CHAPTER 1
INTRODUCTION TO DAMAGES

Passage of the Civil Rights Act of 1991 dramatically changed the nature of relief that can be awarded to victims of employment discrimination by providing additional, previously unavailable, remedies such as compensatory damages for out of pocket economic losses and for emotional harm and suffering. For private sector employees, it also provided for punitive damages. These damages supplement the relief that was previously available.

We now have more than 30 years of experience in assessing awards of compensatory damages and a sizeable body of case law to help guide us. Because the Civil Rights Act of 1991 provided for a statutory cap on nonpecuniary compensatory damages without any allowance for inflation, the potential financial impact on employers has become less focused on compensatory damages and more on pecuniary losses, back pay, and front pay.

Indeed, the flexibility entrusted to the courts and administrative bodies in formulating an appropriate remedy for violations of Title VII and other anti-discrimination statues has weathered well in the ensuing years since the addition of compensatory damages. As the First Circuit noted in its decision in *Franchina v. City of Providence*, 881 F.3d 32, 61 (1st Cir. 2018), an especially heinous and meritorious complaint of sexual harassment (discussed in more depth in Chapter 2), "The abuse Lori Franchina suffered at the hands of the Providence Fire Department is nothing short of abhorrent and, as this case demonstrates, employers should be cautioned that turning a blind eye to blatant discrimination does not generally fare well under anti-discrimination laws like Title VII."

In the pages that follow, we hope the reader will find an understanding of the types of relief that are now available to remedy the effects of employment discrimination, gain insight into the circumstances under which each kind of relief is appropriate, and develop or hone the skills to effectively prove or defend a claim for compensatory damages. While the material should be useful to anyone seeking to prove or defend a claim for compensatory damages, the emphasis is on remedies available to federal sector employees.

It is simply not possible to consider the merits of a claim of employment discrimination without considering the remedies available if the claim is successful. The merits of EEO claims do not exist in a vacuum that excludes damages, regardless of how much one wishes it were so. Consider the following passage from *Pollard v. E.I. DuPont de Nemours, Inc*., 338 F. Supp.2d 865, 884 (W.D. Tenn. 2003), a case that eventually went to the Supreme Court on a writ of *certiorari* regarding other matters:

> Defendant has taken away Plaintiff's sense of self-esteem. Plaintiff, formerly an outgoing, confident, self-assured, and professionally successful individual, has to a large degree lost each of these attributes due to the humiliating and degrading sexual harassment she suffered at DuPont and which her supervisors repeatedly failed to stop despite her requests for help. The Court must compensate her for this mental destruction and quantify in dollars the loss of Plaintiff's sense of self worth.

Realizing the potential harm of cases such as this should cause an employer to consider a claim of discrimination in a profoundly different fashion than the more benign allegations we sometimes confront in cases where an employee alleges merely that he or she was embarrassed by a work place matter, the type of damages often referred to as "garden variety" damages.

As stated by the Supreme Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the principle rule in fashioning appropriate remedies in discrimination cases is to try and place the employee in the position he or she would have held but for the discrimination. In practice, the remedies available and the amounts often awarded fall far short of properly compensating a victim of discrimination.

Take, for example, the Commission's description of the harm suffered by the complainant in *Coopwood v. LaHood*, 0120083127 (May 2, 2012). In a prior decision, the Commission found the agency subjected the complainant to a hostile work environment because of her race, African-American, when management failed to address incidents including the writing of "KKK" and the placement of two nooses on the complainant's work station.

> We find that the hostile work environment harassment caused Complainant to suffer severe emotional pain and mental anguish in that she (1) developed severe depression, (2) vomiting in the office, (3) cried uncontrollably, (4)

had difficulty concentrating because she felt like crying all the time, (4) experienced frequent panic attacks, (5) feared for her safety after learning about the two nooses, and (6) had nightmares and insomnia.

Evidence of severe depression in the record includes the affidavit of Complainant's counselor, who testified that she saw Complainant weekly or bi-weekly for two years, from the start of 2000 to the end of 2001. The counselor averred that Complainant appeared to be extremely depressed, rating 90 out of 95 on the Taylor-Johnson depression scale.

In describing her emotional pain and mental anguish, Complainant averred that during her first week at Knoxville, she vomited in the bathroom due to the tension she felt from her coworkers. She also testified that she left the workplace facility "at least a dozen times" to cry outside or in her car. During those times, she tried to control her inconsolable weeping by repeating to herself, "Don't cry." When this did not work, she took sick leave and went home. She took so much leave to deal with her emotional distress that she eventually had to take leave without pay on many occasions. Because she often felt like crying, she had difficulty focusing and concentrating at work.

Complainant averred that from 2002 to 2003, she had panic attacks on a weekly basis, sometimes two to three times per day. At least twice on her way to work, she pulled her car over because she was crying uncontrollably, feeling overwhelmed by the panic of having to endure another day of work.

Complainant testified that she began to fear for her safety (feeling intimidated, scared, and terrified) after she learned about the two nooses in January 2003. Given that she had previously reported that her coworkers had held a lottery to wager how long it would take to get rid of her, Complainant felt increasingly targeted by the display of two nooses, and viewed such actions as an escalation in the threats against her. She became paranoid, obsessively checking her home alarm system, and inspecting her car for signs of damage or tampering with the gas tank. She had nightmares and insomnia.

…

The affidavits of Complainant's neighbor and brother indicate that Complainant had been an outgoing, adventuresome, articulate, and confident person, with a wonderful sense of humor. But the hostility she experienced at work made her quiet and withdrawn. She lost her sense of self worth and no longer socialized or volunteered for community service events.

…

We note that the Agency acknowledged in its final decision that the discriminatory harassment caused Complainant's weight to change significantly. We are also persuaded that the stress Complainant experienced while at Knoxville exacerbated her stomach problems: irritable bowel syndrome, stomach pain, loose bowel movements, and diarrhea. In her affidavit, Complainant explained that she had stomach problems from 2000 to 2006, and her neighbor corroborated the existence and seriousness of those stomach and digestive ailments. For example, the neighbor averred that Complainant had been hospitalized for her stomach ailments; she had picked Complainant up from the hospital and helped her recover from the ongoing digestive problems. On some days when Complainant was too sick, the neighbor averred that she would take care of Complainant and fix her evening meals.

Therefore, the Commission finds that the discriminatory conduct caused Complainant to experience dramatic changes in her weight, and exacerbated various stomach-related ailments over the course of several years, in addition to the severe depression, anxiety, and insomnia mentioned above.

After summarizing all of the harm suffered by the complainant, the Commission affirmed an award of $150,000, a sum that seems paltry in light of all that she experienced.

The question of damages affects nearly all stages of processing a claim for discrimination. This is particularly so in the administrative processing of discrimination complaints filed by federal employees. For example, a federal agency must conduct an investigation of a complaint of discrimination filed against it and the investigation should include any claim for damages. Further, the Commission has authorized federal agencies to unilaterally dismiss claims where the complaint has failed to state a claim upon which relief can be granted or where the matter is found to be moot. This alone has generated a plethora of Commission and federal court case law in cases where the only harm asserted has not been concrete, such as where there is a claim for emotional distress, humiliation, loss of professional standing

or other assertions of noneconomic harm. Determining whether there is a potential entitlement to compensatory damages is vital and it may not be possible to make the determination of whether the complaint can proceed without first evaluating the claim for damages. Nor is it possible for either the employee or the employer to effectively evaluate whether to settle a claim of employment discrimination without having at least a general sense of the value of the claim if it were to be successful.

And those are only the initial considerations about damages. Once the complaint is set for hearing or trial, damages become an intricate part of discovery, trial preparation and witness examination. If in trial, should a jury trial be sought? In the administrative process, should a party seek bifurcation to permit evidence of damages to be presented after hearing on the merits? Should expert witnesses be consulted or called to testify, and if so, what kinds of experts? Are there strategies that can draw attention to evidence that is more favorable to one side than the other? Can the judges' view or review of an award of damages be influenced by similar cases? These are all questions that must be considered in the course of a typical case where a claim for compensatory damages has been raised.

The availability of compensatory damages provides better opportunities to redress the harm suffered by victims of employment discrimination, but the prospect brings with it many collateral considerations that make the litigation of damages particularly complex. A good lawyer (or other advocate as the administrative process often sees complainants with union or other non-attorney representatives) should consider the interests of the client as a whole and not have a tunnel vision view of the world that limits the role of the lawyer strictly to employment litigation matters. Just as a physician must look at the medical health of the patient as a whole and be alert for a secondary diagnosis for which the patient may need treatment, so too the lawyer must consider the overall legal health of his client and make sure the client considers other sources that may be helpful. There are times when an individual is entitled to compensation from sources other than the employer for losses related to the claim of discrimination. These include unemployment compensation, disability insurance, health benefits, veteran's benefits, and many others. For plaintiff's counsel, it is important that you explore these sources with your client, because your client may not be aware of his or her right to such compensation. For defense counsel, it is imperative to know whether the claimant has availed himself or herself of such sources. Having an award of damages offset by such benefits may limit the employer's exposure.

For defense counsel, it is also imperative to learn through discovery what effort the plaintiff has made to seek available benefits. Such information is compelling for two reasons. First, the employee's failure to explore alternative benefits may enable the employer to argue that the employee did not meet his obligation to mitigate damages. EEOC Enforcement Guidance: *Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991*, EEOC Notice No. N 915.002 (July 14, 1992). Second, if the employee actually received benefits from other sources, counsel may be able to argue that the employer is either entitled to an offset for some or all of the benefits or may in the alternative argue that the information should be considered in determining (calculating) the appropriate amount for the award of damages.

In addition, the victim of an unlawful discriminatory employment action has an affirmative duty to mitigate his or her damages. In some instances, counsel's failure to explore other sources of help for the client may result in an offset against any ultimate award of damages because of the individual's failure to mitigate the damages.

I. GENERAL DISCUSSION OF DAMAGES

Following a determination of liability for employment discrimination, the victim is entitled to an appropriate remedy. The Civil Rights Act of 1964 provides great discretion and latitude in formulating relief in cases of intentional discrimination. The statute itself provides that after a finding of unlawful discrimination:

> …the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

42 USC 2000e-5(g)(1) (1991). Indeed, an appropriate remedy may even require displacing an innocent third party from a position where the appropriate remedy for the victim of discrimination requires placement into a job that was otherwise filled. *See, for example, Hicks v. Forest Preserve Dist. of Cook County Ill.*, 677 F.3d 781 (7th Cir. 2012) ("…making the victim of discrimination whole ordinarily requires reinstating him, even if that requires bumping an incumbent who was hired to fill the position").

The Civil Rights Act of 1991 expanded the available relief by providing for compensatory damages and, in cases involving a private sector employer, punitive damages. Section 1981a(a)(1) of the Act provides:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 USC 2000e-5) 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 USC 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 USC 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

With this new authority, the courts and the Commission had enhanced powers to remedy the effects of unlawful employment discrimination. The prospect of liability for compensatory damages (and punitive damages in nongovernment cases) provides a substantially greater deterrent against unlawful employment actions than did the more modest equitable relief initially provided by Title VII.

In addition, a prevailing party who brings a Title VII or Rehabilitation Act claim of employment discrimination may also be entitled to an award of attorney fees. Section 706(k) of Title VII provides that:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 USC 2000e-5(k).

Federal courts have far reaching authority to craft remedies in employment discrimination cases. In structuring relief to the victim of discrimination, a court or the Commission considers not only how to compensate the individual for past harm, but also how to keep further acts of discrimination (or retaliation) from happening in the future. The Supreme Court has mandated that a court should fashion a remedy in employment discrimination cases that will, "so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), *quoting Louisiana v. United States*, 380 U.S. 145, 154 (1965).

A. DAMAGES PURSUANT TO THE ADEA

Neither compensatory damages nor attorney fees and costs incurred during the administrative processing of a complaint are recoverable under the Age Discrimination in Employment Act of 1967. *See, e.g.*, *Bakken v. LaHood*, 0120093529, n.5 (August 8, 2011), *req. for recon. denied*, 0520110713 (November 29, 2012); *Taylor v. West*, 05930633 (January 14, 1994); 29 CFR 1614.501(e).

However, the Supreme Court's 2020 decision in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), was a significant victory for federal employee litigants who bring cases before the federal courts. In a decision authored by Justice Alito, the Court found that the applicable provisions of the ADEA concerning federal employees are broader then the provisions concerning private sector employees. In short, the Court found that federal employees may prevail if the federal agency impermissibly considers age even absent a showing that the employment decision would not have been made "but for" consideration of age. However, the Court noted that in the absence of "but for" causation, the remedies available may be limited (*Id*. at 1171):

> The federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), 88 Stat. 74, 29 U. S. C. § 633a(a), provides (with just a few exceptions) that "personnel actions" affecting individuals aged 40 and older "shall be made free from any discrimination based on age." We are asked to decide whether this provision imposes liability only when age is a "but-for cause" of the personnel action in question.
>
> We hold that § 633a(a) goes further than that. The plain meaning of the critical statutory language ("made free from any discrimination based on age") demands that personnel actions be untainted by any consideration of age. This does not mean that a plaintiff may obtain all forms of relief that are generally available for a violation of § 633a(a), including hiring, reinstatement, backpay, and compensatory damages, without showing that a personnel action would have been different if age had not been taken into account. To obtain such relief, a plaintiff must show that age was a but-for cause of the challenged employment decision. But if age discrimination played a lesser part in the decision, other remedies may be appropriate.

The *Babb* decision will likely provide a strong incentive for federal agencies to consider settlement of ADEA cases where there is evidence that age was improperly considered in the challenged decision, rather than risk a finding of discrimination even if the relief would be limited. Indeed, author Gary Gilbert was co-lead counsel (together with Joseph Sellers of Cohen Milstein Sellers & Toll PLLC) in a case before the District Court in Washington D.C. where 671 plaintiffs alleged that a decision to contract out the work they performed for the Federal Aviation Administration (an agency within the Department of Transportation) was motivated by improper considerations of age. In denying defendant's motion for summary judgement, *Breen v. Chao*, 253 F. Supp.3d 244, 260 (D.D.C. 2017), the court noted the existence of age-related comments:

> The Court concludes that defendants' widespread comments related to age—in particular, uses of the terms "aging workforce" and "retirement eligible"—create a genuine issue of material fact concerning pretext that only a factfinder can resolve.

The matter ultimately settled for $43,800,000 in funds and adjusted retirement annuities for 25 of the plaintiffs. While there is no means to know the extent to which the Supreme Court's decision in *Babb* influenced the government's decision to settle the claims, the 2017 trial judge's observation in denying summary judgment and the subsequent 2020 decision in *Babb* should have provided powerful incentive for the defendant to settle.

B. EEOC REGULATIONS CODIFY REMEDIES AND RELIEF

The EEOC's regulations at 29 CFR 1614.501 address the nature and type of relief available to federal employees and the circumstances under which various forms of relief are available:

> 1614.501 *Remedies and relief.*
>
> (a) When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief which shall include the following elements in appropriate circumstances:
>
> (1) Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;
>
> (2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur;
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> (3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;
>
> (4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and
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> (5) Commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.
>
> (b) *Relief for an applicant*.
>
> (1)(i) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position that the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination. The offer shall be made in writing. The individual shall have 15 days from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control prevented a response within the time limit.
>
> (ii) If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired. Back pay, computed in the manner prescribed by 5 CFR 550.805, shall be awarded from the date the individual would have entered on duty until the date the individual actually enters on duty unless clear and convincing evidence indicates that the applicant would not have been selected

even absent discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The individual shall be deemed to have performed service for the agency during this period for all purposes except for meeting service requirements for completion of a required probationary or trial period.

(iii) If the offer of employment is declined, the agency shall award the individual a sum equal to the back pay he or she would have received, computed in the manner prescribed by 5 CFR 550.805, from the date he or she would have been appointed until the date the offer was declined, subject to the limitation of paragraph (b)(3) of this section. Interest on back pay shall be included in the back pay computation. The agency shall inform the applicant, in its offer of employment, of the right to this award in the event the offer is declined.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but also finds by clear and convincing evidence that the applicant would not have been hired even absent discrimination, the agency shall nevertheless take all steps necessary to eliminate the discriminatory practice and ensure it does not recur.

(3) Back pay under this paragraph (b) for complaints under title VII or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant.

(c) *Relief for an employee*. When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed by 5 CFR 550.805, unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The back pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

(2) If clear and convincing evidence indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the agency shall nevertheless eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

(d) The agency has the burden of proving by a preponderance of the evidence that the complainant has failed to mitigate his or her damages.

(e) *Attorney's fees or costs*—

(1) *Awards of attorney's fees or costs*. The provisions of this paragraph relating to the award of attorney's fees or costs shall apply to allegations of discrimination prohibited by title VII and the Rehabilitation Act. In a decision or final action, the agency, administrative judge, or Commission may award the applicant or employee reasonable attorney's fees (including expert witness fees) and other costs incurred in the processing of the complaint.

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

(ii) Any award of attorney's fees or costs shall be paid by the agency.

(iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.

(iv) Attorney's fees shall be paid for services performed by an attorney after the filing of a written complaint, provided that the attorney provides reasonable notice of representation to the agency, administrative judge or Commission, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Agencies are not required to pay attorney's fees for services performed during the pre-complaint process, except that fees are allowable when the Commission affirms on appeal an administrative judge's decision finding discrimination after an agency takes final action by not implementing an administrative judge's decision. Written submissions to the agency that are signed by the representative shall be deemed to constitute notice of representation.

(2) *Amount of awards*.

(i) When the agency, administrative judge or the Commission determines an entitlement to attorney's fees or costs, the complainant's attorney shall submit a verified statement of attorney's fees (including expert witness fees) and other costs, as appropriate, to the agency or administrative judge within 30 days of receipt of the decision and shall submit a copy of the statement to the agency. A statement of attorney's fees and costs shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. The agency may respond to a statement of attorney's fees and costs within 30 days of its receipt. The verified statement, accompanying affidavit and any agency response shall be made a part of the complaint file.

(ii)(A) The agency or administrative judge shall issue a decision determining the amount of attorney's fees or costs due within 60 days of receipt of the statement and affidavit. The decision shall include a notice of right to appeal to the EEOC along with EEOC Form 573, Notice Of Appeal/Petition and shall include the specific reasons for determining the amount of the award.

(B) The amount of attorney's fees shall be calculated using the following standards: The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate. There is a strong presumption that this amount represents the reasonable fee. In limited circumstances, this amount may be reduced or increased in consideration of the degree of success, quality of representation, and long delay caused by the agency.

(C) The costs that may be awarded are those authorized by 28 USC 1920 to include: Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case; fees and disbursements for printing and witnesses; and fees for exemplification and copies necessarily obtained for use in the case.

(iii) Witness fees shall be awarded in accordance with the provisions of 28 USC 1821, except that no award shall be made for a Federal employee who is in a duty status when made available as a witness.

C. EEOC REQUIRES AGENCIES TO CONSIDER DISCIPLINARY ACTION AGAINST EMPLOYEES WHO ENGAGE IN DISCRIMINATORY PRACTICES

The Commission has repeatedly held that an element of relief may include requiring the federal agency found to have engaged in unlawful discrimination to consider discipline of any employee responsible for the discrimination. However, it has also rejected any specific disciplinary action as a remedy of the complainant's claim because of the lack of due process afforded to the accused in EEO administrative hearings. See for example, *Mitchell v. Principi,* 07A00016 (April 12, 2001), where the Commission rejected an administrative judge's requirement that the agency take specific disciplinary action against the subordinate employee of a supervisor who harassed the supervisor because of his race and religion.

The Commission quoted from the agency's final order, which stated:

> We disagree with and reject so much of the [AJ's] decision as provides for the issuance of a letter of reprimand to [the subordinate] and that individual's attendance in sensitivity training as a condition of his continued employment with the agency on the grounds that it exceeds the authorized elements of relief that can be granted by the Commission pursuant to 29 C.F.R. § 1614.501(a).

The Commission then continued:

> Commission regulations state that each agency shall take appropriate disciplinary action against employees who engage in discriminatory practices. 29 C.F.R. § 1614.102(a)(6). In promulgating this policy, the Commission clearly stated that it could not discipline or order the discipline of employees directly. 52 Fed. Reg. 41920, 41921 (October 30, 1987). Rather, the Commission stated that the requirement of corrective, curative, or preventative action permits the Commission to recommend that disciplinary action be considered by the agency. *Id.* The Commission reaffirmed this policy in *Cassida v. Department of the Army*, EEOC Request No. 05900794 (September 14, 1990), in which it stated that it could not order an agency to take disciplinary action against a particular individual, but could order the agency to consider taking disciplinary action under appropriate circumstances. The implementation of 29 C.F.R. Part 1614 in 1992, and the implementation of the amendments to Part 1614 in 1999 have not altered the Commission's policy in this regard.
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> To the extent that element (2) of the AJ's order for relief orders the agency to take a particular disciplinary action against an individual employee, that order is inconsistent with 29 C.F.R. § 1614.102(a)(6). A letter of reprimand is clearly a disciplinary action. The Commission declines to order the agency to make attendance in the "sensitivity training" a condition of continued employment with the agency. It is the agency's responsibility to determine what discipline, if any, should be imposed if the subordinate employee does not obey its directive. However, the agency must consider the Commission's recommendation of discipline and report its decision on whether to discipline to the Commission.

See also Munno v. Veneman, 04A10042 (June 18, 2001), where the Commission held that the agency was required to determine whether disciplinary action against the responsible agency officials was appropriate and further ordered, "The agency shall record the basis for its decision to take or not to take such actions, and to report the same to the Commission and to petitioner in the same manner as implementation of the Commission decision is reported."

II. EEOC GUIDANCE TO ITS ATTORNEYS FOR DISCUSSING CLAIMS OF COMPENSATORY DAMAGES WITH POTENTIAL LITIGANTS

The EEOC has considerable guidance to its staff on all aspects of civil rights litigation and we reference such guidance throughout this text. We note here the importance of one aspect of litigating damages that is often understated by complainant/plaintiff's representatives. It is imperative that counsel spend the time necessary to explain the types of damages that may be available, the evidence needed to prove such damages and the reality that making a claim for damages often places intimate aspects of an individual's life in the spotlight and may be quite uncomfortable. As we discuss in later chapters, a litigant may sometimes avoid revealing intimate details of their personal life by seeking only garden variety damages. Nonetheless, the sage guidance to EEOC attorneys, which can be found at https://www.eeoc.gov/d-nonpecuniary-compensatory-damages-issues-review-claimants-prior-filing-suit provides the following conclusion:

> Prior to filing a complaint, trial attorneys should devote sufficient time to reviewing with claimants issues that may arise relating to a claim for nonpecuniary compensatory damages. Trial attorneys must work with claimants to determine if such damages were suffered, and the nature of the injuries should be reviewed in detail. The trial attorney should then carefully explore all factors which may have a bearing on proving such damages, including the availability of corroborating witnesses or documentary evidence, and the extent to which pre-existing or intervening conditions have a bearing on damages. The applicable damage cap and the variability of compensatory damages awards should be discussed. The trial attorney should also ensure that the claimant fully understands that by claiming compensatory damages, certain aspects of his or her personal life will likely be subject to disclosure during discovery and at trial.

III. BEYOND THE 30TH ANNIVERSARY OF THE CIVIL RIGHTS ACT OF 1991: WHAT THE FUTURE HOLDS FOR AWARDS OF COMPENSATORY DAMAGES

It has now been more than 30 years since passage of the Civil Rights Act amendments and the statutory limit for awards of compensatory damages remains $300,000. The relative paucity of awards of nonpecuniary damages because of the statutory cap with no inflationary adjustment means that the compensatory damages (and for the private sector, punitive damages, which are also subject to the caps) provisions of the Civil Rights Act Amendments of 1991 no longer serve the deterrent purpose as it did at the time it was enacted. Concerns about the size of back pay awards and even greater concerns about front pay awards, generally serve as the focus of damages as remedies for wage and other compensation

loss often dwarf the more modest awards of compensatory damages. The authors predict, notwithstanding the relative cloudy crystal ball they rely upon, that in the next several years we will see Congress revisit the statutory limitations imposed on awards of compensatory damages.

CHAPTER 2
TITLE VII EQUITABLE DAMAGES

More than thirty years after enactment of the Civil Rights Act of 1991, the equitable relief provisions of Title VII continue to play a substantial role in providing remedies to victims of unlawful acts of employment discrimination. This is because equitable remedies are excluded from the statutory caps contained in the 1991 Act. This chapter will discuss those traditional remedies and, to some extent, their relationship to damages permitted under the 1991 amendments. Although Title VII did not provide an exhaustive list of remedies available to remedy the effects of employment discrimination, it did specifically list some forms of relief. These included injunctive and declarative relief, reinstatement, and hiring employees, with or without back pay. It also includes prophylactic actions to prevent future civil rights violations, including training and education of the employer's managers and employees.

The Ninth Circuit described the breadth of remedies available to remedy the effects of discrimination in *Clemens v. CenturyLink Inc*., 874 F.3d 1113, 1116 (9th Cir. 2017):

> Indeed, we recently reiterated that "[i]t is the historic purpose of equity to secure complete justice," and that "[i]n the context of a claim brought under a federal statute intended to combat discrimination, the phrase 'complete justice' has a clear meaning: 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" B*ayer v. Neiman Marcus Grp., Inc*., 861 F.3d 853, 873 (9th Cir. 2017) (some alterations in *Bayer*) (footnote, citations, and some internal quotation marks omitted) (quoting *Gen. Tel. Co*., 599 F.2d at 334, and *Albemarle*, 422 U.S. at 418); *see also Kraszewski*, 912 F.2d at 1185–86. Back pay is one manifestation of this principle, *see Loeffler v. Frank*, 486 U.S. 549, 558, 108 S. Ct. 1965, 100 L. Ed.2d 549 (1988), as is prejudgment interest on back-pay awards, *see id.* at 557 (recognizing that the courts of appeals unanimously hold "that Title VII authorizes prejudgment interest as part of [back-pay awards]").

We begin our discussion of equitable relief with the non-monetary remedies, after which we will discuss a variety of matters related to compensation that go well beyond the obvious remedy of lost salary. EEOC Guidance on non-monetary remedies can be found in the Commission's Management Directive 110 (MD-110), a source we will consider again later in this chapter. Although the Commission's guidance is not exhaustive, it does illustrate the breadth of non-monetary remedies available to restore victims of employment discrimination to where they would otherwise have been:

> V. OTHER FORMS OF EQUITABLE RELIEF
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> As appropriate, the agency shall also:
>
> 1. Cancel an unwarranted personnel action and restore the employee to the status s/he occupied prior to the discrimination;
>
> 2. Expunge any adverse materials relating to the discriminatory employment practice from the agency's records;[1] and
>
> 3. Provide the individual with a full opportunity to participate in the employee benefit that was denied—for example, training, preferential work assignments, or overtime scheduling.[2]
>
> When the finding of discrimination involves a performance appraisal, the appropriate relief should include raising the rating to that which the individual would have received absent the discrimination. *McKenzie v. Dep't. of Justice*, EEOC Appeal No. 0120100034 (July 7, 2011); *Hairston v. Dep't. of Education*, EEOC Appeal No. 0120071308 (Apr. 15, 2010). In addition, the individual is entitled to all benefits and awards that s/he would have received if she had achieved the higher performance appraisal rating. *Cook v. Dep't. of Labor*, EEOC Appeal No. 0720080045 (Feb. 22, 2010).
>
> [1] *See Sipriano v. Dep't. of Homeland Security*, EEOC Appeal No. 0120103167 (Jan. 20, 2011), *request for reconsideration denied*, EEOC Request No. 0520110313(May 12, 2011) (ordering the agency to expunge all documentation relating to a discriminatory termination from complainant's records); *Farrington v. Dep't. of*