The Lost Art of Damages
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Yvette Davis	**Paul Klockenbrink**	**Tim Peeples**
Haight Brown & Bonesteel, LLP	Gentry Locke	Daniel Coker Horton & Bell, P.A.
Los Angeles, CA	Roanoke, VA	Oxford, MS
ydavis@hbblaw.com	klockenbrink@gentrylocke.com	tpeeples@danielcoker.com
213.542.8069	540.983.9352	662.232.8979

Recoverable Damages Under Title VII, FMLA, FLSA, ADA, and ADEA

I. TITLE VII

A. Damages Recoverable Under Title VII

i. Back Pay

Back pay damages are recoverable under the theory that an employee who is discriminated against should be made whole for losses suffered as a result of that discrimination. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

Back pay damages represent the income and fringe benefits an employee would have earned had the employer not discriminated against or otherwise not taken an adverse employment action against the employee. These damages include not only lost wages but also interest, overtime, shift differentials, bonuses, commissions, tips, cost-of-living increases, merit increases, and raises due to promotion. *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986); *Beberman v. U.S. Dept. of State*, 2016 WL 1312534 (D. V.I. Apr. 4, 2016).

Back pay damages also include lost fringe benefits such as vacation time, sick leave, pension and retirement benefits, stock options, savings plan contributions, cafeteria plan benefits, travel expenses, employee meal discounts, tuition assistance benefits, and insurance benefits. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974). Courts have described these benefits as the "invisible paycheck." *Id.* The employee bears the burden to establish the value of such benefits. *Vaughn v. Sabine Co.*, 104 F. App'x 980 (5th Cir. 2004).

a. Negative Tax Consequences

The tax consequences of recovering a large lump sum back pay award may justify an award of additional damages to compensate an employee. *Eshelman v. Agere Sys., Inc.*, 554 F.3d 426 (3rd Cir. 2009). Such awards are not necessarily appropriate in a typical Title VII case. *Id.* The employee bears the burden of establishing, through the use of expert testimony, what tax consequences will be suffered by the employee. *O'Neill v. Sears, Roebuck & Co.*, 108 F.Supp.2d 443 (E.D. Pa. 2000).

ii. Reinstatement and Front Pay

Reinstatement of a terminated employee "means to restore him to the position to which he was entitled at the time of his discharge." *State ex rel. Spurck v. Civil Serv. Bd.*, 32 N.W.2d 583 (Minn. 1948). Courts have observed that "reinstatement is a basic element of the appropriate remedy in wrongful discharge cases and, except in extraordinary circumstances, is required," adding that "[t]he rule of 'presumptive reinstatement' in wrongful discharge cases follows the notion that money damages will seldom suffice to make whole persons who are unlawfully discriminated against in the employment environment." *Darnell v. City of Jasper, Ala.*, 730 F.2d 653 (11th Cir. 1984). Notwithstanding that reinstatement is the "presumptively favored equitable remedy," the presumption "may be negated where reinstatement requires the displacement of an uninvolved third party, where hostility would result, . . . where the plaintiff has found other work, . . . [or] when the employer is genuinely dissatisfied with a plaintiff's actual job performance." *Slayton v. Ohio Dept. of Youth Servs.*, 206 F.3d 669 (6th Cir. 2000).

Front pay "is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." *Pollard v. E.I. duPont de Nemours & Co.*, 532 US 843 (2001). Front pay often serves as a substitute for reinstatement because Courts recognize the inherent unfairness of requiring an employee to return to work for a hostile employer. *Abuan v. Level 3 Communs., Inc.*, 353 F.3d 1158 (10th Cir. 2003).

Factors considered in determining the amount of a front pay award include (1) the length of prior employment, (2) the permanency of the position held, (3) the nature of the work, (4) the age and physical condition of the employee, (5) possible consolidation of jobs, and (6) the myriad of other non-discriminatory factors which could validly affect the employer/employee relationship. *Teutscher v. Woodson*, 835 F.3d 936 (9th Cir. 2016). Other Courts have considered the employee's age, job skills, and work-life expectancy. *Id.*

iii. Compensatory and Punitive Damages

An employee may recover compensatory damages under Title VII for future pecuniary losses (such as medical expenses and costs for counseling), emotional distress, inconvenience, loss of enjoyment of life, loss of reputation, and other similar nonpecuniary losses. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Seay v. Tennessee Valley Auth.*, 340 F.Supp.2d 844 (E.D. Tenn. 2004). Before compensatory damages may be recovered in a Title VII case, the employee must prove that he or she actually sustained mental and emotional distress as a result of the workplace discrimination. *Carey v. Piphus*, 435 U.S. 247 (1978). The employee's testimony alone can support an award of compensatory damages so long as the testimony constitutes more than conclusory statements about the employee's anger, distress, frustration, or unhappiness resulting from the alleged discrimination. *LaPorte v. Henderson*, 176 F.Supp.2d 464 (D. Md. 2001). Courts look "to such matters as the presence of genuine injury, the need for medical or psychological attention (including counseling), loss of income by reason of depression or anxiety, the context of the events surrounding the emotional distress, and the nexus between the conduct and the emotional distress." *Id.*

An employee may recover punitive damages in a Title VII case "if the [employee] demonstrates that the [employer] engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual." *White v. Burlington Northern & Santa Fe. R. Co.*, 364 F.3d 789 (6th Cir. 2004). Factors relied upon by Courts in determining whether to award punitive damages include, among others, whether the employer knows of the anti-discrimination laws it is violating (*Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999)), whether the alleged discriminator had managerial authority (*O'Donnell v. K-Mart Corp.*, 100 A.D.2d 488 (N.Y. Sup. Ct. 1984), and whether the employer failed to act in good faith to enforce its own policies (*Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001)).

iv. Injunctive Relief

Under Title VII, "if the court finds that the [employer] has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the [employer] from engaging in such unlawful employment practice and order such affirmative action as may be appropriate." *EEOC v. KarenKim, Inc.*, 698 F.3d 92 (2nd Cir. 2012). Courts' power to shape appropriate injunctive relief is "broad, albeit not unlimited," and is based upon the purposes of Title VII "to prevent discrimination and achieve equal employment opportunity in the future." *Id.*

v. Prejudgment Interest

Prejudgment interest may be recovered in a Title VII claim against a private employer. *Loeffler v. Frank*, 486 U.S. 549 (1988). Since Congress intended for Title VII to be a vehicle by which "to make persons whole for injuries suffered through past discrimination," prejudgment interest may be awarded since it is considered "an element of complete compensation." *Id.*

vi. Attorney's fees

Except in extraordinary circumstances, a "prevailing" employee may recover reasonable attorney's fees in a Title VII claim. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Pro se litigants and attorneys representing themselves are not entitled to recover attorney's fees even if they prevail on their Title VII claims. *Kay v. Ehrler*, 499 U.S. 432 (1991).

The term "prevailing party" has been the subject of much debate under Title VII. The United States Supreme Court established the "floor" for when an employee qualifies as a prevailing party by stating that the employee must first succeed on a "significant issue in litigation which achieved some of the benefit the parties sought in bringing the suit." *Texas St. Teachers Ass'n v. Garland Ind. Sch. Dist.*, 489 U.S. 782 (1989). The employee, at a minimum, "must be able to point to a resolution of the dispute which changes the legal relationship between [the employee] and the [employer]." *Id.* If the recovery or victory, however, is insignificant, the employee may technically have "won" the case but may not be considered to be a "prevailing party" for purposes of recovering attorney's fees. *Id.*

Awards of attorney's fees are calculated with the use of the lodestar method, which involves multiplying the number of hours that could have reasonably been expended on the case by a

reasonable hourly rate. *Hensley*, 461 U.S. at 433. Factors considered in setting an attorney's fee award include (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to the acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Metalmark NW, LLC v. Stewart*, 2006 WL 8459347 (D. Ore. Aug. 2, 2006).

B. Limitations on Damages Recoverable under Title VII

i. Back pay

There is no cap on a back pay award. *Vernon v. Port Auth. of NY and NJ*, 220 F.Supp.2d 223 (S.D. NY 2002).

ii. Front pay

Front pay damages are not subject to a cap. *Pollard.*, 532 US at 854.

iii. Mitigation

While there are no damages caps on back and front pay awards, a discharged employee nevertheless has a statutory duty to mitigate the employee's economic losses. *Booker v. Taylor Milk Co., Inc.*, 64 F.3d 860 (3rd Cir. 1995). Under Title VII, "[i]nterim earnings or amounts earnable with reasonable diligence by the person discriminated against shall operate to reduce the back pay otherwise allowable." 42 USC §2000e-5(g). Mitigation does not require a terminated employee to "go into another line of work, accept a demotion, or take a demeaning position," but if the employee "refuses a job substantially equivalent to the one he was denied," the employee "forfeits his right to backpay." *Ford Motor Co. v. EEOC*, 458 US 219 (1982). Moreover, "an employer charged with unlawful discrimination often can toll the accrual of backpay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages." *Id.; see also Hamovitz v. Santa Barbara Applied Research, Inc.*, 2010 WL 4983798 (W.D. Pa. Dec. 2, 2010) (noting that "a rejection of an unconditional offer cuts off back pay and may cut off front pay if such a rejection is found to be unreasonable").

In some instances, returning to school may satisfy a terminated employee's obligation to mitigate his damages. *Dailey v. Societe Generale*, 108 F.3d 451 (2nd Cir. 1997) (holding that "a fact-finder may, under certain circumstances, conclude that one who chooses to attend school only when diligent efforts to find work prove fruitless, . . . satisfies his or her duty to mitigate").

iv. Compensatory and Punitive damages

Congress has specifically limited the amount of compensatory and punitive damages an employee may recover. 42 U.S.C. §1981a(b).The employee may recover compensatory and punitive damages, combined, in conformity with the following scale:

Number of Employees	Maximum compensatory/punitive damages recovery
15-100	$50,000.00
101-200	$100,000.00
201-500	$200,000.00
More than 501	$300,000.00

The caps apply to "each complaining party in an action," i.e., "a lawsuit brought in court," rather than to each claim. *Black v. Pan American Labs., LLC*, 646 F.3d 254 (5th Cir. 2011).

II. FAMILY MEDICAL LEAVE ACT (FMLA)

A. Damages Recoverable Under FMLA

Congress set forth available damages for the FMLA in 29 U.S.C. § 2617. Employers who violate the FMLA are liable to affected employees for damages equal to "any wages, salary, employment benefits or other compensation denied or lost to such employee by reason of the violation." 29 U.S.C. § 2617 (2018). This damages provision permits employees to seek both front and back pay. *See Nichols v. Ashland Hosp. Corp*, 251 F.3d 496, 504 (4th Cir. 2001) (stating that the award of front pay is solely within the court's discretion, which must be tempered by the potential for windfall to the plaintiff); *Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 869 (8th Circ. 2006) (discussing back pay damages under the FMLA).

i. Back Pay

Back pay is calculated by determining total compensation employee would have earned in the absence of the FMLA violation, reduced by any compensation the employee actually received and any amount the employee would have received through reasonable actions taken to mitigate the damage. *Id.* It is only available for the time when the employee would have been able to work had the violation not occurred. *Id.* The First Circuit has ruled that it is appropriate to include overtime compensation as part of backpay in an FMLA case. *Id; Pagan-Colon v.Walgreens, Inc.*, 697 F.3d 1, 1 (1st Cir. 2012).

Should employees not sustain loss or denial of wages, salary, employment benefits, or other compensation, the FMLA provides that employers pay in damages any actual monetary losses sustained by the employee as a direct result of an FMLA violation (e.g., cost of providing care), up to a sum of 12 weeks of wages or salary for the employee. 29 U.S.C. § 2617 (2018). The FMLA provides that employers must pay the interest on any of these damages, calculated at the prevailing rate. *Id.*

ii. Front Pay/Reinstatement

Reinstatement is the primary form of relief recognized under the FMLA. If an employer determines that it has violated an employee's FMLA rights, one of the quickest ways to cap

exposure is to offer reinstatement. This could be an attractive strategy because many employees who take FMLA leave and complain of a violation are unable or unwilling to return to work for the employer. Thus, the offer of reinstatement not only caps wage loss damages, it can also undermine the employee's claim of loss and/or willingness to return to work.

Front pay is a substitute for reinstatement when a court decides that reinstatement is impossible, impracticable or inequitable (e.g., when there is too much animosity between employer and employee). 1 N. PETER LAREAU, LABOR AND EMPLOYMENT LAW § 174.02 (2003). It estimates future salary, pension, and other benefits plaintiff would have earned from date of judgment until the likely loss of the job or date of retirement. *Id.* "Prospective losses of postretirement benefits may be measured until an actuarially predicted date of death." *Id.*

iii. Liquidated Damages

Liquidated damages are available to prevailing plaintiff, doubling the total amount of compensation awarded, including prejudgment interest. The award of liquidated damages is normally awarded automatically. However, if an employer proves to the satisfaction of the court that the violation of the FMLA was in ***good faith*** and that the employer had ***reasonable grounds*** for believing that the act or omission was not a violation, the court, in its discretion, may choose not to award liquidated damages. The employer has a plain and substantial burden to persuade the court that its failure was in good faith and that it would be unfair to impose liquidated damages. An employer's good faith is measured by an objective standard. *Mayhew v. Wells*, 125 F.3d 216,220 (4th Cir. 1997). As has been stated by different courts:

> Good faith requires more than a showing of ignorance of the prevailing law or uncertainty about its development. It is not enough to show that a violation was not purposeful. Nor is good faith demonstrated by the absence of complaints on the part of the employees or conformity with industry-wide practice. Good faith requires that an employer first take active steps to ascertain the dictates of the law and then move to comply with them.

Thorson v. Geminin, Inc., 96 F.Supp.2d 882, 891 (N.D. Iowa 1999) (citing *Reich v. Southern New England Telecomm Corp.*, 121 F.3d 58, 71 (2d Circ. 1997)), *affd sub nom., Thorson v. Gemini, Inc.*, 205 F.3d 370 (8th Cir. 2000); *cf. Lockwood v. Prince George's Cnty.*, 217 F.3d 839 (4th Cir. 2000) (unpublished per curiam table decision) (quoting *Reich*, 121 F.3d at 71) ("[G]ood faith 'requires that an employer first take active steps to ascertain the dictates of the FLSA and then move to comply with them.'").

iv. Punitive and Emotional Distress Damages

The FMLA specifically identifies damages available for recovery and does not include any provision for punitive damages, emotional distress damages, pain and suffering, or other non-economic compensatory damages.

v. Prejudgment Interest

Under the FMLA, an employer shall be liable for prejudgment interest on the amount of wages, salary, employment benefits or other compensation denied or lost to an employee by reasons of the FMLA violation. Prejudgment interest is awarded at the prevailing rate and that term has not been precisely defined by the courts, but the prevailing trend among courts is to utilize the IRS prime rate. *See, e.g., Carroll v. Sanderson Farms. Inc.*, No. CIV.A. H-10-3108, 2014 WL 549380, at *4 n.1 (S.D. Tex. Feb. 11, 2014) (collecting cases) ("The Court observes that 3.25% is the federal prime rate and an appropriate rate for an FMLA case."); *Lane v. Grant Cnty*., No. CV-11-309-RHW, 2013 WL 5306986, at *10 (E.D. Wash. Sept. 20, 2013) (applying the prime rate based on the reasoning set forth in *Gutierrez v.Grant Cnty.*, No. CV-10-48-LRS, 2011 WL 5279017 (E.D. Wash. Nov. 2, 2011)); *Gutierrez*, 2011 WL 5279017, at *4 ("Considering the compensatory purpose of prejudgment interest, this court finds the 'prime rate' is a fair measure for prejudgment interest, especially in light of the historical reduction of interest rates while this case has been pending."); *Neel v. Mid-Atl. of Fairfield. LLC*, No. SAG-IO-CV-405, 2012 WL 3264965, at *12 (D. Md. Aug. 9, 2012) (citation omitted) ("Courts often award pre-judgment interest at the prime interest rate. In this case, the Court finds that the appropriate rate of prejudgment interest to properly compensate [the plaintiff] is the prime interest rate, compounding annually.").

vi. Attorneys' Fees and Costs

A court shall in addition to any judgment awarded to a plaintiff allow a reasonable attorneys' fee, reasonable expert witness fees and other costs of the action to be paid by the defendant.

B. Caps on Damages

There are no hard caps on damages under the FMLA. Employees are limited to damages that may be awarded under the statute. There is some case law that supports the use of after acquired evidence of other conduct by the employee that would have warranted termination to limit damages in an FMLA claim. *See*, e.g., *Edgar v. JAC Products, Inc.*, 443 F.3d 501, 513-514 (6th Cir. 2006) (citing *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 359-61 (1995)).

C. Statute of Limitations

An action must be brought under the FMLA not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought. However, in a case in which an employer commits a "willful violation" of the FMLA, employees may bring a claim reaching back up to three years "of the date of the last event constituting the alleged violation." *See* 29 U.S.C. § 2617(c) (2018). Willful violations of the FMLA occur when an employer knows of or shows reckless disregard as to whether its conduct is prohibited by the FMLA. 1 N. PETER LAREAU, LABOR AND EMPLOYMENT LAW § 174.02 (2003).

III. THE FAIR LABOR STANDARDS ACT (FLSA)

A. Damages Recoverable Under the FLSA

i. Wages

Employees may recover "unpaid minimum wages, or their unpaid overtime compensation . . . and an additional equal amount as liquidated damages." 29 U.S.C. § 216(b) (2018).

ii. Liquidated Damages

When an employer violates the FLSA overtime compensation provisions, the court can award liquidated damages equal to the amount of unpaid overtime expenses. Though awarding liquidated damages is "the norm", a court may decline to award them if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in **good faith** and that the employer had **reasonable grounds** for believing that the act or omission was not a violation of the FLSA. Even if the court is convinced of the employer's good faith and reasonableness, the court is permitted, but not required, in its sound discretion to ***reduce*** or **eliminate** the liquidated damages which would be otherwise required in any judgment against the employer. If the employer does not show to the satisfaction of the court that it has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages. The employer bears the plain and substantial burden of proving good faith. In general, good faith requires that the employer first take active steps to ascertain the dictates of the FLSA and move to comply with them. Factors that have tended to establish good faith and reasonableness include:

- No history of violations
- Relying on advice of counsel
- Assessment of compliance by compliance officer
- Demonstrable reliance on DOL publications, court opinions, etc.
- Reliance on industry practice/compliance with CBA
- Uncertain area of law ("close call")
- No evidence of continued violation after discovery of violation
- No actual knowledge of violation
- Affirmative action to ensure compliance

iii. Prejudgment Interest

Prejudgment interest may be awarded.

iv. Attorneys' Fees

Any judgment awarded to the plaintiff allows the recovery of reasonable attorneys' fees and costs of the action to be paid by the employer.

B. Statute of Limitations "Reach Back" Period

The Portal-to-Portal Act provides the FLSA's limitations period. *See* 29 U.S.C. § 255 (2018) (providing the statute of limitations for the FLSA). The Portal-to-Portal Act states that, like the FMLA, the limitations period is "within two years after the cause of action accrued . . . except that a cause of action arising out of a willful violation may be commenced within three years." *Id.* The standard for "willful" conduct under the FLSA is the same as that under the FMLA: that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

C. Retaliation Cases (Emotional Distress and Punitive Damages)

Retaliation cases may open other types of damages or terminations in retaliation of an employee exercising his or her rights under the FLSA including, but not limited to, equitable relief, reinstatement, and in some circumstances, emotional distress damages. There are also some courts (although a minority) that have even awarded punitive damages. All these damages are under the federal scheme and obviously additional damages may be available on a state by state basis.

D. Calculation of Rate of Pay

This can be a complicated area and requires the employer to accurately anticipate the calculation of the rate of pay based on varying factors that could include bonus pay and other compensation. Likewise, the fluctuating work week in certain jurisdictions can be employed to reduce the damages to a calculation of half time versus time and a half. [Assuming the employee is salaried non-exempt.]

IV. THE AMERICANS WITH DISABILITIES ACT (ADA)

A. Damages Recoverable Under the FLSA

Remedies under the ADA are the same as provided in Title VII. The enforcement provision of the ADA, 42 U.S.C. §12117, specifically provides for the same recovery in ADA actions as in Title VII actions: "The powers, remedies and procedures set forth in . . .[42 U.S.C. § 2000e-5, the Title VII remedies provision] shall be the powers, remedies and procedures this title provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this Act … concerning employment."

i. Back Pay

Back pay is available under the ADA once the plaintiff establishes that unlawful discrimination caused her loss. (*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (holding that back

pay should be denied only in "unusual circumstances," where the award would frustrate the statutory purpose of making victims whole and eradicating discrimination).

("The ADA provides for all remedies available under Title VII, which includes backpay and front pay or reinstatement. [Front pay relief] is equitable in nature, and thus within the sound discretion of the trial court."), judgment vacated on other grounds, 216 F.3d 354 (3d Cir. 2000). *Marinelli v. City of Erie*, 25 F. Supp.2d 674, 675 (W.D.Pa. 1998).

Note that a plaintiff's unreasonable rejection of an employer's unconditional offer of reinstatement will end the accrual of back pay on the date that the offer is rejected or expires, *Ford Motor Co v. EEOC*, 458 U.S. 219, 238-39 (1982).

ii. Front Pay/Reinstatement

"The central purpose of the ADA is to make the plaintiff whole – to restore the plaintiff to the economic position the employee would have occupied but for the wrongful discrimination of the employer." Davoll v. Webb, 194 F.3d 1116, 1143 (10th Cir. 1999)

Front pay is considered a remedy that substitutes for reinstatement, and is awarded when reinstatement is not viable under the circumstances. See Berndt v. Kaiser Aluminum & Chemical Sales, Inc., 789 F.2d 253, 260-61 (3d Cir. 1986) (noting that "when circumstances prevent reinstatement, front pay may be an alternate remedy").

iii. Compensatory Damages

Compensatory damages, which compensate for past and future pecuniary losses such as emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and out of pocket expenses for medical treatment, may include lost future earnings over and above the front pay award. 42 U.S.C. § 1981a(b)(3).

iv. Punitive Damages

A plaintiff can recover compensatory and punitive damages under the ADA except in reasonable accommodations cases where the employer has made a good faith effort to reasonably accommodate the disabled employee, even if the effort was ultimately unsuccessful, and the employer has consulted with the employee seeking the accommodations to identify and make a reasonable accommodation. 42 U.S.C. § 12117(a); id. § 1981a(a)(3).

Note that some courts have held that compensatory and punitive damages are unavailable for a retaliation claim brought under the ADA. (See *Alvarado v. Cajun Operating Co*., 588 F.3d 1261, 1265 (9th Cir. 2009); *Kramer v. Banc of Am. Sec., L.L.C*., 355 F.3d 961, 965 (7th Cir. 2004); *Bowles v. Carolina Cargo, Inc.*, 100 F. App'x 889, 890 (4th Cir. 2004).

However, punitive damages are available for disparate treatment cases under the ADA when the employer is found to discriminate against the plaintiff "with malice or with reckless indifference." 42 U.S.C. § 1981a(b); Smith, 461 U.S. at 56. "These terms focus on the employer's state of mind and require that "an employer must at least discriminate in the face of a perceived risk that its

actions will violate federal law." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535-36, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999).

Whether an award of punitive damages is reasonable depends on "the degree of reprehensibility of the defendant's conduct." *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996). Courts will consider factors such as whether: (1) the harm was physical, not merely economic; (2) the conduct showed an indifference to, or a reckless disregard of, the health or safety of others; (3) the conduct's target was financially vulnerability; (4) the conduct was part of a larger pattern; and (4) the harm resulted from intentional malice or deception. See id. at 576-77.

Indifference to a plaintiff's rights may be found in cases where: (1) the employer's conduct was so clearly based upon unlawful factors that a statutory violation was obvious, (2) the employer persistently failed to remedy a situation in which an employee's rights were being violated, or (3) the employer exhibited other conduct that was extremely offensive. In the case of EEOC v. Federal Express Corp., 513 F.3d 360 (4th Cir. 2008), the Fourth Circuit affirmed the $8000 compensatory-damage award and $100,000 punitive-damage award to a hearing-impaired package-handler who alleged his former employer failed to reasonably accommodate him under the ADA. Id. at 363-64. Due to lack of accommodations, the plaintiff was unable to understand and participate in employee meetings and training sessions on topics such as workplace safety, handling dangerous goods, interpreting hazardous labels, and potential anthrax exposure. Id. at 365-68. The court therefore found that the employer's management was indifferent to whether its failure to accommodate could jeopardize the safety of plaintiff and other employees. Id. at 373. Punitive damages are subject to caps in ADA actions. See 42 U.S.C. § 1981a (b)(3). But 42 U.S.C. §1981a(c)(2) provides that the court shall not inform the jury of the statutory limitations on recovery of punitive damages.

v. Emotional Distress Damages

In order to recover emotional damages a plaintiff must show "a reasonable probability rather than a mere possibility that damages due to emotional distress were in fact incurred [as a result of an unlawful act."] *Spence v. Bd. of Ed.*, 806 F.2d 1198, 1201 (3d Cir.1986).

A plaintiff does not need to offer medical evidence in order to obtain emotional distress damages so long as the damages sought for emotional distress are supported by competent evidence of genuine injury. (*Heaton v. Weitz Co.*, 534 F.3d 882, 891-93 (8th Cir. 2008) [jury award of $73,320 for emotional distress after plaintiff testified that he felt "inadequate" and had no sense of identity after his employment termination so he took antidepressants after seeing a psychologist and family counselor]; see also *Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 339 F.3d 52, 63-64 (1st Cir. 2005) (wherein court noted that expert medical testimony is not a prerequisite for an emotional-distress award). Testimony from the plaintiff, standing alone, may be sufficient so long as the plaintiff's testimony is "sufficiently articulated" and "show a causal connection between the [employer's] violation and [the plaintiff's] emotional distress. (*Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536, 546-47 (4th Cir. 2003) citing *Dennis v. Columbia Colleton Med. Ctr.*, 290 F.3d, 639, 653 (4th Cir.2002.)

vi. Prejudgment Interest

"Title VII authorizes prejudgment interest as part of the back-pay remedy in suits against private employers." See *Loeffler v. Frank*, 486 U.S. 549, 557-58 (1988)

vii. Attorneys' Fees

Reasonable attorney's fees are available to a prevailing party under the ADA, including litigation expenses, and costs directly attributable to that claim. 42 U.S.C. §12205.

Attorney's fees are computed using the lodestar method, which multiplies the number of hours that reasonably could have been spent on the litigation by a reasonable hourly rate. *Comm'r v. Banks*, 543 U.S. 426, 433 (2005); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In determining the number of hours and appropriate hourly rates, courts consider factors such as (1) the amount of time and work the case required; (2) the degree of skill or experience required by or exhibited in litigating the case; (3) the fees customarily charged by attorneys with similar experience; (4) the amount of fees awarded in comparable cases; (5) the amount of redundancy or waste apparent in the attorney's time records; and (6) the desirability of the representation. *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714, 717, 719 (5th Cir. 1974).

B. Caps on Damages

ADA claims are subject to the statutory damages caps of 42 U.S.C. § 1981a(b)(3). See *E.E.O.C. v. AutoZone, Inc*., 707 F.3d 824, 831 (7th Cir. 2013) (applying Section 1981(a)(b)(3) to ADA claims). Section 1981a(b)(3)(D) provides that "[t]he 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 * * * in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000." Backpay, interest on backpay, and front pay are excluded from the definition of "compensatory damages." 42 U.S.C. § 1981a(b)(2). The caps are as follows:

- 15-100 employees, the cap is $50,000
- 101-200 employees, the cap is $100,000
- 201-500 employees, the cap is $200,000
- 500 employees and up, the cap is $300,000

C. Statute of Limitations

The Equal Employment Opportunity Commission (EEOC) is the federal employment agency which enforces the ADA. Under the EEOC, employees have 180 calendar days to file a claim with the agency. If, however, the state's anti-discrimination laws cover the same discrimination as the federal, then that deadline is extended to 300 days.

In California, the Department of Fair Employment and Housing (DFEH) is the state agency charged with enforcing California's civil rights laws. The California Fair Employment and Housing Act (FEHA), the Unruh Civil Rights Act, and the Disabled Persons Act are state laws that protect people from discrimination based on disability. California employees can file a charge with either the EEOC or the DFEH first.

Beginning January 1, 2020, California employees will have three times as long to file charges alleging discrimination, harassment and retaliation. The statute of limitations for filing a charge under the Fair Employment and Housing Act ("FEHA") has been extended from 1 year to 3 years.

V. THE AGE DISCRIMINATION AND EMPLOYMENT ACT (ADEA)

A. Damages Recoverable Under Title VII

i. Back Pay

The ADEA enforces its provisions much like the FMLA and FLSA; as a matter of fact, Congress explicitly stated that the ADEA "shall be enforced in accordance with the powers, remedies and procedures…of the Fair Labor Standards Act." 29 U.S.C. § 626 (2018). An employee can recover those actual damages that reasonably compensate the employee for any lost wages or benefits, taking into consideration any increases in salary and benefits, including pension that the employee would have received from the employer. Backpay damages apply from the time the employee suffered the adverse employment action until the date of verdict. Backpay awards are mandatory under the ADEA after a finding of discrimination

ii. Front Pay/Reinstatement

An employee may be entitled to front pay from his/her former employer for the period from the date of verdict through a reasonable period of time into the future. Obviously there is an offset for failure to mitigate and/or for other earnings or projected earnings. Reinstatement is the preferred remedy, but often it is not a viable option.

iii. Liquidated Damages

As noted below, under the ADEA, an employee cannot recover compensatory or punitive damages. An employee can, however, recover liquidated damages equal to an amount double of the damages for lost wages and benefits. In order to find for the employee, it must be determined that the violation of the ADEA was willful, meaning that the defendant knew or showed reckless disregard for whether the action was prohibited by law. It is not enough to demonstrate that the employer acted negligently.

iv. Compensatory and Punitive Damages

Under the ADEA, compensatory and punitive damages are generally not recoverable. This is because an employee has the opportunity to be awarded liquidated damages (see above), compensatory and punitive damages are not available.

v. Prejudgment Interest

As with other federal statutes, prejudgment interest is a discretionary remedy available in ADEA cases. *Lindsey v. Am. Cast Iron Pipe, Co.*, 810 F.2d 1094, 1101 (11th Cir. 1987).

vi. Attorneys' Fees

Reasonable attorneys' fees are available to the prevailing party under the ADEA. The ADEA references the attorneys' fees provision from the Fair Labor Standards Act. Courts generally apply the lodestar principles for calculating the reasonable amount to be awarded.

B. Caps on Damages

There are no caps on damages.

C. Statute of Limitations

The Equal Employment Opportunity Commission (EEOC) is the federal employment agency which enforces the ADEA. Under the EEOC, employees have 180 calendar days to file a claim with the agency. If, however, the state's anti-discrimination laws cover the same discrimination as the federal, then that deadline is extended to 300 days.