

GRASPING THE INTANGIBLE: A GUIDE TO ASSESSING NONPECUNIARY DAMAGES IN THE EEOC ADMINISTRATIVE PROCESS

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INTRODUCTION

Title VII of the Civil Rights Act of 1964¹ stands as one of the most significant legacies of the civil rights movement. Intended to remedy the injustice of workplace discrimination,² Title VII embodies the

1. Pub. L. No. 88-352, §§ 701-715, 716(c), 717-718, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994)).

2. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (observing that purpose of Title VII was “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees”).

movement's pursuit of equal opportunity in employment. It covers nearly every aspect of the employer-employee relationship, prohibiting discrimination on the basis of race, color, religion, sex, or national origin.³ To administer and enforce its broad proscriptions against employment discrimination, Title VII established the Equal Employment Opportunity Commission ("EEOC" or "Commission") vested with the authority to investigate and resolve discrimination complaints.⁴ Under Title VII, an aggrieved individual can sue in federal district court once the EEOC finds probable cause to believe the charge is true and mediation of the complaint fails.⁵ As originally enacted, Title VII authorized only equitable relief for discrimination victims.⁶

The promise of equal employment opportunity remained unfulfilled, however, nearly three decades after the passage of Title VII.⁷ Employment discrimination persisted, while criticism of Title VII's remedial scheme mounted.⁸ Spurred by Supreme Court rulings perceived as eroding civil rights protection,⁹ those advocating expanded Title VII remedies stressed the need to adequately compensate discrimination victims while making discriminatory practices prohibitively expensive for employers.¹⁰ The ensuing debate culminated in the enactment of the Civil Rights Act of 1991¹¹ ("1991 Act").

The 1991 Act amended Title VII to provide victims of discrimination with compensatory and punitive damages.¹² In addition, the 1991 Act entitles employees seeking damages to demand a jury trial.¹³ By "shift[ing]" the emphasis of Title VII from conciliation

3. See 42 U.S.C. § 2000e-2 (defining "unlawful employment practice" as failing or refusing to hire, discharging, or otherwise discriminating with respect to "compensation, terms, conditions, or privileges of employment, because of . . . race, color, sex, or national origin").

4. See *id.* §§ 2000e-4 to 2000e-12.

5. See *id.* § 2000e-5(f).

6. Pub. L. No. 88-352, § 706(g), 78 Stat. 259 (codified as amended at 42 U.S.C. § 2000e-5(g)).

7. See 137 CONG. REC. H3857 (daily ed. June 5, 1991) (statement of Rep. Lent) (admitting that although great progress has been made since Civil Rights Act of 1964, more needs to be done to eradicate workplace discrimination).

8. See 137 CONG. REC. H3480 (daily ed. May 22, 1991) (statement of Rep. Hink) (decrying remedial scheme of Title VII because victims of discrimination were entitled only to back pay or reinstatement).

9. See *infra* Part I.A (discussing events leading to passage of Civil Rights Act of 1991).

10. See *infra* Part I.B.1 (examining rationale for expanded remedial scheme and compensatory damages under Title VII).

11. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in various sections of 29 U.S.C. and 42 U.S.C.).

12. See Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a (1994).

13. See *id.* § 102(c), 42 U.S.C. § 1981a(c).

with equitable remedies to litigation with tort-like damage awards,"¹⁴ the 1991 Act effected a radical change in the nature of employment discrimination law.¹⁵

Unclear at first was the 1991 Act's impact on the administrative process¹⁶ established under Title VII to adjudicate equal employment opportunity ("EEO") complaints by federal employees.¹⁷ Although the 1991 Act permits recovery of compensatory damages in Title VII court actions,¹⁸ it is silent on whether compensatory damages are available in administrative proceedings. The EEOC resolved this issue

14. Maj. Charles B. Hernicz, *The Civil Rights Act of 1991: From Conciliation to Litigation—How Congress Delegates Lawmaking to the Courts*, 141 MIL. L. REV. 1, 4 (1993).

15. See *United States v. Burke*, 504 U.S. 229, 241 n.12 (1992) (expressing belief that "Congress' decision to permit jury trials and compensatory damages under [Title VII as amended by the Civil Rights Act of 1991] signals a marked change in its conception of the injury redressable by Title VII").

16. See 42 U.S.C. § 2000e-16 (codifying § 11 of The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 111, which amended the Civil Rights Act of 1964 to cover federal employees). Section 2000e-16 authorizes the EEOC to promulgate rules and regulations for the enforcement of Title VII in the federal sector. See *id.* § 2000e-16(b); see also 29 C.F.R. § 1614 (1996) (enumerating administrative procedures for processing complaints filed by federal employees).

17. See Charles W. Hemingway, *A Review of Administrative Compensatory Damage Award Decisions Under the Civil Rights Act of 1991*, 41 FED. B. NEWS & J. 688, 689 (1994) ("During most of the first year after the [1991 Act] took effect, the EEOC grappled with whether Congress intended that compensatory damages be awarded to federal employees at the administrative stage of discrimination complaint processing (i.e., before the complainant sought relief in a federal court).").

For those unfamiliar with the administrative complaint process for federal employees, a brief outline of the procedure is in order. The employee initiates the process by contacting an agency EEO counselor and filing an informal complaint within 45 days after the alleged incident. See 29 C.F.R. § 1614.105(a)(1). Thirty to 90 days of informal investigation and mediation follow. See *id.* § 1614.105(e)-(f). During this period, counselors advise the complainant of his rights and responsibilities in an effort to resolve the matter. See *id.* § 1614.105(a)-(b). No later than 15 days after the conclusion of informal counseling, the employee must file a formal complaint, see *id.* § 1614.106(b), which the agency either may accept or dismiss. See *id.* § 1614.107. Should the agency elect to dismiss the complaint, the employee has 30 days to appeal the decision to the EEOC Office of Federal Operations ("OFO"), the division of the EEOC responsible for administering the complaint process for federal sector employees. See *id.* §§ 1614.402(a), 403(a). Should the agency choose to accept the complaint, it must complete an investigation and issue a report to the complainant within 180 days. See *id.* § 1614.108(e). The complainant then has 30 days to request a hearing with an EEOC administrative judge ("AJ"). See *id.* If the complainant declines to do so, the agency has 60 days to issue a final agency decision ("FAD") resolving the complaint. See *id.* § 1614.110. In the event that the complainant does request a hearing, an EEOC AJ will hear the case and enter a finding as to the alleged discrimination and the appropriate relief. See *id.* § 1614.109(g) (ordering final decision within 180 days unless AJ has good cause for granting extension). The agency then issues its FAD within 60 days of the AJ's determination. See *id.* § 1614.110. Once the agency has issued its FAD, the complainant has 30 days to appeal the decision to the OFO. See *id.* § 1614.402(a). Finally, the complainant may appeal the OFO's ruling to the EEOC commissioners by filing within 30 days of the OFO decision a request to reopen and reconsider. See *id.* § 1614.407(b). If the EEOC declines to reconsider the complaint, or more than 120 days pass from instigation of the complaint, the complainant may seek relief in federal district court. See *id.* § 1614.410.

18. See Civil Rights Act of 1991 § 102(a), 42 U.S.C. § 1981a(1) (1994).

with its holding in *Jackson v. United States Postal Service*,¹⁹ interpreting the 1991 Act as affording compensatory damages at the administrative stage of discrimination charge processing.²⁰

EEOC administrative judges ("AJ") and federal agency EEO practitioners, faced with the amalgam of tort and employment discrimination law created by the 1991 Act, reacted to the *Jackson* decision with consternation. As one commentator remarked, the introduction of "tort law concepts" to the analysis of discrimination complaints "troubled the federal legal, EEO and personnel communities to no end, and all . . . looked to the EEOC for guidance."²¹

The Commission responded to these concerns by developing an analytical framework for addressing compensatory damages issues.²² With regard to assessing nonpecuniary losses in particular, the EEOC articulated a standard for gauging an appropriate award²³ and indicated it would rely on cases awarding nonpecuniary damages under other civil rights statutes for guidance.²⁴ In only a few cases, however, has the Commission actually quantified an appropriate award. Of the nearly 200 reported EEOC decisions that addressed the issue of compensatory damages, only five determined that a specific monetary award constituted adequate compensation for intangible injuries stemming from discrimination.²⁵

19. E.E.O.C. No. 01923399, 93 F.E.O.R. 3062 (1992).

20. *Jackson v. United States Postal Serv.*, E.E.O.C. No. 01923399, 93 F.E.O.R. 3062, at XII-185 (1992).

21. Hemingway, *supra* note 17, at 688; see ERNEST C. HADLEY, A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW & PRACTICE 1032 (1996) ("Agencies and complainants alike have long awaited some definitive rulings on the part of the EEOC that would begin to take compensatory damages out of the realm of theory and into the realm of actual dollars and cents.").

22. See EEOC Dec. No. 915.002, *Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991*, 1992 WL 189089 (July 14, 1992) [hereinafter *EEOC Enforcement Guidance*].

23. See *Carpenter v. Department of Agric.*, 95 F.E.O.R. 3229, at XII-147 (1995) (requiring that compensatory damage award satisfy two goals: "that it not be 'monstrously excessive' standing alone and that it be consistent with similar awards made in similar cases" (quoting *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989))).

24. See *EEOC Enforcement Guidance*, *supra* note 22, at *11 n.13 ("Cases awarding compensatory . . . damages under other civil rights statutes will be used for guidance in analyzing the availability of damages under [the 1991 Act].").

25. Search of WESTLAW, FLB library, EEOC file (Aug. 9, 1996) (search for cases citing *Jackson v. United States Postal Serv.*, E.E.O.C. No. 01923399 (Nov. 12, 1992)). The EEOC has issued 187 rulings (including appellate decisions by the EEOC OFO) addressing the issue of compensatory damages. Of those, five determined a finite award for intangible injuries. See *Smith v. Department of Defense*, E.E.O.C. No. 01943844, 96 F.E.O.R. 3164, at XII-194 (1996) (awarding \$25,000 for emotional distress stemming from sexual harassment); *Lawrence v. United States Postal Serv.*, E.E.O.C. No. 01952288, 96 F.E.O.R. 3150, at XII-135 (1996) (concluding victim of sexual harassment was entitled to \$3000 for mental anguish and emotional distress); *Wallis v. United States Postal Serv.*, E.E.O.C. No. 01950510, 96 F.E.O.R. 3044, at XII-153 (1995) (awarding \$50,000 for nonpecuniary damages in mental disability discrimination and reprisal case); *Carpenter v. Department of Agric.*, E.E.O.C. No. 01945652, 95 F.E.O.R. 3229, at XII-147

Given the inherent uncertainty of ascribing monetary value to pain and suffering²⁶ or emotional distress,²⁷ the incorporation of compensatory damages within the administrative remedial scheme presents the potential for inadequate or excessive awards. An insufficient award denies the aggrieved employee the relief Congress intended to provide;²⁸ unwarranted compensation might encourage meritless complaints.²⁹ Moreover, inconsistent compensatory damage awards³⁰ can serve to discourage negotiated settlements—an agency has less incentive to settle when it cannot estimate the sum likely to be awarded should a complainant prevail, and the existence of inordinate awards in the past might induce a complainant to hold out for a larger award.

The purpose of this Comment is to aid EEOC AJs and federal agency EEO practitioners in assessing nonpecuniary compensatory damages.³¹ Part I presents a brief history of the debate over

(1995) (finding compensatory damages of \$75,000 adequate award for intangible injury where appellant alleged reprisal and discrimination based on age and disability); *Rountree v. Department of Agric.*, E.E.O.C. No. 01941906, 95 F.E.O.R. 3223, at XII-124 (1995) (determining that \$8,000 properly compensated appellant for nonpecuniary harm stemming from low performance appraisal motivated by racial and sex discrimination).

26. See RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1977) ("There is no scale by which the detriment caused by suffering can be measured and hence there can be only a very rough correspondence between the amount awarded as damages and the extent of the suffering."); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 778 (1985) ("Translating pain and suffering or emotional distress into monetary terms poses tremendous problems of proof. Such injuries have no measurable dimensions, mathematical or financial.") (footnote omitted).

27. See RESTATEMENT (SECOND) OF TORTS § 905 cmt. i ("[T]here is no rule of certainty with reference to the amount of recovery permitted for any particular type of emotional distress; the only limit is such an amount as a reasonable person could possibly estimate as fair compensation."); see also *Carpenter*, 95 F.E.O.R. 3229, at XII-147 ("[D]amage awards for emotional harm are difficult to determine and . . . there are no definitive rules governing the amount to be awarded in given cases.").

28. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(1), 105 Stat. 1071, 1071 (stating as one of Act's purposes "to provide appropriate remedies for intentional discrimination and unlawful harassment in the work place").

29. See H.R. REP. NO. 102-40, pt. 1, at 70 (1991) (noting that opponents of 1991 Act argued that availability of damages would "scuttle Title VII's goal of encouraging voluntary settlement"); 137 CONG. REC. H3874 (daily ed. June 5, 1991) (remarks of Rep. Dornan) (charging that possibility of high damage awards would create a "litigation machine"); see also Hemingway, *supra* note 17, at 702 (warning that "there is a real danger that unwarranted or unproven compensatory damages claims will further clog an already burdened system"); *infra* note 74 (providing statistical evidence of unprecedented increase in discrimination complaints following enactment of 1991 Act).

30. Compare *Nichelson v. Quaker Oats Co.*, 573 F. Supp. 1209, 1231 (W.D. Tenn. 1983) (awarding \$1000 in compensatory damages when employer retaliated by demoting and denying promotion after plaintiff filed race discrimination suit), *rev'd on other grounds*, 752 F.2d 1153 (6th Cir.), *vacated*, 472 U.S. 1004 (1985), with *Richards v. New York City Bd. of Educ.*, 668 F. Supp. 259 (S.D.N.Y. 1987) (granting \$15,000 in compensatory damages when employer denied promotion on basis of race), *aff'd*, 842 F.2d 1288 (2d Cir. 1988).

31. Merit System Protection Board ("MSPB") AJs and practitioners also may find this Comment to be of some value. The MSPB recently adopted the EEOC's holding in *Jackson* for

expanded Title VII remedies which preceded the passage of the 1991 Act. In addition, Part I explores the damages provisions of the 1991 Act. Part II focuses on the EEOC's response to the 1991 Act, outlining the analytical framework the EEOC established for evaluating compensatory damage claims with particular emphasis on the factors and standard of measure the Commission considers in quantifying nonpecuniary losses. Finally, Part III surveys compensatory damages awards in federal civil rights cases to identify factors weighed in the determination of particular sums. For EEOC AJs and federal agency EEO practitioners unfamiliar with evaluating nonpecuniary harm, this analysis should provide some guidance in approximating damages in similar cases.

I. THE CIVIL RIGHTS ACT OF 1991—EXPANDING TITLE VII REMEDIES

A. Prologue

By enacting the 1991 Act, Congress responded to several Supreme Court decisions which retreated from previous advances in civil rights and EEO jurisprudence.³² In *Patterson v. McLean Credit Union*,³³ for example, the Court's holding severely curtailed the scope of protection against racial discrimination afforded by 42 U.S.C. § 1981.³⁴ Section 1981 grants to all persons, inter alia, the right to make and

the proposition that the 1991 Act entitles federal sector complainants to compensatory damages in the merit system protection administrative process. See *Hocker v. Department of Transp.*, 63 M.S.P.B. 497, 505 (1994); cf. *Ignacio v. United States Postal Serv.*, 30 M.S.P.B. 471, 481 (1986) (declaring that in matters concerning discrimination laws, MSPB must give due deference to EEOC).

32. See *Hernicz*, *supra* note 14, at 4 & n.18 (stating that 1991 Act was intended to "restore" civil rights law in response to several Supreme Court decisions (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989) (narrowly interpreting 42 U.S.C. § 1981 as inapplicable to cases of racial discrimination in the course of employment); *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) (holding that intervenors in Title VII actions are not liable for attorneys' fees unless their actions are frivolous); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (limiting liability in mixed-motive claim under Title VII); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) (shifting to plaintiff burden of proof to demonstrate particular employment practice was cause of disparate-impact claim under Title VII); *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989) (sanctioning collateral challenges to affirmative action consent decrees); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 911 (1989) (holding statute of limitations period for Title VII action challenging seniority system runs from date system is adopted, not from time it is applied to complainant))).

33. 491 U.S. 164 (1989).

34. See *Patterson*, 491 U.S. at 179 (holding that racial harassment in course of employment is not actionable under 42 U.S.C. § 1981, which "covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process").

enforce contracts.³⁵ Prior to *Patterson*, courts interpreted § 1981 to cover victims of on-the-job racial or ethnic discrimination.³⁶ In those instances, § 1981 provided equitable as well as compensatory relief and, in particularly egregious cases, punitive damages.³⁷ This protection extended to both public and private contractual relations³⁸ and applied to all employers regardless of the number of their employees.³⁹

In *Patterson*, the plaintiff sued her employer, alleging harassment, failure to promote, and wrongful discharge on the basis of her race.⁴⁰ The Court strictly interpreted the so-called "make and enforce contracts" clause of § 1981,⁴¹ declaring that the statute applied only to racial discrimination in the "formation of a contract, . . . not to problems that may arise later from the conditions of continuing employment."⁴² Consequently, the Court held that racial harassment engendering a hostile work environment was not actionable under § 1981.⁴³

National civil rights organizations decried the *Patterson* decision as a profound rollback of civil rights protection under federal law.⁴⁴

35. See 42 U.S.C. § 1981 (1994). Section 1981 states:

All persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

36. See, e.g., *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 201-03 (1st Cir. 1987) (applying § 1981 to racial discrimination in training, wages, and discharge); *Satterwhite v. Smith*, 744 F.2d 1380, 1383 (9th Cir. 1984) (applying § 1981 to determine whether employee was constructively discharged on basis of race); *Richards v. New York City Bd. of Educ.*, 668 F. Supp. 259, 267 (S.D.N.Y. 1987) (challenging discriminatory denial of promotion under § 1981 on basis of race); see also *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (interpreting § 1981 as prohibiting discrimination on basis of "ancestry or ethnic characteristics").

37. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975); see also *Garner v. Giarrusso*, 571 F.2d 1330, 1339 (5th Cir. 1978) (interpreting § 1981 to permit compensatory damages for suffering and humiliation).

38. See *Johnson*, 421 U.S. at 459-60; see also *Runyon v. McCrary*, 427 U.S. 160, 168 (1976) (applying § 1981 to challenge discriminatory admissions policies of private schools); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-40 (1973) (holding that private swim club with discriminatory guest policy was not exempt from § 1981); cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 & n.78 (1968) (implying that § 1981 reaches purely private acts of racial discrimination).

39. See *Johnson*, 421 U.S. at 460 ("Section 1981 is not coextensive in its coverage with Title VII. The latter is made inapplicable to certain employers." (citing 42 U.S.C. § 2000e(b) (1970 ed., Supp. III))).

40. *Patterson v. McLean Credit Union*, 491 U.S. 164, 169 (1989).

41. See *supra* note 35 (quoting language of 42 U.S.C. § 1981).

42. *Patterson*, 491 U.S. at 176 (emphasis added).

43. See *id.* at 178.

44. See Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 23 (1993) ("National civil rights organizations and their allies in Congress denounced the decision[] in

Critics of the *Patterson* decision argued that because § 1981 applied to all employers regardless of the number of employees, whereas Title VII did not cover businesses with a work force of fewer than fifteen,⁴⁵ the Supreme Court's narrow reading of § 1981 effectively stripped equal employment coverage and remedies from the employees of 3.7 million small businesses.⁴⁶

Patterson and the several other Supreme Court decisions viewed as rolling back federal civil rights protections,⁴⁷ however, were not the sole impetus for the 1991 Act. Commentators have identified at least three other factors prompting the congressional debate surrounding amending Title VII: (1) the difference in remedies between § 1981 and Title VII,⁴⁸ (2) society's heightened sensitivity to sexual harassment in the workplace,⁴⁹ and (3) the trend in state statutes toward fashioning legal and equitable relief for employment discrimination.⁵⁰ The issue of Title VII remedies, however, dominated the debate that culminated in the passage of the 1991 Act.⁵¹

B. The Debate Surrounding Compensatory Damages Under Title VII

1. The argument for compensatory damages

Despite the 1991 Act's original purpose to "restore" federal civil rights law,⁵² drafters of the legislation soon embraced the sweeping goal of extending the remedies available under § 1981 to victims of intentional discrimination on the bases of sex, religion, national

strong (and sometimes vitriolic) rhetoric.").

45. See 42 U.S.C. § 2000e(b) (1994).

46. See H.R. REP. NO. 102-40, pt. 1, at 91 (1991).

47. See *supra* note 32 (listing several Supreme Court decisions that 1991 Act addressed).

48. See Govan, *supra* note 44, at 57 (stating that supporters of 1991 Act argued that "it was a matter of simple equity to eliminate the preferential status of race discrimination cases and provide to victims of gender, religious, national origin, and disability discrimination the remedies long available to victims of race discrimination").

49. See Michael W. Roskiewicz, Note, *Title VII Remedies: Lifting the Statutory Caps from the Civil Rights Act of 1991 to Achieve Equal Remedies for Employment Discrimination*, 43 WASH. U. J. URB. & CONTEMP. L. 391, 397 (1993) (stating that growing hostility toward minorities, women, and disabled persons in workplace influenced Congress to expand scope of remedies available to victims of employment discrimination).

50. See *id.* at 400 (stating that state-level expansion of discrimination remedies influenced Congress to expand scope of Title VII remedies); see also MENTAL AND EMOTIONAL INJURIES IN EMPLOYMENT LITIGATION 5 n.21 (James J. McDonald, Jr. & Francine B. Kulick eds., 1994) [hereinafter MENTAL AND EMOTIONAL INJURIES] (citing state employment discrimination statutes permitting recovery of compensatory damages).

51. See Zachary D. Fasman, *Practical Problems of the Civil Rights Act*, WASH. POST, July 23, 1990, at A11 (citing allowance of compensatory and punitive damages as serious practical problem in debate over 1991 Act).

52. See Govan, *supra* note 44, at 16.

origin, and disability.⁵³ Proponents argued that providing monetary relief would give victims of non-racial discrimination the same remedies which had long been available under federal civil rights laws to victims of racial discrimination.⁵⁴ The preference in remedies accorded victims of racial discrimination, the drafters argued, was inequitable and without justification.⁵⁵ As the House Education and Labor Committee noted in its report accompanying the 1991 Act, sex and religious discrimination are as insidious as discrimination on the basis of race and therefore warrant equal remedies for the purpose of making victims whole.⁵⁶

Congressional supporters also recognized the inadequacy of the remedial scheme under Title VII.⁵⁷ Prior to the 1991 Act, victims of intentional discrimination on the basis of sex, religion, national origin, or disability only were entitled to equitable remedies, including injunctive relief, hiring or reinstatement, and up to two years' back pay.⁵⁸ The vast majority of courts declined to award legal remedies under Title VII.⁵⁹ Thus, no matter how egregious the discrimina-

53. See *id.* at 35-36. The National Women's Law Center, supported by the Women's Legal Defense Fund, first advocated the expansion of legal remedies and availability of jury trials in cases of intentional discrimination based on factors other than race. See *id.* The move to expand remedies and provide the right to a jury trial, however, was not completely free of political motive. The Legal Defense and Education Fund, another member of the drafting committee, favored the proposal as a check to the influence of the federal judiciary, largely consisting of Reagan/Bush appointees, as the exclusive fact-finder in Title VII employment discrimination cases. See *id.* at 36.

54. See *id.* at 57.

55. See *id.*

56. See H.R. REP. NO. 102-40, pt. 1, at 65 (1991).

57. See Govan, *supra* note 44, at 57.

58. See Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g) (1994). The relief provision reads as follows:

If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . 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 . . . or any other equitable relief as the court deems appropriate.

Id.

59. See, e.g., *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 458 (1975) ("Some District Courts have ruled that neither compensatory nor punitive damages may be awarded in the Title VII suit."); *Mitchell v. Seaboard Sys. R.R.*, 883 F.2d 451, 452 (6th Cir. 1989) (acknowledging that although equitable relief is available to Title VII complainants, compensatory damages are not); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988) (affirming that compensatory damages are not awardable in Title VII employment discrimination suits); *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988) (refusing to award compensatory damages in Title VII action); *Bohen v. City of E. Chicago*, 799 F.2d 1180, 1184 (7th Cir. 1986) (ruling that compensatory damages are not available under Title VII); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (declaring that Title VII makes no provision for legal remedies such as compensatory damages); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1363-64 (11th Cir. 1982) (adopting general view that compensatory damages are not awardable under Title VII); *Shah v. Mt. Zion Hosp. & Med. Ctr.*, 642 F.2d 268,

tion, victims were unable to recover compensatory damages despite the emotional suffering, physical pain, and related medical expenses that can accompany such stigmatizing treatment.⁶⁰

In addition, Title VII's equitable relief was all but a legal fiction for those victims of non-racial discrimination who chose to stay on the job; back pay, reinstatement, or hiring provided meager relief for those employees.⁶¹ Moreover, equitable relief failed to redress injuries to professional standing or reputation resulting from intentional discrimination.⁶²

Finally, given the persistence of workplace discrimination,⁶³ expanded liability was necessary to compel employers to abandon such practices.⁶⁴ In drafting Title VII, "Congress made the critical but erroneous assumption that there would be sufficient respect for the law that employers . . . would come into compliance as soon as their wrongs were pointed out to them."⁶⁵ Congress "emphasized conciliation over confrontation" and empowered the courts to issue

272 (9th Cir. 1981) (following "great weight of authority" that "denies support for . . . request[s] for emotional distress . . . damages under Title VII"); *DeGrace v. Rumsfeld*, 614 F.2d 796, 808 (1st Cir. 1980) (holding that Title VII does not authorize an award of either punitive or compensatory damages for the victim's mental anguish); see also *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829, 835-38 (N.D. Cal. 1973) (reviewing legislative history of Title VII and concluding that Congress intended only equitable remedies).

60. See, e.g., *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1532-33 (M.D. Fla. 1991) (awarding injunctive relief and one dollar in nominal damages to victim of egregious sexual harassment in case brought under Title VII); *Brooms v. Regal Tube Co.*, 44 Fair Empl. Prac. Cas. (BNA) 1119, 1122 (N.D. Ill. 1987) (observing that although harassment had caused plaintiff physical illness as well as "severe and debilitating depression" requiring psychiatric treatment, court could not make victim whole nor hold employer liable for past or future medical expenses), *aff'd in relevant part*, 881 F.2d 412 (7th Cir. 1989); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784-85 (E.D. Wis. 1984) (finding that complainant was victim of "sustained, vicious, and brutal harassment" that was both "malevolent and outrageous" and that resulted in severe nausea, diarrhea, vomiting, and cramping, but awarding only \$2763 in back pay), *aff'd in relevant part*, 789 F.2d 540 (7th Cir. 1986); see also Susan M. Matthews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEM. 299, 299 (1991) (observing that prior to 1991 Act, "sexually harassed women who succeed[ed] in Title VII suits [were] rarely compensated for the actual extent of the harms they suffer[ed]").

61. See *Govan*, *supra* note 44, at 57 (stating that victims of harassment who chose to stay at their jobs were not compensated adequately for their injuries); Matthews, *supra* note 60, at 299-301 (explaining that relief to victims is inadequate in comparison to damage caused by sexual harassment).

62. See *Abrams v. Baylor College of Med.*, 805 F.2d 528 (5th Cir. 1986). In *Abrams*, the court found that the defendant hospital "intentionally excluded Jews from its beneficial and educational rotation program." *Id.* at 535. Despite the fact that the defendant's discriminatory conduct foreclosed the plaintiffs from professionally valuable clinical experience, the court could award only back pay for the difference in salary and benefits; it could not fashion compensatory damages to make the plaintiffs whole for the injuries to their professional standing and future earning capacity. See H.R. REP. NO. 102-40, pt. 1, at 68 (1991).

63. See *Govan*, *supra* note 44, at 174 (reporting testimony about prevalence of discrimination in workplace).

64. See *id.* at 57.

65. Richard T. Seymour, *How to Stem the Erosion: A Practical Guide to Using the Civil Rights Act of 1991*, HUM. RTS., Summer 1992, at 12, 13.

injunctions and redress lost wages but included no provision for fashioning legal remedies to compensate for mental anguish or to discourage discriminatory practices.⁶⁶ The unavailability of monetary remedies discouraged aggrieved employees from exonerating their rights⁶⁷ and foreclosed the threat of legal damages as an effective deterrent for recalcitrant employers.⁶⁸

2. *The argument against compensatory damages*

Critics of expansive legal remedies under Title VII defended the preference in federal civil rights law for victims of racial discrimination largely on the basis of policy.⁶⁹ They argued that given the long history of racial bigotry in American culture, racial discrimination warranted legal remedies, whereas non-racial discrimination did not.⁷⁰

This disinclination to equalize remedies for racial and other forms of discrimination also stemmed from employers' fear of the cost imposed by expanded liability.⁷¹ The prospect of larger monetary relief brought with it the collateral danger of encouraging Title VII actions.⁷² Despite assurances to the contrary during the debate preceding the passage of the 1991 Act,⁷³ the business community's

66. See *id.*; see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) ("If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality.").

67. See H.R. REP. NO. 102-40, pt. 1, at 70 (1991). The Committee on Education and Labor observes:

"There is little incentive for a plaintiff to bring a Title VII suit when the best that she can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves and the costs of bringing her suit. One can expect that a potential claimant will pause long before enduring the humiliation of making public the indignities which she has suffered in private . . . when she is precluded from recovering damages for her perpetrators' behavior."

Id. (quoting *Mitchell v. Os Air, Inc.*, 629 F. Supp. 636, 643 (N.D. Ohio 1986)).

68. See *Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (insisting that "the damages a plaintiff recovers contribute significantly to the deterrence of civil rights violations in the future").

69. See *Govan*, *supra* note 44, at 56.

70. See *The Civil Rights Bill*, WASH. POST, June 25, 1990, at A10 (editorial) ("Nor is it a problem . . . if racial and the other prohibited forms of discrimination are differently treated; they are different."); see also 2 *The Civil Rights Act of 1990: Joint Hearings on H.R. 4000 Before the House Comm. on Educ. and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 55-60 (1990) [hereinafter *Joint Hearings*] (testimony of Ralph H. Baxter, Jr., Chairman and Chief Executive Officer, Orrick, Herrington & Sutcliffe).

71. See 1 *Joint Hearings*, *supra* note 70, at 683-85 (statement of Lawrence Z. Lorber, National Association of Manufacturers and Society for Human Resource Management); Steven A. Holmes, *Critics of Rights Law Fear a Flood of Suits Over Jobs*, N.Y. TIMES, May 28, 1990, at A8.

72. See David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, C108 A.L.I.-A.B.A. 251, 269 (1994) ("One widely anticipated consequence of the Civil Rights Act of 1991 is an increase in employment discrimination litigation . . .").

73. See H.R. REP. NO. 102-40, pt. 1, at 70 (1991) ("The notion that adding a damages remedy to Title VII will trigger an explosion of frivolous lawsuits is fanciful.").

concerns appear to have been amply justified. Following the 1991 Act's enactment, the number of discrimination complaints filed with the EEOC increased dramatically.⁷⁴ Though the increase can be attributed in part to a heightened awareness of sexual and other forms of harassment in the workplace,⁷⁵ as well as to a greater willingness to challenge such conduct,⁷⁶ the possibility remains that the prospect of large compensatory damage awards might encourage frivolous complaints. In light of the threat of more discrimination suits and larger awards, opponents contended further that employers would feel compelled to "correct" any imbalance by hiring and promoting on the basis of quotas, not merit.⁷⁷

The most significant criticism of the 1991 Act concerns the fundamental change in employment discrimination law embodied by the expansion of legal remedies under Title VII.⁷⁸ The Civil Rights Act of 1964 emphasized employer-employee conciliation by restricting litigation and creating the EEOC to enforce Title VII's provisions while promoting voluntary compliance.⁷⁹ Title VII's equitable remedies reflected Congress' intention to combat discrimination by encouraging fair employment policies based on individual qualifications rather than on the threat of punishment.⁸⁰ In short, Congress "wanted women and minorities on the job, not languishing in the courts."⁸¹ Critics note that "[t]he 1991 Act shifts the emphasis of Title VII from conciliation with equitable remedies to litigation with tort-like damage awards."⁸² Moreover, the 1991 Act pursues a policy

74. See 232 Daily Lab. Rep. (BNA) at A-7 (Dec. 2, 1992). The EEOC received 70,339 charges in fiscal year 1992, a "sharp increase" from the nearly 63,000 charges filed during the previous fiscal year. See *id.* In particular, the number of sexual harassment charges increased nearly 70%, from 3329 to 5629, between fiscal years 1991 and 1992. See 15 Daily Lab. Rep. (BNA) at A-5 (Jan. 26, 1993). In the first quarter of fiscal year 1993, 1608 sexual harassment charges were filed, more than two-and-a-half times the number of charges filed in the first quarter of fiscal year 1991. See 48 Daily Lab. Rep. (BNA) at A-4 (Mar. 15, 1993).

75. See 15 Daily Lab. Rep. (BNA) at A-4 (reporting that dramatic increase in sexual harassment complaints began soon after Supreme Court confirmation hearings focused public attention on Anita Hill's accusations of sexual harassment by Clarence Thomas).

76. See Roskiewicz, *supra* note 49, at 399-400.

77. See 137 CONG. REC. H3924 (daily ed. June 5, 1991).

78. See Hernicz, *supra* note 14, at 6 (criticizing 1991 Act as promoting "inequal treatment as a means to achieve 'equal' opportunity").

79. See Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 452 (1966).

80. See Roskiewicz, *supra* note 49, at 395 n.19.

81. *The Civil Rights Act of 1990: Hearings on S. 2104 Before the Senate Comm. on Labor and Human Resources*, 101st Cong. 208 (1989) (testimony of Lawrence Z. Lorber, National Association of Manufacturers and Society for Human Resource Management).

82. Hernicz, *supra* note 14, at 4; see also H.R. REP. NO. 102-40, pt. 1, at 147 (1991) (predicting that Title VII would be transformed from statute rightfully oriented to quick resolution of disputes and prompt reinstatement of employee to his or her proper position—with quick economic relief for lost wages—to litigation generating machine that benefits

of race consciousness and individual relief rather than color blindness and class improvement.⁸³

3. *Passage of the Civil Rights Act of 1991*

The debate over expanded remedies for employment discrimination victims pitted a Democratically controlled Congress against a Republican administration.⁸⁴ Congress passed the Civil Rights Act of 1990,⁸⁵ which authorized unlimited compensatory damages while limiting punitive damages to the greater of either \$150,000 or the amount awarded as compensatory damages.⁸⁶ Worried that businesses would react to increased liability by implementing hiring practices based on quotas, President Bush vetoed the bill.⁸⁷

After failing to muster the votes necessary to sustain an override,⁸⁸ Congress set out to pass a modified version of the bill early the next session.⁸⁹ Ultimately, Congress and the White House forged a compromise: a bill that responded to the Supreme Court's civil rights decisions⁹⁰ and expanded legal relief for victims of workplace

only lawyers).

83. See James Forman, Jr., *Victory by Surrender: The Voting Rights Amendments of 1982 and the Civil Rights Act of 1991*, 10 YALE L. & POL'Y REV. 133, 174 (1992) (asserting that 1991 Act permits unequal treatment to achieve "equal" opportunity).

84. See Govan, *supra* note 44, at 31-36 (detailing political machinations and policy debate culminating in passage of 1991 Act).

85. Two bills comprised the 1990 anti-discrimination legislation: H.R. 4000, 101st Cong. (1990), and S. 2104, 101st Cong. (1990).

86. See S. 2104 § 8(A)-(B).

87. See President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990) (vetoing S. 2104, in part due to quota provisions in bill).

88. See 136 CONG. REC. S16,589 (daily ed. Oct. 24, 1990) (reporting failure to override veto of Civil Rights Act of 1990).

89. See 137 CONG. REC. H53 (daily ed. Jan. 3, 1991) (recording introduction of H.R. 1, 102d Cong. (1991), and noting intent to amend Civil Rights Act of 1964 in order to strengthen existing laws prohibiting employment discrimination).

90. See Civil Rights Act of 1991 § 3(4), 42 U.S.C. § 1981 (1994) (stating as one of Act's purposes "to respond to recent decisions of the Supreme Court [interpreting the Civil Rights Acts of 1866 and 1964] by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination"); see also Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1489 (1994) (identifying specific sections of 1991 Act which "were obviously drafted with 'recent decisions of the Supreme Court' in mind") (quoting Civil Rights Act of 1991 § 3(4)).

In addition to § 105 of the Civil Rights Act of 1991, which addresses the Court's finding in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), several sections of the Act specifically respond to other Supreme Court decisions. For example:

[Section] 101 . . . amended the 1866 Civil Rights Act's prohibition of racial discrimination in the "mak[ing] and enforce[ment] [of] contracts" . . . in response to *Patterson v. McLean Credit Union*; § 107 responds to *Price Waterhouse v. Hopkins* by setting forth standards applicable in "mixed motive" cases; § 108 responds to *Martin v. Wilks* by prohibiting certain challenges to employment practices implementing consent decrees; § 109 responds to *EEOC v. Arabian American Oil Co.* by redefining the term 'employee' as used in Title VII to include certain United States citizens working in foreign

discrimination within statutory limits designed to placate employers' fear of costly litigation.⁹¹ On November 21, 1991, President Bush signed the Civil Rights Act of 1991.⁹²

C. Overview of the Damages Provisions of the Civil Rights Act of 1991

The damages provisions of the 1991 Act reflect the concerns raised in the course of the political debate surrounding the issue of expanded remedies under Title VII.⁹³ The 1991 Act states that one of its purposes is "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace,"⁹⁴ and makes concessions in the form of limits to and exclusions from the availability of damages.⁹⁵ These compromises were intended to mollify critics who feared that the availability of unlimited compensatory damages would spawn meritless litigation and prove too costly for employers, especially smaller businesses.⁹⁶

Section 102 of the 1991 Act⁹⁷ authorizes compensatory and

countries for United States employers; § 112 responds to *Lorance v. AT&T Technologies, Inc.* by expanding employees' rights to challenge discriminatory seniority systems; § 113 responds to *West Virginia University Hospitals, Inc. v. Casey* by providing that an award of attorney's fees may include expert fees; and § 114 responds to *Library of Congress v. Shaw* by allowing interest on judgments against the United States.

Landgraf, 114 S. Ct. at 1489-90 (citations and footnote omitted).

91. See President's Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701, 1702 (Nov. 25, 1991) (stating that 1991 Act "adopts a compromise under which 'caps' have been placed" on compensatory damages).

92. See *id.*

93. See generally Govan, *supra* note 44 (detailing debate over 1991 Act); Caryn Leslie Lilling, Note, *The Civil Rights Act of 1991: An Examination of the Storm Preceding the Compromise of America's Civil Rights*, 9 HOFSTRA LAB. L.J. 215 (1991) (explaining political concerns prior to adoption of 1991 Act).

94. Civil Rights Act of 1991 § 3(1), 42 U.S.C. § 1981 (1994).

95. See *id.* § 102, 42 U.S.C. § 1981.

96. See Govan, *supra* note 44, at 57-58, 103-04, 211-12 (explaining employers' concern over expanded monetary liability under Title VII and discussing political debate that resulted in capping damages available under 1991 Act).

97. Civil Rights Act of 1991 § 102(a), 42 U.S.C. § 1981a(a). The provision amending the scope of remedies awardable under Title VII reads as follows:

(1) Civil rights. In an action brought by a complaining party under [Title VII] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under [Title VII], . . . and provided that the complaining party cannot recover under under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

Id. § 102(a)(1), 42 U.S.C. § 1981a(a)(1). For intentional discrimination in violation of the ADA or Rehabilitation Act, section 102 of the Civil Rights Act of 1991 provides:

(2) Disability. In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 . . . (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment

punitive damages in cases brought under Title VII, the Americans with Disabilities Act of 1990⁹⁸ ("ADA"), and the Rehabilitation Act of 1973.⁹⁹ Damages are available only to victims of unlawful intentional discrimination, provided that the aggrieved party cannot recover under 42 U.S.C. § 1981.¹⁰⁰ Damages are not recoverable in cases alleging "disparate impact."¹⁰¹ In addition, damages may not be awarded under the ADA or Rehabilitation Act when an employer exhibited good faith efforts in accommodating an employee's disability.¹⁰² Punitive damages are not recoverable against the

practice that is unlawful because of its disparate impact) . . . the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

Id. § 102(a)(2), 42 U.S.C. § 1981a(a)(2).

98. 42 U.S.C. §§ 12112-12117.

99. 29 U.S.C. § 791 (1994). Compensatory damages are not available, however, for all violations of the Rehabilitation Act. *See Lane v. Pena*, 116 S. Ct. 2092, 2100 (1996) (barring recovery of monetary damages for violations of section 504(a) of Rehabilitation Act of 1973 (codified at 29 U.S.C. § 794), which prohibits discrimination on the basis of disability "under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service"). Although the Court in *Lane* held that Congress has not waived the federal government's sovereign immunity against awards of monetary damages for violations of section 504(a) of the Rehabilitation Act, the Court stated in dicta that "[i]n the Civil Rights Act of 1991, Congress made perfectly plain that compensatory damages would be available for certain violations of § 501 by the Federal Government . . ." *Id.* at 2097. Section 501 of the Rehabilitation Act prohibits discrimination on the basis of disability in employment decisions by the federal government. *See* 29 U.S.C. § 791.

100. *See* Civil Rights Act of 1991 § 102(a)(1)-(2), 42 U.S.C. § 1981a(a)(1)-(2).

101. *See id.* § 102(a)(1), 42 U.S.C. § 1981a(a)(1). Disparate impact and disparate treatment constitute the two principle theories of discrimination under Title VII. *See* Lilling, *supra* note 93, at 217. As the term connotes, disparate treatment under Title VII involves treating individuals differently on the basis of race, color, sex, national origin, or religion. *See id.* at 222. The notion of discrimination via disparate impact, however, is a judicial, rather than a statutory, construct. Extrapolating on the individual right to be free from unlawful discrimination, the Supreme Court recognized "group rights" through the disparate impact theory of discrimination. *See* Hemicz, *supra* note 14, at 3. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a unanimous Court ruled that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431. Congress later ratified the Supreme Court's conclusion that Title VII prohibits employment practices which have a disproportionate adverse effect on a recognized minority even absent discriminatory intent. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e to 2000e-17) (codifying Supreme Court's finding in *Griggs* that Title VII outlaws all forms of employment discrimination, including practices that are not intentionally discriminatory).

102. *See* Civil Rights Act of 1991 § 102(a)(3), 42 U.S.C. § 1981a(a)(3) (1994). Section § 102(a)(3) states:

(3) Reasonable accommodation and good faith effort. In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to [the ADA or Rehabilitation Act], damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

federal government in any event.¹⁰³ When compensatory damages are available, they may be awarded in addition to any equitable relief authorized under Title VII.¹⁰⁴ The 1991 Act also caps compensatory and, in actions brought by private sector employees, punitive damages.¹⁰⁵ The limits are indexed in relation to the size of the employer.¹⁰⁶

II. THE EEOC'S RESPONSE TO THE CIVIL RIGHTS ACT OF 1991

A. *The Jackson Decision—Compensatory Damages Available in the Administrative Process*

The legislative history and language of the 1991 Act were silent as to the availability of legal remedies in the administrative process. Absent explicit congressional intent, resolution of the issue rested with the EEOC. Nearly a year passed before the appropriate case presented the Commission with the opportunity to answer the question. *Jackson v. United States Postal Service*¹⁰⁷ proved to be the landmark case.

In *Jackson*, the appellant alleged reprisal and discrimination on the bases of sex, race, age, and disability after his supervisor shadowed him at the direction of a Postal Service official.¹⁰⁸ The employee asserted that the incident caused stress and exacerbated his pre-existing hypertension, necessitating further medical care.¹⁰⁹ In

Id. § 102(a)(3), 42 U.S.C. § 1981a(a)(3).

103. See *id.* § 102(b)(1), 42 U.S.C. § 1981a(b)(1) (providing for punitive damages against a respondent "other than a government, government agency or political subdivision").

104. See *id.* § 102(b)(2), 42 U.S.C. § 1981a(b)(2) (excluding from compensatory damages "backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964").

105. See *id.* § 102(b)(3), 42 U.S.C. § 1981a(b)(3). Section 102(b)(3) provides:

(3) Limitations. The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party —

(A) in the case of a respondent who has more than 14 and fewer than 101 employees . . . \$50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees . . . \$100,000;

(C) in the case of a respondent who has more than 200 and fewer than 501 employees . . . \$200,000;

(D) in the case of a respondent who has more than 500 employees . . . \$300,000.

Id. 42 U.S.C. § 1981a(b)(3).

106. See *id.*, 42 U.S.C. § 1981a(b)(3).

107. E.E.O.C. No. 01923399, 93 F.E.O.R. 3062 (1992).

108. See *Jackson v. United States Postal Serv.*, E.E.O.C. No. 01923399, 93 F.E.O.R. 3062, at XII-185 (1992).

109. See *id.*

addition to a portion of his medical expenses, he sought compensation for the cost of transportation to the doctor.¹¹⁰ The agency's offer of full relief denied the employee's damages claim.¹¹¹ The appellant refused the offer, and pursuant to EEOC regulation,¹¹² the agency issued a final agency decision ("FAD") cancelling his complaint for failure to accept a certified offer of full relief.¹¹³

On appeal, the EEOC considered whether the agency's offer indeed constituted "full relief" (that is, the relief to which the appellant would have been entitled if findings of discrimination were entered with respect to all allegations raised in the complaint).¹¹⁴ Emphasizing the "make-whole" intent of Title VII's remedial scheme,¹¹⁵ the EEOC observed that relief must eliminate discriminatory employment practices while restoring a victim to the position he would have occupied were it not for the employer's unlawful conduct.¹¹⁶ Concluding that the 1991 Act does provide compensatory damages in the administrative process, the Commission held that the agency's offer did not constitute full relief because it failed to address the employee's compensatory damage claim.¹¹⁷ Accordingly, the EEOC vacated the FAD and remanded the complaint for resolution of the damages issue.¹¹⁸

In holding that compensatory damages are available in administrative proceedings for discriminatory conduct on or after the effective date of the 1991 Act,¹¹⁹ the EEOC relied on policy considerations

110. See *id.*

111. See *id.*

112. 29 C.F.R. § 1614.107(h) (1996) (formerly 29 C.F.R. § 1613.215(a)(7) (1990)).

113. See *Jackson*, 93 F.E.O.R. 3062, at XII-187.

114. See *id.* at XII-185 (citing *Merriell v. Department of Transp.*, E.E.O.C. No. 05890596, 90 F.E.O.R. 3034 (1989)).

115. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) ("It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.").

116. See *Jackson* 93 F.E.O.R. 3062, at XII-185 (citing *Albemarle Paper*, 422 U.S. at 420-21).

117. See *id.* at XII-187.

118. See *id.*

119. See *id.* at XII-221 n.1. At the time the Commission decided *Jackson*, the EEOC interpreted the 1991 Act as inapplicable to complaints pending as of November 21, 1991 (the effective date of the 1991 Act), or to complaints seeking damages for alleged unlawful discrimination occurring prior to the 1991 Act's effective date. See EEOC Notice 915.002, *Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct*, 1992 WL 189089, at *11 (Dec. 27, 1991). In April 1993, the EEOC commissioners voted to rescind the December 1991 policy guidance and subsequently issued an interim instruction declaring that the 1991 Act's damage provisions were retroactive. Memorandum from EEOC Chairman Tony E. Gallegos to James H. Troy, Director, Office of Program Operations, and Ronnie Blumenthal, Director, Office of Federal Operations, *Interim Instructions for Office of Federal Operations—Applicability of Compensatory Damage Provision of Civil Rights Act of 1991 to Pre-Act Conduct* (Oct. 5, 1993).

and inferences drawn from the language of the statute itself.¹²⁰ Section 102(a)(2) of the 1991 Act explicitly refers to actions pursued under Rehabilitation Act procedures,¹²¹ suggesting that the term "action" in this subsection embraces administrative proceedings.¹²² Reading the statute as a whole, the Commission inferred that "action" in section 102(a)(1)¹²³ applied to administrative adjudications commenced under Title VII as well.¹²⁴ Moreover, the definition of "complaining party" includes persons who may bring "an action or proceeding" under Title VII, the ADA, or the Rehabilitation Act,¹²⁵ further indicating that Congress resolved to afford compensatory damages to both federal sector employees seeking relief in the administrative process and private sector employees pursuing an action in district court.¹²⁶

B. Jackson and Its Progeny—Analyzing Compensatory Damage Claims in the EEOC Administrative Process

1. Jackson—evidentiary threshold for recovering compensatory damages

Besides establishing that the 1991 Act authorized compensatory damages in administrative proceedings, the *Jackson* decision announced the evidentiary threshold for maintaining a compensatory damage claim. The Commission adopted a two-pronged test: a complainant must submit "objective evidence" that (1) she incurred compensatory damages and (2) the damages are linked to the alleged discrimination.¹²⁷ Provided that the appellant adduced the requisite evidence, the agency would be required to address compensatory damages in making its offer of full relief.¹²⁸

Following the Supreme Court's decision in *Landgraf v. USI Film Products, Inc.*, 114 S. Ct. 1483 (1994), which held that the compensatory damages provision of the 1991 Act may not be applied retroactively to pre-Act conduct, the Commission voted not to seek compensatory damages for any violation pre-dating the 1991 Act. Memorandum from EEOC Chairman Tony E. Gallegos to James H. Troy, Director, Office of Program Operations, and Ronnie Blumenthal, Director, Office of Federal Operations, *Revision of Interim Instructions on the Application of Compensatory Damages Provision of the Civil Rights Act of 1991 to Pre-Act Conduct* (May 25, 1994).

120. See *Jackson*, 93 F.E.O.R. 3062, at XII-185 (announcing that EEOC's "conclusion is based upon a thorough examination of the statute's language and policy considerations").

121. See *supra* note 97 (quoting § 102(a)(2) of the Civil Rights Act of 1991).

122. *Jackson*, 93 F.E.O.R. 3062, at XII-186.

123. See *supra* note 97 (quoting § 102(a)(1) of the Civil Rights Act of 1991).

124. *Jackson*, 93 F.E.O.R. 3062, at XII-186.

125. See Civil Rights Act of 1991 § 102(d)(1), 42 U.S.C. § 1981a(d)(1) (1994).

126. *Jackson*, 93 F.E.O.R. 3062, at XII-186 to XII-187.

127. See *id.* at XII-187.

128. See *id.*

Because only pecuniary damages (that is, out-of-pocket expenses) were at issue in *Jackson*, the case did not contemplate the evidentiary problems presented by claims for intangible injuries. Given that damages for emotional distress or pain and suffering are inherently subjective, commentators opined that application of *Jackson's* strict "objective proof" standard to assertions of nonpecuniary harm would all but foreclose recovery of compensatory damages beyond medical expenses.¹²⁹

2. Carle—"other evidence" of intangible injury

Shortly after *Jackson*, the EEOC Office of Federal Operations¹³⁰ ("OFO") considered the question of proving nonpecuniary damages in *Carle v. Department of the Navy*.¹³¹ In *Carle*, the appellant alleged sexual harassment by a co-worker and reprisal by a supervisor who failed to stop the harassment and later threatened to fire her because she refused to work with the co-worker in question.¹³² In her complaint, the appellant sought compensatory damages for emotional distress.¹³³ The agency's offer of relief did not include damages, and consequently, the appellant declined the offer.¹³⁴ In response, the agency dismissed her complaint for failure to accept an offer of full relief.¹³⁵ She appealed, contending, *inter alia*, that the offer did not constitute full relief because it omitted compensatory damages.¹³⁶ The OFO found that the agency's offer was deficient, vacated the FAD, and directed the agency to consider the issue of compensatory damages on remand.¹³⁷

Although the OFO's ruling in *Carle* reaffirmed the two-pronged analysis set forth in *Jackson*, it modified the evidentiary standard for proving an entitlement to compensatory damages. No longer would

129. See Hemingway, *supra* note 17, at 691; see also HADLEY, *supra* note 21, at 977 (predicting that EEOC's "requirements of 'objective' proof of not only damages, but a nexus between the harm and the discriminatory action, will indeed prove difficult, if not impossible, for many complainants to overcome").

130. See *supra* note 17 and accompanying text (explaining that OFO is responsible for administering federal sector complaint process). Appellate decisions by the OFO do not have precedential authority; only rulings by the EEOC commissioners themselves constitute true EEOC policy. See Hemingway, *supra* note 17, at 690 n.7. Decisions by the OFO are instructive, however, in that they provide guidance as to the manner in which the EEOC may resolve a particular issue. See *id.*

131. E.E.O.C. No. 01922369, 94 F.E.O.R. 1043 (1993).

132. *Carle v. Department of the Navy*, E.E.O.C. No. 01922369, 94 F.E.O.R. 1043, at XI-48 (1993).

133. See *id.* at XI-48 to XI-49.

134. See *id.* at XI-49.

135. See *id.*

136. See *id.*

137. See *id.* at XI-50.

the EEOC require only objective proof.¹³⁸ Agencies now would be required to examine both objective evidence and "other evidence" in evaluating a claim for damages.¹³⁹ By instructing agencies to accept other evidence such as a complainant's personal statement detailing her emotional distress and explaining how physical and behavioral manifestations of the anguish affected her both on and off the job,¹⁴⁰ the Commission clearly intended to accommodate nonpecuniary damage claims that *Jackson's* stringent "objective evidence" standard effectively precluded.

3. Mims—shifting the burden of production

Absent from the analysis developed by the Commission's holdings in *Jackson* and *Carle* was an allocation of evidentiary burdens between the complainant and the agency in proving (and rebutting) requests for compensatory damages.¹⁴¹ The EEOC's discussion in *Mims v. Department of the Navy*¹⁴² provided this missing element.

The appellant in *Mims* alleged two separate incidents of sexual harassment by her supervisor resulting in her hospitalization for severe emotional distress.¹⁴³ As compensation for pain and suffering, she requested \$300,000.¹⁴⁴ In support of her claim, the appellant submitted medical bills totaling \$755.¹⁴⁵ Without explanation of how it derived the amount, the agency offered only \$500.¹⁴⁶ Following the appellant's rejection of the offer, the agency cancelled her complaint.¹⁴⁷ In declining to affirm the FAD on appeal, the Commission indicated that, were it not for the inexplicable difference in the expenses claimed and the amount offered, it would have regarded the agency's offer as full relief.¹⁴⁸ Instead, the EEOC reinstated the complaint for further processing of the damages claim.¹⁴⁹

138. See *id.*

139. See *id.*

140. See *id.*

141. See Hemingway, *supra* note 17, at 691.

142. E.E.O.C. No. 01933956, 94 F.E.O.R. 3153 (1993).

143. See *Mims v. Department of the Navy*, E.E.O.C. No. 01933956, 94 F.E.O.R. 3153, at XII-19 (1993).

144. See *id.*

145. See *id.* at XII-20.

146. See *id.* at XII-19.

147. See *id.*

148. See *id.* at XII-20 (stating that because "the agency calculated [the sum it offered] without further elaboration, and provided no analysis of a connection linking the objective evidence [the] appellant presented to the \$500 figure," EEOC was unable to determine whether agency's offer constituted full relief as to issue of compensatory damages).

149. See *id.*

In evaluating the adequacy of the agency's offer, the Commission adopted an analysis that shifted the burden of production from the complainant to the agency.¹⁵⁰ That is, once the complainant establishes a prima facie claim to damages, the burden of production shifts to the agency to adduce evidence refuting the request.¹⁵¹ To satisfy the prima facie burden, a complainant must proffer objective and other evidence sufficient to show damages and linkage to a "reasonable certainty."¹⁵²

Because the appellant in *Mims* made a prima facie showing, the agency bore the burden of demonstrating that a sum less than that requested by the complainant constituted an offer of full relief.¹⁵³ Accordingly, the agency should have substantiated its offer of \$500 in light of the appellant's evidence.¹⁵⁴ Absent such an explanation, the Commission concluded that it could not determine whether the offer constituted full relief.¹⁵⁵ The consequence of *Mims* appears to be that in offering a compensatory damage award less than that sought by a complainant, an agency must itemize and justify the amount rather than merely present a sum, or risk remand on appeal.

4. Rountree and Carpenter—*factors to consider and the standard to apply in assessing nonpecuniary damages*

With the *Jackson-Carle-Mims* trilogy, the Commission erected the basic framework for evaluating compensatory damages claims in the administrative process. Yet, for more than two years following *Jackson*, the Commission declined to quantify an award, remanding cases for further investigation of damage claims¹⁵⁶ or affirming agency dismissals of complaints for failure to adduce sufficient proof of

150. See *id.* (stating that once claimant establishes prima facie case of damages, burden of production shifts to agency (citing *Eureka Inv. Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932, 942 (D.C. Cir. 1984))).

151. See *id.* (citing *Eureka*, 743 F.2d at 942; *Barnes v. United States*, 685 F.2d 66, 69 (3d Cir. 1982)).

152. See *id.*

153. See *id.*

154. See *id.*

155. See *id.*

156. See, e.g., *Huhn v. Department of the Treasury*, E.E.O.C. No. 05940630, 95 F.E.O.R. 3143, at XII-121 (1995) (vacating FAD and remanding complaint for further processing when agency improperly dismissed complaint as moot without addressing issue of compensatory damages); *Rivera v. Department of the Navy*, E.E.O.C. No. 01934157, 94 F.E.O.R. 3522, at XII-369 (1994) (remanding complaint for further investigation of compensatory damages issue when agency failed to provide appellant adequate opportunity to submit documentation substantiating claim for damages); *Carlson v. Department of the Navy*, E.E.O.C. No. 05930480, 94 F.E.O.R. 3403, at XII-31 (1994) (remanding complaint when agency improperly dismissed complaint as moot); *Haynes v. United States Postal Serv.*, E.E.O.C. No. 05920891, 94 F.E.O.R. 3168, at XII-72 (1993) (remanding complaint because agency failed to recognize that appellant raised prima facie claim for damages).

damages and other reasons.¹⁵⁷ As a result, the question remained: By what standard were agencies and AJs to determine a proper award? In the summer of 1995, the EEOC provided an answer, rendering the first decisions quantifying compensatory damage awards: *Rountree v. Department of Agriculture*¹⁵⁸ and *Carpenter v. Department of Agriculture*.¹⁵⁹

a. *Rountree—factors to consider in determining a “reasonable” nonpecuniary damage award*

The *Rountree* case concerned a discriminatory performance appraisal.¹⁶⁰ To remedy the discrimination, the agency agreed to improve the appellant's rating and provide bonus pay and benefits commensurate with the higher appraisal.¹⁶¹ The agency also agreed to award compensatory damages, subject to the appellant's submission of adequate proof.¹⁶²

The appellant submitted a request for \$937,725 in compensatory damages.¹⁶³ Of the total claim, \$680,000 constituted compensation for nonpecuniary losses such as stress and various intangible injuries.¹⁶⁴ As evidence of his nonpecuniary damages, the appellant submitted a sworn personal statement describing the numerous losses he allegedly suffered as a result of the agency's discriminatory conduct.¹⁶⁵ Additional proof consisted of: (1) unsworn statements

157. See, e.g., *Jewett v. Department of the Navy*, E.E.O.C. No. 01943527, 95 F.E.O.R. 1065, at XI-161 (1994) (affirming agency's determination that appellant failed to adduce sufficient evidence to prove entitlement to compensatory damages); *Raymer v. United States Postal Serv.*, E.E.O.C. No. 01942478, 95 F.E.O.R. 1004, at XI-13 (1994) (finding that appellant failed to present sufficient evidence to prove damages and linkage despite opportunity to do so); *Munson v. Department of the Navy*, E.E.O.C. No. 01943006, 95 F.E.O.R. 1006, at XI-18 (1994) (upholding agency's determination that appellant had failed to provide objective evidence of damages or agency's responsibility for such damages); *Dennis-Brown v. United States Postal Serv.*, E.E.O.C. No. 01930016, 95 F.E.O.R. 1008, at XI-26 (1994) (finding evidence of damages and linkage adduced by appellant insufficient to prove entitlement to compensatory damages); *Caudle v. United States Postal Serv.*, E.E.O.C. No. 01930473, 94 F.E.O.R. 3163, at XII-46 (1993) (rejecting appellant's damages claim for failure to present any proof).

158. E.E.O.C. No. 01941906, 95 F.E.O.R. 3223 (1995).

159. E.E.O.C. No. 01945652, 95 F.E.O.R. 3229 (1995).

160. See *Rountree v. Department of Agric.*, E.E.O.C. No. 01941906, 95 F.E.O.R. 3223, at XII-120 (1995).

161. See *id.*

162. See *id.*

163. See *id.*

164. See *id.* (asserting nonpecuniary harm due to “stress related problems (loss of sleep, decreased physical activity, decreased libido, weight increase, argumentative behavior with co-workers, adverse side effects of anti-depressant medication, and verbal and physical abuse of wife), . . . loss of consortium, . . . loss of educational opportunities for his child, . . . loss of enjoyment of life, . . . damage to his reputation at work, and . . . damage to his reputation in community and personal life”).

165. See *id.* at XII-120 to XII-121.

from five co-workers describing the appellant's distress over his EEO complaint and the deterioration of his relationships at work; (2) an unsworn statement from the appellant's wife corroborating his representation of an ailing family life; and (3) a letter from a clinical psychologist diagnosing his depression and recommending anti-depressant medication.¹⁶⁶

After reviewing the appellant's proof, the agency issued its FAD denying his request for compensatory damages.¹⁶⁷ On appeal, the Commission reversed the FAD with regard to the agency's rejection of the nonpecuniary damage claim, awarding the appellant \$8,000.¹⁶⁸

At the outset of its analysis of the appellant's claims, the Commission reiterated that in order to receive a compensatory damage award, an appellant must establish: (1) that the agency's discriminatory action directly or proximately resulted in the harm; (2) the nature and degree of the harm; and (3) the duration or anticipated duration of the harm.¹⁶⁹ Assuming the appellant makes a *prima facie* showing, the Commission observed, an award must be limited to the sum necessary to reimburse an appellant for the actual losses, even if intangible, caused by the agency's discriminatory conduct.¹⁷⁰

The Commission ruled that the appellant's emotional distress and resultant symptoms stemmed in large measure from the stress of pursuing the EEO complaint and from alleged reprisal by agency officials after he initiated the complaint.¹⁷¹ Because compensatory damages are not available for intangible injuries resulting from participation in the EEO process¹⁷² and the allegations of reprisal were not at issue in the instant complaint,¹⁷³ the extent of emotional distress attributable to those factors was not compensable.¹⁷⁴

The EEOC also denied the appellant's request for damages resulting from injury to his relationships with co-workers, with his

166. *See id.*

167. *See id.* at XII-122.

168. *See id.* at XII-124.

169. *See id.* at XII-122 (citing *Rivera v. Department of the Navy*, E.E.O.C. No. 01934157, 94 F.E.O.R. 3522 (1994); *EEOC Enforcement Guidance*, *supra* note 22, at *5).

170. *See id.* at XII-123 (citing *EEOC Enforcement Guidance*, *supra* note 22, at *7).

171. *See id.*

172. *See id.* (citing *Appleby v. Department of the Army*, E.E.O.C. No. 01933897, 95 F.E.O.R. 3017 (1994)); *see also infra* notes 271-89 and accompanying text (discussing unavailability of compensatory damages for emotional distress stemming from participation in EEO complaint process).

173. *See Rountree*, 95 F.E.O.R. 3223, at XII-126 n.4 (explaining that complainant could obtain compensatory damages for nonpecuniary harm, if any, resulting from alleged reprisal only if he prevailed in his separate reprisal EEO complaint).

174. *See id.* at XII-123 to XII-124.

family, and with the community for failure to adduce evidence of linkage sufficient to establish a causal nexus between the agency's action and the alleged harm.¹⁷⁵ In rejecting the appellant's assertion that the discriminatory performance appraisal and denial of bonus pay caused him to verbally and physically abuse his wife and child, the EEOC relied on the psychologist's diagnosis that excluded violent or abusive behavior as a symptom of his depression.¹⁷⁶ Generalized distrust of and hostility toward whites likewise are not symptomatic of dysthymia.¹⁷⁷ Consequently, the EEOC dismissed the appellant's contention that his distress over the discrimination caused him to assault a white department store manager, thereby harming his reputation in the community.¹⁷⁸

Public policy concerns also motivated the Commission's ruling. Because a monetary award would contravene the public interest in preventing violence, the EEOC declared it would not grant damages for the appellant's violent outbursts even if he could establish a causal nexus between the agency's conduct and his behavior.¹⁷⁹

In addition, the Commission determined that the appellant failed to prove he was entitled to compensatory damages for the loss of educational opportunities for his son, as the evidence demonstrated that his wife's loss of her job, not the agency's unlawful conduct, prevented the appellant from sending his child to private school.¹⁸⁰

The EEOC did find, however, that some of the appellant's emotional distress was due to the agency's discriminatory treatment.¹⁸¹ The appellant's affidavit indicated his sleeplessness began soon after he learned of the appraisal, whereas his additional mental distress and depression began upon realizing he would be denied bonus pay due to the low rating.¹⁸² Furthermore, although the psychologist's letter did not identify a cause of the appellant's

175. See *id.* at XII-120.

176. See *id.* at XII-124 to XII-125. The psychologist diagnosed the complainant's condition as dysthymia in accordance with the revised third edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ("DSM"). See *id.* at XII-121. The DSM is the "diagnostic bible of the mental health professions" and as of 1994, is in its fourth edition. MENTAL AND EMOTIONAL INJURIES, *supra* note 50, at xxxvi & n.4. As the EEOC observed, according to the DSM, a diagnosis of dysthymia requires a depressed mood for more days than not, with at least two additional symptoms such as insomnia and low self-esteem, and with no evidence of a major depressive episode. See *Rountree*, 95 F.E.O.R. 3223, at XII-121; see also AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 349 (4th ed. 1994) (listing diagnostic criteria for dysthymia).

177. See *Rountree*, 95 F.E.O.R. 3223, at XII-124.

178. See *id.*

179. See *id.* at XII-125.

180. See *id.*

181. See *id.* at XII-123.

182. See *id.*

depression, it confirmed that the appellant was "very tense" and preoccupied with thoughts of the incidents at work leading to his complaint.¹⁸³

Having concluded that the appellant had proved that the agency's discrimination caused a portion of his mental distress, the EEOC set out to determine an appropriate award.¹⁸⁴ To that end, the Commission identified the following factors to consider in assessing a claim:

[W]e first look to the nature and severity of appellant's emotional distress and related symptoms. We consider fairly recent jury and court awards in cases in which the harm to the plaintiff was similar in nature and severity to appellant's emotional distress and related symptoms. We also consider the duration and expected duration of appellant's emotional distress and related symptoms. We consider the extent to which appellant's emotional distress and related symptoms were caused by factors other than the discriminatory act of the agency. Finally, after considering all of these factors, we decide a reasonable dollar value to compensate appellant for that portion of his emotional distress and related symptoms that were caused by the agency's discrimination.¹⁸⁵

Addressing each of these factors in turn, the EEOC first reiterated the host of stress-related problems averred by the appellant in his affidavit.¹⁸⁶ Yet, contrary to the appellant's representation of the depression as severe, the psychologist's diagnosis of dysthymia did not indicate that the appellant suffered a major depressive episode.¹⁸⁷ A review of cases granting damages for injuries similar in nature and severity disclosed awards ranging from \$500 to \$100,000.¹⁸⁸

183. See *id.*

184. See *id.* at XII-123 to XII-124.

185. *Id.* at XII-123 (citing *EEOC Enforcement Guidance*, *supra* note 22, at *5-8 & n.13).

186. See *id.*; see also *supra* note 164 (listing nonpecuniary damages alleged by appellant).

187. See *Rountree*, 95 F.E.O.R. 3223, at XII-123.

188. See *id.* at XII-123 to XII-124 (awarding \$40,000 for embarrassment, humiliation, severe headaches, sleeplessness, and depression in wrongful termination case (citing *Fleming v. County of Kane*, 898 F.2d 553, 562 (7th Cir. 1990); *Wulf v. City of Wichita*, 883 F.2d 842, 874-75 (10th Cir. 1989) (limiting damages for anger, depression, anxiety, frustration, and emotional strain following wrongful discharge to no more than \$50,000); *Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1180 (10th Cir. 1989) (affirming \$24,421 compensatory damage award for depression, muscle spasms, stomach pain, and hair loss in discriminatory discharge case); *McClam v. City of Norfolk Police Dep't*, 877 F. Supp. 277, 284 (E.D. Va. 1995) (finding \$15,000 proper compensation for 18 months of headaches, lowered self-esteem, and harm to attitude and devotion toward job resulting from repeated denials of job transfer requests); *Kuntz v. City of New Haven*, 3 A.D. Cas. (BNA) 1590, 1592 (D. Conn.) (granting \$500 in compensatory damages for disappointment, embarrassment, and sleeplessness stemming from denial of promotion), *aff'd without opinion*, 29 F.3d 622 (2d Cir.), *cert. denied*, 115 S. Ct. 667 (1994); *Boyce v. Board of Comm'rs*, 857 F. Supp. 794, 796 (D. Kan. 1994) (awarding \$50,000 for emotional pain, suffering, and mental anguish suffered due to hostile work environment); *Willson v. Shannon*, 857 F. Supp. 34, 37 (S.D. Tex. 1994) (granting \$100,000 in compensatory damages for mental anguish

Having determined the outer limits of awards warranted under the facts of the complaint, the EEOC next considered the duration of the appellant's mental anguish and depression.¹⁸⁹ The agency notified the appellant that it would raise his performance appraisal and provide the commensurate bonus pay nearly one year after his sleeplessness began and nine months after the onset of his other symptoms.¹⁹⁰ The appellant failed present evidence indicating any emotional distress attributable to the discrimination persisted beyond the date he learned of the agency's decision.¹⁹¹

Examining the extent to which the discriminatory treatment caused the appellant's mental anguish, the Commission looked to his personal statement describing his distress stemming from the low rating, including his concerns that the appraisal would eliminate him from consideration for a supervisory position he desired.¹⁹² Moreover, the Commission found that the resultant denial of bonus pay during the holiday season contributed to his loss of self-esteem.¹⁹³ However, the EEOC noted that the fact that the appellant requested significantly more sick leave after initiating his complaint evidenced the degree to which the stress of the EEO process, and not the discrimination itself, contributed to his anguish.¹⁹⁴ Based on the foregoing considerations, the Commission concluded that \$8000 in compensatory damages constituted a "reasonable" award for the appellant's proven nonpecuniary loss.¹⁹⁵

b. *Carpenter—standard to apply in evaluating the "reasonableness" of a nonpecuniary damage award*

Although the EEOC's discussion in *Rountree* set forth the variables to be included in the calculus of compensatory damages, the analysis failed to complete the equation, as it lacked a formula by which the reasonableness of an award could be evaluated. Within days of the *Rountree* ruling, the Commission decided *Carpenter v. Department of*

caused by reprisal after filing discrimination complaint); *Johnson v. Philadelphia Elec. Co.*, 709 F. Supp. 98, 104 (E.D. Pa. 1989) (awarding \$10,000 for mental anguish resulting from discriminatory denial of promotion))).

189. See *Rountree*, 95 F.E.O.R. 3223, at XII-124.

190. See *id.*

191. See *id.*

192. See *id.*

193. See *id.* (observing that appellant experienced "feelings of inadequacy, embarrassment, and failure").

194. See *id.* The Commission also found that the appellant's statements to co-workers and to his psychologist showed that the EEO process was a great cause of his stress. See *id.*

195. See *id.*

*Agriculture*¹⁹⁶ and in so doing, refined the reasonableness standard articulated in *Rountree*.

In *Carpenter*, the appellant alleged reprisal and discrimination based on age and disability through poor working conditions and unfair assignments.¹⁹⁷ Under the terms of a settlement agreement, the agency agreed to pay proven compensable damages up to \$150,000.¹⁹⁸ Despite the extensive objective and other evidence submitted by the appellant in support of his claim for \$150,000,¹⁹⁹ the agency denied the appellant's request for nonpecuniary damages while offering only \$544.02 in past pecuniary losses.²⁰⁰ On appeal, the Commission thoroughly reviewed the evidence adduced by the appellant and found that the record supported his claim for nonpecuniary damages.²⁰¹ Accordingly, it awarded \$75,000 as compensation for a litany of intangible injuries.²⁰²

In determining an adequate award for the appellant's nonpecuniary harm, the Commission addressed the factors identified in *Rountree*. The appellant submitted a lengthy personal statement describing the nature and severity of his deteriorating health and attendant mental anguish.²⁰³ An affidavit from his wife corroborated his representations, detailing the appellant's diminished libido, his withdrawal from their children, and his other stress-related ailments such as rashes, gastrointestinal distress, sleeplessness, and headaches.²⁰⁴ Statements from several health care providers diagnosed "moderately severe" physical and emotional disorders, including chronic bronchial asthma, hypertension, and manic depression.²⁰⁵

196. E.E.O.C. No. 01945652, 95 F.E.O.R. 3229 (1995).

197. See *Carpenter v. Department of Agric.*, E.E.O.C. No. 01945652, 95 F.E.O.R. 3229, at XII-143 (1995).

198. See *id.*

199. The appellant offered a 50-page, unsworn statement and a brief sworn declaration as evidence of his injury and linkage. See *id.* at XII-145. In addition to an affidavit from his wife, the appellant adduced medical records and statements from two physicians and a psychiatrist extensively corroborating his pain and distress and their connection to the agency's actions. See *id.* at XII-145 to XII-146.

200. See *id.* at XII-143.

201. See *id.* at XII-145 to XII-147.

202. See *id.* at XII-146 (awarding compensatory damages for nonpecuniary losses "attendant to embarrassment, humiliation, inconvenience, mental anguish, loss of enjoyment of life, loss of health, lose [sic] of consortium, and for losses associated with other disruptions of his marital and family relationships").

203. See *id.* at XII-145 (relating numerous injuries averred by appellant in his affidavit). The appellant asserted that the agency's discriminatory conduct caused "irreparable harm to [his] emotional health"; that his "family, friend, and work relationships began to deteriorate"; that he experienced "long periods of anger and self pity" and "feelings of helpless and embarrassment"; and that he suffered a host of physical problems, including "internal bleeding, hemorrhoids, and severe pain." *Id.*

204. See *id.* at XII-145 to XII-146.

205. See *id.*

Given the nature and severity of the appellant's intangible injuries, the Commission considered compensatory damage awards ranging from \$35,000 to \$150,000, which federal courts had deemed appropriate in similar employment discrimination cases.²⁰⁶ Unlike in *Rountree*, in which the EEOC looked only to case law for the possible range of awards, in *Carpenter* the Commission also considered the maximum award the appellant could (and, not surprisingly, did) claim under the terms of the settlement agreement.²⁰⁷

Turning to the duration of the appellant's distress, the EEOC observed that even though the alleged discrimination began before the effective date of the 1991 Act and continued after November 21, 1991, the appellant could seek compensation only for harm incurred as a result of the agency's post-Act conduct.²⁰⁸ The Commission noted that evidence of pre-Act misconduct and injury was relevant, however, because an agency liable for discrimination post-dating the 1991 Act is liable for the ensuing damages, even if the agency's pre-Act conduct emotionally weakened the complainant and thereby amplified the post-Act injury.²⁰⁹ As the evidence in *Carpenter* indicated, the appellant's physical and emotional distress began soon after the agency assigned the appellant to work in a log lodge in June 1988.²¹⁰ In November 1991, the agency required him to work in the

206. See *id.* at XII-147 (citing *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1335 (6th Cir. 1994) (upholding \$85,000 award in age discrimination and termination case); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1062 (8th Cir. 1993) (affirming compensatory damage award of \$150,000 in sex discrimination and termination case); *Moody v. Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201, 211 (6th Cir. 1990) (upholding \$150,000 award in wrongful discharge and age discrimination case); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987) (awarding \$123,000 for emotional distress); *Walters v. City of Atlanta*, 803 F.2d 1135, 1146 (11th Cir. 1986) (affirming \$150,000 damage award for nonpecuniary loss); *Turic v. Holland Hospitality House, Inc.*, 849 F. Supp. 544, 557-58 (W.D. Mich. 1994) (awarding \$50,000 in case involving sex and religion discrimination and termination), *aff'd in part and rev'd in part*, 85 F.3d 1211, 1216 (6th Cir. 1996); *EEOC v. AIC Sec. Investigations, Ltd.*, 823 F. Supp. 571, 575 (N.D. Ill. 1993) (holding \$50,000 in compensatory damages appropriate in discrimination and termination case), *aff'd in part and rev'd in part*, 55 F.3d 1276, 1286 (7th Cir. 1995); *Lussier v. Runyon*, 3 A.D. Cas. (BNA) 223, 232 (D. Me. 1993) (affirming \$75,000 award for injury to mental health); *McAdams v. United Parcel Serv., Inc.*, 2 A.D. Cas. (BNA) 1489, 1494 (D. Minn. 1993) (awarding \$35,000 in failure to accommodate case), *rev'd*, 30 F.3d 1027, 1030 (8th Cir. 1994)).

207. See *id.*

208. See *id.* at XII-146; see also *supra* note 119 (discussing non-retroactivity of 1991 Act).

209. See *Carpenter*, 95 F.E.O.R. 3229, at XII-143 to XII-144 (citing *Hatley v. Store Kraft Mfg. Co.*, 859 F. Supp. 1257, 1259-60 (D. Neb. 1994)); see also *Adesanya v. United States Postal Serv.*, E.E.O.C. No. 04950026, 96 F.E.O.R. 3096, at XII-316 (1996) ("[I]f an agency is liable for post-Act conduct, it is responsible for the damages that result from that conduct, even if the complainant was already emotionally weakened by its pre-Act conduct and the post-Act injury is greater as a result.").

210. See *Carpenter*, 95 F.E.O.R. 3229, at XII-145 (noting that appellant informed supervisors of his breathing difficulties). The lodge to which the U.S.D.A. assigned appellant was "marked by insect damage and infestation, rotted wood, fungus, and molds." *Id.* at XII-142.

lodge periodically, and a year later the agency moved the appellant to a windowless office.²¹¹ The agency's actions during the post-Act period exacerbated the appellant's asthma, thereby adding to his stress and attendant physical and psychological problems.²¹² Of the nearly seven years of emotional distress and physical suffering experienced by the appellant, therefore, only the last three constituted the duration of compensable harm.²¹³

As for the causal nexus between the agency's action and the appellant's injury, the conclusions of the appellant's health care providers buttressed his assertions that poor working conditions and harassment induced his physical and emotional distress.²¹⁴ A physician certified by the American Board of Allergy and Immunology opined that the high levels of allergens in the appellant's office space coupled with inadequate ventilation exacerbated the appellant's respiratory condition,²¹⁵ while a second doctor observed that the appellant's work environment caused mental distress and associated symptoms.²¹⁶ For its part, the agency failed to proffer any evidence that factors other than the complaint activity caused the appellant's intangible injuries.²¹⁷

With the above factors in mind, the Commission turned to the task of quantifying an award. Recognizing the difficulty of calculating an award for intangible injury,²¹⁸ the EEOC adopted a correspondingly indeterminate standard. A "proper award," it declared, must satisfy two criteria: (1) the award must not be "monstrously excessive' standing alone," and (2) the sum must be "consistent with similar awards made in similar cases."²¹⁹ Given that the parties had agreed that the appellant could claim no more than \$150,000 in compensato-

211. *See id.*

212. *See id.*

213. *See id.* at XII-147 (noting that "much of the damages about which appellant complains occurred in the pre-Act period").

214. *See id.* at XII-145 to XII-146.

215. *See id.* at XII-145.

216. *See id.* at XII-146 (quoting doctor's findings that appellant's situation at work "'had created a high pressure and high tension office life initiating . . . emotional, behavioral and mood changes culminating in psychiatric disorder and numerous somatic complaints'").

217. *See id.* at XII-146.

218. *See id.* at XII-147 (observing that "damage awards for emotional harm are difficult to determine and that there are no definitive rules governing the amount to be awarded in given cases").

219. *Id.* (quoting *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989)). In a subsequent case, the EEOC elaborated on the *Carpenter* criteria. *See Wallis v. United States Postal Serv.*, E.E.O.C. No. 01950510, 96 F.E.O.R. 3044, at XII-153 (1995) ("The Commission notes that for a proper award of nonpecuniary damages, the amount of the award should not be 'monstrously excessive' standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases.") (citations omitted).

ry damages, and the fact that "much" of the harm occurred prior to the effective date of the 1991 Act, the EEOC concluded that an award of half of the appellant's request for \$150,000 properly compensated the appellant.²²⁰

Commentators have noted the apparent incongruity of the "monstrously excessive" language of *Carpenter* and the reference to reasonableness in *Rountree*.²²¹ Read separately, the decisions seem to send mixed signals that might prompt appellants to seize on the "monstrously excessive" standard to justify larger claims as agencies resort to the reasonableness language to mitigate awards.²²²

It is unlikely, though, that the decisions were intended to stand independently. With the second ruling following so closely on the heels of the first, it seems more probable that the EEOC sought to incorporate the criteria enunciated in *Carpenter* within the reasonableness standard established in *Rountree*. Except for the additional criteria in *Carpenter*, the analysis employed by the EEOC in both cases is largely the same. The absence in *Carpenter* of specific reference to *Rountree*'s reasonable standard suggests that the Commission intended to clarify its discussion in *Rountree* rather than to create a new standard. To that end, the EEOC supplanted *Rountree*'s "reasonableness" language with a fuller discussion in *Carpenter* of the criteria by which to determine the adequacy of an award.²²³

Therefore, taken together, *Rountree* and *Carpenter* provide the previously missing guidance for applying the basic analytical framework to address administrative compensatory damage claims. As discussed below, numerous other EEOC decisions have refined further the precepts enunciated in *Jackson* and its progeny in response to other issues arising in the course of assessing compensatory damages for intangible injury.²²⁴

220. See *Carpenter*, 95 F.E.O.R. 3229, at XII-147.

221. See Charles W. Hemingway, *First Decisions Quantifying Compensatory Damage Awards Issued by EEOC*, [Perspective] F.E.O.R. V-95-61, at V-95-63 (Sept. 13, 1995) ("The Commission's 'monstrously excessive' language [in *Carpenter*] appears to create potential for confusion when contrasted with its language in *Rountree* that an award should be 'reasonable' to compensate a complainant for the harm done.").

222. See *id.*

223. See *Carpenter*, 95 F.E.O.R. 3229, at XII-147 (articulating criteria by which to measure appropriate award for pecuniary losses).

224. See *infra* Part II.C (reviewing cases after *Jackson* that addressed issues concerning compensatory damage claims).

C. Further Development of the EEOC Analytical Framework—Other Issues in the Evaluation of Claims for Nonpecuniary Damages

1. Eligibility to request compensatory damages

As the 1991 Act states, victims of unlawful intentional discrimination are entitled to seek compensatory damages, provided that the aggrieved parties cannot recover under 42 U.S.C. § 1981.²²⁵ Apparently, Congress intended the “cannot recover” language to resolve any ambiguity arising from the overlap between § 1981 and Title VII (as amended by § 1981a) in cases concerning racial discrimination; yet, the issue still engenders some confusion.²²⁶ The question arose whether, by virtue of § 1981a, victims of racial discrimination were no longer permitted to seek damages under Title VII and instead had to recover under § 1981.²²⁷ The Sponsors’ Interpretative Memorandum²²⁸ explains that the “cannot recover” language is intended to preclude duplicative recovery against a respondent under both § 1981 and § 1981a when, for instance, an African-American woman seeks double recovery for the same harm resulting from racial discrimination (actionable under § 1981) and sex discrimination (actionable under Title VII).²²⁹ Such an individual would be eligible to seek damages under each of the statutes, however, if the racial discrimination caused injury “demonstrably different” from that incurred as a result of the sex discrimination.²³⁰ Furthermore, a complaining party need not first prove a § 1981 cause of action does not lie in order to recover under § 1981a,²³¹ nor must he elect one remedy to the preclusion of the other.²³² Thus, if a party may bring a cause of action under § 1981, yet opts not to do so, he “cannot recover” under § 1981 for purposes of pursuing compensatory damages under

225. See Civil Rights Act of 1991 § 102(a)(1)-(2), 42 U.S.C. § 1981a(a)(1)-(2) (1994).

226. See HERNICZ, *supra* note 14, at 66 (“Less clear is the degree of overlap between 42 U.S.C. § 1981 damages and [the 1991 Act].”); DONALD R. LIVINGSTON, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 62 (1993) (noting that “cannot recover” language “is not free of ambiguity”).

227. See LIVINGSTON, *supra* note 226, at 62-63 (discussing differing interpretations of “cannot recover” requirement).

228. 137 CONG. REC. S15,484 (daily ed. Oct. 30, 1991).

229. See *id.*

230. See *id.*

231. See *id.*

232. See 137 CONG. REC. H9527 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards) (“No party is under any obligation to proceed under one or the other statute or to waive any cause of action under either statute as a condition of proceeding.”).

§ 1981a.²³³ The same result might follow even if the party seeks damages under § 1981 and Title VII simultaneously (provided, of course, that double damages are not awarded for the same harm incurred as a result of the discrimination).²³⁴

Under this reading, which the EEOC adopted, a party "cannot recover" damages under § 1981 until such time as § 1981 relief is actually awarded.²³⁵ Charging that this interpretation impugns the plain language of the statute, at least one critic has opined that the more likely meaning of the "cannot recover" stipulation is that compensatory damages for Title VII violations are available under § 1981a only when no § 1981 action lies.²³⁶ The Commission's stance thus permits double recovery for "multiple discrimination [e.g., disparate treatment on the grounds of both race and sex] based on the same acts" where a plaintiff sues under § 1981 and Title VII.²³⁷

However, such criticism ignores the sponsors' clear intent to permit recovery for multiple discrimination under both statutes only if the plaintiff can demonstrate that each form of discrimination injured him in a different manner.²³⁸ As a practical matter, differentiating between harms allegedly inflicted by a combination of, for instance, racial and national origin discrimination would be a difficult proposition. Furthermore, when a plaintiff may sue under both statutes, she is much more likely to bring a § 1981 action because, unlike Title VII relief under § 1981a, there is no limit on recovery.²³⁹ In the context of the administrative process, it is conceivable that a federal employee injured by multiple discrimination could pursue concurrently a § 1981 court action and a Title VII administrative complaint.²⁴⁰ As in the case of a private sector plaintiff, though,

233. See *id.* (statement of Rep. Edwards) (asserting that "if a party has a potential cause of action under [§ 1981], but for whatever reason does not bring it, the party 'cannot recover under [§ 1981]'" and is therefore eligible to recover under § 1981a).

234. See 137 CONG. REC. H9526 (daily ed. Nov. 7, 1991) (recognizing possibility that Title VII and § 1981 damages actions can be brought concurrently as long as duplicative recovery is not awarded).

235. See *EEOC Enforcement Guidance*, *supra* note 22, at *2 (announcing that "the Commission will seek damages where otherwise appropriate, even if the complaining party has an ongoing § 1981 court action, as long as the complaining party has not recovered under § 1981").

236. See HERNICZ, *supra* note 14, at 66 (noting lack of language prohibiting double recovery in statute); see also Cathcart & Snyderman, *supra* note 72, at 274 (arguing that because sponsors' interpretation of "cannot recover" language is not "obvious" from statutory language, courts may interpret "cannot recover" to mean damages are not available under § 1981a if plaintiff has potential cause of action under § 1981).

237. See HERNICZ, *supra* note 14, at 66.

238. See *supra* text accompanying note 229 (quoting Sponsors' Interpretative Memorandum).

239. See HERNICZ, *supra* note 14, at 66.

240. See *Swicker v. William Armstrong & Sons*, 484 F. Supp. 762, 770 (E.D. Pa. 1980) (holding that federal sector employees need not exhaust administrative remedies prior to bringing § 1981 action).

such a situation is improbable. A federal employee undaunted by the time and expense of litigation will file suit under § 1981 motivated by the prospect of unlimited compensatory damages, whereas one less willing or unable to litigate will exhaust the administrative process before considering federal district court as a last resort.²⁴¹ Thus, critics' fears that the EEOC's interpretation of the "cannot recover" provision will result in double recovery are unlikely to materialize in practice.

Aside from the "cannot recover" requirement for Title VII damage claims, the 1991 Act also limits a complainant's eligibility to recover damages for discrimination on the basis of disability.²⁴² The 1991 Act entitles complainants to compensatory damages under the ADA and Rehabilitation Acts except in cases when the agency exhibits "good faith efforts" to reasonably accommodate the employee's disability.²⁴³

The 1991 Act, however, makes no mention of the Age Discrimination in Employment Act²⁴⁴ ("ADEA"). The EEOC ruled on the question whether an ADEA complainant is eligible to recover compensatory damages in *Taylor v. Department of the Army*.²⁴⁵ In *Taylor*, the appellant alleged that discrimination on the bases of age, disability, and reprisal motivated his non-selection for an engineer position.²⁴⁶ Although the agency did not find discrimination based on disability or reprisal, it did admit age discrimination.²⁴⁷ In its FAD, the agency refused to award attorney's fees, contending that the ADEA does not provide such an award at the administrative level.²⁴⁸ The EEOC OFO also denied the appellant's claim for legal fees.²⁴⁹ In his request for reconsideration by the Commission, the appellant asserted for the first time that the agency's offer did not constitute full relief because it did not include a compensatory damage award.²⁵⁰ Given the absence of "express Congressional intent" to apply the damages provisions of the 1991 Act to ADEA claims, the

241. See 29 C.F.R. § 1614.408 (1996) (providing that federal sector complainant may file suit under Title VII 120 days after instigating complaint or 90 days after final disposition of complaint).

242. See *supra* note 97 (quoting 1991 Act's damages provisions for disability discrimination).

243. See Civil Rights Act of 1991 § 102(a)(3), 42 U.S.C. § 1981a(a)(3) (1994).

244. 29 U.S.C. §§ 623-634 (1994).

245. E.E.O.C. No. 05930633, 94 F.E.O.R. 3252, at XII-262 (1994).

246. See *Taylor v. Department of the Army*, E.E.O.C. No. 05930633, 94 F.E.O.R. 3252, at XII-263 (1994).

247. See *id.*

248. See *id.*

249. See *id.*

250. See *id.*

EEOC held that compensatory damages are not available under the ADEA.²⁵¹ It should be noted, however, that where a complainant prevails under the ADEA in conjunction with an allegation of discrimination under Title VII, compensatory damages are recoverable as to the latter.²⁵²

2. *Nonpecuniary damages that are and are not compensable*

In addition to delineating eligibility requirements for asserting a damages claim, the 1991 Act indicates the nature of nonpecuniary losses for which compensatory damages are recoverable.²⁵³ Commission decisions have adopted the language of the 1991 Act's compensatory damages provision while recognizing other forms of compensable intangible injuries. In *Rountree v. Department of Agriculture*,²⁵⁴ for example, the Commission observed that nonpecuniary losses compensable in the administrative process include "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health," provided, of course, that the damages stem from post-Act discrimination.²⁵⁵ In *Carpenter v. Department of Agriculture*,²⁵⁶ the Commission awarded damages to compensate for embarrassment, humiliation, loss of consortium, and

251. See *id.* at XII-264.

252. See, e.g., *Sowell v. Department of the Navy*, E.E.O.C. No. 01945237, 1995 WL 560207, at *2-3 (Sept. 14, 1995) (holding that agency properly dismissed ADEA claim as moot because age discrimination did not raise issue of compensatory damages, but finding that race and national origin discrimination allegations were not moot because of unresolved compensatory damages issue); *Glover v. United States Postal Serv.*, E.E.O.C. No. 01930696, 94 F.E.O.R. 3176, at XII-89 n.1, XII-90 (1993) (reinstating complaint alleging race, sex, and age discrimination for further processing of compensatory damages claim because although compensatory damages are unavailable as to ADEA claim, such damages remained possible under Title VII claims).

253. See Civil Rights Act of 1991 § 102(b)(2), 42 U.S.C. § 1981a(b)(3) (1994) (including "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses" within gamut of available compensatory damages).

The nonpecuniary losses recoverable under the 1991 Act are those traditionally included within the definition of compensatory damages at law. The notion of compensatory damages denotes "all loss recoverable as a matter of right and includes all damages (beyond nominal damages) other than punitive or exemplary damages." 22 AM. JUR. 2D *Damages* § 23, at 50 (1988). Generally, compensatory damages include "any proximate consequences which can be established with requisite certainty, including damages for future or prospective injuries that are reasonably certain to result, but not for any consequences which are remote and indirect or which are merely speculative and cannot be established with any degree of certainty." *Id.* at 56. In particular, "consequences" compensated in this manner include nonpecuniary harm such as "bodily pain and suffering, . . . disabilities or loss of health, injury to character and reputation, and . . . wounded feelings and mental anguish." *Id.* (footnotes omitted).

254. E.E.O.C. No. 01941906, 95 F.E.O.R. 3223, at XII-119 (1995).

255. *Rountree v. Department of Agric.*, 95 F.E.O.R. 3223, at XII-122 (1995) (citing *EEOC Enforcement Guidance*, *supra* note 22, at *5); see also *supra* note 119 (discussing non-retroactivity of 1991 Act).

256. E.E.O.C. No. 01945652, 95 F.E.O.R. 3229 at XII-142 (1995).

harm to the complainant's marital and family relationships.²⁵⁷ The EEOC also considered the appellant's request for compensation based on injury to relationships with co-workers and friends, although it ultimately concluded that the evidence did not warrant damages on those grounds.²⁵⁸ On another occasion, the EEOC entertained a compensatory damages claim for diminished enthusiasm and self-esteem.²⁵⁹

With regard to compensatory damage requests for loss of opportunity and damage to career, the Commission has expressed some doubt as to the viability of such claims. It examined the issue in *Browne v. Department of Agriculture*.²⁶⁰ In that case, the appellant contended that the agency discriminated against her on the bases of race and age in denying promotion opportunities.²⁶¹ Under the terms of a settlement agreement, the agency agreed to pay proven compensatory damages.²⁶² The appellant submitted a claim for \$57,255, \$10,000 of which she attributed to compensatory damages attendant to lost opportunities and harm to her career.²⁶³ Thereafter, the agency issued its FAD denying her claim.²⁶⁴ In affirming the agency's determination on appeal, the EEOC found the appellant's request for damages based on loss of opportunity and injury to her career "too speculative" due to the many variables unrelated to the agency's action that affect the nature of her opportunities and the course of her career.²⁶⁵ It is important to note that in reaching its decision, the EEOC emphasized the paucity of evidence substantiating the appellant's request.²⁶⁶ Had she identified a specific opportunity lost due to her nonpromotion, the Commission implied that she

257. See *Carpenter v. Department of Agric.*, E.E.O.C. No. 01945652, 95 F.E.O.R. 3229, at XII-146 (1995) (disagreeing with agency's finding denying appellant compensatory damages).

258. See *id.* at XII-146 n.3.

259. See *Feris v. Environmental Protection Agency*, E.E.O.C. No. 01934828, 1995 WL 481169, at *17 (Aug. 10, 1995) (reversing agency's determination that it had accommodated appellant's disability reasonably and directing agency to investigate on remand appellant's assertion that "his enthusiasm and self-esteem have been diminished through his daily struggle with agency management over this issue during a four-year time period").

260. E.E.O.C. No. 01944256, 95 F.E.O.R. 3230, at XII-150 (1995).

261. See *Browne v. Department of Agric.*, E.E.O.C. No. 01944256, 95 F.E.O.R. 3230, at XII-150 (1995) (alleging that agency discriminated against appellant, an African American woman over age 60, in favor of younger white male).

262. See *id.*

263. See *id.* at XII-151 (contending that non-selection for promotion resulted in lost professional opportunities).

264. See *id.* at XII-150.

265. See *id.* at XII-152.

266. See *id.* (noting that complainant must provide evidence of issue at hand); *infra* text accompanying notes 402-07 (discussing appellant's failure to adduce sufficient proof of damages in *Browne*).

might have prevailed on her claim.²⁶⁷ Thus, notwithstanding the speculative nature of a damages claim for lost opportunity and damage to career, the EEOC left open the possibility that a complainant might be entitled to compensatory damages on those grounds, provided she adduces sufficient proof of injury and linkage.

The EEOC has been much clearer in refusing to award compensatory damages to a complainant's spouse for loss of consortium.²⁶⁸ As the Commission explained in *Carpenter*, because the appellant's wife was a not a party to the complaint and compensatory damages are available under the 1991 Act only to federal sector complainants in the administrative process, it could not compensate her for harm allegedly caused by the agency's discriminatory treatment of her husband.²⁶⁹

Nor may a complainant seek compensatory damages with regard to losses allegedly incurred as a result of the agency's improper processing of an EEO complaint.²⁷⁰ The EEOC articulated this rule in *Appleby v. Department of the Army*,²⁷¹ a case involving an allegation that the agency falsified answers to interrogatory questions and submitted a brief to an EEOC AJ containing false statements.²⁷² In his initial complaint, the appellant alleged that the agency discriminated on the basis of disability by not considering him for a position.²⁷³ Once the agency accepted the AJ's recommended finding of discrimination on the first complaint, it dismissed his second complaint as to the mishandling of the original action.²⁷⁴ The EEOC declined to reverse the agency's decision on appeal, concluding that compensatory damages were not awardable for alleged improper handling of a

267. See *Browne*, 95 F.E.O.R. 3230, at XII-152 (noting that appellant "failed to identify any specific opportunity lost as a result of her non-selection or otherwise present any objective evidence in support of her request").

268. See *Carpenter v. Department of Agric.*, E.E.O.C. No. 01945652, 95 F.E.O.R. 3229, at XII-146 n.3 (1995) (denying damages to appellant's wife).

269. See *id.*

270. See, e.g., *Estate of Gerald Shipman v. Department of Transp.*, E.E.O.C. No. 01945720, 1995 WL 397009, at *2 n.1 (June 27, 1995) (observing that appellant was not entitled to compensatory damages when agency allegedly acted in reprisal by failing to submit information to Commission); *Benton v. Department of Defense*, E.E.O.C. No. 01951511, 1995 WL 383504, at *2 (June 20, 1995) (denying compensatory damages when appellant asserted that agency improperly investigated complaint); *March v. Department of Health & Human Servs.*, E.E.O.C. No. 01940975, 94 F.E.O.R. 1071, at XI-31 (1994) (refusing to award compensatory damages when appellant alleged reprisal after agency impeded her ability to attend another individual's EEO hearing by declining to approve appellant's travel request).

271. E.E.O.C. No. 01933897, 95 F.E.O.R. 3017, at XII-43 (1994).

272. See *Appleby v. Department of the Army*, E.E.O.C. No. 01933897, 95 F.E.O.R. 3017, at XII-43 (1994).

273. See *id.* (alleging that appellant was subjected to reprisal for prior EEO activity).

274. See *id.*

complaint.²⁷⁵ The Commission reasoned that "[s]uch damages were not added to the EEO statutes to address how an agency litigates an EEO complaint but rather, to address how an agency treated an employee or applicant in an employment-related matter."²⁷⁶

Later, in *Rountree v. Department of Agriculture*,²⁷⁷ the EEOC expanded *Appleby's* prohibition against compensatory damages for nonpecuniary losses allegedly incurred as a result of the improper processing of a complaint.²⁷⁸ The appellant in *Rountree* did not contend that the agency mishandled his complaint; rather, he asserted that as a result of merely participating in the administrative process, he suffered stress and related symptoms.²⁷⁹ Citing *Appleby* for the proposition that such harm was not compensable, the EEOC declined to make a distinction between injury allegedly caused by improper processing of a complaint and harm due to the stress of the complaint process itself.²⁸⁰ Therefore, regardless of whether the complainant requests damages on the grounds that the agency mishandled her complaint or argues that she is entitled to damages for the stress of merely pursuing a complaint, a complainant may not recover compensatory damages for harms caused by participating in the EEO process.

Finally, the Commission has refused to award compensatory damages for intangible injuries resulting from the alleged breach of a settlement agreement.²⁸¹ The EEOC recently reiterated this

275. See *id.* at XII-44.

276. *Id.*

277. E.E.O.C. No. 01941906, 95 F.E.O.R. 3223, at XII-119 (1995).

278. *Rountree v. Department of Agric.*, E.E.O.C. No. 01941906, 95 F.E.O.R. 3223, at XII-123 (1995) (denying compensatory damages for non-pecuniary losses stemming from participation in EEO process).

279. See *id.*

280. See *id.* ("[C]ompensatory damages are not available for emotional distress and depression caused by the stress of participating in the EEO process.").

281. See, e.g., *Child v. Department of Transp.*, E.E.O.C. No. 01952080, 96 F.E.O.R. 3064, at XII-221 to XII-222 (1996) (denying compensatory damages claim for "mental anguish" purportedly caused by agency's delay in adjusting appellant's pay as stipulated by settlement agreement); *Gibbons v. United States Postal Serv.*, E.E.O.C. No. 01952319, 96 F.E.O.R. 3052, at XII-189 (1995) (rejecting compensatory damages claim for "anxiety" allegedly suffered when appellant was denied union representation in breach of settlement agreement); *Carpenter v. Department of Agric.*, E.E.O.C. No. 01945652, 95 F.E.O.R. 3229, at XII-144 (1995) (rejecting appellant's claim that agency's alleged breach of settlement agreement due to failure to act "expeditiously" and "in good faith" entitled appellant to maximum sum of compensatory damages allowed under agreement).

In *Gibbons*, the EEOC noted:

Congress added compensatory damages to federal EEO statutes in order to make the perpetrators of intentional employment discrimination liable for non-wage economic consequences of their acts, to the extent necessary to provide full relief to victims of discrimination. Compensatory damages are not available for allegations of breach since such allegations do not involve a determination of whether discrimination has occurred.

Gibbons, 96 F.E.O.R. 3052, at XII-189 (citation omitted).

position in *Berendsen v. Department of Agriculture*.²⁸² In *Berendsen*, a husband and wife sought both reconsideration of the Commission's refusal to reinstate their complaints and an award for compensatory damages allegedly caused by the agency's breach of a settlement agreement.²⁸³ The husband originally had complained of reprisal with regard to his performance appraisal rating, which allegedly was lowered as the result of his wife's complaint asserting discrimination based on sex and national origin.²⁸⁴ The settlement provided, inter alia, that the agency would assist in reassigning the appellants.²⁸⁵ As the result of downsizing efforts, though, the agency was unable to find suitable positions for the appellants within the time specified.²⁸⁶ Finding that the agency did not breach the settlement agreement, the EEOC denied the appellants' request for reconsideration.²⁸⁷ Moreover, the Commission noted that even if the agency had breached the agreement, the appellants would not be entitled to compensatory damages as a result.²⁸⁸

3. *When a complainant may request compensatory damages*

Through a series of decisions, the EEOC set forth the principles governing the timing of a compensatory damage claim. Its disposition of *Carlson v. Department of the Navy*²⁸⁹ established the general rule on how late in the administrative process a claim may be raised. *Carlson* involved allegations of rude treatment by supervisors and unwarranted transfers purportedly motivated by religious discrimination.²⁹⁰ Although she had not asserted a claim for compensatory damages, the appellant refused to accept the agency's offer of full relief because it did not include monetary relief.²⁹¹ On appeal, she challenged the agency's dismissal of her complaint for failure to accept a certified offer of full relief on the ground that the offer did not address compensatory damages.²⁹² The OFO concurred with the agency, finding that the agency's offer constituted full relief because the

282. E.E.O.C. No. 05950488, 96 F.E.O.R. 3102, at XII-338 (1996).

283. See *Berendsen v. Department of Agric.*, E.E.O.C. No. 05950488, 96 F.E.O.R. 3012, at XII-339 (1996).

284. See *id.*

285. See *id.*

286. See *id.* at XII-340.

287. See *id.* at XII-341.

288. See *id.* (stating that Commission will not consider claim for compensatory damages raised for first time during request for reconsideration).

289. E.E.O.C. No. 05930480, 94 F.E.O.R. 3403, at XII-29 (1994).

290. See *Carlson v. Department of the Navy*, E.E.O.C. No. 05930480, 94 F.E.O.R. 3403, at XII-29 (1994).

291. See *id.* at XII-30.

292. See *id.*

appellant failed to assert a damage claim before receipt of the agency's certified offer.²⁹³ The appellant sought reconsideration before the Commission.²⁹⁴

Reversing the OFO, the EEOC ruled that a complainant may raise a compensatory damage claim at any stage of the complaint process prior to the filing of a request to reopen and reconsider.²⁹⁵ When the complainant delays and raises the issue of compensatory damages after the agency makes an offer of full relief, the agency must withdraw its offer and request objective and other evidence of the alleged losses and their causal links to the agency's action, per *Jackson* and its progeny.²⁹⁶ Depending on the complainant's response, the agency may either extend a new offer of full relief addressing the damages claim or proceed with the processing of the complaint.²⁹⁷ The agency, however, need not re-investigate the complaint itself.²⁹⁸ As the Commission noted in a later decision, a belated damages claim cannot "breathe new life into an otherwise resolved complaint."²⁹⁹

There is an exception to the general rule precluding a complainant from claiming compensatory damages for the first time in a request to reconsider. Although the EEOC alluded to such an exception in its *Thorne v. Department of Education*³⁰⁰ holding, it would not state the exception clearly until its *Square v. Department of Veterans Affairs*³⁰¹ decision.

The appellant in *Thorne* alleged reprisal and three incidents of discrimination on the grounds of age and disability.³⁰² In its FAD, the agency dismissed all four allegations.³⁰³ The Commission

293. See *id.*

294. See *id.*

295. See *id.* at XII-31; see also *Berendsen v. Department of Agric.*, E.E.O.C. No. 05950488, 96 F.E.O.R. 3102, at XII-341 (1996) (noting general rule that Commission will not entertain compensatory damages claim raised for first time in request for reconsideration); *Simpkins v. United States Postal Serv.*, E.E.O.C. No. 05940887, 96 F.E.O.R. 3021, at XII-74 (1995) (affirming that compensatory damages claim may be raised during administrative process up to and including appeal); *Martin v. Department of Defense*, E.E.O.C. No. 05940745, 95 F.E.O.R. 3248, at XII-204 (1995) (denying claim for compensatory damages raised for first time in request for reconsideration); *Banks v. Department of the Interior*, E.E.O.C. No. 05920680, 94 F.E.O.R. 3327, at XII-465 (1994) (reiterating that complainant may raise issue of compensatory damages any time during complaint process, up to and including appeal stage, but not thereafter).

296. See *Carlson*, 94 F.E.O.R. 3403, at XII-31.

297. See *id.*

298. See *Simpkins*, 96 F.E.O.R. 3021, at XII-74 (stating that on remand of complaint for consideration of compensatory damages issue, agency need only investigate damages claim, not underlying complaint).

299. *Id.*

300. E.E.O.C. No. 05920952, 94 F.E.O.R. 3246 (1993).

301. E.E.O.C. No. 05930910, 95 F.E.O.R. 3018 (1994).

302. See *Thorne v. Department of Educ.*, E.E.O.C. No. 05920952, 94 F.E.O.R. 3246, at XII-250 (1993).

303. See *id.*

vacated the agency's rejection as to three of the allegations on appeal, while affirming the fourth on the ground that it was the subject of a pending civil action in federal district court.³⁰⁴ Following the appellant's retirement, the agency issued its second FAD dismissing the remaining allegations for mootness and failure to state a claim.³⁰⁵ The OFO upheld the agency's second dismissal, prompting the appellant to request reconsideration.³⁰⁶ In his request, the appellant asserted a damage claim for the first time.³⁰⁷ The EEOC refused to reopen the complaint for reconsideration, declaring that when an agency has correctly found that allegations are "no longer justiciable" (as the agency did in this instance), and the Commission affirms the decision, it will not entertain a damage claim raised for the first time in a request for reconsideration.³⁰⁸

From the Commission's discussion in *Thorne*, it appeared that the EEOC might entertain a compensatory damage claim raised for the first time in a request to reconsider when an issue of the complaint remained justiciable. The Commission announced that very proposition in *Square*. In that case, the appellant alleged race, gender, and age discrimination and reprisal.³⁰⁹ Because the agency neglected to address the appellant's claim for damages, she rejected the agency's offer of full relief.³¹⁰ In response, the agency cancelled her complaint.³¹¹ On appeal, the Commission concluded that the agency's offer constituted full relief and affirmed the agency's dismissal of the complaint.³¹² In her request to reopen and reconsider, the appellant argued that the agency failed to take into account her claim for compensatory damages, which she mistakenly had presented as a request for punitive damages in her formal complaint.³¹³ She did not challenge any other element of the offer.³¹⁴ Without addressing the issue whether she in fact had asserted a compensatory damage claim, the Commission reopened on its own motion the prior determination as to the sufficiency of the other items in the agency's

304. *See id.*

305. *See id.* (finding that appellant's retirement ensured elimination of discrimination).

306. *See id.*

307. *See id.* (asserting damage claim for "medical expenses and used sick leave").

308. *See id.*

309. *See Square v. Department of Veterans Affairs*, E.E.O.C. No. 05930910, 95 F.E.O.R. 3018, at XII-45 (1994).

310. *See id.* at XII-46.

311. *See id.*

312. *See id.* at XII-47 to XII-48.

313. *See id.* at XII-46.

314. *See id.*

offer.³¹⁵ Finding that the agency had erred with regard to aspects of the offer other than the issue of compensatory damages, the Commission vacated its prior finding and reversed the agency's decision.³¹⁶

Although the EEOC reiterated that it generally will not consider a claim initially raised in a request to reconsider an appellate decision, the Commission nonetheless directed the agency to address the complainant's compensatory damage claim on remand.³¹⁷ If the prior decision "is found deficient on other grounds, and is being remanded for further processing," the Commission explained, then it is "appropriate that [the] appellant's claim for compensatory damages be considered by the agency on remand."³¹⁸ In other words, when the EEOC determines that "other 'justiciable claims' [are] still alive," it will entertain a claim for compensatory damages raised for the first time in a request to reopen and reconsider.³¹⁹

4. *Raising a prima facie claim for compensatory damages*

As the facts of *Square* indicate, under some circumstances an issue may arise as to whether a complainant actually asserted a claim for compensatory damages.³²⁰ The question is significant because under the *Mims*³²¹ shifting burden of production analysis, an agency need not presume nonpecuniary losses; only after the complainant has raised a prima facie claim must the agency address the issue of compensatory damages.³²²

So how does a complainant establish a prima facie claim for compensatory damages? Cases subsequent to *Mims* demonstrate that the EEOC has adopted a low threshold for making such a claim.³²³ In *Haynes v. United States Postal Service*,³²⁴ for instance, the appellant filed a formal complaint asserting racial and gender discrimination and reprisal when a supervisor allegedly warned the appellant that filing an EEO complaint would furnish a justification for discharging

315. See *id.*

316. See *id.* at XII-47 to XII-48.

317. See *id.* at XII-47.

318. *Id.*

319. See Hemingway, *supra* note 17, at 694.

320. See *supra* text accompanying note 313 (noting that appellant in *Square* mistakenly presented request for compensatory damages as claim for punitive damages).

321. *Mims v. Department of the Navy*, E.E.O.C. No. 01933956, 94 F.E.O.R. 3153 (1994).

322. See *supra* Part II.B.3 (outlining shifting burden of production analysis articulated in *Mims*).

323. See Hemingway, *supra* note 17, at 692 ("[T]he Commission has made it easy for a complainant to get a foot through the compensatory damages door.").

324. E.E.O.C. No. 05920891, 94 F.E.O.R. 3168 (1993).

her.³²⁵ Although the appellant contended that her supervisor "subjected her to mental [and] physical anguish," she neglected to specifically request compensatory damages.³²⁶ As an offer of full relief, the agency proposed a settlement agreement that was silent as to the issue of compensatory damages.³²⁷ She declined the offer and appealed the agency's dismissal of her complaint.³²⁸ The EEOC granted her request to reopen the complaint, determining that the appellant's claim of mental and physical distress "essentially raise[d] an issue as to whether she is entitled to compensatory damages."³²⁹ Thus, absent an examination of the compensatory damage claim implied in her formal complaint, the offer did not constitute full relief.³³⁰

Similarly, in *Fiandaca v. Department of the Navy*,³³¹ the appellant did not make an affirmative claim for compensatory damages.³³² The appellant in *Fiandaca* alleged that the agency did not take appropriate action to end sexual harassment by a co-worker.³³³ After the agency determined that she failed to establish a case of sex discrimination, she appealed.³³⁴ In reversing the agency's finding and directing the agency to address the issue of compensatory damages on remand, the EEOC observed that the appellant "alluded to a claim for compensatory damages throughout the processing of the case," insofar as she represented that she suffered mental anguish and a nervous breakdown as a result of the harassment.³³⁵ Moreover, the Commission noted that in order to establish a prima facie claim, a complainant "need not use legal terms of art such as 'compensatory damages,' but merely must use some [words] or phrases to put the agency on notice that either a pecuniary or non-pecuniary loss has been incurred."³³⁶

325. See *Haynes v. United States Postal Serv.*, E.E.O.C. No. 05920891, 94 F.E.O.R. 3168, at XII-71 (1993).

326. See *id.* at XII-71 to XII-72.

327. See *id.* (restating terms of proposed settlement agreement).

328. See *id.* at XII-71.

329. *Id.* at XII-72.

330. See *id.*

331. E.E.O.C. No. 01943264, 96 F.E.O.R. 3012 (1995).

332. See *Fiandaca v. Department of the Navy*, E.E.O.C. No. 01943264, 96 F.E.O.R. 3012, at XII-42 (1995).

333. See *id.*

334. See *id.* at XII-43.

335. See *id.*

336. *Id.* at XII-43, XII-46 n.3. A complainant's request during EEO counseling for a cash settlement of \$300 was sufficient to make a claim for compensatory damages in one instance. See *Zurcher v. United States Postal Serv.*, E.E.O.C. No. 01945859, 95 F.E.O.R. 1176, at XI-168 to XI-169 (1995) (reversing dismissal of complaint for mootness and remanding for further processing because agency failed to request objective evidence of damages and linkage after complainant requested cash settlement).

Not every complainant satisfies the threshold for making a prima facie claim, however. For example, in *Roberson v. Department of Veterans Affairs*,³³⁷ the appellant complained that her supervisor discriminated against her by insulting her with demeaning comments.³³⁸ The appellant did not raise the issue of compensatory damages, and so the agency's offer did not address whether she was entitled to monetary relief.³³⁹ After the agency cancelled her complaint for failure to accept a certified offer of full relief, she appealed.³⁴⁰ The Commission affirmed the FAD, determining that the agency's offer was acceptable.³⁴¹ Because the record contained only an isolated comment that she had been "hurt emotionally" by the demeaning remarks, the appellant failed to raise a proper claim for compensatory damages.³⁴² The agency, therefore, was not obligated to address the issue in its offer of full relief.³⁴³

As the Commission's holdings in *Haynes*, *Fiandaca*, and *Roberson* demonstrate, in determining whether a complainant has satisfied the threshold for making a prima facie compensatory damages claim, the EEOC considers the nature and relative severity of the purported injury.³⁴⁴ When a complainant alludes to nonpecuniary harm with a fleeting comment, thereby suggesting that any injury suffered as a result of the agency's misconduct was insignificant, the Commission is unlikely to find that the complainant raised a proper claim for compensatory damages.³⁴⁵ When a complainant implies, either by repeated allusions to nonpecuniary harm or by the severity of the alleged discrimination itself, that his intangible injuries were significant, the Commission likely will determine that the complainant asserted a prima facie damage claim that the agency must address.³⁴⁶ If there is any doubt whether a claim has been raised, agencies are

337. E.E.O.C. No. 01940467, 94 F.E.O.R. 3325 (1994).

338. See *Roberson v. Department of Veterans Affairs*, 94 F.E.O.R. 3325, at XII-457 (1994).

339. See *id.*

340. See *id.*

341. See *id.* at XII-458.

342. See *id.*

343. See *id.*

344. See *Hemingway*, *supra* note 17, at 693 (inferring that EEOC takes into account extent of implied harm when determining whether complainant raised prima facie claim for compensatory damages).

345. See *id.* (observing that in *Roberson*, appellant's reference to emotional distress "was seen as an isolated, passing comment which was never mentioned again").

346. See *id.* (concluding that when purported harm is "more pronounced," EEOC likely "will use its remedial authority to reframe charges where it believes a complainant may have a compensatory damage claim"); cf. *Brown v. Department of the Navy*, E.E.O.C. No. 01941334, 94 F.E.O.R. 1048, at XI-62 (1994) (declaring that EEOC has authority to "reframe charges and use available materials and information to articulate lay complainant's charges" (quoting *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355, 357 (6th Cir. 1969))).

best advised to inquire whether the complainant is seeking compensatory damages before making an offer of full relief so as to avoid remand on the issue.³⁴⁷

5. *Affording a complainant an adequate opportunity to present evidence of compensatory damages*

As the foregoing discussion evidences, complainants often raise a prima facie claim for compensatory damages without adducing sufficient evidence for the agency to adequately assess the request.³⁴⁸ In such instances, the agency must solicit evidence of harm and its linkage to the alleged discrimination.³⁴⁹ In addition to providing a complainant an adequate opportunity to present evidence substantiating a claim, the agency must instruct a complainant as to the evidentiary standard and criteria that he is required to meet.³⁵⁰ Agencies that neglect to do so and thereafter determine that a complainant failed to substantiate a claim for compensatory damages most often find that they must re-investigate the issue of damages on remand.³⁵¹

The EEOC follows an "equitable approach" when determining whether an agency afforded a complainant an adequate opportunity to submit proof of damages,³⁵² concluding in a number of cases that

347. Interview with Capt. William R. Kraus, Labor Counsel, Central Labor Law Office of the United States Air Force Legal Services Agency, in Rosslyn, Va. (Jan. 18, 1996) [hereinafter *Kraus Interview*].

348. See *supra* notes 323-36 and accompanying text (discussing low threshold for stating prima facie case as consisting of informal words or phrases indicative of pecuniary or nonpecuniary loss).

349. See, e.g., *Munno v. Department of Agric.*, E.E.O.C. No. 01950343, 96 F.E.O.R. 1101, at XI-248 (1995) (stating that when record does not contain evidence of compensatory damages, complainant should be afforded opportunity to provide such evidence); *Bowman v. Department of the Navy*, E.E.O.C. No. 01953933, 96 F.E.O.R. 1050, at XI-123 (1995) (holding that when complainant puts agency on notice of claim for compensatory damages, agency is required to request evidence prior to issuance of offer of full relief); *Jackson v. United States Postal Serv.*, E.E.O.C. No. 01923399, 93 F.E.O.R. 3062, at XII-184 (1992) (ruling that once appellant claims compensatory damages, agency should request proof of alleged damages incurred and evidence linking purported losses to agency's discriminatory action).

350. See *Munno*, 96 F.E.O.R. 1101, at XI-248 (reversing agency's decision denying compensatory damages when agency failed to specify in settlement agreement that complainant was required to adduce objective proof of damages and evidence establishing nexus between alleged discrimination and purported injury).

351. See *Rivera v. Department of the Navy*, E.E.O.C. No. 01934157, 94 F.E.O.R. 3522, at XII-369 (1994) (vacating agency's dismissal of complaint for mootness and remanding complaint for supplemental investigation of damages when agency did not provide complainant adequate opportunity to present evidence of harm and linkage).

352. See *Hemingway*, *supra* note 17, at 696.

the agency should have provided more time than the minimum required by regulation.³⁵³

In *Blackshire v. Department of the Navy*,³⁵⁴ for instance, the appellant contended that the agency discriminated on the bases of race, age, and sex when it required him to submit medical documentation while he was on sick leave and later barred him from returning to work until a physician approved his release.³⁵⁵ After the appellant rejected the agency's first offer of full relief because it did not address compensatory damages, the agency requested proof of injury and linkage.³⁵⁶ The appellant asked for two fifteen-day extensions of the deadline, which the agency granted.³⁵⁷ Finally, the agency issued a second offer of full relief and notified the appellant that if he did not accept within thirty days, the complaint would be cancelled.³⁵⁸ In response, the appellant submitted a claim for \$12,000 for nonpecuniary losses with some medical documentation and affidavits from himself and his wife.³⁵⁹ He protested that despite making a good faith effort to gather evidence, he had been unable to meet the agency's deadlines because the medical records he needed had become available only recently.³⁶⁰ The agency did not grant an additional extension and subsequently determined that the appellant failed to establish a nexus between the medical treatment and the alleged discrimination.³⁶¹ Concurring with the agency, the EEOC found on appeal that the medical records were insufficient to prove linkage.³⁶² The Commission granted the appellant's request to reopen the complaint and remanded the issue of damages for further processing, however, because the affidavits of the appellant and his wife put the agency on notice that the appellant needed a "more reasonable time" period to secure the necessary documentation to substantiate his claim.³⁶³

353. See *Rivera*, 94 F.E.O.R. 3522, at XII-369 (directing agency to allow appellant another 30 days to submit requested evidence after first submission was delayed three days by postal service and missed original deadline); see also 29 C.F.R. § 1614.107(g) (1996) (mandating that agency must provide complainant 15 days to comply with request for clarification of complaint allegation or element of relief therein).

354. E.E.O.C. No. 01932605, 94 F.E.O.R. 3321 (1994).

355. See *Blackshire v. Department of the Navy*, E.E.O.C. No. 01932605, 94 F.E.O.R. 3321, at XII-447 (1994).

356. See *id.*

357. See *id.* at XII-447 to XII-448.

358. See *id.* at XII-447.

359. See *id.* at XII-448.

360. See *id.*

361. See *id.*

362. See *id.* at XII-448 to XII-449.

363. See *id.* at XII-449.

In contrast to *Blackshire* stands *Munson v. Department of the Navy*.³⁶⁴ In that case, the appellant alleged that the agency acted against her in reprisal for her filing of a prior EEO complaint.³⁶⁵ The agency instructed the appellant to specify the sum of compensatory damages she sought and to provide objective and other evidence of the damages incurred and the causal link between the harm and the agency's actions.³⁶⁶ The agency further informed the appellant that, if necessary, she could ask for additional time to submit the evidence.³⁶⁷ Subsequently, the agency granted three extensions.³⁶⁸ More than a month after the agency's first request for evidence, the appellant responded by claiming \$300,000 in damages and describing various pecuniary and nonpecuniary losses.³⁶⁹ Several weeks later, the agency informed the appellant that the evidence she submitted was inadequate and provided further instruction as to the type of proof required to establish an entitlement to compensatory damages.³⁷⁰ Additionally, it advised the appellant that she could review a copy of the EEOC's guidance on compensatory damages in the agency's EEO office.³⁷¹ Another month passed before the appellant responded to the agency's second request, this time refusing to provide documentation of her expenses or information about her medical treatment and medications.³⁷² Consequently, the agency denied the appellant's request for compensatory damages in its offer of full relief, which she refused to accept.³⁷³ After the agency issued its FAD dismissing her complaint, she appealed. Although the Commission reversed the FAD because the agency's offer was deficient in other respects, it affirmed the agency's determination that the appellant was not entitled to compensatory damages, as she failed to

364. E.E.O.C. No. 01943006, 95 F.E.O.R. 1006 (1994); see also *Wolf v. United States Postal Serv.*, E.E.O.C. No. 01953705, 96 F.E.O.R. 1095, at XI-236 (1995) (finding that agency properly determined that it did not have to provide for compensatory damages in its offer of full relief in light of agency's repeated requests for evidence of damages and linkage, to which appellant responded by merely reiterating her claim).

365. *Munson v. Department of the Navy*, E.E.O.C. No. 01943006, 95 F.E.O.R. 1006, at XI-16 (1994).

366. See *id.* at XI-17.

367. See *id.*

368. See *id.*

369. See *id.* at XI-17 (stating that appellant sought compensatory damages "to remedy . . . her mental stress and anguish, the psychological damage to herself and her family, her loss of wages, the ruining of her credit history, and the ruining of her faith in the federal government").

370. See *id.* (noting that agency instructed appellant to submit evidence such as "receipts and/or bills for medical care, medication, transportation to the doctor, psychiatric expenses, confirmation by other individuals (affidavits), [and] cancelled checks").

371. See *id.*

372. See *id.*

373. See *id.*

provide evidence substantiating her claim despite ample opportunity to do so.³⁷⁴

6. *Carle revisited—forms of evidence the EEOC does and does not require to prove nonpecuniary injury and linkage*

Although EEOC decisions appear to have blurred the distinction between objective and other evidence,³⁷⁵ the rulings nonetheless universally accept the forms of evidence articulated in *Carle v. Department of the Navy*.³⁷⁶ In *Carpenter v. Department of Agriculture*,³⁷⁷ for example, the appellant offered a fifty-page, unsworn statement and a brief sworn declaration as evidence of his injury and linkage.³⁷⁸ In addition to an affidavit from his wife, the appellant adduced medical records and statements from two physicians and a psychiatrist extensively corroborating his pain and distress and their connection to the agency's actions.³⁷⁹ On the basis of this evidence, the Commission found that the appellant made a sufficient showing of nonpecuniary damages and established a nexus between the harm

374. See *id.* at XI-18.

375. Compare *Jackson v. United States Postal Serv.*, E.E.O.C. No. 01923399, 93 F.E.O.R. 3062, at XII-185 (1992) ("[P]rior to making its offer of full relief, the agency should have requested from the appellant objective evidence of the alleged damages incurred. . . . [S]uch proof could have taken the form of receipts and/or bills for medical care, medication and transportation to the doctor."), and *Carle v. Department of the Navy*, E.E.O.C. No. 01922369, 94 F.E.O.R. 1043, at XI-50 (1993) ("Other evidence could have taken the form of a statement by appellant describing her emotional distress, and statements from witnesses, both on and off the job."), with *Taunton v. Department of Veterans Affairs*, E.E.O.C. No. 01943687, 95 F.E.O.R. 1349, at XI-268 (1995) ("Objective evidence may include statements from [the complainant] concerning her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, . . . character or reputation, . . . credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct.").

376. See, e.g., *Stewart v. United States Postal Serv.*, E.E.O.C. No. 01933383, 96 F.E.O.R. 1026, at XI-64 (1995) (ordering agency to "request from appellant objective and other evidence of all . . . losses which resulted from the discriminatory [conduct]"); *Taunton*, 95 F.E.O.R. 1349, at XI-268 (declaring that "the agency should have asked appellant to provide objective and other evidence linking . . . the distress to the unlawful discrimination" (quoting *Carle*, 94 F.E.O.R. 1043, at XI-50)); *Browne v. Department of Agric.*, E.E.O.C. No. 01944256, 95 F.E.O.R. 3230, XII-151 (1995) ("Statements from others, including family members, friends, health care providers, [and] other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown."); *James v. United States Postal Serv.*, E.E.O.C. No. 01944466, 95 F.E.O.R. 1034, at XI-91 (1994) ("Objective evidence also may include documents indicating a complainant's actual out-of-pocket expenses related to medical treatment, counseling, and so forth, related to the injury allegedly caused by [the agency's] discrimination.").

377. E.E.O.C. No. 01945652, 95 F.E.O.R. 3229 (1995).

378. See *Carpenter v. Department of Agric.*, E.E.O.C. No. 01945652, 95 F.E.O.R. 3229, at XII-145 (1995).

379. See *id.* at XII-145 to XII-146.

and the agency's conduct.³⁸⁰ Accordingly, it awarded the appellant \$75,000 in compensatory damages.³⁸¹

The EEOC's discussion in *Carpenter* also is instructive in that it clarifies what proof of nonpecuniary damages *Carle* does not require. In its FAD denying the appellant's claim for emotional distress damages, the agency discounted the unsworn statements from the appellant and his wife because they were not notarized.³⁸² Declaring that signed affidavits are not mandatory, the Commission summarily dismissed the agency's contention.³⁸³ In rejecting the agency's second argument that the statements from the appellant's health care providers failed to establish the requisite nexus between the agency's conduct and the appellant's distress, the EEOC noted that evidence from medical professionals is not necessary for a showing of intangible injury.³⁸⁴ Finally, the Commission objected to the agency's assertion that the appellant should have presented statements from "objective third party witnesses."³⁸⁵ In addition to the fact that outside parties are not likely to be privy to disruptions in an appellant's marital and family relationships, the EEOC observed that courts consistently have awarded compensatory damages on the basis of a plaintiff's testimony alone or in addition to statements from family members and health care providers.³⁸⁶

As the Commission's discussion in *Carpenter* suggested, a complainant can recover compensatory damages without adducing medical evidence.³⁸⁷ In *Lawrence v. United States Postal Service*,³⁸⁸ the appellant filed a sexual harassment complaint.³⁸⁹ Following a hearing, the agency accepted the AJ's recommended finding of discrimination and issued its first FAD, which requested that the appellant provide

380. See *id.* at XII-146.

381. See *id.* at XII-147.

382. See *id.* at XII-146.

383. See *id.*

384. See *id.* (acknowledging weight of authority holding that expert testimony is not necessary to demonstrate intangible injury (citing *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 724 (1st Cir. 1994))).

385. *Id.* at XII-146.

386. See *id.* at XII-146 to XII-147 (citing *Sanchez*, 37 F.3d at 724); see also *EEOC Enforcement Guidance*, *supra* note 22, at *6 (noting that the complainant's "own testimony may be solely sufficient to establish humiliation or mental distress" (quoting *Williams v. TransWorld Airlines*, 660 F.2d 1267, 1273 (8th Cir. 1981))). But see *id.* at *7 ("[F]or conciliation or settlement purposes, testimony solely by the complaining party may not be sufficient to establish emotional harm. There should be corroborating testimony by the complaining party's co-workers, supervisors, family, friends, or anyone else with knowledge of the emotional harm.").

387. See *Carpenter*, 95 F.E.O.R. at XII-146.

388. E.E.O.C. No. 01952288, 96 F.E.O.R. 3150 (1996).

389. See *Lawrence v. United States Postal Serv.*, E.E.O.C. No. 01952288, 96 F.E.O.R. 3150, at XII-132 (1996).

information in support of her compensatory damage claim.³⁹⁰ In response, the appellant submitted a sworn statement detailing the physical and emotional injuries she suffered as the result of a hostile work environment created by her supervisor.³⁹¹ She further indicated that she did not pursue psychiatric or psychological counseling.³⁹² Because the appellant proffered no evidence from a health care provider diagnosing her emotional distress, nor any proof of a causal connection between the supervisor's or the agency's conduct and her alleged injuries, the agency issued its second FAD denying her nonpecuniary damage claim.³⁹³

On appeal, the EEOC reiterated that "expert testimony ordinarily is not required to ground money damages for mental anguish or emotional distress."³⁹⁴ The Commission cautioned, however, that although a complainant's entitlement to a damage award may be inferred from the nature and severity of the discrimination,³⁹⁵ the lack of supporting evidence may limit the recovery deemed appropriate in a given case.³⁹⁶ In this instance, the appellant's personal statement averring embarrassment and humiliation was corroborated by the testimony of three witnesses.³⁹⁷ After reviewing a range of awards in similar cases from \$500 to \$35,000, the Commission found that \$3000 appropriately compensated the appellant for her nonpecuniary injuries.³⁹⁸ The EEOC noted, however, that the lack of

390. *See id.* at XII-133.

391. *See id.* (noting appellant's alleged injuries included headaches, weight loss, nausea, decreased work performance, irritability, anxiety attacks, diminished social life, embarrassment, humiliation, and defamation).

392. *See id.*

393. *See id.*

394. *Id.* at XII-134 (quoting *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 724 (1st Cir. 1994)).

395. *See id.* at XII-135. The EEOC stated that "[t]he more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action; consequently, somewhat more conclusory evidence of emotional distress will be acceptable to support an award for emotional damages." *Id.* (quoting *United States v. Balistreri*, 981 F.2d 916, 932 (7th Cir. 1992)).

396. *See id.*

397. *See id.* at XII-133. The witnesses testified at the administrative hearing that the appellant's supervisor often humiliated her with his sexual comments and made her cry on at least one occasion. *See id.*

398. *See id.* at XII-135 (citing *Kuntz v. City of New Haven*, 3 A.D. Cas. (BNA) 1590, 1592 (D. Conn.) (awarding \$500 for mental anguish based on plaintiff's personal statement averring that he was "disappointed" and "embarrassed" at not having been promoted), *aff'd without opinion*, 29 F.3d 622 (2d Cir.), *cert. denied*, 115 S. Ct. 667 (1994); *Sassaman v. Heart City Toyota*, 66 Fair Empl. Prac. Cas. 1230, 1236 (N.D. Ind. 1994) (finding that \$2000 in nonpecuniary damages was appropriate compensation in sexual harassment case based in part on plaintiff's testimony relating degradation she felt as result of conduct of several supervisors); *Turic v. Hospitality House, Inc.*, 849 F. Supp. 544, 557 (W.D. Mich. 1994) (awarding \$50,000 in nonpecuniary compensatory damages stemming from sex and religion discrimination in wrongful termination case); *EEOC v. AIC Sec. Investigations*, 823 F. Supp. 571, 575 (N.D. Ill. 1993) (holding that

supporting medical evidence limited her compensatory damage award insofar as the sum did not encompass the alleged physical manifestations of her emotional distress.³⁹⁹

Although the Commission has awarded nonpecuniary damages on the basis of a complainant's testimony, it also has denied awards in cases where the complainant failed to provide a statement describing his injuries and their causal connection to the alleged discrimination.⁴⁰⁰ Indeed, the EEOC has ascribed particular import to an appellant's personal statement, effectively requiring such evidence to maintain a claim successfully. For example, the EEOC affirmed a FAD denying a request for damages for loss of health and mental anguish in *Browne v. Department of Agriculture*.⁴⁰¹ In support of her claim, the appellant submitted an affidavit from her housemate declaring that as a result of the agency's action, the appellant often was depressed and suffered from sleeplessness and gastrointestinal problems.⁴⁰² She also offered a letter from a physician describing the appellant's physical symptoms and stating that she was taking medication as a result.⁴⁰³ The appellant, however, failed to submit a personal statement detailing her injury.⁴⁰⁴ Emphasizing that a mere claim for damages filed by counsel is not the equivalent of a personal statement supporting the request,⁴⁰⁵ the Commission found that the absence of such a statement from the appellant "severely undermine[d]" her damages claim⁴⁰⁶ and declined to reverse the agency's decision.⁴⁰⁷

As a practical matter, however, a complainant who submits a personal statement without medical documentation or statements from health care providers is unlikely to prevail on her claim for

plaintiff was entitled to \$50,000 in nonpecuniary damages in disability discrimination and wrongful termination case); *McAdams v. United Parcel Serv., Inc.*, 2 A.D. Cas. (BNA) 1489, 1494 (D. Minn. 1993) (awarding \$35,000 in failure to accommodate case), *rev'd and remanded*, 30 F.3d 1027 (8th Cir. 1994)).

399. *See id.* at XII-135 to XII-136 n.7.

400. *See Wreford v. United States Postal Serv.*, E.E.O.C. No. 01942404, 96 F.E.O.R. 3002, at XII-7 (1995) (denying compensatory damages for pain and suffering when complainant merely claimed damages in her complaint without providing personal statement documenting alleged injury).

401. E.E.O.C. No. 01944256, 95 F.E.O.R. 3230, at XII-153 (1995).

402. *See Browne v. Department of Agric.*, E.E.O.C. No. 01944256, 95 F.E.O.R. 3230, XII-152 (1995).

403. *See id.*

404. *See id.* at XII-152 to XII-153.

405. *See id.*; *see also Rivera v. Department of the Navy*, E.E.O.C. No. 01934157, 94 F.E.O.R. 3522, at XII-368 (1994) (observing that letter from complainant's attorney merely stating complainant's claim, without supporting evidence, falls short of type and extent of proof necessary to substantiate entitlement to compensatory damages).

406. *Browne*, 95 F.E.O.R. 3230, at XII-152.

407. *See id.* at XII-153.

compensatory damages.⁴⁰⁸ Medical evidence serves to corroborate the injuries alleged by a complainant and often establishes the requisite linkage between the damages incurred and the agency's unlawful discrimination.⁴⁰⁹

Medical evidence can prove to be the proverbial double-edged sword, however. While the diagnosis of a psychologist or physician aids in establishing that a complainant suffered emotional distress or physical ailments, it also may limit substantially the extent of recovery to which the EEOC finds a complainant is entitled. In *Rountree v. Department of Agriculture*,⁴¹⁰ for instance, the appellant averred a wide variety of nonpecuniary losses resulting from the agency's purportedly discriminatory performance appraisal and requested compensatory damages for "stress-related problems," including his physical abuse of his wife and his hostility towards whites.⁴¹¹ In support of his damage claim, the appellant submitted a clinical psychologist's diagnosis of his depression.⁴¹² Citing the diagnostic criteria on which the psychologist relied in identifying the appellant's condition, the Commission found that the appellant's depression was not severe.⁴¹³ Similarly, the EEOC declined to award any damages for losses attendant to his

408. See, e.g., *Taylor v. Department of the Navy*, E.E.O.C. No. 01940376, 94 F.E.O.R. 3528, at XII-386 to XII-387 (1994) (determining that appellant's personal statements averring damages and linkage were insufficient to show that purported nonpecuniary damages and medical bills resulted from agency's unlawful conduct alleged in complaint); *Caudle v. United States Postal Serv.*, E.E.O.C. No. 01930473, 94 F.E.O.R. 3163, at XII-50 (1993) (finding that appellant was not entitled to compensatory damages because he only made general claim for emotional distress without medical documentation specifying injury); see also *EEOC Enforcement Guidance*, *supra* note 22, at *6 ("The Commission will typically require medical evidence of emotional harm to seek damages for such harm . . .").

409. See, e.g., *Brandenberger v. Department of the Army*, E.E.O.C. No. 01921751, 94 F.E.O.R. 3361, at XII-562 (1994) (reversing agency's finding of no discrimination and remanding issue of compensatory damages for further processing in light of letter from appellant's psychiatrist stating that "the extreme form of sex-based harassment suffered by appellant caused her to experience . . . emotional distress as well as an inability to work"); *supra* notes 215-17 and accompanying text (discussing medical evidence corroborating appellant's purported injuries and establishing causal nexus between nonpecuniary injury and agency's conduct in *Carpenter*).

Adding evidence of linkage is particularly important because, as the Commission observed in *James v. United States Postal Service*, "[i]n determining damages, the agency is only required to consider objective evidence of damages shown to be a result of the alleged discrimination; the agency is not responsible for remedying pre-existing conditions or for rectifying an individual's health problems in general." E.E.O.C. No. 01944466, 95 F.E.O.R. 1034, at X-91 (1995); see also *EEOC Enforcement Guidance*, *supra* note 22, at *5 ("An award for emotional harm is warranted only if there is sufficient causal connection between the respondent's illegal actions and the complaining party's injury. The discriminatory act or conduct must be the cause of the emotional harm.") (citation omitted).

410. E.E.O.C. No. 01941906, 95 F.E.O.R. 3223 (1995).

411. See *Rountree v. Department of Agric.*, E.E.O.C. No. 01941906, 95 F.E.O.R. 3223, at XII-120 (1995).

412. See *id.* at XII-121.

413. See *id.* at XII-123 (observing that although appellant represented that his depression was severe, major depressive episodes were not indicated by psychologist's diagnosis).

violent behavior and general hostility towards whites, in part because neither was symptomatic of his condition.⁴¹⁴

Furthermore, medical records might disclose alternative causes of a complainant's physical and psychological illnesses unrelated to the agency's discriminatory conduct, thereby mitigating the damages award. In *Smith v. Department of Defense*,⁴¹⁵ for example, the agency sought to deny the appellant's compensatory damages claim on the basis that extraneous factors caused her emotional distress. The appellant in *Smith* alleged that her supervisor subjected her to continuous sexual harassment consisting of unwelcome physical contact, sexual comments, invitations to have sex, and sexual innuendos.⁴¹⁶ In support of her damages claim, the appellant submitted evidence of her emotional distress and medical treatment, including a report from her therapist, medical bills, and several hundred pages of hospital records.⁴¹⁷ The agency's FAD determined that the appellant had been the victim of a hostile work environment, but denied her compensatory damages request despite the voluminous evidence of her physical and emotional injury adduced by the appellant.⁴¹⁸ Because the appellant's documentation of her injuries revealed a history of mental illness, the agency concluded that most of her emotional harm had stemmed from "other factors."⁴¹⁹ Thus, the agency contended, the appellant "failed to establish 'with requisite certainty that the sexual harassment caused her emotional problems and [required] medical treatment.'"⁴²⁰

On appeal, the EEOC reversed the agency's FAD with regard to the denial of the compensatory damages claim and awarded \$25,000 for nonpecuniary damages.⁴²¹ Although the Commission concurred with the agency's finding that the appellant had a history of depres-

414. See *id.* at XII-124 to XII-125.

415. E.E.O.C. No. 01943844, 96 F.E.O.R. 3164 (1996).

416. See *Smith v. Department of Defense*, E.E.O.C. No. 01943844, 96 F.E.O.R. 3164, at XII-188 (1996).

417. See *id.* at XII-189.

418. See *id.* at XII-188.

419. See *id.* at XII-192. In addition to the hostile work environment and sexual harassment, the agency cited the following additional factors contributing to the appellant's emotional harm: "(a) a dysfunctional family (including an alcoholic father, an abusive mother, a childhood kidnapping, and an adolescent rape); (b) four marriages to abusive or alcoholic men; (c) prior alcohol and substance abuse; (d) a manic depressive son, a critical daughter, and three demanding grandchildren; (e) smoking; (f) a new boyfriend; [and] (g) financial problems including a bankruptcy filing." *Id.*

420. *Id.* at XII-188 (quoting unreported agency decision denying request for compensatory damages).

421. See *id.* at XII-195.

sion, it determined that the sexual harassment aggravated her pre-existing emotional condition to such a degree that she required hospitalization and extensive therapy.⁴²² Therefore, she was entitled to compensation to the extent that the agency's conduct exacerbated her depression.⁴²³ Although the appellant in *Smith* ultimately prevailed on her damages claim, the case still illustrates the risk inherent in revealing medical records that disclose possible causes of mental and physical injury distinct from the agency's alleged discrimination. An agency seeking to mitigate, if not refute, a damages claim will cite other causative factors identified in the complainant's medical history to demonstrate that the complainant has failed to satisfy the causal nexus *Jackson* requires to prove an entitlement to damages.

Finally, medical records and statements from health care providers do not insure a compensatory damage award.⁴²⁴ When the medical documentation merely recites a complainant's injuries without opining that the agency's conduct actually inflicted the harm, it will not establish the necessary causal nexus between the purported injury and the alleged discriminatory conduct.⁴²⁵ It follows that when medical documentation links a complainant's distress to the agency's action, a complainant is in a much stronger position to recover compensatory damages.

7. *Medical records and the issue of privacy*

Given the significance of medical records and physicians' statements in demonstrating (and refuting) a claim for damages, the issue arises of whether a complainant can assert a privacy right to shield such documents from agency inquiry. The EEOC answered this question in the negative.

The Commission stated its policy on the issue of medical records and a complainant's privacy in *Carpenter v. Department of Agriculture*.⁴²⁶ In that case, the appellant argued he was entitled to the maximum award of compensatory damages permitted by the

422. See *id.* at XII-193.

423. See *id.*

424. See *Browne v. Department of Agric.*, E.E.O.C. No. 01944256, 95 F.E.O.R. 3230, at XII-152 to XII-153 (1995) (affirming FAD denying appellant's request for compensatory damages despite statement from complainant's physician outlining her nonpecuniary injuries).

425. See *id.* at XII-152 (finding that appellant's showing was deficient not only due to glaring absence of personal statement, but also because physician's statement merely describing her emotional distress and physical ailments failed to establish that agency's action caused decline of her health).

426. E.E.O.C. No. 01945652, 95 F.E.O.R. 3229 (1995).

settlement agreement because the agency breached the agreement's privacy provisions by seeking his medical records without first securing his consent.⁴²⁷ The EEOC rejected the appellant's contention, noting that he "made his medical condition an issue subject to agency examination and review" by virtue of his request for damages related to emotional distress and medical expenses.⁴²⁸

In addition to requiring the production of all pertinent medical documentation available, the Commission has indicated that a complainant may have to reveal certain deeply personal information in order to sustain a request for compensatory damages.⁴²⁹ In *Rivera v. Department of the Navy*,⁴³⁰ for example, the appellant sought \$300,000 in compensatory damages for both pecuniary and nonpecuniary harm stemming from his termination that allegedly was motivated by racial and gender discrimination.⁴³¹ Prior to making an offer, the agency requested objective and other evidence substantiating his claim, to which the appellant's attorney responded by describing the purported injuries.⁴³² Through the agency's internal administrative appeal process, the appellant was reinstated to another position before the agency issued its FAD.⁴³³ That fact, in addition to the agency's determination that the appellant failed to provide sufficient evidence of nonpecuniary damages or that his termination caused the alleged harm, prompted the agency to cancel the claim for mootness.⁴³⁴ The appellant contended on appeal that his new position was inferior to his prior post and that the agency therefore

427. See *Carpenter v. Department of Agric.*, E.E.O.C. No. 01945652, 95 F.E.O.R. 3229, at XII-144 (1995).

428. See *id.* at XII-144 & n.2 (citing *Smith v. Logansport Community Sch. Corp.*, 193 F.R.D. 637, 649 (N.D. Ind. 1991) ("[B]y asserting a claim for emotional distress [plaintiff] has placed her mental and emotional condition in issue and . . . the defendants are entitled to records concerning any counseling she may have received."); *Tramm v. Porter Mem'l Hosp.*, 128 F.R.D. 666, 668 (N.D. Ind. 1989) ("Since the plaintiff has placed her mental and emotional condition in issue, the defendants are entitled to any medical records concerning previous mental health counseling received by the plaintiff."); *Lowe v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296, 298-99 (E.D. Pa. 1983) ("So long as [the] plaintiff seeks compensatory . . . damages by reason of physical, mental or emotional harm or distress, [the] defendant is entitled to inquire during discovery of witnesses, including physicians and psychiatrists, as to [the] plaintiff's past history whether or not directly related to her job . . .")); see also *EEOC Enforcement Guidance*, *supra* note 22, at *5 n.14 (informing complaining parties that "if they claim emotional harm, respondents may be able to obtain records of medical and/or psychiatric treatments for conditions relevant to the complained of symptoms").

429. See *EEOC Enforcement Guidance*, *supra* note 22, at *5 n.14 ("A respondent may also obtain relevant information concerning the complaining party's private life.").

430. E.E.O.C. No. 01934157, 94 F.E.O.R. 3522 (1994).

431. See *Rivera v. Department of the Navy*, E.E.O.C. No. 01934157, 94 F.E.O.R. 3522, at XII-367 (1994).

432. See *id.*

433. See *id.*

434. See *id.*

had improperly dismissed the complaint as moot.⁴³⁵ Additionally, the appellant petitioned that the agency rescind its decision denying his claim for compensatory damages.⁴³⁶ The EEOC found that it could not determine from the record whether the position to which the agency had reinstated the appellant was "substantially equivalent"⁴³⁷ to his previous assignment and so remanded the matter for further investigation.⁴³⁸ On the issue of the appellant's entitlement to compensatory damages, the Commission noted that the letter from the appellant's attorney requesting damages without supporting evidence fell short of the "type and extent of proof" necessary to establish an entitlement to compensatory damages.⁴³⁹ Accordingly, the EEOC directed the agency to advise the appellant on remand of the need to present additional objective and other evidence to establish an entitlement to compensatory damages.⁴⁴⁰ Moreover, the Commission instructed the agency to inform the appellant that he "may need to present personal and sensitive information to the agency to show that the injury is linked solely or partially to the alleged discriminatory conduct."⁴⁴¹

The EEOC's holding in *Munson v. Department of the Navy*⁴⁴² illustrates the likely consequence of invoking the aegis of privacy to conceal personal matters from the agency's view. The appellant in *Munson* alleged reprisal and sought \$300,000 for nonpecuniary and pecuniary losses.⁴⁴³ The agency instructed her to submit objective and other evidence of the damages she purportedly incurred and how they were related to the discrimination.⁴⁴⁴ Asserting a right to privacy, the appellant refused the agency's repeated requests for further documentation.⁴⁴⁵ The agency extended an offer of full relief, which she rejected on the ground that it denied her request for

435. See *id.* at XII-368 (contending that "although he was reinstated to the same title with the same salary as his previous position, his duties under the new position [were] a sham in that he [was] required to wear gym clothes").

436. See *id.*

437. See 29 C.F.R. § 1614.501(b)(1)(i) (1996) (requiring that when agency or Commission finds that applicant for employment has been discriminated against, "the agency shall offer the applicant the position that the applicant would have occupied absent discrimination or . . . a substantially equivalent position").

438. See *Rivera*, 94 F.E.O.R. at XII-368.

439. See *id.*

440. See *id.* at XII-369.

441. *Id.*

442. E.E.O.C. No. 01943006, 95 F.E.O.R. 1006 (1994).

443. See *Munson v. Department of the Navy*, E.E.O.C. No. 01943006, 95 F.E.O.R. 1006, at XI-16 to XI-17 (1994).

444. See *id.* at XI-17.

445. See *id.*

compensatory damages.⁴⁴⁶ On appeal from the agency's FAD cancelling her complaint, the Commission ruled in favor of the agency as to the issue of compensatory damages, concluding that the agency properly denied compensatory damages in making its offer of full relief absent sufficient proof of harm and linkage.⁴⁴⁷

8. *Denying a compensatory damage claim*

Adducing evidence of injury and linkage does not guarantee an award of compensatory damages, however. In addressing the issue of compensatory damages, the EEOC employs a "bifurcated approach" in which it first determines whether the complainant succeeded in making a *prima facie* claim of damages and linkage (which, as discussed previously, is a low threshold to satisfy),⁴⁴⁸ and then considers whether the evidence is sufficient to establish an entitlement to compensatory damages.⁴⁴⁹ To satisfy the latter inquiry, a complainant must demonstrate four elements of proof: (1) the nature of the harm suffered; (2) the duration of the harm; (3) the severity of the injury; and (4) the causal relationship between the agency's action and the purported harm.⁴⁵⁰

The Commission's discussion in *Brandenberger v. Department of the Navy*⁴⁵¹ exemplifies this bifurcated analysis. In that case, the appellant alleged sexual harassment by co-workers, which the AJ found did occur.⁴⁵² However, the AJ determined that she was not entitled to compensatory damages, even though at the hearing the appellant submitted a letter from a psychiatrist detailing her injury and linking it to the ongoing harassment.⁴⁵³ The agency rejected the AJ's finding of discrimination, prompting her appeal.⁴⁵⁴ In reversing the agency's FAD and remanding the complaint for further processing, the Commission directed the appellant to provide additional documentation of her damages and linkage.⁴⁵⁵ Although the

446. See *id.*

447. See *id.* at XI-18.

448. See *supra* Part II.C.4 (discussing relative ease with which complainant may raise *prima facie* claim for compensatory damages).

449. See Hemingway, *supra* note 17, at 697 (identifying bifurcated approach EEOC consistently applies in assessing claims for compensatory damages).

450. See *Rountree v. Department of Agric.*, E.E.O.C. No. 01941906, 95 F.E.O.R. 3223, at XII-122 (1995) (discussing evidentiary standard for establishing entitlement to compensatory damages).

451. E.E.O.C. No. 01921751, 94 F.E.O.R. 3361 (1994).

452. See *Brandenberger v. Department of the Army*, E.E.O.C. No. 01921751, 94 F.E.O.R. 3361, at XII-561 to XII-562 (1994).

453. See *id.*

454. See *id.*

455. See *id.* at XII-565.

psychiatrist's letter sufficed to raise a prima facie claim for compensatory damages, it did not, standing alone, satisfy the evidentiary standard necessary to establish entitlement to an award.⁴⁵⁶

In addition to examining the sufficiency of the evidence proffered, the Commission also looks to the nature of the alleged discrimination itself in determining whether the record warrants an award of compensatory damages.⁴⁵⁷ In *Sanich v. United States Postal Service*,⁴⁵⁸ for instance, the appellant alleged that the agency harassed him in reprisal for prior EEO activity by removing a telephone from his work space⁴⁵⁹ and nine months later replaced the desk at which he sorted mail with a "carrier/clerk case" unsuitable for his work restrictions.⁴⁶⁰ To substantiate his claim for compensatory damages, the appellant submitted a personal statement averring "constant harassment" and describing the physical and psychological manifestations of his emotional distress, statements from his wife and son supporting the appellant's representations of mental anguish, and a statement from a clinical psychologist relating the appellant's depression and anxiety.⁴⁶¹ Affirming the agency's determination that the appellant failed to prove an entitlement to damages with regard to the first incident, the Commission noted that the agency's removal of the telephone "is insufficient as a matter of law to permit recovery of compensatory damages for emotional distress."⁴⁶² Moreover, the EEOC concluded that in both complaints, the appellant did not make a showing of harassment sufficient to justify an award of compensatory damages.⁴⁶³ The EEOC declared that "[u]nless an incident of alleged harassment was particularly egregious or knowingly directed at an individual particularly susceptible to

456. See Hemingway, *supra* note 17, at 697.

457. See *Gjersvold v. Department of the Treasury*, E.E.O.C. No. 01941041, 94 F.E.O.R. 3370, at XII-591 (1994) (holding that appellant failed to show how purported injury was related to alleged discrimination in part because act which appellant challenged did not constitute actionable discrimination). The appellant in *Gjersvold*, an employee of the Internal Revenue Service, asserted that a supervisor's comment that the appellant was a "taxpayer advocate" exacerbated her pre-existing depression. See *id.* at XII-590. In denying her claim for compensatory damages, the Commission determined that the supervisor's remark did not rise to the level of egregious discrimination actionable under Title VII. See *id.* at XII-591. Moreover, the EEOC noted that "when an allegation fails to render a complainant aggrieved for purposes of Title VII . . . , it will not be converted into a processable claim merely because the complainant has requested a specific relief." *Id.*

458. E.E.O.C. No. 01944926, 96 F.E.O.R. 3004 (1995).

459. See *Sanich v. United States Postal Serv.*, E.E.O.C. No. 01944926, 96 F.E.O.R. 3004, at XII-12 (1995).

460. See *id.*

461. See *id.*

462. *Id.* at XII-13.

463. See *id.*

emotional injury, isolated or infrequent actions alleged to be harassing will not result in an award of compensatory damages for emotional distress."⁴⁶⁴

Similarly, in *Stith v. Department of the Navy*⁴⁶⁵ the EEOC determined that the alleged discrimination was insufficient to support a claim for damages. The appellant in *Stith* contended that the agency discriminated against her on the basis of her race and in reprisal for prior EEO activity by detailing her to a lower-level position.⁴⁶⁶ In another allegation, she asserted that the agency harassed her by placing in her personnel file a form erroneously overstating the duration of her assignment to the lesser position.⁴⁶⁷ Based on the fact that the mistake had been corrected, the agency dismissed the allegation regarding her personnel file for mootness.⁴⁶⁸ On appeal, she argued that the alteration of the documents in her personnel records was ongoing, and that as a result, she was entitled to compensatory damages for "serious damage to her health, emotional well-being, professional reputation, and career."⁴⁶⁹ The Commission affirmed the agency's decision cancelling her complaint concerning the changes made to her personnel file, finding that "a mere error in the completion of a form, absent other evidence of compensable injury, is insufficient to support a claim for damages."⁴⁷⁰

Regardless of whether the alleged discrimination is insufficient to warrant an award or the evidence adduced in support of the claim fails to establish an entitlement to damages, the EEOC requires an agency to justify the denial of compensatory damages in its offer of full relief.⁴⁷¹ In *Taunton v. Department of Veterans Affairs*,⁴⁷² for example, the appellant alleged sex discrimination and reprisal; the discrimination involved a statement by a member of agency management to the effect that filing an EEO complaint could threaten her

464. *Id.*

465. E.E.O.C. No. 01943689, 1995 WL 231212 (Apr. 6, 1995).

466. *Stith v. Department of the Navy*, E.E.O.C. No. 01943689, 1995 WL 231212, at *1 (Apr. 6, 1995).

467. *See id.* at *2 (noting that form transferring appellant to temporary assignment stated that detail would be effective December 26, 1993, for period not to exceed 120 days, but mistakenly indicated assignment would not end until May 21, 1994).

468. *See id.*

469. *Id.* at *1-2.

470. *Id.* at *2.

471. *Cf. Wolf v. United States Postal Serv.*, E.E.O.C. No. 01953705, 96 F.E.O.R. 1095, at XI-236 & n.1 (1995) (affirming agency's omission of compensatory damages in its offer of full relief, but noting that "it would be preferable for the agency to specifically note its determination that a complainant is not entitled to compensatory damages in its offer of full relief to more succinctly close the issue").

472. E.E.O.C. No. 01943687, 95 F.E.O.R. 1349 (1995).

job and prospects for advancement, whereas the reprisal consisted of the manager's remark that he would respond honestly if anyone inquired about whether the appellant had engaged in prior EEO activity.⁴⁷³ After investigating her contentions, the agency issued its FAD finding reprisal.⁴⁷⁴ The FAD did not address whether the appellant was entitled to compensatory damages.⁴⁷⁵ On appeal, the appellant contested the finding of no discrimination based on sex and reasserted her claim for compensatory damages.⁴⁷⁶ The EEOC affirmed the agency determination as to the alleged sex discrimination, but remanded the case for a supplemental investigation of the appellant's request for compensatory damages related to the reprisal.⁴⁷⁷ Finding that the appellant had raised the issue of compensatory damages prior to the agency's issuance of its FAD and had adduced evidence in support of her claim, the EEOC concluded that the agency should have addressed her entitlement to damages in the FAD.⁴⁷⁸ The Commission thus rejected the notion that the agency's "mere omission of compensatory damages from the remedy offered in the FAD . . . constitute[d] a determination of [the] appellant's entitlement."⁴⁷⁹

Similarly, as the Commission's discussion in *Mueller v. United States Postal Service*⁴⁸⁰ demonstrates, the EEOC requires AJs to provide an explanation when they recommend against awarding compensatory damages.⁴⁸¹ In *Mueller*, the appellant alleged sex and disability discrimination when the agency terminated him during his probationary period and subsequently refused to reinstate him to a position within the agency.⁴⁸² By way of relief, he sought \$30,000 in compensatory damages, averring that he was unable to secure full-time

473. See *Taunton v. Department of Veterans Affairs*, E.E.O.C. No. 01943687, 95 F.E.O.R. 1349, at XI-266 to XI-267 (1995).

474. See *id.* at XI-267.

475. See *id.*

476. See *id.*

477. See *id.* at XI-268.

478. See *id.* at XI-267 to XI-268.

479. *Id.* at XI-267.

480. E.E.O.C. No. 01942929, 95 F.E.O.R. 3247 (1995).

481. Interestingly, the EEOC does not require AJs to make a finding on the record when they recommend a particular award of compensatory damages. *Kraus Interview*, *supra* note 347. By not requiring an AJ to elaborate in her decision on the manner in which she calculated a particular award, the EEOC effectively creates a double-standard; an agency is obligated under *Mims* to provide such an explanation, as well as an analysis of the connection between the evidence adduced by the complainant and the sum offered, see *supra* Part II.B.3 (discussing *Mims* shifting burden of production analysis), whereas an AJ need not do so unless she recommends against awarding compensatory damages. See *infra* text accompanying notes 482-89 (discussing EEOC's requirement that AJs justify recommendation against awarding compensatory damages).

482. See *Mueller v. United States Postal Serv.*, E.E.O.C. No. 01942929, 95 F.E.O.R. 3247, at XII-198 (1995).

employment after his termination and as a result, suffered depression for which he needed hospitalization and ongoing treatment.⁴⁸³ A hearing was held before an EEOC AJ at the appellant's request.⁴⁸⁴ Following the hearing, the AJ determined that the agency's reason for the denial of the appellant's reinstatement request was not credible and recommended that the agency offer the appellant an entry level position in addition to back pay and benefits.⁴⁸⁵ The AJ specifically recommended against a compensatory damage award, but provided no explanation for the recommendation in her decision.⁴⁸⁶ In its FAD, the agency rejected the AJ's determination of discrimination with regard to the agency's refusal to reinstate the appellant.⁴⁸⁷ On appeal, the Commission concurred with the AJ's finding that the agency discriminated against the appellant when it denied his reinstatement request.⁴⁸⁸ In addition to reversing the FAD, the Commission remanded the issue of the appellant's entitlement to compensatory damages for supplemental investigation, noting that the AJ did not "clearly set forth her reasoning" for her recommendation that the appellant not receive such an award.⁴⁸⁹

9. *Compensatory damages and dismissals for mootness*

The EEOC has stated, "An allegation is deemed 'moot,' when: (1) there is no reasonable expectation that the alleged violation will recur; and, (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."⁴⁹⁰ Thus, when an agency dismisses a complaint for mootness, it must be sure that there is not an outstanding issue concerning the complainant's entitlement to compensatory damages. If the agency does not recognize that the complainant raised a claim, or otherwise fails to address the issue, then a question remains whether the offer of full relief "completely and irrevocably eradicate[s]" the impact of the alleged discrimination. When the possibility of additional relief in the form of compensatory damages remains, the EEOC will reverse the

483. See *id.* at XII-200.

484. See *id.* at XII-198.

485. See *id.* at XII-199.

486. See *id.*

487. See *id.*

488. See *id.* at XII-201.

489. *Id.*

490. *Smith v. Department of the Treasury*, E.E.O.C. No. 01953182, 1995 WL 548421, at *1 (Sept. 8, 1995) (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)); see also 29 C.F.R. § 1614.107(e) (1996) (providing for dismissal of complaint, or portions thereof, when issues raised therein are moot).

dismissal and remand the complaint for further investigation of the appellant's entitlement to compensatory damages.⁴⁹¹

The Commission's ruling in *Smith v. Department of the Treasury*⁴⁹² demonstrates this point. The appellant in *Smith* contended that his manager discriminated on the bases of race and sex by allegedly compiling adverse information on him, which she then discussed with other managers, resulting in the cancellation of an assignment to which he had been detailed previously.⁴⁹³ In addition to written apologies from the managers identified in his complaint, he sought a job promotion and compensatory damages.⁴⁹⁴ Prior to the resolution of the complaint, the appellant resigned from the agency.⁴⁹⁵ Thereupon, the agency issued its FAD cancelling his complaint for mootness without addressing the appellant's request for compensatory damages.⁴⁹⁶ The complainant appealed the dismissal, and the Commission reversed.⁴⁹⁷ The EEOC concluded that, absent a determination in the FAD that the appellant was not entitled to such an award, there was the potential for compensatory damages were he to prevail on the merits of his complaint.⁴⁹⁸ Therefore, the second prong of the test for mootness was not satisfied.⁴⁹⁹

III. ASSESSING NONPECUNIARY HARM—A SURVEY OF COMPENSATORY DAMAGE AWARDS IN 42 U.S.C. § 1981 CASES

With *Jackson* and its progeny, the EEOC established an analytical framework for assessing compensatory damage claims. If the complainant clears the evidentiary and procedural hurdles required to prove an entitlement to damages, agencies and EEOC AJs must turn to the task of quantifying a monetary award.

As the EEOC declared in *Carpenter*, the sum derived must be commensurate with awards in similar cases.⁵⁰⁰ Furthermore, the

491. See *Huhn v. Department of the Treasury*, E.E.O.C. No. 05940630, 95 F.E.O.R. 3143, at XII-121 (1995) (affirming lower decision reversing FAD because agency improperly dismissed complaint where potential for additional relief in form of compensatory damages rendered complaint not moot).

492. E.E.O.C. No. 01953182, 1995 WL 548421 (Sept. 8, 1995).

493. See *Smith v. Department of the Treasury*, E.E.O.C. No. 01953182, 1995 WL 548421, at *1 (Sept. 8, 1995).

494. See *id.*

495. See *id.*

496. See *id.*

497. See *id.*

498. See *id.*

499. See *id.*

500. See *Carpenter v. Department of Agric.*, E.E.O.C. No. 01945652, 95 F.E.O.R. 3229, at XII-147 (1995) (requiring that compensatory damage award satisfy two goals: "that it not be 'monstrously excessive' standing alone and that it be consistent with similar awards made in

Commission has indicated that it will look to discrimination cases awarding nonpecuniary damages under 42 U.S.C. § 1981 for guidance in addressing the issue of compensatory damages.⁵⁰¹ Accordingly, damage awards in § 1981 cases can aid EEO practitioners and EEOC AJs in determining an appropriate sum under the facts of a given complaint.

The Appendix surveys nearly forty § 1981 cases awarding compensatory damages for nonpecuniary losses. In addition to the sum awarded for nonpecuniary damages,⁵⁰² the table lists factors that courts and juries considered in assessing the proper award, including the nature and severity of the defendant's discriminatory conduct, the evidence and extent of the plaintiff's intangible harm, and other facts which were weighed in the determination.

Because § 1981 cases involve only discrimination on the basis of race or ethnicity,⁵⁰³ agencies and EEOC AJs will need to consider cases awarding damages under other civil rights statutes, such as § 1983,⁵⁰⁴ when assessing nonpecuniary damages in complaints alleging forms of discrimination not based on race or ethnicity. The sums awarded under § 1981 are instructive even in instances of non-racial discrimination, however, given the common nature of nonpecuniary losses suffered by victims of all forms of unlawful discriminatory conduct.

similar cases" (quoting *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989)).

501. See *EEOC Enforcement Guidance*, *supra* note 22, at *5 n.13 ("Cases awarding compensatory . . . damages under other civil rights statutes will be used for guidance in analyzing the availability of damages under § 1981a. Section 1981 cases are particularly useful because Congress treated the § 1981a damage provisions as an amendment to § 1981."); see also *supra* note 35 (quoting language of 42 U.S.C. § 1981 (1994)).

502. Some awards include past pecuniary losses for medical and other expenses. When a portion of the award is attributable to losses other than nonpecuniary harm, the amount is noted. See *Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1180 (10th Cir. 1989) (awarding \$24,421 in compensatory damages, nearly \$3000 of which was attributed to medical expenses). In some cases, compensatory damages were awarded by a general verdict that did not itemize the award. In those situations, the sum awarded for nonpecuniary damages represents the portion of the total compensatory damage award not attributable to pecuniary losses. See *id.* (awarding \$74,146 in total damages, of which \$49,725 was attributable to backpay, leaving \$24,421 for intangible injuries and past medical expenses); *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983) (determining that, because jury award of \$20,000 included \$7598 in stipulated wage losses, remaining \$12,402 compensated for "mental anguish, humiliation, embarrassment and stress").

503. See *supra* note 36 (discussing protection against racial or ethnic discrimination afforded by § 1981).

504. Civil Rights Act of 1871, 17 Stat. 13 (codified in part at 42 U.S.C. § 1983 (1994)). Section 1983 states as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable . . ." *Id.* Section 1983 prohibits state government employers from discriminating on the basis of race, sex, religion, and national origin. See 2 C. SULLIVAN ET AL., *EMPLOYMENT DISCRIMINATION* § 22.1.1, at 502 (2d ed. 1988).

Although no previous discrimination case can dictate the specific monetary award appropriate under the facts of a given complaint, as the analysis the EEOC applied in *Rountree* and *Carpenter* demonstrates, a review of similar cases at the very least suggests a range of possible awards.⁵⁰⁵ Though this may, as one commentator has suggested, constitute "more justification than analysis,"⁵⁰⁶ the EEOC's discussion in *Rountree* and *Carpenter* suggests that an agency able to cite case law militating against the amount sought by the complainant will stand in a stronger position to defend the lesser award on appeal.

CONCLUSION

As a result of the Civil Rights Act of 1991, federal agencies and administrative judges must assess claims for nonpecuniary damages in the EEOC administrative process. The Commission has provided some direction in the matter, erecting an analytical framework that considers objective and other evidence of the purported harm and the linkage between the alleged discrimination and the injury. The Commission also has articulated a standard for measuring the adequacy of an award for nonpecuniary losses; the sum must not be "monstrously excessive" standing alone, and it must be commensurate with awards in similar cases.

Future EEOC rulings awarding specific monetary awards for intangible injuries will provide further guidance on calculating compensatory damages in the administrative process. Until the EEOC builds a body of law based on such decisions, EEO practitioners and judicial officials will need to rely primarily on cases awarding damages under other civil rights statutes to gauge a proper award in a given complaint. In that manner, agencies and EEOC AJs can provide deserving victims of employment discrimination appropriate compensation for their nonpecuniary losses without awarding excessive sums that serve to encourage unwarranted claims.

505. See *supra* notes 185, 188, 206 and accompanying text (discussing manner in which EEOC determined range of awards in *Rountree* and *Carpenter*).

506. Hemingway, *supra* note 221, at V-95-63.

Appendix
A Survey of Reported Cases Awarding Compensatory Damages Under 42 U.S.C. § 1981*

Case	Amount of Compensatory Damage Award	Nature of Discriminatory Conduct	Evidence and Extent of Nonpecuniary Harm	Other Factors
Walters v. City of Atlanta, 803 F.2d 1135 (11th Cir. 1986).	\$150,000	Refused to hire on several occasions over three-year period; retaliated	Plaintiff described his "lifelong desire" to fill the museum director position he was denied and the "frustration and emotional wear and tear" resulting from his repeated attempts to obtain employment	
Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987).	\$128,000	Denied training and discriminated in pay raises over six-year period; retaliated by unlawful discharge	Plaintiff testified that he had been under continuous stress, corroborated by psychiatrist's testimony stating that plaintiff was "suffering from symptoms of anxiety, stress, and some depression" for which he took an antidepressant	Plaintiff endured a "significant period of unemployment" following discharge
Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985).	\$100,000	Repeatedly denied appointment to administrative positions and principalships for nearly a decade	Plaintiff stated that he suffered "emotional stress, loss of sleep, marital strain and humiliation"	
Lowery v. WMC-TV, 658 F. Supp. 1240, vacated, 661 F. Supp. 65 (W.D. Tenn. 1987)	\$100,000	Over nine-year period, discriminated in pay, overdocumented plaintiff's alleged misconduct and repeatedly denied promotion; retaliated by taking plaintiff off the air four days after he filed suit.	Plaintiff proved "damage to his reputation" and demonstrated he was "continually humiliated and embarrassed" by the discrimination	Plaintiff suffered "the ultimate in humiliation" when he was taken off the air and "shamed . . . before his co-workers and the community"

* Cases are listed in descending order according to the amount of compensatory damages awarded for nonpecuniary harm. Cases in which multiple plaintiffs received different nonpecuniary damage awards are listed twice.

Case	Amount of Compensatory Damage Award	Nature of Discriminatory Conduct	Evidence and Extent of Nonpecuniary Harm	Other Factors
Alston v. Blue Cross & Blue Shield of Greater N.Y., 37 Fair Empl. Prac. Cas. (BNA) 1792 (E.D.N.Y. 1985).	\$90,000	Over four-year period, denied plaintiff several promotions; subjected her to derogatory comments regarding her race and national origin; retaliated after she filed discrimination complaint by denying promotion and overburdening her with unnecessary paperwork and unreasonable deadlines; retaliated further in demoting plaintiff, an action that constructively discharged her	Plaintiff's physical health was "adversely affected" by the discrimination and "improved dramatically" after she resigned on advice of her doctor; "mental and psychological pain and suffering" inferred from the "blatant discrimination against her and by the racist comments openly addressed to her"	
Wade v. Orange County Sheriff's Office, 844 F.2d 951 (2d Cir. 1988).	\$50,000	Denied promotion; discriminated in pay increases and job assignments; harassed; imposed an unwarranted disciplinary sanction and then caused it to be reported in local newspaper	Evidence demonstrated plaintiff was "repeatedly subjected . . . to humiliation at work" and endured "unjustified public embarrassment"	
Senigaur v. Beaumont Indep. Sch. Dist., 760 F. Supp. 1200 (E.D. Tx. 1991).	\$50,000	Denied promotion	No discussion	
Moffett v. Gene B. Glick Co., 621 F. Supp. 244 (N.D. In. 1985), <i>overruled in part</i> by Reeder-Baker v. Lincoln Nat'l Corp., 644 F. Supp. 983 (N.D. In. 1986).	\$50,000	Continuously harassed for nearly a year by threats, vulgarities and racial slurs directed at both plaintiff and her African-American boyfriend (and later, husband); retaliated by deliberately "building up a case" against plaintiff and by subsequently discharging her less than three weeks after agency issued a finding of probable cause on her harassment charge	Plaintiff testified she felt like a "nervous wreck," that the stress exacerbated her pre-existing palsy condition, and that she suffered from a loss of appetite, "anxiety, helplessness, and fear"; psychiatrist found symptoms of post-traumatic stress disorder, "sleep disorders . . . depression and loss of interest in work" and opined that plaintiff would require two years of therapy	Plaintiff's superiors refused to take action to stop the harassment despite her repeated requests; damage award included over \$16,000 in projected therapy costs

Foster v. MCI Telecomms., 555 F. Supp. 330 (Co. 1983), <i>aff'd</i> , 773 F.2d 1116 (10th Cir. 1985).	\$50,000	Discriminated in evaluation and lay-off policy; refused to rehire	"[E]mbarrassment, humiliation, severe anxiety and great emotional suffering" inferred from "the outrageous and cruel treatment" accorded plaintiff and the "protracted worry about unemployment" resulting from his lay-off
Fisher v. Dillard Univ., 499 F. Supp. 525 (E.D. Lo. 1980), <i>aff'd</i> , 677 F.2d 114 (5th Cir. 1982).	\$50,000	Discriminated in salary and refused to renew employment contract	No discussion
League of United Latin Am. Citizens v. Salinas Fire Dep't, 654 F.2d 557 (N.D. Ca. 1979).	\$40,000	Denied promotion seven times despite "outstanding" performance evaluation; subjected to "racially charged" question containing an epithet during oral promotion examination	Plaintiff endured "mental anguish, pain and suffering," and "undue stress . . . in his personal life and on the job"
Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985).	\$35,000	Harassed; denied training and transfer opportunities; reprimanded harshly for minor infractions; discriminated in lay-off policy	Plaintiff testified that he was "insulted," "humiliated," and "felt as though he had been slapped in the face"; co-worker testified that plaintiff would become "very upset, very quiet" when reprimanded; doctor offered testimony as to plaintiff's pre-existing lung condition and concern about finding a new job Plaintiff offered no evidence that he was "treated for emotional harm or that he became depressed for any sustained period of time"
Flanagan v. Aaron E. Henry Community Health Servs. Ctr., 876 F.2d 1231 (5th Cir. 1989).	\$25,000	Discriminated in salary, denial of continuing education, and harsh disciplinary action over five-month period; unlawfully discharged	Injury inferred from "stress of attempting to satisfy supervisors who harbored racial animus toward her"

Case	Amount of Compensatory Damage Award	Nature of Discriminatory Conduct	Evidence and Extent of Nonpecuniary Harm	Other Factors
<i>Hunter v. Allis-Chalmers Corp.</i> , 797 F.2d 1417 (7th Cir. 1986).	\$25,000	Harassed by racial epithets and threats over one-year period; discharged in retaliation	Plaintiff and his wife described damage to his self-esteem and family; injury inferred from the finding that the treatment to which he had been subjected was "very ugly and wounding"	Plaintiff repeatedly complained to management, who took only "half-hearted" measures to stop the harassment
<i>Jackson v. Pool Mortgage Co.</i> , 868 F.2d 1178 (10th Cir. 1989).	\$24,421	Unlawfully discharged	Doctor stated that plaintiff suffered from "depression, headaches, muscle spasms, stomach pains, and hair loss"	Award included \$3000 in medical expenses
<i>Crawford v. Roadway Express, Inc.</i> , 485 F. Supp. 914 (W.D. La. 1980).	\$17,000	Retaliated by subjecting plaintiff to harassment for over a year through racially derogatory comments, threats of termination, refusal to permit restroom breaks, oppressive surveillance, verbal abuse and warnings, questionable disciplinary letters, and unreasonable orders	Doctor and psychiatrist testified that plaintiff suffered anxiety and depression that resulted in a painful gastrointestinal problem (for which plaintiff was hospitalized twice); plaintiff was treated in a mental institution for over a month and remained in therapy for another six months; wife and co-workers corroborated plaintiff's personality change from a "happy-go-lucky type" to a "moody, short-tempered introvert"	
<i>Cowan v. Prudential Ins. Co.</i> , 852 F.2d 688 (2d Cir. 1988).	\$15,000	Repeatedly denied promotion over five-year period	Plaintiff stated that he suffered from "severe emotional distress, humiliation, and loss of self-esteem"; plaintiff's wife and co-workers provided corroborating testimony	Court observed that plaintiff was not subjected to "overt racism or public humiliation"; plaintiff himself was the cause of some of the emotional injury and had not sought counseling

Marsh v. Digital Equip. Corp., 675 F. Supp. 1186 (Az. 1987).	\$15,000	Discriminated in applying personnel policies; failed to adequately investigate charge of sexual harassment against plaintiff; unlawfully discharged	No discussion	
Richards v. New York City Bd. of Educ., 668 F. Supp. 259 (S.D.N.Y. 1987), <i>aff'd</i> , 842 F.2d 1288 (2d Cir. 1988).	\$15,000	Denied promotion	Plaintiff testified that he was "angered and humiliated" when passed over; his distress was compounded by the disappointment of his family who had expected he would be awarded the promotion	Court noted "depth and tenacity of plaintiff's anguish" evident by his decision not to accept a lesser promotion so as to "pursue his complaint" and to win eventually the job for which he applied
Croker v. Boeing Co., 23 Fair Empl. Prac. Cas. (BNA) 1783 (E.D. Pa. 1979).	\$14,000	Harassed for over four years	Plaintiff stated that she often left her work station virtually in tears, was afraid to come into work, and was emotionally unable to adequately take care of her four children as a single parent	Recognizing that raising children as a working single parent contributed to plaintiff's emotional distress, the court estimated that the discrimination "added to the difficulties of her life by at least 20%"
Block v. R. H. Macy & Co., 712 F.2d 1241 (8th Cir. 1983).	\$12,402	Harassed by referring to plaintiff in offensive terms and "loudly berating" her in "street language" in the presence of a customer and fellow employees; unlawfully discharged	Plaintiff testified that following discharge, she was unemployed for thirteen months, was forced to borrow from relatives, and experienced "sleeplessness, anxiety, embarrassment and depression"	
Johnson v. Philadelphia Elec. Co., 709 F.Supp. 98 (E.D. Pa. 1989).	\$10,000	Denied promotion	Plaintiff consulted psychiatrist for emotional depression following rejection and was so humiliated that he requested a transfer to a lesser position	Evidence indicated that plaintiff had incurred \$500 in medical expenses for psychiatric therapy

Case	Amount of Compensatory Damage Award	Nature of Discriminatory Conduct	Evidence and Extent of Nonpecuniary Harm	Other Factors
Reeder-Baker v. Lincoln Nat'l Corp., 649 F. Supp. 647 (N.D. In. 1986), <i>aff'd</i> , 834 F.2d 1373 (7th Cir. 1987).	\$10,000	Discriminated in evaluating plaintiff and granting lesser pay increase; eliminated plaintiff from consideration for promotion; retaliated after plaintiff filed discrimination complaints by placing a trace on her computer terminal and subsequently discharging her	Plaintiff testified that she experienced "severe tension headaches and a nervous rash" requiring medication, humiliation, depression and exhaustion; plaintiff's marriage ended within months of her discharge; she became dependent on her parents, and her two children had to live with their grandmother; she also was "frequently unhappy" and less outgoing	Plaintiff was publicly humiliated after her discharge when she was forced to pack her belongings in the presence of co-workers and was escorted from the premises
Goldsmith v. E.I. du Pont de Nemours & Co., 571 F. Supp. 235 (Del. 1983).	\$10,000	Retaliated for nearly a year by physical harassment consisting of repeatedly aggravating plaintiff's sensitivity to being touched; harassment was not a daily occurrence, but it was not infrequent	Plaintiff described, and company nurse and co-workers corroborated, his extreme agitation resulting from repeated harassment by supervisor	Supervisor who harassed plaintiff was aware of his peculiar sensitivity
Richardson v. Restaurant Mktg. Assocs. Inc., 527 F. Supp. 690 (N.D. Ca. 1981).	\$10,000	Deprived plaintiff of "work environment conducive to interracial harmony and association"; frequently exposed her to racial slurs and derogatory comments; ordered plaintiff to fire white waitress seen talking with black man; retaliated by unlawfully terminating plaintiff one day after she informed supervisor that she intended to file racial discrimination charge	No discussion	

Richardson v. Restaurant Mktg. Assocs. Inc., 527 F. Supp. 690 (N.D. Ca. 1981).	\$10,000	Harassed by over-monitoring and refusing to permit plaintiff to take regular breaks; unlawfully discharged on the basis of a minor infraction; refused to rehire	No discussion	
Harris v. Richards Mfg. Co., 511 F. Supp. 1193 (W.D. Tenn. 1981), <i>aff'd in part and rev'd in part</i> , 675 F.2d 811 (6th Cir. 1982).	\$10,000	Retaliated by belittling plaintiff with derogatory comments, increasing plaintiff's overtime schedule, placing adverse memos in her file without her knowledge and against company policy, and unlawfully discharging plaintiff after she refused transfer to a less-attractive position; upon her termination, plaintiff was held against her will until police arrived and escorted her from the premises in the presence of co-workers	Evidence indicated "requisite causal connection between the humiliation, embarrassment and mental distress caused the plaintiff by defendant's actions of systematic harassment"; court observed that "plaintiff's pride in her achievement of [a] responsible position . . . was degraded by the defendant's humiliating demand that she be demoted, without just cause, to an entry level type job"	Court found defendant's conduct in holding plaintiff against her will and in calling for a police escort "especially reprehensible"
Hernandez v. Hill Country Tele. Cooperative, Inc., 849 F.2d 139, <i>rev'd denied</i> , 853 F.2d 925 (5th Cir. 1988).	\$5000	Denied promotion for over a year; discriminated in pay	Evidence indicated plaintiff received medical treatment and suffered emotional problems	
Carner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978).	\$5000	Harassed; discriminated by providing inadequate training, transferring plaintiff against his will and ordering him to undergo psychological re-evaluation	No discussion	
Baker v. North Cent. Dialysis Ctrs., 48 Fair Empl. Prac. Cas. (BNA) 31 (N.D. Ill. 1987).	\$5000	Unlawfully discharged	Plaintiff stated that when she was terminated, she "felt like something inside died" and began to question her self-worth	Plaintiff was only source of income for her family

Case	Amount of Compensatory Damage Award	Nature of Discriminatory Conduct	Evidence and Extent of Nonpecuniary Harm	Other Factors
Boyd v. SCM Allied Paper Co., 42 Fair Empl. Prac. Cas. (BNA) 1643 (N.D. In. 1986).	\$5000	Misled plaintiff as to his employ- ment status; discriminated in laying-off and then refusing to rehire plaintiff	Plaintiff stated that he felt "dejected and humiliated" and "inadequate as a producer for his family" because of the loss of his job; plaintiff stated he could not sleep, became depressed, and "had difficulty explaining to his ten-year-old son why he no longer had a job"	Physical effects were "minimal" and there was no evidence of medical expenses
Jackson v. Wakulla Springs & Lodge, 33 Fair Empl. Prac. Cas. (BNA) 1301 (N.D. Fl. 1983).	\$5000	Harassed by racially derogatory epithets and disparaging refer- ences toward black persons; unlawfully discharged	Plaintiff described becoming "very upset" when discharged because she had to borrow money to support her two chil- dren and could not afford to take them to see a doctor	
Jackson v. Wakulla Springs & Lodge, 33 Fair Empl. Prac. Cas. (BNA) 1301 (N.D. Fl. 1983).	\$3000	Harassed by racially derogatory epithets and disparaging refer- ences toward black persons; unlawfully discharged	Plaintiff testified that she had a child to support and was "upset that she had to go on govern- ment assistance"; plaintiff's mother offered corroborating testimony that she "began to eat less and was very depressed"	
Barbour v. Merrill, 48 F.3d 1270 (D.C. Cir. 1995).	\$2500	Refused to hire qualified appli- cant	No discussion	
Jones v. Trailways Corp., 477 F. Supp. 642 (D.D.C. 1979).	\$2500	Demoted without receiving warning or counseling; prior to plaintiff's demotion, supervisor openly advertised for a replace- ment and spread false rumors of her resignation and retirement	Plaintiff suffered "considerable anguish and humiliation"	Court considered supervisor's act of confronting plaintiff with her successor without any warn- ing of her dismissal as a "crown- ing indignity for plaintiff to have to endure"

Croker v. Boeing Co., 23 Fair Empl. Prac. Cas. (BNA) 1783 (E.D. Pa. 1979).	\$2500	Harassed through frequent and unnecessary transfers; retaliated by taking unjustified disciplinary action	Plaintiff stated that he suffered emotional distress and that "the discrimination adversely affected his life away from work"	
Rosemond v. Cooper Indus. Prods., 612 F. Supp. 1105 (N.D. In. 1985).	\$500	Denied plaintiff adequate training; failed to provide her the opportunity to transfer in lieu of termination; over-documented plaintiff's errors; unlawfully discharged	Plaintiff described her "feelings of isolation and feelings of discrimination"	Plaintiff was not subjected to racial comments; no evidence of significant mental humiliation or physical harm
Easley v. Anheuser-Busch, Inc., 572 F. Supp. 402 (E.D. Mo. 1983), <i>aff'd in part and rev'd in part</i> , 758 F.2d 251 (8th Cir. 1985).	\$500	Refused to hire qualified applicant; administered a pre-employment test that discriminated against minorities	Plaintiff offered personal testimony describing mental and emotional distress	
Lucero v. Beth Israel Hosp. & Geriatric Ctr., 479 F. Supp. 452 (Co. 1979).	\$500	Harassed plaintiff with almost continuous criticism, abusive racial slurs and derogatory comments over an eighteen-month period	Plaintiff testified that she suffered emotional distress	Court reduced amount of award due to plaintiff's delay in taking legal action to terminate the discrimination

