

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION TO DAMAGES	1
I. GENERAL DISCUSSION OF DAMAGES.....	3
A. DAMAGES PURSUANT TO THE ADEA	4
B. EEOC REGULATIONS CODIFY REMEDIES AND RELIEF	5
C. EEOC REQUIRES AGENCIES TO CONSIDER DISCIPLINARY ACTION AGAINST EMPLOYEES WHO ENGAGE IN DISCRIMINATORY PRACTICES	8
II. EEOC GUIDANCE TO ITS ATTORNEYS FOR DISCUSSING CLAIMS OF COMPENSATORY DAMAGES WITH POTENTIAL LITIGANTS	8
III. BEYOND THE 30TH ANNIVERSARY OF THE CIVIL RIGHTS ACT OF 1991: WHAT THE FUTURE HOLDS FOR AWARDS OF COMPENSATORY DAMAGES	9
CHAPTER 2: TITLE VII EQUITABLE DAMAGES	11
I. TRAINING	13
II. PURGING EMPLOYER’S RECORDS OF NEGATIVE INFORMATION.....	17
III. REQUIRING EMPLOYER TO APOLOGIZE.....	20
IV. INJUNCTIVE RELIEF	21
A. PRELIMINARY INJUNCTIONS.....	22
1. Likelihood of Success	23
2. Irreparable Harm.....	23
B. INTERIM INJUNCTIVE RELIEF FOR GOVERNMENT EMPLOYEES	23
1. EEOC’s Authority to Enjoin Employment Practices.....	25
C. INTERIM ADMINISTRATIVE RELIEF FOR GOVERNMENT EMPLOYEES.....	25
D. INTERIM RELIEF MAY ENJOIN FUTURE DISCIPLINE WITHOUT AN INDEPENDENT REVIEW	27
V. REINSTATEMENT OR PLACEMENT IN THE POSITION SOUGHT AND PRIORITY CONSIDERATION/PLACEMENT.....	29
VI. BACK PAY.....	30
A. COMMISSION GUIDANCE ON BACK PAY FROM MD-110	31
B. BASIC CONCEPTS OF BACK PAY IN EMPLOYMENT DISCRIMINATION CASES	33
C. LOSS OF OPPORTUNITY	36
D. BACK PAY DURING PERIODS OF FORCED LEAVE	41
E. LIMITATIONS ON BACK PAY.....	41
1. Interim Earnings May Be Set Off Against an Award of Back Pay	42
2. Commencing the Period for Back Pay	44
3. Commencing the Period for Back Pay in Disability Claims Alleging a Failure to Provide Reasonable Accommodation	44
4. Subsequent Promotions in an Award of Back Pay	45
5. Ending the Period for Back Pay	49
6. The Impact of After Acquired Evidence on Back Pay Awards	50
7. Where the Employer Subsequently Has RIFs or Layoffs	52
8. Back Pay When Employment Was a Term Appointment	52
9. Other Limitations on Back Pay	52
10. Subsequent Disabling Injury	56

11.	Voluntary Resignation or Retirement.....	56
12.	Other EEOC Decisions on Ending Back Pay Period.....	60
13.	Effect of Bonuses or Other Discretionary Salary Increases	60
F.	BACK PAY LIMITED TO TWO YEARS PRIOR TO ADMINISTRATIVE COMPLAINT.....	61
1.	Continuing Violations and Back Pay	61
2.	Back Pay Awards in Continuing Violations Claims Generally Available Only in Hostile Work Environment Cases.....	62
G.	HEALTH INSURANCE AND RELATED BENEFITS	63
H.	SENIORITY BENEFITS	63
I.	OVERTIME	64
J.	INTEREST ON BACK PAY.....	68
K.	DETERMINING BACK PAY BY COMPARING EARNINGS OF OTHER EMPLOYEES	72
L.	OTHER BENEFITS OF EMPLOYMENT.....	73
VII.	FRONT PAY.....	74
A.	AN AWARD OF FRONT PAY DOES NOT REQUIRE EXPERT TESTIMONY	81
B.	SUPREME COURT DECIDES THAT FRONT PAY IS NOT SUBJECT TO CAPS	82
C.	WHEN FRONT PAY IS APPROPRIATE	84
1.	The Duration of Front Pay May Be Limited Where There Is Evidence a Deteriorating Medical Condition Would Have Shortened a Plaintiff's Work-Life Expectancy	85
D.	SOCIAL MEDIA AS EVIDENCE TO SUPPORT FRONT PAY CLAIM.....	89
E.	DURATION OF FRONT PAY.....	90
F.	OTHER CONSIDERATIONS IN AWARDING FRONT PAY	99
G.	FRONT PAY MAY NOT BE APPROPRIATE WHERE THERE WAS A FAILURE TO MITIGATE DAMAGES	102
H.	FACTORS LIMITING OR CUTTING-OFF FRONT PAY.....	106
VIII.	FRINGE BENEFITS.....	107
A.	CALCULATING THE VALUE OF FRINGE BENEFITS	108
B.	EMPLOYER MATCHING FOR PENSION AND 401(K) PLANS	110
C.	THRIFT SAVINGS PLAN (TSP) BENEFITS	110
D.	SURVIVOR BENEFITS.....	112
E.	ANNUAL AND OTHER LEAVE.....	113
1.	Restored Leave May Not Be Subject to the 240 Hour Limit on Annual Leave That Can Be Carried Over.....	115
IX.	REINSTATEMENT.....	116
A.	WHEN REINSTATEMENT IS NOT PRACTICAL	118
B.	REINSTATEMENT NOT APPROPRIATE WHERE SAME ACTION WOULD HAVE BEEN TAKEN	120
C.	AFTER-ACQUIRED EVIDENCE.....	120
D.	WHERE HOSTILITY MAKES EMPLOYMENT RELATIONSHIP IMPOSSIBLE	122
E.	WHERE INNOCENT EMPLOYEE WOULD BE DISPLACED.....	125
F.	REINSTATEMENT DOES NOT PRECLUDE FRONT PAY	126
G.	RERUNNING THE SELECTION PROCESS	126
H.	AWARDING THE POSITION WHERE COMPLAINANT NOT CONSIDERED FOR THE POSITION.....	128
I.	FAILURE TO MITIGATE DAMAGES DOES NOT PRECLUDE REINSTATEMENT	128
X.	BUMPING	128
A.	EEOC AUTHORITY TO ORDER BUMPING	131

XI.	REINSTATEMENT MAY REQUIRE REPAYMENT OF ANY LUMP SUM PAYMENT FOR UNUSED ANNUAL LEAVE.....	132
XII.	UNION DUES MAY BE DEDUCTED FROM AN AWARD OF BACK PAY	132
CHAPTER 3: THE CIVIL RIGHTS ACT OF 1991 AND COMPENSATORY DAMAGES.....		133
I.	OVERVIEW OF THE 1991 ACT	133
A.	NO CLAIM FOR COMPENSATORY DAMAGES PRIOR TO 1991	134
II.	COMPENSATORY DAMAGES ARE AVAILABLE IN ADMINISTRATIVE HEARINGS.....	134
A.	THE EEOC RULES IT HAS AUTHORITY TO ORDER DAMAGES	134
B.	A DISPUTE WITHIN THE CIRCUITS	136
C.	THE SUPREME COURT SETTLES THE DISPUTE	140
III.	DAMAGE PROVISIONS OF THE CIVIL RIGHTS ACT OF 1991 WERE NOT RETROACTIVE	143
A.	WHERE UNLAWFUL EMPLOYMENT ACT CONTINUED AFTER ENACTMENT.....	144
B.	ALLOCATING REMEDIES WHERE CONDUCT CONTINUED AFTER ENACTMENT	146
IV.	COMPENSATORY DAMAGES DO NOT PUNISH BAD CONDUCT	146
V.	COMPENSATORY DAMAGES NOT AVAILABLE IN CASES OF DISPARATE IMPACT	148
VI.	COMPENSATORY DAMAGES NOT AVAILABLE WHEN THE EMPLOYER ACTED WITH LEGITIMATE AS WELL AS DISCRIMINATORY MOTIVES	148
VII.	COMPENSATORY DAMAGES NOT AVAILABLE UNDER THE ADEA.....	150
VIII.	COMPENSATORY DAMAGE AWARDS ARE LIMITED BY STATUTORY CAPS.....	151
A.	DAMAGE CAPS APPLY TO EACH AGGRIEVED INDIVIDUAL	154
B.	DAMAGE CAPS APPLY PER PLAINTIFF AND PER SUIT	154
IX.	TRIAL BY JURY	157
X.	ADMINISTRATIVE HEARINGS AND BIFURCATED PROCEEDINGS	158
XI.	FEDERAL COURT BIFURCATED TRIALS ON DAMAGES.....	159
XII.	TYPES OF DAMAGES AVAILABLE.....	160
XIII.	PECUNIARY DAMAGES	160
A.	PAST PECUNIARY DAMAGES	161
B.	PAST PECUNIARY DAMAGES MUST BE PROVEN	165
C.	FUTURE PECUNIARY DAMAGES.....	169
XIV.	NONPECUNIARY DAMAGES	172
A.	INCONVENIENCE	175
B.	LOSS OF FUTURE EARNINGS CAPACITY	175
C.	DAMAGE TO PROFESSIONAL REPUTATION	178
D.	FUTURE EMOTIONAL DISTRESS	180
E.	LOSS OF CONSORTIUM	181
F.	LOSS OF OPPORTUNITY	182
XV.	INTEREST	182
XVI.	RAISING A CLAIM FOR COMPENSATORY DAMAGES	183
A.	WHEN A CLAIM FOR COMPENSATORY DAMAGES MUST BE RAISED BEFORE THE EEOC.....	183
B.	WHERE A FEDERAL AGENCY ACTS TO DISMISS A CLAIM AS MOOT	185
C.	IN CASES WHERE THERE IS NO HEARING	186
D.	A CLAIM FOR DAMAGES MAY BE RAISED ON APPEAL FROM A FINAL AGENCY DECISION	186
E.	IN CASES WHERE AN EEOC HEARING IS HELD	187
F.	ON APPEAL FROM THE MSPB	188

XVII. EXHAUSTION OF REMEDIES	189
A. A FEDERAL COURT MAY BAR A CLAIM FOR DAMAGES IF NOT RAISED IN ADMINISTRATIVE FORUM..	189
XVIII. NOMINAL DAMAGES.....	192
XIX. PUNITIVE DAMAGES.....	194
XX. NO COMPENSATORY DAMAGES FOR STRESS RELATED TO FILING A COMPLAINT.....	196

CHAPTER 4: PROVING DAMAGES 197

I. PROOF OF DAMAGES.....	197
II. NATURE, SEVERITY AND DURATION OF THE HARM	200
A. GARDEN VARIETY COMPENSATORY DAMAGES	200
B. EVIDENCE OF MORE SUBSTANTIAL DAMAGES	203
III. CAUSATION	205
A. PROOF OF CAUSATION IN NONPECUNIARY DAMAGES	206
B. PROOF OF CAUSATION IN PECUNIARY DAMAGES	208
IV. PROOF OF ACTUAL HARM OR INJURY	212
V. PROOF OF LOSS OF EARNINGS.....	217
VI. PROOF OF DAMAGES WITHOUT A HEARING	219
VII. PROOF OF PECUNIARY DAMAGES.....	221
A. PROOF OF FUTURE PECUNIARY DAMAGES	227
VIII. PROOF OF NONPECUNIARY DAMAGES.....	230
A. EMOTIONAL HARM CAN BE PROVEN FROM COMPLAINANT’S TESTIMONY ALONE.....	231
1. The Plaintiff’s Testimony as Evidence for Damages.....	231
2. The Need for Corroborating Evidence to Substantiate Plaintiff’s Testimony and Large Awards...	236
3. The Sufficiency of the Evidence Provided.....	238
B. DOCUMENTING EVIDENCE OF NONPECUNIARY DAMAGES.....	240
C. GENERAL ALLEGATIONS OF EMOTIONAL HARM GENERALLY WILL SUPPORT ONLY MODEST AWARDS.....	241
IX. CREDIBILITY OF WITNESSES	242
X. EXPERT WITNESSES.....	250
A. EXPERT TESTIMONY IS NOT REQUIRED TO PROVE DAMAGES	251
B. USE OF EXPERT WITNESSES.....	256
C. TYPES OF EXPERT WITNESSES	257
D. EXPERT WITNESSES AND ECONOMIC HARM.....	258
E. EXPERT TESTIMONY AND EMOTIONAL HARM	259
F. TESTIMONY OF TREATING PHYSICIAN OR OTHER HEALTH CARE PROVIDER GENERALLY DOES NOT REQUIRE CERTIFICATION OR DISCLOSURE AS AN EXPERT	265
G. EXPERT TESTIMONY AND PHYSICAL INJURIES	268
H. OTHER USE OF EXPERTS	268
I. EXPERT REBUTTAL TESTIMONY	272
XI. EMPLOYER’S USE OF REBUTTAL WITNESSES.....	274
XII. RECORD MAY NOT BE SUPPLEMENTED ON APPEAL.....	275

CHAPTER 5: MITIGATION AND OFFSET 277

I. OFFSETS AND THE DUTY TO MITIGATE DAMAGES	277
A. BACK PAY MAY BE CALCULATED USING A PERIODIC RATHER THAN AN AGGREGATE COMPARISON OF EARNINGS WHERE THERE WAS A FAILURE TO MITIGATE DURING LIMITED PERIODS OF TIME.....	279

B.	REASONABLE DILIGENCE IN SEEKING OTHER EMPLOYMENT	281
C.	SUBSTANTIALLY EQUIVALENT EMPLOYMENT.....	282
1.	Unconditional Offer of Reemployment May End Right to Back Pay	283
2.	An Unconditional Offer of Reinstatement Must Include Reasonable Accommodation, if Needed.....	287
3.	An Unconditional Offer of a Position Intended to Cut Off Back Pay Must Be in the Same Geographic Location	290
4.	Failure to Mitigate Damages Does Not, in Itself, Bar Reinstatement.....	290
5.	Extended Leave of Absence Without Pay May Signal Unavailability for Work	291
D.	DUTY TO MITIGATE EXTENDS TO MAINTAINING FUTURE EMPLOYMENT	291
E.	CONTINUED EMPLOYMENT AFTER DENIAL OF A PROMOTION; CONSTRUCTIVE DISCHARGE	294
F.	MITIGATING DAMAGES IN CLAIMS OF SEXUAL HARASSMENT	298
G.	REASONABLE DILIGENCE MUST BE IN LIGHT OF THE PARTICULAR FACTS OF A CASE.....	299
1.	No Failure to Mitigate Where Plaintiff Quit Subsequent Employment Following a Sexual Assault.....	299
2.	No Failure to Mitigate Where Inability to Work Resulted From Medical Impairment Causally Related to Employer's Discriminatory Act	299
H.	THE DUTY TO MITIGATE REQUIRES A SUSTAINED EFFORT TO FIND WORK.....	303
I.	PURSUING EDUCATION MAY EFFECTIVELY REMOVE AN INDIVIDUAL FROM THE WORKFORCE	304
1.	Cases Where Pursuing Education Ended the Period for Back Pay	305
2.	Cases Where Pursuing Education Did Not End the Period for Back Pay	306
J.	SUBSTANTIALLY EQUIVALENT EMPLOYMENT.....	309
II.	REASONABLE DILIGENCE IN SEEKING ALTERNATIVE EMPLOYMENT MAY INCLUDE CONSIDERATION OF THE ATTRIBUTES OF THE PLAINTIFF	313
A.	REASONABLE DILIGENCE	314
B.	REASONABLE DILIGENCE AND SELF-EMPLOYMENT.....	317
C.	INABILITY TO WORK BECAUSE OF DISABILITY.....	319
D.	WHERE VICTIM OF DISCRIMINATION BEGINS COLLECTING RETIREMENT BENEFITS AFTER DISCHARGE	321
E.	DUE DILIGENCE IN SEEKING EMPLOYMENT DOES NOT REQUIRE SEEKING WORK IN A DIFFERENT GEOGRAPHIC AREA FROM IMMEDIATE FAMILY MEMBERS	322
III.	BURDEN IS ON EMPLOYER TO SHOW FAILURE TO MITIGATE.....	322
A.	BURDEN SHIFTS WHERE EMPLOYEE MAKES NO EFFORT TO FIND OTHER EMPLOYMENT	326
B.	EMPLOYEE'S BURDEN LOWERED WHERE WORK IN THE SAME FIELD IS NOT AVAILABLE BECAUSE OF EMPLOYER'S MISCONDUCT.....	328
C.	DOCUMENTING EFFORTS TO MITIGATE DAMAGES.....	330
IV.	FAILURE TO MITIGATE MAY BAR FRONT PAY	331
V.	NO DUTY TO MITIGATE WHERE EMPLOYEE IS STILL ON COMPANY ROLLS.....	331
VI.	MITIGATION AND OTHER DAMAGES	332
A.	EEOC HOLDS NO DUTY TO MITIGATE NONPECUNIARY DAMAGES	332
B.	FEDERAL COURTS HAVE GENERALLY FOUND NO DUTY TO MITIGATE NONPECUNIARY COMPENSATORY DAMAGES.....	333
C.	DUTY TO MITIGATE OTHER PECUNIARY DAMAGES.....	335
	CHAPTER 6: OTHER FACTORS IMPACTING CALCULATIONS OF REMEDIES	339
I.	COLLATERAL SOURCE RULE.....	339
A.	UNEMPLOYMENT COMPENSATION.....	343

B.	WORKERS' COMPENSATION BENEFITS	344
C.	PUBLIC ASSISTANCE BENEFITS.....	347
D.	DISABILITY INSURANCE BENEFITS.....	347
E.	VETERAN'S AND SOCIAL SECURITY BENEFITS	348
F.	PENSION BENEFITS	349
G.	HEALTH INSURANCE BENEFITS	351
H.	EXCEPTIONS TO THE ADMISSION OF EVIDENCE OTHERWISE NOT ADMISSIBLE PURSUANT TO THE COLLATERAL SOURCE RULE	353
II.	THE EGGSHELL PLAINTIFF	353
III.	THE EFFECT OF PREEXISTING INJURIES ON A CLAIM FOR DAMAGES	356
A.	WHERE PREEXISTING CONDITION WOULD HAVE WORSENERD	360
B.	ALLOCATING CAUSATION	364
C.	MULTIPLE CAUSES OF EMOTIONAL HARM	369
IV.	TAX CONSEQUENCES OF COMPENSATORY AND OTHER MONETARY DAMAGES	372
A.	COMPENSATORY DAMAGES AWARDS FOR EMOTIONAL INJURIES ARE GENERALLY TAXABLE INCOME.....	372
B.	TRENDING: STATE AND LOCAL ENTITIES EXEMPTING COMPENSATORY DAMAGES FROM TAXABLE INCOME: THE CIVIL RIGHTS TAX RELIEF ACT.....	373
C.	TAXATION OF ATTORNEY FEES.....	373
D.	TAX WITHHOLDING OF DAMAGE AWARDS.....	374
E.	ENHANCEMENT OF DAMAGES TO ADJUST FOR TAXES: TAX GROSS-UP	374
F.	TAX GROSS-UP UNDER THE FMLA	380
G.	COMPENSATION TO OFFSET THE EFFECT OF A LUMP SUM PAYMENT OF BACK PAY, NOT SUBJECT TO THE STATUTORY CAPS	380
H.	ADDITIONAL AWARD TO COMPENSATE FOR TAX CONSEQUENCE OF NONPECUNIARY DAMAGES...	383
V.	SEEKING REVIEW OF DAMAGE AWARDS IN FEDERAL COURT AFTER A FAVORABLE DECISION BY THE EEOC	383
VI.	SEEKING ENFORCEMENT OF EEOC DAMAGE AWARDS IN FEDERAL COURT	386
VII.	A NOTE ABOUT TIMELINESS.....	388
VIII.	EFFECT OF FAILING TO DISCLOSE EXISTENCE OF COMPLAINT OF DISCRIMINATION IN BANKRUPTCY PROCEEDING	388
VIV.	FAILURE TO DISCLOSE TITLE VII CLAIM IN BANKRUPTCY PROCEEDING DOES NOT BAR REINSTATEMENT..	391
CHAPTER 7: CONSIDERATIONS IN APPROACHING SETTLEMENT		393
I.	A FINDING OF DISCRIMINATION IS NOT REQUIRED TO SETTLE A COMPLAINT.....	394
II.	THERE MUST BE A MEETING OF THE MINDS	394
III.	ENFORCEABLE AND UNENFORCEABLE PROVISIONS UNDER SETTLEMENT AGREEMENTS	396
IV.	PARTIES MUST BE AWARE OF AVAILABLE RELIEF	398
V.	SETTLEMENT AGREEMENTS MUST STATE THE PARTIES' AGREED UPON TERMS WITH PARTICULARITY.....	398
VI.	AGENCIES SHOULD CONSIDER THE OVERALL COST TO THE GOVERNMENT.....	400
VII.	NO PERSONNEL ACTION IS REQUIRED FOR SETTLEMENT	400
VIII.	CONFIDENTIALITY CLAUSES.....	401
IX.	LUMP SUM SETTLEMENTS	402
X.	A GOOD FAITH RESPONSE IS REQUIRED TO DAMAGE INQUIRIES DURING SETTLEMENT DISCUSSIONS.....	403
XI.	OLDER WORKERS BENEFIT PROTECTION ACT	405
XII.	WHERE RETIREMENT BENEFITS ARE INVOLVED	411

XIII. ENFORCEMENT OF SETTLEMENT AGREEMENTS	412
XIV. COMPENSATORY DAMAGES ARE NOT AVAILABLE FOR BREACH OF A SETTLEMENT AGREEMENT	413
XV. ATTORNEY FEES AVAILABLE FOR SUCCESSFUL PETITION TO ENFORCE SETTLEMENT AGREEMENT	413
XVI. INTEREST ON DELAYED PAYMENT OF MONETARY BENEFITS AFTER SETTLEMENT	414
XVII. OFFERS OF RESOLUTION.....	414
XVIII. SAMPLE SETTLEMENT PROPOSAL.....	416

CHAPTER 8: REMEDIES UNDER OTHER STATUTES.....421

I. THE EQUAL PAY ACT	421
A. COMMISSION AWARDS OF LIQUIDATED DAMAGES IN EQUAL PAY ACT CASES.....	423
II. DAMAGES UNDER THE ADA AND REHABILITATION ACT OF 1973.....	424
A. AGENCIES ARE LIABLE FOR COMPENSATORY DAMAGES WHEN THEY FAIL TO MAKE A GOOD FAITH EFFORT TO PROVIDE REASONABLE ACCOMMODATION.....	425
B. ENTITLEMENT TO DAMAGES UNDER THE ADA AND REHABILITATION ACT RESULTING FROM UNLAWFUL PREEMPLOYMENT MEDICAL EXAMINATIONS AND INQUIRIES.....	426
C. IMPROPER MEDICAL DISCLOSURES MAY WARRANT REMEDIES IN CLASS ACTION VIOLATIONS	429
III. FAMILY MEDICAL LEAVE ACT	430
IV. DAMAGES ARE NOT AVAILABLE UNDER THE ADEA	430
A. BACK PAY AWARDS UNDER THE ADEA ARE MANDATORY	433
V. DAMAGES UNDER THE WHISTLEBLOWER PROTECTION ACT	434
VI. THE GENETIC INFORMATION NONDISCRIMINATION ACT	434
VII. THE PREGNANT WORKERS FAIRNESS ACT	434

CHAPTER 9: MANAGING DISCOVERY ABOUT DAMAGES.....435

I. DISCOVERY BY THE EMPLOYEE	435
II. DISCOVERY BY THE EMPLOYER	436
A. DISCOVERY REGARDING EFFORTS TO MITIGATE BACK PAY	437
B. DISCOVERY REGARDING SOURCES OF INCOME SUBJECT TO THE COLLATERAL SOURCE RULE	438
1. Evidence Regarding the Source of Other Income	438
2. Evidence Regarding the Amounts of Other Income From Other Sources.....	439
C. DISCOVERY REGARDING EMOTIONAL HARM	439
D. OTHER AREAS OF DISCOVERY	440
E. COMPLAINANTS MAY PREVENT DISCLOSURE OF MEDICAL INFORMATION BY LIMITING A CLAIM FOR DAMAGES TO "GARDEN VARIETY" DAMAGES	441
III. PSYCHOTHERAPIST-PATIENT PRIVILEGE	442
IV. BIFURCATED DISCOVERY.....	444
V. PROTECTIVE ORDERS	445
VI. MEDICAL EXAMINATIONS.....	447
A. SOURCES OF AUTHORITY FOR CONDUCTING MEDICAL EXAMINATIONS.....	447
1. Medical Examinations Are Authorized by EEOC MD-110.....	447
2. Medical Examination Under Rule 35 of Federal Rules	448
3. Guidance on Medical Examinations in AJ Handbook.....	449
B. WHEN MEDICAL EXAMINATIONS ARE APPROPRIATE.....	449
C. MEDICAL EXAMINATION GRANTED	454
D. MEDICAL EXAMINATION DENIED	457
E. WHO MAY ATTEND THE MEDICAL EXAMINATION	459

F.	OTHER MATTERS RELATED TO MEDICAL EXAMINATIONS	460
VII.	WHERE EVIDENCE OF DAMAGES IS NOT REVEALED THROUGH DISCOVERY	460
CHAPTER 10: CALCULATING AN AWARD OF DAMAGES		463
I.	DETERMINING AN APPROPRIATE AWARD	463
A.	COUNSEL CAN INFLUENCE AN AWARD OF DAMAGES.....	464
B.	AWARDS OF COMPENSATORY DAMAGES SHOULD BE CONSISTENT WITH AWARDS IN OTHER CASES EVIDENCING SIMILAR HARM	465
1.	Awards of Compensatory Damages Should Not Be Motivated by Passion or Prejudice.....	466
2.	Where Cases Evidencing Similar Harm Are Limited or Non-Existent.....	466
3.	Disability Cases Where Harm Suffered Is an Exacerbation of the Underlying Disability.....	466
C.	INITIAL EEOC DAMAGE AWARDS WERE LIMITED.....	469
D.	COMMISSION RULES SET NO FORMULA FOR CALCULATING DAMAGES	475
E.	FACTORS AFFECTING AN AWARD OF DAMAGES.....	475
F.	MULTIPLE CAUSES OF EMOTIONAL HARM	479
G.	POST JUDGMENT INTEREST	480
II.	APPELLATE REVIEW OF DAMAGE AWARDS	481
A.	ON APPEAL AN AWARD OF DAMAGES MAY BE REDUCED TO THE MAXIMUM WARRANTED BY THE FACTS	483
B.	APPEALING AN AWARD OF DAMAGES IN THE ADMINISTRATIVE FORUM TO THE EEOC.....	486
C.	A NOTE ABOUT FILING A CIVIL ACTION WHILE AN APPEAL IS PENDING BEFORE OFO	487
D.	CREDIBILITY DETERMINATIONS AND DAMAGES.....	488
E.	BURDEN IS ON THE PARTY SEEKING TO MODIFY DAMAGES TO PRODUCE EVIDENCE.....	491
F.	IN GENERAL, ADDITIONAL EVIDENCE MAY NOT BE ADDED ON APPEAL.....	491
G.	CLAIM FOR COMPENSATORY DAMAGES MAY PRECLUDE DISMISSAL OF AN ADMINISTRATIVE CLAIM FOR MOOTNESS.....	492
H.	EEOC IMPOSES NO REQUIREMENT TO REPAY AWARD OF DAMAGES PENDING APPEAL	492
I.	OPTIONS WHEN AN AGENCY FAILS TO IMPLEMENT RELIEF ORDERED BY THE EEOC	492
J.	FEDERAL COURTS HAVE DENIED JURISDICTION IN CLAIMS SEEKING TO ENFORCEMENT SETTLEMENT AGREEMENTS ENTERED INTO WITHOUT A FINDING OF LIABILITY ON MERITS	493
CHAPTER 11: ATTORNEY FEES AND COSTS		495
I.	ATTORNEY FEES ARE NOT RECOVERABLE FOR ADEA ADMINISTRATIVE CLAIMS	501
II.	<i>PRO SE</i> COMPLAINANTS MAY NOT RECOVER ATTORNEY FEES	501
III.	COMPUTING ATTORNEY FEES	502
A.	COMPLAINANT HAS THE BURDEN TO ESTABLISH ENTITLEMENT TO ATTORNEY FEES	503
B.	ATTORNEY FEES ARE GENERALLY NOT AVAILABLE FOR TIME SPENT PRIOR TO FILING A COMPLAINT, EXCEPT WHERE AN AGENCY SUBSEQUENTLY FILES AN APPEAL	503
C.	FEES ARE AWARDED BASED ON THE NUMBER OF HOURS REASONABLY EXPENDED	506
1.	Time Spent on FOIA Requests May Be Hours Reasonably Expended.....	511
2.	Time Spent Attending EEO Investigations May Be Reasonably Expended	511
3.	Time Spent on Related Matters	511
4.	Time Spent Clerical Tasks May Be Recovered Where Clerical Tasks Are an Integral Part of the Attorney's Work	512
5.	Time Spent Reviewing The Record Is Compensable	513
6.	Filing an Unsuccessful Request to Reconsider Is Not Reasonable Expenditure of Time to Warrant Award of Attorney Fees	514

7.	Attorney Fees May Be Awarded Where the Matter Must Be Retried.....	514
8.	It May Be a Reasonable Expenditure of Attorney Time for Complainant's/Plaintiff's Counsel to Spend More Hours Prosecuting a Claim Than for Defense Counsel to Defend the Claim.....	515
9.	Time Spent on Settlement Negotiations Is Generally Presumed to Be Reasonable	515
D.	CONTINGENCY FEE ARRANGEMENTS SHOULD NOT IMPACT FEE SHIFTING.....	516
E.	WHERE FEE REDUCTION IS APPROPRIATE.....	518
1.	Awards May Be Reduced Where There Is Duplication of Work.....	518
2.	Awards May Be Reduced Where Employee Prevails on Fewer Than All Claims Raised	522
3.	Attorney Fees May Be Denied if Relief Is Insubstantial	531
4.	Attorney Fees May Be Denied or Reduced Where Fee Petition Lacks Specificity.....	534
F.	REASONABLE HOURLY RATE	536
G.	THE <i>LAFFEY</i> MATRIX AND THE SUCCESSOR <i>FITZPATRICK</i> MATRIX FOR WASHINGTON, D.C. PRACTITIONERS.....	540
1.	Agency Has Burden of Proof to Argue That Complainant's Retention of Out-Of-Area Counsel Was Unreasonable.....	541
2.	Complainant Can Claim Fees at Current Rather Than Historical Rates.....	546
3.	Attorney Firm Overhead and the Hourly Rate	547
H.	ATTORNEY FEES AVAILABLE WHEN ATTORNEY MUST PERFORM ADDITIONAL WORK DUE TO AGENCY'S ACTIONS	547
I.	ATTORNEY FEES AVAILABLE FOR PREPARING AND DEFENDING A PETITION FOR ATTORNEY FEES...	548
J.	FEES FOR USE OF PARALEGALS AND LAW CLERKS.....	551
K.	WHERE ATTORNEYS PERFORM WORK GENERALLY DONE BY PARALEGALS	552
L.	ATTORNEY TRAVEL TIME	553
M.	ATTORNEY FEES AWARDS MAY BE ENHANCED.....	555
IV.	COMPUTING COSTS.....	556
A.	WITNESS FEES	557
B.	TRAVEL AND MEAL EXPENSES	558
C.	TELEPHONE EXPENSES.....	560
D.	REVENUE TAXES.....	560
E.	RESEARCH COSTS	560
F.	PRINTING AND SCANNING COSTS.....	561
G.	COPYING COSTS	562
H.	CONSULTANTS	562
V.	INTEREST ON ATTORNEY FEES	563
VI.	ATTORNEY FEES AND SETTLEMENT AGREEMENTS	564
VII.	COUNSEL FOR COMPLAINANT HAS NO INDIVIDUAL RIGHT TO APPEAL AN AWARD OF ATTORNEY FEES..	567
VIII.	COMPLAINANTS CAN FILE CIVIL ACTIONS AFTER PREVAILING BEFORE THE EEOC SOLELY ON THE ISSUE OF ATTORNEY FEES.....	568
IX.	FILING OF A CIVIL ACTION CEASES PROCESSING OF ANY CLAIM FOR ATTORNEY FEES IN THE ADMINISTRATIVE FORUM.....	570
X.	AWARDS OF ATTORNEY FEES CAN BE DEDUCTED ON COMPLAINANT'S TAX RETURNS.....	570
XI.	APPELLATE REVIEW OF AWARDS OF LEGAL FEES	570
	CHAPTER 12: A SUMMARY OF SELECTED COMMISSION DAMAGE AWARDS.....	573
I.	AWARDS UP TO \$10,000	573
II.	AWARDS OF \$10,001 TO \$25,000	583

III.	AWARDS OF \$25,001 TO \$50,000	597
IV.	AWARDS OF \$50,001 TO \$100,000.....	603
V.	AWARDS IN EXCESS OF \$100,000	621
CHAPTER 13: A HISTORICAL CHART OF SIGNIFICANT EEOC NONPECUNIARY DAMAGE AWARDS		635
CHAPTER 14: A SUMMARY OF SELECTED DAMAGE AWARDS ISSUED BY ADMINISTRATIVE JUDGES.....		683
I.	BALTIMORE FIELD OFFICE.....	683
A.	AJ FINDS \$4,000 APPROPRIATE FOR HHS EMPLOYEE WHOSE MEDICAL INFORMATION WAS DISCLOSED TO THOSE WITHOUT A NEED TO KNOW	683
B.	\$5,000 AWARDED BY AJ FOR FEMA EMPLOYEE NOT SELECTED FOR POSITION DUE TO RACE AND AGE	683
C.	GARDEN VARIETY DAMAGES OF \$5,000 AWARDED TO OPM EMPLOYEE	683
D.	AJ AWARDS \$25,000 TO CONSTRUCTIVELY DISCHARGED ARMY EMPLOYEE WHO ONLY PRESENTED HIS OWN TESTIMONY IN SUPPORT OF DAMAGES.....	684
E.	AFTER GRANT OF DEFAULT JUDGMENT, AJ AWARDS \$75,000 IN COMPENSATORY DAMAGES AND OTHER RELIEF TO VA EMPLOYEE	684
F.	AJ AWARDS \$90,000 AFTER GRANTING DEFAULT JUDGMENT FOR AGENCY’S FAILURE TO COOPERATE IN DISCOVERY	684
II.	BIRMINGHAM DISTRICT OFFICE	685
A.	AJ AWARDED \$20,000 TO COMPLAINANT WHO PREVAILED ON TWO EVENTS OF RETALIATORY HARASSMENT AND HAD PREEXISTING CONDITIONS	685
B.	AWARD OF \$60,000 ISSUED TO COMPLAINANT WHO PRESENTED TESTIMONY FROM HERSELF AND SPOUSE REGARDING IMPACTS OF DISCRIMINATION	685
C.	NONPECUNIARY DAMAGES IN THE AMOUNT OF \$67,500 FOUND APPROPRIATE TO EMPLOYEE WHO SUBMITTED SWORN TESTIMONY FROM HIMSELF AND FAMILY MEMBERS	685
D.	AWARD OF \$120,000 ISSUED TO COMPLAINANT SUBJECTED TO HARASSMENT, INCLUDING RACIST COMMENTS	686
E.	SUCCESSFUL COMPLAINANT RECEIVES AWARD OF \$200,000 IN NONPECUNIARY AND \$141,500 IN PECUNIARY DAMAGES FOR FORECLOSURE ON HOME.....	686
F.	AJ AWARDS \$275,000 TO COMPLAINANT WHO WAS SEXUALLY HARASSED BY MALE VA PATIENTS..	686
G.	VICTIM OF SEXUAL HARASSMENT WHO ENDURED SEXUAL HARASSMENT FOR OVER SEVEN YEARS AWARDED \$300,000	687
H.	EMPLOYEE WHO EXPERIENCED STRESS, DIFFICULTY SLEEPING, ANXIETY, ISOLATION, AND FEAR AFTER NOT BEING SELECTED FOR 10 POSITIONS AWARDED MAXIMUM NONPECUNIARY DAMAGES	687
I.	EMPLOYEE WHO EXPERIENCED PERMANENT AND SEVERE HARM DUE TO RACIAL EPITHETS OVER A TEN-YEAR PERIOD RECEIVED \$300,000 IN NONPECUNIARY COMPENSATORY DAMAGES	687
III.	BOSTON AREA OFFICE.....	688
A.	AJ AWARDS \$10,000 TO VA EMPLOYEE DENIED ACCOMMODATION FOR NINE MONTHS.....	688
IV.	CLEVELAND FIELD OFFICE.....	688
A.	AJ AWARDS \$5,000 TO USPS EMPLOYEE SUBJECTED TO RELIGIOUS HARASSMENT AFTER LIMITING DAMAGES TESTIMONY AS SANCTION	688
B.	\$10,000 AWARDED TO EMPLOYEE SUBJECTED TO RACIALLY HOSTILE SPEECH.....	689
C.	VA EMPLOYEE RECEIVES \$80,000 AWARD BY AJ FOR EMOTIONAL TRAUMA	689

D.	AJ AWARDS \$100,000 TO VA EMPLOYEE SUBJECTED TO HARASSMENT BASED ON DISABILITY, AND DENIED ACCOMMODATION	690
E.	AJ AWARDS \$175,000 AFTER GRANTING COMPLAINANT’S MOTION FOR SUMMARY JUDGMENT ON FAILURE TO ACCOMMODATE CLAIM AGAINST USPS	690
V.	HOUSTON DISTRICT OFFICE	691
A.	AJ AWARDED \$4,000 WHERE COMPLAINANT’S MEDICAL RECORDS WERE COMMINGLED BUT COMPLAINANT COULD NOT SHOW SIGNIFICANT PERSONAL HARM	691
B.	LACK OF EVIDENCE REGARDING SEVERITY AND DURATION RESULTED IN \$6,000 AWARD BY AJ	691
C.	VAGUE TESTIMONY REGARDING DURATION OF HARM LED TO \$7,000 NONPECUNIARY DAMAGES AWARD	691
D.	AWARD OF \$13,000 INCREASED DUE TO INFLATION	691
E.	DURATION OF ONE YEAR OF HARM AFTER DISCRIMINATORY NONSELECTION RESULTED IN AWARD OF \$20,000	692
F.	PRIOR TRAUMATIC EVENTS SERVED AS OFFSET TO AWARD, RESULTING IN \$40,000 BEING FOUND APPROPRIATE	692
G.	TRIGGERING OF PTSD DUE TO DISCRIMINATION AND HARASSMENT SUPPORTED \$50,000 AWARD ...	692
H.	AJ AWARDS \$50,000 TO COMPLAINANT WHO WAS “PATENTLY AND INDISPUTABLY THE BEST QUALIFIED CANDIDATE FOR THE POSITION”	692
I.	WHERE COMPLAINANT ONLY PREVAILED ON SOME CLAIMS, AJ AWARDS \$50,000	693
J.	EGREGIOUSNESS OF AGENCY’S ACTIONS SUPPORT \$65,000 AWARD	693
K.	LACK OF MEDICAL DOCUMENTATION DOES NOT DETER AWARD OF \$75,000 IN DAMAGES	693
L.	AWARD OF \$75,000 ISSUED WHERE COMPLAINANT ESTABLISHED EMOTIONAL AND PHYSICAL IMPACTS OF HARASSMENT	693
M.	RETALIATION FOR REPORTING SEXUAL HARASSMENT RESULTED IN HARM SUPPORTING \$142,141.67 DAMAGES AWARD	693
VI.	MIAMI DISTRICT OFFICE	694
A.	COMPLAINANT WHO ESTABLISHED <i>PER SE</i> RETALIATION RECEIVES \$2,000 IN NONPECUNIARY COMPENSATORY DAMAGES	694
B.	<i>PER SE</i> RETALIATION RESULTS IN ADMINISTRATIVE JUDGE AWARD OF \$3,000 IN NONPECUNIARY COMPENSATORY DAMAGES	694
C.	AWARD OF \$3,500 APPROPRIATE TO COMPLAINANT WHO ESTABLISHED SEX DISCRIMINATION WITH REGARD TO SHIFT SCHEDULES	694
D.	AJ AWARDS \$75,000 TO COMPLAINANT WITH DETAILED TESTIMONY, BUT NO MEDICAL EVIDENCE, IN SUPPORT OF HARM SUFFERED	694
VII.	NEW ORLEANS FIELD OFFICE	695
A.	AJ AWARDS \$5,000 TO COMPLAINANT WHO RECEIVED UNSATISFACTORY PERFORMANCE EVALUATION DUE TO DISCRIMINATION	695
VIII.	NEW YORK DISTRICT OFFICE	695
A.	AJ <i>SUA SPONTE</i> ISSUED SUMMARY JUDGMENT ON IMPROPER MEDICAL DISCLOSURE CLAIM AND AWARDED \$2,000 IN DAMAGES	695
B.	VICTIM OF RELIGIOUS DISCRIMINATION RECEIVES \$15,000 AWARD OF DAMAGES FROM AJ	695
C.	\$45,000 AWARD TO EPA EMPLOYEE SUBJECTED TO HARASSMENT BASED ON SEX AND RETALIATION, AND PLACEMENT ON PIP DUE TO RETALIATION ISSUED BY AJ	696
D.	AWARD OF \$80,000 TO INTERIOR EMPLOYEE SUBJECTED TO RACE AND COLOR DISCRIMINATION, AS WELL AS RETALIATION	696
E.	AJ AWARDS \$95,000 TO VA EMPLOYEE SUBJECTED TO RETALIATORY HARASSMENT	696
F.	\$150,000 TO VA EMPLOYEE AWARDED BY AJ AFTER FINDING OF RETALIATORY HARASSMENT	697
IX.	PHILADELPHIA DISTRICT OFFICE	697

A.	\$5,000 APPROPRIATE AWARD TO SSA EMPLOYEE SUBJECTED TO <i>PER SE</i> RETALIATION.....	697
B.	AWARD OF \$25,000 TO HUD EMPLOYEE DENIED TELEWORK AS AN ACCOMMODATION	697
C.	AJ AWARDS \$28,000 TO USPS EMPLOYEE WHO DID NOT RECEIVE EFFECTIVE ACCOMMODATION ...	697
D.	USPS EMPLOYEE RECEIVES \$30,000 IN NONPECUNIARY COMPENSATORY DAMAGES AFTER PREVAILING ON SEXUAL HARASSMENT CLAIM	698
E.	AJ ISSUES \$40,000 AWARD TO DEPARTMENT OF DEFENSE EMPLOYEE WHO WAS SEXUALLY HARASSED	698
F.	AJ FINDS \$40,000 APPROPRIATE AWARD TO COMPLAINANT SUBJECTED TO <i>PER SE</i> RETALIATION ...	698
G.	AFTER GRANT OF DEFAULT JUDGMENT, AJ ISSUES \$40,000 IN NONPECUNIARY COMPENSATORY DAMAGES	699
H.	AJ AWARDS \$80,000 TO VA EMPLOYEE SUBJECTED TO COWORKER HARASSMENT BASED ON DISABILITY	699
I.	AJ AWARDS \$85,000 TO COMMERCE EMPLOYEE WHO FAILED TO APPEAR FOR DAMAGES HEARING ..	699
J.	\$110,000 AWARDED TO COMMERCE EMPLOYEE WHO PREVAILED ON SOME BUT NOT ALL CLAIMS OF SEXUAL HARASSMENT	699
K.	VA EMPLOYEE SUBJECTED TO SEXUAL HARASSMENT AWARDED \$160,000 IN NONPECUNIARY COMPENSATORY DAMAGES BY AJ	700
APPENDIX: TABLE OF CONTENTS		701
APPENDIX A: EEOC FEDERAL SECTOR REGULATIONS ON REMEDIES—29 CFR PART 1614, SUBPARTS E AND F.....		703
APPENDIX B: SECTION 102 OF THE CIVIL RIGHTS ACT OF 1991 (42 USC 1981A)		711
APPENDIX C: COMPENSATORY AND PUNITIVE DAMAGES AVAILABLE UNDER SECTION 102 OF THE CIVIL RIGHTS ACT OF 1991, EEOC NOTICE NO. N 915.002		713
APPENDIX D: EEOC REGIONAL ATTORNEYS’ MANUAL, 2005, PART 2,II.D.— NONPECUNIARY COMPENSATORY DAMAGES: ISSUES FOR REVIEW WITH CLAIMANTS PRIOR TO FILING SUIT		725
APPENDIX E: THE <i>FITZPATRICK</i> MATRIX.....		733
APPENDIX F: DECLARATION OF BRIAN T. FITZPATRICK.....		737
APPENDIX G: EEOC MEMORANDUM ENDING UNAUTHORIZED MONETARY SANCTIONS AGAINST FEDERAL AGENCIES		745
APPENDIX H: EEOC GUIDANCE TO AGENCIES FOR APPLYING DEFERRED RESIGNATION PROGRAM AGREEMENTS TO PENDING EEO COMPLAINTS		747
TABLE OF CASES.....		749
INDEX.....		785