Ka-ching!

MAKING EEOC RING THE CASH REGISTER FOR YOU.

AN EMPLOYEE'S GUIDE TO RECOVERING COMPENSATORY DAMAGES FOR PSYCHOLOGICAL TRAUMA.

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What formula does EEOC use to calculate compensatory damages for psychological trauma that results from intentional discrimination?

Is this the formula?

1. $P(\emptyset) = 0$
2. $P(\Omega) = 1$
3. $0 \leq P(A) \leq 1$
4. $P(A \cup B) = P(A) + P(B) - P(A \cap B)$
5. $P(A^c) = 1 - P(A)$
6. $P(A \cap B) = P(A|B)P(B)$

If A and B are mutually exclusive then

4′. $P(A \cup B) = P(A) + P(B)$

If A and B are independent then

6′. $P(A \cap B) = P(A)P(B)$

***Achtung*: This article contains no legal advice. If you need legal advice, you should get it from someone qualified to dispense it.**

No? Okay, is this the formula?

(Please just one more silly picture. I promise to get to the law soon enough.)

No? Then surely this must be the formula:

Formula One Racing Car

EEOC denies that it uses a "precise formula" for calculating compensatory damages for psychological trauma.[i] But that does not mean that we should not develop a *rough* formula to *approximate* the amount of compensatory damages that should be awarded. After all, if EEOC awards complainants money to compensate them for the psychological trauma, we should try to assign a monetary value to the components, i.e., "variables" of that trauma. For as Lord Kelvin said, "When you can measure what you are speaking about, and express it in numbers, you know something about it; but when you cannot measure it, when you cannot express it in numbers, your knowledge of it is of a meager and unsatisfactory kind; it may be the beginning of knowledge, but you have scarcely, in your thoughts, advanced it to the stage of science.***"***[ii] Before we identify the variables that comprise the formula, let's first look at the law that allows the award of compensatory damages.

The Civil Rights Act of 1991

Pursuant to section 102(a) of the Civil Rights Act of 1991, complainants who established their claims 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).

Compensatory damages are available only for intentional discrimination; so, if you are a victim of disparate-impact discrimination, you are out of luck.[iii]. You are in luck if you are a qualified employee with a disability and your agency failed to provide you with a reasonable accommodation, unless your agency can demonstrate that it made a good faith effort to accommodate your disability.[iv] But you are out of luck if you get traumatized---which unavoidably you will---as a result of the agency's mishandling of your complaint administratively, including the agency playing hardball in the litigation of the complaint before EEOC.[v] You are also out of luck if you are discriminated against because you are old.[vi]

Congress passed the Civil Rights Act of 1991to fill in the hole that it had left in the "make whole remedies" provisions of 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.[vii] Those make whole remedies were intended to restore a victim of intentional discrimination as nearly as possible to the position she/he would have occupied absent the discrimination. [viii] Because federal agencies cannot waive a wand over its victims and undo the psychological injuries they have caused, federal agencies must pay cash to its victims to make them as whole as possible, but limited only to $300 K with no punitive damages allowed.[ix]

In setting caps on recovering compensatory damages, Congress was considerate enough to list some of those areas in which an employee or applicant might find him/her self less than whole after being victimized by discrimination:

> 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-

Let's use the *nonpecuniary losses* which Congress identified to start populating our formula with *variables.*

Let $ = the amount of compensatory damages for non-pecuniary losses

Let ep = monetary damages for emotional pain

s. = monetary damages for suffering
i = monetary damages for inconvenience
eol. = monetary damages for loss of the enjoyment of life

So far, our formula reads as follows:

$=ep+s+i+eol

As contemplated by Congress, we will add other nonpecuniary losses as those are identified in the caselaw. But for now let's examine the variables in our formula.

Purity of the Variables

Do any of the variables overlap and, if they do, how do we adjust their monetary value to take into account that overlap? For example, unless she is a masochist, a victim of discrimination does not *enjoy life* while she is experiencing *emotional pain*. So assuming we can assign a monetary value to the victim's loss of enjoyment of life, should we deduct from that value the loss of life inherent in the other variables? After all, the victim should not be compensated more than once for the same loss. In short, we should be careful that variables do not bleed into each other. That does not mean that the victim should not be compensated for experiencing two or more nonpecuniary losses at the same time. For example, the victim could be suffering emotional pain while not partaking in an activity from which she used to derive some enjoyment of life. She should be compensated for both since Congress clearly intended the losses to be additive by supplying us with a list of examples of nonpecuniary losses, the total of which cannot exceed $300,000.

Since a victim of discrimination can be compensated only for those losses that she sustained because of her employer's discrimination,[x] the losses in our formula must also be free from the "taint" of any prior existing injury.[xi] Likewise, the agency is not responsible to pay for psychological injuries occurring after the discrimination.[xii] The agency does not however get to take a deduction based on the victim's vulnerability to injury; the agency takes the victim as the agency finds her.[xiii]

Does EEOC first assess the nature and extent of the complainant's psychological injuries from all sources and then allocates to the agency the percentage for which it is responsible? Sometimes, yes.

In *Starling v. Henderson,* [xiv] the Commission's Administrative Judge (AJ) 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. On appeal, the Commission agreed with the AJ's method for computing damages:

> 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.

Properties of the Variables

What components do all the variables in our formula share? To borrow from computer programming, I ask in the alternative: what are the *properties* of the variables? To gain a better insight into the answer, you should understand that nonpecuniary losses are *experienced* by the victim.[xv] Put more simply, the victim *feels* the emotional pain, she *feels* the suffering, or she *feels* or *experiences* the loss of enjoyment of life. What are the properties that these unpleasant experiences have in common? Congress did not identify these properties but the caselaw does some. The Commission says, "Compensatory damages should consider the extent, nature, and severity of the harm and the length of time the injured party endured the harm." [xvi]

The "extent" of something describes the area covered by it.[xvii] Just as "physical pain" --- also a nonpecuniary loss, *infra*, ---has an emotional component to it, "emotional pain" presumably has a physical component to it. I suppose a victim of discrimination could identify the areas of her body in which she feels emotional pain in answering a question about the "extent" of emotional pain from which she suffers. But "extent" is also synonymous with "degree," and I cannot distinguish "degree" of harm from "severity" of harm; so to the extent that that "extent" means "severity" the two are redundant of each other.

The "nature" of the harm means the intrinsic qualities[xviii] of the harm that distinguish it from other harms. For example, physical pain is variously described as "sharp," "dull," "aching," "jabbing," "stinging," "burning," or "throbbing."[xix] I do not know whether those descriptions are applicable to emotional pain, but insofar as the victim describes the pain's *sensations*, she is explaining its nature. (Please note that I used the plural of *sensation* because some sensations are co morbid of the primary sensation while others, like dull and sharp pain, are mutually exclusive of each other.[xx])

Describing the nature of pain (as "aching," "jabbing," etc) tells us nothing, however, about the *severity* of it. I prefer *intensity* to *severity* because it connotes better the *range* in the strength of pain from mild to severe. (Yes, I know that the intensity of the pain can

and does vary from time to time, but you will have to wait until I get to the property of *stability, infra*.)

Let us assume that our victim experiences a sharp, jabbing emotional pain of moderate intensity. The Commission says that we cannot assign a monetary value to that variable without first knowing how long she has been suffering with that pain; for surely there should be a rough linear relationship between the *duration* of the loss and the monetary value to be assigned to it. Measuring the past duration of the loss is reasonably straightforward. Ask the victim when she started and stopped feeling the pain and you have calculated "length of time the injured party endured the harm."[xxi] But what if she has *not* stopped experiencing the pain? Can she recover for future pain and suffering? You bet she can,[xxii] provided an expert will back her up.[xxiii]

The Commission says that complainants do not have to adduce expert testimony to prove entitlement to compensatory damages for nonpecuniary losses.[xxiv] But that principle is misleading because it is even better settled that "[W]here a question of fact is beyond the comprehension of the ordinary lay person, expert testimony is required to prove that fact."[xxv] And the expected duration or permanency of a psychological injury is not a question of fact that laymen can "plainly determine."[xxvi] Indeed, as a former personal-injury lawyer, I do not know how complainants are excused from having to introduce expert testimony to show that the discrimination was the proximate cause of their psychological injuries.[xxvii] In short, complainants are well advised to hire a psychologist or psychiatrist to render an opinion within a reasonable degree of psychological probability about how long the psychological injury will last.[xxviii]

For however many years, months, days, etc a victim of discrimination endures the emotional pain thereof, she surely must have respites from it. For the most part, emotional pain is not continuous; it is *episodic*. [xxix] Although neither the Commission nor the courts have identified the *frequency* with the victim suffers emotional pain as a property of it, we still need to account for the *recurrent, serial* nature of the emotional pain and other compensable unpleasant experiences to value them properly. If the victim has been keeping a daily diary, [xxx] she should be better able to estimate the *intervals* between episodes.

Commonsense tells us that the intensity of emotional pain varies both within an episode and between episodes. Therefore, the *variability* of the unpleasant compensable experience---its ebb and flow---must be factored into the equation. (I was tempted to use "stability" instead of "variability" to avoid being criticized for "the variability of the variable," but I am not writing for pedants anyway.) Not only does the intensity of pain naturally wax and wane, but also its variability might be "artificially" manipulated. Xanax, generically available as Alprazolam, is a benzodiazepine anxiolytic that is used in "the treatment of Generalized Anxiety Disorder (GAD) and is also indicated for the management of panic disorder with or without agoraphobia."[xxxi] "Benzos" are highly addictive[xxxii] so the victim's compensatory damages award should not be reduced because she abjures benzodiazepine anxiolytics. By contrast, selective serotonin reuptake inhibitors (e.g. citalopram, fluoxetine, fluvoxamine, paroxetine, and sertraline) are

nonaddictive, reasonably safe, and effective in the treatment of depression.[xxxiii] Some forms of psychotherapy, specifically cognitive therapy, have been found to be even more effective than SSRIs in the treatment of depression.[xxxiv] Accordingly, if the victim can give no good reason for refusing treatment that will safely ameliorate her symptoms (or maybe even make them disappear entirely), the amount of her recovery should be reduced because she failed to mitigate her damages.[xxxv]

There are undoubtedly more properties that comprise nonpecuniary losses, but the nature, extent, intensity (severity), duration, frequency, and variability of the injuries are the main ones. But is each property as important as another in computing the dollar value of the variable (loss)? Perhaps the intensity of the injury is three times more valuable than the variability of it. Who is to say? The courts, the Commission, the psychiatric experts? Since none of the above have said and since no caselaw even hints at assigning multiples to the properties of injuries, for the time being let's assume that each property is as valuable as another in computing the dollar value for the variable (loss). Accordingly, for example, if ep = monetary damages for emotional pain, then ep= nature, extent, intensity (severity), duration, frequency, and variability of the emotional pain. And the same would hold true for the other nonpecuniary losses that Congress has specifically identified.

Let's add some more variables (losses) to the equation.

Ka-ching: the Commission's six-figure cases

We are in this for the money, right? So if we want to hear that cash register ring as loudly as it can, we should review those cases in which the Commission awarded the "max" or as near to the max as the Commission will go. We should expect to find additional nonpecuniary losses in those cases.

Roseann Furch recovered $150,000 from the Department of Agriculture for the mental anguish she suffered when she proved that she was discriminatorily nonselected for promotion.[xxxvi] You heard right: a cool $150k above and beyond a retroactive promotion, back pay and attorney fees. Ms. Furch testified 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 Vistrail. Ms. Furch saw a psychologist for 6-8 months, and continued to see a Licensed Social Worker through the agency's Employee Assistance Program. Even at the time of the hearing, Ms. Furch testified that she still suffered from weekly crying spells, saw no relief in sight and had withdrawn socially from friends and family. Ms. Furch's daughter and co-workers corroborated her testimony and reported that she suffered from stomach problems, anxiety, and was no longer the outgoing person she once was. Ms. Furch submitted medical records from her physician, psychologist, and psychiatrist, and noted she 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 Ms.

Furch for the discrimination. The AJ cited Commission precedents that 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. On appeal, the Commission found that substantial evidence supported the AJ's award even though Ms. Furch had started to see an EAP counselor before her nonselection because a reassignment she was upset with.

Since Congress has already included loss of enjoyment of life in the formula, let's provisionally add depression, interference with family relationships, permanent diminishment in quality of her life, and physical symptoms to our list of nonpecuniary losses. Can you discern any difference between "loss of enjoyment of life" and "diminishment in quality of her life"? I suppose a victim of discrimination could do as much as she did before was injured, but not enjoy it as much. Maybe what the Commission was driving at was permanent diminishment in the *activities* of her life. On the depression variable, do you think that a psychologist or psychiatrist differentiates between depression on the one hand and diminishment in quality of life and loss of enjoyment of life on the other? Do you think that depression might be a catchall label that comprises a host of symptoms that include diminishment in quality of life and loss of enjoyment of life?

The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders IV (DSM IV) lists the following "depressive disorders."[xxxvii]

- Major depression (can include psychotic features)
- Dysthymia
- Bipolar depression
- Substance induced mood disorders
- Mood disorder due to general medical condition
- Cyclothymia

Please take my word for it, all but major depression and dysthymia have nothing to do with trauma-induced depression. The AMA frankly admits that it has a hard time distinguishing between major depression and dysthymia:

> The differential diagnosis of dysthymia and major depressive disorder is particularly difficult, since the two disorders share similar symptoms and differ primarily in duration and severity. Usually major depressive disorder consists of one or more discrete major depressive episodes that can be distinguished from the person's usual functioning, whereas dysthymia is characterized by a

> chronic mild depressive syndrome that has been present for at least 2 years. If the initial onset of what appears to be dysthymia directly follows a major depressive episode, the appropriate diagnosis is major depressive disorder in partial remission. The diagnosis of dysthymia can be made following major depressive disorder only if there has been a full remission of the major depressive episode that has lasted at least 6 months before the development of dysthymia.
>
> People with dysthymia frequently have a superimposed major depressive disorder, and this condition is often referred to as double major depressive disorder. Patients with double major depressive disorder are less likely to have a complete recovery than are patients with major depressive disorder without dysthymia.[xxxviii]

"Ka-ching," "ka-ching." I can hear the cash register ringing loudly. The caselaw must be packed with cases in which the expert has diagnosed a major depressive disorder superimposed on dysthymia, right? Wrong. There is only one case in which there was even the suggestion that the complainant suffered from both dysthymia and a major depressive disorder.[xxxix] That is not to say that dysthymia has not been mentioned in Commission cases; it has---disparagingly. In *Roundtree v. Department of Agriculture*, EEOC Request No. 05950919 (Feb. 15, 1996), the Commission awarded $8,000 in non-pecuniary damages where the complainant was 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. Roundtree, however, did better than Pamela McKinney who was awarded only $2,500 even though her 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 one incident of unwelcomed sexual touching in June 1998.[xl]

I believe that dysthymia has been disrespected. Whereas its more hi-profiled relative, major-depressive disorder, comes and goes as it pleases---it is episodic by definition---dysthymia, like a faithful dog, is always with you. Does not its loyalty count for anything? Day after day, it weighs you down. It tethers you; you are not going too far or too fast with dysthymia. Admittedly, a major depressive episode hurts more than dysthymia; perhaps it hurts a lot more. But you cannot depend on a major depressive episode: here one day and gone the next. Because dysthymia is not as fickled as depression, the Commission should award more in comp damages than it has for this loss; and, in all seriousness, it would if complainants' attorneys knew how to highlight its paramount property: *chronicity*.

But I digress; ostensibly, I was investigating depression to determine whether it is a discrete nonpecuniary loss, or whether it bleeds into other losses by comprising them in

its definition. Here are the criteria for a single-episode, major depressive disorder according to DSM IV.

A. The person experiences a single major depressive episode:

1. For a major depressive episode a person must have experienced at least five of the nine symptoms below for the same two weeks or more, for most of the time almost every day, and this is a change from his/her prior level of functioning. One of the symptoms must be either (a) depressed mood, or (b) loss of interest.
    a. Depressed mood. For children and adolescents, this may be irritable mood.
    b. A significantly reduced level of interest or pleasure in most or all activities.
    c. A considerable loss or gain of weight (e.g., 5% or more change of weight in a month when not dieting). This may also be an increase or decrease in appetite. For children, they may not gain an expected amount of weight.
    d. Difficulty falling or staying asleep (insomnia), or sleeping more than usual (hypersomnia).
    e. Behavior that is agitated or slowed down. Others should be able to observe this.
    f. Feeling fatigued, or diminished energy.
    g. Thoughts of worthlessness or extreme guilt (not about being ill).
    h. Ability to think, concentrate, or make decisions is reduced.
    i. Frequent thoughts of death or suicide (with or without a specific plan), or attempt of suicide.
2. The persons' symptoms do not indicate a mixed episode.
3. The person's symptoms are a cause of great distress or difficulty in functioning at home, work, or other important areas.
4. The person's symptoms are not caused by substance use (e.g., alcohol, drugs, medication), or a medical disorder.
5. The person's symptoms are not due to normal grief or bereavement over the death of a loved one, they continue for more than two months, or they include great difficulty in functioning, frequent thoughts of worthlessness, thoughts of suicide, symptoms that are psychotic, or behavior that is slowed down (psychomotor retardation).

B. Another disorder does not better explain the major depressive episode.
C. The person has never had a manic, mixed, or a hypomanic Episode (unless an episode was due to a medical disorder or use of a substance).[xli]

Get the tourniquet quickly because depression is bleeding into all manner of nonpecuniary losses. Compare side by side DSM's major depressive episode criteria with the nonpecuniary losses listed in *Furch*, *supra*, and you will see the overlap between the two. DSM's "The person's symptoms are a cause of great distress or difficulty in functioning at home" equates to Furch's "interference with family relationships." DSM's "loss of interest" equates to Furch's "loss of enjoyment of life." And it gets much worse. In *Economou v. Department of the Army*, EEOC Appeal No. 01983435 (August 5, 1999) the Commission awarded $35,000.00 in non-pecuniary damages awarded to complainant

where evidence showed he experienced humiliation, anxiety, depression, and sleeplessness even though DSM lists insomnia as a symptom of depression. Ditto *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). The complainant in *Day v. USPS*, EEOC Appeal No. 07A10079 (November 2, 2001) was a octuple dipper who collected $80K for among other losses, sleeplessness, inability to communicate with family, humiliation, feelings of worthlessness, lack of motivation, suicidal thoughts, and weight loss as well as depression even though depression comprises all of them.

Are these complainants actually receiving multiple compensation for the same loss? Aren't I being pedantic in failing to acknowledge that the Commission might being using *depression* to mean *depressed mood*? in which case it would not be awarding multiple compensation for the same loss. The Commission risks awarding multiple compensation for the same loss when it uses clinical terms haphazardly. Because the Commission, and the courts equally so, have failed to standardize on the meaning of clinical terms it uses to describe the same loss, the Commission and its AJs issue widely variant awards for the same loss. For every case in which the Commission has awarded a complainant a reasonably substantial amount of compensatory damages for depression, there is another case in which it has awarded a complainant a pittance for depression.

For example, in *Johnson v. Department of the Interior*, EEOC Appeal No. 01961812 (June 18, 1998), the Commission awarded $37,500.00 in non-pecuniary damages to complainant based on reports from two physicians showing complainant's depression was a result of the agency's discrimination. But 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 *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. Worse yet, in *Tula v. Department of the Navy*, EEOC Appeal No. 01A13645 (August 30, 2002), the Commission awarded $5,000.00 in non-pecuniary damages based on complainant's testimony reveals that she experienced depression, anxiety attacks, withdrawal and humiliation. But in. *Bullock v.. Potter,. 2005 Wl 1936076,* the Commission affirmed an AJ's award of $60,000 to complainant in nonpecuniary compensatory damages even though his psychologist testified that he would need only 18 more months of psychotherapy to cure him of his depression. But in *Clay v. Potter, 2005 WL 1936117* the complainant received only $3500 for her discrimination-induced depression. But then again Roseann Furch recovered $150,000 for depression [among other losses] and, unlike Denise Clay, Ms. Furch was not jailed for her retaliatory firing.

Don't try to reconcile these disparate awards on the basis of the duration or intensity of the depression; for the Commission does not even acknowledge the properties of depression much less its varying manifestations. And the few cases cited above are just

the tip of the depression iceberg. I could have cited scores more for depression at the top and bottom of the dollar scale. I propose that if the Commission and the courts abjured "depression" entirely and used only apposite symptoms thereof less variations in awards would result. Certainly complainant's expert would feel comfortable about testifying about those symptoms, and the agency could not accuse complainant of receiving multiple compensation for the same loss. Best of all, the more variables our formula contains, the more money that can be assigned to each variable. Let's continue to review the Commission's six-figure cases to see if my "more the merrier" variable argument holds true.

Cecilia T. Durinzi loaded every imaginable problem/symptom/injury she could find onto the bed of her dump truck, drove it to the EEOC, tilted the bed skyward, and dumped it all on the Commission's AJ:

> 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 post office figured that Ms. Durinzi's nonpecuniary losses were worth only $10K. But on appeal, the Commission took one look at this laundry-list of losses and awarded her $120,000, noting that "a six-year duration period has been established and that there was no indication that the symptoms have diminished."[xlii] Other noteworthy six-figure, kitchen-sink cases are: *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). *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). More recently in *Kloock v. Potter*, 2004 WL 290885, the Commission awarded $150,000 where complainant presented sufficient evidence establishing that the agency's actions caused him depression, social withdrawal, weight gain, anxiety, sleeplessness, feelings of hopelessness, anger, paranoia, victimization, humiliation, constant fear of unjustified job loss, loss of self-esteem, severe financial strain, loss of his home and future home, familial strain, added physical pain associated with his herniated disc, and the loss of his hockey coach career.

Although more pecuniary losses seem to produce higher awards, we should not neglect establishing the *properties* of each loss in a rush to add as many losses as possible to the formula. Indeed, a good argument can be made that a complainant should eliminate weak losses entirely not to distract the Commission from concentrating on the stronger ones. That appears to have been Tova Glockner's approach, and the Commission awarded her $200,000.[xliii]

A clinical pharmacist for the V.A., Ms. Glockner introduced substantial medical evidence to prove that the migraine headaches which had disappeared before she began working for the VA, reappeared with a vengeance when her supervisors harassed because of her race (Caucasian), religion (Jewish), and age (fifty-something). Ms. Glockner was shrewd to establish a causal connection between the harassment and the migraines because migraines hurt *physically*; and physical pain is more palpable and therefore (to some) more believable than psychic pain. In the same vein, Ms. Glockner proved that she developed other "physical ailments" as a result of the harassment: Irritable Bowel Syndrome (an otherwise dubious condition), kidney stones, and irritational fibroma. To reiterate: because physical ailments are more *verifiable* than psychic ones, the Commission has an easier time believing them.

Because the duration of the harassment bespeaks loudly of the duration of the suffering therefrom, Ms. Glockner also concentrated on establishing that her anti-Semitic, racist supervisors had been harassing her for five years, a point which the Commission was quick to emphasize. Ms. Glockner also wisely paid attention to proving the extent of the harassment. She showed that not only did her supervisors belittle her in private, but they also that denigrated her to others:

> We note as did the AJ, that many of the incidents that comprise complainant's harassment claim will permanently impact complainant's career, and cannot be remedied other

> than through compensatory damages. For example, the agency's obstruction of complainant's professional growth and damage to her professional reputation by not permitting her to teach classes or attend team meetings when she was assigned to the diabetic clinic and its denial of complainant's scope of practice credentials which repeatedly caused complainant humiliation when she, unlike pharmacists with much less experience, was unable to order lab tests. This made it necessary for complainant to ask physicians to order her tests for her, which resulted in them asking complainant why she could not order her own lab tests. We also note that complainant introduced medical evidence of her injuries, and statements from her co-workers about how she was impacted by the discriminatory harassment

Last but not least, the Commission pointed out "complainant avers that she has not recovered from any of the injuries or conditions that she alleges were caused by the agency." Leaving aside that Ms. Glockner's attorney, who earned $47+K in fees, should have had an expert testify on permanency, the Commission 's document clearly implies that her injuries are permanent. If she will suffer from these injuries until she dies, a fair question is: how much longer does Ms. Glockner have to live?

The per diem argument: Day by day, getting worse in every way.

Since Ms. Glockner was born in May 1947, she has a life expectancy of 23.67 years.[xliv] That's 8639.55 days. In actuality, the Commission awarded Ms. Glockner less than twenty-five dollars a day for all the pain and suffering she will have to endure until she dies. ($200,000 divided by 8639 days) Although the Commission did not explicitly divide its award between past and future nonpecuniary losses, a plain reading of the decision shows that the Commission awarded substantially less than twenty-five dollars a day for future pain and suffering since they placed so much emphasis on the five years of harassment she endured. " Ten to fifteen dollars per day for future pain and suffering is chicken feed," you might say.

And that is precisely what a slick personal-injury lawyer hopes you say to yourself. Welcome to the "per diem" argument about compensatory damages in which the lawyer in her closing argument suggests a modest amount of damages that should be awarded per day (hence "per diem") which, when multiplied by the number of days the victim is expected to live, becomes a fortune.[xlv] Many courts look askance on per diem arguments because they have no basis in evidence, because no witness can testify to the value of a plaintiff's pain and suffering, because they invade the province of the jury, because they give a false sense of certainty to an uncertain subject and because the value of pain and suffering, unlike lost income and medical expenses, cannot be determined by mathematical computation. [xlvi] But if, as we have seen, the expected duration of the injury

is the most important property to assign a value to the injury, just how is the jury (or administrative judge) supposed to calculate the value of the permanency of an injury?

The Kansas Supreme Court faced and answered this question unflinchingly in *Wilson v. Williams*, 933 P2d 757 (1997). In this personal-injury case, Wilson's attorney, Jerry Levy, argued on rebuttal that the jury should award Wilson $25,000 for nonpecuniary damages, including pain, suffering, disability, disfigurement, and loss of enjoyment of life, and $100,000 for future nonpecuniary damages. He then attempted to convince the jury that these figures were not really as large as they seemed by making the following argument:

"MR. LEVY: We're going to be trying to answer some questions and give some reasons why I think certain numbers that I'm going to suggest to you as a verdict in this case are reasonable. . . . Wade Wilson, his life expectancy is 36 and a half years and if my figures are correct, that comes to around 13,323 days. I give you those figures only because when I discuss with you in a minute what I believe is a fair value for future losses, I am going to show you it is really, although the figure is large, per day it is not very much.
. . . .
". . . And so, for [Wade Wilson's] pain and suffering, disability, disfigurement, loss of enjoyment of life $25,000.00. Same thing for loss of enjoyment of life and disability and so on in the future $100,000.00. And again, with his life expectancy, that comes out to around $8.00 a day or something like that, not a lot of money to compensate a man who is going to have lots of pain and swelling in his leg every day of his life; and who is going to have an ankle that is going to develop arthritis; and who is going to have an ankle that is going to wear out. Total $296,500.00, again, it is a big figure but when you consider the length of time we're talking about for which this man is going to have to suffer, the losses he has already incurred, the pain and suffering and disability he has already been through, I think these figures are fair."
Williams' counsel objected when Wilson's counsel listed the life expectancy of Wilson in days and years in order to show that the amount of future pain and suffering damages requested was not very much per day. This objection was overruled by the trial court.

The jury returned an itemized verdict, awarding the precise amount of nonpecuniary damages to Wilson argued by his counsel in the rebuttal closing argument--$25,000 for pain, suffering, disability, and loss of enjoyment of life to date, and $100,000 for pain, suffering, disability, and loss of enjoyment of life in the future.

In an unpublished opinion, the Court of Appeals found that Wilson's attorney utilized a per diem or formula argument when requesting future pain and suffering damages for Wilson and that such argument was an error that presumptively caused prejudice to Williams. The Court of Appeals reversed the jury verdict judgment, remanding the case for a new trial as to the damages for Wilson without the use of a per diem closing argument.
The precise issue before the Kansas Supreme Court was whether that state's prohibition against the per diem or formula rule should be overruled and the court held that it should.

The court traced the prohibition back to the New Jersey Supreme Court's decision in *Botta*, *supra*:

> One of the first cases in the country to analyze whether the formula technique should be allowed in opening or closing arguments was *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713 (1958). In *Botta*, the New Jersey Supreme Court prohibited the use of the formula technique, finding that the arguments invaded the province of the jury, were speculative, and were not supported by evidence. 26 N.J. at 100-03. In order to be consistent with this prohibition of the formula technique, the *Botta* court, unlike Kansas, forbade the mention or request of any amount of future pain and suffering damages by the plaintiff, even a request for a total lump sum amount of future pain and suffering damages. 26 N.J. at 104. This New Jersey rule, which prohibited the use of formula technique, became known across the country as the *Botta* rule. In 1962, this court had the opportunity to decide whether it would accept the *Botta* rule and prohibit the use of the formula technique in opening and closing arguments or whether it would allow such arguments. This opportunity arose in the case of *Caylor v. Atchison, T. & S.F. Rly. Co.*, 189 Kan. 210, 368 P.2d 281 (1962) (*Caylor I*), *rev'd in part on rehearing* 190 Kan. 261, 374 P.2d 53 (1962) (*Caylor II*).

The Kansas Supreme Court then noted that it had adopted the *Botta* rule in *Caylor v. Atchison, T. & S.F. Rly. Co.*, 374 P.2d 53 (1962). Thirty-five years later, the Kansas Supreme Court came to it senses in *Wilson* and abandoned the *Botta* rule:

> This state permits argument as to life expectancy, which is just as speculative as a suggested per diem amount for unliquidated pain and suffering damages. This state also allows argument as to the total amount desired for unliquidated damages such as pain and suffering. The jury is instructed that counsel's argument is not evidence. PIK. Civ. 2d 2.04. Only evidence is allowed into the jury room during deliberations. Thus, the trial court should not permit formula charts, which can be used in oral argument but not admitted into evidence, to be taken into the jury room. To suggest to a jury a sum per unit of pain is not inconsistent with analogous arguments. It is not testimony, it is simply argument, and would be accepted by a juror as just that, *i.e.*, an argument--the advocate's suggestion to the jurors as to how they might arrive at a certain sum for damages.

> If a party could show a jury had arrived at a sum for pain and suffering by placing a value on a unit of pain, we would not grant a new trial. Why, then, should we hold it error for an attorney, whom the jury knows is an advocate, to suggest the jury consider arriving at a lump sum by assigning a sum it considers reasonable to a unit of pain, whether that unit be an hour, a day, a week, a month, or a year, and multiply that sum by the number of units of pain the plaintiff is expected to suffer?

Even if the Commission did not reject the per diem argument (aka "unit of time") on policy grounds, it still might fall on the deaf ears of the Commission's AJs. For unlike juries that decide the amount of damages as a question of fact, the Commission's AJ's inexplicably decide the amount of damages as a mixed question of fact and law. The Commission tells its AJs that the amount of compensatory damages they award should not be "motivated by passion or prejudice" and should not be "monstrously excessive."[xlvii] This is more or less the same guidance a jury receives from a judge instructing them on how to calculate compensatory damages. But the Commission goes on to tell its AJs to be certain that the amount they award is "consistent with the amounts awarded in similar cases."[xlviii] Juries are not asked to reconcile their verdicts with verdicts rendered by juries in other cases. Jury verdicts from other cases would be clearly inadmissible as evidence to set the amount of damages in the current case. First, there is no reason to assume that a jury in another case is any more perspicacious about damages than the jury in the current case so as to offer the current jury guidance on how to calculate damages. Second, even if the jury in another case did have special insight on damages, its verdict should be imposed as a template on the verdict in the current case only if the two cases are factual clones of each other. And short of the jury in the current case reading the transcript of the other case there is no way of establishing that the two cases are factually comparable. Third, even if the two cases are factually similar that still does not take into account each jury's responsibility to assess the credibility of the witnesses. The jury in another case may have found the plaintiff to be incredible on damages whereas the jury in the current case finds the plaintiff to be credible.

These reasons and others make it an abomination for EEOC to force AJs to scrounge around to find previous Commission decisions to justify their compensatory damage awards. This is not just my view; some bold jurists have said the same:

> 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. [xlix]

Circuit Judge Dennis said it even better in his concurring decision in *Thomas v. Texas Dept. of Criminal Justice* 297 F.3d 361, *373 (C.A.5 (Tex.),2002):

> 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.

As an advocate, you should be able to convince an AJ that it is futile to benchmark a previous decision against your case by pointing out that no previous decision provides sufficient information to be used as an accurate gauge. Let's assume that your adversary cited the Commission's decision in *McKinney v. Potter*[l], for the proposition that the victim of a single-act of sexual harassment should not recover more than $2,500 for her injuries. In that case, the AJ concluded that complainant established a prima prima facie case of sexual harassment because she established her supervisor subjected her to unwelcome conduct that created a hostile work environment. when on June 11, 1998, he placed both hands with palms up on complainant's behind, and pushed in an upward motion. Previously, he had told complainant to get her "fat butt off" a piece of equipment. The AJ awarded Ms. McKinney $2500 for that incident based on her psychotherapist's reports and testimony "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."

Do you see now why I attempted to drum into your head the distinction between *losses* (variables) and the *properties* thereof? Just how sad and stressed out was Ms. McKinney? The Commission tells us nothing about the *severity* or *intensity* of these losses. Just how long did Ms. McKinney suffer with dysthymia? The Commission tells us nothing about the *duration* and possible *permanency* of this loss. Since Generalized Anxiety Disorder is by definition episodic, just how frequently did she suffer bouts of anxiety? The Commission tells us nothing about the intervals between the episodes. Was the dysthymia amenable to treatment with SSRIs? Was the GAD amenable to treatment with anxiolytics? The Commission tells us nothing about the *tractability* of the disorders.

Indeed, if SSRIs or anxiolytics were indicated and Ms. McKinney refused to take them, she would be guilty of failing to mitigate her damages. We don't know if she did because the Commission has not told us. I could list other relevant properties of losses that the Commission failed to consider, but hopefully you get my point about just how futile it is to use precedent as a ruler to measure compensatory damages in any other case.

Conclusion

You don't need to be a math wizard to work with the formula for computing compensatory damages. Identify all the relevant variables (losses) and for each variable assign a monetary value to it based on the relevant properties of the variable and then total them up. The arithmetic is straightforward; the skill needed is in persuading the AJ that the complainant actually sustained the loss and then demonstrating that the loss sustained was horrific.

About the author

Mitchell Kastner served as an Administrative Judge with the United States Merit Systems Protection Board and its predecessor, the United States Civil Service Commission, for ten years. During the last three years of his tenure, he was the Deputy Regional Director of the Board's New York Regional Office. As an Administrative Judge, he conducted hearings and wrote decisions on all of the appeals over which the Board's Regional Offices had jurisdiction, including adverse actions (removals, demotions, and suspensions for more than 14-days); reductions in force; denials of within-grade salary increases; disability retirement reconsideration decisions; legal retirement reconsideration decisions; performance-based removals or reductions in grade; OPM suitability determinations; denials of restoration of reemployment rights, and certain terminations of probationary employees.

Since returning to private practice in 1985, he has represented employees before the Board on all of these types of appeals and several others which were added after he left, most notably, representing whistleblowers in Independent Right of Action appeals under the Whistleblower Protection Act of 1989. He has also represented federal employees and postal workers before EEOC and in federal court on claims under all of the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. With the exception of the National Treasury Employees Union (which employs its own attorneys), he has represented bargaining unit members of every major federal employee and postal service worker union in arbitrations. He is featured with former MSPB Chairman Daniel Levinson on Dewey Publication’s compact disc *MSPB LITIGATION TECHNIQUES*

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Endnotes

[i] 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,

[ii] From: http://www.cromwell-intl.com/3d/Index.html

iii 42 U.S.C. 1981a (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.

[iv] *Id.*

[v] Compensatory damages that cannot be awarded for an agency's improper handling of an EEO complaint. *Appleby v. Secretary of Army*, 01933897, 3993/A9 (1994). In the *Appleby* , 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. The Commission denied him recovery for these acts: :" [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 S 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."

[vi] The ADEA does not permit a separate recovery of compensatory damages for pain and suffering or emotional distress. C.I.R. v. Schleier 515 U.S. 323, *326, 115 S.Ct. 2159, **2162 (U.S.,1995)

[vii] *JOSE A. OTERO, COMPLAINANT, DR. FRANCIS J. HARVEY, SECRETARY, DEPARTMENT OF THE ARMY, AGENCY. 2005 WL 2921305, *2*

[viii] *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).

[ix] 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

[x] 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. RANDY A. KALLAUNER, COMPLAINANT, SAMUEL W. BODMAN, SECRETARY, DEPARTMENT OF ENERGY, AGENCY. 2005 WL 2835209, *5

[xi] 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

[xii] VERONICA C. CHEVIS, COMPLAINANT, v. MIKE JOHANNS, SECRETARY, DEPARTMENT OF AGRICULTURE, AGENCY. 2005 WL 819622, *4

[xiii] 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).

[xiv] STARLING, COMPLAINANT, v. WILLIAM J. HENDERSON, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (PACIFIC/WEST REGION), AGENCY. 2000 WL 342418, *4

[xv] E.g., 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)(italics added).

[xvi] *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

[xvii] Encarta Dictionary: English (North America)

[xviii] *Id.*

[xix] http://www.mayoclinic.com/health/pain/PN00017

[xx] http://en.wikipedia.org/wiki/Comorbid

[xxi] *Boyd v. Rumsfeld*, supra.

[xxii] CONNIE T. ELLIS, COMPLAINANT, v. DONALD H. RUMSFELD, SECRETARY, DEPARTMENT OF DEFENSE (DEFENSE COMMISSARY AGENCY) AGENCY. 2003 WL 21048467, *8

[xxiii] Evidence of future pain and suffering requires a showing that it is reasonably certain to occur in the future. Maddox v. Rozek, 265 Ill. App. 3d 1007, 1009, 639 N.E.2d 164, 166 (1994). Several Illinois cases have held that the evidence required to support a jury instruction on future pain and suffering can be established by either expert or lay testimony. See, *e.g.*, A.O. Smith Corp. v. Industrial Comm'n, 69 Ill. 2d 240, 245, 371 N.E.2d 607, 609 (1977) ("the general rule is that direct expert evidence is not essential to establish the permanency or future effects of an injury"); Onion, 191 Ill. App. 3d at 320, 547 N.E.2d at 723 (" '[s]ome evidence' *** from either an expert or a lay person warrants the giving of a jury instruction"); Ross v. Aryan International, Inc., 219 Ill. App. 3d 634, 648, 580 N.E.2d 937, 946 (1991); Pourchot v. Commonwealth Edison Co., 224 Ill. App. 3d 634, 637, 587 N.E.2d 589, 592 (1992).

However, lay testimony will only suffice to warrant a jury instruction on future pain and suffering when the existence of the plaintiff's ongoing pain and suffering would be readily apparent to a lay jury from the nature of the injury. See Maddox, 265 Ill. App. 3d at 1010-11, 639 N.E.2d at 167. In Maddox, the court effectively articulated and analyzed this rule as follows:

"Where future pain and suffering can be objectively determined from the nature of an injury, the jury may be instructed on future pain and suffering based on lay testimony alone or even in the absence of any testimony on the subject. Where future pain and suffering is not apparent from the injury itself, or is subjective, the plaintiff must present expert testimony that pain and suffering is reasonably certain to occur in the future to justify the instruction." Maddox, 265 Ill. App. 3d at 1011, 639 N.E.2d at 167.

[xxiv] Courts also have held that "expert testimony ordinarily is not required to ground money damages for mental anguish or emotional distress." See Wulf v. City of Wichita, 883 F.2d 842, 875 (10th Cir. 1989). A complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain his/her burden in this regard. Nonetheless, 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). [FN3] CECILIA T. DURINZI, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2005 WL 1903378, *5. See alson *Pena-Crespo v. Puerto Rico* 408 F.3d 10, *14 (C.A.1 (Puerto Rico),2005) “Although we have held that expert

testimony is not necessarily required, "the lack of such evidence is relevant *to the amount of the award*." *Koster v. Trans World Airlines, Inc.*, 181 F.3d 24, 35 (1st Cir.1999) (emphasis added)."

[xxv] Butt v. Greenbelt Home Care Agency 2003 WL 685026, *14 (N.D.Iowa) (N.D.Iowa,2003)

[xxvi] *Layton v. Yankee Caithness Joint Venture, L.P.*, 774 F.Supp. 576 (D.Nev.1991) See also Diaz v. Johnson Matthey, Inc. 869 F.Supp. 1155, *1166 (D.N.J.,1994): "Expert testimony will be required on a variety of issues including the core issue in this case: are the sequelae of the platinum allergy permanent?"

[xxvii] Davis v. U.S. 143 Fed.Appx. 371, *372 (C.A.2 (N.Y.),2005). According to New York law, in order to establish a medical malpractice claim, Davis must demonstrate that: (1) the MDC medical staff departed from accepted standards of medical practice and (2) the departure was the proximate cause of Carter's death. *See Arkin v. Gittleson*, 32 F.3d 658, 664 (2d Cir.1994).New York law requires that, unless the matter is within the knowledge and experience of an ordinary juror, a plaintiff alleging medical malpractice must provide "expert medical opinion evidence" with respect to each of these two prongs. *See Milano v. Freed*, 64 F.3d 91, 95 (2d Cir.1995) (quoting *Fiore v. Galang*, 64 N.Y.2d 999, 1001, 489 N.Y.S.2d 47, 478 N.E.2d 188 (1985)).We have reviewed the record and conclude that Davis was required to submit expert opinion evidence in this case, *see id.*, because an ordinary juror would not have sufficient knowledge to determine whether Carter's death was proximately caused by a deviation from accepted standards of medical practice.

[xxviii] See generally *Olivier v. Robert L. Yeager Mental Health Center* 398 F.3d 183 (2005), *190 - 191 (C.A.2 (N.Y.),2005) Determining the presence of mental illness and the potential effects thereof are "to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician." *Addington v. Texas*, 441 U.S. 418, 430, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). Even with such expert assistance, "[t]he subtleties and nuances of psychiatric *191 diagnosis render certainties virtually beyond reach in most situations." *Id.*

[xxix] Compare however dysthymia (The condition of persistent dysphoria or mild mood depression) with major depressive disorder (For and individual to be diagnosed with this Depressive Disorder they must have experienced at least one Major Depressive Episode, but no Manic, Hypomanic, or Mixed episodes.) http://www.behavenet.com/capsules/disorders/mjrdepd.htm

[xxx] To download a personal injury, navigate to http://www.youclaim.co.uk/Injury diary.htm

[xxxi] http://www.mentalhealth.com/drug/p30-x01.html#Head_2

[xxxii] http://www.benzodiazepine.org/

[xxxiii] *Role of selective serotonin reuptake inhibitors in psychiatric disorders: a comprehensive review*, Vaswani M, Linda FK, Ramesh S., Department of Psychiatry,All India Institute of Medical Sciences, 110029, New Delhi, India *Prog Neuropsychopharmacol Biol Psychiatry* 2003 Feb;27(1):85-102

[xxxiv] http://www.jr2.ox.ac.uk/bandolier/band135/b135-4.html.

[xxxv] *Fox v. Evans*, 127 Wn. App. 300 (2005)

[xxxvi] ROSEANN FURCH, COMPLAINANT, MIKE JOHANNS, SECRETARY, DEPARTMENT OF AGRICULTURE, AGENCY. 2005 WL 1936149, *3

[xxxvii] http://www.psych.org/AIDS/modules/mood/sld010.htm

[xxxviii] http://www.psych.org/psych_pract/treatg/pg/Depression2e.book-11.cfm

[xxxix] *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);

[xl] PAMELA K. MCKINNEY, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (SOUTHWEST AREA), AGENCY. 2003 WL 21048382, *5

[xli] http://www.allaboutdepression.com/1

[xlii] CECILIA T. DURINZI, COMPLAINANT, JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY. 2005 WL 1903378, *6

[xliii] TOVA GLOCKNER, COMPLAINANT, v. ANTHONY J. PRINCIPI, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, AGENCY. 2004 WL 2237198, *6

[xliv] http://www.annuityadvantage.com/lifeexpectancy.htm

[xlv] 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)

[xlvi] See generally *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713 (1958).

[xlvii] E.g., BERTHA WARD-JENKINS, APPELLANT, v. BRUCE BABBITT, SECRETARY, DEPARTMENT OF THE INTERIOR, AGENCY. 1999 WL 139427, *6

[xlviii] 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

[xlix] Lampley v. Onyx Acceptance Corp. 340 F.3d 478, *485 (C.A.7 (Ill.),2003)

[l] PAMELA K. MCKINNEY, COMPLAINANT, v. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (SOUTHWEST AREA), AGENCY. 2003 WL 21048382, *5