

**PROVING  
COMPENSATORY  
DAMAGES THROUGH  
LAY WITNESS**  
*(AND HOW TO DISCREDIT THEM)*

**EEOC EXCEL AUGUST 2012**  
**Joseph V. Kaplan, Esq.**  
Passman & Kaplan, P.C.

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Proving Emotional distress  
Damages**

The Goal: Convince the judge that the Complainant suffered emotionally due to the discrimination/retaliation by the Agency

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Proving Emotional distress  
Damages**

▣ How to achieve the goal?

- Largely through testimony of witnesses.
- But which witnesses?



(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Proving Emotional distress Damages -- What Witnesses?**

- ▣ It's logical -- Who knows the Complainant the best?
  - ▣ Family
  - ▣ Friends
  - ▣ Co-workers

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Proving Emotional distress Damages -- What Witnesses?**

The EEOC has long held that evidence from a health care provider is not a prerequisite for recovery of compensatory damages.

*See Carpenter v. USDA, EEOC Appeal No. 01945652 (July 17, 1995).*

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Proving Emotional distress Damages -- What Witnesses?**

(Of course, health care providers or experts may still be important to establish diagnoses, symptoms, causality).



(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

### Agency's Reaction to Lay Witnesses?

- ❑ All too often, agency representatives have a dismissive knee-jerk reaction to evidence of causal connection or severity presented through lay witnesses
- ❑ This leads to understating the weight and value of this evidence.
- ❑ Often, lay witnesses are not even deposed.

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

### Agency's Reaction?

This May Be A Costly Mistake!



(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

### Tell a Story:

"A Tale of Two Cities" Begins:

It was the best of times,  
it was the worst of times,  
it was the age of wisdom,  
it was the age of foolishness,  
it was the epoch of belief,  
it was the epoch of incredulity,  
it was the season of Light,  
it was the season of Darkness,  
it was the spring of hope,  
it was the winter of despair.

- Charles Dickens

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Tell a Story:  
A Tale of “Two” Complainants**

- ☐ Be the “Charles Dickens” to the Complainant
  
- ☐ Your case is about contrasts
  
- ☐ Your task: Paint two different pictures of the Complainant

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Tell a Story:  
A Tale of “Two” Complainants**

- ☐ First picture: Complainant *before* the discrimination / reprisal 
  
- ☐ Second picture: Complainant *after* the discrimination / reprisal 

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Examine The Various Aspects Of  
The Complainant’s Life**

There are many aspects to the Complainant’s life. Examine each. For example:

- ✓ Work
- ✓ Home
- ✓ Outside activities: hobbies, social, etc.

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Examine The Various Aspects Of  
The Complainant's Life -- Work**

- ☐ Have there been changes in --
  - Performance
  - Work Habits
  - Personality Traits; interactions
  
- ☐ Don't forget the seeming trivial behaviors

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Examine The Various Aspects Of  
The Complainant's Life -- Work**

Don't forget the seeming trivial behaviors

- ☐ Was the Complainant "the birthday cake guy / gal" ? What about now?



(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Examine The Various Aspects Of  
The Complainant's Life -- Work**

It's the lay CO-WORKERS  
who can testify as to these  
changes in the Complainant



(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Examine The Various Aspects Of  
The Complainant's Life -- Home**

- ▣ There is much fodder in examining changes in the Complainant's home life.
- ▣ Look at daily routines, though "mundane":
  - Cooking, cleaning
  - Bed-time habits
  - Sartorial interests



(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Examine The Various Aspects Of  
The Complainant's Life -- Home**

It's the spouse, family members,  
or roommate who  
who can testify as to these  
changes in the Complainant



(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Examine The Various Aspects Of  
The Complainant's Life -- Home**

It's the spouse, family members,  
or roommate who  
who can testify as to these  
changes in the Complainant

**See the testimony excerpt in my  
paper;  
witness was complainant's son**

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Examine The Various Aspects Of  
The Complainant's Life --  
Outside Activities**

▣ There is much fodder in examining changes in the Complainant's activities outside the home.

- Sports (still active on bowling team??)
- Socializing with friends
- Movies; theater
- Church activities
- Even shopping!

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Examine The Various Aspects Of  
The Complainant's Life --  
Outside Activities**

Here's the point: The myriad of activities we take for granted can all be affected by acts of discrimination and retaliation.



(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**Examine The Various Aspects Of  
The Complainant's Life --  
Outside Activities**

It's the family members  
and friends who  
who can testify as to these  
changes in the Complainant

**See the testimony excerpt in my paper;  
witness was complainant's best friend**

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**EXAMPLES OF EEOC DECISIONS  
AWARDING COMPENSATORY  
DAMAGES BASED ON LAY  
TESTIMONY**

- ▣ Bartron Dep't of Defense, EEOC Appeal No. 0720100054, 2011 -- \$92,500 non-pecuniary, compensatory damages awarded.
- ▣ Utt v. U.S. Postal Service, EEOC Appeal No. 0720070001, 2009 -- \$25,000 non-pecuniary, compensatory damages awarded. Seems to not to be based on medical evidence.

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**EXAMPLES OF EEOC DECISIONS  
AWARDING COMPENSATORY  
DAMAGES BASED ON LAY  
TESTIMONY (cont'd)**

- ▣ Bad Heart Bull v. Dep't of Health and Human Services, EEOC Appeal No. 01A12574, 2002 -- \$40,000 non-pecuniary, compensatory damages awarded.

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**How to (Attempt to) Discredit  
Lay Witnesses**

- ▣ Examine For Biases:
  - Affinity Bias
    - You love your [insert relationship here]?
    - Even though you never saw what happened to him/her at work, you believe him/her because s/he's you [insert relationship here].
    - You want his/her suffering to end?
    - His/her suffering is impacting you negatively?
    - The negative impact on you will lessen or stop if Complainant wins this case?

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

### How to (Attempt to) Discredit Lay Witnesses

- ☐ Examine For Biases:
  - Financial Bias
    - Complainant's loss of income has impacted you negatively?
    - Complainant's out-of-pocket medical fees have impacted you negatively?
    - Complainant's attorney fees have impacted you negatively?
    - Have you loaned the Complainant any money associated with his/her case?
    - Your chances of recovering that money are greater if the Complainant wins this case?

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

### How to (Attempt to) Discredit Lay Witnesses

- ☐ Examine For Biases:
  - Other Bias
    - You also work for Complainant's supervisor?
    - And you think Supervisor has treated you badly too?
    - You are hoping if Complainant wins this case Supervisor will be disciplined or lose his/her job?
    - You feel you'd be better off if Supervisor lost his/her job?

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

### How to (Attempt to) Discredit Lay Witnesses

- ☐ **WARNING:** Do not assume that just because lay witnesses are relatives or friends of the Complainant, with bias in Complainant's favor, that that means they will be found not to be credible.
- ☐ Agency counsel often draw that knee-jerk reaction. They do so at their (or their Agency's) peril.

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

### In Conclusion: Charles Dickens Revisited

- ❑ Dickens closes out his *A Tale of Two Cities* with this memorable line, “It is a far, far better thing that I do, than I have ever done; it is a far, far better rest that I go to than I have ever known.”
- ❑ Hopefully, by effectively using lay witnesses to paint two pictures of the Complainant -- *before* the discrimination and *after* – the recovery of compensatory damages for emotional distress will be “far far better” than without such testimony!

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

### QUESTIONS?



(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

### Valuable Resources

*The Federal Employees Legal Survival Guide, 2d ed*

by the attorneys of  
Passman & Kaplan, P.C.

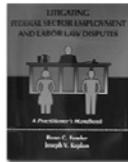
To Order:  
[www.passmanandkaplan.com](http://www.passmanandkaplan.com)



❑ *LITIGATING FEDERAL SECTOR EMPLOYMENT AND LABOR LAW DISPUTES: A Practitioners' Handbook*

By Renn C. Fowler and Joseph V. Kaplan

❑ Email: [dewey@deweypub.com](mailto:dewey@deweypub.com)  
❑ Phone: 703.524.1355



(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---

**THE END**  
**PROVING COMPENSATORY DAMAGES  
THROUGH LAY WITNESS**  
*(AND HOW TO DISCREDIT THEM)*  
**EEOC EXCEL AUGUST 2012**  
**Joseph V. Kaplan, Esq.**  
Passman & Kaplan, P.C.  
1828 L Street, N.W.  
Suite 600  
Washington, DC 20036  
[www.passmanandkaplan.com](http://www.passmanandkaplan.com)

(c) Joseph V. Kaplan, Esq.

---

---

---

---

---

---

---

---