arguments. Sasaki v. Class, 92 F.3d 232, 235-36 (4th Cir. 1996) (reversible error requiring new trial on damages).

If a jury should award the plaintiff compensatory or punitive damages under Title VII 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. See, e.g., Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 509-10 (9th Cir. 2000) (proper for district court to reallocate $100,000 in back pay, $2,000,000 in front pay and $1,000,000 in compensatory emotional distress damages to plaintiff's Washington Law Against Discrimination claim); Martini v. Federal Nat'l Mortgage Ass'n, 178 F.3d 1336, 1349-50 (D.C. Cir. 1999) (excess jury award should be reallocated to plaintiff's DCHRA claim); Estes v. Georgetown Univ., 231 F. Supp. 2d 279, 286 (D.D.C. 2002) (same).

The D.C. Circuit recently emphasized that the statutory caps for Title VII claims are just that — caps — and not a maximum below which the courts should or must go based on a sliding scale analysis:

> **First, we reject the argument that § 1981a(b) itself ever requires a reduction below the $300,000 cap.** By its plain language, [§] 1981a(b)(3) does nothing other than provide a cap. Nothing in the language of that section evidences a congressional intent to specifically empower, let alone require, a trial or appellate court to reduce a verdict in excess of $300,000 to some lesser figure. Although appellant offers a plethora of cases in which smaller damage figures have been awarded, and in which remittiturs to amounts below $300,000 have been ordered, **appellant provides no authority for the proposition that cases involving some perceived or even evident degree of injury less than the most egregious must inherently be awarded some figure lower than the cap.** . . .

> Rather, the proper approach is to determine whether the judgment awarded, regardless of whether it is the statutory maximum, is supported by evidence, and does not shock the conscience, or is not inordinately large so as to be obviously unreasonable. Cf. Smith v. Northwest Financial Acceptance, Inc., 129 F.3d 1408, 1416 (10th Cir. 1997). The cases that appellant offers for purposes of comparison in which lesser damages were awarded or approved do not convince us to the contrary. In rejecting that line of argument, we find useful the reasoning of a state court considering a similar question in a different context:
>
>> The appellant argues that a comparison of this award to other awards for similar injuries would show that this award is excessive. We stated in Fitzsimonds v. Cogswell, [405 P.2d 785 (Wyo. 1965)] . . . that "We are sure counsel realizes that there is no way of obtaining uniformity in the amount juries and trial judges may award for damages in personal-injury cases." Because of the unique circumstances of each case as well as the adjustments which would necessarily have to be made for inflation, it is awkward to discuss the size of an award through comparison with past decisions.
>
> Mariner v. Marsden, 610 P.2d 6, 16 (Wyo. 1980). Just so here.

Peyton v. DiMario, 287 F.3d 1121, 1127 (D.C. Cir. 2002) (emphasis added) (upholding district court's award of $300,000 in compensatory damages, reduced from $482,000 jury verdict).

C. DCHRA.

The remedies under the DCHRA are governed by its private cause of action provision, which allows for the court to "grant **any relief** it deems appropriate, including the relief provided in §§ 2-1403.07 and 2-1403.13(a)." D.C. Code Ann. § 2-1403.16(b) (emphasis added). Section 2-1403.07 provides for injunctive relief. Section 2-1403.13(a) provides for the following legal and equitable remedies that are relevant to employment discrimination litigation:

> (A) The **hiring, reinstatement or upgrading of employees, with or without back pay;**
> (B) The restoration to the membership in any respondent labor organization, admission to or participation in a program, apprenticeship training program, on-the-job training program or other occupational training or retraining program;
> (C) The extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons;
> (D) The payment of **compensatory damages** to the person aggrieved by such practice;
> (E) The payment of **reasonable attorney fees;** . . .

D.C. Code Ann. § 2-1403.13(a)(1) (emphasis added). The D.C. Office of Human Rights has promulgated guidelines for the award of monetary relief. See 4 D.C.M.R. §§ 200 to 299, available online at <http://ohr.dc.gov/pdf/guidelines.shtm> or <http://ohr.dc.gov/main.shtm>. The DCHRA does not have any statutory caps to damages.

Although the DCHRA does not specify that punitive damages are available, the D.C. courts have recognized that punitive damages fall within the ambit of Section 2-1403.16(b)'s "any relief" provision. The D.C. Court of Appeals has expressly held that punitive damages are available under the DCHRA, based on its "broad statutory language" and legislative history. See Arthur Young & Co. v. Sutherland, 631 A.2d 354, 372 (D.C. 1993) ("We therefore hold that punitive damages are available in civil actions under the DCHRA, subject only to the general principles governing any award of punitive damages."); accord Pendarvis v. Xerox Corp., 3 F. Supp. 2d 53, 57 (D.D.C. 1998) (recognizing availability of punitive damages under DCHRA). Furthermore, punitive damages are available for any discrimination claim brought under the DCHRA. See Daka, Inc. v. Breiner, 711 A.2d 86, 98 (D.C. 1998) ("we now explicitly hold that punitive damages are available in all discrimination cases under the DCHRA").

Under the DCHRA, individuals, as well as employers, can be held liable for punitive damages. Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 888-89 (D.C. 1998). This is in contrast to Title VII, for which there is no individual liability. Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir. 1995).

II. 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, and 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). Thus, the Court later 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 money while unemployed).

The D.C. Circuit recently emphasized that the "employer has the burden of proving failure to mitigate." Peyton, 287 F.3d at 1128. Thus, the employer needs to present evidence showing that the plaintiff "withdrew from the [job] market and was not ready, willing, and able to accept other employment." Id. (upholding back pay award).

In Estes, the district court set aside the jury's back pay award because her proof of economic injury, based primarily on expert testimony by plaintiff's economist witness, "was too speculative." Estes v. Georgetown Univ., 231 F. Supp. 2d 279, 284 (D.D.C. 2002). The economist's expert opinion was that if the plaintiff had not been terminated, she would have been promoted to her supervisor's job, and given a commensurate salary increase, all within six months after the date of her termination. Id. However, the court stated that this expert opinion "did not fully account" for evidence showing that the plaintiff had never applied for her supervisor's position or any other position during the previous four years, had less work experience and fewer credentials than her supervisor, and her performance reviews might have affected her ability to be promoted. Id. ("Because plaintiff's proof of economic injury was impermissibly speculative, the jury's award of back pay must be set aside.").

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.").

An 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 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").

A constructive discharge can support an award of back pay. See Durham, 166 F.3d at 155 ("Title VII allows back pay awards when an employee does not leave her employment voluntarily."). However, if the constructive discharge claim is rejected, the plaintiff is no longer entitled to back pay, but remains 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.

Employees who are illegal aliens generally are not entitled to a back pay award. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, ___, 122 S. Ct. 1275, 1283-84 (2002) (reversing D.C. Circuit decision upholding award of back pay to employee wrongfully terminated in violation of NLRA). It remains to be seen whether the courts will apply Hoffman to back pay claims under Title VII and Section 1981. Hoffman does not apply to claims for unpaid wages under the Fair Labor Standards Act, 29 U.S.C. § 215, because FLSA claims are for work already performed, as opposed to back pay. See, e.g., Singh v. Jutla & C.D. & R's Oil, Inc., 214 F. Supp. 2d 1056, 1057 (N.D. Cal. 2002) (FLSA claims; distinguishing Hoffman); Flores v. Amigon, 233 F. Supp. 2d 462 (E.D.N.Y. 2002) (same); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002) (same).

III. Reinstatement and Front Pay.

A. Nature of the Remedy.

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. 1998) ("future damages should not be awarded unless reinstatement is impractical or impossible"); 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.

B. Evidentiary Standard for Obtaining Front Pay.

The D.C. Circuit, in Peyton, recently emphasized the need for proving front pay claims based on objective evidence, as opposed to subjective speculation:

> In Barbour v. Merrill, 48 F.3d 1270 (D.C. Cir. 1995), cert. dismissed, 516 U.S. 1155 (1996), we articulated factors to be considered in calculating front pay. Certain considerations "**including whether an award of front pay would be 'unduly speculative,'** may in some circumstances limit the court's discretion." Id. at 1280. **"The longer a proposed front pay period, the more speculative the damages become."** McKnight v. GM, 973 F.2d 1366, 1372 (7th Cir. 1992). Here the award of 26 years of front pay was unduly speculative and therefore an abuse of discretion. Contrary to the district court's understanding, Barbour does

> not hold that a plaintiff's intention to remain at her employer until retirement, even if that intention is entirely reasonable, automatically entitles front pay for the remainder of her work life. Rather, Barbour includes a list of non-exhaustive factors to consider, including age. See Barbour, 48 F.3d at 1280. Indeed, Barbour specifically suggests that the district court consider the length of time employees in similar positions stay at the defendant employer as well as at other employers, the time required to secure similar employment, and other factors. Id. Moreover, on remand, the district court in Barbour only awarded one year of front pay, which was affirmed by this Court. See Barbour v. Merrill, 132 F.3d 1480 (D.C. Cir. 1997) (table). Neither the district court nor appellee cites any case which suggests that an employee's subjective intent to remain at a job until retirement, by itself, justifies an award of front pay for the rest of her career.
>
> **While some speculation is necessary to determine front pay, here the appellee produced no expert testimony concerning her earning potential**, nor did the district court examine what positions were available in the private sector comparable to a journeyman proofreader position at GPO. "The plaintiff bears the initial burden of providing the district court 'with the essential data necessary to calculate a reasonably certain front pay award.'" Barbour, 48 F.3d at 1279 (quoting McKnight, 973 F.2d at 1372).

Peyton, 287 F.3d at 1128-29 (emphasis added). Thus, "some speculation" is acceptable, and perhaps even necessary in determining front pay:

> [A] **district court should not refuse to award front pay merely because some speculation about future earnings is necessary, or because parties have introduced conflicting evidence.** Indeed, in other contexts, such as when valuing lost earning capacity in a personal injury case, courts (or juries) routinely engage in some speculation, based on the factual record the parties have established. . . . [plaintiff] established a prima facie case for an award of front pay: he provided the district court with both a proposed salary base for the award and a definite duration for the award.

Barbour v. Merrill, 48 F.3d 1270, 1280 (D.C. Cir. 1995) (emphasis added).

In Peyton, the D.C. Circuit then discussed the factual circumstances, including plaintiff's age, her ability to continue working, and her short post-termination employment history, and concluded that the district court's front pay award was unwarranted:

> To award Peyton front pay based on the assumption that she will continue in an allegedly low-paying job (compared to a journeyman proofreader at GPO) for a full career, when she is only 34 years old and not incapacitated, **is to give her a tremendous windfall rather than to make her whole.** There is no reason to assume that if she is, in fact, qualified for a high-paying job at GPO, she will not

> be able to find a high-paying job in the future. Perhaps she will not. Perhaps private printers systemically pay less for the work she was training to do. However, the district court cannot make this determination solely on the basis of appellee's one month of experience at a private employer that may, or may not, be representative of the private sector, doing work that may, or may not, be comparable to the work of a journeyman proof-reader at GPO. The record does not support such a speculative conclusion. Accordingly, we vacate the district court's award of $377,615.72 in future lost earnings, and remand for proceedings consistent with this opinion.

Peyton, 287 F.3d at 1130 (emphasis added).

The D.C. courts have thus recognized that the plaintiff must put forth at least some evidence to support her claim to front pay. See, e.g., United Mine Workers of Am. v. Moore, 717 A.2d 332, 340 (D.C. 1998) ("A party is not required to prove damages to a degree of mathematical certainty . . . but must instead offer some evidence which allows the trier of fact to make a reasoned judgment.") (upholding front pay award under DCHRA).

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").

C. Reinstatement or Front Pay as Alternative Remedies.

The courts have recognized that numerous facts and circumstances exist for determining whether reinstatement is an appropriate or available remedy. A district court has 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), aff'd 214 F.3d 999 (8th Cir. 2000) (upholding jury verdict in favor of plaintiff). 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 [appellate] 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 [appellate] 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 Fifth Circuit recently discussed an interesting example of actions taken by a defendant after the trial that justified an increased award of front pay in a sexual harassment case brought by a faculty member:

> After initially reducing the jury's recommended award to reflect only ten years of lost future wages, the court added five additional years of front pay based on an email sent by President Low to all 8,000 University employees. The court determined that the email, which Low sent the day after the jury verdict, was the continuation of a pattern of vindictive behavior demonstrated at trial. In the email, Low expressed his disappointment over the jury's finding of retaliation, stating: "I want to make it very clear that [Mota] was not fired, but rather failed to return to his faculty duties upon expiration of leave that he had requested and was granted by UT-Houston." The district court portrayed the email as attempting to "present Mota in the worst professional light possible." The court also concluded that this behavior would impact Mota's future work prospects.

Mota v. University of Tex. Houston Health Sci. Ctr., 261 F.3d 512, 527 (5th Cir. 2001) (upholding district court's front pay award of $194,989.00).

D. Methods for Calculating Front Pay.

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 the applicable discount rate.

Barbour v. Merrill, 48 F.3d 1270, 1279 (D.C. Cir. 1995) (internal quotation marks omitted).

One generally accepted factor for front pay calculations is the discount rate of the 52-week U.S. Treasury Bills. The latest rates, and those going back to 1980 are posted online by the Bureau of Public Debt, at: <http://www.publicdebt.treas.gov/>. 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.

E. Front Pay and the Value of Stock Options.

An increasingly important issue in calculating front pay is determining the value of stock options. See Scully v. US Wats, Inc., 238 F.3d 497, 507 (3d Cir. 2001) ("judicial adjudication of stock options is becoming more common due to the widespread use of options as incentives and bonuses"). The Third Circuit defined stock options and discussed their recent proliferation:

> Stock options ("call options") allow an employee to buy the employer's stock at a specified future date at a price (the "strike price" or "exercise 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 for several years into the future.
>
> Stock options have become prominent over the past decade, as many Internet "start up" companies typically offer to their employees and applicants the prospect of potentially lucrative stock options in order to recruit and maintain their workforce. . . . Employees who are terminated or constructively discharged usually forfeit their ability to participate in their employer's stock option plans, and may therefore seek judicial relief.

Id. (quoting L. Bernabei & A.R. Kabat, "Stock Options and Employment Discrimination Law," in 2 National Empl. Lawyers Ass'n, 2000 Eleventh Annual Convention Course Manual, at 709-10 (2000). If an employee who alleges that she was subjected to a discriminatory termination 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, if the stock options at issue do not vest until some time after the close of trial, then it will become necessary for the plaintiff to present evidence as to how much those stock options would likely be worth upon the exercise date(s), assuming that the employer is unwilling to allow the former employee to have the right to exercise her options at the future date. This determination is complicated and will likely require expert economic testimony as to the valuation of stock options. Kerkhof v. MCI WorldCom, Inc., 282 F.3d 44, 53 (1st Cir. 2002) ("Because they are often not marketable, employee [stock] options are often hard to value even for a sophisticated analyst.").

The inherent problem is that the value of a stock option is a function of the difference between the strike price, or the face price of the stock option (i.e., the price that the employee gets to pay for the stock), 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. See generally 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 WL 395948, at *4, 2 Wage & Hour Cas. 2d 1345 (E.D. Pa. July 3, 1995) (citing Gemmill, supra), aff'd 92 F.3d 1172 (3rd Cir. 1996) (table). 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 might argue, 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.

At least two federal appellate courts have recently held that the calculation of damages for loss of stock options should be based on a breach of contract measure of damages, not a conversion claim (which could allow for recovery at a higher intermediate price). See Lucente v. IBM Corp., 310 F.3d 243, 263 (2d Cir. 2002) (reversible error to use conversion valuation); Scully, 238 F.3d at 512-13 (rejecting conversion valuation).

IV. **Injunctive and Declaratory Relief.**

A. **Nature of the Remedy.**

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.").

B. **Injunctive Relief and State Government Employees.**

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 Eleventh Amendment state immunity. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); see also Kimel v. Florida Bd. of Regents, 528 U.S. 62, 91 (2000) (ADEA did not abrogate state immunity; so plaintiff could not sue state government in federal court). These concerns do not implicate D.C. government employees, since the Eleventh Amendment does not apply to the District of Columbia. La Shawn A. v. Barry, 87 F.3d 1389, 1393 n.4 (D.C. Cir. 1996) (en banc). The Supreme Court 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).[2]

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[2] Notwithstanding the clear holding of Fitzpatrick, state governments have unsuccessfully continued to challenge Title VII claims brought by state employees. See, e.g., Maitland v.

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"). Similarly, state government employees will probably be barred from bringing claims under the federal statutes that protect nuclear and environmental whistleblowers. Federal Maritime Comm'n v. South Carolina, 535 U.S. 743, ___, 122 S. Ct. 1864, 1888 (2002) (Breyer, J., dissenting) ("The Court's decision may undermine enforcement against state employers of many laws designed to protect worker health and safety.").

The Supreme Court recently granted certiorari to a Ninth Circuit decision which held that a state employee could bring a FMLA claim, contrary to the holdings of several other courts. See Hibbs v. Nevada Dep't of Human Resources, 277 F.3d 844 (9th Cir. 2001), cert. granted, 122 S. Ct. 2618 (2002). Oral arguments were heard on January 15, 2003, and a decision is expected by June 2003. See "Justices Consider States' Immunity from FMLA Family Leave Lawsuits," 71 U.S.L.W. 3497 (Jan. 28, 2003).

For the federal employment statutes lacking the requisite 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, 527 U.S. 706 (1999). In Alden, the Court 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, 527 U.S. at 712. 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 728. 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 754.

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

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University of Minn., 260 F.3d 959 (8th Cir. 2001) (Eleventh Amendment did not bar Title VII action against state university), cert. denied, 122 S. Ct. 1320 (2002); Okruhlik v. University of Ark., 255 F.3d 615 (8th Cir. 2001) (same); *In re* Empl. Discr. Litig. Against the State of Ala., 198 F.3d 1305 (11th Cir. 1999) (disparate impact claims could be brought by state employees).

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 756-57. 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 759.

The outcome of Alden and Kimel is that, absent 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.

V. Attorney's Fees.

A. The Supreme Court's *Buckhannon* Decision.

In 2001, the Supreme Court set forth an important limitation to attorney's fee awards under the statutes that provide for attorney's fees to prevailing parties. Previously, what had happened is that during the course of litigation, the parties might reach a settlement, or the challenged conduct (in an action seeking only injunctive relief) would be rendered moot by virtue of the defendant having changed its position or actions. If the parties were then unable to agree among themselves as to reimbursement for attorney's fees, the plaintiff would then petition the district court for an award of attorney's fees, based on the so-called catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources, 532 U.S. 598, 601 (2001). While the majority of the federal circuits had adopted the catalyst theory, id. at n. 3, the Fourth Circuit had rejected this theory. Id. The Supreme Court adopted the position of the Fourth Circuit, thereby abrogating the approach taken by the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.

The Supreme Court differentiated between judgments on the merits and settlement agreements enforced through a consent decree -- which "may serve as the basis for an award of attorney's fees," id. at 604 -- and other non-judicially enforced resolutions of lawsuits. The rationale is that a private settlement, or a "defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change." Id. at 605. More generally, the Court stated that:

> Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal.

Id. at 604 n.7 (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994)).

The courts are already split as to whether a settlement agreement, even one that is enforceable by the court in which the original litigation was filed, can constitute a basis for an award of attorney's fees, notwithstanding Buckhannon. While settlement agreements are not necessarily filed with the court (largely to preserve the confidentiality of the settlement amounts), the parties may file a motion for dismissal of the underlying action that requests that the court retain jurisdiction to enforce the settlement agreement, pursuant to Kokkonen, 511 U.S. at 381. In such circumstances, when the parties were unable to agree on the attorney's fees as part of the settlement agreement, several courts have found that a settlement agreement does allow the plaintiff to request that the court adjudicate the plaintiff's request for attorney's fees, since the result is analogous to a consent decree. Compare Richard S. v. Department of Developmental Servs., 319 F.3d 1080, 1086-88 (9th Cir. 2003) (plaintiffs are prevailing party for

having obtained legally enforceable settlement agreement and preliminary injunction); Barrios v. California Interscholastic Federation, 277 F.3d 1128, 1134 (9th Cir. 2002) ("the parties, in their settlement, agreed that the district court would retain jurisdiction over the issue of attorneys' fees, thus providing sufficient judicial oversight to justify an award of attorneys' fees and costs"), cert. denied, 123 S. Ct. 98 (2002) and American Disability Ass'n v. Chmielarz, 289 F.3d 1315, 1321 (11th Cir. 2002) ("by approving the settlement agreement and then expressly retaining jurisdiction to enforce its terms, the district court effected precisely the same result as would have been achieved pursuant to a consent decree") and Johnson v. District of Columbia, 190 F. Supp. 2d 34, 45 (D.D.C. 2002) ("entering into a private settlement agreement does alter the legal relationship of the parties in a real and substantial manner") (citing Kokkonen) with Roberson v. Giuliani, No. 99 CIV 10900 DLC, 70 U.S.L.W. 1535, 2002 WL 253950 (S.D.N.Y. Feb. 21, 2002) ("the Court's retention of jurisdiction over the enforcement of the settlement agreement does not constitute judicial approval and oversight sufficient to confer prevailing party status on the plaintiffs under Buckhannon"). The Fourth Circuit suggested, in dicta, "that an order containing an agreement reached by the parties may be functionally a consent decree for purposes of the inquiry to which Buckhannon directs us, even if not entitled as such." Smyth v. Rivero, 282 F.3d 268, 282 (4th Cir. 2002).

A district court extended Buckhannon to apply to Rule 68 offers of judgment, holding that because such offers are judicially enforceable, the plaintiff who had accepted such an offer was entitled to attorney's fees under Title VII's fee-shifting statute. Aynes v. Space Guard Prods., Inc., 201 F.R.D. 445, 450-51 (S.D. Ind. 2001).

The Fourth Circuit recently held where the plaintiffs were successful on their motion for a preliminary injunction, and the defendant then took action that rendered the claims moot, so that the plaintiffs dismissed their complaint, that the preliminary injunction did not constitute a judgment on the merits that would warrant an award of attorneys' fees by the court. Smyth, 282 F.3d at 276-77. Further, since the plaintiffs did not ask the court to enter a dismissal order that retained jurisdiction to enforce the order, as Kokkonen requires, the Fourth Circuit held that the settlement agreement and order of dismissal did not give the district court jurisdiction to rule upon plaintiffs' motion for attorneys' fees. Id. at 285.

The Federal Circuit recently upheld the Merit System Protection Board's determination that where an agency unilaterally reversed the suspension of a federal employee, that Buckhannon precluded the employee from obtaining attorney's fees, since there was no "court-ordered change in the legal relationship of the parties to permit an award." Sacco v. Department of Justice, 317 F.3d 1384, 1386 (Fed. Cir. 2003).

B. 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 1999).

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. See, e.g., Thomas v. National Football League Players Ass'n, 273 F.3d 1124, 1127-28 (D.C. Cir. 2001); 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").

For example, Thomas involved three plaintiffs with race and gender discrimination and retaliation claims, but only one of whom was successful, receiving $73,390.60 in back pay and fringe benefits. Thomas, 273 F.3d at 1127. The employer appealed the fee award of $338,000, which itself was reduced by the district court from the plaintiff's original request of $563,637, based on the attorney's limited success. Id. The D.C. Circuit affirmed the award, agreeing with the district court that the award "was not 'unreasonable in relation to the overall result achieved' given the length of the litigation and the 'dilatory' defense waged." Id. at 1129. The D.C. Circuit further concluded "that the fees awarded are, as the district court acknowledged, 'nearly five times the amount of plaintiff's recovery,' does not make them excessive." Id. (citing City of Riverside v. Rivera, 477 U.S. 561, 576 (1986)).

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").

C. Attorney's Fees Under the DCHRA.

The DCHRA provides for the "payment of reasonable attorney fees." D.C. Code Ann. § 2-1403.13(a)(1)(E). Unlike Title VII, the DCHRA does not appear to provide for attorney's fees to a prevailing defendant.

There are few published decisions involving attorneys fees under the DCHRA, as opposed to Title VII. The D.C. courts have applied the same analysis used in Title VII attorney's fee litigation, see Part V.D, *infra*, to the DCHRA. See, e.g., Goos v. National Ass'n of Realtors, 74 F.3d 300 (D.C. Cir. 1996) (per curiam); Goos v. National Ass'n of Realtors, 68 F.3d 1380 (D.C. Cir. 1995). The D.C. Office of Human Rights' guidelines also follow these standards. See 4 D.C.M.R. § 213.1 to § 213.8, available online at <http://ohr.dc.gov/pdf/guidelines.shtm> or <http://ohr.dc.gov/main.shtm>.

D. 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 [42 U.S.C.] . . . 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) (emphasis added) (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") (citations and quotation marks omitted).

E. The Attorney's Fee Petition.

The successful plaintiff then has the burden of preparing her fee petition, which must be submitted within fourteen days after the jury verdict. Rule 54(d)(2)(B), Fed. R. Civ. P.; Rule 54(d)(2)(B), D.C. Sup. Ct. R. — Civ. The Local Civil Rules of the federal courts also provide guidance concerning the contents of the fee petition and the recoverable costs.

The fee petition ordinarily comprises the following documentation: (1) a legal memorandum setting forth the legal standard(s) for awarding attorneys' fees and costs under the applicable statutes and summarizing the work for which recovery is sought; (2) affidavit(s) prepared by plaintiff's counsel, describing in detail the nature of the work performed and the professional qualifications of the attorneys; (3) billing statements in which the hours are categorized by litigation phase; and (4) receipts justifying the costs for which recovery is sought.

Attorneys' fees are to be determined by the "lodestar" method, which entails multiplying the number of hours reasonably expended in connection with bringing and prosecution of the complaint by a reasonable hourly rate. The attorneys' fees award produced through application of the lodestar method is presumptively reasonable. See Blanchard v. Bergeron, 489 U.S. 87, 94 (1989); Murphy v. Int'l Union of Operating Eng'rs, 772 F.2d 114, 127-28 (6th Cir. 1985) (holding a court need only consider the reasonableness of the number of hours spent and the reasonable hourly rate, as "such an approach 'will take into account all the relevant factors'").

The hours in the fee petition should be itemized by discrete categories of services performed. The following categories are those used by this firm in employment discrimination cases in the U.S. District Court for the District of Columbia:

A = Initial Consultation, Pre-Suit Settlement Efforts, and EEOC Charge;
B = Complaint and Answer;
C = Initial Disclosures and Discovery;
D = Discovery Follow-up and Discovery-Related Motions;
E = Analysis of Documents Produced in Discovery and Preparation of Case Chronology;
F = Interviewing Witnesses;
G = Depositions;
H = Summary Judgment and Related Motions;
I = Pretrial;
J = Settlement Negotiations;
K = Trial Preparation;
L = Trial;
M = Post-Trial;

N = Attorneys Fee and Bill of Costs.

These categories can be revised as necessary, such as incorporating a motion to dismiss or an interlocutory appeal. It should be noted that the U.S. District Court for the District of Maryland requires the use of an alternate scheme, with ten categories. See Appendix B to Local Rules (D. Md.) (July 2001).

The legal memorandum should provide a summary description of the hours expended in each category. The memorandum should also explain the extent to which recovery is not being sought for a certain level of hours, such as time expended on claims that were dismissed, in an exercise of billing discretion. The memorandum should also explain, with citations to relevant correspondence or pleadings, examples of defendants' litigation conduct that needlessly caused plaintiff's counsel to expend additional time on activities that could have been obviated, such as preparing a successful motion to compel, or responding to baseless evidentiary objections raised by defendants.

Plaintiff's counsel may seek payment at market rates for their legal services. Covington v. District of Columbia, 57 F.3d 1101 (D.C. Cir. 1995); Save Our Cumberland Mountains v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988) (en banc) ("SOCM"); and Hotel & Restaurant Employees, Local 25 v. JPR, Inc., 136 F.3d 794 (D.C. Cir. 1998). The prevailing market rates for the District of Columbia are set out in the "Laffey" fee-matrix which is promulgated by the United States Attorneys' Office, and updated annually by that office. The Laffey matrix is online at: <http://www.usdoj.gov/usao/dc/laffey/laff9203.html>. The current Laffey rates for June 1, 2002 through May 31, 2003 are $100 per hour for paralegals and lawclerks; $175 per hour for attorneys with 1-3 years' experience; $215 per hour for 4-7 years' experience; $265 per hour for 8-10 years' experience; $325 per hour for 11-19 years' experience; and $370 per hour for 20 or more years' experience.[3]

Invariably, an employment discrimination case will require several years to litigate, from the filing of an administrative charge through the jury verdict. Plaintiffs should request reimbursement for all time expended at current rates, in order to compensate them for the delay in payment. As the Supreme Court has noted, use of current rates is an appropriate method for compensating counsel for the delay in payment. Missouri v. Jenkins, 491 U.S. 274, 283-84 (1989) ("an appropriate adjustment for delay in payment — whether by application of current rather than historic hourly rates or otherwise — is within the contemplation of the statute."). Indeed, use of current rates is the most common method of compensating for delay in payment of

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[3] Some courts have recognized that the Laffey rates do not reflect the actual market rates for legal services in the Washington, D.C. metropolitan area, and instead awarded rates of $444 per hour (1999-2000) to $466 per hour (2000-2001) for senior attorneys. See North Carolina Alliance for Transp. Reform, Inc. v. U.S. Dep't of Transp., 168 F. Supp. 2d 569 (M.D.N.C. 2001) (environmental claims litigated by D.C. attorneys); Salazar v. District of Columbia, 123 F. Supp. 2d 8 (D.D.C. 2000) (Section 1983 claims).

attorneys' fees, presumably because of ease of administration. See Loranger v. Stierheim, 3 F.3d 356, 361 n. 3 (11th Cir. 1993) ("Although [plaintiff] suggests enhancing the lodestar to account for delay, we believe the better view in light of Jenkins is simply to apply current rather than historic rates."); Sierra Club v. EPA, 769 F.2d 796, 809-10 (D.C. Cir. 1985) (allowing prevailing party to obtain rates based on evidence of hourly rates at the time of their fee petition); Murray v. Weinberger, 741 F.2d 1423, 1433 (D.C. Cir. 1984) ("Using current market rates to calculate the lodestar figure may counterbalance the delay in payment as well as simplify the task of the district court."); Smith v. Roher, 954 F. Supp. 359, 364 (D.D.C. 1997) ("In Jenkins, the [Supreme] Court sanctioned an adjustment for delay, and our Circuit has approved the use of current hourly rates to calculate attorneys' fees awards.").

There has developed a comprehensive body of attorneys' fees law under the Civil Rights Act of 1976, 42 U.S.C. § 1988, which the Supreme Court has stated should be applied uniformly under all fee-shifting federal statutes. Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 478 U.S. 546, 560 (1986). In Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), the Supreme Court observed that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." If the "plaintiff has obtained excellent results," then her

> attorney should recover a fully compensatory fee. Normally this will encompass **all hours reasonably expended on the litigation**, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances **the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.**

Hensley, 461 U.S. at 435 (emphasis added); accord Goos, 74 F.3d at 302. The year after Hensley was decided, the Supreme Court in Blum v. Stenson, 465 U.S. 886 (1984), held that "reasonable fees" in 42 U.S.C. § 1988 cases:

> . . . are to be calculated according to prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel.

Id. at 895. The relevant market for fee awards under federal fee-shifting statutes is the market for complex federal litigation such as antitrust cases. See id. at 893 (quoting S. Rep. No. 94-1011, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5913)). The D.C. Circuit, sitting en banc, made Blum's holding applicable to attorneys in private practice who provide legal services at below-market rates for non-economic reasons:

> [T]he prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals.

SOCM, 857 F.2d at 1524. Thus, the D.C. Circuit approved the use of the aforementioned fee-matrix first used in Laffey v. Northwest Airlines and urged that it be developed and expanded to recover "other relevant years" to simplify the fee-setting process. Id. at 1525.

Work on the fee petition itself is, of course, compensable. The D.C. Circuit recently echoed the Supreme Court's observation that a fee petition "should not result in a second major litigation." Covington, 57 F.3d at 1107. Because the burden is on the fee applicant to establish the appropriate rate and the reasonableness of the time expended, id., the plaintiffs' fee petition will necessarily be a substantial submission.

The prevailing party can also recover litigation costs through the fee petition. In the SOCM panel decision, which remained undisturbed by the subsequent en banc decision, Judge Bork confirmed that prevailing plaintiffs are entitled to recover "incidental expenses of attorneys that are routine to all litigation and routinely billed to private clients." Save Our Cumberland Mountains v. Hodel, 826 F.2d 43, 54 (D.C. Cir. 1987) (citing Sierra Club v. EPA, 769 F.2d 796, 812 (D.C. Cir. 1985) (construing wording identical with Title VII to allow routine attorney expenses beyond those taxable by statute.)). These costs are in addition to those recoverable under Rule 54(d)(1), Fed. R. Civ. P., and 28 U.S.C. § 1920, for which a separate bill of costs must be submitted. The Local Rules for the U.S. District Courts provide further guidance on allowable costs recoverable through the bill of costs.

VI. Compensatory Damages.

Compensatory damages generally include emotional distress damages and lost future earnings (as distinct from front pay, supra), but not front pay or back pay. 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 harassment 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). 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 damage awards based upon the employer's size. 42 U.S.C. § 1981a(c)(2). There are no caps to compensatory damages under the DCHRA.

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"), aff'd in relevant part, 195 F.3d 654 (D.C. Cir. 1999) (per curiam) 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 since 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.").

The Michigan Court of Appeals recently upheld a $21 million compensatory damages jury verdict for a single plaintiff (i.e., $20 million for emotional damages and $1 million for future medical expenses) in a particularly egregious sexual harassment case brought under the Michigan Civil Rights Act. This case involved pervasive and extremely crude harassment of a automobile factory employee, by known and anonymous perpetrators. The appellate court's affirmance of the trial court's denial of defendant's motion for a new trial or remittitur is illustrative of the deference accorded in the determination of compensatory damages in response to the defendant's request for remittitur:

> Strictly speaking, the test for remittitur examines whether the evidence submitted to the jury that decided the case will support the award. While some opinions make fleeting reference to comparable jury awards, the core analysis remains focused on the evidence in the case at bar. Jury awards in different cases involving wholly unrelated facts are not particularly germane to whether the trial court erred in denying remittitur, especially when the awards cited were given many years ago.
>
> It certainly is possible that a different jury would have reacted differently to the evidence in this case and might have given Gilbert a smaller award. However, the jury in this case could have found compelling Gilbert's evidence that she would die an untimely death because of the effects of the harassment that Chrysler knew existed and did nothing to stop. Alternatively, the jury could have found persuasive Gilbert's evidence that her life was and would be completely joyless because the harassment had caused her to develop major depressive and post-traumatic stress disorders, changing the fundamental chemistry in her brain. Hnat

> also provided testimony explaining the high costs of treatment Gilbert is likely to incur in the future. All these factors, as well as the length of the harassment, might have contributed to the high award. The precise amount of appropriate damages is often an elusive figure that cannot be calculated with simple mathematical equations, which is why the law requires only a reasonable approximation by the jury. That the jury exercised its independence by awarding Gilbert only about fifteen percent of the $140,000,000 Feiger said was appropriate suggests that it decided the amount of the award on how it perceived the evidence the parties presented, not because of passion, bias, or misunderstanding. Like the jury, the trial court heard all the evidence and decided that it supported the jury's award. Giving the trial court the deference it is surely due, it is impossible to say that the trial court abused its discretion in reaching this conclusion.

Gilbert v. DaimlerChrysler Corp., No. 227392, 2002 WL 1767672, at *31 (Mich. Ct. App. July 30, 2002) (per curiam); see also A. Liptak, "Pain-and-Suffering Awards Let Juries Avoid New Limits," N.Y. Times, Oct. 28, 2002, at A-14 (discussing this case).

VII. Punitive Damages.

The purpose of punitive damages "is to punish unlawful conduct and to deter its repetition." Daka, Inc. v. Breiner, 711 A.2d 86, 98 (D.C. 1998) (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 567 (1996)). It is not surprising that punitive damages have seemingly generated more controversy, and more appellate decisions, than other remedies available to employment discrimination plaintiffs.

A. Burden of Proof and Evidentiary Standard.

In order to obtain punitive damages, the plaintiff must first prove, by a preponderance of the evidence, that the defendant committed a tort that injured the plaintiff. See, e.g., Butera v. District of Columbia, 235 F.3d 637, 657 (D.C. Cir. 2001); District of Columbia v. Jackson, 810 A.2d 388, 396 (D.C. 2002).

If this threshold is met, the plaintiff must then prove, by the requisite burden of proof, that the defendant acted with the requisite state of mind. It is at this stage that the standards under Section 1981, Title VII, and the DCHRA diverge regarding the burden of proof and the state of mind, as summarized in the following table:

Statute	Burden of Proof for Punitive Damages	Evidentiary Standard for Imposing Punitive Damages
Title VII	preponderance of the evidence	malice or reckless indifference to plaintiff's legal rights
DCHRA	clear and convincing evidence	willful and outrageous conduct aggravated by evil motive, actual malice, or with callous and reckless indifference to plaintiff's legal rights
Section 1981 (D.C. Circuit)	preponderance of the evidence	finding of intentional discrimination
Section 1981 (Fourth Circuit)	preponderance of the evidence	egregious misconduct beyond mere intent to discriminate, i.e., conduct exhibiting malice, an evil motive, or recklessness or callous indifference to a federally protected right

B. Punitive Damages Under Title VII.[4]

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).

The Supreme Court, in Kolstad, resolved a split in the circuit courts as to the appropriate standard for awarding punitive damages under Title VII. Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999). The Kolstad decision, written by Justice O'Connor, has two distinct components regarding punitive damages under Title VII:

(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, 527 U.S. at 533-39. Specifically, 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. Id.

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[4] Although this chapter is limited to punitive damages under Title VII, Section 1981, and the DCHRA, it must be emphasized that such damages are available for other federal statutory claims only if the underlying statute expressly provides for punitive damages, or was otherwise not enacted pursuant to the Spending Clause (as part of congressional power to attach conditions to the receipt of federal grants).

Thus, the Supreme Court recently held that punitive damages are not available for public accommodation claims under the ADA and the Rehabilitation Act, since those provisions were enacted pursuant to the Spending Clause. See Barnes v. Gorman, 536 U.S. 181, ___, 122 S. Ct. 2097, 2103 (2002) (affirming district court's vacation of jury verdict of $1.2 million in punitive damages for public accommodation claims under the ADA and the Rehabilitation Act). This decision does not affect claims for punitive damages under the employment discrimination provisions of the ADA, since those provisions were not enacted pursuant to the Spending Clause.

(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 545.

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 541-42. The Restatement (Second) of Agency, § 218C, "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 542. 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. at 543 (quoting Restatement (Second) of Agency, § 218C(c)). The problem with the Restatement's 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 544 (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. 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 546. As it happened, Ms. Kolstad's case settled shortly before a new trial on punitive damages.

Intentional discrimination, which is what a jury must find in order to return a judgment for plaintiff for compensatory damages, necessarily suggests that defendants discriminated in the face of a perceived risk that their conduct was unlawful. Since Kolstad, therefore, the federal courts have explained that, should the plaintiff raise sufficient evidence of intentional discrimination to send that issue to the jury, then the issue of punitive damages should also be sent to the jury. "[I]n general, intentional discrimination is enough to establish punitive damages liability." Hemmings v. Tidyman's Inc., 285 F.3d 1174, 1198-99 (9th Cir. 2002) (reversing

district court's ruling that evidence was insufficient to support the jury's award of punitive damages as a matter of law). In Alexander v. Riga, 208 F.3d 419, 431 (3d Cir. 2000), the court discussed the post-Kolstad standard for punitive damages liability, ultimately holding that the district court erred by sending failing to send the issue of punitive damages to the jury along with the issue of liability. The court commented that "because the jury's finding of a violation under the Fair Housing Act necessarily encompasses a finding of intentional discrimination, the plaintiffs need not also demonstrate that the conduct was particularly egregious or malicious in order to obtain punitive damages. . . . Indeed, recklessness and malice may be inferred [from the statutory violation]." Id.

Since Kolstad, the federal appellate courts have also recognized that the standard for punitive damages is satisfied where the defendant discriminates "in the face of a perceived risk that its actions will violate federal law." See, e.g., Romano v. U-Haul Intern., 233 F.3d 655, 669 (1st Cir. 2000); Cush-Crawford v. Adchem Corp., 271 F.3d 352, 356 (2d Cir. 2001); Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 442 (4th Cir. 2000); Preferred Properties, Inc. v. Indian River Estates, Inc., 276 F.3d 790, 799 (6th Cir. 2002); Hertzberg v. SRAM Corp., 261 F.3d 651, 661 (7th Cir. 2001); Otting v. J.C. Penney Co., 223 F.3d 704, 711 (8th Cir. 2000); Hemmings v. Tidyman's Inc., 285 F.3d 1174, 1198 (9th Cir. 2002); Dilley v. SuperValu, Inc., 296 F.3d 958, 966 (10th Cir. 2002); EEOC v. W&O, Inc., 213 F.3d 600, 611 (11th Cir. 2000); see also Bolden v. J&R, Inc., Civ. No. 99-1255(GK), 2001 WL 1910561, at *3 (D.D.C. Mar. 1, 2001) ("This standard [for punitive damages] is met upon a showing of discrimination 'in the face of a perceived risk that [a defendant's] actions will violate federal law.'") (quoting Kolstad)

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." At the same time, defendants are in a quandary, since asserting the Kolstad defense "would open the door to proof of other employment discrimination cases against [defendant]." Estes, 231 F. Supp. 2d at 284 n.7. Since the Kolstad Court did not define the scope or baseline for such efforts, the lower courts will struggle to draw the line in this area.

The courts are split as to whether a plaintiff can obtain punitive damages under Section 1981a absent 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) (there is "no reason [that] comes to mind for reading a compensatory-punitive link into Section 1981a"); accord Salitros v. Chrysler Corp., 306 F.3d 562 (8th Cir. 2002) (ADA claim); 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).

C. Punitive Damages Under the DCHRA.

The D.C. Court of Appeals has determined that the burden of proof for the award of punitive damages for tortious conduct is by clear and convincing evidence:

> We are persuaded by the growing majority of jurisdictions deciding the issue that we should adopt the requirement that proof by clear and convincing evidence must be shown in order to receive an award of punitive damages.

Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 937 (D.C. 1995), reh'g denied, 681 A.2d 1097 (D.C. 1996) (per curiam) ("Woodner"); Jackson, 810 A.2d at 396 (discussing "'more stringent' proof requirement of clear and convincing evidence"); see also Standardized Jury Instructions for the District of Columbia, Inst. 16-1 (2002). This burden of proof has been followed by federal courts applying District of Columbia law for punitive damages awards. See, e.g., National Tel. Coop. Ass'n v. Exxon Corp., 38 F. Supp. 2d 1, 17 (D.D.C. 1998) (citing Woodner).

Therefore, the courts have held that the burden of proof for punitive damages under the DCHRA is that of "clear and convincing evidence." See Daka, 711 A.2d at 99 ("clear and convincing evidence was the proper evidentiary standard for determining the requisite state of mind" under DCHRA); see also United Mine Workers of Am., Int'l Union v. Moore, 717 A.2d 332, 341-42 (D.C. 1998) (clear and convincing evidence).

The D.C. Court of Appeals has clarified the requisite level of intent and conduct to justify the award of punitive damages for general tortious conduct. The Woodner court held that:

> . . . in order to sustain an award of punitive damages, the plaintiff must prove, by a preponderance of the evidence, that the defendant committed a tortious act, and by clear and convincing evidence that the act was accompanied by conduct and a state of mind evincing malice or its equivalent.

Woodner, 665 A.2d at 938. As the D.C. Court of Appeals previously stated:

> Punitive damages are warranted only when the defendant commits a tortious act "accompanied with fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard of the plaintiff's rights, or other circumstances tending to aggravate the injury."

Washington Med. Ctr., Inc. v. Holle, 573 A.2d 1269, 1284 (D.C. 1990) (citations omitted); see also Woodner, 665 A.2d at 938; National Tel. Coop., 38 F. Supp. 2d at 17 (defendant's actions must be "wanton, reckless, or in willful disregard for another's rights").

The evidentiary standard for punitive damages under the DCHRA requires the plaintiff to prove, by clear and convincing evidence, that the defendant's conduct (1) was motivated by

intentional, discriminatory conduct that injured plaintiff; (2) was willful and outrageous; and (3) was aggravated by evil motive, actual malice, or with callous and reckless indifference to the plaintiff's legal rights. Barbour, 48 F.3d at 1277; Arthur Young, 631 A.2d at 371-73.

The plaintiff need not prove evil motive or actual malice by direct evidence to justify punitive damages. See Vassiliades v. Garfinckel's, 492 A.2d 580, 593 (D.C. 1985) ("Direct evidence of malicious intent is not required; malice and wrongful motive may be inferred from the acts of a party and circumstantial evidence"). Thus, the D.C. Court of Appeals stated that:

> The requisite state of mind need not (and usually cannot) be proven by direct evidence, but may be inferred from all the facts and circumstances of the case.

Robinson v. Sarisky, 535 A.2d 901, 906 (D.C. 1988) (citations omitted); see also Washington Med. Ctr., 573 A.2d at 1284 (recognizing that "direct proof will rarely be available"). Based on the foregoing analysis, the courts have applied the same evidentiary standards for proving the requisite level of intent (mens rea) and conduct (actus reus) under the DCHRA. This "showing" under the DCHRA is consistent with the general law "governing punitive damages in the District of Columbia courts." Arthur Young, 631 A.2d at 372 (recognizing that the "requisite state of mind need not (and usually cannot) be proven by direct evidence, but may be inferred from all the facts and circumstances of the case") (quoting Robinson, 535 A.2d at 906). Since the evidentiary burden of proof governing punitive damages under the DCHRA is concordant with that for general tortious conduct, then the discrimination plaintiff can prove the defendants' state of mind by inference from the surrounding circumstances.

The plaintiff must prove compensatory or economic damages in order to qualify for punitive damages under the DCHRA. However, nominal damages alone are sufficient to justify the award of punitive damages:

> We think the essence of our case law is this: A plaintiff must prove a basis for actual damages to justify the imposition of punitive damages. **The amount of such damages may be nominal, stemming from the difficulty of quantifying them or from some other cause.** But without proof of at least nominal damages, punitive damages may not be awarded.

Maxwell v. Gallagher, 709 A.2d 100, 104 (D.C. 1998) (footnote omitted) (emphasis added).

Since the DCHRA does not have statutory caps on punitive damages, the D.C. courts have looked to whether the jury's award was so "grossly excessive as to deprive [the employer] of due process of law." Daka, 711 A.2d at 101. Thus, the D.C. Court of Appeals has applied the Supreme Court's Gore decision (discussed *infra*, for Section 1981) to determine whether a $390,000 punitive damages award under the DCHRA was excessive as a matter of law, which requires an analysis of the underlying discriminatory conduct, and of the size of the award in relation to the compensatory damage award and the defendant's total income:

> First, a reasonable jury could surely find that Daka's conduct in this case was sufficiently reprehensible to merit a sizable sanction. The evidence showed that an unprofessional atmosphere of insult and ridicule permeated Daka's worksite. Most of the harmful conduct in this case involved upper management, *i.e.,* Mr. Sakell; those incidents not directly involving Sakell could not have escaped Daka's notice. When Breiner complained to Sakell about his remarks and told him that they were unlawful, Sakell's response was to continue the insults. The trial court concluded that Breiner "was subjected to severe and pervasive abusive conduct" and that Sakell's actions "substantially diminished [Breiner's] ability to be effective, let alone comfortable or fulfilled."
>
> Second, Breiner was found to have actually suffered in the amount of $10,000. While the ratio of punitive to compensatory damages, thirty-nine to one, may "raise a suspicious judicial eyebrow," TXO, 509 U.S. at 481, 113 S. Ct. at 2732 (O'Connor, J., dissenting), the Supreme Court in TXO upheld an award of $19,000 in compensatory damages and $10 million in punitive damages, a ratio of more than five hundred to one. In Gore, on the other hand, the Court reversed an award of $4,000 in actual damages and $2 million in punitive damages, a ratio of five hundred to one. Read together, TXO and Gore reaffirm what the Court said in Haslip: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." 499 U.S. at 18, 111 S. Ct. at 1043. Moreover, Sakell testified that Daka made $8.5 million a year at the three Smithsonian sites *alone.* As the trial court noted, the $390,000 punitive damages award represents a mere 2.9 percent of Daka's income from the Smithsonian during the time of Breiner's employment. Because it is so small in relation to Daka's total income, we conclude that it does not "exceed the boundaries of punishment and lead to bankruptcy." Jonathan Woodner, 665 A.2d at 941.
>
> Third, we look to the difference, if any, between the punitive award and the civil or criminal penalties authorized. . . . Of course, the total amount of damages awarded here, $400,000, is above the maximum available under Title VII. But because of the need to deter future misconduct of the sort presented on this record, we think the additional $100,000 is not so excessive as to render the jury's award unconstitutional, especially when there is no ceiling on the damages available under the 1866 and 1870 Civil Rights Acts on which the DCHRA is also based.

Daka, 711 A.2d at 101-02.

In order to find a defendant corporation or other entity liable for punitive damages under the DCHRA for the tortious acts of its employees, the plaintiff must show "that the wrongful act was authorized and ratified by the corporation, not merely perpetrated by an employee."

Remeikis v. Boss & Phelps, Inc., 419 A.2d 986, 992 (D.C. 1980) (citations omitted); see also Standardized Jury Instructions for the District of Columbia, Inst. 16-2 (2002).

The corporate ratification requirement is satisfied where corporate officers participated in or approved of the tortious conduct. Remeikis, 419 A.2d at 992 (ratification present if "an executive officer of high rank participated in the misconduct"); Woodard v. City Stores Co., 334 A.2d 189, 191 (D.C. 1975) (ratification present if "some additional indication of approval" is found). The D.C. courts have applied this ratification requirement to determine a corporate defendant's liability for punitive damages under the DCHRA, based upon the discriminatory acts of its employees. See Pendarvis, 3 F. Supp. 2d at 57 (requiring ratification by corporate defendant); Gregg, 942 F. Supp. at 10 (same).

D. 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.

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). A district court in the Seventh Circuit has similarly applied BMW to reduce the jury's award of punitive damages under Section 1981, 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, 835 (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. At present, neither condition applies to punitive damages under the DCHRA. 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, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (Ohio 1999).

E. Defendants' Net Worth and Punitive Damages.

Evidence regarding a defendant's net worth is not only relevant, but highly important to the jury's correct calculation of punitive damages. The D.C. Circuit has explained that "when punitive damages are to be awarded, the jury's knowledge of the financial capabilities of the defendants is important to the administration of justice." Faison v. Nationwide Mortg. Corp., 839 F.2d 680, 691 (D.C. Cir. 1987). As the Supreme Court held:

> [Defendant] also contends that the admission of evidence of its alleged wrongdoing in other parts of the country, as well as the **evidence of its impressive net worth,** led the jury to base its award on impermissible passion and prejudice. . . . Under well-settled law, however, factors such as these are **typically considered in assessing punitive damages.**

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 462 n.28 (1993); accord Jones v. Ebrahimi-Zanganeh, Civ. No. 87-0094 (JGP), 1987 WL 25425, at *2 (D.D.C. Nov. 19, 1987) ("If the jury should find for the plaintiffs, then it is likely that the issue of punitive damages would also be considered; thus, the defendant's net worth is relevant."). Hence, the D.C. courts have recognized the principle of discoverability of defendant's net worth and related financial information. See, e.g., Floyd-Mayers v. American Cab Co., 130 F.R.D. 278, 279 (D.D.C. 1990) (ordering defendant "to answer the plaintiffs' inquiries about its financial status"); aff'd, C.A. No. 89-1777(CRR), 1990 WL 116855, at *1 (D.D.C. July 30, 1990) ("the Court concludes that under the discovery rules the plaintiffs must be permitted to obtain an accurate picture of American's true net worth"); Curry v. Giant Food Co., 522 A.2d 1283, 1290 (D.C. 1987) ("It is true that in cases where punitive damages are sought, testimony with respect to the financial assets of a particular defendant may be received.").

The federal appellate courts, in applying state law to punitive damage awards arising under statutory or common law claims, have similarly held that evidence of defendants' net worth is relevant and admissible so that the trier of fact may make a proper determination of the

exact level of punitive damages to be awarded. See, e.g., Graef v. Chemical Leaman Corp., 106 F.3d 112, 119 (5th Cir. 1997) ("Generally, evidence of a defendant's worth or income is admissible in determining the proper level of punitive damages."); Dunn v. HOVIC, 1 F.3d 1371, 1384 (3d Cir. 1993) (en banc) (under Virgin Islands law, "ability to pay . . . is a relevant factor in assessing punitive damages awards"); Capstick v. Allstate Ins. Co., 998 F.2d 810, 821 (10th Cir. 1993) ("Under Oklahoma law, the net worth of a defendant may be considered in assessing punitive damages."); Id. at 823 ("In order to have a deterrent effect, the damage award must be sufficient to attract the attention of the defendant in order to assure that oppressive practices do not continue."); Ramsey v. Culpepper, 738 F.2d 1092, 1099 (10th Cir. 1984) (applying New Mexico law; "evidence of a party's financial condition . . . . is admissible for the purpose of fixing the amount of punitive damages."); Brink's Inc. v. City of New York, 717 F.2d 700, 706-07 (2d Cir. 1983) ("Under New York law evidence of a defendant's wealth is admissible on the issue of the amount of punitive damages.").[5]

The federal district courts have reached the same conclusion. See, e.g., Softel, Inc. v. Dragon Med. & Scientific Communications Ltd., 891 F. Supp. 935, 945 (S.D.N.Y. 1995) ("Because the object of punitive damages is to punish the defendant, it is appropriate for the trier of fact to consider the defendant's financial circumstances in determining the amount of punitive damages."), aff'd and remanded on other grounds, 118 F.3d 955 (2d Cir. 1997); Lee v. Junior College Dist., 67 FEP Cases 859, 860 (E.D. Mo. 1994) (under Missouri Human Rights Act, "evidence of net worth is admissible in making an assessment as to the amount of punitive damages"); Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co., 809 F. Supp. 400, 404 (D.S.C. 1992) ("the defendant's ability to pay is a factor that may be used in establishing an award"), aff'd 989 F.2d 492 (4th Cir. 1993) (table); Mid Continent Cabinetry, Inc. v. George

[5] The state appellate courts are in agreement. See, e.g., Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 29 (Tex. 1994) ("evidence of a defendant's net worth is relevant in determining the proper amount of punitive damages, and therefore may be subject to pretrial discovery"); Lenz v. CNA Assurance Co., 630 A.2d 1082, 1083 (Conn. Super. Ct. 1993) ("Once deterrence rather than compensation becomes the focus of [statutory] punitive damages, however, then the financial standing of the party against whom damages are sought becomes relevant and material."); Adams v. Murakami, 813 P.2d 1348, 1351 (Cal. 1991) ("A reviewing court cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of the defendant's financial condition. . . . we have repeatedly examined punitive damage awards in light of the defendant's financial condition.") (citations omitted); Id. at 1352 ("However, when provided with evidence of a defendant's financial condition, the reviewing court can at least reach a reasonably informed decision. Without such evidence, a reviewing court can only speculate as to whether the award is appropriate or excessive."); Harrell v. Old American Ins. Co., 829 P.2d 75, 81 n.6 (Okla. Ct. App. 1991) (defendant's wealth "is an element which certainly may be considered by the jury in assessing punitive damages under Oklahoma law"); Strauss v. Biggs, 525 A.2d 992, 1000 (Del. Super. Ct. 1987) ("Evidence of the defendant's wealth is admissible to enable the jury to assess a penalty which will appropriately punish and deter.").

Koch Sons, Inc., 130 F.R.D. 149, 151 (D. Kan. 1990) ("Information of defendant's net worth or financial condition is relevant in this case because it can be considered in determining punitive damages."); Vollert v. Summa Corp., 389 F. Supp. 1348, 1351 (D. Haw. 1975) ("plaintiff has shown that his claim for punitive damages is not spurious . . . . Therefore, it is not premature for plaintiff to demand discovery of any financial information relevant to the question of punitive damages.").

Several important goals are achieved by the jury's consideration of evidence regarding a defendant's net worth. On the plaintiff's side, the jury's consideration of a defendant's net worth aids the setting of a punitive damages amount which will have a deterrent effect on defendant's conduct, the purpose of punitive damages. On the defendant's side, evidence regarding its net worth informs the jury of its ability to pay a punitive damages award, so that such an award is not set at a level that could bankrupt the defendant. As the D.C. Court of Appeals commented, these two considerations require introduction of evidence regarding a defendant's net worth:

> Because the purpose of punitive damages is to punish a tortfeasor and deter future conduct, the amount of such damages should be enough to inflict punishment, while not so great as to exceed the boundaries of punishment and lead to bankruptcy. "The purpose of punitive damages is to punish defendants and serve as a deterrent . . . the award of punitive damages should only hurt but not bankrupt a defendant." Therefore, since current net worth fairly depicts a tortfeasor's ability to pay punitive damages, the plaintiffs here were required to present sufficient proof of current net worth to support the punitive damages awarded by the jury.

Woodner, 665 A.2d at 941 (internal citations omitted); see also Standardized Jury Instructions for the District of Columbia, Inst. 16-3 (2002) (listing net worth as a factor to be considered in jury's calculation of an appropriate punitive damages award).

Thus, 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 this evidence is diametrically opposed under Title VII and the DCHRA.

The federal courts, for federal statutory claims, 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. Woodner, 665 A.2d at 941 n.19.

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 minimize any potential punitive damage award under Title VII. If the plaintiff knows that the defendant is comparatively 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.

VIII. 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").

IX. Taxation of Damages.

A. The Statutory Problem and Proposed Legislative Relief.

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. note (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); see also F.M. Gittes, "Taxing Our Civil Rights," 1 Employee Rights Q. 47 (2000); L. Sager & S. Cohen, "How the Income Tax Undermines Civil Rights Law," 73 S. Cal. L. Rev. 1075 (2000).

Prior to 1996, the courts 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), the "Civil Rights Tax Relief Act of 2001" was introduced in early 2001; since this legislation did not pass, it will be reintroduced in the current congressional session. This legislation 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," which includes compensatory damages for emotional distress and attorney's fees. At the same time, these bills would not exclude back pay, front pay, or punitive damages from taxable income. Instead, these bills 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.[6]

The outcome of this proposed legislation would be as follows:

Damages	**Taxable or Excluded?**	**If Taxable, Income Averaging?**
Compensatory damages for emotional distress	Excluded	n/a
Attorney's fees	Excluded	n/a
Back pay	Taxable	Yes
Front pay	Taxable	Yes
Punitive damages	Taxable	No

B. Taxation of Attorney's Fees.

Meanwhile, a majority of the federal circuit courts have held that a contingent fee award payable to the attorney is taxable income to the plaintiff, thereby resulting in double-taxation as both the plaintiff and the attorney pay taxes on the same income. As of January 2003, the First, Third, Fourth, Seventh, Ninth, Tenth, and Federal Circuits have sided with the IRS; the Fifth, Sixth and Eleventh Circuits have instead held that contingent fees are not taxable to the plaintiff.

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[6] The National Employment Lawyers Association website discusses the rationales and history of this legislation. See "Civil Rights Tax Relief Act: Tax Equity for Targets of Discrimination" <http://www.nela.org/news/civilrightstaxrelief.htm>. Comparable legislation was recently enacted under the D.C. tax code, for plaintiffs who are D.C. residents. See D.C. Code Ann. §§ 47-1803.02(a)(U), 47-1806.10 (Supp. 2003) (retroactive to Jan. 1, 2001).

See W.C. Smith, "No Closure on Contingent-Fee Tax Issue; Justices Refuse to Resolve Circuit Split for Third Time in Two Years," ABA Journal, E-Report (May 24, 2002). The D.C., Second and Eighth Circuits have not yet ruled on this issue.

As a result, the IRS has revised its reporting regulations, which now require that a defendant who pays attorney's fees to a plaintiff must file an IRS Form 1099, reporting this payment as being made to both the attorney and the plaintiff. See 26 C.F.R. § 1.6041-1 (2003); IRS, "Information Reporting Requirements for Certain Payments Made on Behalf of Another Person, Payments to Joint Payees, and Payments of Gross Proceeds from Sales Involving Investment Advisors," 67 Fed. Reg. 48,754 (July 26, 2002); see generally IRS, Market Segment Specialization Program, "Lawsuit Awards and Settlements" (2001). The effective date of these so-called "Middleman Regulations" is January 1, 2003. The bottom line is that even if the defendant cuts separate checks to the attorney and to the plaintiff, the plaintiff gets a Form 1099 setting forth the total amount of both checks. See R.W. Wood & J.R. Flora, "New (Final!) Form 1099 Reporting Regs: Attorneys' Fee Regs in Drag?," Tax Notes, Oct. 14, 2002, at 265.

Commentators have recognized that some plaintiffs may be faced with paying taxes on an attorneys' fee award that can exceed their recovery on their claims. See, e.g., A. Liptak, "Tax Bill Exceeds Award to Officer in Sex Bias Suit," N.Y. Times, Aug. 11, 2002, at 12; D.C. Johnston, "A 'Stealth Tax' Is Creeping Up on Growing Numbers of Americans," N.Y. Times, Feb. 17, 2002, § 3, at 17, 19. For that reason, the Court of Appeals of Washington recently held that a plaintiff was entitled, as part of her actual damages in a gender discrimination case under the Washington Law Against Discrimination, to a supplemental judgment to offset the adverse federal income tax consequences arising from the taxation to the plaintiff of the damages and the attorney's fee award. Blaney v. International Ass'n of Machinists & Aerospace Workers, 114 Wash. App. 80, 92-102, 55 P.3d 1208, 1214-18, 90 FEP Cases (BNA) 97 (2002). This decision is now on appeal to the Supreme Court of Washington; as Washington does not have a state income tax, only federal taxes were at issue.

Two recent Title VII cases in the U.S. District Court for the District of Columbia illustrate approaches taken by prevailing plaintiffs to forestall the tax consequences of the taxation of the attorneys' fee award. In Porter v. USAID, the plaintiff initially moved for equitable relief by requesting that the defendant should compensate the plaintiff for taxes owed on the attorneys' fee award, through a "gross-up" of the award. See Plaintiff's Petition for Equitable Relief (June 28, 2002), at 8-10; Defendant's Opposition to Plaintiff's Petition for Equitable Relief (July 12, 2002), at 11-12; Plaintiff's Reply in Support of His Petition for Equitable Relief (July 25, 2002), at 9-11 (attached as Exhibits 1-3, Appendix, *infra*). Judge Robertson's initial ruling recognized that this request "very clearly invokes the 'make whole' equitable powers of this Court." See Memorandum (Sept. 9, 2002), at 4 (attached as Exhibit 4, *infra*). Judge Robertson then noted that Congress may resolve this problem, but if Congress "does not, I will consider whether there is some way of delinking the payment of attorneys fees from the plaintiff himself, and, if there is none, I will give further consideration to a 'grossed up' award." Id. at 4-5.

In Estes v. Georgetown University, the plaintiff moved for indemnification — as opposed to the "gross up" in Porter — for any possible taxation of her attorneys' fees. See Plaintiff's Motion to Amend Judgment and Petition for Equitable Relief (Sept. 19, 2002), at 1-8; Defendants' Opposition to Plaintiff's Motion to Amend Judgment and Petition for Equitable Relief (Sept. 30, 2002), at 1-9; Reply Memorandum in Support of Plaintiff's Motion to Amend Judgment and Petition for Equitable Relief (Oct. 8, 2002), at 1-10 (attached as Exhibits 5-7, *infra*). Judge Robertson ruled that the motion for indemnification was not ripe for consideration, since the attorney's fee determination had not yet been made. Estes, 231 F. Supp. 2d at 286.

Subsequently, the Porter plaintiff submitted a new motion for indemnification. See Plaintiff's Memorandum in Support of Motion (1) for Award of Attorneys' Fees and Costs, and (2) for Order of Indemnification (Feb. 21, 2003), at 6-9 (attached as Exhibit 8, *infra*). In contrast to Mr. Porter's prior "gross up" request, his new motion, similar to that filed in Estes, requests that the defendant indemnify the plaintiff for any tax consequences. Requesting indemnification is probably the better approach, since it is purely equitable, "make whole" relief, whereas a "gross up" contemplates setting the dollar amount of the tax liability in advance, but it is difficult to predict what the IRS will do in any given case.

C. Taxation of Back Pay and Front Pay.

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" for back pay. 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"); see also Jordan v. CCH, Inc., 230 F. Supp. 2d 603, 617 (E.D. Pa. 2002) (awarding $33,124 in damages for negative tax impact of back pay award); O'Neill v. Sears, Roebuck & Co., 108 F. Supp. 2d 443, 446-49 (E.D. Pa. 2000) (plaintiff entitled to additional amount for taxation of front pay and back pay, but not for compensatory or liquidated damages); see generally S.P. Duffy, "Tax Effect Requires Enhanced Age Bias Award," The Legal Intelligencer (Philadelphia), Oct. 8, 2002.

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").

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 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.").

APPENDIX

Exhibit 1 Porter v. USAID, Plaintiff's Petition for Equitable Relief (June 28, 2002).

Exhibit 2 Porter v. USAID, Defendant's Opposition to Plaintiff's Petition for Equitable Relief (July 12, 2002).

Exhibit 3 Porter v. USAID, Plaintiff's Reply in Support of His Petition for Equitable Relief (July 25, 2002).

Exhibit 4 Porter v. USAID, Memorandum (Sept. 9, 2002).

Exhibit 5 Estes v. Georgetown Univ., Plaintiff's Motion to Amend Judgment and Petition for Equitable Relief (Sept. 19, 2002).

Exhibit 6 Estes v. Georgetown Univ., Defendants' Opposition to Plaintiff's Motion to Amend Judgment and Petition for Equitable Relief (Sept. 30, 2002).

Exhibit 7 Estes v. Georgetown Univ., Reply Memorandum in Support of Plaintiff's Motion to Amend Judgment and Petition for Equitable Relief (Oct. 8, 2002).

Exhibit 8 Porter v. USAID, Plaintiff's Memorandum in Support of Motion (1) for Award of Attorneys' Fees and Costs, and (2) for Order of Indemnification (Feb. 21, 2003).

Note: for several of these briefs, only the sections pertaining to taxation of damages are included.