

A large rectangular area with a blue background depicting a calm ocean under a clear sky with light, wispy clouds. The horizon line is visible in the middle of the frame.

Remedies & Attorneys Fees

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Remedies

- Principle Rule in discrimination law is:
 - As nearly as possible, to place the victim of discrimination in the position that person would have occupied but for the discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); 29 CFR 1614.501(a)(3).

Remedies

- The Commission gives its administrative judges broad discretion in fashioning corrective remedies noting that “we recognize that precise measurement cannot always be used to reduce the wrong inflicted,”
- “The burden of limiting the remedy rests with the agency.”
- *Reasor v. Postmaster General*, EEOC Appeal No. 0720070004 (2009).

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Equitable Remedies

- Remedies in place before 1991 Civil Rights Act and compensatory damages:
 - Injunctive relief;
 - Back pay and attendant benefits;
 - Front pay.

Injunctive Relief

- Freezes or restores the status quo
 - Interim relief where case involves removal, separation, or suspension beyond date of appeal. 29 CFR 1624.505.
 - Requires temporary restoration.
 - No back pay or attorney fees during period of interim relief.

Injunctive Relief

- The agency has an obligation to provide notice of interim relief when it files an appeal and when “it failed to give notice, the agency’s appeal was subject to dismissal.”
- *Page v. Secretary of Homeland Security*, EEOC Appeal No. 0720060036 (2008).

Back Pay

- Back pay: Complainant is entitled to back pay from time of loss through to time appointment or promotion.
- *See, e.g., Carmon-Coleman v. Secretary of Defense*, EEOC Appeal No. 04A30030 (2004).

Back Pay

- "The person who has been discriminated against must receive a sum . . . equal to what would have been earned . . . in the employment lost through discrimination (gross back pay) less what was actually earned from other employment . . . after normal expenses incurred in seeking and holding the interim employment have been deducted (net interim earnings). . .

Back Pay

- ". . .The difference between gross back pay and net interim earnings is net back pay due. Net back pay accrues from the date of discrimination, except where the statute limits recovery, until the discrimination against the individual has been remedied.

Back Pay

- "Gross back pay should include all forms of compensation and must reflect fluctuations in working time, overtime rates, penalty overtime, Sunday premium and night work, changing rates of pay, transfers, promotions, and privileges of employment to which the petitioner would have been entitled but for the discrimination. . . .

Back Pay

- “The Commission construes “benefits” broadly to include, *inter alia*, annual leave, sick leave, health insurance, overtime and premium pay, night differentials and retirement contributions. A back pay claimant under Title VII generally has a duty to mitigate damages. The burden is on the agency, however, to establish by a preponderance of the evidence that petitioner has failed to mitigate her damages.

Back Pay

- “The Commission recognizes that precise measurement cannot always be used to reduce the wrong inflicted; nonetheless, the Commission believes that the burden of limiting the remedy rests with the agency. It is the agency’s obligation to ensure that its back pay calculations are clear, supported in the record and in accordance with 29 C.F.R. § 1614.501.”

Back Pay

- Agency must prove failure to mitigate.
- *See, e.g., Secretary of Navy, EEOC Appeal No. 04A20032 (2003).*

Back Pay

- Two-prong test requires agency to show:
 - that petitioner failed to use reasonable care and diligence in seeking a suitable position, and
 - that there were suitable positions available which petitioner could have discovered and for which he or she was qualified.

Back Pay

- Although the agency bears the burden of proof on the mitigation issue, the employee must cooperate and provide the agency with evidence of efforts to secure alternative work. The failure of an agency to notify an employee of his duty to mitigate damages does not excuse the employee from failing to attempt to do so.
- *Source v. Postmaster General*, EEOC Appeal No. 01912228 (1991).

Back Pay

- As a general rule, retirement constitutes a failure to mitigate and cuts off a back pay award.
 - But where there is “a direct link between complainant’s age, retirement eligibility and non-selection” there is an exception.
- *Hulvey v. Secretary of Labor*, EEOC Appeal No. 0720070059 (2008).

Back Pay

- Complainant must be ready, willing and able to work to receive back pay.
- But agency can be liable when its discrimination renders complainant unable to work.
- *Barnett v. Postmaster General*, EEOC Appeal No. 0720060019 (2008) (agency's failure to accommodate by providing a smoke-free truck resulted in complainant being totally disabled from working, and agency was liable for back pay from the time the complainant became unable to work until its decision became final).

Back Pay

- Alternative employment.
- A complainant fails to mitigate damages when the agency unconditionally offers him an equivalent or greater job, provided the offer is not made as part of an effort to resolve the case. *Bankston v. Secretary of Tennessee Valley Authority*, EEOC Appeal No. 01971472 (1998).

Back Pay

- May Include Step Increases.
 - *Carmon-Coleman, supra.*
- Interest On Back Pay.
 - Civil Rights Act of 1991. Section 114, codified at 42 USC 2000e–16(d), provides that the government is liable for interest on back pay awards to the same extent as private employers.

Back Pay

- Includes benefits:
 - Health insurance. *Williams V. Navy*, EEOC Appeal No. 01A01421 (June 19, 2002).
 - Seniority rights. *Franks v. Bowman* 424 U.S. 747, 774 (1976).

Back Pay

- Can include such things as:
 - Annual and sick leave;
 - Federal Thrift Savings Plan deposits and lost interest.

Back Pay

- General rule is that complainant is not entitled to subsequent promotions.
 - Exception is where complainant can show subsequent promotion would have been perfunctory in nature, e.g., career-ladder promotion.
 - Burden is on complainant to establish entitlement.

Back Pay

- “[T]he remedy to which a complainant is entitled includes subsequent promotions which the complainant would likely have received had he or she received the position directly in issue at the time of the original selection.”
- *Rai v. Secretary of Interior*, EEOC Petition No. 05880596 (1988).

Front Pay

- May be awarded in three circumstances:
 - Return to previous position is not possible because there is no position available;
 - Where the subsequent working relationship is broken and would be antagonistic; or
 - Where employer has long term record of resistance to anti-discrimination efforts.
- *Finlay v. Postmaster General*, EEOC Appeal No.1942985 (1997).

Equal Pay Act Remedies

- Like Title VII, allows for recovery of back pay.
- Complainant can recover under both statutes but no duplicative recovery; entitled to highest recovery.
- Allows for “liquidated damages” equaling the amount of back pay.
- Can escape if acted in good faith and had reasonable grounds to believe it was not in violation of EPA.

Compensatory Damages

- Available in cases of intentional discrimination under Title VII and the Rehabilitation Act.
- Coming soon to a theater near you:
 - Compensatory damages will be available under the Genetic Information Nondiscrimination Act of 2008.

Compensatory Damages

- Agency has potential good faith defense, if it has made a good faith effort to provide reasonable accommodation.
- Hostile environment harassment is a form of intentional discrimination.
- No compensatory damages in age discrimination cases.

Damages Trilogy

- *Rountree v. Secretary of Agriculture*, EEOC Appeal No. 01941906 (1995);
- *Carpenter v. Secretary of Agriculture*, EEOC Appeal No. 01945652 (1995); and
- *Wallis v. Postmaster General*, EEOC Appeal No. 01950510 (1995).

Compensatory Damages

- Three types of damages:
 - Past pecuniary damages;
 - Future pecuniary damages; and
 - Nonpecuniary damages.

Past Pecuniary Damages

- Out-of-pocket costs that the complainant incurred as a result of discrimination, *e.g.*, medical expenses, job-hunting expenses, relocation costs.
- Losses incurred prior to resolution of a complaint via a finding of discrimination.
- *Androvich v. Secretary of Agriculture*, EEOC Appeal No. 01950531 (1996).

Past Pecuniary Damages

- Must be proven by bills or invoices from doctors, hospitals, psychiatrists, psychologists or any other health care provided he or she has received treatment from.
- Failure to document the claimed expenses will result in a denial of pecuniary damages. *See, e.g., Jones v. Secretary of Commerce*, EEOC Appeal No. 01A13671 (2002).

Past Pecuniary Damages

- But the failure to properly document pecuniary damages does not bar an award for emotional distress damages.
- *Glockner v. Secretary of Veterans Affairs*, EEOC Appeal No. 07A30105 (2004).

Past Pecuniary Damages

- Past pecuniary damages not included within the \$300,000 cap. *See* EEOC Notice N-915.002, "Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991," (July 14, 1992), at 7.

Future Pecuniary Damages

- Out-of-pocket costs that the complainant will incur in the future as a result of discrimination, e.g., future medical treatment, lost earning potential.

Future Pecuniary Damages

- Generally requires medical or other expert testimonial evidence.
- Future medical expense claims must be supported by:
 - Evidence of diagnosis;
 - Prognosis of injury;
 - Duration of planned course of treatment
- *Carpenter v. Secretary of Transportation*, EEOC Appeal No. 01971161 (2000).

Nonpecuniary Damages

- These are damages for emotional distress, pain and suffering, humiliation, embarrassment, injury to professional reputation, etc.
 - May be proven without any medical or other expert evidence.
 - But absence of such evidence may effect size of an award of nonpecuniary damages.

Nonpecuniary Damages

- An award of nonpecuniary damages should take into account the *nature of the harm*, the *severity of the harm* and the *duration of time* the injured party has suffered from the harm.

Nonpecuniary Damages

- Two elements to nonpecuniary damages:
 - Proof of actual harm;
 - Proof of causation.

Nonpecuniary Damages

- The “eggshell skull” rule:
 - The victim of discrimination may recover for all actual harm or injury, even though the results may not have been foreseeable and even though the injury to an average person would not have been as severe.
 - “A tortfeasors takes his victims as he finds them.”

Nonpecuniary Damages

- Preexisting injury rule:
 - Individual with a preexisting injury may recover only for the aggravation of the preexisting condition or disability, not the sum that would compensate her for her total disability.
 - Where the preexisting condition would have worsened even absent the unlawful conduct, an award should be limited the accelerated worsening.

Nonpecuniary Damages

- Multiple causes of harm:
 - Where an employee is already seeking medical care, it may be appropriate to allocate the costs so as to not unreasonably punish the employer.
 - Where the emotional harm was caused by multiple factors, but the discrimination was the primary cause, the employer may be liable for all emotional harm.

Attorneys Fees and Costs

- A prevailing party under Title VII or the Rehabilitation Act is entitled to an award of attorneys fees and costs.
- Fees and costs are routinely awarded to prevailing parties absent "special circumstances."
- *Qazie v. Secretary of Interior*, EEOC Appeal No. 01873357 (1988), citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1975).

Attorneys Fees and Costs

- Some basics:
 - No attorneys fees if the complainant was not represented by an attorney.
 - No attorneys fees for cases brought under ADEA.
 - No attorneys fees if the complainant is not the prevailing party.
 - Lots of attorneys fees if you are represented by Gary or Ernie.

Attorneys Fees and Costs

- Look before you leap!
- Time spent by an attorney defending a fee award is compensable time. *See, e.g., Black v. Secretary of Army*, EEOC Appeal No. 05960390 (1998).
- Think settlement!

Prevailing Party

- Commission follows *Hensley v. Eckerhart*, 461 U.S. 424 (1983):
 - “Plaintiffs may be considered ‘prevailing parties’ for attorney’s fees purposes if they succeed on any significant issue in litigation which achieves some benefit the parties sought in bringing the suit.”
 - *See Haddock v. Secretary Air Force*, EEOC Appeal No. 01830822 (1983).

The Lodestar

- The Commission follows the “lodestar” method in calculating fee award amounts:
 - Reasonable hourly rates x reasonable number of hours expended.
 - 29 C.F.R. § 1614.501(e)(2)(B).
 - “Strong presumption” that this represents a “reasonable fee.”

Reasonable Hourly Rates

- "The best evidence of a reasonable hourly rate for the community in general is the rate customarily charged by the attorney or law firm for fee-paying clients."
Washington v. Postmaster General, EEOC Appeal No. 01991703 (2002).

Reasonable Hourly Rates

- Attorney may be entitled to a prevailing rate above the rate charged in the fee agreement:
 - If attorney charges clients a reduced rate in the public interest, he/she is entitled to the prevailing market rate.
 - *Hatfield v. Secretary of Navy*, EEOC Appeal No. 01892909 (1989) citing *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 402 (D.C.Cir., 1988).

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Reasonable Hourly Rates

- Attorney may be entitled to prevailing market rate in his/her own community if representation is not available where litigation takes place.
 - *Moore v. Attorney General*, EEOC Appeal No. 0120072439 (2007) (metropolitan D.C. rate applied to case in Texas).
 - *But see Southerland v. Postmaster General*, EEOC Appeal No. 01A05403 (2002) (no showing that local counsel was not available).

Reasonable Hours Expended

- "A raw total of hours spent does not complete the inquiry. It does not follow that the amount of time actually expended is the amount of time reasonably expended."
- *Atlenza v. Secretary of Navy*, EEOC Appeal No. 01872727 (1988).

Partial and Fractionable Fees

- When a complainant prevails on some claims but not others, there are two methods of adjusting the fee award:
 - Allocating the actual time spent between the successful and unsuccessful claims (partial fee);
 - A percentage reduction based on the degree of success.

Partial and Fractionable Fees

- Occasionally, but not often, claims are sufficiently distinct that time spent can be allocated.
 - Complainant's award is only for those hours spent on the successful claim(s).
 - Problem is that even if claims are distinct, precise allocation of time may not be possible.

Partial and Fractionable Fees

- Fractionable fees are used:
 - Where the successful and unsuccessful claims are interrelated; or
 - Where allocation of time is not possible.

Partial and Fractionable Fees

- Factors to consider in fee reduction:
 - Was successful claim primary or secondary.
See Wilson v. Attorney General, EEOC Appeal No. 01A52756 (2006) (one-third reduction in fee where complainant prevailed on sexual harassment which was primary and did not succeed on secondary reasonable accommodation claim).

Partial and Fractionable Fees

- Factors to consider:
 - Degree of relief. *Donelson v. Secretary of Veterans Affairs*, EEOC Appeal No. 01996394 (2001) (15 percent reduction where complainant prevailed on only two of four claims, but relief would not have significantly increased if she prevailed on remaining claims).

Partial and Fractionable Fees

- A fee reduction is not required simply because the complainant is unsuccessful on some claims.
 - *See, e.g. Layman v. Postmaster General*, EEOC Appeal No. 01995568 (2002) (full fee where complainant prevailed on five of six claims);
 - *Ferrell v. Secretary of Navy*, EEOC Appeal No. 07A30054 (2003) (all claims have common factual core).

Costs

- Costs of litigation are recoverable. 29 C.F.R. 1614.501(e)(2).
- *Overton v. Secretary of Army*, EEOC Appeal No. 01902827 (1990) (“award of reasonable out-of-pocket expenses shall include those incurred by the attorney which normally charged to a fee-paying client in the normal course of providing representation”).



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