

# **DAMAGES IN EMPLOYMENT LAW CASES**

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This paper discusses the types of damages available under Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), the Americans with Disabilities Act (“ADA”), the Age Discrimination in Employment Act (“ADEA”), the Equal Pay Act (“EPA”), the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (“Rehabilitation Act”), and the Reconstruction Era Civil Rights Acts (“Sections 1981 and 1983”).

### **1. MONETARY RELIEF**

#### **(a) Back Pay**

Back pay is available under Title VII, the ADA, the ADEA, the EPA, the Rehabilitation Act, the USERRA, and Sections 1981 and 1983. Once the plaintiff establishes that unlawful discrimination caused her loss, she is entitled to back pay. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (holding that back pay should be denied only in “unusual circumstances,” where the award would frustrate the statutory purpose of making victims whole and eradicating discrimination). The standard of review for awards (or denials) of back pay is whether the district court was clearly erroneous and abused its discretion. *Id.* at 424.

The Equal Employment Opportunity Commission (“EEOC”) can seek recovery of back pay even when an employee has signed a mandatory arbitration agreement. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291, 296-97 (2002) (holding that EEOC can seek victim-specific relief without the alleged victim’s consent, though her acceptance of a monetary settlement limits the EEOC’s ability to recover back pay).

#### **(i) Elements of Back-Pay Awards**

##### **(1) Wages and Salary**

While the plaintiff bears the burden of establishing the value of her lost salary, she is not required to establish the exact dollar amount. *See Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 156 (3d Cir. 1999) (“[U]ncertainties [in the calculation of back pay] are resolved against a discriminating employer.”). The plaintiff may also recover overtime, shift differentials, commissions, tips, cost-of-living increases, merit increases, and raises due to promotion by showing that she would have earned those items absent discrimination. *See, e.g., Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1563 (11th Cir. 1986). The back-pay award must be based on reasonable expectations, not speculation. *Compare Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1040 (9th Cir. 2003) (history of bonuses justified award), *with Neufeld v. Searle Lab.*, 884 F.2d 335, 342 (8th Cir. 1991) (denying recovery of future bonuses as speculative).

##### **(2) Fringe Benefits**

The plaintiff also bears the burden of proof for claims for fringe benefits, such as vacation pay, pension and retirement benefits, stock options and bonus plans, savings plan contributions, cafeteria plan benefits, profit-sharing benefits, and medical and life insurance benefits. The plaintiff must demonstrate her entitlement to, and the value of, such benefits with reasonable

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certainty. *Vaughn v. Sabine Cnty.*, 104 F. App'x. 980, 985 (5th Cir. 2004) (holding that a jury may consider the value of employee benefits in making a back-pay determination, provided that evidence in the record supports a calculation). However, when the employee would have been obligated to shoulder part of the cost of benefits, that portion may reduce the back-pay award.

### (3) Prejudgment Interest

The Supreme Court established a strong presumption that prejudgment interest on back-pay awards should be granted in employment discrimination cases. *See Loeffler v. Frank*, 486 U.S. 549, 557-58 (1988) (“Title VII authorizes prejudgment interest as part of the back-pay remedy in suits against private employers”). Some courts have declined to award prejudgment interest to plaintiffs who did not comply with procedural rules to preserve the possibility of recovering prejudgment interest. *See, e.g., Bunch v. Bullard*, 795 F.2d 384, 399 (5th Cir. 1986) (plaintiffs’ failure to appeal or cross-appeal from the lower court’s judgment precludes a challenge to a back-pay award that denied prejudgment interest); *Goodman v. Heublein, Inc.*, 682 F.2d 44, 45 (2d Cir. 1982) (prejudgment interest is barred in an ADEA action where the prevailing plaintiff has not moved to alter or amend the judgment within ten days, as is required by Fed. R. Civ. P. 59(e)).

### (4) Negative Tax Consequences

Under Title VII, the plaintiff may receive additional back pay to compensate for her increased tax liability occasioned by a single-year lump-sum award. *See Sears v. Atchison, Topeka & Santa Fe Ry. Co.*, 749 F.2d 1451, 1456 (10th Cir. 1984); *see also Smith v. Dep’t of Transp.*, AT-0752-05-0901-P-2 (June 13, 2017) (finding that Merit Systems Protection Board has authority, under relevant EEOC precedent, to award compensatory damages to plaintiff for his increased tax burden due to having received a lump-sum back-pay award). The plaintiff must establish the amount of the increased tax burden, as well as any related accountant fees. *Compare O’Neill v. Sears, Roebuck & Co.*, 108 F. Supp. 2d 443, 447 (E.D. Pa. 2000) (allowing recovery of increased tax liability from lump-sum back-pay and front-pay award, where expert testimony specified the award’s tax consequences), *with Barbour v. Medlantic Mgmt. Corp.*, 952 F. Supp. 857, 865 (D.D.C. 1997) (denying award due to plaintiff’s failure to provide any evidence of the difference between taxes paid on lump-sum front-pay award and amount of taxes that would have been paid had the salary been earned over time).

#### (ii) Period of Recovery for Back-Pay Awards

Back pay is generally awarded from when the occurrence of the alleged discrimination begins until the harm suffered by the plaintiff is redressed. *See Thorne v. City of El Segundo*, 802 F.2d 1131, 1136 (9th Cir. 1986). The plaintiff must demonstrate the amount of economic harm she has suffered as a result of the alleged discrimination. The award of back pay may be denied if, in the absence of the alleged discrimination, the plaintiff would have been demoted, terminated, or otherwise separated from her job regardless.

#### (1) Commencement of Back-Pay Period

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Subject to statutory limits, back-pay liability begins at the point of the employer's illegal act causing the plaintiff to suffer an economic injury. Title VII precludes the recovery of back-pay damages suffered more than two years before the plaintiff filed a charge of discrimination with the EEOC, unless she also alleges a pattern-or-practice claim. 42 U.S.C. § 2000e-5(g)(1). Alleged failures to promote, denials of transfer, termination, and similar adverse employment decisions are "discrete discriminatory acts" that are not considered part of a "continuing violation"; instead, they must be challenged within the applicable statute of limitations. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Although each discriminatory paycheck constitutes a separate violation of the EPA, the continuing violation doctrine does not permit the plaintiff to recover back pay for discriminatory pay periods outside the applicable statute of limitations period. *O'Donnell v. Vencor Inc.*, 466 F.3d 1104, 1113 (9th Cir. 2006).

However, under Sections 1981 and 1983, a back-pay award is subject to the appropriate statute of limitations under state law, rather than the two years specified under Title VII. *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 460 (1975); e.g., *Kornegay v. Burlington Indus., Inc.*, 803 F.2d 787, 788 (4th Cir. 1986) (three-year North Carolina statute of limitations capped back-pay period). Furthermore, under the ADEA, back pay may be recovered for a period of either two years or, in the event of a willful violation, three years. 29 U.S.C. § 255.

### (2) Termination of Back-Pay Period

The back-pay accrual period ends on either the date judgment is rendered or the date that the jury returns its verdict. However, the employer may truncate the accrual period by demonstrating (1) the plaintiff's failure to mitigate, (2) the plaintiff's reemployment or inability to work, (3) the plaintiff's refusal of an unconditional offer of reinstatement, (4) after-acquired evidence of the plaintiff's misconduct or fraud, or (5) shorter-than-average tenure of employees in the plaintiff's position.

#### a. Failure to Mitigate

The plaintiff has an affirmative duty to mitigate lost wages by "us[ing] reasonable diligence" to locate "substantially equivalent" employment. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). Consequently, her failure to mitigate damages can reduce or completely cancel out a back-pay award. 42 U.S.C. § 2000e-5(g) ("Interim earnings or amounts earnable with reasonable diligence by the person discriminated against shall operate to reduce the back pay otherwise allowable"); e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 253 n.5 (1994) (reducing back-pay award by the amount plaintiff could have earned with reasonable diligence).

A substantially equivalent position offers similar compensation, promotional opportunities, job responsibilities, working conditions, and job status as the position from which the plaintiff has discriminatorily lost. *Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 85 (3d Cir. 2009). Although the plaintiff need not accept significantly inferior employment, the plaintiff may not satisfy her duty to mitigate by insistently looking for an identical job with the same compensation. *See, e.g., Ford Motor*, 458 U.S. at 231 (stating that plaintiff "need not go into another line of work, accept a demotion, or take a demeaning position"); *Hutchison v. Amateur Elec. Supply, Inc.*, 42 F.3d 1037, 1067 (7th Cir. 1994) (holding that an employee who receives an above-market salary

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has a duty to seek employment at the market rate); *Walters v. City of Atlanta*, 803 F.2d 1135, 1145 (11th Cir. 1986) (finding that the plaintiff's extensive efforts to obtain only the particular position discriminatorily denied the plaintiff are insufficient). Relatedly, back-pay awards may be adjusted to include expenses the plaintiff has incurred in mitigating damages.

The employer must establish the plaintiff's failure to mitigate by showing that she did not exercise reasonable diligence in seeking available, substantially equivalent positions. *Killian v. Yorozu Auto. Tenn. Inc.*, 454 F.3d 549, 556 (6th Cir. 2006); *Peyton v. Dimaro*, 287 F.3d 1121, 1128 (D.C. Cir. 2002). In addition, when the plaintiff fails to make any effort to find or pursue employment, the employer may not even need to show that substantially equivalent positions were available in the relevant geographic area. *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 382, 393-94 (5th Cir. 2003); *Quint v. A.E. Staley*, 172 F.3d 1, 16 (1st Cir. 1999).

To satisfy her duty to mitigate, the plaintiff must be proactive in finding employment; simply reviewing employment ads is not enough. *See, e.g., Dailey v. Societe Generale*, 108 F.3d 451, 455 (2d Cir. 1997) (registering with employment agencies, interviewing for open positions, and discussing job prospects with friends and acquaintances satisfies the plaintiff's duty). The plaintiff who abandons her search for employment or fails to pursue employment with reasonable diligence does not satisfy her duty to mitigate, unless she shows that her deficient efforts are a product of the psychological or economic injuries inflicted upon her by the employer's conduct. *See Fogg v. Gonzales*, 492 F.3d 447, 455 (D.C. Cir. 2007) (affirming district court's conclusion that plaintiff's inability to find other police work was not a failure to mitigate; his for-cause termination of employment had made any such effort futile).

### b. Reemployment or Inability to Work

As referenced above, the back-pay accrual period typically ends when the plaintiff obtains a "substantially equivalent" position. If the plaintiff voluntarily resigns or is terminated from subsequent employment for cause, back-pay liability may be cut off. *See Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 937 (5th Cir. 1996) (holding that plaintiff was entitled to back pay only up to the point that he found substantially similar employment, and not for the period after he was fired from this subsequent employment for his excessive absences, excess use of the company phone for personal calls, and conflicts with a coworker). *But see Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 382 (1st Cir. 2004) (holding that plaintiff was entitled to back pay regardless of the cause of termination from subsequent employment); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 696 (2d Cir. 1998) (stating that voluntarily quitting a job does not toll the back-pay period when it is motivated by unreasonable working conditions or an earnest search for better employment).

Back pay may be further reduced for periods during which the plaintiff is unavailable for or unable to work, or has voluntarily left the job market. *See Thornley v. Penton Publ'g, Inc.*, 104 F.3d 26, 31 (2d Cir. 1997) ("The remedy in a discriminatory discharge case . . . does not extend to granting back pay for a period when a plaintiff would have been unable, due to an intervening disability, to continue employment."). In *Thornley*, after retrial of the plaintiff's ADEA claim, the Social Security Administration determined that his disability prevented him from working. *Id.* Subsequently, the Second Circuit held that, after the onset of the plaintiff's disability, the

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appropriate remedy for him became disability benefits under the employer's long-term disability plan, not back pay. *Id.* However, a court will not necessarily offset collateral source payments—including social security disability benefits—from the plaintiff's back-pay award, especially if the plaintiff could have worked during the disputed period had she received reasonable accommodations. *See Tse v. N.Y. Univ.*, 190 F. Supp. 3d 366, 373-74 (S.D.N.Y. 2016) (“Offsetting damages awards . . . would enable employers to shift the burden of their discriminatory conduct onto public and private insurance systems created to serve larger public purposes.”).

The plaintiff's income from her new employment, dating from her separation from her former employer to the judgment in the case, likely will reduce an award of back pay unless the plaintiff shows she would have earned such income regardless of being employed in her former position at that time. *See Shapiro v. Textron*, Civ. A. No. 95-4083, 1997 WL 45288, at \*1 (E.D. La. Feb. 4, 1997), *aff'd*, 141 F.3d 1163 (5th Cir. 1998) (holding that a successful ADEA plaintiff's back-pay award will not be reduced by the receipt of other income he would have received even if he had not been discharged). To reduce the back-pay award, the employer has the burden of demonstrating the amount of the plaintiff's interim earnings.

### c. Refusal of Unconditional Offer of Reinstatement

The employer may cut off its back-pay liability by showing that the plaintiff received an unconditional offer for a position substantially equivalent to her former position. *See Ford Motor*, 458 U.S. at 238-39; *cf. Madden v. Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 679 (6th Cir. 2008) (holding that the plaintiff's reinstatement offer, which required him to drop his complaint, was not “unconditional” and thus did not mitigate the employer's liability for back pay). The plaintiff's unreasonable rejection of an employer's unconditional offer of reinstatement will end the accrual of back pay on the date that the offer is rejected or expires, *Ford Motor*, 458 U.S. at 238-39, and will preclude the award of reinstatement or front pay, *e.g., Lewis Grocer Co. v. Holloway*, 874 F.2d 1008, 1012 (5th Cir. 1989); *Stanfield v. Answering Serv., Inc.*, 867 F.2d 1290, 1296 (11th Cir. 1989). To preserve the right to recover back pay, the plaintiff must show that her rejection of the offer was reasonable and justified by special circumstances. *Ford Motor*, 458 U.S. at 238 & n.7. The absence of retroactive seniority or accrued back pay does not constitute special circumstances that justify a rejection of an otherwise valid offer. *Id.* at 241.

### d. After-Acquired Evidence of Employee Misconduct or Fraud

Back-pay liability ends when an employer discovers sufficient evidence of employee misconduct or fraud that precedes the discriminatory act. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360-61 (1995) (stating that the back-pay period should be “from the date of the unlawful discharge to the date the new information was discovered”); *Russell v. Microdyne Corp.*, 65 F.3d 1229, 1240 (4th Cir. 1995) (applying *McKennon* to after-acquired evidence of misrepresentations in resume and job application to limit back pay to the period from the date of unlawful discharge to the date new information was discovered). The employer has the burden to show the misconduct or fraud “was of such severity that the [plaintiff] would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.” *McKennon*, 513 U.S. at 363.

### e. Average Tenure

The employer may also reduce back pay by demonstrating that employees in the plaintiff's position typically do not remain with the same employer for long periods of time. *E.g., EEOC v. Mike Smith Pontiac GMC, Inc.*, 896 F.2d 524, 530 (11th Cir. 1990) (limiting back pay to the average tenure of sales employees).

### (iii) Defenses

The employer may avoid back-pay liability when the plaintiff (1) did not demonstrate that her resignation constitutes constructive discharge or (2) failed to timely bring her claim.

#### (1) Constructive Discharge

When the plaintiff resigned from or abandoned her position, the plaintiff must satisfy a high bar to show that the alleged discrimination created such intolerable conditions in the workplace that she could not reasonably be expected to stay in her job. *See Penn. State Police v. Suders*, 542 U.S. 129, 134 (2004).

#### (2) Laches

The plaintiff must promptly bring her claim so that evidence will not deteriorate and thereby provide the employer with an opportunity to mount an effective defense. *See Nat'l Passenger R.R. v. Morgan*, 536 U.S. 101, 108-09 (2002).

### (iv) Limitations on Back-Pay Awards

#### (1) Non-Collateral Sources of Income

Social security disability benefit payments, retirement benefits paid by the employer, severance payments, and workers' compensation time loss payments may reduce back-pay awards to prevent double recovery by the plaintiff. However, income or other benefits the plaintiff received from sources collateral to the defendant cannot reduce the employer's back-pay liability. *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 494-95 & n.37 (5th Cir. 2001). Courts are divided on whether unemployment compensation may reduce a back-pay award. *Compare Hare v. H & R Indus., Inc.*, 67 F. App'x 114, 121 (3d Cir. 2003) (concluding that unemployment benefits should not be deducted from a Title VII back pay award), *and Dominguz v. Tom James Co.*, 113 F.3d 1188, 1191 (11th Cir. 1997) (holding that unemployment benefits should not be deducted from back-pay awards under ADEA), *with Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 697 F.2d 743, 756 (7th Cir. 1981) (offsetting back pay by employer contributions to unemployment compensation fund).

#### (2) Pattern or Practice Claim

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When the number of qualified class members exceeds the number of openings lost through discrimination and identifying individuals entitled to relief is not practical, back pay may be prorated among multiple plaintiffs or distributed only to plaintiffs who are reevaluated on a nondiscriminatory basis. *See Catlett v. Mo. Highway & Transp. Comm'n*, 828 F.2d 1260, 1268 (8th Cir. 1987).

### **(b) Front Pay**

Front pay compensates the plaintiff for (1) the future effects of discrimination when reinstatement would be an unfeasible (albeit appropriate) remedy, or (2) the estimated length of the interim period before the plaintiff can return to her former position. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 850 (2001); *see, e.g., Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 87-88 (3d Cir. 2009) (affirming ten-year front pay award to a temporary employee who was not offered a permanent position due to unlawful sex discrimination).

#### **(i) Front Pay v. Reinstatement**

Although reinstatement is generally preferred, *see infra*, 3(b)(ii) Reinstatement, front pay may be awarded in lieu of reinstatement when (1) no position is available; (2) a subsequent working relationship between the parties would be antagonistic; or (3) the employer has a record of long-term resistance to anti-discrimination efforts. *See, e.g., Abuan v. Level 3 Commc'ns, Inc.*, 353 F.3d 1158, 1179 (10th Cir. 2003) (holding that plaintiff should not be forced into an employment relationship with a hostile employer and forego front pay); *Salitros v. Chrysler Corp.*, 306 F.3d 562, 573 (8th Cir. 2002) (finding front pay appropriate when a reinstatement of the plaintiff was illusory: employer's harassment prevented plaintiff from returning to work). In addition, front pay may be appropriate when no comparable position is available or when the plaintiff's impending retirement would make the front-pay period of short duration. *See Whittlesy v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984); *Chance v. Champion Spark Plug Co.*, 732 F. Supp. 605, 610 (D. Md. 1990) (finding that reinstatement would be impracticable due to the ADEA plaintiff's plans to retire in one month).

#### **(ii) Factors to Calculate Front Pay**

In determining the amount of the front-pay award, courts consider the following factors: (1) the age of the plaintiff; (2) the reasonable length of time for the plaintiff to obtain a comparable position; (3) the length of time the plaintiff had worked at the employer, or at previous employer(s); and (4) the length of time employees in similar positions had worked at the employer. *See Barbour v. Merrill*, 48 F.3d 1270, 1280 (D.C. Cir. 1995); *see, e.g., EEOC v. HBE Corp.*, 135 F.3d 543, 555 (8th Cir. 1998) (reducing five-year front-pay award to one year based on high turnover of predecessors).

Front pay is subject to the same deductions and cancellation to which back pay may be limited. As with back pay, front pay will not be awarded when the plaintiff failed to mitigate damages or unreasonably declined an unconditional offer of reinstatement to her former position. *See Vaughn*, 104 F. App'x at 986; *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 909 (2d Cir. 1997). At the very least, an employer can eliminate front-pay liability when it discovers sufficient

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evidence of the plaintiff's misconduct or fraud preceding the alleged discriminatory act. *See McKennon*, 513 U.S. at 360-61.

### **2. COMPENSATORY AND PUNITIVE DAMAGES**

Compensatory damages (to compensate for past and future pecuniary losses, namely emotional distress and out-of-pocket expenses for medical treatment) and punitive damages (intended to punish the employer for especially malicious or reckless discrimination) are available under Title VII, the ADEA, the ADA, the EPA, the Rehabilitation Act, and Sections 1981 and 1983. In addition, in *West v. Gibson*, 527 U.S. 212 (1999), the Supreme Court held that the EEOC has the authority to award compensatory damages in its administrative process. *See also Ward-Jenkins v. Dep't of the Interior*, EEOC Appeal No. 01961483 (Mar. 4, 1999). For example, in *EEOC v. AutoZone, Inc.*, 707 F.3d 824 (7th Cir. 2013), after considering “whether the damages awarded (1) were monstrously excessive; (2) had no rational connection between the award and the evidence; and (3) were roughly comparable to awards made in similar cases,” the court found that the Commission's \$100,000 compensatory-damage award was not excessive. *Id.* at 833-34.

#### **(a) Statutes Allowing Recovery of Compensatory and Punitive Damages**

##### **(i) Title VII**

In cases involving intentional discrimination, Title VII allows the plaintiff to recover compensatory and punitive damages for her “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” 42 U.S.C. § 1981a(b)(3). However, there are caps that limit the amount of these damages a jury may award to the plaintiff. The cap limit varies with the size of the employer; specifically, the number of employees that the employer has in each of twenty or more calendar weeks in the current calendar year. The four statutory limits are: (1) \$50,000 for employers of 15 to 100 employees; (2) \$100,000 for employers of 101 to 200 employees; (3) \$200,000 for employers of 201 to 500 employees; and (4) \$ 300,000 for employers with 501 or more employees. *Id.*

On the other hand, these caps do not limit front-pay awards—which are not considered compensatory damages—or the plaintiff's recovery under relevant state anti-discrimination statutes. *See Pollard*, 532 U.S. at 852; *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1196 (9th Cir. 2002) (Title VII damages cap inapplicable to \$650,000 award of noneconomic damages under Washington Law Against Discrimination).

##### **(ii) Sections 1981 and 1983**

Compensatory and punitive damages may be recovered under Sections 1981 and 1983. *Smith v. Wade*, 461 U.S. 30, 56 (1983) (holding that a jury may award punitive damages under Section 1983 where the defendant has exhibited reckless or careless disregard or indifference to the plaintiff's protected rights); *Carey v. Phiphus*, 435 U.S. 247, 263-64 (1978) (finding that damages for emotional distress caused by defendant's denial of procedural due process may be awarded under Section 1983); *Johnson*, 421 U.S. at 460 (“An individual who establishes a cause of action under [Section] 1981 is entitled to both equitable and legal relief, including compensatory

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and, under certain circumstances, punitive damages.”). Unlike Title VII, there are no statutory caps on the damages that may be recovered under these sections. 42 U.S.C. § 1981a(b)(4). In addition, while injury to reputation, by itself, does not provide a basis for an action under Sections 1981 and 1983, persons who sustain such injury in connection with an adverse employment action may claim compensatory damages. *Cf. Carey*, 435 U.S. at 264 (requiring evidence of “actual injury” to receive compensation for emotional distress).

### **(iii) The ADEA & the EPA**

Liquidated damages are considered either compensatory or punitive damages. *See Shea v. Galazi Lumber & Constr. Co.*, 152 F.3d 729, 733-34 (7th Cir. 1998) (compensatory); *Lindsey v. Am. Cast Iron Pipe Co.*, 810 F.2d 1094, 1102 (11th Cir. 1987) (punitive). They are available up to the amount of back pay to be awarded for willful violations of the ADEA or EPA. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985). A violation is “willful” when “the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.” *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993) (applying this definition “to all disparate impact cases under the ADEA”).

Under the ADEA, the court must award liquidated damages once the plaintiff establishes the employer’s violations as willful. *See Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 398 (5th Cir. 2002). The ADEA allows an award of damages only for pecuniary benefits connected to the job, not for compensatory damages for mental anguish, pain, suffering, humiliation, and loss of employment. *Collazo v. Nicholson*, 535 F.3d 41, 44-45 (5th Cir. 2008).

Under the EPA, the court may not award liquidated damages if the employer can prove its act or omission was in good faith and it had reasonable grounds to believe such act or omission did not violate the EPA. *See Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 357 (4th Cir. 1994). However, the EPA does allow damages for mental and emotional distress for violations of its anti-retaliation provisions. *Moore v. Freeman*, 355 F.3d 558, 563 (6th Cir. 2004).

### **(iv) The ADA & the Rehabilitation Act**

The ADA allows compensatory and punitive damages except in reasonable accommodations cases, where the employer has made a good-faith—though ultimately unsuccessful—effort to reasonably accommodate the disabled employee, and has consulted with the employee seeking the accommodation. 42 U.S.C. § 12117(a); *id.* § 1981a(a)(3). Also, some courts have held that compensatory and punitive damages are unavailable for a retaliation claim brought under the ADA. *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1265 (9th Cir. 2009); *Kramer v. Banc of Am. Sec., L.L.C.*, 355 F.3d 961, 965 (7th Cir. 2004); *Bowles v. Carolina Cargo, Inc.*, 100 F. App’x 889, 890 (4th Cir. 2004).

### **(b) Compensatory Damages**

To recover compensatory damages, the plaintiff must submit proof of actual, non-economic injuries—such as emotional distress, pain and suffering, or harm to reputation—caused by the employer’s unlawful conduct. *Carey*, 435 U.S. at 264; *see, e.g., Williams v. Pharmacia, Inc.*, 137

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F.3d 944, 953-54 (7th Cir. 1998) (affirming \$250,000 compensatory-damage award in lost future earnings and diminished professional standing as a result of termination); *see also Patterson*, 90 F.3d at 936 (concluding that Title VII's standard of proof to establish compensatory damages is comparable to the Sections 1981 and 1983 standard to demonstrate emotional distress).

In the context of the EEOC, the Commission has determined that it may take the age of comparable awards into consideration when calculating current compensatory-damage awards, "to account for inflation and to reflect the present-day dollar value of comparable awards." *Lara G. v. Postmaster Gen.*, EEOC Request No. 0520130618 (June 9, 2017) (approving a \$10,000 increase to the Complainant's award given the nearly six-year gap between it and an earlier, comparable award). The holding in *Lara G.*, which relied on the Inflation Calculator from the Department of Labor's Bureau of Labor Statistics, could lead to substantial readjustments of compensatory-damage awards based on the present-day value of the awards (though some of these awards would be capped by the Title VII statutory cap limits). *See, e.g., Munno v. Dep't of Agriculture*, EEOC Appeal No. 01A01734 (Feb. 8, 2001) (\$250,000 emotional distress award would be readjusted to \$348,027); *Santiago v. Dep't of the Army*, EEOC Appeal No. 01955684 (Oct. 14, 1998) (\$125,000 emotional distress award would be readjusted to \$186,534); *April v. Glickman*, EEOC Appeal No. 01963775 (June 5, 1997) (\$30,000 emotional distress award would be readjusted to \$45,801).

### (i) Emotional Distress Evidentiary Threshold

Damages for emotional distress must be supported by competent evidence of genuine injury, though medical evidence is not necessary. *Heaton v. Weitz Co.*, 534 F.3d 882, 891 (8th Cir. 2008); *see also Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 339 F.3d 52, 63-64 (1st Cir. 2005) (noting that expert medical testimony is not a prerequisite for an emotional-distress award). The plaintiff's testimony may be sufficient so long as she offers specific facts as to the nature of her alleged emotional distress and its causal connection to the employer's alleged violation. *Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536, 546-47 (4th Cir. 2003).

For example, in *Heaton*, the Eighth Circuit found that the plaintiff's testimony sufficiently supported the jury's award of \$73,320 for emotional distress. 534 F.3d at 885. The plaintiff testified that following his termination, he felt "inadequate" and had no sense of identity; his reputation among his peers was damaged; he went to a psychologist and family counselor for help; and he began taking antidepressants, which he was still taking during trial and which caused him to suffer negative side effects, including sweating, nausea, and insomnia. *Id.* at 892-93.

### (ii) Factors Mitigating Amount of Damages

The difficulty of meeting the evidentiary threshold rises relative to the amount of damages sought. *See Annis v. Cnty. of Westchester*, 136 F.3d 239, 249 (2d Cir. 1998) (plaintiff's own testimony, by itself, was insufficient to support award of compensatory damages for emotional distress where no physical manifestations of distress were alleged, no affidavits or other evidence corroborated her claims that she attended counseling, and she remained in her job); *Giles*, 245 F.3d at 489 (plaintiff's own testimony was insufficient to support the award of \$300,000 for emotional distress).

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Courts will also compare the award with awards from similar cases in terms of the employer's conduct, the losses alleged by the plaintiff, and the quality of evidence presented to support the claims for damages. See *Thomas v. Tex. Dep't of Criminal Justice*, 297 F.3d 361, 363, 370-72 (5th Cir. 2002) (remitting \$100,000 Title VII award to \$50,000 after review of three cases where emotional distress damage awards were remitted to amounts below six figures). In addition, if a court finds the compensatory damages to be excessive and the plaintiff does not accept a remitter, the Seventh Amendment requires a new trial. *Hetzel v. Cnty. of Prince William*, 523 U.S. 208, 211 (1998).

### (iii) Eggshell Plaintiffs

The employer is liable for all harms it inflicted upon an eggshell plaintiff. See *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1286 (7th Cir. 1995) (finding that \$50,000 emotional distress award to terminated employee with terminal cancer was not excessive because the emotional burden on a person dying of cancer and unable to provide for his family "is considerably greater than that suffered by the ordinary victim of a wrongful discharge").

However, the plaintiff cannot recover damages for harm resulting from factors unrelated to the alleged discrimination that have caused emotional distress or other harm, such as prior injuries. Compare *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 506 (1st Cir. 1996) (affirming \$2500 compensatory damages award in sexual harassment case to plaintiff who had been sexually abused as a child, as it was difficult to differentiate between harm caused by childhood abuse and workplace harassment), and *Malandris v. Merrill Lynch, Peirce, Fenner & Smith Inc.*, 703 F.2d 1152, 1170 (10th Cir. 1981) (holding that employer was liable for compensatory damages because the aggravation of plaintiff's preexisting emotional distress was a foreseeable consequence of employer's conduct), with *Smith v. Monsanto Co.*, 9 F. Supp.2d 1113, 1118-19 (E.D. Mo. 1998) (finding \$500,000 emotional distress award excessive due to plaintiff's failure to account for how unrelated personal problems contributed to emotional distress).

### (c) Punitive Damages

Punitive damages are available for disparate treatment cases under Title VII, the ADA, and Sections 1981 and 1983 when the employer is found to discriminate against the plaintiff "with malice or with reckless indifference." 42 U.S.C. § 1981a(b); *Smith*, 461 U.S. at 56.

On the other hand, punitive damages are unavailable under the Rehabilitation Act and, in some circuits, in pattern or practice cases under Title VII. See *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415, 417 (5th Cir. 1998) (compensatory and punitive damages involve unique individual issues; thus, the ability to recover such damages requires proof of individual injury).

To recover punitive damages, the plaintiff must successfully impute liability to the employer for the alleged unlawful discrimination. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 539-46 (1999). The plaintiff also must show that the defendant engaged in the alleged discriminatory conduct with the knowledge that it might be in violation of federal anti-discrimination law. *Id.* at 536-40. The plaintiff need not show that the employer engaged in egregious or outrageous acts, nor need the plaintiff demonstrate the employer's actual knowledge

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that its conduct would violate federal anti-discrimination law; the employer's perceived risk that the conduct may violate federal law is sufficient. *See EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 513 (6th Cir. 2001).

The reasonableness of a punitive-damage award depends on "the degree of reprehensibility of the defendant's conduct." *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996). To determine reprehensibility, courts consider whether: (1) the harm was physical, not merely economic; (2) the conduct showed an indifference to, or a reckless disregard of, the health or safety of others; (3) the conduct's target was financially vulnerability; (4) the conduct was part of a larger pattern; and (4) the harm resulted from intentional malice or deception. *See id.* at 576-77. With respect to the award itself, besides reprehensibility courts will look at whether the amount is proportional to the harm actually suffered and the amounts awarded in comparable cases. *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 418 (2004). The worse the employer's conduct was, the more likely the court will view punitive damages as reasonable to punish or deter such conduct. *But see id.* at 429 (\$145 million punitive-damage award on \$1 million compensatory-damage judgment violated due process for being neither reasonable nor proportionate to the harms plaintiff suffered).

An employer demonstrates sufficient indifference to a plaintiff's rights to risk a punitive-damage award in cases where: (1) the employer's conduct was so clearly based upon unlawful factors that a statutory violation was obvious, (2) the employer persistently failed to remedy a situation in which an employee's rights were being violated, or (3) the employer exhibited other conduct that was extremely offensive. For example, in *EEOC v. Federal Express Corp.*, 513 F.3d 360 (4th Cir. 2008), the Fourth Circuit affirmed the \$8000 compensatory-damage award and \$100,000 punitive-damage award to a hearing-impaired package-handler who alleged his former employer failed to reasonably accommodate him under the ADA. *Id.* at 363-64. The plaintiff was denied the accommodations necessary for him to understand and participate in employee meetings and training sessions on important subjects such as workplace safety, handling dangerous goods, interpreting hazardous labels, and potential anthrax exposure. *Id.* at 365-68. The court concluded that the award of punitive damages was justified because management, despite its awareness of ADA requirements, was indifferent as to whether its failure to accommodate could jeopardize not just his safety but also the safety of others. *Id.* at 373.

### **(d) Defenses**

The employer may (1) avoid compensatory and punitive damages by presenting a mixed-motive defense; (2) avoid punitive damages by presenting a good-faith defense; or (3) reduce punitive damages by presenting due process concerns.

#### **(i) Mixed-Motive Defense**

Under Title VII, an employment practice that uses a prohibited characteristic (race, color, religion, sex, or national origin) as a "motivating factor" is unlawful. 42 U.S.C. § 2000e-2(a)(1), (m). However, in cases where the employer relies on the absence of "but-for" causation as an affirmative defense, arguing that discrimination was merely one of its motivating factors, the plaintiff's damages are limited to declaratory relief, injunctive relief, and attorney's fees and costs directly related to bringing the claim. *See id.* 2000e-5(g)(2)(B); *see also Landgraf*, 511 U.S. at

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249, 251 (indicating that plaintiffs who demonstrate employer liability for discrimination in mixed-motive cases are entitled to limited relief). Employers thus may avoid liability for compensatory and punitive damages, as well as any order requiring the plaintiff's "admission, reinstatement, hiring, promotion, or payment," 42 U.S.C. 2000e-5(g)(2)(B)(ii), by presenting evidence that it would have taken the same action regarding the plaintiff's employment even in the absence of a discriminatory motive. *But see Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100-01 (2003) (holding that plaintiff need not present direct evidence of discrimination to prove employment discrimination in Title VII mixed-motive case).

Furthermore, under § 2000e-3(a), the plaintiff must prove Title VII retaliation claims according to traditional principles of but-for causation; that is, "the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Univ. of Tex. Sw. Med. Ctr. V. Nassar*, 133 S.Ct. 2517, 2533 (2013). *See also Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011) (finding that if a supervisor performs an act motivated by anti-military animus that is intended to cause an adverse employment action, and it serves as the but-for cause of the employment action, the employer is liable under USERRA); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (concluding that the ADEA requires proof that age was the but-for cause of the employer's allegedly prohibited employment action taken against the plaintiff).

### (ii) Good-Faith Defense

When the employer's "managerial agent" committed the discriminatory action, the employer may challenge punitive-damage claims by demonstrating that it acted in good faith to comply with anti-discrimination laws. *See Kolstad*, 527 U.S. at 544 (holding that in the punitive damages context, an employer may not be vicariously liable for discriminatory employment decisions of managerial agents where such decisions are contrary to the employer's good faith efforts to comply with Title VII); *see also Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2439 (2013) (holding that, for purposes of vicarious liability under Title VII, an employee is a managerial agent only if she "is empowered by the employer to take tangible employment actions against the [plaintiff]"). For example, in *Kolstad*, the Supreme Court held that where an employer has made good-faith efforts to accommodate an employee's disability, punitive damages may not be awarded. 527 U.S. at 544-45.

Furthermore, in *Dominic v. DeVilbiss Air Power Co.*, 493 F.3d 968 (8th Cir. 2007), an employee established sexual harassment and retaliation at trial and was awarded \$113,000 in compensatory damages and \$50,964.51 in attorney fees. *Id.* at 973. Granting the employer's appeal of the punitive damages award, the Eighth Circuit held that punitive damages were not warranted because the employer promptly responded to the plaintiff's harassment complaint with good-faith efforts. *Id.* at 976. The employer, which had a zero-tolerance sexual harassment policy, initiated four investigations into the plaintiff's complaint against his supervisor. *Id.* at 974. The employer also hired outside employment law specialists who determined the employer's internal investigations were proper and thorough. *Id.* at 974-75.

### (iii) Due Process Concerns

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The employer may challenge awards of punitive damages on due process grounds when the ratio of the amount of compensatory damages to that of punitive damages awarded to the plaintiff is more than a single digit. See *State Farm*, 538 U.S. at 425 (“[F]ew awards exceeding a single-digit ratio between compensatory and punitive damages will satisfy due process.”). Nevertheless, under Title VII, punitive damages can be awarded even in the absence of compensatory damages. *Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 535 (6th Cir. 2005) (dismissing constitutional concern); *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 359 (2d Cir. 2001); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010-11 (7th Cir. 1998).

In harassment cases, the employer should pay close attention to jury instructions regarding the basis of punitive damages. In *Phillip Morris v. Williams*, 127 S. Ct. 1057 (2007), the Supreme Court held that the Due Process Clause forbids basing a punitive damage award on conduct that did not affect the plaintiff. *Id.* at 1063. The Court drew a line between allowing evidence of the employer’s similar conduct to non-parties to show the reprehensibility of the conduct to the plaintiff and allowing that same evidence to serve as the basis of the punitive damages award. *Id.* at 1064. In fact, in *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004), the Eighth Circuit remitted an award of punitive damages to a Title VII plaintiff where the award was based, in part, on proof of the employer’s discriminatory conduct toward other employees. *Id.* at 797-98.

### **3. INJUNCTIVE AND AFFIRMATIVE RELIEF**

Injunctive and affirmative relief is equitable relief that the court may grant to plaintiffs under Title VII, the ADA, the ADEA, Sections 1981 and 1983, and the Rehabilitation Act. However, with respect to Title VII class actions, plaintiffs may face certification difficulties if they seek monetary relief in addition to declaratory or injunctive relief. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (holding that a nationwide class of 1.5 million female employees was improperly certified under Federal Rule of Civil Procedure 23(b)(2) because their back-pay claims were not “incidental” to the declaratory or injunctive relief sought).

#### **(a) Injunction Against the Use of Specific, Unlawful Employment Practices**

Courts have enjoined the use of specific, discriminatory employment practices, which include but are not limited to height and weight requirements, age limits, scored tests, and educational requirements, as well as ordered affirmative measures to remedy unlawful practices. The scope of a prohibitory injunction is determined by the scope of the conduct found unlawful.

Where there is evidence of consistent past discrimination, the employer may avoid the entry of injunctive relief by establishing that further non-compliance is unlikely. *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1519 (9th Cir. 1989); *Cox*, 784 F.2d at 1561. As such, the employer may show that:

- The employer’s discrimination ceased well before entry of judgment against it, see, e.g., *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1401 (4th Cir. 1990) (affirming denial of injunctive relief because employer had ceased its challenged practice of paying “head of household” salary supplement to be in compliance with EPA);

- The plaintiff or perpetrator is no longer employed by the employer and is unlikely to be reinstated, *see, e.g., Cardenas v. Massey*, 269 F.3d 251, 265 (3d Cir. 2001) (denying injunction requiring employer to implement specific anti-discrimination policies because plaintiff was no longer employed there); *Spencer v. Gen. Elec.*, 894 F.2d 651, 660-61 (4th Cir. 1990) (affirming denial of injunction against sexual harassment where harassing supervisor was no longer employed and company had implemented comprehensive policy against sexual harassment); or
- Injunctive relief is unnecessary to prevent future noncompliance. But courts nevertheless retain the power to enter injunctive relief when it determines such relief is necessary fully remedy the alleged discrimination and prevent recurrence. *See United States v. Gregory*, 871 F.2d 1239, 1246 (4th Cir. 1989) (observing that the district court has authority to grant injunctive relief even after unlawful practices apparently have ceased).

### **(b) Make-Whole Relief**

When discrimination is found, the court must provide the plaintiff with “make-whole relief” to restore her as nearly as possible to the position she would have occupied absent the discrimination. *Albemarle Paper*, 422 U.S. at 418. The burden of limiting the remedy rests with the employer. *Smallwood v. United Airlines, Inc.*, 728 F.2d 614, 615 n.5 (4th Cir. 1984).

Specific make-whole relief includes hiring, transfer, promotion, reinstatement, retroactive seniority, tenure, restoration of benefits, salary adjustment, expunging adverse material from personnel files, letters of commendation, and reasonable accommodation. *See, e.g., Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1214 (2d Cir. 2003) (affirming award of promotion with commensurate salary increase); *Ralph v. Lucent Techs., Inc.*, 135 F.3d 166, 172 (1st Cir. 1998) (affirming award of accommodation permitting employee to work part-time on temporary basis); *Hartman v. Duffey*, 88 F.3d 1232, 1239 (D.C. Cir. 1996) (ordering set number of slots to be filled by job applicant members); *In re Pan Am. World Airways, Inc.*, 905 F.2d 1457, 1460, 1464-65 (11th Cir. 1990) (ordering reinstatement for flight attendant discharged because of unlawful pregnancy policy); *Harrison v. Dole*, 643 F. Supp. 794, 795, 797 (D.D.C. 1986) (ordering transfer to position with greater potential for upward mobility); *EEOC v. Rath Packing Co.*, 787 F.2d 318, 334-35 (8th Cir. 1986) (reversing denial of retroactive seniority to victims of hiring discrimination, even though such remedy would require bumping long-term employees to inferior jobs and could impair employee morale).

A court may give make-whole relief only to actual victims of discrimination; it may not order those remedies for an individual who was not an actual victim, even if the defendant could have provided that relief voluntarily. *Fire Fighters Local 1784 v. Stotts*, 467 U.S. 561, 576 n.9 (1984). However, the provision does not preclude a consent decree that benefits persons who were not actual victims of discrimination. *Fire Fighters Local 93 v. City of Cleveland*, 478 U.S. 501, 515 (1986).

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### (i) Retroactive Seniority

Retroactive seniority for victims of discrimination in hiring is a presumptively correct remedy and can only be denied in unusual circumstances. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 780 n.41 (1976). Adverse impact on “other, arguably innocent, employees” is not a reason to deny such relief. *Id.* at 774.

### (ii) Reinstatement

Restatement is a preferred remedy in cases of discriminatory discharge, particularly when such cases involve alleged violations of procedural due process. *E.g.*, *Barachkov v. Lucido*, 151 F. Supp. 3d 745, 753-55 (E.D. Mich. 2015) (reinstatement was appropriate remedy for plaintiffs’ Section 1983 action where employer terminated their employment without a hearing). *See generally Carey*, 435 U.S. at 259 (holding that any damages awarded for a constitutional right violation “should be tailored to the interests protected by the particular right in question”).

However, reinstatement will not be ordered where it would produce excessive hostility. *See supra*, 1(b) Front Pay. It is also inappropriate when:

- Some intervening nondiscriminatory event would have ended the plaintiff’s employment, *see, e.g.*, *McKennon*, 513 U.S. at 361-62 (holding that after-acquired evidence of misconduct bars prospective relief); *Neufeld v. Searle Labs.*, 884 F.2d 335, 342 (8th Cir. 1989) (holding that employer can avoid reinstatement order by proving that “some new development—such as a sales force reduction or termination of operations—would have ended [plaintiff’s] employment”);
- Substantial changes in the company have made reinstatement impracticable, *see, e.g.*, *Kelewa v. Jim Meagher Chevrolet, Inc.*, 952 F.2d 1052, 1055 (8th Cir. 1992) (holding that employer’s current adverse financial position militated against award of reinstatement or front pay); *Williams v. Pharmacia Ophthalmics, Inc.*, 926 F. Supp. 791, 795 (N.D. Ind. 1996) (declining to order reinstatement in light of pending merger and reorganization, which would result in elimination of plaintiff’s position);
- The employer in a mixed-motive case proves it “would have taken the same action in the absence of the impermissible motivating factor,” 42 U.S.C. § 2000e-5(g)(2)(B) (in mixed-motive cases, courts may grant attorney’s fees, declaratory relief, and injunctive relief, except orders requiring any admission, reinstatement, hiring, or promotion);
- The plaintiff is not capable of performing the job in question, *see, e.g.*, *Thurman v. Yellow Freight Sys.*, 90 F.3d 1160, 1171-72 (6th Cir. 1996) (affirming denial of reinstatement where plaintiff injured himself and was unable to do heavy lifting required for the position); or

- The relief sought would place the plaintiff in a better position than she would have occupied in the absence of discrimination, *see, e.g., McKnight v. Gen. Motors, Inc.*, 973 F.2d 1366, 1370-71 (7th Cir. 1992) (affirming denial of reinstatement where plaintiff sought placement in different job and relocation in new city).

The plaintiff generally will not be reinstated until the next job becomes available; until that time, the employer is responsible for back pay or front pay. *See Fire Fighters Local 1784*, 467 U.S. at 579 n.11 (“[R]elief for actual victims does not extend to bumping employees previously occupying jobs.”); *Briseno v. Cent. Technical Cmty. Coll. Area*, 739 F.2d 344, 348 (8th Cir. 1984) (holding that until plaintiff is placed in a position comparable to the one he was wrongfully denied, he is entitled to monthly payments minus any amount he earns in mitigation of damages). However, courts are more likely to order bumping when the employer has exhibited bad faith, such as evidence of a pattern of discriminatory conduct or violation of a settlement agreement. *See Lander v. Lujan*, 888 F.2d 153, 156 (D.C. Cir. 1989) (bumping is necessary to place plaintiff in a unique, high-level job with no reasonable substitute); *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 121 (4th Cir. 1983) (bumping is permissible to remedy employer’s noncompliance with prior judgment awarding plaintiff the next available vacancy).

### **(c) Preliminary Injunctions**

Preliminary injunctive relief may be ordered to preserve the status quo pending the outcome of litigation, while permanent injunctive relief may be ordered to prevent further violations. The plaintiff must show (1) a strong likelihood of success on the merits; (2) the presence of irreparable harm to the plaintiff; (3) harm to others; and (4) whether the public interest will be furthered by issuing an injunction.

An employer’s retaliatory action that has a chilling effect on the employee’s ability to exercise her own rights is sufficient to show irreparable harm. *See Marx v. Jackson*, 833 F.2d 1121, 1125-28 (3d Cir. 1987) (plaintiff can show irreparable harm where retaliatory discharge threatens her ability to prove her case by intimidating potential witnesses). Loss of a job or job opportunity is insufficient to demonstrate irreparable harm. *See, e.g., Cox v. City of Chi.*, 868 F.2d 217, 223 (7th Cir. 1989) (delay in promotion is not irreparable harm); *Castro v. United States*, 775 F.2d 399, 408 (1st Cir. 1985) (termination from job is not irreparable harm); *Holt v. Cont’l Grp., Inc.*, 708 F.2d 87, 90-91 (2d Cir. 1983) (“[I]rreparable harm is not established in employee discharge cases by financial distress or inability to find other employment, unless truly extraordinary circumstances are shown.” (citing *Sampson v. Murray*, 415 U.S. 61, 91-92 & n.68 (1974))). However, courts are divided on whether financial hardship, humiliation, emotional distress, damage to reputation, or diminished ability to obtain other employment is sufficient to demonstrate irreparable harm. *Compare Stewart v. U.S. Immigration & Naturalization Serv.*, 762 F.2d 193, 199-200 (2d Cir. 1985) (insufficient), *with EEOC v. Chrysler Corp.*, 733 F.2d 1183, 1186 (6th Cir. 1984) (sufficient).

### 4. ATTORNEY'S FEES

Reasonable attorney's fees are available to a prevailing party under Title VII the ADA, the ADEA, the EPA, and the Family and Medical Leave Act ("FMLA"). In addition, the Equal Access to Justice Act ("EAJA") allows a court to award attorney's fees to a party prevailing in a non-tort civil action against the United States, unless the court finds that the government's position "was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983) (requiring that district courts disallow a prevailing party's claims for "excessive, redundant, or otherwise unnecessary" expenses).

Only the prevailing party, not her attorney, has standing to seek attorney's fees under § 1988 or Title VII. Neither a lawyer who represents herself in a successful civil rights action nor a pro se plaintiff may recover attorney's fees. *See Kay v. Ehrler*, 499 U.S. 432, 435-38 (1991); *Hawkins*, 163 F.3d at 694-95.

#### (a) Who Is a Prevailing Plaintiff?

Under *Hensley*, a "prevailing" plaintiff is entitled to recover reasonable attorney's fees. 461 U.S. at 429. The plaintiff must demonstrate she has succeeded on a "significant issue" and obtained some of the relief sought, which "materially alters the legal relationship between the parties." *See Farrar v. Hobby*, 506 U.S. 103, 104 (1992); *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-93 (1989). Namely, the plaintiff must receive (1) damages of some significance relative to what was sought in the case, or (2) nonpecuniary relief that secures important statutory or constitutional rights on behalf of the plaintiff or the public at large. *See Karraker v. Rent-A-Center, Inc.*, 492 F.3d 896, 899-900 (7th Cir. 2007) (holding that plaintiffs who obtained an injunction ordering employer to discard plaintiffs' personality test results were a prevailing party because the injunctive relief had value to it); *cf. Champion Produce, Inc. v. Ruby Robinson Co., Inc.*, 342 F.3d 1016, 1025 (9th Cir. 2003) (holding that plaintiff was not the prevailing party because its recovery was relatively small compared to the damages sought); *Pedigo v. P.A.M. Transp., Inc.*, 98 F.3d 396, 398 (8th Cir. 1996) (holding that, despite employer's declaration that it discriminated against under ADA, legal relationship between parties remained unaltered because plaintiff no longer worked for employer).

A party prevails only when she obtains relief in a judgment or settlement enforced by a court through a consent decree, not when she achieves the desired result though the other party's voluntary change in response to her lawsuit. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 601, 603 (2001); *e.g., Bill M. v. Nebraska Dep't of Health & Human Res.*, 570 F.3d 1001 (8th Cir. 2009) (holding that plaintiffs who obtained their desired relief through a settlement agreement are not prevailing parties because the court did not retain jurisdiction over the settlement agreement or give any indication of approval or disapproval). *But see Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1135 & n.5 (9th Cir. 2002) (holding that a party to a legally enforceable private settlement agreement is a prevailing party, disposing of *Buckhannon's* holding as mere dicta). In addition, a party does not prevail if the preliminary injunction she initially obtained is subsequently "reversed, dissolved, or otherwise undone by the final decision in the same case." *Sole v. Wyner*, 55 U.S. 74, 83 (2007).

### **(b) Grounds for Denying or Limiting Award of Attorney's Fees**

The defendant carries the burden to show special circumstances that warrant the denial of attorney's fees to a prevailing plaintiff. For example, while the award of nominal damages may confer the plaintiff with "prevailing party" status, the court nevertheless may deny a fee award. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990) (citations omitted) ([F]ees are available only to a party that 'prevails' by winning the relief it seeks."); *cf. Pino v. Locascio*, 101 F.3d 235, 239 (2d Cir. 1996) (holding that attorney's fees and costs are not appropriate when plaintiff recovered only nominal damages). In addition, the court has discretion to deny fees for a plaintiff's unsuccessful or limited efforts or claims. *Hensley*, 461 U.S. at 440 ("[W]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained."); *e.g., Wash. All. Of Tech. Workers v. U.S. Dep't of Homeland Sec.*, No. 16-5235, 2017 WL 2294175, at \*8-9 (D.C. Cir. May 26, 2017) (upholding reduced EAJA fee awards in light of plaintiff's multiple unsuccessful claims and the narrow success it achieved on its one successful claim).

Courts have found that in Title VII mixed-motive cases, a plaintiff can obtain an award of attorney's fees even where the employer is not liable for damages. *See Costa v. Desert Palace*, 299 F.3d 838, 850 (9th Cir. 2002), *aff'd on other grounds*, 539 U.S. 90 (2003). However, under the ADEA, attorney's fees are unavailable in mixed-motive cases. Unlike Title VII, the ADEA incorporates the fee provisions of the Fair Labor Standards Act ("FLSA"), which require a final judgment in the plaintiff's favor. *See Donovan v. Dairy Farmers of Am., Inc.*, 53 F. Supp.2d 194, 198-99 (N.D.N.Y. 1999) ("[E]ven if recovery of attorney's fees in mixed-motive ADEA cases seems reasonable, this court cannot create such a precedent when what truly is required is congressional action.").

### **(c) Prevailing Defendants**

The defendant may receive an award of attorney's fees after prevailing in a suit under Title VII or Section 1988. However, the defendant does not need to receive a favorable ruling on the merits to be considered a "prevailing party" under Title VII's fee provision. *CRST Van Expedited, Inc. v. EEOC*, 136 S.Ct. 1642, 1646 (2016). All the defendant needs to do is prevent the plaintiff from obtaining a material change in the relationship between the parties marked by "judicial imprimatur." *Id.* (emphasis and citations omitted). "The defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason." *Id.* at 1651.

Consequently, a court may award fees if it determines that the plaintiff's claim was "frivolous, unreasonable, or without foundation," or that the "plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978); *see, e.g., C.W. v. Capistraon Unified Sch. Dist.*, 784 F.3d 1237, 1247-48 (9th Cir. 2015) (claim barred by state sovereign immunity under Eleventh Amendment); *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 152 (4th Cir. 2014) (claim effectively moot when it was first filed). To make this determination, courts have identified three factors: (1) whether the plaintiff established a prima facie case; (2) whether the defendant offered to settle; and (3) whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits.. Thus, the defendant likely will not recover attorney's fees when the plaintiff's claims have survived summary judgment, the plaintiff

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has established a prima facie case of discrimination, or the plaintiff received a right-to-sue letter from the EEOC, even if the defendant ultimately prevails. In addition, under the ADEA, the defendant may only receive a fee award when the plaintiff is found to have brought her suit in bad faith. See *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 686 (5th Cir. 2001).

### (d) Calculating Attorney's Fees Awards

#### (i) The Lodestar Method

Attorney's fees are computed using the lodestar method, which multiplies the number of hours that reasonably could have been spent on the litigation by a reasonable hourly rate. *Comm'r v. Banks*, 543 U.S. 426, 433 (2005); *Hensley*, 461 U.S. at 433. In determining the number of hours and appropriate hourly rates, courts consider factors such as (1) the amount of time and work the case required; (2) the degree of skill or experience required by or exhibited in litigating the case; (3) the fees customarily charged by attorneys with similar experience; (4) the amount of fees awarded in comparable cases; (5) the amount of redundancy or waste apparent in the attorney's time records; and (6) the desirability of the representation. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717, 719 (5th Cir. 1974); see, e.g., *Barnes v. Cincinnati*, 401 F.3d 729, 746-47 (6th Cir. 2005) (concluding that the district court's use of a multiplier of 1.75 to increase the award of attorney's fees was reasonable because of the "novelty and difficulty" presented by the case required great skill to conduct it properly).

The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. *Covad Commc'ns Co. v. Revonet, Inc.*, 267 F.R.D. 14, 29 (D.D.C. 2010) ("The fee petitioner's application must be sufficiently detailed to allow the Court to determine, independently, that the hours claimed are justified."). Inadequate documentation may be a basis for the reduced fee. See *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 173 (2d Cir. 1998) (twenty percent reduction of fees in ADEA case due in part to inadequate record).

#### (1) Rates

The hourly rate generally is determined through a survey and comparison of rates among the community of attorneys in the court's jurisdiction with comparable experience, often with reference to rates appearing in similar cases within the jurisdiction. See *Blum v. Stenson*, 465 U.S. 886, 893 (1984) (citing The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988).

#### (2) Hours

"When the facts and legal theories overlap . . . and when the prevailing party pursued alternative legal theories in good faith, rejection of one theory 'is not a sufficient reason for reducing a fee.'" *Sturgill v. United Parcel Serv.*, 512 F.3d 1024, 1036 (8th Cir. 2008) (quoting *Hensley*, 461 U.S. at 434). Courts will disallow time viewed as duplicative or otherwise unnecessary or wasteful. *Stark v. PPM America, Inc.*, 354 F.3d 666, 674 (7th Cir. 2004); see, e.g., *Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245, 1258 (10th Cir. 2005) ("Time spent reading background material designed to familiarize an attorney with an area of law is presumptively unreasonable."). Attorney's fees for work done in connection with administrative proceedings

may be awarded if the “proceedings are part of or followed by a lawsuit.” *N.C. Dep’t of Transp. v. Crest St. Cmty. Council*, 479 U.S. 6, 14-15 (1986). Fees connected to the preparation of an attorney’s fee application are also considered a legitimate portion of an award of attorney’s fees. *See Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1183-84 (2d Cir. 1996).

(ii) Adjustments to the Lodestar

Courts also consider the prevailing party’s degree of success when tasked with adjusting awards of attorney’s fees. Contingent fee arrangements between plaintiffs and their attorneys do not limit the amount of attorney’s fees that may be recovered in connection with a case. *See Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989). Nor does the risk of loss inherent in contingent fee arrangements serve as the basis to enhance the amount of attorney’s fees. *City of Burlington v. Dague*, 505 U.S. 557, 562-63 (1992).

The award of attorney’s fees may also be truncated by the plaintiff’s rejection of a reasonable offer of settlement. *See Marek v. Chesny*, 473 U.S. 1, 10-11 (1985). Under Rule 68 of the Federal Rules of Civil Procedure, the fees awarded to the plaintiff may be limited to fees related to work done prior to an offer to allow a consent judgment for a particular amount to be entered against the defendant, if the final judgment obtained by the plaintiff is not more favorable than the defendant’s offer. *See id.* at 9.

(e) Tax Issues Regarding Awards of Attorney’s Fees

A contingent fee agreement is treated “as an anticipatory assignment to the attorney of a portion of the client’s income from any litigation recovery,” regardless of the speculative nature of the claim’s ultimate value. *Comm’r*, 543 U.S. at 434. Thus, the portion of recovery that the litigant later pays as a contingent fee should be viewed as the litigant’s income, regardless of any state laws granting attorneys a superior lien on the contingent-fee portion of the recovery. *Id.* at 435 (“[I]ncome should be taxed to the party who earns the income and enjoys the consequent benefits.”). While the portion of the recovery paid to the attorney may be deductible, it is not excludable from the gross income of the litigant. *Id.* at 437. However, there is some uncertainty as to whether attorney’s fees awarded under a federal fee-shifting statute would constitute gross income or taxable income. *See Thompson v. Astrue*, No. 06-CV-237A, 2009 U.S. Dist. LEXIS 19035, at \*6 (W.D.N.Y. Mar. 3, 2009) (citing *Comm’r*, 543 U.S. at 439).