

Compensatory Damages

1. Statutory entitlement

1.1.(a) Right of recovery (1) Civil rights In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party 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 section 706(g) of the Civil Rights Act of 1964, from the respondent. (2) Disability In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent. (3) Reasonable accommodation and good faith effort In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12112(b)(5)] or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business. (b) Compensatory and punitive damages (1) Determination of 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. (2) Exclusions from compensatory damages Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)]. (3) Limitations The sum of the amount of compensatory damages awarded under this section for

future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party-- (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000; (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000; and (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000. (4) Construction Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title. (c) Jury trial If a complaining party seeks compensatory or punitive damages under this section-- (1) any party may demand a trial by jury; and (2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section. (d) Definitions As used in this section: (1) Complaining party The term "complaining party" means-- (A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or (B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of Title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12111 et seq.]. (2) Discriminatory practice The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section. 42 U.S.C.A. § 1981a

- 1.2.***Section 102(a) of the Civil Rights Act of 1991 (the CRA 1991), codified as 42 U.S.C. § 1981a, authorizes an award of compensatory damages as part of the "make whole" relief for intentional discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended. THELMA LEATHERMAN, COMPLAINANT, v. GORDON R. ENGLAND, SECRETARY, DEPARTMENT OF THE NAVY, AGENCY. 2001 WL 1650704, *1*
- 1.3.***Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., may receive for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this "make whole" relief. 42 U.S.C. § 1981a(b)(3). Future pecuniary losses are losses that are likely to occur after resolution of a complaint. Enforcement Guidance at 9. For claims seeking pecuniary damages, such objective evidence*

*should include documentation of out-of-pocket expenses for all actual costs and an explanation of the expenses, e.g., medical and psychological billings, other costs associated with the injury caused by the agency's actions, and an explanation for the expenditure. Id. at 9. In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that the Commission has the authority to award compensatory damages in the federal sector EEO process. The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in EEOC's Enforcement Guidance, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (July 14, 1992) ("Enforcement Guidance"). Briefly stated, complainant must submit evidence to show that agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. Id. at 11-12, 14; Rivera v. Department of the Navy, EEOC Appeal No. 01934157 (July 22, 1994). The amount awarded should reflect the extent to which the agency's discriminatory action directly or proximately caused harm to complainant and the extent to which other factors played a part. Enforcement Guidance at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to complainant, and the duration or expected duration of the harm. Id. at 14. JOSE A. OTERO, COMPLAINANT, DR. FRANCIS J. HARVEY, SECRETARY, DEPARTMENT OF THE ARMY, AGENCY. 2005 WL 2921305, *2*

1.4.(3) Limitations *The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party-- 42 U.S.C.A. § 1981a*

1.5. *Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes his claim of unlawful discrimination may receive, in addition to equitable remedies, compensatory damages for past and future pecuniary losses (i.e., out of pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish). 42 U.S.C. 1981a(b)(3). For an employer with more than 500 employees, such as the agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000.00 Id. RANDY A. KALLAUNER, COMPLAINANT, SAMUEL W. BODMAN, SECRETARY, DEPARTMENT OF ENERGY, AGENCY. 2005 WL 2835209, *5*

1.6. *Compensatory damages are available only in cases of intentional discrimination under Title VII and the Rehabilitation Act. Sec. 102, Civil Rights Act of 1991, codified at 42 USC 1981a(b). In addition, compensatory damages can be awarded under the Rehabilitation Act for failure to make reasonable accommodation, provided the agency has not made a good faith effort to provide accommodation. FSEEG CH 20, V ()*

1.6.1. *Compensatory damages only apply to intentional acts of discrimination.*

There are no compensatory damages that can be awarded for an agency's improper handling of an EEO complaint. Appleby v. Secretary of Army, 01933897, 3993/A9 (1994). In the Appleby case, the complainant alleged that the agency had submitted several false answers in response to interrogatories and also had submitted a brief to the administrative judge that contained false

statements: [C]ongress added compensatory damages to federal EEO statutes in order to make the perpetrators of intentional employment discrimination liable for non-wage economic consequences of their acts, to the extent necessary to provide full relief to victims of discrimination. *See* 137 Cong. Rec. at § 15, 484 (daily ed. Oct. 30, 1991). Such damages were not added to the EEO statutes to address how an agency litigates an EEO complaint alleging employment discrimination, but rather, to address how an agency treated an employee or applicant in an employment-related context. For this reason, the Commission finds that appellant is not entitled to recover compensatory damages in this case. FSEEG CH 20, V ()

1.7. *Turning to the AJ's award of non-pecuniary compensatory damages, we note that when discrimination is found, the agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore him as nearly as possible to the position he would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Service, EEOC Appeal No. 01933395 (July 21, 1994). Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this "make whole" relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 119 S.Ct. 1906 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. VICKIE DELLINGER, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (EASTERN AREA), AGENCY. 2005 WL 2492880, *5*

1.8. *Punitive damages not available*

1.8.1. As codified at 42 U.S.C. § 1981a(b)(1), Title VII provides that parties may recover punitive damages "against a respondent (*other than a government, government agency or political subdivision*)" (emphasis added). *Baker v. Runyon* 114 F.3d 668, *669 (C.A.7 (Ill.),1997) Congress, in enacting section 1981a, exempted all government agencies from the Act's punitive damage provision, with no articulated exceptions. *Baker v. Runyon* 114 F.3d 668, *669 (C.A.7 (Ill.),1997) Punitive damages were not available to former Immigration and Naturalization Service (INS) employee in his suit under Title VII against INS, Department of Justice, and Attorney General. *Terry v. Ashcroft*, C.A.2 (N.Y.) 2003, 336 F.3d 128. 42 U.S.C.A. § 1981a

1.8.2. Under statute governing damages in employment discrimination actions, punitive damages could not be awarded against Department of Navy, an executive department of the federal government. *Garrison v. Johnson*, D.Me.2003, 286 F.Supp.2d 41. 42 U.S.C.A. § 1981a

1.8.3. Punitive damages not available against Postal Service

1.8.3.1. *Postal Service was "government agency" exempt from punitive*

damages under Title VII. 42 U.S.C.A. § 1981a(b)(1). Baker v. Runyon 114 F.3d 668 (C.A.7 (Ill.),1997)

1.9. EEOC's Authority to Award

1.9.1. Equal Employment Opportunity Commission (EEOC) has authority, under Title VII, to require federal agencies to pay compensatory damages when they discriminate in employment, given that Title VII, as amended, explicitly provides EEOC with authority to enforce its provisions "through appropriate remedies," and provides that "complaining party may recover compensatory damages," that purpose of remedial scheme under Title VII, to provide quicker, less formal, less expensive, and less burdensome means to resolve disputes, would be undermined without EEOC's authority to award compensatory damages, and that legislative history of Title VII shows that such remedy was required to deter discrimination and to help make victims whole. *West v. Gibson*, U.S.III.1999, 119 S.Ct. 1906, 527 U.S. 212, 144 L.Ed.2d 196, on remand 201 F.3d 990, rehearing and rehearing en banc denied. 42 U.S.C.A. § 1981a

1.9.2. In *West v. Gibson*, 119 S.Ct. 1906 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. *THELMA LEATHERMAN, COMPLAINANT, v. GORDON R. ENGLAND, SECRETARY, DEPARTMENT OF THE NAVY, AGENCY*. 2001 WL 1650704, *1

1.9.3. Equal Employment Opportunity Commission (EEOC) has authority, under Title VII, to require federal agencies to pay compensatory damages when they discriminate in employment, given that Title VII, as amended, explicitly provides EEOC with authority to enforce its provisions "through appropriate remedies," and provides that "complaining party may recover compensatory damages," that purpose of remedial scheme under Title VII, to provide quicker, less formal, less expensive, and less burdensome means to resolve disputes, would be undermined without EEOC's authority to award compensatory damages, and that legislative history of Title VII shows that such remedy was required to deter discrimination and to help make victims whole. *West v. Gibson*, U.S.III.1999, 119 S.Ct. 1906, 527 U.S. 212, 144 L.Ed.2d 196, on remand 201 F.3d 990, rehearing and rehearing en banc denied.

1.9.4. 42 U.S.C.A. § 1981a

2. Definition

3. Caps

3.1.Exclusions

3.1.1. Backpay

3.1.1.1. *The statute limits punitive damages and certain types of compensatory damages to a total of \$300,000, but the limitation does not include back pay. See Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495, 499 (7th Cir.2000). Lust v. Sealy, Inc. 277 F.Supp.2d 973, *977 (W.D. Wis.,2003)*

3.1.2. Frontpay

3.1.2.1. *Front pay was not an element of compensatory damages within the*

meaning of provisions of Civil Rights Act of 1991 governing damages in cases of intentional discrimination in employment, and, therefore, was not subject to Act's statutory cap. Pollard v. E.I. du Pont de Nemours & Co., U.S.Tenn.2001, 121 S.Ct. 1946, 532 U.S. 843, 150 L.Ed.2d 62, on remand 14 Fed.Appx. 351, 2001 WL 857193. 42 U.S.C.A. § 1981a

- 3.2.** Statutory cap on damages under Civil Rights Act of 1991 applied to each party in an action, not to each claim, and, thus, district court correctly capped prevailing plaintiff's claims at \$300,000 for sexual harassment and retaliation claims together, rather than allowing a maximum of \$300,000 per claim. Baty v. Willamette Industries, Inc., C.A.10 (Kan.) 1999, 172 F.3d 1232
<<https://web2.westlaw.com/find/default.wl?DB=506&SerialNum=1999096739&FindType=Y&AP=&mt=LaborAndEmployment&fn= top&sv=Split&utid=%7b8A7F5ADD-B65E-4114-B970-16E1CFF6A32E%7d&vr=2.0&rs=WLW5.05>>
Civil Rights
<<https://web2.westlaw.com/digest/default.wl?rp=%2fdigest%2fdefault.wl&CMD=NOKEY&DocName=78k1574&AP=&mt=LaborAndEmployment&fn= top&sv=Split&utid=%7b8A7F5ADD-B65E-4114-B970-16E1CFF6A32E%7d&vr=2.0&rs=WLW5.05>>1574
<<https://web2.westlaw.com/digest/default.wl?rp=%2fdigest%2fdefault.wl&CMD=NOKEY&DocName=78k1574&AP=&mt=LaborAndEmployment&fn= top&sv=Split&utid=%7b8A7F5ADD-B65E-4114-B970-16E1CFF6A32E%7d&vr=2.0&rs=WLW5.05>>;

3.3.\$300,000

- 3.3.1.** Section 1981a(b)(2) indicates that compensatory damages do not include back pay, interest on back pay, or any other type of equitable relief authorized by Title VII. Section 1981a(b)(3) limits the total amount of compensatory damages that may be awarded to each complaining party for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, according to the number of persons employed by the respondent employer. The limit for an employer with more than 500 employees, such as the agency herein, is \$300,000.00. 42 U.S.C. § 1981a(b)(3)(D). THELMA LEATHERMAN, COMPLAINANT, v. GORDON R. ENGLAND, SECRETARY, DEPARTMENT OF THE NAVY, AGENCY. 2001 WL 1650704, *1
- 3.3.2.** 42 U.S.C. § 1981a(b)(3)(D) states: (3) Limitations The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party-- (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000. Probst v. Reno 917 F.Supp. 554, *561 (N.D.Ill.,1995)
- 3.3.3.** Under Title VII, awards for loss of future earning capacity are subject to the statutory cap for compensatory damages-in this case \$300,000.00. 42 U.S.C. § 1981a(b)(3)(D). Since complainant was previously awarded

\$125,000.00 in non-pecuniary damages, complainant's award for future pecuniary losses cannot exceed \$175,000.00. Because it appears that the cap on compensatory damages may be met in this case with or without applying the collateral source rule, we will not address the appropriateness of the agency's offset of complainant's service connected disability benefits at this time. GENEVIEVE KUEPFER, COMPLAINANT, R. JAMES NICHOLSON, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, AGENCY. 2005 WL 1903467, *11

3.4. Applicable to entire action

3.4.1. Limitation imposed on recoveries for discrimination, under Title VII, applies to entire action rather than each individual claim. *Rau v. Apple-Rio Management Co., Inc.*, N.D.Ga.1999, 85 F.Supp.2d 1344, affirmed 251 F.3d 161. 42 U.S.C.A. § 1981a

3.4.2. Consolidated actions

3.4.2.1. *Plaintiff who brings two separate Title VII actions, which are consolidated for purposes of trial, is entitled to recover only a single award of compensatory damages of up to \$300,000 under the damages cap provision of the Civil Rights Act of 1991. Galliher v. Rubin, S.D.Ga.1997, 969 F.Supp. 1329. 42 U.S.C.A. § 1981a*

4. Non pecuniary

4.1. In general

4.1.1. Congress added compensatory damages to federal EEO statutes...to make the perpetrators of intentional employment discrimination liable for [the] non-wage economic consequences of their acts, to the extent necessary to provide full relief to victims of discrimination. (citation omitted). *4 *Id.* at 4. REGINALD J. ROUNTREE, APPELLANT, v. DAN GLICKMAN, SECRETARY, DEPARTMENT OF AGRICULTURE, AGENCY. 1996 WL 77396, *3 -4

4.1.2. The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in EEOC Notice No. N 915.002, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (July 14, 1992). Briefly stated, the complainant must submit evidence to show that the agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. *Id.* at 11-12, 14; *Rivera v. Department of the Navy*, EEOC Appeal No. 01934157 (July 22, 1994). The amount awarded should reflect the extent to which the agency's discriminatory action directly or proximately caused harm to the complainant and the extent to which other factors may have played a part. EEOC Notice No. N 915.002 at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the complainant, and the duration or expected duration of the harm. *Id.* at 14. RANDY A. KALLAUNER, COMPLAINANT, SAMUEL W. BODMAN, SECRETARY, DEPARTMENT OF ENERGY, AGENCY. 2005 WL 2835209, *5

4.1.3. There is no precise formula for determining the amount of damages for non-pecuniary losses, except that the award should reflect the nature and

severity of the harm and the duration or expected duration of the harm. *Loving v. Department of the Treasury*, EEOC Appeal No. 01955789 (August 29, 1997); *Rountree v. Department of Agriculture*, EEOC Appeal No. 01941906 (July 7, 1995). We note that for a proper award of non-pecuniary damages, the amount of the award should not be "monstrously" excessive standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See *Ward-Jenkins v. Department of the Interior*, EEOC Appeal No. 01961483 (March 4, 1999).

4.1.4. LORI A. ADAMS, COMPLAINANT, v. R. JAMES NICHOLSON, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, AGENCY. 2005 WL 871190, *2

4.2. *Types of nonpecuniary injuries*

4.2.1. Objective evidence of non-pecuniary compensatory damages can include statements from the complainant concerning her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other nonpecuniary losses that are incurred as a result of the discriminatory conduct. Statements from others, including family members, friends, health care providers, other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. *KAREN B. MCCOY, COMPLAINANT, R. JAMES NICHOLSON, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, AGENCY*. 2005 WL 2429042, *3

4.3. *Actual injury*

4.3.1. Compensatory damages, however, are further limited to the amount necessary to compensate an injured party for actual harm caused by the agency's discriminatory action, even if the harm is intangible. *Damiano v. U.S. Postal Service*, EEOC Request No. 05980311 (February 26, 1999). Compensatory damages should consider the extent, nature, and severity of the harm and the length of time the injured party endured the harm. *Id.*; *Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991*, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14. *OSSIE BOYD, COMPLAINANT, DONALD H. RUMSFELD, SECRETARY, DEPARTMENT OF DEFENSE, (DEFENSE COMMISSARY AGENCY), AGENCY*. 2005 WL 2492822, *3

4.3.2. In the present case, we find that the AJ, who had the opportunity to observe the witnesses, properly determined that complainant "should be awarded a sum to compensate her for severe emotional distress from April [until] December 1992, and for moderate emotional distress until June of 1993 ... discounted by 50% to offset the non-discriminatory causative factors" contributing to the stress. [FN5] We next note that the Commission generally awards large nonpecuniary awards in cases where a complainant establishes severe emotional harm and/or a long-term injury. See *Finlay v. United States Postal Service*, EEOC Appeal No. 01942985 (April 29, 1997) (\$100,000 in

nonpecuniary damages for severe psychological injury over four years which was expected to continue for an indeterminate period of time.); Wallis v. United States Postal Service, EEOC Appeal No. 01950510 (November 13, 1995) (\$50,000.00 in nonpecuniary damages for aggravation of pre-existing emotional condition, where effects were expected to last at least seven years). Based on the foregoing evidence which establishes the stress and emotional discomfort sustained by complainant and upon consideration of damage awards reached in comparable cases, the Commission finds that complainant is entitled to award of nonpecuniary damages in the amount of \$5,000 for the severe emotional distress suffered during the period from April until December 1992, and \$1,400 for the moderate emotional distress suffered from December 1992 until June 1993. After offsetting this amount by 50% to account for the non-discriminatory causative factors contributing to the stress, complainant's award for nonpecuniary damages is \$3,200. LYNDIA K. STARLING, COMPLAINANT, v. WILLIAM J. HENDERSON, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (PACIFIC/WEST REGION), AGENCY. 2000 WL 342418, *4

4.3.3. "To recover compensatory damages in a Title VII case, the plaintiff must present evidence of actual injury." *L.T. Blackshear v. City of Wilmington*, 15 F.Supp.2d 417, 430 (D.Del.1998) (citing *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121 (3d Cir.1988)). *Moussa v. Commonwealth of Pennsylvania Dept. of Public Welfare* 289 F.Supp.2d 639, *665 (W.D.Pa.,2003)

4.3.4. An award for compensatory damages must be predicated on the harm experienced as a result of the agency's actions, and the agency is only responsible for those damages that are clearly shown to be caused by its actions. [Rivera v. Department of the Navy, EEOC Appeal No. 01934156 \(July 22, 1994\)](#) <<http://www.westlaw.com/Find/Default.wl?rs++++1.0&vr=2.0&DB=4031&FindType=Y&SerialNum=1994425093>>, req. to recon. den., EEOC Request No. 05940927 (December 11, 1995) <<http://www.westlaw.com/Find/Default.wl?rs++++1.0&vr=2.0&DB=4031&FindType=Y&SerialNum=1995424361>>; *Carle v. Department of the Navy, EEOC Appeal No. 01922369 (January 5, 1993)* <<http://www.westlaw.com/Find/Default.wl?rs++++1.0&vr=2.0&DB=4031&FindType=Y&SerialNum=1993408953>>; *Fazekas v. USPS, EEOC Appeal No. 01954627 (April 7, 1997)* <<http://www.westlaw.com/Find/Default.wl?rs++++1.0&vr=2.0&DB=4031&FindType=Y&SerialNum=1997436336>>.

4.3.5. However, neither medical evidence nor corroborating testimony is necessarily required in order to support an award of mental anguish damages. *Id. See also Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1046 (5th Cir.1998); *Delph v. Dr. Pepper Bottling Co.*, 130 F.3d 349, 357 (8th Cir.1997); *666 *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215 (6th Cir.1996); *Bolden v. Southeastern Pa. Trans. Auth.*, 21 F.3d 29, 34 (3d Cir.1994) (§ 1983 case). *Moussa v. Commonwealth of Pennsylvania Dept. of Public Welfare* 289 F.Supp.2d 639, *665 -666 (W.D.Pa.,2003)

4.3.6. Harm not presumed

4.3.6.1. *Non-pecuniary damages are available to compensate an injured*

party for actual harm, even where the harm is intangible. *Carter v. Duncan-Higgins, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984). Emotional harm will not be presumed simply because complainant is a victim of discrimination. Guidance at 5. The existence, nature, and severity of emotional harm must be proved. *Id.* LEA M. SMITH, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (SOUTHEAST AREA), AGENCY. 2005 WL 1606167, *3

4.3.6.2. For instance, in *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1227-29 (7th Cir.1995), we diminished an award from \$21,000 to \$10,500 because the degree of emotional distress was not proven; only 14 lines of testimony addressed emotional distress. By contrast, in the instant case, there were numerous pages of testimony regarding emotional distress. In *Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576 (7th Cir.1996), the plaintiff's \$25,000 award was remitted by approximately \$6,000. However, the plaintiff's retaliatory discharge in *Merriweather* was only one of several factors, such as her father's death, affecting the plaintiff's emotional state. *Id.* at 581. Here, *Onyx* has not shown that *Lampley's* emotional distress was the result of anything but the termination. [FN9] *Lampley v. Onyx Acceptance Corp.* 340 F.3d 478, *484 (C.A.7 (Ill.),2003)

4.4. *Psychological treatment or medical treatment not required*

4.4.1. Admittedly, plaintiff's evidence of emotional distress is far from overwhelming. Unfortunately for defendant, however, the bar is not very high for receiving emotional distress damages. The court of appeals recently upheld a \$50,000 award for a plaintiff in a sex discrimination case who testified she felt "robbed" and "cheated" when she did not receive a promotion, "like a truck had just run her over." *David*, 324 F.3d at 864. Like plaintiff, the plaintiff in *David* did not have evidence of her emotional injuries beyond her own testimony. *See also U.S. EEOC v. AIC Security Investigations*, 55 F.3d 1276, 1285-86 (7th Cir.1995) (upholding award of \$50,000 for emotional distress even though plaintiff did not seek professional treatment when he testified that he experienced "depression, rage and fear resulting from his sudden firing"); *Fleming v. County of Kane, State of Illinois*, 898 F.2d 553 (7th Cir.1990) (upholding award of \$40,000 when plaintiff testified he was humiliated and depressed and suffered from headaches and sleeplessness). Considering the importance of plaintiff's job to her, the substantial amount of time she had waited to receive a promotion and the lingering effects of defendant's decision, I cannot conclude that an award of \$27,000 is "monstrously excessive" or that it bears no rational relation to the evidence. *Liu v. Price Waterhouse, LLP*, 302 F.3d 749, 756 (7th Cir.2002). *Lust v. Sealy, Inc.* 277 F.Supp.2d 973, *997 (W.D.Wis.,2003)

4.5. *Vulnerability of plaintiff*

4.5.1. Unusual economic and emotional sensitivity of discharged employee as young, unwed mother who was walking "economic tightrope" and who had just discovered she was pregnant for second time was properly considered in

determining amount of compensation to which she was entitled because of employment discrimination under Title VII; employee's vulnerability was particularly relevant, since her supervisors had direct knowledge of her vulnerability before they discharged her. *Turic v. Holland Hospitality, Inc.*, C.A.6 (Mich.) 1996, 85 F.3d 1211, rehearing and suggestion for rehearing en banc denied. 42 U.S.C.A. § 1981a

4.6. Proof of injury

4.6.1. family members, friends, and health care providers

4.6.1.1. *Statements from others, including family members, friends, and health care providers could address the outward manifestations of the impact of the discrimination on the complainant. Id. The complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. Id. Non-pecuniary damages must be limited to the sums necessary to compensate the injured party for the actual harm and should take into account the severity of the harm and the length of the time the injured party has suffered from the harm.*

*Carpenter v. Department of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995). VERONICA C. CHEVIS, COMPLAINANT, v. MIKE JOHANNES, SECRETARY, DEPARTMENT OF AGRICULTURE, AGENCY. 2005 WL 819622, *3*

4.6.1.2. *Statements from others, including family members, friends, health care providers, other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. See Lawrence v. United States Postal Service, EEOC Appeal No. 01952288 (April 18, 1996), citing Carle v. Department of the Navy, EEOC Appeal No. 01922369 (January 5, 1993). VICKIE DELLINGER, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (EASTERN AREA), AGENCY. 2005 WL 2492880, *6*

4.6.1.3. *The Commission has held that evidence from a health care provider is not a mandatory prerequisite for recovery of compensatory damages. See Carpenter v. Department of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995). The absence of supporting evidence may affect the amount of damages deemed appropriate in specific cases. See Lawrence v. USPS, EEOC Appeal No. 01952288 (April 18, 1996). SHARON A. WHEELER, COMPLAINANT, DR. FRANCIS J. HARVEY, SECRETARY, DEPARTMENT OF THE ARMY, AGENCY. 2005 WL 2492877, *4*

4.6.1.4. *Objective evidence of non-pecuniary compensatory damages can include statements from the complainant concerning her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other nonpecuniary losses that are incurred as a result of the discriminatory conduct. Statements from others,*

*including family members, friends, health care providers, other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Lawrence v. United States Postal Serv., EEOC Appeal No. 01952288 (April 18, 1996), (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (January 5, 1993)). KAREN B. MCCOY, COMPLAINANT, R. JAMES NICHOLSON, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, AGENCY. 2005 WL 2429042, *3*

4.6.2. Proof

4.6.2.1. Objective evidence

4.6.2.1.1. In *Carle v. Department of the Navy*, the Commission explained that "objective evidence" of non-pecuniary damages could include a statement by the complainant explaining how he or she was affected by the discrimination. EEOC Appeal No. 01922369 (January 5, 1993). Statements from others, including family members, friends, and health care providers could address the outward manifestations of the impact of the discrimination on the complainant. *Id.* The complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. *Id.* RANDY A. KALLAUNER, COMPLAINANT, SAMUEL W. BODMAN, SECRETARY, DEPARTMENT OF ENERGY, AGENCY. 2005 WL 2835209, *5

4.6.3. Nature and extent of discrimination or harassment

4.6.3.1. *Given the reduction of the jury award to \$300,000, to reflect the statutory cap, the *1038 question for the Court is whether an award of \$300,000 for emotional distress is excessive. The Ninth Circuit has held that a jury's finding on the amount of damages should be reversed only if the amount is "grossly excessive or monstrous," Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1040 (9th Cir.2003) (internal quotation marks omitted), or if the amount is "clearly unsupported by the evidence" or "shocking to the conscience." Brady v. Gebbie, 859 F.2d 1543, 1557 (9th Cir.1988) (internal quotation marks omitted). In making this determination, the Court must focus on evidence of the qualitative harm suffered by Dr. Velez, and not simply on the severity or pervasiveness of the conduct constituting the harassment. See, e.g., Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 513-14 (9th Cir.2000) (focusing on evidence of harm suffered by plaintiff, e.g., anxiety, rashes, etc.); see also Peyton v. DiMario, 287 F.3d 1121, 1128 (D.C.Cir.2002) ("[T]o the extent that the egregiousness of GPO's conduct was considered, it was merely as a proxy to assess the distress inflicted upon Peyton."). The severity or pervasiveness of the conduct is relevant insofar as it provides probative evidence from which a jury may infer the nature and degree of emotional injury suffered, but direct evidence of the injury is still the primary proof. Velez v. Roche 335 F.Supp.2d 1022, *1038 (N.D.Cal.,2004)*

4.7. Preexisting condition

- 4.7.1.** In considering such cases, the Commission relies on the principle that "a tortfeasor takes its victims as it finds them." *Wallis v. USPS*, EEOC Appeal No. 01950510 (November 13, 1995), citing, *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1295 (7th Cir. 1987). There are two exceptions to this general rule, however. First, when a complainant has a pre-existing condition, the agency is liable only for the additional harm or aggravation caused by the discrimination. EEOC Notice, p. 12. Second, if the complainant's pre-existing condition inevitably would have worsened, the agency is entitled to a reduction in damages reflecting the extent to which the condition would have worsened even absent the discrimination. *Wallis v. USPS*, *supra*, citing, *Maurer v. United States*, 668 F.2d 98, 99-100 (2d Cir. 1981); *VERLANE EBERLY, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY*. 2004 WL 1191286, *7
- 4.7.2.** In considering the appropriate award in this case, we note that some of complainant's evidence of harm relates to incidents associated with complainant's pre-existing Major Depressive Disorder diagnosis or other matters which occurred before and after the agency's actions. Specifically, the record shows that complainant's symptoms of mental illness manifested themselves prior to her employment with the agency; that she has experienced other "stressors," such as marriage problems and other physical problems, such as Grave's disease and Hepatitis C. However, the record reveals that the agency's failure to accommodate complainant's disability, resulting in termination of her employment, was a significant factor in complainant's severe depression. We therefore find that the evidence supports an award of \$40,000.00. This amount takes into account the severity and the likely duration of the harm, particularly the five-years that complainant was unemployed. The Commission further notes that this amount meets the goals of not being motivated by passion or prejudice, not being "monstrously excessive" standing alone, and being consistent with the amounts awarded in similar cases. See *Ward-Jenkins v. Department of the Interior*, EEOC Appeal No. 01961483 (March 4, 1999). This award is not for harm associated with complainant's pre-existing conditions. *VERONICA C. CHEVIS, COMPLAINANT, v. MIKE JOHANNNS, SECRETARY, DEPARTMENT OF AGRICULTURE, AGENCY*. 2005 WL 819622, *4
- 4.7.3.** The Commission applies the principle that "a tortfeasor takes its victims as it finds them." *Wallis v. United States Postal Service*, EEOC Appeal No. 01950510 (November 13, 1995) (quoting *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1295 (7th Cir. 1987)). However, the Commission also applies two exceptions to this general rule. First, when a complainant has a pre-existing condition, the agency is liable only for the additional harm or aggravation caused by the discrimination. Second, if the complainant's pre-existing condition inevitably would have worsened, the agency is entitled to a reduction in damages reflecting the extent to which the condition would have worsened even absent the discrimination; the burden of proof is on the agency to establish the extent of this entitlement. *Wallis*,

EEOC Appeal No. 01950510 (citing Maurer v. United States, 668 F.2d 98 (2d Cir. 1981)); Finlay v. United States Postal Service, EEOC Appeal No. 01942985 (April 29, 1997). The Commission notes, therefore, that complainant is entitled to recover damages only for injury, or additional injury, caused by the discrimination. Terrell v. Department of Housing and Urban Development, EEOC Appeal No. 01961030 (October 25, 1996); EEOC Notice No. N 915.002 at 12. RANDY A. KALLAUNER, COMPLAINANT, SAMUEL W. BODMAN, SECRETARY, DEPARTMENT OF ENERGY, AGENCY. 2005 WL 2835209, *5

4.8. Duration

- 4.8.1.** The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in EEOC Notice No. N 915.002, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (July 14, 1992). Briefly stated, the complainant must submit evidence to show that the agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. *Id.* at 11-12, 14; Rivera v. Department of the Navy, EEOC Appeal No. 01934157 (July 22, 1994). The amount awarded should reflect the extent to which the agency's discriminatory action directly or proximately caused harm to the complainant and the extent to which other factors may have played a part. EEOC Notice No. N 915.002 at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the complainant, and the duration or expected duration of the harm. *Id.* at 14. RANDY A. KALLAUNER, COMPLAINANT, SAMUEL W. BODMAN, SECRETARY, DEPARTMENT OF ENERGY, AGENCY. 2005 WL 2835209, *5
- 4.8.2.** As noted above, the previous decision considered the actual and anticipated duration of the harm in determining the compensatory damages award. In doing so, the previous decision found that "[t]he record contains no evidence that any emotional harm attributable to the discriminatory performance appraisal rating and denial of bonus pay was likely to extend beyond the date appellant received notice of the agency's decision." REGINALD J. ROUNTREE, APPELLANT, v. DAN GLICKMAN, SECRETARY, DEPARTMENT OF AGRICULTURE, AGENCY. 1996 WL 77396, *5
- 4.8.3.** In the present case, we find that the AJ, who had the opportunity to observe the witnesses, properly determined that complainant "should be awarded a sum to compensate her for severe emotional distress from April [until] December 1992, and for moderate emotional distress until June of 1993 ... discounted by 50% to offset the non-discriminatory causative factors" contributing to the stress. [FN5] We next note that the Commission generally awards large nonpecuniary awards in cases where a complainant establishes severe emotional harm and/or a long-term injury. See Finlay v. United States Postal Service, EEOC Appeal No. 01942985 (April 29, 1997) (\$100,000 in nonpecuniary damages for severe psychological injury over four years which was expected to continue for an indeterminate period of time.); Wallis v.

United States Postal Service, EEOC Appeal No. 01950510 (November 13, 1995) (\$50,000.00 in nonpecuniary damages for aggravation of pre-existing emotional condition, where effects were expected to last at least seven years). Based on the foregoing evidence which establishes the stress and emotional discomfort sustained by complainant and upon consideration of damage awards reached in comparable cases, the Commission finds that complainant is entitled to award of nonpecuniary damages in the amount of \$5,000 for the severe emotional distress suffered during the period from April until December 1992, and \$1,400 for the moderate emotional distress suffered from December 1992 until June 1993. After offsetting this amount by 50% to account for the non-discriminatory causative factors contributing to the stress, complainant's award for nonpecuniary damages is \$3,200. LYNDA K. STARLING, COMPLAINANT, v. WILLIAM J. HENDERSON, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (PACIFIC/WEST REGION), AGENCY. 2000 WL 342418, *4

4.9. Pain and suffering

4.9.1. In general

4.9.1.1. *FN5. Arguably, damages for pain and suffering are themselves not truly compensatory. See D. Dobbs, Law of Remedies § 8.1, pp. 548-550 (1973). Certainly, such awards are of a different character. They are inherently noneconomic and are established through the subjective discretion of the jury. Poletto v. Consolidated Rail Corporation, 826 F.2d, at 1278, n. 14. Prejudgment interest on these speculative awards does not make up for the lost use of money and cannot be considered compensatory in any realistic sense. Monessen Southwestern Ry. Co. v. Morgan 486 U.S. 330, *348, 108 S.Ct. 1837, **1849 (U.S.Pa., 1988)*

4.9.2. Proof of pain and suffering

4.9.2.1. *Finally, the Court takes guidance from the Ninth Circuit that substantial emotional distress damages awards need not be supported by "objective" evidence and that the subjective testimony of the plaintiff, corroborated by others (including relatives), may be sufficient. See Passantino, 212 F.3d at 513- 14 (noting that case law in Washington state, Ninth Circuit, and Supreme Court does not require emotional distress damages awards to be supported by "objective" evidence and that, in this case, plaintiff's claims of distress were corroborated by husband and sister); see also Zhang, 339 F.3d at 1040 (in § 1981 case, stating that plaintiff's "testimony alone is enough to substantiate the jury's award of emotional distress damages," which court estimated could be more than \$200,000). In the instant case, the evidence of the qualitative harm suffered by Dr. Velez consisted largely of Dr. Velez's own testimony and the testimony of her husband Michael Remler. Dr. Velez testified that, as a result of the gender discrimination, she cried every time she got close to the DGMC and that she used to be a high energy person but that she became so depressed that she could not sleep, that she had no interest in doing anything, that she stopped activities and hobbies such as working out, gardening, painting, doing things with her children, and that she*

*could barely get one thing done. Dr. Velez also testified that she felt betrayed and lied to by her AF colleagues and that her reputation suffered injury. Dr. Velez acknowledged that she did not seek the help of a counselor, therapist, or clergyperson but that was in large part due to the fact that she got counsel and assistance from her husband, a neurologist. Dr. Remler testified that Dr. Velez suffered from clinical depression for which he counseled her *1039 and continues to counsel her to the present. He also testified about the change in Dr. Velez's attitude, from a strong independent woman to one who completely broke down, including sudden outbursts into tears, and from a person with vitality and energy into one without interest in the activities and hobbies she loved to do. Velez v. Roche 335 F.Supp.2d 1022, *1038 -1039 (N.D.Cal.,2004)*

4.9.3. Jury determination

4.9.3.1. *"[A]wards for pain and suffering are highly subjective and should be committed to the sound discretion of the jury, especially when the jury is being asked to determine injuries not easily calculated in economic terms." Eich, 350 F.3d at 763 (quoting Frazier v. Iowa Beef Processors, Inc., 200 F.3d 1190, 1193 (8th Cir.2000)). The jury's discretion, however, is not boundless and is limited to a reasonable range supported by the evidence. If the verdict is substantially above that range the conscience of the Court becomes involved. Shepard v. Wapello County, Iowa 303 F.Supp.2d 1004, *1021 (S.D.Iowa,2003)*

4.9.3.2. *The jury award in the present case for past and future pain and suffering is on the high end of the damages spectrum framed by the aforementioned cases. Given the severity and debilitating nature of plaintiff's multiple injuries, the award is, however, solidly within that spectrum and fairly reflects "the nature and extent of the injuries sustained, the permanence and extent of the pain caused by those injuries, the loss of enjoyment of life, and the need for further surgery" Iovine v. City of New York, 286 A.D.2d 372, 373, 729 N.Y.S.2d 182 (2d Dep't 2001). Therefore, we must not disturb the jury verdict in the present case because "[a]ssigning dollar amounts to pain and suffering is an inherently subjective determination, and peculiarly within the province of the jury." Pahuta v. Massey-Ferguson, Inc., 997 F.Supp. 379, 385 (W.D.N.Y.1998) (citing In re Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 853-54 (2d Cir.1992)); accord Clarke v. One Source, Inc., No. 99 Civ. 2323(RPP), 2002 WL 31458238, at *5 (S.D.N.Y. Nov. 1, 2002) ("Although a jury has a great amount of discretion when *479 awarding pain and suffering damages, 'a court may not sustain an award that it deems so excessive as to suggest that it was motivated by "passion or prejudice" rather than a reasoned assessment of the evidence of injury presented at trial.' " (citation omitted)). Indeed, "[d]eference must be accorded the interpretation of the evidence by the jury if there is credible evidence sufficient to support that interpretation, even if other evidence exists in the record which would support a contrary conclusion." Pahuta, 997 F.Supp. at 385. In the present case, the jury had before it ample credible evidence*

*of plaintiff's pain and suffering, and we will not disturb its subjective quantification of the monetary damages for that pain and suffering. Marcoux v. Farm Service and Supplies, Inc. 290 F.Supp.2d 457, *478 - 479 (S.D.N.Y.,2003)*

- 4.9.3.3.** *It is well-settled that awards for pain and suffering are highly subjective and should be committed to the sound discretion of the jury, especially when the jury is being asked to determine injuries not easily calculated in economic terms. See, e.g., Jenkins v. McLean Hotels, Inc., 859 F.2d 598, 600 (8th Cir.1988); Morrissey v. Welsh Co., 821 F.2d 1294, 1299 n. 3 (8th Cir.1987); Stafford v. Neurological Medicine, Inc., 811 F.2d 470, 475 (8th Cir.1987); Vanskike v. Union Pac. R. Co., 725 F.2d 1146, 1150 (8th Cir.1984). On appeal, the district court will only be reversed for abuse of discretion. Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051, 1061-62 (8th Cir.1993) (citing Benny M. Estes & Assocs. v. Time Insurance Co., 980 F.2d 1228, 1235 (8th Cir.1992)). A district court's refusal to remit an emotional distress award will be reversed only when the appellate court is "pressed to conclude that the verdict represents a monstrous or shocking injustice." Kientzy, 990 F.2d at 1061-62 (citation omitted). Thus, this court must consider whether Baker's emotional distress awards are so excessive as to shock the conscience. Mathieu v. Gopher News Co., 273 F.3d 769, 783 (8th Cir.2001) (citing Verhel v. Independent Sch. Dist. No. 709, 359 N.W.2d 579, 591 (Minn.1984)). Nonetheless, the court is mindful that "the issue to be decided here 'is not the size of the award alone, but the *945 evidence supporting the award.' " Evans v. Port Authority of New York and New Jersey, 273 F.3d 346, 354 (3d Cir.2001) (quoting Blakey v. Continental Airlines, Inc., 992 F.Supp. 731, 737 (D.N.J.1998)). Baker v. John Morrell & Co. 266 F.Supp.2d 909, *944 -945 (N.D.Iowa,2003)*
- 4.9.3.4.** *Under Pennsylvania law, which governs the assault and battery claim, the determination of whether any pain suffered by a plaintiff is compensable is generally to be left for the jury. Van Kirk v. O'Toole, 857 A.2d 183, 186 (Pa.Super.2004). "The test of whether a zero verdict can be upheld [is] whether the uncontroverted injuries are such that a conclusion that they are so minor that no compensation is warranted defies common sense and logic." Id. at 185. Whichard v. Bayloy 2005 WL 2596875, *1 (3rd Cir.(Pa. (C.A.3 (Pa.),2005)*
- 4.9.3.5.** *We conclude that although the compensatory damages award is substantial, we do not view it as monstrous or shocking, given the testimony regarding Moore's repeated abusive conduct. See Jenkins v. McLean Hotels, Inc., 859 F.2d 598, 600 (8th Cir.1988). As we recently noted in Eich v. Board of Regents for Cent. Missouri State University, 350 F.3d 752, 763 (8th Cir.2003), "awards for pain and suffering are highly subjective and should be committed to the sound discretion of the jury, especially when the jury is being asked to determine injuries not easily calculated in economic terms." (internal quotation marks and citations omitted). In Eich, which involved abuse no more severe than that to which*

*Rowe was subjected, we reinstated an award for \$200,000. Because it is difficult to quantify the extent of the psychic injury that months and years of unwanted touching and verbal abuse, combined with threats of murder and rape, might cause, it was for the jury, equipped as it was with the collective wisdom that life's experiences confer, to determine the amount that would adequately compensate Rowe for that injury, and thus we decline to reduce the compensatory award. Cf. Madison v. IBP, Inc., 330 F.3d 1051, 1054 (8th Cir.2003) (affirming award of \$266,750 in emotional distress damages and \$76,667 in back pay and benefits); Warren v. Prejean, 301 F.3d 893, 899 (8th Cir.2002) (upholding remitted award of \$60,000 in actual damages and \$150,000 in compensatory damages). Rowe v. Hussmann Corp. 381 F.3d 775, *783 (C.A.8 (Mo.)banc 2004)*

4.9.3.6. *This court has consistently held that "awards for pain and suffering are highly subjective and should be committed to the sound discretion of the jury, especially when the jury is being asked to determine injuries not easily calculated in economic terms." Frazier v. Iowa Beef Processors, Inc., 200 F.3d 1190, 1193 (8th Cir.2000); see also Jenkins, 859 F.2d at 600; Morrissey v. Welsh Co., 821 F.2d 1294, 1299 n. 3 (8th Cir.1987) ("We adhere to the belief that a jury is the best-equipped entity to determine the size of a damage award."); Stafford v. Neurological Med., Inc., 811 F.2d 470, 475 (8th Cir.1987) (assessment of damages especially within a jury's discretion when damages are not easily calculable in economic terms); Vanskike v. Union Pac. R.R. Co., 725 F.2d 1146, 1150 (8th Cir.1984) ("Assessment of damages is within the sound discretion of the jury."). Eich v. Board of Regents for Cent. Missouri State University 350 F.3d 752, *763 (C.A.8 (Mo.)banc 2003)*

4.9.3.7. *Webner testified that he was emotionally devastated by losing his job--a termination Titan told him explicitly was because of his disability. He testified that immediately after he was terminated he felt "empty," like he lost his best friend and that there was "a hole in his chest." (Appellant's App. at 171, 176.) He also testified that he was scared that he would be unable to pay his bills and was frustrated with his inability to find other regular work for six months. Titan contends that Webner's self-serving testimony about his reaction after he was terminated is insufficient to sustain the jury's award of emotional distress damages. We disagree. As previously stated a plaintiff's own testimony may provide ample evidence when heard in combination with the circumstances surrounding the plaintiff's termination. Furthermore, "[a]wards for pain and suffering are highly subjective and the assessment of damages is within the sound discretion of the jury, especially when the jury must determine how to compensate an individual for an injury not easily calculable in economic terms." Jenkins v. McLean Hotels, Inc., 859 F.2d 598, 600 (8th Cir.1988) (internal citations and quotations omitted). We will not disturb the jury's *837 award of emotional distress damages to Webner on his disability claim. Webner v. Titan Distribution, Inc. 267 F.3d 828, *836 -837 (C.A.8*

(Iowa),2001)

- 4.9.3.8.** *In the case of Niblo v. Parr Manufacturing, Inc., 445 N.W.2d 351, 355 (Iowa 1989), the Supreme Court of Iowa observed: "We see no logical reason to require a plaintiff to prove that the emotional distress was severe when the tort is retaliatory discharge in violation of public policy." In addition, it is well settled that awards for pain and suffering are highly subjective and should be committed to the sound discretion of the jury, especially when the jury is being asked to determine injuries not easily calculated in economic terms. See, e.g., Jenkins v. McLean Hotels, Inc., 859 F.2d 598, 600 (8th Cir.1988); Morrissey v. Welsh Co., 821 F.2d 1294, 1299 n. 3 (8th Cir.1987); Stafford v. Neurological Medicine, Inc., 811 F.2d 470, 475 (8th Cir.1987); Vanskike v. Union Pac. R. R., 725 F.2d 1146, 1150 (8th Cir.1984). At trial both Frazier and his ex-wife, Joyce Taylor, testified regarding the emotional havoc Frazier suffered as a result of his termination. Frazier testified that he had always been gainfully employed and that he felt all of his dignity and self esteem were taken away when he was improperly terminated. Tr. 280-82. He also stated that he felt empty and lost. Tr. 281. To deal with these feelings, he frequently went to bible study group and spent extra time alone. Tr. 282. Taylor testified that Frazier appeared to be a "broken man" and that his spirit was broken. Tr. 469. While the \$40,000 verdict appears to be generous, we do not feel that it was excessive. Frazier v. Iowa Beef Processors, Inc. 200 F.3d 1190, *1193 (C.A.8 (Iowa),2000)*
- 4.9.3.9.** *Against this backdrop, we conclude that the district court acted within the confines of its discretion in ordering a new trial unless Delli Santi accepted a remittitur of \$295,000. Although Delli Santi testified about her distress, the district court determined that Delli Santi's evidence of pain and suffering did not support an award of \$300,000. Because we must give deference to the judgment of the trial court who was "in the best position to evaluate the evidence and *207 assess whether the jury's verdict [was] rationally based", Gumbs, 823 F.2d at 772 (quoting Murray v. Fairbanks Morse, 610 F.2d 149, 153 (3d Cir.1979)), we cannot say that the district court exceeded the bounds of its discretion in remitting the pain and suffering award from \$300,000 to \$5,000. Delli Santi v. CNA Ins. Companies 88 F.3d 192, *206 -207 (C.A.3 (N.J.),1996)*
- 4.9.3.10.** *Awards of pain and suffering are fact-specific and depend to a great extent on the fact-finder's observation of the plaintiff and its subjective determination of the amount needed to achieve full compensation. Johnson, 845 F.2d at 1357. As such, the district court is accorded great latitude in assessing damages. Parks v. Dowell Div. of Dow Chemical Corp., 712 F.2d 154, 160 (5th Cir.1983). Considering the record in this case, a jury award of \$300,000 for past and future pain and suffering does not seem clearly erroneous, nor did the district court abuse its discretion in denying Scurlock a new trial. See Stokes, 894 F.2d at 769. Additionally, because the district court is in a better position to evaluate the prejudice flowing from counsel's improper comments during trial and*

to determine the most effective response to ensure a fair trial, a new trial will not be granted, even if counsel's remarks are improper, unless after considering the record as a whole the court concludes that manifest injustice would result from letting the verdict stand. Johnson v. Ford Motor Co., 988 F.2d 573, 582 (5th Cir.1993). Because Gautreaux's counsel asked only a single question, to which Archie Scurlock responded in the negative and about which no further comment was made, substantial prejudice was not caused Scurlock and a new trial was not necessary.

4.9.3.11. *Gautreaux v. Scurlock Marine, Inc. 84 F.3d 776, *783 (C.A.5 (La.),1996)*

4.9.3.12. *The Court must also bear in mind that "awards for pain and suffering are highly subjective and should be committed to the sound discretion of the jury, especially when the jury is being asked to determine injuries not easily calculated in economic terms." Baker v. John Morrell & Co., 266 F.Supp.2d 909, 944 (N.D.Iowa 2003); see also Fox v. GMC, 247 F.3d 169, 180 (4th Cir.2001) (noting that "[c]ourts defer to a jury's award of damages for intangible harms, such as emotional distress, 'because the harm is subjective and evaluating it depends considerably on the demeanor of the witnesses' "). Velez v. Roche 335 F.Supp.2d 1022, *1038 (N.D.Cal.,2004)*

4.9.4. Unit of time

4.9.4.1. *In Colburn, 883 F.2d at 377-78, this court reversed a jury verdict based on the district court's failure to give a cautionary instruction to counter the prejudicial effects of the "unit of time" argument made by plaintiff's counsel, reasoning: Without a specific cautionary instruction, there is a danger that this argument will create an illusion in the jury's mind that pain and suffering damages can and perhaps should properly be measured or calculated by simple multiplication rather than through the jury's sound discretion. Id. at 377 (citing Baron Tube Co. v. Transport Ins. Co., 365 F.2d 858, 865 (5th Cir.1966) (en banc)). The Colburn court noted that the "blanket cautionary instruction given in this case that 'any statements, objections, or arguments made by lawyers are not evidence in this case' inadequately addresses" the Court's concern with the use of "unit of time" argument. Id. Fontenot v. Dual Drilling Co. 179 F.3d 969, *979 (C.A.5 (La.),1999)*

4.9.4.2. *The blanket cautionary instruction given in this case that "any statements, objections, or arguments made by lawyers are not evidence in this case," and "[w]hat the lawyers say is not binding upon [the jury]" inadequately addresses our concerns with the use of the "unit of time" argument. An appropriate instruction would inform the jury that the dollar figure advanced by counsel in making the "unit of time" argument does not constitute evidence but merely represents argument which the jury is free to disregard in its deliberations. Mileski v. Long Island R.R. Co., 499 F.2d 1169, 1174 (2d Cir.1974). The trial court erred by not giving a specific cautionary instruction. Colburn v. Bunge Towing, Inc. 883 F.2d*

4.10. **Emotional Injuries**

4.10.1. **Mood Disorders**

4.10.1.1. **Dysthymia**

4.10.1.1.1. Background: The current consensus is that major depressive disorder, dysthymia, double depression (alternating dysthymia and depression), and some apparently transient dysphorias all are manifestations of the same disease process. Thus, all of these varieties of depression respond to similar psychological and physical treatments, and they share polysomnographic abnormalities. For the consensus opinion concerning a depressive spectrum, see Judd and Aksikal, 2000. Controversy exists, however. For example, see Chen et al, 2000, who suggest that risk factors for pure dysthymia are more environmental and less genetic than for the other members of the spectrum.

4.10.1.1.2. Because transitions between dysthymia and major depression are common, dysthymia is highly predictive of a major depression. For this reason, considerable redundancy will occur between a discussion of major depression and a discussion of dysthymia. However, the goal of this article is to emphasize issues that apply particularly to dysthymia. For a further discussion of the criteria for diagnosing dysthymia, see Frances et al.

4.10.1.1.3. By definition, dysthymia is a chronic mood disorder, with a duration of at least 2 years in adults and 1 year in adolescents and children. It is manifested as depression for most of the day, occurring more days than not, and accompanied by some of the following symptoms: poor appetite or overeating, insomnia or hypersomnia, low energy or fatigue, low self-esteem, poor concentration, difficulty making decisions, and feelings of hopelessness. For cases of dysthymia, manic episodes must not have occurred, and major depressive episodes must not have occurred in the first 2 years of the illness (1 year in children). The *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)* allows transient euthymic episodes of up to 2 months, but Dunner, 1999, finds euthymic episodes ranging only from 3-30 days.

4.10.1.1.4. By contrast, major depression is diagnosed if 5 or more of the following symptoms have been present most of the day, every day, for the past 2 weeks and if depressed mood (the first symptom) or loss of interest or pleasure in usual activities (the second symptom), or both, is present.

4.10.1.1.4.1. *Depressed mood*

4.10.1.1.4.2. *Loss of interest or pleasure in usual activities*

4.10.1.1.4.3. *Significant weight loss or gain*

4.10.1.1.4.4. *Insomnia or hypersomnia*

4.10.1.1.4.5. *Psychomotor agitation or retardation*

4.10.1.1.4.6. *Fatigue or loss of energy*

4.10.1.1.4.7. *Feelings of worthlessness or excessive or inappropriate guilt*

4.10.1.1.4.8. *Diminished ability to think or concentrate*

4.10.1.1.4.9. *Recurrent thoughts of death or suicide*

4.10.1.1.5. Chronic depression can be separated into the following 3 subtypes:

4.10.1.1.5.1. *Chronic major depression with a duration of more than 2 years*

4.10.1.1.5.2. *Milder dysthymia*

4.10.1.1.5.3. *Double depression, where episodes of major depression are superimposed on more enduring dysthymia*

4.10.1.2. **Depression**

4.10.1.2.1. **Clinical depression** is state of [sadness](#) or [melancholia](#) that has advanced to the point of being disruptive to an individual's social functioning and/or activities of daily living. The diagnosis may be applied when an individual meets a sufficient number of the symptomatic criteria for the [depression spectrum](#) as suggested in the [DSM-IV-TR](#) or [ICD-9](#)/[ICD-10](#). It is important to note that an individual may suffer from what is termed a "clinical depression" without fully meeting the criteria for a specific diagnosis on the depression spectrum. Clinically, this is referred to as a "depressed mood". This state is typically psycho-social in nature, as opposed to organic (chemical). A strict clinical diagnosis of Depression, and/or its various corollaries, almost invariably maintains the presence of a biological component. Although a [mood](#) characterized by [sadness](#) is often colloquially referred to as [depression](#), clinical depression is something more than just a temporary state of sadness. [Symptoms](#) lasting two weeks or longer, and of a severity that begins to interfere with typical social functioning and/or activities of daily living, are considered to constitute clinical depression.

4.10.1.2.2. **Criteria for Major Depressive Episode**

4.10.1.2.3. ([cautionary statement](#))

5. Five (or more) of the following [symptoms](#) have been present during the same 2-week period and represent a change from previous functioning; at least one of the symptoms is either
 - 5.1. [depressed mood](#) or
 - 5.2. loss of interest or pleasure.
 - 5.2.1.1. **Note:** Do not include symptoms that are clearly due to a general medical condition, or [mood-incongruent](#) or [delusion](#) or [hallucination](#).
6. *depressed mood most of the day, nearly every day, as indicated by either*

subjective report (e.g., feels sad or empty) or observation made by others (e.g., appears tearful). **Note:** In children and adolescents, can be [irritable <../path/irritable.htm>](#) mood.

7. markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day (as indicated by either subjective account or observation made by others)
8. significant weight loss when not dieting or weight gain (e.g., a change of more than 5% of body weight in a month), or decrease or increase in appetite nearly every day. **Note:** In children, consider failure to make expected weight gains.
9. [Insomnia <insomnia.htm>](#) or [Hypersomnia <hypersomniad.htm>](#) nearly every day
10. [psychomotor agitation <../path/psychomotoragitation.htm>](#) or [retardation <../path/psychomotorretardation.htm>](#) nearly every day (observable by others, not merely subjective feelings of restlessness or being slowed down)
11. fatigue or loss of energy nearly every day
12. feelings of worthlessness or excessive or inappropriate guilt (which may be delusional) nearly every day (not merely self-reproach or guilt about being sick)
13. diminished ability to think or concentrate, or indecisiveness, nearly every day (either by subjective account or as observed by others)
14. recurrent thoughts of death (not just fear of dying), recurrent [suicidal <../path/suicidal.htm>](#) ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide
15. The symptoms do not meet criteria for a [Mixed Episode <mixeddep.htm>](#) (see p. 335).
16. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.
17. The symptoms are not due to the direct physiological effects of a [substance <../treatments/drugs/drug.htm>](#) (e.g., a drug of abuse, a medication) or a general medical condition (e.g., hypothyroidism).
18. The symptoms are not better accounted for by [Bereavement <bereavement.htm>](#), i.e., after the loss of a loved one, the symptoms persist for longer than 2 months or are characterized by marked functional impairment, morbid preoccupation with worthlessness, suicidal ideation, psychotic symptoms, or psychomotor retardation.

18.1.1.1.1. Reprinted with permission from the [Diagnostic and Statistical Manual of Mental Disorders, fourth Edition <d4class.htm>](#).
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<<http://www.psych.org>>

18.1.1.1.2. Symptoms <http://psychcentral.com/disorders/sx22.htm>

18.1.1.1.3. Depression

18.1.1.1.4. (Major Depressive Disorder)

18.1.1.1.5. SYMPTOMS

18.1.1.1.5.1. Frequent Signs and Symptoms

http://www.wramc.amedd.army.mil/education/pat_edu/w

omenuhlth/HealthCareIssues/depression.htm

18.1.1.1.5.1.1. Loss of interest in life; boredom.

18.1.1.1.5.1.2. Listlessness and fatigue.

18.1.1.1.5.1.3. Insomnia; excessive or disturbed sleeping.

18.1.1.1.5.1.4. Social isolation.

18.1.1.1.5.1.5. Appetite loss or overeating.

18.1.1.1.5.1.6. Loss of sex drive.

18.1.1.1.5.1.7. Constipation.

18.1.1.1.5.1.8. Difficulty making decisions; concentration difficulty.

18.1.1.1.5.1.9. Unexplained crying bouts.

18.1.1.1.5.1.10. Intense guilt feelings over minor or imaginary misdeeds.

18.1.1.1.5.1.11. Irritability.

18.1.1.1.5.1.12. Various pains, such as headache or chest pain, without evidence of disease

18.1.1.1.6. A person who suffers from a major depressive disorder (sometimes also referred to as clinical depression or major depression) must either have a depressed mood or a loss of interest or pleasure in daily activities consistently for at **least a 2 week period**. This mood must represent a change from the person's normal mood. Social, occupational, educational or other important functioning must also be negatively impaired by the change in mood. For instance, a person who has missed work or school because of their depression, or has stopped attending classes altogether or attending usual social engagements.

18.1.1.1.7. A depressed mood caused by substances (such as drugs, alcohol, medications) is not considered a major depressive disorder, nor is one which is caused by a general medical condition. Major depressive disorder generally cannot be diagnosed if a person has a history of manic, hypomanic, or mixed episodes (e.g., a bipolar disorder) or if the depressed mood is better accounted for by schizoaffective disorder and is not superimposed on schizophrenia, a delusion or psychotic disorder. Typically the diagnosis of major depression is also not made if the person is grieving over a significant loss in their lives (see note on bereavement below).

18.1.1.1.8. Clinical depression is characterized by the presence of the majority of these symptoms:

18.1.1.1.8.1. *Depressed mood most of the day, nearly every day, as indicated by either subjective report (e.g., feeling sad or empty) or observation made by others (e.g., appears tearful). (In children and adolescents, this may be characterized as an irritable mood.)*

18.1.1.1.8.2. *Markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day*

18.1.1.1.8.3. *Significant weight loss when not dieting or weight gain (e.g., a change of more than 5% of body weight in a month), or decrease or increase in appetite nearly every day.*

- 18.1.1.1.8.4.** *Insomnia or hypersomnia nearly every day*
- 18.1.1.1.8.5.** *Psychomotor agitation or retardation nearly every day*
- 18.1.1.1.8.6.** *Fatigue or loss of energy nearly every day*
- 18.1.1.1.8.7.** *Feelings of worthlessness or excessive or inappropriate guilt nearly every day*
- 18.1.1.1.8.8.** *Diminished ability to think or concentrate, or indecisiveness, nearly every day*
- 18.1.1.1.8.9.** *Recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide*
- 18.1.1.1.9.** In addition, for a diagnosis of major depression to be made, the symptoms must not be better accounted for by [Bereavement </disorders/sx39.htm>](#), i.e., after the loss of a loved one, the symptoms persist for longer than 2 months or are characterized by marked functional impairment, morbid preoccupation with worthlessness, suicidal ideation, psychotic symptoms, or psychomotor retardation.

18.1.1.1.10. What is depression

- 18.1.1.1.11.** The word 'depression' is used to describe everyday feelings of low mood which can affect us all from time to time. Feeling sad or fed up is a normal reaction to experiences that are upsetting, stressful or difficult; those feelings will usually pass.
- 18.1.1.1.12.** If you are affected by depression, you are not 'just' sad or upset. You have an illness which means that intense feeling of persistent sadness, helplessness and hopelessness are accompanied by physical effects such as sleeplessness, a loss of energy, or physical aches and pains.
- 18.1.1.1.13.** Sometimes people may not realise how depressed they are, especially if they have been feeling the same for a long time, if they have been trying to cope with their depression by keeping themselves busy, or if their depressive symptoms are more physical than emotional.
- 18.1.1.1.14.** Here is a list of the most common symptoms of depression. As a general rule, if you have experienced four or more of these symptoms, for most of the day nearly every day, for over two weeks, then you should seek help.
 - 18.1.1.1.14.1.** *Tiredness and loss of energy*
 - 18.1.1.1.14.2.** *Persistent sadness*
 - 18.1.1.1.14.3.** *Loss of self-confidence and self-esteem*
 - 18.1.1.1.14.4.** *Difficulty concentrating*
 - 18.1.1.1.14.5.** *Not being able to enjoy things that are usually pleasurable or interesting*
 - 18.1.1.1.14.6.** *Undue feelings of guilt or worthlessness*
 - 18.1.1.1.14.7.** *Feelings of helplessness and hopelessness*
 - 18.1.1.1.14.8.** *Sleeping problems - difficulties in getting off to sleep or waking up much earlier than usual*
 - 18.1.1.1.14.9.** *Avoiding other people, sometimes even your close friends*
 - 18.1.1.1.14.10.** *Finding it hard to function at work/college/school*
 - 18.1.1.1.14.11.** *Loss of appetite*
 - 18.1.1.1.14.12.** *Loss of sex drive and/ or sexual problems*
 - 18.1.1.1.14.13.** *Physical aches and pains*
 - 18.1.1.1.14.14.** *Thinking about suicide and death*
 - 18.1.1.1.14.15.** *Self-harm*
- 18.1.1.1.15. Cases**
 - 18.1.1.1.15.1.** *The psychologist stated that complainant had no*

history of psychological treatment or intervention prior to the detail at issue. The psychologist also stated that complainant's condition of major depression was a direct result of being detailed. The psychologist estimated that complainant will require at least 18 to 24 months of therapy and medicine for his sleep disturbance, depression and anxiety. Based on the psychiatrist's medical opinion, we find that complainant has demonstrated the causal nexus between the retaliation and the need for his psychiatric treatment. We also find that complainant has demonstrated that all of the psychiatric treatment would be for conditions incurred by the retaliation. We further find that, based upon his experience of dealing with sufferers of major depression, complainant's psychiatrist has demonstrated the rationale for the anticipated length of the treatment. The Commission concludes that the agency inappropriately reduced the amount of complainant's request. Accordingly, we award complainant \$20,000.00 for future pecuniary damages. *4 Next, addressing the issue of non-pecuniary damages, we note that the record contains complainant's testimony that as a result of the agency's retaliation, he suffered sleep disturbance with nightmares, weight gain, general fatigue and loss of interest in usual activities, social and interpersonal withdrawal, frequent bouts of crying, feelings of worthlessness, thoughts of suicide, disillusionment with his job and extreme anger. After a careful review of the record, as well as damage awards reached in comparable cases, the Commission finds that complainant is entitled to an award of non-pecuniary damages in the amount of \$35,000.00. See e.g., *Feris v. Environmental Protection Agency*, EEOC Appeal No. 01983167 (September 18, 1998) (\$35,000.00 in non-pecuniary damages awarded to complainant where testimony showed that the agency's discrimination resulted in emotional harm and his career suffered); *Economou v. Department of the Army*, EEOC Appeal No. 01983435 (August 5, 1999) (\$35,000.00 in non-pecuniary damages awarded to complainant where evidence showed he experienced humiliation, anxiety, depression and sleeplessness as a result of the agency's discrimination); *Johnson v. Department of the Interior*, EEOC Appeal No. 01961812 (June 18, 1998) (\$37,500.00 in non-pecuniary damages awarded to complainant based on reports from two physicians showing complainant's depression was a result of the agency's discrimination). JOSE A. OTERO, COMPLAINANT, DR. FRANCIS J. HARVEY, SECRETARY, DEPARTMENT OF THE ARMY, AGENCY. 2005 WL 2921305, *3 -4

18.1.1.1.15.2. The AJ found that complainant suffered from insomnia, depression, anxiety, and chest pain, based on complainant's hearing testimony. The AJ further found that 55

*percent of complainant's symptoms were attributable to the agency's discrimination, again based on complainant's hearing testimony. The AJ awarded \$15,000 but cited no caselaw to support such an award. Several Commission decisions have addressed compensatory damages in cases similar to complainant's. See Terrell v. Department of Housing and Urban Development, EEOC Appeal No. 01961030 (October 25, 1996) (\$25,000 award for emotional harm where discriminatory nonselection exacerbated, for at least two years, problems unrelated to discrimination); Smith v. Department of Defense, EEOC Appeal No. 01943844 (May 9, 1996) (\$25,000 award for emotional harm, where many aggravating factors not related to discrimination were also present); Hatchett v United States Postal Service, EEOC Appeal No. 01964256 (October 1, 1996) (\$20,000 awarded for anger, suspicion, and withdrawal from family and friends, and exacerbation of pre-existing anxiety and depression). Given the above, we find that the evidence supports an award of \$25,000.00. This amount takes into account the severity and the duration of the harm done to complainant by the agency's action, as well as the fact that some of complainant's symptoms were unrelated to the agency's action. This amount further meets the goals of not being motivated by passion or prejudice, not being "monstrously excessive" standing alone, and being consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Department of the Interior, EEOC Appeal No. 01961483 (March 4, 1999) (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)); US EEOC v. AIC Security Investigations, Ltd., 823 F.Supp. 573, 574 (N.D. Ill 1993). RANDY A. KALLAUNER, COMPLAINANT, SAMUEL W. BODMAN, SECRETARY, DEPARTMENT OF ENERGY, AGENCY. 2005 WL 2835209, *6*

18.1.1.1.15.3. *Compensatory damages may be awarded for the past pecuniary losses, future pecuniary losses, and non-pecuniary losses which are directly or proximately caused by the agency's discriminatory conduct. EEOC Notice No. 915.002 at 8. Objective evidence of compensatory damages can include statements from the complainant concerning his or her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Statements from others, including family members, friends, health care providers, other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. See Lawrence v. United*

*States Postal Service, EEOC Appeal No. 01952288 (April 18, 1996), citing Carle v. Department of the Navy, EEOC Appeal No. 01922369 (January 5, 1993). After a thorough review of the record, and given the severity, nature and duration of distress experienced by complainant, we find that an award of \$10,000.00 is supported by substantial evidence. The AJ found that complainant was entitled to \$10,000.00 in non-pecuniary damages "for pain and suffering and financial losses incurred." However, complainant has not testified that she was unable to work after she was released from the agency or to otherwise function, she was not diagnosed as depressed and she conceded at the hearing that she did not have counseling, although complainant alleged that she could not afford it. We credit complainant's testimony that she was upset after she was separated from the agency, had some financial problems, lost weight and had a strained relationship with her children. However, complainant provided no medical or other documentation regarding her mental condition following her separation from the agency, nor did she provide documentation regarding her actual financial state during this time. We find that non-pecuniary compensatory damages are designed to remedy a harm and not to punish the agency for its discriminatory actions. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 311-12 (1986) (stating that compensatory damages determination must be based on the actual harm sustained and not the facts of the underlying case). We further note that this award is not "monstrously excessive" standing alone, is not the product of passion or prejudice, and is consistent with the amount awarded in similar cases, as cited above. Ward- Jenkins v. Department of the Interior, EEOC Appeal No. 01961483 (March 4, 1999) (citing Cygnar v. Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)). VICKIE DELLINGER, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (EASTERN AREA), AGENCY. 2005 WL 2492880, *6*

18.1.1.1.15.4. *Shah v. Department of Veterans Affairs, EEOC Appeal No. 07A30040 (September 30, 2003) (awarding \$30,000 in a retaliatory harassment case which showed that complainant experienced increased anxiety and depression, stomach distress, chest palpitations, elevated blood pressure, and interference with social and family relationships as a result of the discrimination). LISA SILCOX, COMPLAINANT, R. JAMES NICHOLSON, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, AGENCY. 2005 WL 2492894, *3*

18.1.1.1.15.5. *The AJ found that an award of \$365,000.00 in non-pecuniary compensatory damages was appropriate. However, the AJ reduced that amount to \$300,000.00, the statutory limit. The AJ found that complainant suffered emotional distress due to the*

agency's discriminatory action, with some of the conditions persisting for over four and one half years. Specifically, the AJ found that complainant suffered from: avoidance of people, crowds, and intense distrust of White males; social isolation and withdrawal, including loss of friends and colleagues; joylessness and loss of sense of humor; distraction and withdrawal from family; relationship with husband severely strained; high levels of stress and anxiety; exacerbation of previously existing migraine, bronchitis, and asthma conditions; menstrual irregularities; gastro-intestinal disorders; cracking of the teeth due to excessive clenching and grinding; heart palpitations; 30 to 40 pound weight gain; foot problems; heartburn; difficulty sleeping; diagnosed with moderately severe depression and generalized anxiety; loss of appetite; diminished energy; and loss of self-esteem and self-respect. The agency argues on appeal that the AJ's award of non-pecuniary compensatory damages was not consistent with the amounts awarded in similar cases after considering the nature, severity, and duration of harm. The agency argues that the AJ based the award of non-pecuniary compensatory damages on insufficient medical evidence. Finally, the agency argues that the AJ did not give sufficient weight to complainant's behavior, admissions, and relative lack of credibility, and to evidence of mitigation. The Commission has held that evidence from a health care professional is not a mandatory prerequisite for recovery of compensatory damages for emotional distress. *Lawrence v. United States Postal Service*, EEOC Appeal No. 01952288 (April 18, 1996); *Carpenter v. Department of Agriculture*, EEOC Appeal No. 01945652 (July 17, 1995); *Bernard v. Department of Veterans Affairs*, EEOC Appeal No. 01966861 (July 17, 1998). *4 In determining compensatory damages, the Commission strives to make damage awards for emotional harm consistent with awards in similar cases. We find that \$300,000.00 in non-pecuniary damages in this case is excessive considering the nature, severity, and duration of the harm as compared to analogous cases. Insofar as complainant has submitted evidence of emotional distress, we note that the Commission has awarded compensatory damages in cases somewhat similar to complainant's in terms of harm sustained. See *Yasko v. Department of the Army*, EEOC Appeal No. 01A32340 (April 21, 2004)(awarding complainant \$100,000.00 in non-pecuniary compensatory damages after being subjected to sexual harassment resulting in depression, post-traumatic stress disorder, anxiety, severe intermittent insomnia, weight gain and stress); *Winkler v. Department of Agriculture*, EEOC Appeal No. 01975336 (June 7, 2000)(awarding \$110,000.00 in non-pecuniary compensatory damages for emotional distress after being subjected to sexual harassment and

*experiencing major depression, excessive sleeping, social withdrawal, anxiety, irritability, weeping, increased suicidal ideation, fright, shock, humiliation, loss of marital harmony and loss of enjoyment in life). The Commission finds these cases analogous to the above referenced cases with respect to the nature, severity, and duration of the harm. After considering the nature of the agency's action, in conjunction with complainant's testimony, we find that \$100,000.00 is an appropriate amount of non-pecuniary compensatory damages to be awarded. Finally, we note that this award is not "monstrously excessive" and is consistent with the amounts awarded in similar cases. PATRICIA KANN, COMPLAINANT, GALE A. NORTON, SECRETARY, DEPARTMENT OF THE INTERIOR, AGENCY. 2005 WL 2492834, *3 -4*

18.1.1.1.15.6. *Non-Pecuniary Compensatory Damages The AJ found that an award to \$380,000.00 in non-pecuniary compensatory damages was appropriate. However, the AJ reduced that amount to \$300,000.00, the statutory limit. The AJ found that complainant suffered emotional distress due to the agency's discriminatory actions, with some of the conditions persisting for over five years. Specifically, the AJ found that complainant suffered from: weight gain; loss of self-esteem; vertigo with dizziness; stomach problems including vomiting and diarrhea; feelings of helplessness and being out of control; depression manifested by feelings of sadness and frequent crying; fear of contact with people, particularly older men; social withdrawal; severe swelling in feet; feelings of being aged; adjustment disorder with depressive features; sleeplessness; and nightmares. The agency argues on appeal that the AJ's award of non-pecuniary compensatory damages was not consistent with the amounts awarded in similar cases after considering the nature, severity, and duration of harm. The agency argues that the doctor's diagnosis of complainant was flawed because it was not based on medical tests and examinations and was too attenuated in time to be given any weight. Finally, the agency argues that the AJ did not give sufficient weight to complainant's own behavior, admissions, and relative lack of credibility, and to evidence of mitigation. The Commission has held that evidence from a health care professional is not a mandatory prerequisite for recovery of compensatory damages for emotional distress. Lawrence v. United States Postal Service, EEOC Appeal No. 01952288 (April 18, 1996); Carpenter v. Department of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995); Bernard v. Department of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998). *4 In determining compensatory damages, the Commission strives to make damage awards for emotional harm consistent with awards in similar*

*cases. We find that \$300,000.00 in non-pecuniary damages in this case is excessive considering the nature, severity, and duration of the harm as compared to analogous cases. Insofar as complainant has submitted evidence of emotional distress, we note that the Commission has awarded compensatory damages in cases somewhat similar to complainant's in terms of harm sustained. See Yasko v. Department of the Army, EEOC Appeal No. 01A32340 (April 21, 2004)(awarding complainant \$100,000.00 in non-pecuniary compensatory damages after being subjected to sexual harassment resulting in depression, post-traumatic stress disorder, anxiety, severe intermittent insomnia, weight gain and stress); Winkler v. Department of Agriculture, EEOC Appeal No. 01975336 (June 7, 2000)(awarding \$110,000.00 in non-pecuniary compensatory damages for emotional distress after being subjected to sexual harassment and experiencing major depression, excessive sleeping, social withdrawal, anxiety, irritability, weeping, increased suicidal ideation, fright, shock, humiliation, loss of marital harmony and loss of enjoyment in life). The Commission finds these cases analogous to the above referenced cases with respect to the nature, severity, and duration of the harm. After considering the nature of the agency's action, in conjunction with complainant's testimony, we find that \$110,000.00 is an appropriate amount of non-pecuniary compensatory damages. Finally, we note that this award is not "monstrously excessive" and is consistent with the amounts awarded in similar cases. MARY TURTON, COMPLAINANT, GALE A. NORTON, SECRETARY, DEPARTMENT OF THE INTERIOR, AGENCY. 2005 WL 2492835, *3 -4*

18.1.1.1.15.7. In regard to the compensatory damages awarded by the agency, we find that the award of \$50,000.00 for compensatory damages was appropriate. The record contains complainant's statement regarding the harm suffered, as well as, statements from family members and friends. Complainant stated that as a result of the agency's discriminatory denial of her request for reasonable accommodation, she began to feel more fatigued and exhausted from the stress. Complainant was unable to sleep and felt increased numbness and tingling in her extremities. Complainant also stated that she began crying frequently, experienced feelings of hopelessness and fear, and had frequent, severe headaches. Complainant's Deposition Testimony at 19-21. Statements from family members and friends corroborate complainant's statements that she increasingly experienced physical maladies, including numbness and weakness in her limbs and pain and suffered episodes of depression. Further, the statements also provide that complainant was once energetic and outgoing, but is no longer so. Because the award of \$50,000.00 is not monstrously excessive and

is consistent with similar Commission decisions, we find that the agency appropriately complainant \$50,000.00 in non-pecuniary damages. See *Cavanaugh v. United States Postal Serv.*, EEOC Appeal No. 07A20102 (November 12, 2003) (\$50,000.00 award in non-pecuniary damages where the agency's discriminatory actions exacerbated complainant's depression, affected her relationship with family and friend, and complainant suffered from severe tension headaches and was irritable); *Amen v. United States Postal Serv.*, EEOC Appeal No. 07A10069 (January 6, 2003) (\$50,000.00 award in non-pecuniary damages where complainant suffered prolonged mental anguish, depression, humiliation, insomnia, etc, as a result of the agency's discriminatory actions); *Bowden v. Dep't of Veterans Affairs*, EEOC Appeal No. 01A00360 (June 22, 2000) (\$45,000 award in non-pecuniary damages where the agency subjected complainant to harassment, which resulted in exacerbation of depression, injury to professional standing, character, reputation, and credit rating, humiliation, physical manifestations, loss of self-esteem, and marital and family problems). KAREN B. MCCOY, COMPLAINANT, R. JAMES NICHOLSON, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, AGENCY. 2005 WL 2429042, *4

18.1.1.1.15.8. *The AJ awarded complainant \$40,000.00 in non-pecuniary damages. On appeal, the agency asserts that if non-pecuniary damages are awarded, they should be reduced to \$5,000.00. The record reveals that complainant testified that, in addition to embarrassment, she suffered increased fatigue, stress, and depression as a result of her non-selection. HT Vol. II at 102. The record further reveals that complainant was diagnosed with fibromyalgia and other medical conditions, prior to her non-selection. Complainant's Hearing Exhibits B-1, B-2. Complainant further testified that depression and stress are common symptoms of fibromyalgia and the non-selection exacerbated these symptoms. HT Vol II. at 102, 114. In determining compensatory damages, the Commission strives to make damage awards for emotional harm consistent with awards in similar cases. The Commission finds that the AJ did not rely on prior Commission precedent in determining the specific amount that was awarded complainant. We note that the Commission has awarded non-pecuniary compensatory damages in cases somewhat similar to complainant's case in terms of the harm sustained. See *Pachecano v. United States Postal Service*, Appeal No. 01A32170 (May 20, 2004) (\$25,000.00 awarded to complainant when he was not selected for a position and he experienced depression and an aggravation of his pre-existing Post Traumatic Stress Disorder); *Baker v. Department of Veterans Affairs*, EEOC Appeal No. 07A30075 (August 7, 2003) (\$25,000.00 awarded to complainant when she was not selected*

*for a position and she experienced depression, anger, difficulty in sleeping and aggravation of her hypertension). *9 Upon review of the entire record and upon consideration of damage awards reached in comparable cases, the Commission reduces the award of non-pecuniary damages from \$40,000.00 to \$25,000.00. We note that this award is not motivated by passion or prejudice, is not "monstrously excessive," and is consistent with the amounts awarded in similar cases. DEBORAH NEAL, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2005 WL 2137519, *8 -9*

18.1.1.1.15.9. *Complainant testified that he suffered from high blood pressure, anxiety and depression as a result of the agency's discriminatory conduct. The record also shows that the agency did not rebut complainant's testimony. The Commission finds that the AJ's award of \$600.00 in non-pecuniary damages was appropriate. [FN2] This amount takes into account the severity of the harm suffered, and is consistent with prior Commission precedent. Jojola-Jemison v. U.S. Postal Service, EEOC Appeal No.01970027 (October 8, 1998) (\$500 award for non-pecuniary damages where the agency subjected complainant to harassment, which resulted in marital strain, injury to personal and professional reputation, depression, sleeplessness, anxiety and damage to general health); Gross v. U.S. Postal Service, EEOC Appeal No. 01980733 (November 19, 1999) (\$750 award for non-pecuniary damages where the agency issued complainant a Notice of Removal that was later reduced to a 14-day suspension, which resulted in emotional distress). WILLIAM J. COLBERT, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (CAPITAL METRO AREA) AGENCY. 2005 WL 1936093, *5*

18.1.1.1.15.10. *The AJ then considered complainant's claim for compensatory damages. In so doing, the AJ noted that some of complainant's evidence dealt with her 1999 reassignment, which was not at issue in the instant complaint. Therefore, the damages awarded in her decision only dealt with the non-selection in 2001. The AJ reviewed complainant's testimony which established that following the non-selection, she stayed home from work for three weeks. During the months that followed, she suffered anxiety, insomnia, lack of appetite, and began a medication regimen which included Paxil, Zoloft, Ambien and Vistral. Complainant saw a psychologist for 6-8 months, and continues to see a Licensed Social Worker through the agency's Employee Assistance Program. Even at the time of the hearing, complainant testified that she still suffered from weekly crying spells, sees no relief in sight and has withdrawn socially from friends and family. Complainant's daughter and co-workers corroborated*

complainant's testimony and reported complainant suffered from stomach problems, anxiety, and is no longer the outgoing person she once was. Complainant submitted medical records from her physician, psychologist, and psychiatrist, and noted complainant had been diagnosed with Generalized Anxiety Disorder. After a review of the testimony and medical records, the AJ found complainant established a link between her non-selection in 2001 and the resulting emotional distress. In light of the gravity of the distress, and the fact that it continued at least through the hearing, the AJ found that an award in the amount of \$150,000.00 would adequately compensate complainant for the discrimination. The AJ cited Commission precedents which were in line with the emotional distress suffered in complainant's case. Specifically, the AJ found complainant suffered from depression, loss of enjoyment of life, interference with family relationships, permanent diminishment in quality of her life, and physical symptoms
ROSEANN FURCH, COMPLAINANT, MIKE JOHANNNS, SECRETARY, DEPARTMENT OF AGRICULTURE, AGENCY. 2005 WL 1936149, *2

18.1.1.2. Dysthemia

18.1.1.2.1. Dysthymic Disorder

18.1.1.2.2. Dysthymic Disorder is characterized by chronic depression, but with less severity than a major depression. The essential symptom for dysthymic disorder is an almost daily depressed mood for at least two years, but without the necessary criteria for a major depression. Low energy, sleep or appetite disturbances and low self-esteem are usually part of the clinical picture as well. The diagnostic criteria is as follows:

18.1.1.2.3. On the majority of days for 2 years or more, the patient reports depressed mood or appears depressed to others for most of the day.

18.1.1.2.3.1. *When depressed, the patient has 2 or more of:*

18.1.1.2.4. Appetite decreased or increased

18.1.1.2.5. Sleep decreased or increased

18.1.1.2.6. Fatigue or low energy

18.1.1.2.7. Poor self-image

18.1.1.2.8. Reduced concentration or indecisiveness

18.1.1.2.9. Feels hopeless

18.1.1.2.9.1. *During this 2 year period, the above symptoms are never absent longer than 2 consecutive months.*

18.1.1.2.9.2. *During the first 2 years of this syndrome, the patient has not had a **Major Depressive <major_depression.htm>** Episode.*

18.1.1.2.9.3. *The patient has had no **Manic <dysthymic_cyclothymic_episodes.htm>**, **Hypomanic <dysthymic_cyclothymic_episodes.htm>** or **Mixed <dysthymic_cyclothymic_episodes.htm>** Episodes.*

18.1.1.2.9.4. *The patient has never fulfilled criteria for **Cyclothymic Disorder <cyclothymic_disorder.htm>**.*

18.1.1.2.9.5. *The disorder does not exist solely in the context of a chronic psychosis (such as **Schizophrenia <schizophrenia_disorder.htm>** or **Delusional Disorder <delusional_disorder.htm>**).*

18.1.1.2.9.6. *The symptoms are not directly caused by a general medical condition or the use of substances, including prescription medications.*

18.1.1.2.9.7. *The symptoms cause clinically important distress or*

impair work, social or personal functioning.

- 18.1.1.2.10. Specify whether
- 18.1.1.2.11. Early onset, if it begins by age 20
- 18.1.1.2.12. Late onset, if it begins at age 21 or later
- 18.1.1.2.13. The only specifier that can apply is With Atypical Features.
- 18.1.1.2.14. **Associated Features:**
- 18.1.1.2.15. **Depressed Mood**
[.<./clinical_psychology/clinical_psychology_mood_disorders1_bipolar.htm>](http://clinical_psychology/clinical_psychology_mood_disorders1_bipolar.htm)
- 18.1.1.2.16. **Somatic or Sexual Dysfunction**
[.<./clinical_psychology/clinical_psychology_sexual_dysfunction1_male.htm>](http://clinical_psychology/clinical_psychology_sexual_dysfunction1_male.htm)
- 18.1.1.2.17. Guilt or Obsession
- 18.1.1.2.18. **Addiction**
[.<./clinical_psychology/clinical_psychology_substance_related_disorders1.htm>](http://clinical_psychology/clinical_psychology_substance_related_disorders1.htm)
- 18.1.1.2.19. Anxious or Fearful or **Dependent Personality**
[.<./clinical_psychology/criteria_personality_codependent.htm>](http://clinical_psychology/criteria_personality_codependent.htm)
- 18.1.1.2.20. Dramatic or Erratic or **Antisocial Personality**
[.<./clinical_psychology/criteria_personality_antisocial.htm>](http://clinical_psychology/criteria_personality_antisocial.htm)
- 18.1.1.2.21. **Differential Diagnosis:**

18.1.2. Emotional Distress

18.1.2.1. *This court has considered the excessiveness of jury awards for emotional distress in several cases involving claims under Title VII. For example, in Kucia v. Southeast Arkansas Community Action Corp., 284 F.3d 944, 947-48 (8th Cir.2002), we upheld \$50,000 in compensatory damages for emotional distress in a race discrimination case where the plaintiff testified that it was hard for her to hold her head up, that she was on edge, and that she had lost sleep and felt anxious. We held that \$50,000 was not so excessive as to shock the judicial conscience. Id. at 948. Similarly, in Ross v. Douglas County, Nebraska, 234 F.3d 391, 397 (8th Cir.2000), we ruled that \$100,000 for emotional distress in a race discrimination case was not excessive where the plaintiff suffered emotional and physical injuries and was forced to take a lower paying job without health benefits. Also, in Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051, 1061-62 (8th Cir.1993), we upheld an award of \$125,000 for mental anguish and suffering and held that the district court did not abuse its discretion in failing to remit the award. The court has upheld varying amounts of emotional distress damages in cases not involving Title VII. See, e.g., Mathieu v. Gopher News Co., 273 F.3d 769, 782-83 (8th Cir.2001) (finding \$165,000 emotional distress award not excessive where plaintiff in ADA claim was only witness to testify about emotional distress); Foster v. Time Warner Entm't Co., 250 F.3d 1189, 1196 (8th Cir.2001) (holding \$75,000 award for emotional distress in ADA claim was not excessive where plaintiff and her husband testified that plaintiff had become withdrawn, could not eat, experienced back pain and other physical and emotional problems); Frazier, 200 F.3d at 1193 (upholding \$40,000 award in FMLA claim where plaintiff testified he felt "empty and lost" and his dignity and self-esteem were taken from him); Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989, 993 (8th Cir.1984) (finding \$125,000 award for mental anguish in § 1981 case to be reasonable). In the present case, Eich testified: It's very frustrating to know that that behavior I was*

*subjected to would be *764 allowed to happen for so long, so many times and nothing be done to correct it. They didn't care anything about what I contributed to the university. They put in my job performance or my job performance reviews I am a valuable employee of the university but when I turned to them for help it was like I was nothing. There is just no way to really describe everything that I have been through, the volume, the intense situations, the rejection of my requests for help. There is just, there is really no words to describe how completely and totally devastating everything that has happened to me has been. It's completely destroyed everything. Appellant's Br. at 55. Her testimony reflects how demeaning and humiliating the actions of Drake and Gillespie were by reason of the abusive conduct used against her. We cannot hold that the jury verdict, as rendered, shocks the judicial conscience. The remittitur reflects the trial judge's erroneous view that there was no evidence of sexual harassment. We find this was an abuse of discretion. The district court, under the existing record, failed to analyze the record by giving the Plaintiff the benefit of all reasonable inferences and resolving all conflicts in the evidence in her favor. Under the circumstances, we hold that it was for the jury to determine the reasonable amount of damages incurred. Therefore, we reinstate the verdict of \$200,000 and reverse the district court. Eich v. Board of Regents for Cent. Missouri State University 350 F.3d 752, *763 - 764 (C.A.8 (Mo.)banc 2003)*

18.1.2.2. *Titan also argues that the jury rationally could not have awarded Webner \$12,500 in emotional distress damages for each of his two claims because he established no serious emotional injuries stemming from his discharge. "Compensatory 'damages for emotional distress must be supported by competent evidence of "genuine injury." ' ' Foster v. Time Warner Entm't Co., 250 F.3d 1189, 1196 (8th Cir.2001) (quoting Forshee v. Waterloo Indus., Inc., 178 F.3d 527, 531 (8th Cir.1999)). To prove emotional distress in relation to his ADA claim, Webner was not required to present medical or other expert evidence. See Kim v. Nash Finch Co., 123 F.3d 1046, 1065 (8th Cir.1997). Instead, "[a] plaintiff's own testimony, along with the circumstances of a particular case, can suffice to sustain the plaintiff's burden in this regard." Hammond v. Northland Counseling Ctr., Inc., 218 F.3d 886, 893 (8th Cir.2000) (internal quotations omitted). Webner was obligated to offer specific facts as to the nature of his claimed emotional distress and the causal connection to Titan's alleged violations. See Browning v. President Riverboat Casino-Missouri, Inc., 139 F.3d 631, 636 (8th Cir.1998). Webner v. Titan Distribution, Inc. 267 F.3d 828, *836 (C.A.8 (Iowa),2001)*

19. Specific amounts

19.1. 300,000

19.1.1. On review of the record, we disagree with Defendant's contention that Plaintiff failed to establish actual injury. Plaintiff testified--albeit succinctly--that he felt "devastated" following his termination from Polk, and he experienced multiple symptoms including anxiety, sleeplessness, and

increased episodes of heartburn. He was unable to care for his family and, due to loss of income, was forced to cash in savings bonds that he had put aside for his children's education. His symptoms persisted from the time he was fired until a few months into his reinstatement at Polk when Plaintiff became re-acclimated at work. During this time he sought treatment from Dr. Fee and was prescribed a narcotic for pain symptoms as well as anti-anxiety medication. (Tr. 10/25/02 at 51-53.) While testifying on this point, Plaintiff became emotional and required a break in the proceedings in order to regain his composure. The evidence cumulatively was sufficient to support an award for mental anguish damages. *Moussa v. Commonwealth of Pennsylvania Dept. of Public Welfare* 289 F.Supp.2d 639, *666 (W.D.Pa.,2003)

19.2. \$180,000

19.2.1. Defendants, using the power of the government, initiated an unfounded retaliatory, biased DEA/OPR investigation of plaintiff Probst on the purported, but pretextual, basis that plaintiff Probst had engaged in misconduct and insubordination. Plaintiff was told by DEA/OPR Inspector McKulsky that he, Probst, could be fired. When plaintiff Probst provided a list of witnesses in his defense, those witnesses were ignored by the DEA/OPR investigators because the stated basis for the investigation was pretextual and the real reason was retaliation for Probst having spoken out against race discrimination in the DEA. Probst knew the investigation was pretextual, but was powerless to do anything about it. After the biased and unjustified investigation, Probst was suspended for ten days in May of 1993 in retaliation for his lawful expression. His health deteriorated. He would wake up at night and worry. He would do this night after night. He was unable to get back to sleep. He was always tired. He suffered persistent migraine headaches and stomach aches. When he was awake, the unfairness with which he was treated by the defendants obsessed him. He became emotionally upset and depressed. He was anxious about what had been done to him. He was continuously suspicious and fearful about his future. Probst considered his life destroyed. The devastating, emotional anguish suffered by plaintiff Probst which resulted from the intentional unlawful retaliatory conduct of the defendants persisted in varying degrees of intensity beginning in late 1991, over a period of four years--1992, 1993, 1994 and 1995. There were times plaintiff Probst could not function at work or at home as well as he had before defendants' unlawful actions against him. Additionally, he was afraid that his seeking medical help or ingesting prescribed drugs for the ailments brought on by defendants' conduct would somehow be used against him by the supervisory personnel of the DEA to cause him further difficulties in his position as a DEA special agent. After listening to plaintiff's testimony and viewing his demeanor, the court finds him credible. The court on the same basis also finds the testimony of plaintiff's wife, Vilija Bilaisis, credible. The court offered defendants' counsel the opportunity to call as witnesses any of the DEA special agents or DEA administrative personnel named by plaintiff Probst and Ms. Bilaisis in their testimony presented at trial. Thus, the defendants were provided the opportunity to rebut that testimony. No such witnesses were called to testify

by defendants' counsel. [FN9] *562 [2] Since it is the court's obligation as the fact finder to quantify the "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses," 42 U.S.C. § 1981a(b)(3) proven by the evidence that plaintiff sustained as a proximate cause of defendants' intentional unlawful retaliatory conduct committed after November 21, 1991, the court finds that the compensatory damages plaintiff Probst suffered and should recover resulting from the intentional unlawful retaliatory acts taken against him to be \$180,000. The court has come to this finding by considering the appropriate compensatory damages reasonably suffered by plaintiff during each calendar year after 1991 as follows: 1992 \$ 85,000 1993 55,000 1994 25,000 1995 15,000 ----- Total \$180,000 The court finds that the defendants' intentional unlawful retaliatory conduct against plaintiff Probst as the most intense and caused him the most compensatory damages during the calendar year 1992 because it was during that year that the pretextual OPR investigations of himself and his wife were underway. [FN10] Early in the next year, 1993, defendant was notified of the results of the DEA/OPR investigation of him. He was notified that he would be punished for what he knew, and for what have now been conceded, to be pretextual reasons with a ten-day suspension from his work with the DEA. Plaintiff Probst served the ten-day suspension in May of 1993. His emotional pain and suffering did not end, but persisted thereafter because he knew the reasons for his ten-day suspension were a pretext for his speaking out against race discrimination within the DEA. In 1994, the intentional unlawful retaliatory conduct of defendants against plaintiff Probst had a less detrimental effect on plaintiff Probst than in the previous two years causing him emotional distress and compensatory damages that persisted, but were nonetheless diminished from those in 1992 and 1993. Also in 1994, he mitigated his compensatory damages by taking the appropriate lawful action of filing this lawsuit. During 1995 the retaliatory conduct had a further diminished effect on plaintiff, but still a lingering mental anguish persisted that adversely affected plaintiff Probst's life. The defendants' counsel's pretrial concessions and position at trial as well as the trial itself, plus this verdict in plaintiff's favor are all mitigating factors during 1995 as to the emotional pain and mental anguish to which plaintiff Probst had previously been subjected for the last four years. II. *Plaintiff's Compensatory Damages for Injuries to Him Proximately Caused by Actions Taken Against His Wife* Included in the \$180,000 damage determination, indeed within the amount of \$85,000 for the year 1992, is the amount of \$30,000 of compensatory damages for the emotional pain and mental anguish suffered by plaintiff Probst for the defendants' intentional, unlawful retaliatory action taken against plaintiff by the defendants' initiation of the DOJ/OPR investigation of plaintiff's wife, Assistant United States Attorney (AUSA) Vilija Bilaisis. ASAC Vanacora and G/S Woolley directly and intentionally caused a Department of Justice (DOJ) OPR investigation to be initiated against plaintiff Probst's wife in January 1992. Ms. Bilaisis was in 1992, and remains today, an Assistant U.S. Attorney for the Northern District of Illinois. This DOJ/OPR investigation of AUSA

Bilaisis was an act of intentional unlawful retaliation against plaintiff's Probst for his speaking out and exposing the racial discrimination in the DEA. The defendants' conduct in initiating the DOJ/OPR investigation of AUSA Bilaisis was intended by defendants to be and in fact was, in addition to the emotional pain and mental anguish resulting to plaintiff Probst for defendants' retaliatory acts taken against plaintiff in his employment with the DEA. The monetary figure the court finds appropriate to compensate plaintiff Probst for this emotional pain and mental anguish is \$30,000. The court has included this \$30,000 amount *563 as part of the compensatory damages of \$85,000 suffered by plaintiff Probst during the year 1992. Probst v. Reno 917 F.Supp. 554, *561 -563 (N.D.Ill.,1995)

19.3. \$150,000

19.3.1. The AJ then considered complainant's claim for compensatory damages. In so doing, the AJ noted that some of complainant's evidence dealt with her 1999 reassignment, which was not at issue in the instant complaint. Therefore, the damages awarded in her decision only dealt with the non-selection in 2001. The AJ reviewed complainant's testimony which established that following the non-selection, she stayed home from work for three weeks. During the months that followed, she suffered anxiety, insomnia, lack of appetite, and began a medication regimen which included Paxil, Zoloft, Ambien and Vistral. Complainant saw a psychologist for 6-8 months, and continues to see a Licensed Social Worker through the agency's Employee Assistance Program. Even at the time of the hearing, complainant testified that she still suffered from weekly crying spells, sees no relief in sight and has withdrawn socially from friends and family. Complainant's daughter and co-workers corroborated complainant's testimony and reported complainant suffered from stomach problems, anxiety, and is no longer the outgoing person she once was. Complainant submitted medical records from her physician, psychologist, and psychiatrist, and noted complainant had been diagnosed with Generalized Anxiety Disorder. After a review of the testimony and medical records, the AJ found complainant established a link between her non-selection in 2001 and the resulting emotional distress. In light of the gravity of the distress, and the fact that it continued at least through the hearing, the AJ found that an award in the amount of \$150,000.00 would adequately compensate complainant for the discrimination. The AJ cited Commission precedents which were in line with the emotional distress suffered in complainant's case. Specifically, the AJ found complainant suffered from depression, loss of enjoyment of life, interference with family relationships, permanent diminishment in quality of her life, and physical symptoms. ROSEANN FURCH, COMPLAINANT, MIKE JOHANNNS, SECRETARY, DEPARTMENT OF AGRICULTURE, AGENCY. 2005 WL 1936149, *2

19.3.2. Despite the agency's argument to the contrary, the AJ specifically noted that the damages award only dealt with emotional distress related to the discriminatory non-selection, not the emotional distress complainant encountered after the reassignment. Although complainant may have visited

an EAP counselor prior to the events in question herein, the emotional distress suffered as a result of her non-selection was more severe than what she reported to the EAP Counselor, thus meriting a high award. For instance, only after the non-selection did complainant take three weeks off from work, begin therapy with a psychologist, and begin taking medications for the emotional distress. There is no evidence that complainant required any of this medical intervention prior to the non-selection. Accordingly, although complainant did visit an EAP Counselor in the past, we find that the AJ properly accounted for the emotional distress suffered in the past, and we also find substantial evidence to support the award made by the AJ. ROSEANN FURCH, COMPLAINANT, MIKE JOHANNIS, SECRETARY, DEPARTMENT OF AGRICULTURE, AGENCY. 2005 WL 1936149, *3

19.4. \$120,000

19.4.1. Complainant, in a November 21, 2003 statement, wrote that: Since August, 1997, for over six years, as a result of the U.S. Postal Service denying me reasonable accommodations and no job, to say that my life has been turned upside down would be a gross understatement. The anxiety and pain that I have experienced as a result on the agency's actions has had a severe negative impact on my physical, emotional, mental, spiritual, and financial well-being. I have gone from being a person who was secure, organized, well adjusted, focused, happy with a bright future to a person who is irritable, agitated, worried, tired, anxiety-ridden, unable to stay focused, difficulty concentrating, angry, distressed and depressed feeling a sense of dread about life in general. The person that I once was is gone... The discriminatory action of the agency against me have caused me to even challenge my faith and religion, which has become a great source of pain, sorrow, and guilt for me. My faith has always carried me through life up until this time. However, the duration of time that this has gone on - six years - has caused me to become too overburdened and too overwhelmed for too long a period of time...I used to be a highly motivated individual. I now feel motionless most of the time... I have also experienced significant amount of weight loss... Six years ago, when the agency denied me reasonable accommodation and denied me work because of my disabilities, they threatened everything that meant anything to me (my health, my marriage, my livelihood, my dignity, my intelligence, my faith, my very being!!!) Not only to me personally, but it took a significant toll and put a tremendous amount of strain on my relationship with my husband and on our marriage. Our intimate marital relations, as a result, have become virtually non-existent. In his August 2003 statement, complainant's husband stated that: She lost interest in having sex. We were not able to have any intimacy at all. She was completely withdrawn. This was very difficult. Prior to this incident, [complainant] and I enjoy [sic] a healthy and active sex life. *5 He also indicated that: I worried about [her] health all of the time. This was my main concern. She had struggled for a long time with her present health conditions and I feared that her emotional health would effect her physical health. I tried to keep a close watch on her. She was suffering so much. She looked awful! [She] was run down, physically in pain and an emotional "wreck." She was

not the Ceil that I knew. She would not socialize. She kept telling me that she didn't feel like seeing anyone. Complainant's sister submitted a statement indicating that: I have watched her over these years struggle with depression and anxiety. It has been very upsetting for me and other members of my family to see the toll that this has taken on her since she was denied work by the post office. There has been a marked change in her personality. I have always known my sister to be a cheerful, helpful and outgoing person ready to help anyone who needs it. In describing complainant's personality since August 1997, complainant's sister stated that: she always seems worried, nervous, and/or distracted...appears to be indifferent about things that she used to enjoy doing... She seems easily irritated by the least things...She was not like this in the past. The agency determined that \$10,000.00 was reasonable to compensate complainant for her non-pecuniary damages for emotional distress. According to the agency, this amount takes into account the extent, severity and duration of the alleged harm. In support of this position, the agency noted that complainant provided no medical statements from her doctors to support her claim that her pre-existing medical conditions were exacerbated by the discrimination; and that the duration of the harm was limited to the date she began working for the family business in March 1998. The agency also indicated that complainant was not entitled to compensation for the stress involved in pursuing her EEO complaint. Finally, the agency maintained that the problems with intimacy noted by complainant and her husband were due more to her physical condition, not the agency's discrimination. According to the agency, complainant, in an affidavit dated April 1998, stated that engaging in sexual activity worsened her piriformis syndrome and caused symptoms such as numbness in her right leg and foot. The agency did not provide a copy of the affidavit, however. CECILIA T. DURINZI, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2005 WL 1903378, *4 -5

19.4.2. Complainant's testimony, and that of corroborating witnesses, attest to observed severe changes in her habits, personality, and mental state. We also find that a six-year duration period has been established and that there was no indication that the symptoms have diminished. These symptoms, among other things, include a loss of self-esteem, anxiety, and depression. We find that complainant's request for \$300,000.00 in non-pecuniary damages is excessive. We find that an award of \$120,000.00 is sufficient to compensate complainant for her non-pecuniary losses. Non-pecuniary compensatory damages are designed to remedy harm and not to punish the agency for its discriminatory actions. See *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 311- 12 (1986) (stating that a compensatory damages determination must be based on the actual harm sustained and not the facts of the underlying case). We agree with the agency that complainant is not entitled to receive compensatory damages for the frustration of pursuing her EEO complaint. Here, however, we find that she has established that it was the agency's discriminatory conduct that caused the losses for which damages are sought.

A \$120,000 award is not "monstrously excessive" standing alone, is not the product of passion or prejudice, and is consistent with the amount awarded in similar cases. Franklin v. United States Postal Service, EEOC Appeal No. 07A00025; 01A03882 (January 19, 2001)(award of \$150,000 where complainant and his wife testified that he became withdrawn, depressed, embarrassed, humiliated, lost self esteem, and experienced financial difficulties, after he was denied a reasonable accommodation); Holland v. SSA, EEOC Appeal No. 01A01372 (October 2, 2003)(award of \$100,000 where the statement of complainant and his psychiatrist showed that he experienced a severe emotional injury when he continued to experience feelings of worthlessness and low self-esteem for a period of five years, after he was denied a reasonable accommodation and constructively discharge); and Gamez v. SSA, EEOC Appeal No. 07A20129 (October 27, 2003), request for reconsideration denied EEOC Request No. 05A40247 (December 30, 2003)(award of \$90,000 where complainant, her husband, and close friends testified that, after she was denied a reasonable accommodation, she experienced emotional distress, her relationship with her husband deteriorated, and she became withdrawn and suffered low self-esteem). CECILIA T. DURINZI, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2005 WL 1903378, *6

19.5. \$100,000-\$110,00

19.5.1. Although complainant had served in Vietnam, there are no indications in the record that he had exhibited any signs of PTSD prior to February 1996. In a notarized letter to the agency dated June 17, 2004, complainant stated that he had been injured in 1992, and was off from work for about two years as a result. He further stated that, during the time that he was not working, he had been seeing a psychologist for depression, but was happy when he returned to work. The record includes a report from a clinical psychologist to a treating psychiatrist dated August 23, 1994. The report indicated that things were going well for complainant at work, in that he was very pleased with his job, that the work environment was "more than satisfactory," and that complainant's co-workers and supervisors were "great to work with." The report also noted that complainant had done a good job of integrating pain management techniques into his daily routine, that he had become much less irritable and more patient, and that, "overall, he and his family [felt] that he [was] back to his old self." In addition, he had decreased his dosages of Pamelor, an antidepressant medication that he was on. The record contains extensive medical documentation establishing that complainant's condition worsened substantially after February 1996, and that he had continued to exhibit severe symptoms between March 1996 and May 2004. Complainant has presented reports from treating psychiatrists and psychologists, assessments from the VA medical center in Dallas, Texas, medication lists, medical records, treatment plans, and other documentation of PTSD and major depression. These conditions manifested as nervousness, sleeplessness, anxiety, irritability, low self-esteem, isolation, fear of crowds, and nightmares.

ROBERT D. GREEN, COMPLAINANT, JOHN E. POTTER,
POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,
AGENCY. 2005 WL 1903661, *2

19.5.2. In *Glockner*, complainant was subjected to ongoing discriminatory harassment between July 1999 and June 2001, a period of nearly two years. She testified that, in addition to suffering from depression, anxiety, and exhaustion, she had been experiencing migraine headaches as well as irritable bowel syndrome and other gastrointestinal disorders. She also testified that she started to bite her cheeks and developed an irrational fibroma, which required surgery. In addition to her own testimony, the complainant presented a neurologist's report indicating that a magnetic resonance imaging scan performed in October 2000 had ruled out physiological causes of her migraines, and that as far back as 1999, the complainant's doctor had attributed her migraines to work-related stress. In addition, a staff physician working at the complainant's facility testified that he had seen complainant several times testified as to his belief that the complainant's symptoms originated from her working conditions. Other evidence included letters from complainant's doctors regarding treatment of her kidney stones and the removal of her irrational fibroma. In *Mack*, the complainant's award was based on a finding that he had been left homeless for two years following a discriminatory termination from his employment. The complainant testified without rebuttal that, as a result of being fired after testing positive for the HIV virus, he could no longer pay rent, his lease was not renewed and he was forced to give up custody of his seven-year-old daughter. Between 1995 and 1997, he was left homeless, unable to bathe and often sleeping in the street. His belongings and those of his daughter were sold at an auction after he could no longer pay the monthly storage fees. In addition, his relationship with his daughter was irreparably damaged. Finally, his depression worsened considerably after his removal. He began to suffer from migraines and insomnia, and his emphysema had gotten worse as well. *4 In the instant case, an assessment from the VA medical center in Dallas dated November 28, 1997, indicates that complainant had been a patient at the center since April 23, 1996, that he had been diagnosed with PTSD, that his social and occupational functioning had been significantly impaired, and that his prognosis was poor. A clinical psychologist's memorandum dated December 5, 1997, stated that complainant continued to display the symptom configurations associated with PTSD and major depression at severe levels. The memorandum noted that complainant's prognosis was poor and that a global functionality assessment indicated a functionality of 50, which indicated serious impairment in social and vocational functioning. He had been on various psychotropic medications to control his symptoms, including, but not limited to Gabapentin, Citalopram Hydrobromide, Clonazepam, Quetiapine Fumarate, Trazodone, Nortriptyline, and Klonopin. Despite extensive psychiatric treatment and evaluation, he continued to exhibit these symptoms between March 1996 and May 2004, and beyond. He reported that panic reactions would be triggered by such activities as attending church

services where people would be behind him, and watching the rain. A doctor's note dated December 4, 2001, indicated that had also been diagnosed with peripheral neuropathy, a degenerative nerve condition, which caused him to have to walk with a cane. The doctor stated that, although complainant was first diagnosed with peripheral neuropathy in 1985, the condition had been made worse by having been "coupled with his PTSD." The doctor characterized his neuropathy as, "more of a disability." The various statements from treating psychiatrists and psychologists indicate that complainant's condition is permanent. There are, however, no indications in the record that complainant lost his employment, home, or property, as had the complainants in Mack and Koock. Moreover, complainant has not exhibited physical symptoms of his emotional distress to the same extent that the complainant in Glockner had. Rather, the facts in this case are similar to those in which the Commission has awarded \$100,000 in compensatory damages. See *Hendley v. Department of Justice*, EEOC Appeal No. 01A20977 (May 15, 2003), request for reconsideration dismissed, EEOC Request No. 05A30962 (January 14, 2004) (\$100,000 awarded where complainant was diagnosed with severe bipolar disorder, had experienced paranoia, insomnia, eating disorders, and uncontrollable crying for six years, and would require treatment for the rest of her life); *Patel v. Department of the Army*, EEOC Appeal No. 01980279 (September 26, 2001) (\$100,000 awarded where, after several discriminatory nonselections, complainant required continuous medical treatment for five years, covering major depression, chest pains, palpitations, anxiety, and insomnia); and *Finlay v. United States Postal Service*, EEOC Appeal No. 01942985 (\$100,000 awarded where complainant experienced depression, frequent crying, concern for her safety, lethargy, social withdrawal, recurring nightmares, a damaged marriage, stomach distress, and headaches for a period of four years, and was expected to continue experiencing those symptoms for an indeterminate time). *5 Accordingly, we will award complainant \$100,000 in nonpecuniary compensatory damages. ROBERT D. GREEN, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2005 WL 1903661, *3-5

19.5.3. We note that the AJ considered the evidence of record and ordered the agency to pay complainant \$100,000.00 in non-pecuniary damages. In making the determination on compensatory damages, the AJ specifically considered the testimony of complainant and her husband, who credibly testified that their lives were negatively impacted as a result of the harassment and discrimination she received by facility HRM staff. The AJ noted that the period of the discrimination was from about March of 1997 to October of 1997, and she stated that during this period she was in pain and depressed, and felt physically and emotionally drained by having to satisfy the HRM's demands due to her telecommuting request. The AJ also noted that complainant's testimony with regard to having difficulty with the HRM staff and being unable to have advanced sick leave approved was consistent with E1's testimony. Further, the AJ noted that during this period, complainant had an uveitis flare-up in August of 1997, but cited the testimony of the agency's expert physician in concluding that the evidence did

not support the conclusion that complainant suffered stress-related cardiac palpitations during the period at issue. AJ's Decision at 38. Further, the AJ found that the evidence did not support a relationship between stress and the premature rupture of membranes, nor did the AJ find that complainant's newborn child was in any way negatively affected due to her premature birth. In awarding complainant **\$100,000.00 in compensatory damages** for emotional pain and suffering, as well as exacerbation of physical symptoms, the AJ referenced the testimony of complainant and her husband. We note that complainant did not indicate if she was treated medically for her emotional pain and suffering. The Commission finds that although a claim for non-pecuniary damages may rest on a complainant's statement alone, we note that she did not submit evidence other than the statements of herself and her husband regarding the effects of her emotional distress on her family. Nevertheless, complainant has indicated that she experienced emotional/mental pain and suffering during the nine months that the agency discriminated against her with regard to her requests for telecommuting and advanced sick leave. The evidence does establish that based on the actions of the facility's HRM office's staff, complainant suffered discomfort and pain related to her pregnancy, had several uveitis flare-ups, and was depressed and stressed. The evidence also supports complainant's statements that she felt emotionally and physically drained by having to meet the unreasonable demands of HRM staff. Further, the AJ found that the evidence of record clearly supported a finding that the physical and emotional difficulties complainant underwent over an eight month period were related to the agency's "campaign" of harassment and discrimination. AJ's Decision at 37. As noted by the AJ, the medical evidence submitted by complainant did not support a finding that stress related to the discrimination was a proximate cause of the premature rupture of her membranes during her pregnancy, nor was the premature delivery of her daughter affected by stress related to the discrimination. GENEVA ELLIS-BALONE, COMPLAINANT, v. SPENCER ABRAHAM, SECRETARY, DEPARTMENT OF ENERGY, AGENCY. Appeal No. 07A30125 Agency No. 98(105)RL Hearing No. 380-2000-08082X December 29, 2004

19.5.4. The AJ found that an award of \$365,000.00 in non-pecuniary compensatory damages was appropriate. However, the AJ reduced that amount to \$300,000.00, the statutory limit. The AJ found that complainant suffered emotional distress due to the agency's discriminatory action, with some of the conditions persisting for over four and one half years. Specifically, the AJ found that complainant suffered from: avoidance of people, crowds, and intense distrust of White males; social isolation and withdrawal, including loss of friends and colleagues; joylessness and loss of sense of humor; distraction and withdrawal from family; relationship with husband severely strained; high levels of stress and anxiety; exacerbation of previously existing migraine, bronchitis, and asthma conditions; menstrual irregularities; gastro-intestinal disorders; cracking of the teeth due to excessive clenching and grinding; heart palpitations; 30 to 40 pound weight gain; foot problems; heartburn; difficulty sleeping; diagnosed with moderately

severe depression and generalized anxiety; loss of appetite; diminished energy; and loss of self-esteem and self-respect. The agency argues on appeal that the AJ's award of non-pecuniary compensatory damages was not consistent with the amounts awarded in similar cases after considering the nature, severity, and duration of harm. The agency argues that the AJ based the award of non-pecuniary compensatory damages on insufficient medical evidence. Finally, the agency argues that the AJ did not give sufficient weight to complainant's behavior, admissions, and relative lack of credibility, and to evidence of mitigation. The Commission has held that evidence from a health care professional is not a mandatory prerequisite for recovery of compensatory damages for emotional distress. *Lawrence v. United States Postal Service*, EEOC Appeal No. 01952288 (April 18, 1996); *Carpenter v. Department of Agriculture*, EEOC Appeal No. 01945652 (July 17, 1995); *Bernard v. Department of Veterans Affairs*, EEOC Appeal No. 01966861 (July 17, 1998). *4 In determining compensatory damages, the Commission strives to make damage awards for emotional harm consistent with awards in similar cases. We find that \$300,000.00 in non-pecuniary damages in this case is excessive considering the nature, severity, and duration of the harm as compared to analogous cases. Insofar as complainant has submitted evidence of emotional distress, we note that the Commission has awarded compensatory damages in cases somewhat similar to complainant's in terms of harm sustained. See *Yasko v. Department of the Army*, EEOC Appeal No. 01A32340 (April 21, 2004)(awarding complainant \$100,000.00 in non-pecuniary compensatory damages after being subjected to sexual harassment resulting in depression, post-traumatic stress disorder, anxiety, severe intermittent insomnia, weight gain and stress); *Winkler v. Department of Agriculture*, EEOC Appeal No. 01975336 (June 7, 2000)(awarding \$110,000.00 in non-pecuniary compensatory damages for emotional distress after being subjected to sexual harassment and experiencing major depression, excessive sleeping, social withdrawal, anxiety, irritability, weeping, increased suicidal ideation, fright, shock, humiliation, loss of marital harmony and loss of enjoyment in life). The Commission finds these cases analogous to the above referenced cases with respect to the nature, severity, and duration of the harm. After considering the nature of the agency's action, in conjunction with complainant's testimony, we find that \$100,000.00 is an appropriate amount of non-pecuniary compensatory damages to be awarded. Finally, we note that this award is not "monstrously excessive" and is consistent with the amounts awarded in similar cases. PATRICIA KANN, COMPLAINANT, GALE A. NORTON, SECRETARY, DEPARTMENT OF THE INTERIOR, AGENCY. 2005 WL 2492834, *3 -4

19.5.5. The record reflects that primarily because of the discriminatory harassment, the complainant began being treated for depression and anxiety, as well as an aggravation of her hypertension, in March 1999. Her husband stated that prior to the effects of the harassment, the complainant was vibrant, confident and independent, socialized quite a bit, loved dancing, was the core of the family, and had dignity and grace. According to the complainant's

daughter, prior to the effects of the harassment her mother was outspoken, lively and affectionate. In their August and September 2002, statements, the husband and daughter indicated that after enduring the harassment for awhile, the complainant changed, and was still changed. The husband stated that his wife spiritually deteriorated, was depressed and anxious, had anxiety attacks, got easily frustrated which led to agitation and crying, felt embarrassed, and gained much weight, and contemplated suicide, always saying she was worth more dead than alive. Her daughter corroborated much of the above, adding that her mother is also angry and was robbed of her dignity. More specifically, the husband stated that when the complainant was still working, she became despondent due to threats of violence, and "died," the day she found the sexual/written jokes on her desk (in June 1999) that were printed by her supervisor. He stated that the complainant would vomit and cry upon returning from work, and sometimes when taking her to work she would start to shake violently and they had to turn around. She also had violent headaches and chest pain. During this time, she had trouble sleeping, and could not talk without crying or getting frustrated or agitated. The husband stated there were days the complainant could not get out of bed and go to work. The daughter stated that during this working time her mother could not go places without her being present, and worried about her surroundings to the point of paranoia. The husband stated that at one point the complainant was so depressed she could not get out of bed for months, and the daughter added that when her mother was awake she was barely capable of conversation. The husband wrote the complainant once fell asleep with food in her mouth. Both the husband and daughter detailed the complainant's ongoing debilitating anxiety attacks, which began occurring after the harassment. When around people for a length of time, near them, in public and crowds, she gets anxiety attacks and sweats, or has to fight off the attacks, and needs to leave. When going to a mall, she insists on being escorted by her daughter. The husband said the complainant isolates herself from people. He related that in August 2002 they were going to go to a soldier's cookout, and when almost there and seeing all the people the complainant stopped dead in her tracks, started sweating, said she could not do this and returned home. Another time the complainant promised her husband's Company Commander that she would attend a cruise but backed out at the last minute, then cried for days because she liked the Commander and broke her promise. Both the husband and daughter stated the complainant no longer drives a car. The husband noted she gets jumpy and scared when a car passes at high speed. Trying to express things, the husband wrote his wife was afraid of her own shadow. He wrote that his wife now has a hard time focusing and accomplishing the simplest task, and sometimes he has to tell her things two or three times before she grasps what he is saying, especially in stressful situations. The husband wrote that he missed laughing with his wife, and the daughter stated that she now had a depressed, angry, sick mom. *3 The husband indicated that as a result of her deteriorated mood, the complainant gained much weight, going up six dress sizes to the 250 pound range, making it difficult for her to walk long periods. He stated she often

cries about her weight, and cries when he tries to be intimate, saying she knows he finds her repulsive and fat. The husband indicated that he and the complainant had an expectation that the complainant would work, and doing so was necessary for the family's finances. He stated that the complainant wanted to return to work, but could not because of her fear of what happened to her at the agency. He stated that because of only having one income they have been unable to pay all their bills, damaging their credit rating, with creditor judgments against the complainant. He wrote that the complainant prided herself on being responsible, and the collections depressed her, and she would say he would be better off without her because she was not pulling her weight. A friend of the complainant since 1999 wrote in August 2000 from Germany that the complainant sought employment but was unable to follow through because she could not work. She added that the complainant was depressed about her previous job and continually dredged up the past. The husband noted that the complainant continued to be involved in the community, putting in a couple of hours a month at community functions, and occasionally helping neighbors when asked. He stated the complainant had good and bad days, and sometimes smiles brightly, but was easily set back by things. He stated that the complainant has been encouraged by her psychiatrist to get over her fear and anxiety in steps by getting out. She went to Poland with the spouses of officers, and had a nice time except an anxiety attack. The husband wrote, however, that after returning the complainant cried for days, saying she wanted her life back. The daughter stated her mother always volunteers, and the above friend wrote that the complainant volunteered at many community events. The complainant indicated that as a result of the harassment, she became so emotionally distraught, confused and scared that she was completely disconnected from life for awhile, and repeatedly threw up and cried. She was scared to go to work everyday. She wrote that she lost her footing, was devastated and humiliated. She wrote that she was existing, not living, and wondered why she bothered with life anymore. She indicated that after the harassment began she once went to the hospital thinking she was having a heart attack, but was told she was having an anxiety attack. She claimed that her condition worsened after she left the job because she started having nightmares about the harassment. The husband also noted the nightmares. An affidavit written by the Landmark Medical Group physician assistant and signed by a group physician represents that the complainant was under the care of the group from 1996 to December 1999. An affidavit states that the complainant was treated intermittently for high blood pressure prior to February 1999, but beginning in March 1999 was treated for hypertension, anxiety, stress and symptoms of depression. They stated that the hypertension was not chronic, but was aggravated by stress and anxiety caused by workplace sexual harassment, and that her blood pressure was so high it was life threatening. They stated the complainant's asthma was exacerbated by stress and anxiety of the job, and she also had insomnia, chest pains, and would cry. She was prescribed medicine for high blood pressure, and Atavan, Prozac, and Valium for symptoms of anxiety and depression, and Ambien for

insomnia. *4 An U.S. Army physician in Germany wrote in August 2000, that the complainant had been under his care since July 2000, and was being treated for depression, post-traumatic stress disorder (PTSD), anxiety, and severe intermittent insomnia. A licensed clinical psychologist wrote in March 2003 that since September 2002 the complainant has been in weekly therapy with him for PTSD and Depressive Disorder. He wrote that despite therapy and medication, the complainant had difficulty controlling her anxiety level, and that when she become anxious it triggered an increase in her heart rate, exacerbating her blood pressure. He expressed a belief that the PTSD was caused by sexual harassment at work, and in particular, the threat to her life in early 1999. He opined that the complainant would likely have difficulty working because she becomes very apprehensive and anxious in social environments, which spurs a physiological arousal, distress, fear, anxiety, and avoidance behavior. However, the psychologist opined that with continued therapy, the complainant could overcome her problems and return to work in four to eight months. On appeal, the agency notes that in November 1995, the complainant took the job where the harassment was found to have occurred. It submits a letter by a treating physician written in February 1995 stating that the complainant was under his care for hypertension and situational and reactive depression related to anxiety and stress caused by her job. The agency notes this was prior to the sexual harassment at issue. Co-worker B affirmed that the complainant took the job where the sexual harassment at issue occurred to get away from alleged sexual harassment and stress in a prior job, which made her gain weight. Co-worker B stated that in the first year or so of the new job, things went well and the complainant lost weight, but after the sexual harassment commenced a year or two later, things deteriorated. The agency also notes that the complainant completed a workers' compensation claim form in September 1999 claiming injury from stress at work (including fear of being killed by co-worker A), stating it started in March 1998. The agency argues this is prior to events the complainant raised in connection with her harassment claim. A review of the record reveals that while the complainant wrote March 1998, it appears she meant March 1999, as this was when the Landmark Medical Group, referenced in the claim form, indicated the psychological symptoms were raised. The agency argues that damages should be reduced because the complainant's injuries were caused partly by things other than the found harassment. It points to statements by the complainant's husband and daughter for the proposition that the complainant's continuing injury is caused by the ongoing EEO claim JEANNETTE YASKO, COMPLAINANT, v. R.L. BROWNLEE, ACTING SECRETARY, DEPARTMENT OF THE ARMY, AGENCY. 2004 WL 933369, *2 -4

19.5.6. Likewise, as a result of the harassment, the complainant started feeling depressed and anxious by March 1999, and was still in emotional distress when her psychologist wrote his statement in March 2003, four years later. Further, it was expected the distress would last at least another four to eight months. By March 1999, while working, the complainant feared for her life, and continued to do so at least until she stopped working in March 2000. This

was a source of great distress. At times she was too anxious to go to work, and upon returning from work would frequently cry and vomit. The harassment broke the complainant's spirit, and she changed from a lively affectionate person to a depressed and angry person. For months she was so depressed she had trouble getting out of bed, and when she was awake, was barely capable of conversation. She suffered from debilitating anxiety attacks for years, and was so jumpy she no longer drove. The anxiety attacks isolated the complainant, at first preventing much social contact, but later usually preventing extended social contact. Further, she had ongoing problems with suicidal ideation, nightmares about the harassment, and insomnia. As a result of the harassment, she is distracted, and has trouble focusing and accomplishing tasks. Further, as a result of the emotional injuries caused by the harassment, she has been incapable of working for a period of time. *6 The evidence indicates that the complainant's weight gain and hypertension were aggravated by the affects of the harassment, but not completely caused by it. Prior to the harassment, the complainant had weight problems and hypertension, and had been treated for high blood pressure. These are ongoing conditions. While the complainant also had situational and reactive depression in February 1995, statements by the complainant's husband and daughter demonstrate that this had resolved prior to the harassment at issue. Further, while the complainant was distressed by the EEO process and the 15-6 investigation, the weight of the evidence shows that these played a minor role in her overall injuries. As the complainant's emotional pain and suffering is about the same level as in Kelly and Leatherman, and she is entitled to \$100,000 in nonpecuniary damages. JEANNETTE YASKO, COMPLAINANT, v. R.L. BROWNLEE, ACTING SECRETARY, DEPARTMENT OF THE ARMY, AGENCY. 2004 WL 933369, *5 -6

19.5.7. The record indicates that complainant was treated for suicidal ideation and depression. Complainant testified that he was devastated by the termination. Complainant began drinking beer which progressed to a drinking problem with Everclear [FN1] and Crown Royal. Complainant states that he started drinking to "stay drunk and sleep through it, [so he would not] have to worry about [being terminated]." Complainant testified that he lost his self esteem and experienced stress. He indicated that he attended individual and group therapy after the termination. BLAISE A. MIKA, COMPLAINANT, v. DR. JAMES G. ROCHE, SECRETARY, DEPARTMENT OF THE AIR FORCE, AGENCY. Appeal No. 07A40113

19.5.8. The AJ found that an award to \$380,000.00 in non-pecuniary compensatory damages was appropriate. However, the AJ reduced that amount to \$300,000.00, the statutory limit. The AJ found that complainant suffered emotional distress due to the agency's discriminatory actions, with some of the conditions persisting for over five years. Specifically, the AJ found that complainant suffered from: weight gain; loss of self-esteem; vertigo with dizziness; stomach problems including vomiting and diarrhea; feelings of helplessness and being out of control; depression manifested by feelings of sadness and frequent crying; fear of contact with people,

particularly older men; social withdrawal; severe swelling in feet; feelings of being aged; adjustment disorder with depressive features; sleeplessness; and nightmares. The agency argues on appeal that the AJ's award of non-pecuniary compensatory damages was not consistent with the amounts awarded in similar cases after considering the nature, severity, and duration of harm. The agency argues that the doctor's diagnosis of complainant was flawed because it was not based on medical tests and examinations and was too attenuated in time to be given any weight. Finally, the agency argues that the AJ did not give sufficient weight to complainant's own behavior, admissions, and relative lack of credibility, and to evidence of mitigation. The Commission has held that evidence from a health care professional is not a mandatory prerequisite for recovery of compensatory damages for emotional distress. *Lawrence v. United States Postal Service*, EEOC Appeal No. 01952288 (April 18, 1996); *Carpenter v. Department of Agriculture*, EEOC Appeal No. 01945652 (July 17, 1995); *Bernard v. Department of Veterans Affairs*, EEOC Appeal No. 01966861 (July 17, 1998). *4 In determining compensatory damages, the Commission strives to make damage awards for emotional harm consistent with awards in similar cases. We find that \$300,000.00 in non-pecuniary damages in this case is excessive considering the nature, severity, and duration of the harm as compared to analogous cases. Insofar as complainant has submitted evidence of emotional distress, we note that the Commission has awarded compensatory damages in cases somewhat similar to complainant's in terms of harm sustained. See *Yasko v. Department of the Army*, EEOC Appeal No. 01A32340 (April 21, 2004)(awarding complainant \$100,000.00 in non-pecuniary compensatory damages after being subjected to sexual harassment resulting in depression, post-traumatic stress disorder, anxiety, severe intermittent insomnia, weight gain and stress); *Winkler v. Department of Agriculture*, EEOC Appeal No. 01975336 (June 7, 2000)(awarding \$110,000.00 in non-pecuniary compensatory damages for emotional distress after being subjected to sexual harassment and experiencing major depression, excessive sleeping, social withdrawal, anxiety, irritability, weeping, increased suicidal ideation, fright, shock, humiliation, loss of marital harmony and loss of enjoyment in life). The Commission finds these cases analogous to the above referenced cases with respect to the nature, severity, and duration of the harm. After considering the nature of the agency's action, in conjunction with complainant's testimony, we find that \$110,000.00 is an appropriate amount of non-pecuniary compensatory damages. Finally, we note that this award is not "monstrously excessive" and is consistent with the amounts awarded in similar cases. MARY TURTON, COMPLAINANT, GALE A. NORTON, SECRETARY, DEPARTMENT OF THE INTERIOR, AGENCY. 2005 WL 2492835, *3 -4

19.6. \$90,000

19.6.1. The AJ also determined that complainant was entitled to \$90,000 in non-pecuniary damages. The AJ awarded this amount based on statements by complainant indicating her shock and state of disbelief after being told that she was removed. Complainant testified that she felt depressed and

demoralized. She also began experiencing stomach problems. Complainant spent a lot of the time sleeping because she found it easier to be asleep than to be awake. She lacked the mental or physical energy to take on another job. She exhausted her savings and tried to earn money walking other people's dogs and working at a pool where most of her co-workers were teenagers. Further, because the facility was in a small community, she could not avoid meeting her old customers from the facility who would ask what happened. Complainant found it humiliating to have to explain that she was fired for dishonesty even though she had not stolen any money. The AJ noted that complainant continues to be depressed over the loss of her job and the humiliation involved in accepting food, money and other items from members of her community due to the reduction in income. *5 Complainant's psychologist provided testimony regarding complainant's mental and emotional state. He first saw complainant in November 1999, and diagnosed her with Adjustment Disorder with anxious and depressive symptoms in response to a psychosocial stressor. The Psychologist indicated that after complainant became aware of the termination, her symptoms became more severe such as persistent sadness, crying, inability to enjoy life, and constant worry and obsession with her situation. The Psychologist then changed his diagnosis to Major Depression. He also stated that there were no factors other than complainant's loss of employment at the agency that caused or contributed to complainant's depressed mental state. Complainant also suffered insomnia, poor concentration, lack of motivation, social withdrawal, and period of heightened anxiety. The AJ noted that the agency did not present any evidence to mitigate the damages established by complainant or her Psychiatrist. Based upon the evidence as to the emotional harm suffered by complainant due to the agency's discrimination, the AJ found that complainant was entitled to \$90,000 in non-pecuniary compensatory damages. CAROL FOTI, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2004 WL 2331028, *4 -5

19.7. \$85,000

19.7.1. The AJ arrived at \$85,000.00 in non-pecuniary damages in the instant case, based on complainant's own testimony regarding her stress and health issues during the subject period. The AJ found that the complainant showed that she suffered mental and physical pain consisting of depression, anxiety, sleeplessness, marital problems that lead to a divorce, loss of family and friends, excessive crying, chest pains, back spasms, rashes, sharp abdominal pains and loss of weight. This testimony was borne out by the complainant's submission of various statements from a psychiatrist and a medical doctor. Based on the foregoing, the Commission finds that the AJ appropriately determined that complainant incurred these injuries due to the retaliatory action and that she is entitled to an award of compensatory damages. We must also review whether the AJ's award of non-pecuniary damages was appropriate. The AJ determined that complainant was entitled to an award of \$85,000.00 based on the agency's retaliation. Upon review, the Commission

finds that this award is supported by the substantial evidence of the record and is consistent with case precedent. See e.g. *Bernard v. Department of Veterans Affairs*, EEOC Appeal No. 01966861 (July 17, 1998) (\$80,000.00 in non-pecuniary damages awarded where affidavits provided by complainant, friends, and co-workers described the emotional distress that resulted from the agency's discriminatory actions); *Santiago v. Department of the Army*, EEOC Appeal No. 01955684 (October 14, 1998) (\$125,000.00 in non-pecuniary damages awarded where complainant suffered depression and other emotional and mental disorders, severe chest and stomach pains and digestive problems); and *Bahaudin v. Department of the Army*, EEOC Appeal No. 01993594 (September 13, 2000) (\$85,000.00 in non-pecuniary damages awarded where complainant produced evidence indicating that the agency's discriminatory actions caused him to become very irritable, distant, neglect his home duties, not eat, not want to go to work and wake up at night and make sudden jerking movements). We note that this sum is meant to compensate complainant for the emotional distress she suffered, which was caused by the agency's retaliatory actions. Finally, this amount meets the goals of not being motivated by passion or prejudice, not being "monstrously excessive" standing alone, and being consistent with the amounts awarded in similar cases. See *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989). LEA M. SMITH, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (SOUTHEAST AREA), AGENCY. 2005 WL 1606167, *3

19.8. \$65,000

19.8.1. On appeal, the agency indicates that it adopts the decision of the EEOC Administrative Judge (AJ) in the captioned case, finding that the agency discriminated against complainant on the basis of disability (left knee amputation residuals) when it failed to provide "handicapped" parking as a reasonable accommodation. However, the agency disputes the award of compensatory damages and the restoration of annual and sick leave ordered by the AJ as remedial relief. [FN1] According to the record, the agency employed complainant at its Trident Refit Facility, Naval Submarine Base, King's Bay, Georgia, during the relevant time period. Complainant filed a formal EEO complaint with the agency on February 13, 2002. After conducting a hearing, the AJ rendered a decision on March 1, 2004, finding that the agency violated Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., when it failed to provide complainant with "handicapped" parking as a reasonable accommodation. The AJ then conducted a second hearing, for the purpose of assessing damages, and rendered a decision on November 4, 2004 awarding complainant make-whole relief. Specifically, the AJ awarded complainant non-pecuniary compensatory damages in the sum of \$15,000.00 for emotional harm, frustration, negativity, and loss of sleep which he experienced for a four year period; as well as an additional \$50,000.00 for the physical and mental pain directly associated with the excessive walking itself. Regarding pecuniary compensatory damages, the AJ determined that complainant failed

to submit his medical bills to demonstrate past medical expenses, but determined that because approximately one-third of complainant's future medical care could be reasonably attributed to the exacerbation of his physical condition due to the discrimination, he awarded complainant the sum of \$2,200.00 for future medical expenses. The total award of compensatory damages was then \$67,200.00 DAVID A. HENERY, COMPLAINANT, GORDON R. ENGLAND, SECRETARY, DEPARTMENT OF THE NAVY, AGENCY. 2005 WL 2428901, *1

19.8.2. After a careful review of the record, we discern no basis to disturb the AJ's award of compensatory damages in this case. Specifically, we find that the AJ conducted a full hearing on the issue of damages, and made specific credibility determinations in calculating the amount of non-pecuniary compensatory damages awarded in this case. Moreover, notwithstanding the agency's arguments to the contrary, as set forth above, we find that this award is supported by the record, and that it is neither punitive, monstrously excessive, nor inconsistent with the awards made by the Commission in similar cases. In this regard, we find that the record confirms that the agency was in clear violation of the Rehabilitation Act in failing to provide adequate handicap parking at complainant's work facility for a period of many years, and that complainant's multiple requests went unheeded despite his obvious physical pain and emotional distress, thereby intensifying the degree and duration of the harm. *4 Furthermore, we find that the AJ's award is limited to only the harm which may be associated with the agency's discrimination, excluding complainant's pre-existing medical and emotional problems associated with his motorcycle accident. In particular, we find that the record confirms the significant increase in complainant's need for medical treatment shortly after his employment with the agency, and find that the award of remedies reflects the significant amount of additional harm, both physical and emotional, caused by the agency's discrimination. Additionally, we find no error in the AJ's award of pecuniary damages for future medical expenses, as the long-term effects of the exacerbation of complainant's condition, and need for future treatment, are well documented in the record. Likewise, we find that the record supports a finding that complainant used approximately 200 hours of annual leave and 200 hours of sick leave (i.e., 10 weeks in total, over a period of several years) because of the exacerbation of his medical/emotional condition due to the agency's discrimination. Finally, we find that although complainant might have described stress associated with the processing of his EEO complaint, we find no support for the agency's contention that compensation for this stress was included in the AJ's award of remedies in this case. Therefore, for the reasons set forth above, we conclude that the AJ's findings of fact are supported by substantial evidence, and the AJ correctly applied the appropriate regulations, policies, and law in the award of remedies in this case. DAVID A. HENERY, COMPLAINANT, GORDON R. ENGLAND, SECRETARY, DEPARTMENT OF THE NAVY, AGENCY. 2005 WL 2428901, *3 -4

19.9. \$50,000

19.9.1. Taking into account the evidence of non-pecuniary damages submitted by appellant, the Commission finds that appellant is entitled to non-pecuniary damages in the amount of \$50,000. This amount takes into account the severity and duration of the harm done to appellant by the reassignment, and accounts for the fact that the harm done by the discrimination was an aggravation of a pre-existing condition. Further, this amount takes into account that, unlike cases where greater damages were awarded, appellant's injury did not render her totally incapacitated either for work or in her personal life. Finally, this amount meets the goals of not being motivated by passion or prejudice, not being "monstrously excessive" standing alone, and being consistent with the amounts awarded in similar cases. **BERTHA WARD-JENKINS, APPELLANT, v. BRUCE BABBITT, SECRETARY, DEPARTMENT OF THE INTERIOR, AGENCY. 1999 WL 139427, *6**

19.9.2. In regard to the compensatory damages awarded by the agency, we find that the award of \$50,000.00 for compensatory damages was appropriate. The record contains complainant's statement regarding the harm suffered, as well as, statements from family members and friends. Complainant stated that as a result of the agency's discriminatory denial of her request for reasonable accommodation, she began to feel more fatigued and exhausted from the stress. Complainant was unable to sleep and felt increased numbness and tingling in her extremities. Complainant also stated that she began crying frequently, experienced feelings of hopelessness and fear, and had frequent, severe headaches. Complainant's Deposition Testimony at 19-21. Statements from family members and friends corroborate complainant's statements that she increasingly experienced physical maladies, including numbness and weakness in her limbs and pain and suffered episodes of depression. Further, the statements also provide that complainant was once energetic and outgoing, but is no longer so. Because the award of \$50,000.00 is not monstrously excessive and is consistent with similar Commission decisions, we find that the agency appropriately complainant \$50,000.00 in non-pecuniary damages. See *Cavanaugh v. United States Postal Serv., EEOC Appeal No. 07A20102* (November 12, 2003) (\$50,000.00 award in non-pecuniary damages where the agency's discriminatory actions exacerbated complainant's depression, affected her relationship with family and friend, and complainant suffered from severe tension headaches and was irritable); *Amen v. United States Postal Serv., EEOC Appeal No. 07A10069* (January 6, 2003) (\$50,000.00 award in non-pecuniary damages where complainant suffered prolonged mental anguish, depression, humiliation, insomnia, etc, as a result of the agency's discriminatory actions); *Bowden v. Dep't of Veterans Affairs, EEOC Appeal No. 01A00360* (June 22, 2000) (\$45,000 award in non-pecuniary damages where the agency subjected complainant to harassment, which resulted in exacerbation of depression, injury to professional standing, character, reputation, and credit rating, humiliation, physical manifestations, loss of self-esteem, and marital and family problems). Therefore, after a careful review of the record, including complainant's contentions on appeal, the agency's response, and arguments and evidence not specifically addressed

in this decision, we affirm the agency's final decision. KAREN B. MCCOY, COMPLAINANT, R. JAMES NICHOLSON, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, AGENCY. 2005 WL 2429042, *4

19.9.3. Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes his or her claim of unlawful discrimination may receive, in addition to equitable remedies, compensatory damages for past and future pecuniary losses (i.e., out of pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish). 42 U.S.C. § 1981a(b)(3). We must review whether or not the AJ's award of non-pecuniary damages was appropriate. The AJ determined that complainant was entitled to an award of \$50,000 based on the agency's acts of retaliation which resulted in complainant experiencing mental anguish, depression, physical pain, loss of health and loss of enjoyment of life. Upon review, we find that this award is supported by the substantial evidence of the record and is consistent with case precedent. See, e.g., *Cavanaugh v. United States Postal Service*, EEOC Appeal No. 07A20102 (November 12, 2003)(awarding \$50,000 in non-pecuniary damages where complainant presented evidence that the agency's discriminatory non-selection resulted in pain and suffering and mental anguish); *Johnson v. Department of the Interior*, EEOC Appeal No. 01961812 (June 18, 1998) (awarding \$37,500 in non-pecuniary damages where complainant provided reports from two physicians linking racial harassment with complainant's problems including depression, dysthymia, and adjustment disorder); *Turner v. Department of the Interior*, EEOC Appeal No. 01956390 (April 27, 1998) (providing \$40,000 where discriminatory harassment caused complainant to experience psychological trauma and physical injury with permanent effects); *Carpenter v. Department of Agriculture*, EEOC Appeal No. 01945652 (July 17, 1995) (awarding \$75,000 in a failure to accommodate case which resulted in emotional harm to complainant which damaged his relationships with family and friends and reduced his quality of life, as well as resulting in some physical manifestations such as a digestive disorder). Accordingly, we conclude that the amount of \$50,000 is appropriate. KRISTINE H. SCHEELS, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (PACIFIC AREA), AGENCY. 2005 WL 1903393, *6

19.10. \$40,000.00

19.10.1. As a previously noted, the agency considered evidence suggesting external factors contributed to complainant's depression, namely her pre-existing mental condition, in awarding complainant \$25,000.00 in non-pecuniary damages. Based on the record and the medical evidence, the Commission finds the agency's award insufficient to remedy the harm that the agency's actions caused complainant. We find \$40,000.00 an appropriate amount as complainant presented sufficient evidence to establish that she had persistent depression exacerbated by the agency's discriminatory actions. The record reveals that complainant's doctor testified that she suffered numerous symptoms compatible with major depression, caused by the agency's actions,

including crying spells, irritability, insomnia, apathy, loss of pleasure in previously enjoyed activities, hopelessness, helplessness, alteration in weight and appetite, lack of energy and poor concentration and memory. Complainant's doctor also testified that complainant's health deteriorated because of the agency's denial of accommodation and the agency's termination of her employment. Complainant testified that as a result of discrimination, she lost her home and automobile. Complainant also testified that she sought employment constantly from February 1996 to January 2001 without finding any. Complainant further maintains that after being terminated by the agency her physical and mental state deteriorated. Finally, the record reveals three affidavits from complainant's friends. They testified that after being terminated by the agency, complainant lost her automobile and home and that she suffered from low self-esteem.

19.10.2. *4 Several Commission decisions have addressed compensatory damages in cases similar to complainant. See *Ward-Jerkins v. Department of the Interior*, EEOC Appeal No. 01961483 (March 4, 1999) (\$50,000.00 in non-pecuniary damages where the complainant who after being detailed and reassigned suffered a diagnosed acute distress disorder, and aggravation of her depressive condition); *Smith v. United States Postal Service*, EEOC Appeal No. 01981579 (September 7, 2001) (\$40,000.00 in non-pecuniary damages due to a denial of reasonable accommodation and intentional disability discrimination where complainant suffered from physical and emotional harm, and was diagnosed with major depression); *Kannikal v. Department of Justice*, EEOC Appeal No. 01960146 (June 15, 2001)(\$32,500.00 in non-pecuniary damages for harm suffered by complainant because the agency's exacerbation of a pre-existing condition was severe, but of limited duration).

19.10.3. VERONICA C. CHEVIS, COMPLAINANT, v. MIKE JOHANNNS, SECRETARY, DEPARTMENT OF AGRICULTURE, AGENCY. 2005 WL 819622, *3 -4

19.11. \$35,000

19.11.1. Next, addressing the issue of non-pecuniary damages, we note that the record contains complainant's testimony that as a result of the agency's retaliation, he suffered sleep disturbance with nightmares, weight gain, general fatigue and loss of interest in usual activities, social and interpersonal withdrawal, frequent bouts of crying, feelings of worthlessness, thoughts of suicide, disillusionment with his job and extreme anger. After a careful review of the record, as well as damage awards reached in comparable cases, the Commission finds that complainant is entitled to an award of non-pecuniary damages in the amount of \$35,000.00. See e.g., *Feris v. Environmental Protection Agency*, EEOC Appeal No. 01983167 (September 18, 1998) (\$35,000.00 in non-pecuniary damages awarded to complainant where testimony showed that the agency's discrimination resulted in emotional harm and his career suffered); *Economou v. Department of the Army*, EEOC Appeal No. 01983435 (August 5, 1999) (\$35,000.00 in non-pecuniary damages awarded to complainant where evidence showed he experienced humiliation, anxiety, depression and sleeplessness as a result of the agency's

discrimination); Johnson v. Department of the Interior, EEOC Appeal No. 01961812 (June 18, 1998) (\$37,500.00 in non-pecuniary damages awarded to complainant based on reports from two physicians showing complainant's depression was a result of the agency's discrimination). JOSE A. OTERO, COMPLAINANT, DR. FRANCIS J. HARVEY, SECRETARY, DEPARTMENT OF THE ARMY, AGENCY. 2005 WL 2921305, *4

19.12. \$33,000

19.12.1. In an affidavit dated September 22, 2002, complainant stated that her supervisor's harassment made her nervous and uncomfortable. She stated that she stopped coming to work on days that she thought she might be alone with her supervisor. She further stated that in the early weeks and months of the harassment, she cried every day and even in September 2002, still felt persecuted and guilty. Complainant maintained that over the previous three years, she has felt too stressed to work and has had to call in sick or leave work early many times. She further stated that since September 1999, she has gained 75 pounds because she eats out of nervousness. Complainant also claimed that several months after the incidents of September 1999, she experienced "horrible nightmares." Complainant further asserted that she has been concerned about her safety because she knew her supervisor "paid a heavy price for his actions and I am the most logical person for him to blame for his losses." She further stated that on many occasions, she imagined her supervisor in the car behind her in traffic, and on at least two occasions, was convinced her supervisor was following her. Complainant's husband stated that the harassment has taken a serious toll on complainant's life and placed "a lot of stress on our relationship." He stated that complainant shared details of her supervisor's harassing conduct at first, but felt "trapped" because she feared reporting it would lead to retaliation. He further stated that after the harassment began, complainant experienced excessive weight gain, often cried, and suffered from insomnia. "Essentially, I have witnessed a once joyful, trusting, and motivated Terri become someone that rarely smiles and is extremely cynical," he stated. A long-term friend of complainant stated that complainant often told her how uncomfortable her supervisor made her feel. She stated that after the harassment began, complainant transformed from a "usually happy and jovial friend" into a "sad and withdrawn" person. She noted that complainant has gained weight and is often depressed. She further stated that complainant has expressed concern for her safety during the ordeal and even considered getting a firearm to protect herself. "Terri has been a completely different person since her dealings with [the harasser]," she stated. Upon review of this matter, we note that the agency determined that a "great deal" of complainant's emotional distress resulted from her participation in the EEO process. However, after a thorough review of the record, we find that the agency's determination greatly inflated the portion of complainant's emotional distress related to her participation in the EEO process. Complainant's supporting statements regarding compensatory damages reflect that the harassment complainant suffered from January 1997 until September 1999

caused complainant great distress. Moreover, while the supporting statements reflect that complainant was conflicted over whether she should report the harassment to management and file an EEO complaint, the underlying predominant cause of complainant's anxiety was her supervisor's harassing conduct. We conclude that the statements by complainant, her friend, and husband persuasively demonstrate that she sustained substantial pain and suffering as a result of being subjected to incidents of sexual harassment spanning approximately two and a half years. Given all the above, we find that complainant is entitled to \$33,000.00 in non-pecuniary damages. This amount takes into account the severity of the harm suffered, and is consistent with prior Commission precedent. See *Barrett v. United States Postal Service*, EEOC Appeal No. 01984091 (July 24, 2001) (\$35,000 in non-pecuniary damages where denial of transfer led to depression, sleeplessness and mental anguish); *Turner v. Department of Interior*, EEOC Appeal No. 01956390 (April 27, 1998) (\$40,000 in non-pecuniary damages awarded where the agency subjected complainant to sexual harassment and retaliation, which resulted in depression, anger, anxiety, frustration, sleeplessness, crying spells, loss of self-esteem and strained relationships). *4 Therefore, after a careful review of the record, we MODIFY the agency's final decision and direct the agency to take remedial action in accordance with this decision and the ORDER set forth below TERRI H. CAMPBELL, COMPLAINANT, ALBERTO GONZALES, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, (FEDERAL BUREAU OF PRISONS), AGENCY. 2005 WL 2331821, *3 -4

19.13. \$25,000

19.13.1. The AJ found that complainant suffered from insomnia, depression, anxiety, and chest pain, based on complainant's hearing testimony. The AJ further found that 55 percent of complainant's symptoms were attributable to the agency's discrimination, again based on complainant's hearing testimony. The AJ awarded \$15,000 but cited no caselaw to support such an award. Several Commission decisions have addressed compensatory damages in cases similar to complainant's. See *Terrell v. Department of Housing and Urban Development*, EEOC Appeal No. 01961030 (October 25, 1996) (\$25,000 award for emotional harm where discriminatory nonselection exacerbated, for at least two years, problems unrelated to discrimination); *Smith v. Department of Defense*, EEOC Appeal No. 01943844 (May 9, 1996) (\$25,000 award for emotional harm, where many aggravating factors not related to discrimination were also present); *Hatchett v United States Postal Service*, EEOC Appeal No. 01964256 (October 1, 1996) (\$20,000 awarded for anger, suspicion, and withdrawal from family and friends, and exacerbation of pre-existing anxiety and depression).

19.13.2. Given the above, we find that the evidence supports an award of \$25,000.00. This amount takes into account the severity and the duration of the harm done to complainant by the agency's action, as well as the fact that some of complainant's symptoms were unrelated to the agency's action. This amount further meets the goals of not being motivated by passion or

prejudice, not being "monstrously excessive" standing alone, and being consistent with the amounts awarded in similar cases. See *Ward-Jenkins v. Department of the Interior*, EEOC Appeal No. 01961483 (March 4, 1999) (citing *Cygnar v. City of Chicago*, 865 F. 2d 827, 848 (7th Cir. 1989)); *US EEOC v. AIC Security Investigations, Ltd.*, 823 F.Supp. 573, 574 (N.D. Ill 1993). RANDY A. KALLAUNER, COMPLAINANT, SAMUEL W. BODMAN, SECRETARY, DEPARTMENT OF ENERGY, AGENCY. 2005 WL 2835209, *6

19.14. \$24,000

19.14.1. The record reveals that complainant suffered emotional distress, depression, anxiety, frustration and humiliation as a result of the agency's discriminatory conduct. Complainant also suffered symptoms of lethargy and sleeplessness. Complainant's husband testified that because complainant's emotional state got "worse and worse," he had to physically take care of her in the summer of 2002. He added that complainant had difficulty performing simple tasks, such as picking out her clothes and doing laundry, due to her depression over the incidents at work. Complainant's physician also testified how the agency's action exacerbated complainant's preexistent mental condition. The Commission finds that the AJ's award of \$24,000.00 in nonpecuniary damages was appropriate. Several Commission decisions have addressed compensatory damages in cases similar to complainant's. See *Terrell v. Department of Housing and Urban Development*, EEOC Appeal No. 01943844 (October 25, 1996) (\$25,000 awarded for emotional harm, where many aggravating factors not related to discrimination were also present); *Smith v. Department of Defense*, EEOC Appeal No. 01943844 (May 9, 1996) (\$25,000 awarded for emotional harm, where many aggravating factors not related to discrimination were also present); *Hatchett v. United States Postal Service*, EEOC Appeal No. 01964256 (October 1, 1996) (\$20,000 awarded for anger, suspicion, and withdrawal from family and friends, and exacerbation of preexisting anxiety and depression). The amount of \$24,000.00 takes into account the severity and the duration of the harm done to complainant [FN6], as well as the fact that some of complainant's symptoms were unrelated to the agency's actions and were related to complainant's pre-existing condition. The record demonstrates that complainant suffered from stress/depression since 1987, due to the death of her niece. This amount further meets the goals of not being motivated by passion or prejudice, not being "monstrously excessive" standing alone, and being consistent with the amounts awarded in similar cases. See *Ward-Jenkins v. Department of the Interior*, EEOC Appeal No. 01961483 (March 4, 1999) (citing *Cygnar v. City of Chicago*, 865 F. 2d 827, 848 (7th Cir. 1989)). Therefore, we conclude that the AJ appropriately awarded complainant \$24,000.00, because it is adequate, and not excessive, to compensate complainant for her emotional distress. PAMELA J. MULLEN, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (EASTERN AREA), AGENCY. 2005 WL 3526015, *9

19.15. \$20,000.00

19.15.1. Regarding the award of nonpecuniary compensatory damages, pecuniary damages, and attorney's fees, we note that the agency has not specifically disputed these awards, other than to argue that the overall finding of discrimination is erroneous. The AJ found that complainant incurred feelings of worthlessness, difficulty sleeping, anxiety, night sweats, nightmares, indigestion, stomach cramps, weight loss, and headaches, all due to the agency's discrimination. Several Commission decisions have addressed compensatory damages in cases similar to complainant's. See *Telles v. United States Postal Service*, EEOC Appeal No. 01994535 (January 30, 2002) (awarding \$20,000.00 in nonpecuniary damages for depression, feelings of inadequacy and failure, loss of credit due to bankruptcy, and marital problems); *Colwell v. United States Postal Service*, EEOC Appeal No. 01985789 (June 13, 2001) (awarding \$20,000.00 in nonpecuniary damages for complainant's depression and emotional distress, loss of credit standing and loss of professional standing); *Perez v. United States Postal Service*, EEOC Appeal No. 07A20117 (July 23, 2003) (\$20,000.00 awarded where complainant experienced anger, bitterness, humiliation, depression, marital problems and financial setbacks). Given the above, we find that the evidence supports an award of \$20,000.00 in nonpecuniary compensatory damages. This amount takes into account the severity and the duration of the harm done to complainant by the agency's action **JULIUS SIMS, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY**. 2005 WL 3664035, *4

19.15.2. The AJ awarded complainant \$9,500.00 in non-pecuniary damages. The AJ found that complainant's assertions and submissions addressed harms suffered throughout her non-selection, but that she also alleged circumstances unrelated to the agency's action. The AJ further found that complainant did not show objective evidence of a medical, physiological or functional nature detailing the injuries resulting from the discrimination to justify a larger award. For the reasons stated below, we find \$9,500.00 insufficient and adjust the non-pecuniary damages award to \$20,000.00. Although we take notice that complainant also suffered from factors unrelated to her non-selection and she did not show any medical evidence of her harm, we find that complainant has sufficiently proved that she is due a larger award based on our review of similar cases. We also give credence to the fact that: (1) complainant suffered sleeplessness, depression, emotional distress and anxiety for approximately seven years, since 1995; (2) complainant's loss of income through her becoming unemployed and her and her family's uncertain future caused her significant stress and anxiety; (3) complainant's economic deprivation caused her loss of enjoyment of life, loss of relationship with her family; and (4) complainant had many episodes of crying due to her and her family's plight, but that she did not undertake treatment or counseling from any health care or lay provider due to lack of monies to support such. This evidence provides a sufficient nexus between the discriminatory conduct and the emotional distress detailed in the record. A \$20,000.00 non-pecuniary damages award is consistent with other awards that we have issued in similar

situations. For example, the Commission awarded a complainant \$20,000.00 in non-pecuniary damages where complainant suffered from depression and anxiety for six to seven months, followed by a four to five month period of major depression, due to the agency's discrimination. *Money v. United States Department of Agriculture*, EEOC Appeal No. 01974494 (May 24, 2000). In addition, the Commission awarded a complainant \$20,000.00 for an undetermined length of injury for complainant's depression and emotional distress, loss of credit standing, and loss of professional standing. *Colwell v. United States Postal Service*, EEOC Appeal No. 1985789 (June 13, 2001). Furthermore, the Commission awarded \$25,000.00 for sleep problems, frequent crying, weight loss, depression, embarrassment, mental anguish, loss of relationships with his wife, family, and friends, lasting approximately two and a half years, but mitigated by evidence that other factors unrelated to agency's discrimination contributed to complainant's distress. *Terrell v. Department of Housing and Urban Development*, EEOC Appeal No. 01961030 (October 25, 1996) request to reconsider denied, EEOC Request No. 05970336 (November 20, 1997). Moreover, the Commission awarded a complainant \$35,000.00 for discrimination when complainant and his wife testified that complainant suffered severe stress, sleeplessness, and misery as a result of the agency failing to reasonably accommodate his disability. See *Feris v. Environmental Protection Agency*, EEOC Appeal No. 01983167 (September 18, 1998). We point out that non-pecuniary compensatory damages are intended to remedy a harm and not to punish the agency for its discriminatory actions. See *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 311-12 (1986) (stating that a compensatory damages determination must be based on the actual harm sustained and not the facts of the underlying case). Therefore, we modify the AJ's decision award complainant \$20,000.00 in non-pecuniary damages. NANCY R. FLOWERS, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (EASTERN AREA OFFICE), AGENCY. 2004 WL 2330987, *3

19.15.3. In this case, complainant adduced evidence from several health care providers who testified regarding the impact on her of the sexual harassment to which she had been subjected. A psychiatrist averred as follows: *7 My current diagnosis of [complainant] is depression (major depression, single episode with psychotic features). [Complainant] remains depressed as evidenced by lowered mood, decreased energy, increase irritability, social withdrawal, decreased trust, decreased libido, and impaired sleep ... I have treated [complainant] with supportive psychotherapy and anti-depressant medication. Please note that the emotional trauma resulting from the retaliation and harassment which she experienced at work has made it very difficult to trust anyone ... It is my opinion that [complainant] absolutely requires continued psychotherapy and anti-dpressent medication to maintain her current level of functioning. Complainant averred that as a result of the harassment she was, for several years, "a virtual prisoner in [her] own home" because of her fear of contact with others. She experienced "panic attacks" on

visits to the grocery store. Because of her depression, complainant's relationship with her young daughter also suffered. Based on the evidence reviewed above, we find that complainant proved that she experienced severe emotional distress which was caused by the harassment. The record reveals that complainant's suffering started in early 1992 and persisted until at least 2003. The Commission finds the \$5000 awarded by the agency to be inadequate. An award of \$20,000.00 in non-pecuniary damages would be appropriate. This amount takes into account the severity of the harm suffered, and is consistent with prior Commission precedent. See *Money v. United States Department of Agriculture*, EEOC Appeal No. 01974494 (May 24, 2000) (\$20,000.00 where complainant suffered from depression and anxiety for 6-7 months, followed by a 4-5 month period of Major Depression, due to the agency's discrimination); *Minardi v. USPS*, EEOC Appeal No. 01981955 (October 3, 2000) (\$20,000.00 where statements from complainant's friends established he suffered depression, stress, and a loss of patience, self-control and self-esteem). We point out that non-pecuniary compensatory damages are intended to remedy a harm and not to punish the agency for its discriminatory actions. See *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 311-12 (1986) (stating that a compensatory damages determination must be based on the actual harm sustained and not the facts of the underlying case). Therefore, we conclude that complainant shall be awarded \$20,000.00 in damages because the amount is adequate, and not excessive, to compensate complainant for her suffering. JANET DAVIS, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2004 WL 2983743, *6 -7

19.16. *\$15,000*

19.16.1. Complainant contends that the agency's discrimination caused embarrassment, humiliation, anguish, great grief, feelings of guilt and depression, sleeplessness, periods of trembling, confusion, stressfulness, detrimental effects on his blood pressure, numbness, inability to think clearly, fixation on the harassment, and physical and mental exhaustion. He also maintains that his wife incurred emotional harm as well as a stroke due to the agency's discrimination. Complainant's wife submitted a statement averring that complainant changed from being happy, jovial, and compassionate to becoming sad, depressed, preoccupied, mentally exhausted, depleted, with physical ailments such as high blood pressure, numbness in the legs, feet, arms, and chest, and sleeplessness. She further averred that the harassment caused a strain in their marital relationship. Complainant submitted a statement from his physician who reported that complainant complained of emotional distress, inability to sleep, lack of the ability to concentrate and general anxiety and depression. The physician attributed these symptoms to the agency's discrimination and noted that complainant sought treatment for such symptoms up until he retired from the agency "in the summer of 2003 [FN1]." Complainant also submitted statements from two coworkers who stated that complainant became more withdrawn, less happy and spontaneous and that his enthusiasm and energy diminished. MONTAZA POHLEL,

COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE, AGENCY. 2005 WL 3526063, *2

19.16.2. Regarding the harm claimed by complainant, several Commission decisions have addressed compensatory damages in cases similar to complainant's. See *Sellers v. Department of Veterans Affairs*, EEOC Appeal No. 01964003 (October 3, 2000) (awarding \$13,000 to complainant who showed that she suffered additional physical and mental problems as a result of the agency's failure to provide reasonable accommodation and forcing complainant to accept a reassignment to a downgraded position over removal); *Hull v. Department of Veterans Affairs*, EEOC Appeal No. 01951441 (Sept. 18, 1998) (\$12,000.00 in non-pecuniary damages based on complainant's testimony of emotional distress due to retaliatory harassment); *Yue Lee Wan v. United States Postal Service*, EEOC No. 01995204 (July 11, 2001) (\$15,000.00 in non-pecuniary damages for emotional distress, depression, and inability to sleep); *Olsen v. Department of Defense*, EEOC Appeal No. 01956675 (July 29, 1998) (\$16,000.00 in non-pecuniary damages for stress, depression, and anxiety). Given the above, we find that the evidence supports an award of \$15,000.00. This amount takes into account the severity and the duration of the harm done to complainant by the agency's action. The Commission further notes that this amount meets the goals of not being motivated by passion or prejudice, not being "monstrously excessive" standing alone, and being consistent with the amounts awarded in similar cases. See *Ward-Jenkins v. Department of the Interior*, EEOC Appeal No. 01961483 (March 4, 1999) (citing *Cygnar v. City of Chicago*, 865 F. 2d 827, 848 (7th Cir. 1989)); *US EEOC v. AIC Security Investigations, Ltd.*, 823 F.Supp. 573, 574 (N.D. Ill 1993). MONTAZA POHLEL, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2005 WL 3526063, *3

19.16.3. As to non-pecuniary losses, complainant stated that \$100,000 would be "neither excessive nor unreasonable." To the extent that complainant seeks to hold the agency responsible for his total disability and mental status, we reject this argument. The discriminatory event herein for which the agency is responsible is the delay in pay for three weeks. Both before and after this incident, Dr. R described complainant as depressed, anxious, and not trusting of the agency or his immediate supervisor, nor is there any medical evidence that complainant experienced a change in his condition due to or after the discriminatory event. While complainant's condition and his inability to work are unfortunate, we do not find that he has shown that the agency's discriminatory action was the cause of his situation; in fact, he has shown that his condition existed prior to the discriminatory incident and that the discriminatory event had little effect. The agency is only responsible for those damages that are shown to be caused by the its conduct, and complainant has not proved that the agency's actions were the cause of his condition. *Carle v. Department of the Navy*, EEOC Appeal No. 01922369 (January 5, 1993); *Fazekas v. USPS*, EEOC Appeal No. 01954627 (April 7, 1997); see also *Johnson v. Department of Interior*, EEOC Appeal No. 01961812 (June 18,

1998); Guidance at p. 8. The agency is responsible for any exacerbation in complainant's condition. See *Wallis v. USPS*, supra. Given complainant's paranoid beliefs toward the agency and his immediate supervisor, it is not unreasonable to assume that the discriminatory act amplified these feelings. Where the discriminatory action is not the main cause of a complainant's mental/emotional problems, the agency remains liable for the extent of the exacerbation. See, e.g., *Rountree v. Department of Agriculture*, EEOC Appeal No. 01941906 (July 7, 1995) (\$8,000 in non-pecuniary damages awarded where medical evidence and testimony showed the majority of complainant's emotional problems were caused by factors other than the discrimination). *3 After a review of the record, the agency's final decision, and statements and supporting evidence submitted on appeal, the Commission agrees with the agency that complainant is entitled to \$1,000, in pecuniary damages. As to his claim for non-pecuniary damages, we find that the agency's award of \$2,000 is not sufficient to compensate him for the effects of the cut-off in pay. The record shows that complainant experienced economic disruption and further mental stress when the agency did not pay him for a three-week period. Although complainant had pre-existing mental conditions, the record evidence indicates that the absence of income in February 1997, caused him severe distress and exacerbated his mental status. We find that an award of \$15,000 for pain and suffering is more appropriate in the circumstances of this matter. This amount meets the standards established by the Commission that an award of compensatory damages for non-pecuniary losses, including emotional harm, should reflect the extent to which the agency's discriminatory action directly or proximately caused the harm, the nature and severity of the harm, and the duration or expected duration of the harm. The amount is not "monstrously excessive" standing alone and not the product of passion or prejudice. Further, the amount is consistent with awards in similar cases for non-pecuniary harm where the agency was held liable for exacerbation of an existing, underlying condition, and the discriminatory event was not the sole factor for the harm. See *Rountree v. Department of Agriculture*, supra, (\$8,000 in non-pecuniary damages; medical evidence and testimony showed the majority of complainant's emotional problems were caused by factors other than the discrimination); *Fraley v. Department of Veterans Affairs*, EEOC Appeal No. 01A33418 (July 21, 2004) (\$15,000 for anxiety, depression, panic attacks, and humiliation where other factors present); *McGraw v. Department of Veterans Affairs*, EEOC Appeal No. 07A20121 (November 27, 2002) (\$15,000 for stress, depression, and sleeplessness with evidence of other contributing factors); *Taber v. USPS*, EEOC Appeal No. 01983780 (July 18, 2001) (\$15,000 with disassociation from family and friends, and anxiety but other likely causes contributing). JAMES H. WILSON, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2005 WL 1606092, *2 -3

19.17. *\$10,000*

19.17.1. After a thorough review of the record, and given the severity,

nature and duration of distress experienced by complainant, we find that an award of \$10,000.00 is supported by substantial evidence. The AJ found that complainant was entitled to \$10,000.00 in non-pecuniary damages "for pain and suffering and financial losses incurred." However, complainant has not testified that she was unable to work after she was released from the agency or to otherwise function, she was not diagnosed as depressed and she conceded at the hearing that she did not have counseling, although complainant alleged that she could not afford it. We credit complainant's testimony that she was upset after she was separated from the agency, had some financial problems, lost weight and had a strained relationship with her children. However, complainant provided no medical or other documentation regarding her mental condition following her separation from the agency, nor did she provide documentation regarding her actual financial state during this time. We find that non-pecuniary compensatory damages are designed to remedy a harm and not to punish the agency for its discriminatory actions. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 311-12 (1986) (stating that compensatory damages determination must be based on the actual harm sustained and not the facts of the underlying case). We further note that this award is not "monstrously excessive" standing alone, is not the product of passion or prejudice, and is consistent with the amount awarded in similar cases, as cited above. *Ward- Jenkins v. Department of the Interior*, EEOC Appeal No. 01961483 (March 4, 1999) (citing *Cygnar v. Chicago*, 865 F. 2d 827, 848 (7th Cir. 1989)). Based on the above analysis, we disagree with complainant's allegations on cross-appeal that she is entitled to non-pecuniary and pecuniary damages in the amount of \$150,000.00. VICKIE DELLINGER, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (EASTERN AREA), AGENCY. 2005 WL 2492880, *6

19.17.2. In the instant case, complainant submitted a declaration indicating that, as a result of the agency's discriminatory conduct, he suffered from emotional distress, humiliation and severe anxiety from April 1997 up to and beyond January 1998. Complainant also submitted documentation from his doctor indicating that complainant was to attend two to three psychotherapy sessions, and reporting that complainant suffered from multiple symptoms, including suffering from job distress, feeling anxious or tense, being sad or discouraged, having difficulty sleeping, feeling hopeless, losing his appetite, feeling quick to anger, worrying without reason, and having disturbing thoughts. Complainant's friend submitted a statement which stated that complainant had changed during the period in question, noting that complainant seemed more withdrawn, somber, and easily angered. Complainant's mother submitted a statement noting that he had become unhappy at work and reclusive at home. ROY A. SHOBERT, COMPLAINANT, MICHAEL L. DOMINGUEZ, ACTING SECRETARY, DEPARTMENT OF THE AIR FORCE, AGENCY. 2005 WL 1936063, *2

19.17.3. In determining compensatory damages, the Commission strives to make damage awards for emotional harm consistent with awards in similar

cases. A number of Commission decisions have awarded non-pecuniary damages in cases which we compare to complainant's. *Bradley v. United States Postal Service*, EEOC Appeal No. 01A22995 (April 23, 2003) (awarding \$10,000 in non-pecuniary damages based on stress and emotional harm resulting from the agency's disability discrimination); *Howard v. Department of Defense*, EEOC Appeal No. 07A10098 (September 30, 2002) (awarding \$10,000 in non-pecuniary damages based on complainant's testimony that her professional reputation was harmed, that she was physically and socially isolated from her co-workers, and that she suffered humiliation and emotional distress due to the agency's discriminatory conduct); *Rountree v. Department of Agriculture*, EEOC Appeal No. 01941906 (July 7, 1995) (awarding \$8,000 in non-pecuniary damages where complainant suffered from emotional distress, but the majority of complainant's emotional problems were caused by factors other than the discrimination). *3 As such, the Commission awards non-pecuniary compensatory damages in the amount of \$10,000 since the record shows that complainant experienced emotional distress, anxiety, embarrassment, and adverse effects on his social life for nearly nine months as a result of the agency's disability discrimination. ROY A. SHOBERT, COMPLAINANT, MICHAEL L. DOMINGUEZ, ACTING SECRETARY, DEPARTMENT OF THE AIR FORCE, AGENCY. 2005 WL 1936063, *2 -3

19.18. \$9,000

19.18.1. The AJ also determined that complainant was entitled to compensatory damages in the amount of \$9,000. The AJ based this amount on complainant's testimony indicating that she would enter the agency's facility and would have anxiety attacks. [FN8] She feared what the agency would do to her or she would lose her job. Complainant also indicated that after the incidents in January and February 2002, she became more depressed and anxious with crying all the time. [FN9] Complainant testified that she felt humiliated, embarrassed and cornered by management. She also noted that because of the discrimination, her relationship with her husband became strained. [FN10] Based on the nature and severity of the harm incurred by complainant and the Commission's case precedent, the AJ determined that an award of \$9,000 was appropriate JOHANNA IFTIKAR-KHAN, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2005 WL 3526051, *5

19.18.2. The AJ determined that complainant was entitled to \$ 9,000 based on the agency's failure to provide a reasonable accommodation. Upon review, we find that this award is supported by the substantial evidence of the record and is consistent with case precedent. See e.g., *Burchfield v. Department of the Treasury*, EEOC Appeal No. 01A20021 (March 19, 2003) (\$12,000 in non-pecuniary damages based on evidence of embarrassment, and humiliation, and statements of family members noting complainant's refusal to leave the house based on denial of reasonable accommodation); *Totten v. Department of the Interior*, EEOC Appeal No. 01A21880 (April 24, 2003) (awarding \$10,000 for complainant who was treated for major depression and had suicidal thoughts); *Wimberly v. USPS*, EEOC Appeal No. 01A23646

(May 29, 2003), request for reconsideration denied, EEOC Request No. 05A30980 (September 22, 2003) (awarding \$ 8,500 where evidence showed that complainant experienced stress, embarrassment, humiliation, and financial difficulties and that there were other contributing factors). Accordingly, we discern no basis to disturb the AJ's finding that complainant is entitled to \$ 9,000.00 in compensatory damages. JOHANNA IFTIKAR-KHAN, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2005 WL 3526051, *9

19.19. \$8,000

19.19.1. Furthermore, the record confirms that complainant was emotionally distraught because of S's discriminatory treatment, even to the point of crying at work, apparently on several occasions. Although we note S's testimony that she only observed crying on only one occasion, regarding an unrelated matter, we find that this testimony is consistently rebutted by that of P, complainant's co-worker and complainant himself. Moreover, we rely on the AJ's findings that complainant credibly testified as to the nature and severity of his emotional distress, to include anger and crying, withdrawal from his family, and no longer attending church. We concur with the AJ that complainant's emotional distress lasted from October 1997 to April 1998 (when he was transferred), with some improvement in December 1997. Based on testimony and record evidence illustrating the nature, severity, and duration of complainant's symptoms, and need for treatment, as described above, we find that the AJ's award of \$4,000.00 in compensatory damages is not supported by substantial evidence. We note that the AJ offered no justification or explanation for the amount of the award here. Upon careful review, we find that the evidence supports an award of \$8,000.00. This amount takes into consideration the severity and duration of the harm suffered. Moreover, the amount is consistent with prior Commission precedent. In *Mullins v. U.S. Postal Service*, EEOC Appeal No. 01954362 (May 22, 1997), the Commission ordered an award of \$10,000.00 on evidence showing that the agency's discrimination caused complainant to experience depression, to include pessimism, helplessness, loss of concentration, withdrawal behavior, resentment and hostility. In *Guerra v. U.S. Postal Service*, EEOC Appeal No 01982149 (July 19, 2000), the Commission awarded \$10,000.00 for physical and emotional harm in the form of exacerbation of a physical impairment and stress associated with continued harassment. In *Jones v. Department of Defense*, EEOC Appeal No. 01973551 (April 14, 2000), the Commission awarded \$9,000.00 based on evidence showing that complainant experienced interference with family and marital relations, anxiety, sleeplessness and exhaustion. In *Rountree v. Department of Agriculture*, EEOC Appeal No. 01941906 (July 7, 1995); request for reconsideration denied, EEOC Request No. 05950919 (February 15, 1996), the Commission ordered an award of \$8,000.00 where the evidence showed that complainant experienced emotional distress, to include feelings of inadequacy, failure and depression. *5 Accordingly, with reference to Commission precedence, and the nature and

duration of complainant's suffering, we MODIFY the AJ's award of non-pecuniary compensatory damages, and find that complainant is entitled to an award of \$8,000.00. TARRIE RUCKER, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2005 WL 3526057, *4 -5

19.19.2. Roundtree v. Department of Agriculture, EEOC Request No. 05950919 (Feb. 15, 1996) (\$8,000 in non-pecuniary damages awarded where claimant only diagnosed with "dysthymia" rather than major depression, and "most of" the claimant's emotional distress stemmed from factors other than the agency's discrimination). LYNNEA ST. JOHN, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2003 WL 21423751, *7

19.20. \$7500

19.20.1. We find that the record supports the agency's award of \$7,500. We note that the evidence on damages consisted of testimony from the complainant, the complainant's husband, the complainant's friends and some medical testimony. The testimony showed that the complainant had feelings of inadequacy and loss of self-esteem, depression, frustration, weight gain, and withdrawal from participating in her family. The record shows that none of the medical evidence presented draws a clear connection between the complainant's conditions and the actions found to be discriminatory. ELLA ROBERTS, COMPLAINANT, v. NORMAN Y. MINETA, SECRETARY, DEPARTMENT OF TRANSPORTATION, AGENCY. 2004 WL 1191143, *2

19.21. \$7,000.00

19.21.1. Based on complainant's statement and the AJ findings, the Commission concludes that the agency action caused complainant to suffer emotional distress. Complainant's statements show that the agency's discrimination caused her to develop feelings of low-self-esteem, humiliation, hyper-vigilance, increased anxiety, and feelings of hopelessness. Given the severity and duration of the emotional distress, the Commission finds that the AJ's award of \$7,000.00 in non-pecuniary damages was appropriate. See Tula v. Department of the Navy, EEOC Appeal No. 01A13645 (August 30, 2002) (\$5,000.00 in non-pecuniary damages based on complainant's testimony reveals that she experienced depression, anxiety attacks, withdrawal and humiliation); Kennedy v. Department of the Army, EEOC Appeal No. 01A33269 (October 6, 2004) (\$7,000.00 in non-pecuniary damages where complainant presented sufficient objective evidence to establish that he had persistent emotional harm attributable to his non-selection); Butler v. Department of Agriculture, EEOC Appeal No. 01971729 (April 15, 1999) (\$7,500.00 in non-pecuniary damages based on complainant's testimony regarding his emotional distress). Therefore, we conclude that the award and payment of \$7,000.00 in non-pecuniary damages is appropriate, and we AFFIRM the agency's final decision. [FN2] LORI A. ADAMS, COMPLAINANT, v. R. JAMES NICHOLSON, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, AGENCY. 2005 WL 871190,

*2

19.22. \$5,000

19.22.1. The record reveals that complainant suffered emotional distress, anger, irritability and a perception of being "victimized" by employees of the agency as a result of the agency's discriminatory conduct. The record also shows through medical testimony that complainant suffered agitation, trouble sleeping, severe headaches, reduced appetite, nausea and reduced concentration. RONALD RITCHIE, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (EASTERN AREA), AGENCY. 2004 WL 1040201, *2

19.23. \$3500

19.23.1. The undisputed evidence shows that complainant suffers with depression and has been on anti-depressant medication since 2000. The record also shows that in July 2002, complainant was dealing with spousal abuse, separation from her husband and eviction from her home for non-payment of rent. In August 2002, the dosage of her anti-depressant medication doubled. With respect to the distress caused by the retaliatory termination, the undisputed evidence shows that because she was terminated, complainant was unable to meet an "agreement" with the State of Ohio which resulted in her incarceration for 20 days. Complainant testified that the incarceration was devastating. She stated "there are no words to describe how badly that hurt. Being in jail, seeing your kids through a glass, begging your daughter for money to bail you out. My three-year-old grandchild, can't even touch her through a glass. My two children, 7 and 8, seeing me in jail." Complainant further testified, "my love has always been carrying mail, and its very important to me. I waited for this job for almost eleven to twelve years to be full time.... I cannot award my daughter ... with presents that normal parents give their ... children.... All I wanted was a full time job with the [agency], full time benefits, so that I could be a decent parent to give what any parent wants to give their child. I can't even do that." In *Benson v. Department of Agriculture*, EEOC Appeal No. 01952854 (June 27, 1996), the Commission affirmed the agency's award of \$5,000.00 in non-pecuniary damages where the complainant, his relatives, and his colleagues offered testimony regarding the embarrassment and humiliation that the employee suffered at work as a result of the denial of promotional opportunities, a suspension, and other adverse actions. In *Palmer v. Department of the Navy*, EEOC Appeal No. 01956059 (September 2, 1998), the Commission found the AJ's award of \$5,000 to be reasonable based on the employee's testimony that she had been subjected to a hostile work environment and suffered moderately severe psychological stress as a result. In addition to her own testimony, the employee submitted reports from a psychologist. Finally, in *Androvich v. Department of Agriculture*, EEOC Appeal No. 01950531 (July 12, 1996), the Commission awarded \$5,000 to the aggrieved employee on the basis of testimony from herself, her sister, and her ex-spouse, as well as statements from four clinical psychologists, that she suffered from anxiety attacks, depression, and insomnia, as a result of the agency's aggravation of a pre-

existing mental condition caused by its discriminatory conduct. Upon review of the evidence, taking into consideration the duration, severity and limited evidence presented of the harm, as well as awards of non-pecuniary damages in similar cases, it is the decision of the Commission to AFFIRM the final agency action and conclude that complainant is entitled to \$3,500 in non-pecuniary compensatory damages. DENISE CLAY, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (EASTERN AREA) AGENCY. 2005 WL 1936117, *3

19.24. \$3,000

19.24.1. Complainant testified that then she proceeded to the locker room to call the EEO Office, at which time she saw the Commissary Officer (S2) peeking around the wall to see the interaction between she and U2. Complainant testified that she fainted while she was in the locker room and was taken to the emergency room and diagnosed with "Syncope caused by emotional distress." Complainant testified that she returned to work the following day. OSSIE BOYD, COMPLAINANT, DONALD H. RUMSFELD, SECRETARY, DEPARTMENT OF DEFENSE, (DEFENSE COMMISSARY AGENCY), AGENCY. 2005 WL 2492822, *1

19.24.2. Based on the record, we find \$3,000 an appropriate amount as complainant presented sufficient objective evidence to establish that she had a severe physical reaction, i.e., fainting, due to her emotional distress. However, complainant indicated further that her emotional distress necessitated her absence from work for one day only. Similar cases with somewhat similar evidence support this award. See, e.g., Smith v. U.S. Postal Service, EEOC Appeal No. 01A01538 (January 9, 2003)(\$2,000 in non-pecuniary damages where the complainant suffered extreme disappointment as a result of a retaliatory failure to rehire). OSSIE BOYD, COMPLAINANT, DONALD H. RUMSFELD, SECRETARY, DEPARTMENT OF DEFENSE, (DEFENSE COMMISSARY AGENCY), AGENCY. 2005 WL 2492822, *3

19.25. \$2500

19.25.1. Complainant's psychotherapist provided documentary and testimonial evidence that established complainant suffered from sadness, stress, tearfulness and diagnosed her as having dysthymia and generalized anxiety disorder as a result of the sexual harassment in June 1998. We therefore agree with the AJ's determination the \$2,500 is sufficient to compensate complainant for the emotional distress as a result of the Manager's June 11, 1998 touching. PAMELA K. MCKINNEY, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (SOUTHWEST AREA), AGENCY. 2003 WL 21048382, *5

19.26. \$2,000

19.26.1. In the instant case, complainant contends that her depression and stress worsened as a result of her discriminatory termination. However, there is scant evidence of record in support of this contention. Complainant provided no elaboration about the specific harm that she suffered after, and directly as a result of, the discriminatory termination. Complainant offered the

statements of two (2) co-workers, who stated that complainant was embarrassed by being terminated and she was not the same person as she was before she was terminated. We note that complainant stated that the termination made a great impact on her life and health, and she suffered physical and emotional distress. However, contrary to complainant's contention, the evidence establishes that while complainant stated she was humiliated by her termination, her depression, anxiety and stress which required psychiatric treatment began well before she received the Notice of Removal. We note that while complainant's removal was effective on December 23, 1993, the removal was reduced to a suspension and she returned to work around February 25, 1994. Accordingly, based on complainant's statements and the statements of her co-workers, we modify FAD II's determination that the record contains insufficient evidence in support of complainant's request for non-pecuniary compensatory damages, and will award complainant \$2,000.00 in non-pecuniary compensatory damages JAMIE PORTER, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (EASTERN AREA), AGENCY. 2005 WL 1688125, *3

19.27. \$1,000.00

19.27.1. The record reveals that complainant suffered emotional distress, she felt embarrassed and suffered a loss of self esteem as a result of being escorted out of the building. However, we find that the evidence of compensatory damages in the record is quite limited. Given the severity and duration of the emotional distress, the Commission finds that the agency's award of \$1,000.00 in non-pecuniary damages was appropriate. See *Adesanya v. United States Postal Service*, EEOC Petition No. 04980016 (February 19, 1999) (\$1,389 in non-pecuniary damages awarded where as a result of discriminatorily not being provided work within her restrictions while pregnant, the complainant sustained lack of sleep, had constant headaches, was irritable, and short-tempered for a compensable period of about four months); *Partridge v. United States Postal Service*, EEOC Appeal No. 01966191 (August 13, 1998) (\$1,000 in non-pecuniary damages where as a result of not reasonably accommodating the complainant's religious belief by adjusting his schedule so he could attend a religious convention, the complainant lost biblical guidance and sustained anguish and emotional pain); *Jacobs v. Department of the Army*, Appeal No. 01982989 (August 30, 2001) (\$750 in non-pecuniary damages where as a result of reprisal, complainant's supervisor requested in a letter, that was rescinded a month later, that complainant be reassigned; complainant suffered from thinking she was treated unfairly, felt disrespected, had headaches, and her blood pressure increased). DEBORAH Y. CAPERS, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (SOUTHWEST AREA), AGENCY. 2004 WL 2330972, *2

19.27.2. After a careful review of the record, we find the award of \$1,000.00 in non-pecuniary damages was appropriate. In her November 13,

2004 letter detailing her request for damages, complainant fails to describe the harm caused by the agency's delay in providing her a disabled parking space. Rather, complainant described her difficulties in adjusting to life on an oxygen tank twenty-four hours a day seven days a week. We note that complainant is precluded from seeking compensatory damages on any other alleged discriminatory incident other than the discriminatory denial of a disabled parking space. With regard to the discriminatory delay in providing her a disabled parking space we note that complainant failed to provide specific evidence that she suffered extended harm as a result of the agency's discriminatory actions. Several Commission decisions have awarded compensatory damages in cases similar to complainant's case: *Sindel v. Department of Veterans Affairs*, EEOC Appeal No. 01A11618 (March 19, 2003), request for reconsideration denied, EEOC Request No. 05A30668 (May 13, 2003) (\$500.00 awarded where complainant issued letter of admonishment which caused complainant trouble sleeping and caused him to be frustrated more easily); *Rastogi v. Broadcasting Board of Governors*, EEOC Appeal No. 01A03707 (August 15, 2003) (\$500.00 awarded where complainant issued low performance appraisal which caused complainant to be depressed and leave work on the day appraisal received). Thus, in the present case we find \$1,000.00 is adequate to compensate complainant for the harm shown to be causally related to the discriminatory conduct. *5 The agency's decision awarding \$1,000.00 in compensatory damages was proper and we shall order the agency to make such payment to complainant. SHARON A. WHEELER, COMPLAINANT, DR. FRANCIS J. HARVEY, SECRETARY, DEPARTMENT OF THE ARMY, AGENCY. 2005 WL 2492877, *4 -5

20. Per Diem

20.1. *Prohibited*

20.1.1. The jurisdictions that allow either a bottom line or per diem argument for noneconomic damages are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin

20.1.1.1. *Rationale for prohibition*

20.1.1.1.1. Courts in jurisdictions where per diem arguments have been ruled improper often justify the policy by claiming that they · have no basis in evidence because no witness can testify to the value of a plaintiff's pain and suffering. · invade the province of the jury. · give a false sense of certainty to an uncertain subject: The value of pain and suffering, unlike lost income and medical expenses, cannot be determined by mathematical computation. · may result in excessive verdicts. *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713 (1958).

20.2. *The district court concluded that "[t]he best way that the Court can quantify a damage figure is on a per diem basis, i.e., that a certain amount per*

*day be awarded which represents what this Court believes to be a reasonable damage award *1215 to this Plaintiff who was unconstitutionally denied his ability to freely exercise his religion for the month of Ramadan in 1993."* Appellants' App. Vol. I at 42-43 (emphasis added). In doing so, the court incorrectly based its award on the abstract value of the constitutional right rather than on the actual injuries Mr. Makin suffered from the denial of that right, and we must vacate its award Makin v. Colorado Dept. of Corrections 183 F.3d 1205, *1214 -1215 (C.A.10 (Colo.),1999)

20.3. Example

20.3.1. Over ENSCO's objection, Fontenot made the following "unit of time" argument in closing: [H]ow about \$2 an hour? \$2 an hour for the physical pain and suffering, the mental anguish, the scarring and disfigurement, the permanent loss of the use of his hand, \$2 an hour for the rest of his life. \$16 for half a day, \$32 a day. The figures I came up with were \$125,000 for physical pain and suffering. For mental anguish, \$75,000.... And for the disability, the fact that he has to walk around for the rest of his life with his hand in the way that it is, \$280,000. Fontenot v. Dual Drilling Co. 179 F.3d 969, *979 (C.A.5 (La.),1999)

20.3.2. Counsel's "unit of time" argument would account for the sum of \$243,528 in damages representing \$1 per hour for 16 waking hours per day for a period of 41.7 years. (Blue Brief at p. 37). Matos v. Chloe Z Fishing Co., Inc. 129 F.3d 126, 1997 WL 702919, **1 (9th Cir.(Guam (C.A.9 (Guam),1997)

20.3.3. To make a per diem argument, you assign a specific economic value to the plaintiff's noneconomic loss; say, \$50. You then multiply this amount by the amount of time the plaintiff experienced and will continue to experience the loss-for example, two months, or \$50 x 60 days. The result-in this example, \$3,000-represents the amount the jury should award.²

20.3.3.1. 2. 75A AM. JUR. 2D Trial §561 (2002).

20.3.3.2. To calculate the per diem amount, first decide on a fair and reasonable amount of compensation and work backward. For example, if your client would need \$300,000 to be made whole, then divide that by the time the client has and will continue to suffer, say, 43 years or 15,705.75 days. That works out to about \$19 a day, using the common multiplier of 365.25 days.

20.3.4. C. Per Diem Damages Argument ACF and Union Pacific contend that the district court erred in failing to declare a mistrial because of the Vanskikes' unit-of-time, or per diem, damages argument. The Vanskikes counter that permitting the argument was within the discretion of the district court or, alternatively, that the defendants were not prejudiced by the argument. In their closing argument to the jury, the Vanskikes urged the jury to adopt unit-of-time valuations and mathematical computations utilizing such measurements to compute damages for pain and suffering. They first asked the jury to award \$1,000 to Warren Vanskike for his pain and suffering on the day of his injury. The jury was then asked to award \$2,700 for 27 days of hospitalization at \$100 per day. Finally, an award for future pain and suffering of \$402,712 was calculated by multiplying a per hour valuation of \$1.50 (\$36 per diem) by the 11,242 days of Warren Vanskike's anticipated life expectancy. They also asked the jury for \$202,788 for Lucille's "debt" based upon 75 cents per hour (\$18 per diem) times the 11,266 days of her anticipated life expectancy. These

per hour and per diem valuations and calculations were displayed on a large chart placed before the jury during closing argument. Defendants' motions for a mistrial were denied, but the district court stated, "The Eighth Circuit is going to reverse you if you get a verdict." The propriety of closing argument is a procedural issue to be determined by federal law. *McDonald v. United Airlines, Inc.*, supra, 365 F.2d at 595; *Yeargain v. National Dairy Products Corp.*, 317 F.2d 779, 780 (8th Cir. 1963). "Although there is a sharp split among the state authorities on the use of the so-called 'unit-of-time' argument, the federal courts of appeal which have considered the question generally have permitted such arguments." *Waldron v. Hardwick*, 406 F.2d 86, 89 (7th Cir. 1969) (footnotes*211 omitted). Missouri is a state which opposes the per diem argument. See *Strong, Per Diem Argument in Missouri-A Status Report*, 35 J.Mo.Bar 237 (1979). Likewise, although this circuit has never expressly considered the propriety of per diem closing arguments, ever since *Chicago & North Western Ry. v. Candler*, 283 F. 881 (8th Cir. 1922), we have upheld the refusal to give instructions requiring per diem mathematical calculation of future pain and suffering. Cf. *Flanigan v. Burlington Northern, Inc.*, supra, 632 F.2d at 886-87 (improper to reduce an award for pain and suffering to present value); but cf. *Chiarello v. Domenico Bus Service, Inc.*, 542 F.2d 883, 886 (2d Cir. 1976) (damages for future pain and suffering should be reduced to present value). This condemnation has been interpreted by other circuits as a prohibition on unit-of-time arguments. See, e. g., *Waldron v. Hardwick*, supra, 406 F.2d at 89 n.4; *Baron Tube Co. v. Transport Insurance Co.*, 365 F.2d 858, 863 n.3 (5th Cir. 1966). Some circuits allow unit-of-time arguments only so long as they are carefully controlled by the district court, *id.*, and do not result in excessive verdicts. *Waldron v. Hardwick*, supra, 406 F.2d 86; *Pennsylvania R.R. v. McKinley*, 288 F.2d 262 (6th Cir. 1961). [47] [48] [49] We recognize that limitation of counsel's argument to the jury on computation of damages is within the discretion of the district judge. Therefore, although we continue to condemn instructions requiring per diem mathematical calculations, we do not disapprove of per diem closing arguments as long as such arguments are carefully controlled by the district court. See *Waldron v. Hardwick*, supra, 406 F.2d at 89 (declining to adopt an inflexible rule of prohibition). Our position continues to be, however, that unit-of-time calculations are arbitrary and artificial. As stated in *Flanigan v. Burlington Northern, Inc.*, supra, 632 F.2d at 886: The same amount of pain and suffering does not occur from year to year nor can the degree of pain and suffering that will occur in any year be quantified with any degree of certainty. Requiring the reduction of an award for pain and suffering to its present value would improperly allow a jury to infer that pain and suffering can be reduced to a precise arithmetic calculation. Because we have reversed and remanded the damages issue for a new trial on another ground, see Part VII B supra, on remand the district court should take steps to insure fairness in the per diem argument. The jury should be cautioned that references to per diem damages in closing arguments are not evidence, but merely a form of argument, and that pain and suffering cannot be reduced to a precise

arithmetic calculation. See *Flanigan v. Burlington Northern, Inc.*, supra, 632 F.2d at 886; *Waldron v. Hardwick*, supra, 406 F.2d at 89. *Vanskike v. ACF Industries, Inc.* 665 F.2d 188, *210 -211 (C.A.Mo., 1981)

20.4. *Cautionary Instruction*

20.5. *Unit of Time* During closing argument, Colburn's attorneys made a "unit of time" argument, suggesting to the jury that \$1.00 per hour for the number of hours in Colburn's 47 1/2 year remaining life expectancy, for a total of \$420,000, would be a satisfactory measure of non-economic damages. Following the initial jury instructions, the trial court invited counsel to object to the charge. Bunge objected to the "unit of time" argument and tendered a proposed cautionary instruction. The trial court refused to give the instruction, stating that "[the instruction] should have been presented to the court at the time that the other instructions were, and to go back now ... would [be unduly] critical of [the plaintiffs argument]. The defendant had ample opportunity to answer that argument in [his closing] remarks...." In *Baron Tube Co. v. Transport Ins. Co.*, 365 F.2d 858 (5th Cir.1966) (*en banc*), this Court held: [Reasons against allowing "unit of time" arguments] must be weighed against the desirability of allowing at least a modicum of advocacy in an adversary proceeding designed to determine plaintiff's damages. When so weighed, the scales are tipped to the side of advocacy. Thus, on balance, our view is that a unit of time type of argument is not improper *where accompanied by a suitable cautionary instruction.* (emphasis added) *Id.* at 864. In discussing safeguards that a trial court should take to protect against the potential prejudicial effect of such an argument, we stated: *377 [The] court should ... make it clear to the jury that the unit of time argument is merely a method of presenting contentions, and is not to be considered as evidence. This may be done at the time the argument is made, or in the charge to the jury, or on both occasions.... We hasten to reiterate that these matters, except for requiring a cautionary instruction, are left to the discretion of the trial court. *Id.* at 865. Our most recent consideration of the "unit of time" argument was in *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233. In *Westbrook*, defendants did not object at trial to the plaintiff's use of the "unit of time" argument, did not request a cautionary instruction and did not, on appeal, directly challenge the utilization of the "unit of time" argument. Rather, the defendants simply claimed that the amount of verdict was excessive. *Id.* at 1240. In reviewing the amount of the verdict, we noted *sua sponte* that a "unit of time" argument was made without a cautionary instruction. *Id.* at 1238. Reversing the damage award, we emphasized that *Baron Tube* requires that a cautionary instruction must be given to "ameliorate the effects of a unit of time argument." *Westbrook*, 754 F.2d at 1240. Without a specific cautionary instruction, there is a danger that this argument will create an illusion in the jury's mind that pain and suffering damages can and perhaps should properly be measured or calculated by simple multiplication rather than through the jury's sound discretion. *Baron Tube*, 365 F.2d at 864. [4] The blanket cautionary instruction given in this case that "any statements, objections, or arguments made by lawyers are not evidence in this case," and "[w]hat the lawyers say is not binding upon [the jury]" inadequately addresses our concerns with the use of the "unit of time" argument. An appropriate instruction would

inform the jury that the dollar figure advanced by counsel in making the "unit of time" argument does not constitute evidence but merely represents argument which the jury is free to disregard in its deliberations. *Mileski v. Long Island R.R. Co.*, 499 F.2d 1169, 1174 (2d Cir.1974). The trial court erred by not giving a specific cautionary instruction. *Colburn v. Bunge Towing, Inc.* 883 F.2d 372, *376 -377 (C.A.5 (Miss.),1989)

20.5.1. In *Colburn*, 883 F.2d at 377-78, this court reversed a jury verdict based on the district court's failure to give a cautionary instruction to counter the prejudicial effects of the "unit of time" argument made by plaintiff's counsel, reasoning: Without a specific cautionary instruction, there is a danger that this argument will create an illusion in the jury's mind that pain and suffering damages can and perhaps should properly be measured or calculated by simple multiplication rather than through the jury's sound discretion. *Id.* at 377 (citing *Baron Tube Co. v. Transport Ins. Co.*, 365 F.2d 858, 865 (5th Cir.1966) (en banc)). The *Colburn* court noted that the "blanket cautionary instruction given in this case that 'any statements, objections, or arguments made by lawyers are not evidence in this case' inadequately addresses" the Court's concern with the use of "unit of time" argument. *Id.* Fontenot v. Dual Drilling Co. 179 F.3d 969, *979 (C.A.5 (La.),1999)

20.6. *Not objectionable per se*

20.6.1. During closing arguments Manning's counsel urged the jury to base its calculation of damages according to a unit-of-time or per diem formula. Although this court has "condemn[ed] [jury] instructions requiring per diem mathematical calculations," we have not disapproved per diem closing arguments provided the "arguments are carefully controlled by the district court." *Vanskike v. ACF Indus.*, 665 F.2d 188, 211 (8th Cir.1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1632, 71 L.Ed.2d 867 (1982). *Manning v. Lunda Const. Co.* 953 F.2d 1090, *1093 (C.A.8 (Minn.),1992)

20.6.2. "Although there is a sharp split among the state authorities on the use of the so-called 'unit-of-time' argument, the federal courts of appeal which have considered the question generally have permitted such arguments." *Waldron v. Hardwick*, 406 F.2d 86, 89 (7th Cir. 1969) (footnotes*211 omitted). Missouri is a state which opposes the per diem argument. See *Strong, Per Diem Argument in Missouri-A Status Report*, 35 J.Mo.Bar 237 (1979). Likewise, although this circuit has never expressly considered the propriety of per diem closing arguments, ever since *Chicago & North Western Ry. v. Candler*, 283 F. 881 (8th Cir. 1922), we have upheld the refusal to give instructions requiring per diem mathematical calculation of future pain and suffering. Cf. *Flanigan v. Burlington Northern, Inc.*, supra, 632 F.2d at 886-87 (improper to reduce an award for pain and suffering to present value); but cf. *Chiarello v. Domenico Bus Service, Inc.*, 542 F.2d 883, 886 (2d Cir. 1976) (damages for future pain and suffering should be reduced to present value). This condemnation has been interpreted by other circuits as a prohibition on unit-of-time arguments. See, e. g., *Waldron v. Hardwick*, supra, 406 F.2d at 89 n.4; *Baron Tube Co. v. Transport Insurance Co.*, 365 F.2d 858, 863 n.3

(5th Cir. 1966). Some circuits allow unit-of-time arguments only so long as they are carefully controlled by the district court, *id.*, and do not result in excessive verdicts. *Waldron v. Hardwick*, *supra*, 406 F.2d 86; *Pennsylvania R.R. v. McKinley*, 288 F.2d 262 (6th Cir. 1961). *Vanskike v. ACF Industries, Inc.* 665 F.2d 188, *210-211 (C.A.Mo., 1981)

20.6.3. We recognize that limitation of counsel's argument to the jury on computation of damages is within the discretion of the district judge. Therefore, although we continue to condemn instructions requiring per diem mathematical calculations, we do not disapprove of per diem closing arguments as long as such arguments are carefully controlled by the district court. See *Waldron v. Hardwick*, *supra*, 406 F.2d at 89 (declining to adopt an inflexible rule of prohibition). Our position continues to be, however, that unit-of-time calculations are arbitrary and artificial. As stated in *Flanigan v. Burlington Northern, Inc.*, *supra*, 632 F.2d at 886: The same amount of pain and suffering does not occur from year to year nor can the degree of pain and suffering that will occur in any year be quantified with any degree of certainty. Requiring the reduction of an award for pain and suffering to its present value would improperly allow a jury to infer that pain and suffering can be reduced to a precise arithmetic calculation. Because we have reversed and remanded the damages issue for a new trial on another ground, see Part VII B *supra*, on remand the district court should take steps to insure fairness in the per diem argument. The jury should be cautioned that references to per diem damages in closing arguments are not evidence, but merely a form of argument, and that pain and suffering cannot be reduced to a precise arithmetic calculation. See *Flanigan v. Burlington Northern, Inc.*, *supra*, 632 F.2d at 886; *Waldron v. Hardwick*, *supra*, 406 F.2d at 89. *Vanskike v. ACF Industries, Inc.* 665 F.2d 188, *211 (C.A.Mo., 1981)

20.7. *In general*

20.7.1. A per diem argument asks the jury to award the plaintiff a certain amount for each year, month, week, or day of suffering since the injury. It also takes into consideration future damages based on the plaintiff's life expectancy.¹

20.7.1.1. David R. Lee, *Pain Analogies for Closing Argument*, 16 N.M. TRIAL L. 165 (1988), at 165; *See also* JOHN A. TARRANTINO & PATRICIA K. ROCHA, ESTIMATING AND PROVING PERSONAL INJURY DAMAGES §143.1 (1991).

21. Formula for calculating non pecuniary compensatory damages

21.1. *There is no precise formula for determining the amount of damages for non-pecuniary losses, except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. Loving v. Department of the Treasury, EEOC Appeal No. 01955789 (August 29, 1997); Rountree v. Department of Agriculture, EEOC Appeal No. 01941906 (July 7, 1995). We note that for a proper award of non-pecuniary damages, the amount of the award should not be "monstrously" excessive standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Ward-Jenkins v. Department of the Interior, EEOC*

*Appeal No. 01961483 (March 4, 1999). WILLIAM J. COLBERT, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (CAPITAL METRO AREA) AGENCY. 2005 WL 1936093, *5*

- 21.2.** *However, even though "[a]wards in other cases provide a reference point that assists the court in assessing reasonableness[,] they do not establish a range beyond which awards are necessarily excessive. Due to the highly fact-specific nature of Title VII cases, such comparisons are rarely dispositive." Lampley v. Onyx Acceptance Corp., 340 F.3d 478, 485 (7th Cir.2003), cert. denied, 540 U.S. 1182, 124 S.Ct. 1421, 158 L.Ed.2d 85 (2004). Deloughery v. City of Chicago 422 F.3d 611, *621 (C.A.7 (Ill.),2005)*
- 21.3.** *We conclude that although the compensatory damages award is substantial, we do not view it as monstrous or shocking, given the testimony regarding Moore's repeated abusive conduct. See Jenkins v. McLean Hotels, Inc., 859 F.2d 598, 600 (8th Cir.1988). As we recently noted in Eich v. Board of Regents for Cent. Missouri State University, 350 F.3d 752, 763 (8th Cir.2003), "awards for pain and suffering are highly subjective and should be committed to the sound discretion of the jury, especially when the jury is being asked to determine injuries not easily calculated in economic terms." (internal quotation marks and citations omitted). In Eich, which involved abuse no more severe than that to which Rowe was subjected, we reinstated an award for \$200,000. Because it is difficult to quantify the extent of the psychic injury that months and years of unwanted touching and verbal abuse, combined with threats of murder and rape, might cause, it was for the jury, equipped as it was with the collective wisdom that life's experiences confer, to determine the amount that would adequately compensate Rowe for that injury, and thus we decline to reduce the compensatory award. Cf. Madison v. IBP, Inc., 330 F.3d 1051, 1054 (8th Cir.2003) (affirming award of \$266,750 in emotional distress damages and \$76,667 in back pay and benefits); Warren v. Prejean, 301 F.3d 893, 899 (8th Cir.2002) (upholding remitted award of \$60,000 in actual damages and \$150,000 in compensatory damages). Rowe v. Hussmann Corp. 381 F.3d 775, *783 (C.A.8 (Mo.)banc 2004)*
- 21.4.** *This court has consistently held that "awards for pain and suffering are highly subjective and should be committed to the sound discretion of the jury, especially when the jury is being asked to determine injuries not easily calculated in economic terms." Frazier v. Iowa Beef Processors, Inc., 200 F.3d 1190, 1193 (8th Cir.2000); see also Jenkins, 859 F.2d at 600; Morrissey v. Welsh Co., 821 F.2d 1294, 1299 n. 3 (8th Cir.1987) ("We adhere to the belief that a jury is the best-equipped entity to determine the size of a damage award."); Stafford v. Neurological Med., Inc., 811 F.2d 470, 475 (8th Cir.1987) (assessment of damages especially within a jury's discretion when damages are not easily calculable in economic terms); Vanskike v. Union Pac. R.R. Co., 725 F.2d 1146, 1150 (8th Cir.1984) ("Assessment of damages is within the sound discretion of the jury."). This court has considered the excessiveness of jury awards for emotional distress in several cases involving claims under Title VII. For example, in Kucia v. Southeast Arkansas Community Action Corp., 284 F.3d 944, 947-48 (8th Cir.2002), we upheld \$50,000 in compensatory damages for emotional distress in*

*a race discrimination case where the plaintiff testified that it was hard for her to hold her head up, that she was on edge, and that she had lost sleep and felt anxious. We held that \$50,000 was not so excessive as to shock the judicial conscience. Id. at 948. Similarly, in Ross v. Douglas County, Nebraska, 234 F.3d 391, 397 (8th Cir.2000), we ruled that \$100,000 for emotional distress in a race discrimination case was not excessive where the plaintiff suffered emotional and physical injuries and was forced to take a lower paying job without health benefits. Also, in Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051, 1061-62 (8th Cir.1993), we upheld an award of \$125,000 for mental anguish and suffering and held that the district court did not abuse its discretion in failing to remit the award. The court has upheld varying amounts of emotional distress damages in cases not involving Title VII. See, e.g., Mathieu v. Gopher News Co., 273 F.3d 769, 782-83 (8th Cir.2001) (finding \$165,000 emotional distress award not excessive where plaintiff in ADA claim was only witness to testify about emotional distress); Foster v. Time Warner Entm't Co., 250 F.3d 1189, 1196 (8th Cir.2001) (holding \$75,000 award for emotional distress in ADA claim was not excessive where plaintiff and her husband testified that plaintiff had become withdrawn, could not eat, experienced back pain and other physical and emotional problems); Frazier, 200 F.3d at 1193 (upholding \$40,000 award in FMLA claim where plaintiff testified he felt "empty and lost" and his dignity and self-esteem were taken from him); Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989, 993 (8th Cir.1984) (finding \$125,000 award for mental anguish in § 1981 case to be reasonable). In the present case, Eich testified: It's very frustrating to know that that behavior I was subjected to would be *764 allowed to happen for so long, so many times and nothing be done to correct it. They didn't care anything about what I contributed to the university. They put in my job performance or my job performance reviews I am a valuable employee of the university but when I turned to them for help it was like I was nothing. There is just no way to really describe everything that I have been through, the volume, the intense situations, the rejection of my requests for help. There is just, there is really no words to describe how completely and totally devastating everything that has happened to me has been. It's completely destroyed everything. Appellant's Br. at 55. Her testimony reflects how demeaning and humiliating the actions of Drake and Gillespie were by reason of the abusive conduct used against her. We cannot hold that the jury verdict, as rendered, shocks the judicial conscience. The remittitur reflects the trial judge's erroneous view that there was no evidence of sexual harassment. We find this was an abuse of discretion. The district court, under the existing record, failed to analyze the record by giving the Plaintiff the benefit of all reasonable inferences and resolving all conflicts in the evidence in her favor. Under the circumstances, we hold that it was for the jury to determine the reasonable amount of damages incurred. Therefore, we reinstate the verdict of \$200,000 and reverse the district court. Eich v. Board of Regents for Cent. Missouri State University 350 F.3d 752, *763 -764 (C.A.8 (Mo.)banc 2003)*

22. Appellate Review of Compensatory Damages Awards

22.1. When assessing the propriety of a compensatory damages award, relevant

- inquiries may include "whether the award is monstrously excessive," "whether there is no rational connection between the *484 award and the evidence," and "whether the award is roughly comparable to awards made in similar cases."* AIC Sec. Investigations, 55 F.3d at 1285 (internal quotation marks omitted). *Lampley v. Onyx Acceptance Corp.* 340 F.3d 478, *483 -484 (C.A.7 (Ill.),2003)
- 22.2.** Generally, Court of Appeals reviews an award of compensatory damages with an eye to three considerations: (1) whether the award is monstrously excessive; (2) whether there is no rational connection between the award and the evidence; and (3) whether the award is roughly comparable to awards made in similar cases *Deloughery v. City of Chicago* 422 F.3d 611 (C.A.7 (Ill.),2005)
- 22.3.** We note that these damages awards are not out of line with other Title VII cases in this circuit. See *Tullis*, 243 F.3d at 1067-68 (upholding \$80,000 in damages for emotional distress where plaintiff felt "degraded" and "backstabbed" by the employer). As we observed in *Lampley*, "[a]wards in other cases provide a reference point that assists the court in assessing reasonableness; they do not establish a range beyond which awards are necessarily excessive. Due to the highly fact-specific nature of Title VII cases, such comparisons are rarely dispositive." 340 F.3d at 485. *Harvey v. Office of Banks and Real Estate* 377 F.3d 698, *714 (C.A.7 (Ill.),2004)
- 22.4.** Moreover, we review the size of the compensatory award "with a keen sense of respect for the latitude given to juries," and will order remittitur only if the verdict is so grossly excessive as to shock the conscience. *Id.*; *Ouachita Nat'l Bank v. Tosco Corp.*, 716 F.2d 485, 488 (8th Cir.1983). *Rowe v. Hussmann Corp.* 381 F.3d 775, *783 (C.A.8 (Mo.)banc 2004)
- 22.5.** A court should not substitute a jury's damages verdict with its own figure merely because a case with similar facts has not yet arisen, or because a plaintiff in a similar case was perhaps not able to plead his facts to the jury as well. Awards in other cases provide a reference point that assists the court in assessing reasonableness; they do not establish a range beyond which awards are necessarily excessive. Due to the highly fact-specific nature of Title VII cases, such comparisons are rarely dispositive. We therefore conclude that the district court did not abuse its discretion in denying a new trial or remittitur with respect to the compensatory damages award. *Lampley v. Onyx Acceptance Corp.* 340 F.3d 478, *485 (C.A.7 (Ill.),2003)
- 22.6.** This court has consistently held that "awards for pain and suffering are highly subjective and should be committed to the sound discretion of the jury, especially when the jury is being asked to determine injuries not easily calculated in economic terms." *Frazier v. Iowa Beef Processors, Inc.*, 200 F.3d 1190, 1193 (8th Cir.2000); see also *Jenkins*, 859 F.2d at 600; *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1299 n. 3 (8th Cir.1987) ("We adhere to the belief that a jury is the best-equipped entity to determine the size of a damage award."); *Stafford v. Neurological Med., Inc.*, 811 F.2d 470, 475 (8th Cir.1987) (assessment of damages especially within a jury's discretion when damages are not easily calculable in economic terms); *Vanskike v. Union Pac. R.R. Co.*, 725 F.2d 1146, 1150 (8th Cir.1984) ("Assessment of damages is within the sound discretion of the jury."). This court has considered the excessiveness of jury awards for emotional

*distress in several cases involving claims under Title VII. For example, in Kucia v. Southeast Arkansas Community Action Corp., 284 F.3d 944, 947-48 (8th Cir.2002), we upheld \$50,000 in compensatory damages for emotional distress in a race discrimination case where the plaintiff testified that it was hard for her to hold her head up, that she was on edge, and that she had lost sleep and felt anxious. We held that \$50,000 was not so excessive as to shock the judicial conscience. Id. at 948. Similarly, in Ross v. Douglas County, Nebraska, 234 F.3d 391, 397 (8th Cir.2000), we ruled that \$100,000 for emotional distress in a race discrimination case was not excessive where the plaintiff suffered emotional and physical injuries and was forced to take a lower paying job without health benefits. Also, in Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051, 1061-62 (8th Cir.1993), we upheld an award of \$125,000 for mental anguish and suffering and held that the district court did not abuse its discretion in failing to remit the award. The court has upheld varying amounts of emotional distress damages in cases not involving Title VII. See, e.g., Mathieu v. Gopher News Co., 273 F.3d 769, 782-83 (8th Cir.2001) (finding \$165,000 emotional distress award not excessive where plaintiff in ADA claim was only witness to testify about emotional distress); Foster v. Time Warner Entm't Co., 250 F.3d 1189, 1196 (8th Cir.2001) (holding \$75,000 award for emotional distress in ADA claim was not excessive where plaintiff and her husband testified that plaintiff had become withdrawn, could not eat, experienced back pain and other physical and emotional problems); Frazier, 200 F.3d at 1193 (upholding \$40,000 award in FMLA claim where plaintiff testified he felt "empty and lost" and his dignity and self-esteem were taken from him); Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989, 993 (8th Cir.1984) (finding \$125,000 award for mental anguish in § 1981 case to be reasonable). In the present case, Eich testified: It's very frustrating to know that that behavior I was subjected to would be *764 allowed to happen for so long, so many times and nothing be done to correct it. They didn't care anything about what I contributed to the university. They put in my job performance or my job performance reviews I am a valuable employee of the university but when I turned to them for help it was like I was nothing. There is just no way to really describe everything that I have been through, the volume, the intense situations, the rejection of my requests for help. There is just, there is really no words to describe how completely and totally devastating everything that has happened to me has been. It's completely destroyed everything. Appellant's Br. at 55. Her testimony reflects how demeaning and humiliating the actions of Drake and Gillespie were by reason of the abusive conduct used against her. We cannot hold that the jury verdict, as rendered, shocks the judicial conscience. The remittitur reflects the trial judge's erroneous view that there was no evidence of sexual harassment. We find this was an abuse of discretion. The district court, under the existing record, failed to analyze the record by giving the Plaintiff the benefit of all reasonable inferences and resolving all conflicts in the evidence in her favor. Under the circumstances, we hold that it was for the jury to determine the reasonable amount of damages incurred. Therefore, we reinstate the verdict of \$200,000 and reverse the district court. Eich v. Board of Regents for Cent. Missouri State University 350 F.3d 752, *763 -764 (C.A.8 (Mo.)banc 2003)*

- 22.7.** *We also find that the compensatory damages award is supported by substantial evidence and is consistent with Commission precedent. ROSEANN FURCH, COMPLAINANT, MIKE JOHANNIS, SECRETARY, DEPARTMENT OF AGRICULTURE, AGENCY. 2005 WL 1936149, *3*
- 22.8.** *The agency argues that the AJ's award of compensatory damages was improperly punitive. The agency argues that complainant's doctor testified that complainant would require approximately eighteen months to two years of psychotherapy or counseling to treat his depression. The agency argues that the record indicates that therapy for 104 weeks (2 years) including medicine would cost \$20,000.00. Thus, the agency argues that the AJ's award of \$60,000.00 was intended to punish the agency rather than compensate complainant for actual harm suffered. Thus, the agency argues that the compensatory damages award should be reduced to \$20,000.00. In essence, the agency is arguing it should only be responsible for pecuniary, and not non-pecuniary compensatory damages. However, the AJ only awarded non-pecuniary compensatory damages. Thus, we find the agency's argument unpersuasive. The AJ found that an award of \$60,000.00 in non-pecuniary compensatory damages was appropriate. The AJ found that complainant suffered emotional distress due to the agency's discriminatory actions. Specifically, the AJ found that complainant, after the termination, felt confused, frustrated, angry, embarrassed and depressed. Further, the record contains testimony from complainant's aunt indicating that her nephew grew moody and depressed, less sociable and more irritable and withdrawn after the termination. Complainant's friends testified that he socialized less after the termination. A clinical psychologist diagnosed complainant as severely depressed with significant self-esteem issues. The AJ concluded that complainant was a withdrawn, irritable, depressed individual, compensating for his career disappointment by over-eating. In determining compensatory damages, the Commission strives to make damage awards for emotional harm consistent with awards in similar cases. In so far as complainant has submitted evidence of emotional distress, we note that the Commission has awarded compensatory damages in cases somewhat similar to complainant's in terms of harm sustained. Hicks, Jr. v. United States Postal Service, EEOC Appeal No. 07A10020 (September 26, 2003) (awarding \$70,000 after termination when complainant experienced humiliation, embarrassment, and rejection); Levy v. Department of Veterans Affairs, EEOC Appeal No. 01A01561 (May 12, 2003) (awarding \$60,000 following her termination, complainant exhibited feelings of humiliation and shame, worry, nervousness, and anxiety). *7 The Commission finds these cases analogous to the above referenced cases with respect to the nature, severity, and duration of harm. After considering the nature of the agency's action, in conjunction with complainant's testimony, we find that \$60,000.00 is an appropriate amount of non-pecuniary compensatory damages. The agency's decision finding no discrimination is REVERSED and we REMAND the matter to the agency to comply with the Order issued by the AJ, as reprinted and slightly modified, herein. JAMES A. BULLOCK III, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2005 WL 1936076, *6 -7*

22.9. *The undisputed evidence shows that complainant suffers with depression and has been on anti-depressant medication since 2000. The record also shows that in July 2002, complainant was dealing with spousal abuse, separation from her husband and eviction from her home for non-payment of rent. In August 2002, the dosage of her anti-depressant medication doubled. With respect to the distress caused by the retaliatory termination, the undisputed evidence shows that because she was terminated, complainant was unable to meet an "agreement" with the State of Ohio which resulted in her incarceration for 20 days. Complainant testified that the incarceration was devastating. She stated "there are no words to describe how badly that hurt. Being in jail, seeing your kids through a glass, begging your daughter for money to bail you out. My three-year-old grandchild, can't even touch her through a glass. My two children, 7 and 8, seeing me in jail." Complainant further testified, "my love has always been carrying mail, and its very important to me. I waited for this job for almost eleven to twelve years to be full time.... I cannot award my daughter ... with presents that normal parents give their ... children.... All I wanted was a full time job with the [agency], full time benefits, so that I could be a decent parent to give what any parent wants to give their child. I can't even do that." In *Benson v. Department of Agriculture*, EEOC Appeal No. 01952854 (June 27, 1996), the Commission affirmed the agency's award of \$5,000.00 in non-pecuniary damages where the complainant, his relatives, and his colleagues offered testimony regarding the embarrassment and humiliation that the employee suffered at work as a result of the denial of promotional opportunities, a suspension, and other adverse actions. In *Palmer v. Department of the Navy*, EEOC Appeal No. 01956059 (September 2, 1998), the Commission found the AJ's award of \$5,000 to be reasonable based on the employee's testimony that she had been subjected to a hostile work environment and suffered moderately severe psychological stress as a result. In addition to her own testimony, the employee submitted reports from a psychologist. Finally, in *Androvich v. Department of Agriculture*, EEOC Appeal No. 01950531 (July 12, 1996), the Commission awarded \$5,000 to the aggrieved employee on the basis of testimony from herself, her sister, and her ex-spouse, as well as statements from four clinical psychologists, that she suffered from anxiety attacks, depression, and insomnia, as a result of the agency's aggravation of a pre-existing mental condition caused by its discriminatory conduct. Upon review of the evidence, taking into consideration the duration, severity and limited evidence presented of the harm, as well as awards of non-pecuniary damages in similar cases, it is the decision of the Commission to AFFIRM the final agency action and conclude that complainant is entitled to \$3,500 in non-pecuniary compensatory damages. DENISE CLAY, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (EASTERN AREA) AGENCY. 2005 WL 1936117, *3*

22.10. *DENNIS, Circuit Judge, specially concurring. I disagree with the majority opinion insofar as it reviews the excessiveness of Ms. Thomas's award by comparison to amounts awarded in prior cases. This practice is highly suspect and contrary to controlling law in this circuit. Although judgments in comparable cases may provide some frame of reference when reviewing awards for*

*excessiveness, they do not control our assessment of an individual case. The proper focus of our inquiry is whether, based on the facts in the record, the award is entirely disproportionate to the injury sustained, not whether the award is greater or smaller than awards granted by previous juries. Because I agree, however, that \$50,000 is the most that a jury could have properly awarded for future emotional distress damages in this case, I concur in the judgment. Thomas v. Texas Dept. of Criminal Justice 297 F.3d 361, *373 (C.A.5 (Tex.),2002)*