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Damages in Employment Cases

by

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Syverson v. International Business Machines Corp., 461 F.3d 1147, 98 FEP Cases 1345 (9th Cir. 2006), reversed the grant of summary judgment to the ADEA collective action defendant and held that IBM’s release and covenant not to sue did not meet the requirement of the OWBPA. The flaw in question was that IBM’s severance package required that employees sign a document containing a release of all claims, including ADEA claims, and also containing a covenant not to sue that expressly excluded claims under the ADEA. Judge Berzon summarized the panel ruling at 1149:

Under the Older Workers Benefit Protection Act (“OWBPA”), employees may not waive rights or claims arising under the Age Discrimination in Employment Act (“ADEA”) unless the waiver is “knowing and voluntary.” 29 U.S.C. § 626(f)(1) (2000). To qualify as “knowing and voluntary,” a waiver included in an agreement between an employer and its employees must, among other things, be “written in a manner calculated to be understood” by the average employee eligible to participate in the agreement. Id. § 626(f)(1)(A). This appeal presents the question whether a waiver form used by International Business Machines Corp. (“IBM”) in connection with a severance benefit package meets that standard. We hold that it does not and was therefore not “knowing and voluntary.” Id. § 626(f)(1).

The court further elaborated on the OWBPA requirements in referring with approval to the U.S. Department of Labor’s explication:
To satisfy the “manner calculated” requirement, “[w]aiver agreements must be
drafted in plain language geared to the level of understanding of the individual party to
the agreement or individuals eligible to participate” in a group termination plan. 29
C.F.R. § 1625.22(b)(3) (2005). Employers are thus instructed to “take into account such
factors as the level of comprehension and education of typical participants.” Id. These
considerations “usually will” require the limitation or elimination of technical jargon and
of long, complex sentences.” Id.

Id. at 1152 (footnote omitted.) Because the court held that the basic requirements of the statute
were not met, it saw no reason to decide whether to adopt the “totality of the circumstances”
approach for deciding matters as to which the basic requirements are met. Id. at 1152 n.7. The
court held that the apparent conflict between the release and the covenant not to sue would be
confusing to the ordinary reader, and that IBM’s business purpose in adding the covenant not to
sue—to ensure its ability to collect damages if a signing employee sued on a waived claim—did
not save the provision:

Given this substantive overlap between releases and covenants not to sue, that fact
that the MERA Agreement’s covenant not to sue contains an exception for ADEA claims
necessarily creates potential confusion, as it appears to lift any barrier from proceeding to
court with an ADEA claim. The confusion ensues, in part, from including in a single
document two concepts that, technically speaking, cannot coexist. Under the classic
definitions contained in Black’s Law Dictionary and in the case law quoted above, a
covenant not to sue is pertinent only if the underlying right is not extinguished, while a
release extinguishes any underlying right. Where both nonetheless appear in the same
document, the covenant not to sue largely swallows the release—and the negation of the
covenant not to sue can therefore be read as negating the release as well.

IBM stresses that without the covenant not to sue it would have been deprived of
the “full benefit of its bargain” with those employees who signed on to the MERA
Agreement, because without the covenant, although “IBM could raise the Release as an
affirmative defense and obtain a dismissal of the suit, it still would be out its costs and
attorneys’ fees.” IBM also maintains that the covenant not to sue was drafted to comply
with the EEOC regulation that provides: “[n]o ADEA waiver agreement, covenant not to
sue, or other equivalent arrangement may impose any . . . penalty, or any other limitation
adversely affecting any individual’s right to challenge the agreement . . . . [including]
provisions allowing employers to recover attorneys’ fees and/or damages because of the
filing of an ADEA suit.” 29 C.F.R. § 1625.23(b).

It very well may have been IBM’s intention to draft an agreement that would
preserve the right of an employee to challenge without penalty his waiver of ADEA
claims as not knowing or voluntary. See Thomforde II, 406 F.3d at 504 (observing that
“[t]he intended effect of the Agreement was to release the employee’s substantive claims
under the ADEA, while preserving the employee’s right to challenge the validity of the
release through a lawsuit, as provided by the regulations” (citing 29 C.F.R. §
1625.23(b))). If that was IBM’s intention, it would have been quite easy to have
accomplished this purpose directly. The MERA Agreement, by contrast, uses a term
unfamiliar to lay people,”covenant not to sue,” and does not explain how the release and
the covenant not to sue dovetail, either in general or as they relate to the ADEA claims. 

See id. (noting that “the Agreement does not explain how the provisions relate to each other or the limited nature of the exception to the covenant not to sue in light of the release of claims”); see also 29 C.F.R. § 1625.22(b)(3) (“Consideration [of the need to draft waiver agreements in plain language] . . . usually will require the limitation or elimination of technical jargon and of long, complex sentences.”).

Indeed, far from explaining the intended, independent functions of the release and of the covenant not to sue, the MERA Agreement muddles the matter by referring to both provisions with the same shorthand name—”Release”—indicating interchangeability, not distinction. See Thomforde II, 406 F.3d at 504 (noting same). Adding to the confusion, the paragraph containing the covenant not to sue in fact refers to the covenant and the broader “Release” as if the terms were completely interchangeable. See id. (noting same).

Id. at 1160–61.

Thomforde v. International Business Machines Corp., 406 F.3d 500, 95 FEP Cases 1145 (8th Cir. 2005), also held that these aspects of IBM’s release and covenant not to sue were too confusing to meet the OWBPA requirements.

Myricks v. Federal Reserve Bank of Atlanta, 480 F.3d 1036, 1041, 100 FEP Cases 1 (11th Cir. 2007), affirmed the grant of summary judgment to the Title VII defendant, holding that the cause of action was barred by plaintiff’s execution of a general release as part of his severance agreement. The court explained the standards in considering the knowing and voluntary character of a release:

The error of Myricks’s argument is that the Bank explained in clear terms that the severance agreement required the execution of a general release, and Myricks had an opportunity to consult his attorney about those terms. A genuine issue of fact may exist when an employee has not been given enough time to review the agreement after being terminated . . . is not educated enough to understand the waiver . . . or is misled to believe that the release was necessary to prevent the employer from taking an unlawful action . . . but an educated employee with ample time to consider an agreement cannot profess ignorance about its clear terms after consulting an attorney . . . . Myricks had enough time to consider the clear terms of the release, was educated, was not threatened with any unlawful action, and consulted an attorney.

The court affirmed the award of costs against plaintiff, because the defendant prevailed on an affirmative defense.

B. Announced Settlements

Practice Tip: Do Not Agree to a Settlement and Then Assert that New Desired Terms are Material: Dillard v. Starcon International, Inc., 483 F.3d 502, 100 Fair Empl.Prac.Cas. (BNA) 824 (7th Cir. 2007), enforced an oral settlement agreement, holding that enforceability was governed by State law, and that plaintiff’s disputes about additional written terms he wanted to see in the agreement were immaterial. One of the disputes concerned
plaintiff’s effort to change his at-will employment status. The court approved the Magistrate Judge’s finding this was immaterial because plaintiff had always been an at-will employee, and this question had not even been mentioned in the negotiations leading to the oral agreement although “more mundane” matters had been addressed. The court rejected plaintiff’s argument that terms discussing the consequences of certain possible events were material, stating: “Terms addressing purely contingent matters are not necessarily material.”

C. Settlement Authority

Makins v. District of Columbia, 389 F.3d 1303 (D.C. Cir. 2004) (per curiam), after an answer to a question certified to the D.C. Court of Appeals, that attorneys do not have any presumed authority to settle cases and that in the absence of actual authority defendants cannot rely on any statements by plaintiff’s counsel but must have direct confirmation from the plaintiff of authority to settle. The D.C. Court of Appeals citation answering the certified question is Makins v. District of Columbia, 861 A.2d 590 (2004). The court stated at 594–95:

As pointed out, in the District of Columbia the decision to settle belongs to the client, see D.C. Rule of Prof. Conduct 1.2(a) (2004), a fact confirmed by our decisions. In Bronson, supra note 3, 404 A.2d at 960, for example, an attorney brought a declaratory judgment action to enforce a purported settlement agreement against the client. This court refused to bind the client to the agreement, because the decision to accept the agreement was the client's and not the attorney's. "[R]egardless of the good faith of the attorney," we stated, "absent specific authority, an attorney cannot accept a settlement offer on behalf of a client." Id. at 963.

D. Damages for Breach of Settlement

Frahm v. United States, 492 F.3d 258, 100 Fair Empl.Prac.Cas. (BNA) 1631 (4th Cir. 2007), involved a settlement agreement of a Title VII claim. The IRS conceded that it had breached the agreement. The agreement provided: “If a breach of this provision or any other provision occurs, Frahm will be permitted to reassert any and all claims covered by this Agreement. IRS acknowledges and waives any applicable time restraints and/or statutes of limitation generally applicable to such claims, expressly permitting such claims to be reopened and asserted.” The court held that there was no right to monetary damages for the breach, where the settlement agreement did not provide such a remedy.

E. Verdicts and Verdict Forms

Medina v. District of Columbia, __ F.3d __, 2011 WL 2609840 (D.C. Cir. July 1, 2011) (No. 10-7094), reversed the judgment of $180,000 in compensatory damages to plaintiff on his racial discrimination claim against the D.C. Police Department as an impermissible double recovery, where the verdict form showed $90,000 on a Federal claim and $90,000 on a D.C. claim. The court had to jump through analytic hoops to determine that the Federal claim on which damages were awarded was § 1983 and not Title VII based on the instructions. Id, at p. at p. *3. The court held, based on the Complaint, that plaintiff had pleaded only one injury, emotional distress caused by retaliation. It then concluded that the jury’s award was a duplicate recovery for one injury, at pp. *4-*5:
The only question remaining is whether Medina recovered twice for the same injury. We conclude he did. The magistrate judge held as a matter of law Medina could recover under both D.C. law and federal law theories. *Id.* at 96, *reprinted at* J.A. 369 (“I have concluded as a matter of law that [Medina] may [succeed under both the D.C. law and federal law theories] and you [the jury] are not to concern yourself with that question at all or worry about double recovery.”). It seems the magistrate judge believed the double recovery inquiry turned not on the injuries Medina suffered but on the source of law giving rise to the cause of action. *See* Medina, 718 F.Supp.2d at 58 (“Thus, contrary to defendant's claim that plaintiff recovered twice upon the same theory of retaliation, plaintiff actually recovered once under a federal statute and once under a District of Columbia statute.”). But this is incorrect. As we explained earlier, “[i]f a federal claim and a state claim arise from the same operative facts, and seek identical relief, an award of damages under both theories will constitute double recovery.” Mason, 115 F.3d at 1459 (quoting U.S. Indus., 854 F.2d at 1259). Medina's D.C. law and federal law theories of retaliation arose from the same facts (MPD's failure to transfer him to Internal Affairs) and sought identical relief (compensation for emotional distress and humiliation). That Medina presented both D.C. law and federal law theories to prove his case does not alter this conclusion.

Medina can prevail under these facts only if the jury intended to award him $180,000 for a single injury and allocated that amount between Medina's two theories of liability. Although Medina failed to make this argument, even if he had, it would be unsuccessful. The magistrate judge explicitly instructed the jury not to concern itself with double recovery because he had concluded “as a matter of law” that Medina could recover under both his federal law and D.C. law theories. Trial Tr. at 96 (July 24, 2008), *reprinted at* J.A. 369. In light of this statement, we cannot presume the jury intended to compensate Medina $180,000 for a single injury without regard to the multiplicity of theories pled.

The court held that the problem of a double recovery does not arise for punitive damage awards: “Punitive damages, unlike compensatory damages, are not aimed at making a plaintiff whole; thus the rule against double recovery is inapplicable when the damages awarded are punitive.” *Id.* at p. *5.

**Comment on Medina v. District of Columbia:** Attorneys on both sides need to pay more attention to the verdict form, to avoid the difficulties the court encountered. The practical difficulty is that if a verdict form has one damages entry for multiple theories, a reversal on any one will require a re-trial. Perhaps the safest form would be one that had a blank for the total award, and a question whether the same award would have been made under either statute by itself. If the answer is “no,” the jury will need to be asked for separate awards.

*Bains LLC v. Arco Products Co.*, 405 F.3d 76 (9th Cir. 2005), affirmed the judgment of liability and the award of compensatory damages, but held that the award of $5 million in punitive damages to the Sikh-owned plaintiff was excessive and that the most that could be allowed was between $300,000 and $450,000. The court rejected defendant’s challenge to the verdict form as inconsistent, holding that the $1 awarded in nominal damages did not necessarily mean that there was no harm, but that the extent of the harm had not been proven. The court was
required to adopt the latter interpretation because it made sense out of the verdict, considering
the evidence.

Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1287, 102 FEP Cases 716 (11th
Cir. 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation
plaintiff. In connection with the court’s holding on the permissibility of admitting evidence of
other instances of discrimination, the court stated: “The jury reached a split verdict that
discharged Bagby Elevator from liability for Goldsmith’s claim of a hostile work environment
and his claim about a failure to promote. A split verdict suggests that the jury reached a
‘reasoned conclusion free of undue influence.’” (Citation omitted.)

Wilbur v. Correctional Services Corp., 393 F.3d 1192, 1200 n.4 (11th Cir. 2004),
affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant
because the jury’s answers to the special interrogatories removed any basis for the award of
damages. The court held that defendant did not waive its Rule 49(b) challenge to the
inconsistency of the verdict despite its failure to raise the issue before the jury was discharged.
The court held it would have been futile, because plaintiff’s counsel had raised the issue of
inconsistency prior to discharge of the jury, and the trial court had refused to resubmit the
question. “To find otherwise means that CSC was required, solely for the sake of formality, to
challenge the same matter that the district court had expressly ruled on an instant before.”

F.  After-Aquired Evidence

1.  Background

(1995), held that evidence of employee wrongdoing or problems acquired after the challenged
employment decision was taken, or occurring after that decision was taken, can never bar a
finding of liability but can be taken into account in determining the remedy. The Sixth Circuit
rule rejected by the Court had barred all types of employment discrimination suits—even racial
and sexual harassment cases, e.g., Vandeventer v. Wabash National Corp., 867 F. Supp. 790, 67
FEP Cases 619 (N.D. Ind. 1994) (racial harassment; alternative holding), superseded, 887 F.
Supp. 1178, 68 FEP Cases 56 (N.D. Ind. 1995); Conaway v. Auto Zone, Inc., 866 F. Supp. 351,
66 FEP Cases 265 (N.D. Ohio 1994) (sexual harassment)—if the employer could prove that it
would not have hired the employee if it had known of the concealed problem.

The Court held that such evidence can be relevant to the relief to be accorded a victim of
discrimination, but is never relevant to liability. Nor may such evidence operate in all cases to
foreclose all relief. Discussing the importance of the ADEA and the effect of individual suits in
vindicating public policy, the Court stated:

It would not accord with this scheme if after-acquired evidence of wrongdoing that would have
resulted in termination operates, in every instance, to bar all relief for an earlier violation of the
Act.

513 U.S. 352, 358. Mixed-motive cases are inappposite, because the task here is not disentangling
the employer’s motives at the time of the action. Here, the employer did not know of the
legitimate reason for termination at the time of the decision. *Id.* at 359–60. Further, the “clean hands” doctrine does not apply where a private suit serves important public purposes. *Id.* at 360. The effect of such evidence on relief is to be determined on a case-by-case basis, bearing in mind both the importance of the statutory goals and the importance of legitimate employer prerogatives. The Court stated:

> The proper boundaries of remedial relief in the general class of cases where, after termination, it is discovered that the employee has engaged in wrongdoing must be addressed by the judicial system in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case. We do conclude that here, and as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.

*Id.* at 361–62. The Court stated that the back pay questions were more difficult, requiring a balancing test between the need to compensate victims and deter violations on the one hand, and to give effect to employers’ lawful rights on the other:

Resolution of this question must give proper recognition to the fact that an ADEA violation has occurred which must be deterred and compensated without undue infringement upon the employer’s rights and prerogatives. . . . Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired in the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. The beginning point in the trial court’s formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered. In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party. An absolute rule barring any recovery of backpay, however, would undermine the ADEA’s objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination.

Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge. The concern that employers might as a routine matter undertake extensive discovery into an employee’s background or performance on the job to resist claims under the Act is not an insubstantial one, but we think the authority of the courts to award attorney’s fees, mandated under the statute, 29 U.S.C. §§ 216(b), 626(b), and in appropriate cases to invoke the provisions of Rule 11 of the Federal Rules of Civil Procedure will deter most abuses.

*Id.* at 362–63 (citation omitted).
2. **Misconduct During the Hiring Process**

*Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114–15, 83 FEP Cases 556 (D.C. Cir. 2000), reversed the dismissal, for failure to state a claim, of the pro se Title VII and § 1981 Complaint. The lower court had dismissed the Complaint for failure to plead facts sufficient to establish a prima facie claim and to establish pretext. The D.C. Circuit rejected that reasoning. The court stated that a plaintiff can “plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible.” *Id.* at 1116 (citation omitted). It observed that the plaintiff came close to the line here by alleging his conviction of multiple felonies in 1982, his falsification of his employment application, and United’s informing him that it was firing him because of his dishonesty in failing to reveal the convictions. “But that is not the end of the matter. First, this nondiscriminatory reason would apply at most to Sparrow’s termination claim; the complaint does not suggest that United knew of Sparrow’s false statement at the time his requests for promotion were rejected.” *Id.* at 1116–17 (citation omitted).

In general, the appellate courts are treating *McKennon* as applicable when the after-acquired evidence concerns a lie or misstatement in the hiring process, as well as an employee’s wrongful conduct during employment.

3. **Misconduct After Termination**

*Sellers v. Mineta*, 358 F.3d 1058, 1063–65, 93 FEP Cases 417 (8th Cir. 2004), affirmed the lower court’s denial of reinstatement and front pay to the Title VII plaintiff because of her post-termination serious misconduct that led to her discharge from a subsequent employer. The court stated that “we cannot establish a bright-line rule and foreclose the possibility that a Title VII plaintiff’s post-termination conduct may, under certain circumstances, limit the remedial relief available to the plaintiff.” *Id.* at 1063. The court explained::”The availability of front pay as a remedy thus presupposes that reinstatement is impractical or impossible due to circumstances not attributable to the plaintiff. It would be inequitable for a plaintiff to avail herself of the disfavored and exceptional remedy of front pay where her own misconduct precludes her from availing herself of the favored and more traditional remedy of reinstatement. As such, we hold that a plaintiff’s post-termination conduct is relevant in determining whether a front pay award is available, and if so, in determining the extent of the award.” *Id.* at 1064. The court held that defendant had to establish its actual practices, and could not simply rely on the representation that it would never employ a person fired or forced to resign. The court stated: “On remand, in order to establish that Sellers’ front pay remedy should be limited by her post-termination conduct, the defendant must convince the court by a preponderance of the evidence that Sellers’ post-termination conduct renders her ineligible for reinstatement under the FAA’s employment regulations, policies, and actual employment practices.” *Id.* at 1065 (footnote omitted).

*Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 554–55, 78 FEP Cases 1592 (10th Cir.), cert. denied, 528 U.S. 813 (1999), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff, but stated: “Defendant is correct that it may rely on information obtained during the discovery process in making employment decisions so long as it does not do so as a pretext for discrimination or retaliation.” *Id.* at 554. The court stated that information on pre-termination misconduct that was learned by the defendant after plaintiff’s discharge may bar
reinstatement, front pay, and possibly back pay. Post-termination misconduct is in a different category, however. The court explained:

Defendant argues that it would have terminated plaintiff on the basis of his post-termination conduct at his unemployment compensation benefits hearing, during which he “touched and cursed at Defendant’s counsel.” . . . Although we do not foreclose the possibility that in appropriate circumstances the logic of McKennon may permit certain limitations on relief based on post-termination conduct . . . we cannot conclude that the district court abused its discretion in refusing to adopt defendant’s proffered instruction. The alleged misconduct to which defendant points occurred at a hearing occasioned by plaintiff’s termination. In this case, as in most cases in which the alleged misconduct arises as a direct result of retaliatory termination, the necessary balancing of the equities hardly mandates a McKennon-type instruction on after-occurring evidence.7

7 It is not difficult to envision a defendant goading a former employee into losing her temper, only to claim later that certain forms of relief should be unavailable because it would have discharged the plaintiff based on her inability to control her temper.

Id. at 555 & n.7.

4. General Application

Miller v. AT&T Corp., 250 F.3d 820, 837–38, 6 WH Cases 2d 1754 (4th Cir. 2001), affirmed the judgment on stipulated facts for the FMLA plaintiff. The court affirmed the lower court’s holding that defendant did not make out its case for limiting plaintiff’s back pay award in McKennon, but disagreed with its reasoning. The court explained:

The district court concluded that the after-acquired evidence doctrine did not apply to the January absences because “AT&T was aware of Miller’s additional absences at the time of her termination” and “therefore had the ability to evaluate that conduct as part of an overall decision to terminate her employment.” . . . This reasoning overlooks the fact that, while AT&T was aware that the additional absences had occurred when it terminated Miller, the Health Affairs Office had not yet determined whether those absences were covered by the FMLA. AT&T policy therefore prohibited it from considering those absences in deciding whether to terminate Miller. Cf. 29 C.F.R. § 825.307(a)(2) (2000) (providing that an employee is “provisionally entitled” to protection under the FMLA while the employer seeks a second opinion).

Perhaps recognizing this flaw in its logic, the district court noted that AT&T should have resolved the ongoing investigation into the additional absences before deciding to terminate Miller. . . . Such a requirement is not realistic. Indeed, in the case of a chronically absent employee, it is entirely possible that evaluating all outstanding requests for FMLA leave before making a decision would effectively preclude any action by the employer.

Id. at 837. The court rejected defendant’s reliance on a stipulation that it would have fired the plaintiff for absences in January and that it did not believe plaintiff was entitled to FMLA leave
for those absences, because the stipulation did not meet the second prong of defendant’s burden: to show that plaintiff was in fact not entitled to FLMA leave for those absences. The court stated: “AT&T reads too much into this stipulation.” *Id.* at 838.

*Smith v. The Berry Co.*, 165 F.3d 390, 395, 79 FEP Cases 52 (*5th Cir.*), *modified in other respects*, 198 F.3d 150 (*5th Cir.* 1999), upheld the jury finding of liability for age discrimination and rejected the defendant’s argument that after-acquired evidence that the plaintiff had tried to tape an office meeting in violation of company policy, and by going on unapproved travel during her medical leave. “In denying Berry’s post-trial motion for judgment as a matter of law, the district court stated that the jury could have reasonably found that Berry failed to satisfy its burden of proving that Smith would have been fired for her violations of company policy alone. In light of the factual disputes over travel and the fact that the antirecording policy focused on phone calls with clients, we agree with the district court’s conclusion.”

*Dvorak v. Mostardi Platt Associates, Inc.*, 289 F.3d 479, 485–87, 13 AD Cases 1 (*7th Cir.* 2002), affirmed the grant of summary judgment to the ADA defendant. Defendant explained plaintiff’s firing by referring to plaintiff’s poor performance, including his written tirade against the company, and the discovery that he had apparently misused his company laptop to save a confidential customer database and to send a competitor disparaging information about defendant. Plaintiff contended that the laptop-related information was after-acquired evidence, and could not be considered in connection with his termination, because he was fired on April 3, 1997, when he was told to clean out his desk and take FMLA leave. Defendant contended plaintiff was fired on May 28, 1997, after discovery of the laptop-related problems, when it sent him an official letter of termination. *Id.* at 482–83. The court held that the correct date was May 28 because neither plaintiff nor defendant had treated plaintiff as fired on April 3. The application for FMLA leave would have been fraudulent if plaintiff were no longer an employee, and on April 28 plaintiff had written to the HR Director asking for clarification of whether he had been fired or remained an employee. The court held that the May 28 date was the most unequivocal notice of termination. “With no competent evidence to support a termination date earlier than May 28, the laptop misuse is not information that the employer learned after the termination; it may thus be considered as one of Mostardi-Platt’s nondiscriminatory reasons for terminating Dvorak.” *Id.* at 487.

*Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1074–75, 93 FEP Cases 929 (*9th Cir.* 2004), affirmed the protective order entered by the district court, barring defendant from using the discovery process to find out the immigration status of the plaintiffs. See the discussion of this case in Chapter 44 (Back Pay), in the section on “Entitlement to Back Pay.”

*Crapp v. City of Miami Beach*, 242 F.3d 1017, 85 FEP Cases 353 (*11th Cir.* 2001), affirmed the lower court’s amendment of the judgment and denial of defendant’s Rule 60(b) motion. Defendant fired plaintiff for asserted misconduct. After the entry of judgment, the Criminal Justice Standards and Training Commission of the Florida Department of Law Enforcement suspended for two years plaintiff’s certification as a law enforcement officer, retroactive to the date of his discharge. The lower court treated the suspension as after-acquired evidence, and vacated the back pay award and order of reinstatement, but left the compensatory-damages award in place and held that the decertification would not affect plaintiff’s establishment of a *prima facie* case or the determination of liability. *Id.* at 1019. The court held
that the decertification could not be considered a legitimate nondiscriminatory reason for plaintiff’s termination because it was unknown at the time. Id. at 1020–21. The court held that the lower court’s vacation of the back pay award and order of reinstatement, while leaving in place the award of compensatory damages, “appropriately recognized that the City could have fired Crapp for a lawful reason—lack of certification—on the same day that it fired him for a discriminatory reason.” Id. at 1021. The court rejected defendant’s contention that this result was inconsistent: “The district court vacated its award of backpay and reinstatement because the FDLE’s decision precluded the City from retaining Crapp as a police officer. The FDLE’s decision does not, however, change the fact that the jury concluded that the City’s decision to fire Crapp was a racially motivated adverse employment action for which Crapp should be compensated.” Id.

5. Inapplicability of McKennon to Predictions of Future Wrongdoing

*Teahan v. Metro-North Commuter Railroad Co.*, 80 F.3d 50, 55, 5 AD Cases 603 (2d Cir. 1996), held that the defendant's use of psychiatric testimony on the likelihood of a recurrence of plaintiff's substance abuse went to the issue whether plaintiff was "otherwise qualified" under the Rehabilitation Act and did not trigger McKennon's limitations on the use of after-acquired evidence.

6. Waiver of the Defense

*Russell v. Microdyne Corp.*, 65 F.3d 1229, 1240, 68 FEP Cases 1602 (4th Cir. 1995), held that an employer may waive the "after-acquired" defense as to remedies by failing to terminate the plaintiff immediately upon learning of the alleged misstatement or misconduct:

In this case, Russell did not suffer any immediate negative employment decision after Microdyne's alleged discovery of her supposed falsehoods. Absent such a negative employment decision premised upon evidence of wrongdoing, the defense cannot apply and the remedies available are not curtailed in any way. Under these rather unusual circumstances, however, we do not think this is fatal to Microdyne's use of the defense, for the company faced a difficult situation in which the availability of this defense was not established, and it acted in an understandably conservative manner, in fear of the additional liability for discriminatory retaliation that might attach to its conduct. Thus, we believe that the after-acquired evidence doctrine, as limited by the McKennon Court, might be available in this case. We note, though, that in post-McKennon cases, an employer's decision not to terminate a Title VII plaintiff would be dispositive on this issue. *Cf. Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1108 (5th Cir. 1995) ("We are persuaded that the pertinent inquiry, except in refusal-to-hire cases, is whether the employee would have been fired upon discovery of the wrongdoing...").

*Hyatt v. Northrop Corp.*, 80 F.3d 1425, 11 IER Cases 1020 (9th Cir. 1996), applied McKennon to a California claim of wrongful discharge in violation of public policy, based on plaintiff's having filed a False Claims Act qui tam action. The court held that California law would not use the after-acquired evidence doctrine to bar all recovery for a wrongful discharge,
where the plaintiff worked for the defendant for almost five years, and had a satisfactory work performance notwithstanding his false representations on his application. The court affirmed the district court's denial of the defendant's post-trial motion to limit plaintiff's back-pay remedy to the time period from the date of his discharge until the date plaintiff's misrepresentations were discovered. The court held that the defendant waited too long to raise the defense, having failed to assert it in a motion for summary judgment and failing to request a jury instruction. *Id.* at 1433 n.3.

7. Establishing That the Wrongdoing Would, if Known, Have Led to Discharge or Other Adverse Consequences

a. Defendant Has the Burden of Persuasion

*Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160, 1168, 72 FEP Cases 657 (6th Cir.), *modified on rehearing in other respects*, 97 F.3d 833, 73 FEP Cases 1359 (6th Cir. 1996), stated that the defendant had "failed to prove" that it would have refused to hire the plaintiff if it had known of the omissions and misstatements on his application form, suggesting that the defendant had the burden of persuasion on this issue. This case is discussed below in greater detail.

*Welch v. Liberty Machine Works*, 23 F.3d 1403, 1404, 3 AD Cases 385 (8th Cir. 1994), a pre-*McKennon* case, involved an employee discharged a week after he informed the defendant that he had developed a fistula requiring surgery. He sued for wrongful discharge under ERISA and for handicap discrimination under Missouri law. In discovery, the defendant learned that plaintiff had intentionally omitted from his application form the fact that he had worked for another company for a month and been discharged for poor performance. The defendant's application form states that "any misstatement or omission of fact on this application shall be considered cause for dismissal." The defendant obtained summary judgment based on an undisputed affidavit from the company president stating that the company would not have hired the plaintiff if it had known of his prior employment and his discharge for poor performance, and that the company would have terminated the plaintiff for omitting this information on his application. The court of appeals reversed, stating that the affidavit was inadequate because the defendant did not have the misconduct in mind at the time the challenged decision was made.

Therefore, we believe that the employer bears a substantial burden of establishing that the policy pre-dated the hiring and firing of the employee in question and that the policy constitutes more than mere contract or employment application boilerplate. Liberty presented no other evidence of its policies. By itself, Maier's affidavit is a self-serving document and does not establish the material fact that Liberty would not have hired Welch but for the misrepresentation. As the movant for summary judgment, Liberty bore the significant burden of establishing that it had a settled policy of never hiring individuals similarly situated to Welch.

*Id.* at 1405–06. The court stated that it was not deciding whether some undisputed employer affidavits "could, in some circumstances, establish the requisite material fact of a particular employer's policy." *Id.* at 1406.


**O'Day v. McDonnell Douglas Helicopter Co.,** 79 F.3d 756, 759, 70 FEP Cases 615 (9th Cir. 1996), held by a divided panel that the employer asserting an "after-acquired evidence" defense has the burden of persuasion not just that it could have fired the employee for the misconduct alone if it had known of the misconduct, but that it would have fired the employee for this reason alone. The court rejected plaintiff's argument that the employer's burden should be of "clear and convincing" proof, and held that the proper standard is proof by a preponderance of the evidence. *Id.* at 760–61. Judge Fletcher dissented, arguing that the proof question here is fundamentally different from that in mixed-motive cases and that the employer should be required to prove by clear and convincing evidence that it would have fired the plaintiff for the misconduct alone. *Id.* at 764–68.

**Turnes v. AmSouth Bank, N.A.,** 36 F.3d 1057, 66 FEP Cases 340 (11th Cir. 1994), involved a prospective employer that ran a credit check on the rejected applicant plaintiff after he had filed an EEOC charge. The defendant argued that it had a "clean credit" policy, that it would have discovered the credit problems in due course if it had proceeded with the application, and that the plaintiff therefore could not have been injured by the discrimination. The district court agreed and granted summary judgment. Reversing, the court of appeals pointed out that the plaintiff had produced evidence from which a reasonable factfinder could conclude that the company had no such policy, that the company was inconsistent in its treatment of credit problems, and that his credit may not have been so bad as to be rejected under the employer's normal practices.

**b. Severity of the Alleged Misconduct**

**Patterson v. P.H.P. Healthcare Corp.,** 90 F.3d 927, 934–35, 72 FEP Cases 613 (5th Cir. 1996), *cert. denied,* 519 U.S. 1091 (1997), held that the district court did not commit clear error in finding that an employee filled out his application form truthfully, denying that he had ever pleaded guilty to, or been convicted of, any criminal offense excluding minor traffic violations, because of his testimony that his parole officer had told him that his conviction would be expunged once he completed the probation and paid restitution, and that it was not necessary for him to notify employers of an expunged conviction. Moreover, plaintiff contended that the Project Manager already knew of the conviction. The defendant asserted that the prior conviction would not necessarily bar plaintiff from working for the defendant, but that "application fraud would result in that employee's immediate dismissal." 90 F.3d 927, 934. The court stated:

Even if PHP Healthcare did not have imputed knowledge of Brown's prior conviction, we are not convinced that Brown's failure to include his 10 year-old conviction on his employment application was so severe that PHP Healthcare would have terminated him based on this after-acquired knowledge. The district court's decision to award back pay and reinstatement does not leave us with a firm and definite conviction that a mistake has been made and, as such, we find no clear error.

*Id.* at 935.
Thurman v. Yellow Freight Systems, Inc., 90 F.3d 1160, 1168, 72 FEP Cases 657 (6th Cir.), modified on rehearing in other respects, 97 F.3d 833 (6th Cir. 1996), held that the trial court did not err in finding that plaintiff’s failure to list on his application form that a $27 utility account had been placed for collection, his misstatement of his dates of employment with a prior employer, and his leaving blank the reason why he had left that prior job, were “not material.” Plaintiff explained that he did not receive the utility bill because he had moved, and that he later paid the bill. The court held that the district court did not commit clear error in finding that the reason plaintiff left his job with the former employer was not because of poor performance or because of another negative factor, because the employer had later recommended him for another job. The plaintiff met the defendant’s requirement of two years of driving experience even though he overstated his period of employment with the former employer. “Because Yellow Freight failed to prove it could have and would have refused to hire Thurman, the after-acquired evidence defense did not apply.” Id.

Sheehan v. Donlen Corp., 173 F.3d 1039, 1047, 79 FEP Cases 540 (7th Cir. 1999), affirmed the judgment on a jury verdict for the Title VII pregnancy discrimination plaintiff. The court affirmed the lower court’s rejection of the defendant’s after-acquired evidence defense. “Donlen argued that Sheehan had falsified her job application by leaving several jobs off her résumé and not explaining that she had been fired from one of them.” The court affirmed the lower court’s finding that there had been no falsification. “It found that the application and the résumé were separate documents and the omissions were made only on the résumé, no job history at all being provided on the application; and, moreover, that there was no evidence Sheehan had been fired from those jobs.” Id. The court affirmed the finding that there was no evidence of causation, because no one in the history of the company had ever been fired for such falsifying a résumé. The court stated that employers often say they will discharge employees for particular employees, but often do not do so. “‘that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.’” Id. at 1048 (citation omitted).

Kempcke v. Monsanto Co., 132 F.3d 442, 445–46, 75 FEP Cases 1403 (8th Cir. 1998), reversed the grant of summary judgment to the defendant on plaintiff’s retaliation claim, holding that a reasonable jury could find that the plaintiff was lawfully opposing age discrimination by refusing to return all copies of two documents he had innocently acquired, where the documents had caused him to be concerned over age discrimination against him and to make an enquiry of his supervisor, and where he turned the documents over to his attorney when the supervisor gave him a noncommittal response and told his supervisor that the company should contact his attorney for return of the missing documents. The documents were on the hard drive of a computer the plaintiff had been assigned to use, but which had previously been used by a high-ranking Human Resources officer. The court distinguished this situation from that of an employee who steals documents potentially evidencing discrimination, stating:

But when documents have been innocently acquired, and not subsequently misused, there has not been the kind of employee misconduct that would justify withdrawing otherwise appropriate § 623(d) protection. Of course, employee insubordination is ordinarily a legitimate non-discriminatory reason for adverse action . . . and insubordination can include refusing to return confidential employer documents. But when the insubordination consists of refusing to cease
what a jury could find to be reasonable ADEA-protected activity, such as retaining a document that may evidence on-going discrimination, summary judgment dismissing a retaliation claim is not appropriate.

Id. at 446 (citation omitted). Judge Fagg dissented. Id. at 447.

Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1497-98, 67 FEP Cases 1222 (9th Cir. 1995), held that equitable remedies are not barred when some of the language on an employee's resume may be misleading to the casual reader but did not seem seriously intended to deceive. In this case, the plaintiff's resume stated that he had a degree when he had satisfied all requirements for the degree but had not registered to receive the diploma because of cost concerns.

Ricky v. Mapco, Inc., 50 F.3d 874, 876, 68 FEP Cases 1745 (10th Cir. 1995), held that one of the elements the defendant must prove to take advantage of the defense is that the misconduct alleged "was serious enough to justify discharge."

c. Possible vs. Certain Consequences

Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 40, 66 FEP Cases 1133 (2d Cir. 1994), involved a plaintiff who had continued to hold a second job without company approval. The company relied on its employee handbook as establishing a prohibition against holding a second job. The district court granted summary judgment to the defendant on other issues, and the court of appeals reversed. The court stated that it was "hardly clear" that defendant would be able to prove that its policy was as strict as it maintained. The employee handbook actually stated that the company preferred that full-time employees not engage in such employment, and should obtain permission from a supervisor before accepting such employment. Only employment with a competitor of the defendant was flatly ruled out.

Kristufek v. Hussman Foodservice Co., 985 F.2d 364, 369, 61 FEP Cases 72 (7th Cir. 1993), rejected the employer's contentions that it would have fired the plaintiff if it had known of his misrepresentations on his resume, because the principal evidence was a statement on the application form stating that misstatements and omissions of material facts "may be cause for immediate dismissal." The court stated: "May be' is not 'will be' and is not enough to avoid the proven charge of a retaliatory firing." The plaintiff's misrepresentations as to his education also did not involve a "critical" factor. 985 F.2d at 370.

d. Other Elements of the Defendant's Showing

Castle v. Rubin, 78 F.3d 654, 657, 72 FEP Cases 1701 (D.C. Cir. 1996), involved a plaintiff who prepared training manuals for the Office of the Comptroller of the Currency. During discovery, the defendant learned that in writing her training manuals she had plagiarized the works of other authors in violation of Federal copyright laws. The court rejected plaintiff's contention that termination is an excessive penalty for plagiarism, because she merely pointed to one decision of the Merit Systems Protection Board involving the authority to reconsider the mitigation of an employee's removal for plagiarism to a demotion. The decision does not explain the nature or circumstances of the plagiarism, and does not hold that termination is, as a
matter of law, an excessive penalty for plagiarism. *Id.* at 659. Plaintiff was denied reinstatement and her jury verdict for back pay was limited to a period of less than nine months.

*Perkins v. Brigham & Women's Hospital*, 78 F.3d 747, 751, 70 FEP Cases 568 (*1st Cir.* 1996), held that the plaintiff could not use *McKennon* to attack the district court's reliance on three coworker affidavits in considering the defendants' motion for summary judgment, on the ground that the affidavits did not exist at the time he was terminated. The court rejected this “anfractuous reasoning.” It held that the information contained in the affidavits, which “contain lurid firsthand accounts of his unsavory conduct,” was known to the defendants and fully absorbed by them at the time they fired plaintiff.

*Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 124–25, 72 FEP Cases 1448 (*2d Cir.* 1996), *cert. denied*, 520 U.S. 1274 (1997), involved the demotion of plaintiff from his position as Superintendent of Train Operations in charge of the Operations Control Center (“OCC”) for asserted mismanagement. For the reasons discussed in Chapter 14 (The *McDonnell Douglas / Burdine / Hicks Model*), the court held that a reasonable jury could find that the defendant's asserted reasons for the demotion were a pretext for retaliation against the plaintiff for having provided testimony to the EEOC that in its details supported another employee's age discrimination claim, and in retaliation for the plaintiff's having filed his own EEOC charge alleging retaliation. Plaintiff admittedly lied at the end of his affidavit to the EEOC, when he said that he did not know his supervisor's reason for disqualifying the other employee but he did not think it was because of the employee's age. The defendant asserted that plaintiff’s admitted perjury should disqualify him from an award of front pay because if he were reinstated to his former position its officials would never know whether he was lying to them. The court did not comment on the obvious problems with this assertion, but instead rested on two narrower grounds. *First*, neither of the defendant's affiants “stated that, if Padilla had remained as superintendent, his making of a false statement to the EEOC would have led to his demotion for that reason alone.” *Id.* at 124. *Second*, there was no evidence “that Metro-North had a policy in which it demoted managers for making such false statements, or that a manager had ever been demoted for this reason in the past.” *Id.* at 124–25. The court affirmed plaintiff's entitlement to front pay.

*O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 759, 70 FEP Cases 615 (*9th Cir.* 1996), stated: “The inquiry focuses on the employer's actual employment practices, not just the standards established in its employee manuals, and reflects a recognition that employers often say they will discharge employees for certain misconduct while in practice they do not.” The court observed that it was doubtful that employers would be able “to come forward with proof that they discharged other employees for the precise misconduct at issue.” *Id.* at 762. Often, the only proof available will be evidence of a company policy “and the testimony of a company official that the misconduct would have resulted in immediate discharge.” *Id.* The court cautioned that employers cannot simply rely on “bald assertions,” *id.*, but the testimony here is buttressed by both a plausible reading of the company policy and common sense. *Id.* The plaintiff did not contest either the misconduct he was charged with committing or the contention that he would have been fired for engaging in such misconduct if the defendant had known of it. The court affirmed the grant of summary judgment to the defendant on the after-acquired evidence defense, reversed the grant of summary judgment on the entire case, and remanded the
case for a determination of plaintiff’s ADEA claim and for the award of the limited remedies still available.

On December 14, 1995, the EEOC issued an ENFORCEMENT GUIDANCE ON AFTER-ACQUIRED EVIDENCE in light of McKennon. EMPLOYMENT DISCRIMINATION REPORT (BNA), vol. 5, No. 23 at 686 (Dec. 20, 1995). Enforcement Guidances are prepared by the EEOC’s Office of Legal Counsel, are voted on by the Commission, and are placed in the agency’s Compliance Manual for the guidance of EEOC employees, including investigators and conciliators. One provision in the GUIDANCE has attracted criticism by some plaintiffs’ attorneys:

If no comparable past incidents are discovered, other criteria may be used in ascertaining whether the misconduct would have prompted the employer to take the adverse action. Such inquiries may include whether: 1) the misconduct is criminal in nature, (e.g., embezzlement, fraud, assault or theft); 2) the employee’s behavior compromised the integrity of the employer’s business (divulgence of trade secrets, security, or confidential information); or 3) the nature of the employee’s misconduct was such that the adverse action appears reasonable and justifiable.

Id. at 687.

O’Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 764 (9th Cir.), held that the district court properly granted summary judgment to the defendant on the after-acquired evidence defense, but erred in holding that this was a complete bar to plaintiff’s ADEA claim.

8. Contentions of Excessive Employer Inquiries

There are no reported appellate decisions, within the period covered by this volume, on this subject. We will monitor this area of the law for developments.

The EEOC’s ENFORCEMENT GUIDANCE states that any purposeful attempt by a respondent (“R”) to obtain derogatory information about a charging party (“CP”) is retaliatory, and “is one example of an extraordinary equitable circumstance that may warrant additional relief.” EMPLOYMENT DISCRIMINATION REPORT (BNA), vol. 5, No. 23 at 688. Its example suggests that retaliatory motive can be presumed from the respondent’s conducting an extensive background investigation of the charging party:

Example—CP files a charge alleging that he was discriminatorily denied a promotion. R launches an extensive background investigation of CP and learns that he falsified his application. Accordingly, R fires CP. The Commission investigation reveals that R does terminate employees who have falsified their applications. It also shows that the failure to promote was not discriminatory. R contends that CP suffered no loss until the termination, that the termination was for legitimate reasons and that R is not, therefore, liable to CP. However, the Commission finds that R did not simply discover the information in the course of investigating the charge, but purposefully sought derogatory information about CP in retaliation for his challenging the failure to promote.

As in McKennon, reinstatement would be inappropriate because the employer
does terminate those known to have engaged in similar misconduct. However, because the evidence of wrongdoing was not simply unearthed during an investigation of CP’s complaint, but was deliberately sought to retaliate against CP and to discourage similar charges, the Court’s “starting point” for backpay cannot be the ending point. Instead this is the kind of “extraordinary equitable circumstance” that warrants extending backpay to the date the complaint is resolved. An employer who chooses to wage a retaliatory investigation must lose the advantage of equities that would, absent the retaliation, favor that employer, especially since retaliation is an independent violation of the federal employment discrimination laws.

*Id.* The Commission’s rationale for extending back pay to the date of resolution of the charge seems to be limited to the administrative investigation, because footnote 5 states that *McKennon*’s reliance on Rule 11 and awards of attorneys’ fees to protect against defendants’ overzealousness are inapplicable to charge-processing and “other constraints are needed.” The Commission’s own rationale would not support applying its retaliation rule once the case comes to court.

Comment by Richard Seymour on the EEOC’s Enforcement Guidance: It is not clear that this rule will have much practical effect. The key here is the EEOC’s limitation of this rule to the administrative process, which I think will severely limit its effect. Where the limitation on relief makes a substantial difference, I expect that many respondents will simply refuse to conciliate and will wait for the case to be filed in court and for the limitation on relief then to become applicable. With such a limitation, the Commission’s policy will primarily affect respondents who are anxious to resolve the charge in conciliation. In the meantime, respondents who would rather wait to be sued will still have a strong incentive to discover any misconduct as soon as possible because the date of discovery will eventually insulate them from the further accumulation of back pay.

Going beyond the Commission’s rationale, it seems reasonable that some types of background investigation could be so intense as to trigger the equitable considerations that *McKennon* said could justify a change in the presumptive limitations on relief. For example, the employer’s tapping the complainant’s telephone, opening and reading her mail, or having a zealous private investigator interview her neighbors, would appear so extreme to a court or jury that it could be easy for them to draw a reasonable inference of retaliation. Using an imprudent private investigator, invading the plaintiff’s privacy, bringing the plaintiff into disrepute among friends or acquaintances, and similarly extreme steps, could be used in litigation to support a claim of retaliation and may lead to the employer’s forfeiture of its protection.

9. **Effect of the Rule on Liquidated Damages**

*Wallace v. Dunn Construction Co.*, 62 F.3d 374, 380–81, 68 FEP Cases 990 (11th Cir. 1995) (*en banc*), held that after-acquired evidence does not bar a claim for liquidated damages under the Equal Pay Act for the retaliation claim. “The after-acquired evidence is irrelevant to Dunn's mental state and thus does not bar these liquidated damages under the Equal Pay Act.” *Id.* at 380. However, such damages are tied to back pay, and “after-acquired” evidence “may . . . mandate an early end to the period of liquidated damages.” *Id.* at 381.
The EEOC’s Enforcement Guidance states that after-acquired evidence should not bar the award of liquidated damages under the Equal Pay Act or in ADEA cases. Employment Discrimination Report (BNA), vol. 5, No. 23 at 687 n.4, 689.

10. Effect of the Rule on Compensatory and Punitive Damages

Castle v. Rubin, 78 F.3d 654, 656, 72 FEP Cases 1701 (D.C. Cir. 1996), affirmed—without discussion of this issue—a judgment for plaintiff for $75,000 in damages for an unlawful termination, in addition to a back pay award substantially reduced because of the defendant's discovery that plaintiff had plagiarized the works of other authors in preparing official training manuals for the Office of the Comptroller of the Currency. The court also denied front pay and reinstatement to the plaintiff.

Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1231-33, 65 FEP Cases 734 (3d Cir. 1994), vacated and remanded for reconsideration in light of McKennon, 514 U.S. 1034 (1995), reaffirmed in relevant part, 65 F.3d 1072, 68 FEP Cases 481 (3d Cir. 1995), discussed the need to provide a remedy for discriminatory injury to dignity and self-esteem even where the victim has lied on his or her resume as a reason why the after-acquired evidence defense should not bar a finding of liability.

Russell v. Microdyne Corp., 65 F.3d 1229, 1241, 68 FEP Cases 1602 (4th Cir. 1995), squarely addressed this issue:

Thus, because Russell’s complaint contains examples of unlawful activity in 1992, she would be eligible for damages, both compensatory and punitive, resulting from actions occurring between November 21, 1991, and May 25, 1993, regardless of whether the doctrine of after-acquired evidence applies.

The court also referred to the doctrine as dealing with an “after-acquired motive.” Id. at 1237.

EEOC v. Farmer Bros. Co., 31 F.3d 891, 901, 65 FEP Cases 857 (9th Cir. 1994), approved in dictum the decision in Massey v. Trump’s Castle Hotel and Casino, 828 F. Supp. 314, 63 FEP Cases 21 (D.N.J. 1993), holding that it would be inequitable to deny other forms of damages to a plaintiff already penalized by denial of reinstatement and front pay.

The EEOC’s Enforcement Guidance states that economic damages should, like back pay, continue only to the date of discovery. The example involves out-of-pocket costs associated with job loss. However, the Guidance states that a charging party should be able to obtain compensatory damages for emotional harm caused by discrimination, where “the resulting emotional harm continued after a legitimate reason for the adverse action is discovered.” The Guidance states that punitive damages should not be barred or limited by after-acquired evidence and that proof of retaliation “virtually always” warrants punitive damages. Employment Discrimination Report (BNA), vol. 5, No. 23 at 688–89.
11. **Plaintiffs’ Efforts to Use the Doctrine to Bar Evidence**

*Teahan v. Metro-North Commuter R.R. Co.*, 80 F.3d 50, 5 AD Cases 603 (2d Cir. 1996), is a Rehabilitation Act case involving an employee who was discharged for excessive absenteeism. The defendant’s notice of intent to discharge was mailed to him on the same day he entered an inpatient rehabilitation program for alcohol and drug abuse. The court conducted a hearing to determine whether plaintiff was an “otherwise qualified individual,” and heard testimony from two psychiatric experts that “there was a significant potential, indeed a likelihood, of relapse.” *Id.* at 53. The plaintiff had relapsed after going through an earlier rehabilitation program. *Id.* at 52. Plaintiff contended that *McKennon* barred the district court from considering, on a question relating to liability, evidence not available to the employer at the time of its decision to fire him. The court held:

In this case, Metro-North did not offer its psychiatric testimony to present an alternative, “legitimate” motive for dismissing Teahan. It offered this evidence to prove that its decision to dismiss Teahan had a reasonable basis under all the facts as they existed at the time of the dismissal. As we stated in *Teahan I*, the issue “whether the employee is ‘otherwise qualified’ as of the date of termination is forward-looking and enables the employer to consider how the employee will perform as compared to nonhandicapped individuals.” . . . Thus, the expert testimony at trial was necessarily predictive. Accordingly, the rule announced in *McKennon* has no application here.

*Id.* at 55 (internal citations omitted).

**G. Back Pay**

1. **Entitlement**

a. **Defendant’s Lowering of Pay Scale in the Job at Issue**

*Dodoo v. Seagate Technology, Inc.*, 235 F.3d 522, 531, 84 FEP Cases 933 (10th Cir. 2000), affirmed the judgment on a jury verdict for the ADEA and Title VII plaintiff as to a promotion to Product Line Manager and Program Line Manager positions. The court rejected defendant’s argument that plaintiff suffered no actual loss justifying the $15,000 back pay award for the Program Line Manager position in light of the fact that defendant had reduced the pay grade for the job to a figure $15,000 lower than plaintiff’s then-current salary. The court explained:

As for the remaining backpay award (for Seagate’s failure to promote Dodoo to the Program Manager position), the evidence sufficed for a jury finding that but for Seagate’s unlawful discrimination the position would not have been downgraded to grade 30 (it will be recalled that downgrading took place in the context of awarding the position to newcomer Koelsch, for whom grade 30 was a step up from grade 28). It was surely reasonable for the jury to infer that if Dodoo had gotten the spot instead, that job would have remained at grade 32 (as originally posted), with Dodoo receiving the corresponding increase in salary.
b. Undocumented Aliens

_Hoffman Plastics Compounds, Inc. v. N.L.R.B._, 535 U.S. 137, 169 L.R.R.M. (BNA) 2769 (2002), reversed the Board’s grant of back pay to Jose Castro, an undocumented alien who had never been authorized to work in the United States. Castro testified that he had used a friend’s birth certificate fraudulently to obtain a Social Security card, and a California driver’s license, and he had used these to obtain employment. There was no evidence that he had applied or intended to apply for legal authorization to work in the United States. The Court held that the legal landscape of prior decisions was altered by enactment of the Immigration Reform and Control Act of 1986. Speaking of the fact that “it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies,” _id._ at 148, such as by the employee’s tender of fraudulent documentation or the employer’s knowing hiring of an undocumented alien, the Court stated:

The Board asks that we overlook this fact and allow it to award backpay to an illegal alien years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud. We find, however, that awarding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer. _Id._ at 148–49. The Court pointed out that Castro could not satisfy his duty to mitigate his earnings loss without committing further violations of IRCA. Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented.

The logic of this decision would seem to apply to back pay awards under all of the antidiscrimination statutes, but not necessarily to awards of compensatory and punitive damages. It is not clear that this decision would bar minimum-wage and overtime awards under the FLSA for work already performed.

The Court’s caveat—that there was no evidence that Castro had applied or intended to apply for legal authorization to work in the United States—raises the question whether Castro could have rehabilitated himself for purposes of a back pay award by applying for such authorization.

Some courts have held that _Hoffman Plastics_ does not affect a plaintiff’s right under FLSA or State wage and hour law to obtain back pay or overtime compensation for work actually performed, and/or have for this reason barred discovery into the plaintiff’s immigration status. _Flores v. Amigon_, 233 F. Supp. 2d 462, 463–65 (E.D. N.Y. 2002); _Zeng Liu v. Donna Karan Int’l, Inc._, 207 F.Supp.2d 191, 192–93 (S.D. N.Y. 2002); _Singh v. Jutla & C.D. & R’s Oil, Inc._, 214 F. Supp. 2d 1056, 8 WH Cases 2d 165 (N.D. Calif. 2002).

c. Pattern and Practice Finding Creates Presumption

_In re Employment Discrimination Litigation Against State of Alabama_, 198 F.3d 1305, 1315–16, 81 FEP Cases 950 (11th Cir. 1999), stated in _dicta_ that, when the plaintiff shows that
an employment practice has disparate impact against a protected group and the defendant fails to
demonstrate that it is lawful, the principal relief should be an injunction. It stated that
determinations must then be made as to individual equitable remedies: “As for individual relief,
if an individual plaintiff has shown that he or she was within the class of persons negatively
impacted by the unlawful employment practice, then the employer must be given an opportunity
to demonstrate a legitimate nondiscriminatory reason why, absent the offending practice, the
individual plaintiff would not have been awarded the job or job benefit at issue anyway. . . . If
the employer cannot so demonstrate, then individual relief may be merited.”

d. **Eleventh Amendment**

*In re Employment Discrimination Litigation Against State of Alabama*, 198 F.3d 1305,
1315–16, 81 FEP Cases 950 (11th Cir. 1999), held that Congress validly abrogated the State’s
Eleventh Amendment immunity to Title VII suits for disparate-impact discrimination.

e. **Entitlement When Plaintiff Too Sick to Work**

*Lathem v. Department of Children and Youth Services*, 172 F.3d 786, 793–94, 79 FEP
Cases 1267 (11th Cir. 1999), affirmed the grant of back pay to the Title VII plaintiff
notwithstanding the defendant’s argument that she was not eligible for an award because she was
disabled and not available for work during the back pay period. “The district court, after
reviewing all the evidence, specifically found that DCYS’s conduct caused Lathem’s disability
and that this disability precluded her from obtaining other employment. Accordingly, we hold
that a Title VII claimant is entitled to an award of back pay where the defendant’s discriminatory
conduct caused the disability.” *Id.* at 794.

2. **Causation**

*Fogg v. Gonzales*, 492 F.3d 447, 100 Fair Empl.Prac.Cas. (BNA) 1601 (D.C. Cir. 2007),
affirmed the award of backpay, holding that the defendant could not switch positions after trial
and post-trial motions, arguing a “same decision” defense as a defense to back pay when it had
litigated the case until then as a single-motive case. The court rejected the government’s
argument that the 1991 Civil Rights Act had abolished single-motive liability. Judge Henderson
concurred.

*Alexander v. City of Milwaukee*, 474 F.3d 437, 451, 99 FEP Cases 961 (7th Cir. 2007),
affirmed the judgment holding the City liable, and the then Police Chief and each of the
members of the Board of Police and Fire Commissioners personally liable, under Title VII and
42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs
in making promotions to the rank of Captain. The court held that the lower court erred in
instructing the jury that, under the lost-chance method, plaintiffs were to be evaluated only
against other plaintiffs with respect to each of the promotional opportunities in question:

The plaintiffs bear the burden of establishing their losses, and, in the case of
promotional opportunities, it is the plaintiffs’ burden to establish the probability that they
would be promoted over *all* other potential candidates. Only in the face of evidence that
they would have been promoted over any other non-plaintiff candidates absent
discrimination would the district court have been justified in instructing the jury to limit its consideration of the plaintiffs’ lost chances to the consideration only of other plaintiffs. Although the evidence in the record strongly supports the conclusion that the lieutenant-plaintiffs were qualified—indeed, that is uncontested—it necessarily does not follow from our case law that the plaintiffs were entitled to an instruction that treated them as though they were the only qualified individuals.

(Footnote omitted; emphases in original.) The court held that the same analysis had to be applied to the damages for emotional distress.

*Voeltz v. Arctic Cat, Inc.*, 406 F.3d 1047, 16 AD Cases 1208 (8th Cir. 2005), vacated the back pay award on plaintiff’s ADA failure-to-accommodate claim, because there was no evidence that plaintiff lost his job as a result of defendant’s failure to engage further in the interactive process, and the jury had rejected his disparate-treatment claim by finding that defendant would have made the same decision regardless of plaintiff’s multiple sclerosis.

### 3. Unconditional Offers of Reinstatement

*Ford Motor Co. v. E. E. O. C.*, 458 U.S. 219, 29 Fair Empl. Prac.Cas. (BNA) 121 (1982), held that an employee’s rejection of an unconditional offer of reinstatement, even without constructive seniority, stops the accumulation of back pay. The Court held that this both serves the goal of facilitating the employer’s coming into compliance with the fair employment laws, while satisfying the employee’s duty of mitigation. The employee may accept without being required to surrender any of the claims for relief in the lawsuit, and may not reject the offer on the ground that the offer is not accompanied by the other relief sought in the lawsuit.

**Comment on the Ford Motor Rule:** The *Ford Motor* rule does seem to me to apply equally to employers’ offers of hiring or promotion; reinstatement should operate the same as reinstatement. The rule does not require an employee to submit to unlawful working conditions, such as requiring a former employee to come back to work and submit to sexual or other harassment, or require a disabled employee needing a reasonable accommodation to work without an accommodation.

*Halle Enterprises v. NLRB*, 247 F.3d 268 (D.C. Cir. 2001), denied the employer’s petition for review and granted the Board’s cross-application for enforcement of the Board’s order requiring reinstatement and make-whole relief. The court rejected the employer’s argument that its offer of reinstatement to four senior employees had been unconditional and barred the accrual of back pay. When the four senior employees tried to return to work pursuant to an unconditional offer, the employer’s Property Manager told them they could not return unless they “signed a waiver agreeing not to participate in legal action against the company.” *Id.* at 270. The employer agreed that that made the offer conditional, and argued that this preceded the unconditional offer made by the President of the employer. The court held that substantial evidence supported the Board’s determination that Ellis’s offer was the last offer.

*Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 908–09 (2d Cir. 1997), held that the plaintiff’s entitlement to back pay was terminated when he rejected the defendants’ unconditional offer of reinstatement into the job from which he had been terminated. The court rejected plaintiff’s argument that he should have been able to disregard the offer because the pay rate of
his old job was affected by discrimination and he was not offered a higher salary. The court stated that substantial equivalence to the position at issue was all that was required. “In short, an employer is not required to ‘insure the claimant against the risk that the employer might win at trial.’” *Id.* at 908. The court rejected plaintiff's unsupported argument that the offer was made in bad faith to allow the defendant to continue to harass the plaintiff while figuring out a more effective way to rid itself of the plaintiff. *Id.* The court also rejected plaintiff's contention that his rejection was reasonable because he had already agreed to accept a position with a different company. “It is a matter of law that a commitment to a new employer does not preserve the employee's right to recover back pay for discriminatory termination from a previous employer.” *Id.* at 909. The court rejected as unsupported plaintiff's contention his rejection of the offer should be excused because returning to the defendant “would have imperiled his health and well-being.” *Id.* at 908. Plaintiff had a physician's supporting affidavit at the time he raised his point in opposition to the defendants' motion for partial summary judgment, but did not attempt to introduce it until he moved to vacate and amend the order granting partial summary judgment. *Id.* at 909. Finally, the court held that an unconditional offer of reinstatement is not a settlement document and is therefore not barred from evidence by Rule 408, FED. R. EVID. *Id.* The court affirmed the grant of partial summary judgment to the defendants.

_Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 905, 17 AD Cases 1153 (8th Cir. 2006), affirmed the judgment on a jury verdict to the ADA plaintiff on all issues other than punitive damages. The court rejected defendant’s argument that plaintiff’s back pay should have ended because of its reinstatement letter, citing the district court’s actions with approval: “The district court also remarked Dr Pepper’s July 30 offer was not an unconditional offer of reinstatement, because the offer was conditioned on Canny arranging his own transportation, making wage concessions, and relocating. The district court further reasoned Dr Pepper failed to engage in discussion with Canny regarding the accommodations of that position.”

4. **Mitigation**

_Fogg v. Gonzales*, 492 F.3d 447, 455, 100 Fair Empl.Prac.Cas. (BNA) 1601 (D.C. Cir. 2007), affirmed the lower court’s rejection of defendant’s argument that plaintiff failed to mitigate his damages. The court stated at *6:

We approach this issue cognizant of the Supreme Court's teaching that “the unemployed or underemployed [Title VII] claimant need not go into another line of work, [or] accept a demotion.” . . . As for opportunities in Fogg's line of work, the district court accepted Fogg's self-evidently plausible assertion that because his employment record showed the USMS had dismissed him for insubordination, “any efforts to find a comparable law enforcement position would have been futile.” . . . The Government, notwithstanding that it bears the burden of proving failure to mitigate, simply ignores this point. Lacking any evidence to the contrary, therefore, the district court fairly inferred Fogg’s failure to mitigate his damages by finding other police work was attributable to the Marshals Service's having terminated him purportedly for cause, and hence did not abuse its discretion in preventing the Government from profiting from its own wrongful conduct.
Judge Henderson concurred.

**Borges Colon v. Roman-Abreu, 438 F.3d 1 (1st Cir. 2006),** affirmed the judgment for the First Amendment political-affiliation plaintiffs, holding that there was sufficient evidence that defendants’ privatization of the municipal sanitation department was motivated by discrimination. The court rejected defendants’ argument that plaintiffs failed to mitigate by failing to apply for jobs in two municipal departments: “When there was evidence the Mayor instructed ARB and municipal officials not to hire the laid-off employees in San Lorenzo, he is ill-situated to argue that the employees should have, despite the demonstrated futility of requesting jobs, made the requests anyway.” *Id.* at 21.

**Conetta v. National Hair Care Centers, Inc., 236 F.3d 67, 77, 85 FEP Cases 578 (1st Cir. 2001),** affirmed the lower court’s refusal to set aside the entry of default on plaintiffs’ retaliatory discharge claim, holding that defendant failed to show good cause. The lower court found that plaintiff’s attempts to mitigate were inadequate, and reduced her back pay claim by 25%. Both sides appealed. The court held that defendant showed that some comparable jobs were available, but plaintiff showed that “she pursued at least one application and reviewed newspaper advertisements every day.” The court stated: “No one knows exactly what would have happened if Conetta had been more vigorous in her efforts, and the district court’s use of a partial discount was a sensible way of resolving the problem.” (Citation omitted.)

**Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 591, 77 FEP Cases 1699 (5th Cir. 1998), vacated on grant of reli’g en banc, 169 F.3d 215, 79 FEP Cases 1770 (5th Cir.), reinstated in relevant part, 182 F.3d 333, 80 FEP Cases 704 (5th Cir. 1999),** affirmed the back pay judgment based on the jury verdict. The court rejected the argument of the Title VII and § 1981 defendant that the plaintiff’s back pay period should have ended when she quit her subsequent employment. She testified that when she obtained the new job, she moved to her in-laws’ residence in a lower-income area because of her reduced earnings. When she was sexually assaulted at her new residence, she resigned. She sought $34,000 in lost earnings, and the jury awarded $19,000. The defendant argued that her lost earnings should be no more than $10,000, reflecting its contended end of the back pay period caused by the plaintiff’s asserted failure to mitigate her losses. The plaintiff testified as to her efforts to obtain a job after her resignation from the interim employer. The court held that mitigation is a question of fact turning on “reasonableness, similarity, and diligence,” and that a reasonable jury could have found that the plaintiff had satisfied her duty of mitigation. *Id.*

**Chalfant v. Titan Distribution, Inc., 475 F.3d 982, 992–93, 18 AD Cases 1601 (8th Cir. 2007),** affirmed the judgment on a jury verdict for the ADA plaintiff, holding that plaintiff was entitled to the $60,000 awarded in back pay, and rejecting defendant’s argument that plaintiff failed to mitigate his damages. The court relied on the fact that plaintiff found other employment, at half his former pay, within two months, and continued looking for better jobs in the newspaper classified advertisements. “Titan relies on testimony from Chalfant’s and Titan’s vocational experts that Chalfant would have been able to find a better paying job. There was also testimony from Chalfant’s vocational expert, though, that at Chalfant’s age it would be difficult to find a similar paying job. With this evidence, we cannot say the district court clearly abused its discretion in concluding that the jury could reasonably find that Chalfant mitigated his damages.” *Id.* at 992 (citation omitted).
Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1253, 16 AD Cases 1197 (10th Cir. 2005), affirmed the judgment on a jury verdict for the ADA plaintiff. The court rejected defendant’s attack on the award based on an asserted failure to mitigate: “The evidence of Ms. Praseuth’s efforts by way of mitigation of damages (evidence that she applied for several jobs, searched classified job advertisements, and made monthly visits to the Kansas Job Services Offices) was sufficient to preclude interference with the jury’s determination, with the aid of the trial court’s instruction on mitigation, of the amount of her compensatory damages.” Id. at 1253.

McClure v. Independent School District No. 16, 228 F.3d 1205, 1214 (10th Cir. 2000), reversed the limitation of plaintiff’s back pay to the 1996–97 school year. The lower court found that plaintiff had failed to mitigate her damages. After her discharge, plaintiff “applied for employment in public school systems within an eighty mile radius of Salina, sending out fifty to seventy resumes.” These applications were all unsuccessful, and plaintiff took early retirement. Id. at 1210. The court of appeals held that the duty to mitigate is not the same as a duty to succeed in mitigation, and that only an “‘honest good faith effort’” is required. Id. at 1214 (citation omitted). It held that plaintiff had made an adequate effort.

5. Laches

Pruitt v. City of Chicago, 472 F.3d 925, 99 FEP Cases 737 (7th Cir. 2006), affirmed the grant of summary judgment to the Title VII and § 1981 racial harassment defendant, because of laches. The ten plaintiffs alleged that for twenty years a certain Foreman had harassed them for being black or Hispanic, and as part of the harassment had disciplined them and denied them promotions because of their race. The court held: “That discrete acts may have been mixed with a hostile environment does not extend the time; Morgan, which involved just such a mixture, shows as much.” Id. at 927 (citation omitted). The court observed that plaintiffs knew enough to bring suit by 1981, and held that plaintiffs had delayed unreasonably and that defendant had been prejudiced. It held that Morgan allowed the application of laches to hostile environment claims even though they were within the period of limitations. It continued:

There remains the final question posed by Morgan: “what consequences follow if laches is established”? . . . The district court assumed that the upshot of laches must be outright dismissal. Yet that’s not the only possible consequence. A less severe consequence would be to carve off the aspects of the plaintiffs’ claim that are no longer subject to meaningful adversarial testing. It might well be sensible to allow litigation about events back to 1999 (four years before the § 1981 suit began) while foreclosing litigation about older events. That would respect the fact that prejudice is not an all-or-none affair—evidence about what happened three or four years ago is more accessible, and memories of that time more reliable, than evidence about the events 10 or 20 years earlier.

The court observed that plaintiffs had not urged such an approach, but had litigated the twenty-year period as an all-or-nothing affair. It continued at 930:

Although using laches to carve years out of a claim thus may be a sensible way to answer the question reserved in Morgan, it is not the relief that plaintiffs sought in the district court. They did not try to identify the scope of the prejudice caused by delay and
specify a temporal bound that would leave the opposing sides with roughly equal access to evidence. Their appellate brief hints at such a possibility but does not undertake any of the work necessary to determine how far back the claim could reach without undue prejudice to the employer. In the district court plaintiffs’ argument was limited to the proposition (one inconsistent with Morgan) that the claim must stretch at least four years back because laches never may be used to abbreviate the time allowed by a statute of limitations. The City argued that plaintiffs have forfeited the benefit of any other approach. Plaintiffs then filed a reply brief that ignored the City’s argument that forfeiture has occurred. Such a head-in-the-sand position is unavailing. We hold the parties to the positions they preserved in the district court, which means that we need not attempt to draw a line between recent events (unaffected by laches) and older ones where the employer’s ability to defend has been undermined.

This also means that we need not discuss Chicago’s fallback argument that Morgan’s one-employment-practice holding is limited to Title VII (which has a short period of limitations) and does not apply under § 1981. If the City is right, then an employee never may complain about episodes of hostile environment that occurred more than four years before the suit began. Whether that is so is a question for another day.

6. **Elements of Back Pay**

*Acevedo-Garcia v. Monroig*, 351 F.3d 547, 571 (*1st Cir.* 2003), rejected defendants’ argument that the jury’s awards for back pay were excessive because they exceeded the amounts of lost earnings that had been proven. The court explained:

As a threshold matter, the magnitude of the claimed discrepancy is sufficiently small (ranging from $2,607.94 to $10,900.00) to preclude a finding that the verdict was “grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand.” . . . Furthermore, the jury was entitled to consider any secondary economic injuries flowing from the plaintiffs’ loss of earnings and employment benefits. . . . For example, nearly every claimant testified that they relied entirely on their monthly earnings to cover the expenses of running their household, meet their mortgage obligations, pay their children’s tuition, etc. As a consequence of losing their jobs, plaintiffs were forced to seek additional bank loans, dip into their savings, and make other costly financial adjustments to cover these expenses.

(Citations omitted.)

*Sharkey v. Lasco (AUL Ltd.)*, 214 F.3d 371, 374–75, 84 FEP Cases 967 (*2d Cir.* 2000), reversed the denial of the successful ADEA plaintiff’s lost pension benefits, holding that relief without such benefits did not make him whole. Such benefits are compensation for past economic loss, not prospective relief. The court held that there are two ways to provide the plaintiff with the appropriate relief. In addition to restoring his lost service and salary credits to his pension plan, “it is also possible to award money damages to compensate the plaintiff for the value of the pension benefits that were lost. This form of legal relief is proper for a jury to award.” *Id.* at 375 (citation omitted). The court held that the record was unclear as to whether the jury’s award of $1,427,200 in damages included the lost pension benefits, and remanded the
issue so that the lower court could address it and either award the relief or withhold it so as to avoid duplicative relief. While the plaintiff did not attempt to quantify his lost benefits to the jury, the evidence presented to the jury contained references to pension provisions, and plaintiff’s closing argument referred to pension benefits. The lower court had instructed the jury that the plaintiff’s “economic loss” should be the measure of damages, and had referred four times in its instructions to the plaintiff’s right to recover salary and benefits, or pension benefits, or financial losses. *Id.* Judge Hall concurred in part and dissented in part. *Id.* at 376–77.

*City of New York v. Local 28, Sheet Metal Workers’ International Association,* 170 F.3d 279, 285 (2d Cir.), affirmed the lower court’s order that the fee for reinstatement to active status with the union be waived for nonwhite journeypersons who are entitled to back pay for having been harmed by a practice found to have been in contempt of an earlier order, but modified the order as to the payment of back dues:

Had there been no discrimination, and had these members never been terminated for inability to pay dues due to lack of work, they would never have been forced to pay the reinstatement fee. However, returning the members to their *ex ante* position does not require a waiver of all back dues. If the nonwhite journeypersons had been working steadily from 1984 to 1991, they would have paid dues in the normal course. As a compensatory contempt remedy, the back pay award should not place the journeypersons in a better financial position than they would have been in if the Union had not discriminated against them. Accordingly, we reverse the order of the district court waiving the payment of back dues from back pay awards, with one caveat. Due to the Union’s financial condition, journeypersons discriminated against by the Union are likely to receive only a portion of their lost back pay. . . . Back dues should therefore not be deducted from a back pay award for a given year except to the extent that the actual award for that year exceeds an amount equal to the full back pay for that year minus back dues for the year.

(Citation omitted.)

*Skalka v. Fernald Environmental Restoration Management Corp.*, 178 F.3d 414, 425 (6th Cir. 1999), cert. denied sub nom. Conover v. Fernald Environmental Restoration Management Corp., 530 U.S. 1242 (2000), reversed the judgment for ADEA plaintiff Skalka and remanded it for a remittitur or new trial on damages. The court held that future pension payments cannot be included in back pay and subjected to doubling as liquidated damages, but must be treated as front pay. The court held that the defendant had not waived the issue by failing to object to the jury instruction defining back pay as including “‘pension benefits which a plaintiff would have received’” but for the discrimination, because it was possible to construe the language as referring only to 401(k) payments that the plaintiff would have received before the trial.

*Greene v. Safeway Stores, Inc.*, 210 F.3d 1237, 1243–44, 82 FEP Cases 1306, 24 EB Cases 1417 (10th Cir. 2000), affirmed the judgment on a jury verdict for the ADEA plaintiff, who had been fired at the age of 53, about two years before the plaintiff’s interest in the defendant’s Supplemental Executive Pension Plan and new stock options vested. The judgment included $4.4 million for unrealized stock option appreciation, including both the options that had not yet vested and the difference in the value of the already-vested options at the time of
plaintiff’s termination, when he exercised them and sold the stock to pay his IRS bills, and their value if he had been able to execute his plan of retiring at 55, exercising them, and selling the stock. The court discussed the importance of stock options in executive compensation, id. at 1243, and held that stock option appreciation is compensable under the ADEA, but that it was not subject to liquidated damages. Moreover, the court upheld the inclusion in the judgment of the $3 million difference between the value of the options in 1993, when the plaintiff was forced to exercise them, and the value the options would have had if he had been able to exercise them two years later, as he had planned. The court rejected the defendant’s argument that this difference was compensatory damages not allowable under the ADEA:

Safeway argues that the unrealized stock option appreciation constituted “consequential damages” because Safeway had no control over the market price of its stock and Greene opted to sell his stock a short time after exercising his options. Safeway’s argument is unpersuasive because Safeway conferred on Greene the right to buy shares of its stock at a set price. The value of that right to buy stock at a prefixed price went up and down with the market price of the stock. In forcing Greene to exercise the options earlier than he otherwise would have, Safeway curtailed Greene’s right to choose the date on which he would exercise his right to buy stock in order to maximize his profit on the sale of the shares acquired.

Id. at 1244. See the discussion below as to mitigation.

Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1348, 88 FEP Cases 628 (11th Cir. 2000), affirmed the judgment on a jury verdict for the discharged ADEA plaintiff. The court rejected the defendant’s argument that the award included fringe benefits such as the reduced cost of meals, health insurance coverage, and vacation pay. “This circuit repeatedly has held that such benefits should be recouped in a back pay award.” (Citation omitted.)

7. **Length of Back Pay Period**

Fogg v. Gonzales, 492 F.3d 447, 455, 100 Fair Empl.Prac.Cas. (BNA) 1601 (D.C. Cir. 2007), held at p. *5 that the lower court did not abuse its discretion in awarding back pay from the date of plaintiff’s termination in 1995 to the date of judgment in 2005. The court also held that the back pay period did not stop in 1999, when plaintiff stated he was unable to go back to work, because plaintiff did not represent that he was disabled. Id. at *6. Judge Henderson concurred.

8. **Calculation**

a. **“Lost Chance” Method**

Alexander v. City of Milwaukee, 474 F.3d 437, 451, 99 FEP Cases 961 (7th Cir. 2007), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. The lower court used the lost-chance method of awarding back pay, and the court held that the plaintiffs had to be compared to all other eligible
candidates, not just to other plaintiffs. “Although the evidence in the record strongly supports
the conclusion that the lieutenant-plaintiffs were qualified—indeed, that is uncontested—it
necessarily does not follow from our case law that the plaintiffs were entitled to an instruction
that treated them as though they were the only qualified individuals.” (Footnote omitted;
emphases in original.) The court held that the same analysis had to be applied to the damages for
emotional distress.

*Bishop v. Gainer*, 272 F.3d 1009, 1016–17, 87 FEP Cases 920 (*7th Cir.* 2001), affirmed
the calculation of back pay based on the “lost chance” method described hypothetically in *Doll v.
Brown*, 75 F.3d 1200, 5 AD Cases 369 (*7th Cir.* 1996):

Here, Hanford and Robert were competing against each other—as well as the
person who actually was promoted. The judge turned to our decision in *Doll* and took us
up on our invitation to apportion damages under a lost-chance theory, borrowed from tort
law, which we said “recognizes the inescapably probabilistic character of many injuries.”
We analogized by saying that if a patient was entitled to 25 percent of his full damages
because he had only a 25 percent chance of survival, he should be entitled to 75 percent
of his damages if he had a 75 percent chance of survival—not 100 percent of his damages
on the theory that by establishing a 75 percent chance he proved injury by a
preponderance of the evidence.

At 1206. Using the tort approach, the judge proceeded to calculate the plaintiffs’
damages by assessing what the chances were that each would have received the
promotion he sought. For this promotion, Hanford placed third and Robert fourth on the
promotion list. The person who was first received a different promotion and the person
who placed second had been out of the particular district for several years, and for that
reason the judge reasoned that his chances of getting the promotion would be reduced to
25 percent. Then the judge assessed that Hanford had a 45 percent chance and Robert had
a 30 percent chance to receive the promotion. The other appellant, Volle, was competing
for a promotion with two other white males who placed higher than he did on the list, so
his chances were assessed at 15 percent.

The approach obviously involves more art than science. But as we said in *Doll*,
that is true in all comparative negligence calculations as well. It strikes us that in this
particular situation, it was the likeliest way to arrive at a just result. We think the judge
(Judge Harry Leinenweber here) did a wonderful job of cutting this Gordian knot. We
have examined the evidence and find no reason to disturb the thoughtful calculations he
has made and the result they have produced.

b. **“Make-Whole” Relief When There are More Complainants than Vacancies**

*United States v. City of Miami*, 195 F.3d 1292, 1300–02, 81 FEP Cases 397 (*11th Cir.*
vacated and remanded the remedy the lower court had ordered after a finding that the City was in
contempt of the Consent Decree by issuing unwarranted “Special Certifications” that allowed it
to promote one additional black candidate to the rank of Sergeant, and one to the rank of
Lieutenant. The court held that the lower court impermissibly ordered make-whole relief for all of the 35 bypassed officers on the promotional certificates. It held that “make-whole” relief should instead be limited to one promotion for each rank, from among the pools on the regular Certificates. *Id.* at 1299. The court approved the lower court’s decision to use a classwide approach, because the promotional process was highly subjective and there was no means to determine which of the 23 bypassed candidates for Sergeant, and which of the 12 bypassed candidates for Lieutenant, would have been promoted in the absence of the Special Certifications. “We have explained in the context of remedial backpay relief that a classwide remedy is appropriate when fashioning an individualized remedy would create a ‘quagmire of hypothetical judgment[s]’ as to which individuals, out of a large class, should receive remedial relief. . . . In endorsing this approach, we have recognized that the only other relief alternatives would be unpalatable: either (1) randomly selecting several individuals from a large class for full ‘make-whole’ relief, or (2) awarding no relief at all because specific individuals deserving of a ‘make-whole’ remedy could not be identified from a victim class.” *Id.* (citations omitted; some internal quotation marks omitted). The court stressed that equity for both sides is important. *Id.* at 1299–1300. The court held that the district court’s error was in treating each bypassed candidate as if he had been deprived of a 100% chance of promotion, whereas “each lieutenant candidate stood only a one in twenty-three (or four percent) chance of promotion, and each sergeant candidate stood only a one in twelve (or eight percent) chance of promotion.” *Id.* at 1300. The court held that a *pro rata* approach should be used, with the value of the promotion for each rank divided among the eligible pool for that rank. *Id.* at 1300–01. It stated that the district court’s approach was punitive in nature because of its excessiveness. *Id.* at 1301–02. Moreover, the sheer number of promotions “could radically restructure the City’s police force by creating many more lieutenants and sergeants than the City sought fit to create under its own promotion policies. The very magnitude of this remedy risks reshaping the Police Department in a variety of ways unforeseen and unintended by the district court.” *Id.* at 1302. The court vacated the remedy and remanded the case for the entry of *pro rata* relief. *Id.*

c. **Ending Date**

*EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 731, 18 AD Cases 1793 (5th Cir. 2007), affirmed the award of $91,000 in back pay to the ADA charging party, holding that the record allowed the jury to disregard the charging party’s physician’s certification that he was unable to work and determine that he would have worked longer in the absence of discrimination:

Although Dr. Montegut, Barrios’s physician, testified that Barrios was medically unable to work after June 2001, the jury could have relied upon testimony that Barrios had a high pain threshold and could have worked after that date. The jury was in a better position than this court to weigh the evidence concerning the proper date to cut off backpay. . . . Further, assessing the backpay at the modest amount of approximately $20,000 per year over a five-year period was not improper.

(Footnote and citation omitted.) Note 4 stated: “The backpay award was adjusted for the amount of disability compensation Barrios received from DuPont during this period.”
d. **Offsetting Economic Value**  
*Alexander v. City of Milwaukee*, 474 F.3d 437, 452, 99 FEP Cases 961 (7th Cir. 2007), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. The court held that the lower court erred in ignoring the economic value of the overtime the plaintiffs did earn as Lieutenants but could not have earned as Captains, and in ignoring the economic value of the flextime Captains earned.

e. **Ranges of Pay Rates**  
*Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 941–42, 99 FEP Cases 1127 (8th Cir. 2007), affirmed the judgment for the Title VII racial-discrimination and retaliation plaintiff, holding that the lower court did not err in finding that plaintiff would likely have received the top range of managerial pay rather than the bottom range, because plaintiff was still receiving Assistant Manager pay after her demotion to the job of Cashier. Judge Smith concurred in part and dissented in part. *Id.* at 945–46.

f. **Components**  
*Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245, 1250 n.1, 16 AD Cases 1197 (10th Cir. 2005), affirmed the judgment on a jury verdict for the ADA plaintiff. The court held that there was sufficient evidence of back pay and front pay to support the jury award of compensatory damages, once the value of fringe benefits—an additional 40% of pay—was taken into account. *Id.* at 1252.

9. **Jury Determinations**  
*Arrieta-Colon v. Wal-Mart Puerto Rico, Inc.*, 434 F.3d 75, 91, 17 AD Cases 769 (1st Cir. 2006), affirmed the judgment for the ADA harassment plaintiff on a jury verdict for $76,000 in compensatory damages and $160,000 in punitive damages. The court rejected plaintiff’s argument that the lower court erred in denying his post-verdict motion for back pay and front pay in addition to the compensatory-damage award:

> As the district court correctly noted, in this circuit when the jury is asked, as here, to resolve issues of liability and compensatory damages, the issue of back pay is normally decided by the jury as well. . . . Here, Arrieta did not advise the court before the jury was instructed that he wished to reserve the issue of back pay from the compensatory damages calculation by the jury, nor did he object to the instructions on compensatory damages. So the district court was not put on notice that Arrieta wished to have the issue of back pay decided by the court. We are not inclined to hold the plaintiff harmless from the foreseeable consequences of his actions.

(Citations omitted.) The court did not mention the provisions of the Civil Rights Act of 1991 that effectively reserve back pay for the court and allow jury trials only of common-law damage claims. 42 U.S.C. §§ 1981a(b)(2) and (c). It did, however, state that plaintiff failed to present evidence of his efforts to mitigate his back pay by seeking other employment, but did not explain
why it placed the burden of showing mitigation on plaintiff, instead of placing the burden on
defendant of showing failure to mitigate.

H. Front Pay

1. Entitlement

Wilson v. Phoenix Specialty Mfg. Co., Inc., 513 F.3d 378, 388, 20 AD Cases 193 (4th Cir. 2008), affirmed the judgment for the ADA plaintiff on his claim that defendant
discriminated against him because it regarded him as disabled. The court affirmed the denial of
front pay because plaintiff’s neurologist testified that “Wilson was competitively unemployable
by the end of 2005, which was six months before the entry of judgment.” Judge Niemeyer
dissented. Id. at 388–95.

Chalfant v. Titan Distribution, Inc., 475 F.3d 982, 993, 18 AD Cases 1601 (8th Cir. 2007), affirmed the judgment on a jury verdict for the ADA plaintiff, holding that plaintiff was
entitled to the $18,750 awarded as front pay, representing one year’s difference in earnings and
benefits, because plaintiff continued looking for better jobs in the newspaper classified
advertisements. Plaintiff had sought six years of front pay.

Voeltz v. Arctic Cat, Inc., 406 F.3d 1047, 16 AD Cases 1208 (8th Cir. 2005), vacated the
front pay award on plaintiff’s ADA failure-to-accommodate claim, because there was no
evidence that plaintiff lost his job as a result of defendant’s failure to engage further in the
interactive process, and the jury had rejected his disparate-treatment claim by finding that
defendant would have made the same decision regardless of plaintiff’s multiple sclerosis.

Salitros v. Chrysler Corp., 306 F.3d 562, 570, 13 AD Cases 1057 (8th Cir. 2002),
affirmed the judgment for the ADA retaliation plaintiff for $445,516 in front pay, “representing
seven years worth of wages and benefits, up to September 8, 2007, Salitros’s anticipated
retirement date.” The court held that the award was not an abuse of discretion notwithstanding
the jury’s determination that plaintiff was not entitled to back pay through the date of the verdict.
The court rejected defendant’s argument that the front pay award conflicted with the jury verdict
that there had been no discrimination. “The district court’s finding of animosity between the
parties was not based on disability discrimination on Chrysler’s part, but on retaliation.
Therefore, the district court’s reasoning did not conflict with the verdict for Chrysler on
Salitros’s discrimination claim.” Id. at 573.

2. Alternative of Reinstatement

Borges Colon v. Roman-Abreu, 438 F.3d 1, 20 (1st Cir. 2006), affirmed the judgment for
the First Amendment political-affiliation plaintiffs, holding that there was sufficient evidence
that defendants’ privatization of the municipal sanitation department was motivated by
discrimination. The court affirmed the reinstatement order:

Plaintiffs presented strong evidence of a First Amendment violation, and many of
the career plaintiffs have not found work in the aftermath. The possibility of workplace
antagonism, and the upheaval that will be caused by finding jobs for the fired workers,
are the “foreseeable sequelaes of defendant[s’s] wrongdoing,” Rosario-Torres, 889 F.2d at
322. Nor do the damage awards obviate the need for reinstatement. See Hiraldo-Cancel, 925 F.2d at 13 (noting that often, “[w]hen a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole,” because “[t]he psychological benefits of work ... are real and cannot be ignored”) (first alteration in original) (internal quotation marks omitted) (quoting Allen v. Autauga County Bd. of Educ., 685 F.2d 1302, 1306 (11th Cir. 1982)). Defendants’ last argument, that the career plaintiffs do not have “clean hands,” is without merit. On the evidence at trial, those plaintiffs who did not apply for jobs had good reason for their decisions both as to ARB, where working conditions were poor, and as to the Municipality, where they had every reason to believe they were unwelcome.

Abuan v. Level 3 Communications, Inc., 353 F.3d 1158, 1178, 93 FEP Cases 94 (10th Cir. 2003), affirmed the two-year front-pay award for the ADEA and Title VII plaintiff, relying in part on the tone of the parties’ court filings as showing too great a level of animosity for reinstatement to be feasible. “The facts surrounding Level 3’s treatment of Mr. Abuan, together with its litigation strategy, are persuasive examples of animosity on Level 3’s part resulting from Mr. Abuan’s prosecution of this litigation.” The court added: “Even an unconditional and comparable job offer does not prevent the award of front pay in lieu of reinstatement when hostility renders reinstatement inappropriate.” The court held that the lower court abused its discretion in basing plaintiff’s rate of pay for front-pay purposes on his salary at time of layoff, and that the jury’s back pay award showed that that salary was depressed because of defendant’s discriminatory demotions of plaintiff. The court explained, id. at 1179:

We believe the court abused its discretion in failing to adjust Mr. Abuan’s front pay to reflect the effects of Level 3’s illegal conduct on his failure to receive promotions. The jury’s award of back pay clearly reveals its finding that Mr. Abuan had suffered a loss in salary as a result of Level 3’s retaliation. The fact that his salary at the time of trial was above that of others in positions comparable to the job he held then is irrelevant if the evidence indicates he would have been in a higher position absent Level 3’s retaliation.

Banks v. Travelers Companies, 180 F.3d 358, 364–65, 80 FEP Cases 30 (2d Cir. 1999), reversed the trial court’s denial of both reinstatement and front pay, for the reasons discussed below. The court stated that, while animosity between the employer and employee may bar reinstatement, it is “not a ground on which to deny front pay.” Id. at 365 n.5.

Rutherford v. Harris County, 197 F.3d 173, 188–89, 81 FEP Cases 1775 (5th Cir. 1999), vacated and remanded the Title VII front pay award because the lower court did not adequately articulate its findings on why reinstatement to the promotional position at issue was inappropriate and front pay should be awarded. The court distinguished between the reinstatement of discharged employees, which was not involved in this case, and the reinstatement of the plaintiff into a promotional position discriminatorily denied her. It stated that the considerations may differ for these two types of actions.

Salitros v. Chrysler Corp., 306 F.3d 562, 570, 13 AD Cases 1057 (8th Cir. 2002), affirmed the judgment for the ADA retaliation plaintiff for $445,516 in front pay, “representing seven years worth of wages and benefits, up to September 8, 2007, Salitros’s anticipated
retirement date.” The court rejected defendant’s argument that the award of front pay was an abuse of discretion because defendant had offered to reinstate plaintiff: “In this case, the district court found that the reinstatement Chrysler offered Salitros was illusory, because Salitros was never able to work after he was reinstated, and his inability to work resulted from Chrysler’s ill-treatment: ‘He remained on medical leave because of physically and psychologically damaging harassment experienced at the worksite.’” Id. at 572.

Caudle v. Bristow Optical Co., Inc., 224 F.3d 1014, 1021 (9th Cir. 2000), affirmed the lower court’s decision ending the pregnancy discrimination plaintiff’s front pay period in September 1995, because the plaintiff voluntarily withdrew from the workforce then to care for her young child, and this decision was unaffected by the defendant’s discrimination. The court held that she suffered no subsequent injury after her return to the workforce in 1997. The defendant had offered her reinstatement, in a different job and under a different supervisor, with only incidental contact with the former supervisor who had discriminated against her. The plaintiff rejected the offer because she felt she would feel awkward there. The court held that this was not sufficient for a finding of excessive hostility between the parties.

Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 512–13 (9th Cir. 2000), affirmed under Washington law the jury’s award of $2,000,000 in front pay to the still-employed plaintiff, relying in part on Federal law, as the courts of Washington do. The court explained that the defendant’s failure to seek a jury instruction on the subject had waived its argument that the plaintiff was barred as a matter of law from receiving front pay because she had not quit and thus had not been constructively discharged. Indeed, the defendant had presented its own jury instruction on front pay. At trial, it objected to the plaintiff’s testimony of future losses only on foundation/opinion grounds, and did not object after a foundation was laid. Its closing argument mentioned front pay. Id. at 512. The court held in the alternative that there was “ample basis on which to support the jury’s award” even if the objection were considered. The court held that there was evidence of hostility substantial enough to warrant a front pay award. Id. at 512–13. It explained that the plaintiff felt constrained to stay in her job because she was the primary breadwinner for her family, and continued: “Nonetheless, she made it clear that she could not remain in her job much longer. Thus, the evidence also permitted the jury to find that, as a result of the hostile atmosphere, Passantino would be forced to actually terminate her employment. Accordingly, the jury could properly award front pay on the ground that Passantino was entitled to compensation for the difference between what she would have earned had she been promoted (in the absence of retaliation) and what she is able to earn at a new job.” Id. at 513 (citation omitted).

Gotthardt v. National Railroad Passenger Corp., 191 F.3d 1148, 1155–56, 80 FEP Cases 1528 (9th Cir. 1999), affirmed the award of front pay to the plaintiff. The court held that the plaintiff had shown sufficient evidence of a causal connection between the sexually hostile working environment to which the plaintiff was subject and her post-traumatic stress disorder (“PTSD”) rendering her unable to work. The court recognized that the plaintiff had been treated for PTSD prior to the harassment, after a train on which she had been working as fireman hit and killed four young people. Although the train crew was not at fault, the plaintiff received treatment for PTSD for eleven months. Id. at 1156 n.8. The court stated that “the district court’s finding of causation is plausible in light of the extensive testimony of Dr. Jeanne Rivoire, Gotthardt’s treating psychologist and psychological expert, that the hostile environment at
Amtrak caused Gotthardt’s disability.” Id. at 1156. Because the plaintiff’s expert was qualified as an expert and there was no evidence showing that she was less credible than the defendant’s expert, the court rejected the defendant’s argument that the district court should have credited the defendant’s expert instead of the plaintiff’s expert. Id. at 1156 n.9. The court approved the trial court’s finding, based on Dr. Rivoire’s testimony, that the plaintiff’s PTSD made her unable to perform any job. It held that the lower court did not abuse its discretion in awarding front pay in lieu of reinstatement. Id. at 1156.

Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1349–51, 88 FEP Cases 628 (11th Cir. 2000), affirmed the judgment on a jury verdict for the discharged ADEA plaintiff. The court rejected the defendant’s argument that the award of front pay in lieu of reinstatement was improper. It stated that the district court enjoyed “wide discretion in selecting which remedy to impose.” Id. at 1349. “Moreover, when age discrimination plaintiffs are near the age of retirement, this court has signaled its comfort with awarding front pay.” Id. Here, the plaintiff had worked for the defendant for 27 years, and was one year away from retirement as of the close of trial. Awarding a year of front pay was not an abuse of discretion. Id.

EEOC v. W&O, Inc., 213 F.3d 600, 619, 83 FEP Cases 117 (11th Cir. 2000), vacated the award of front pay to one of the formerly pregnant women on whose behalf the EEOC had brought suit, because the defendant had stated its willingness to re-employ the woman in question and the district court had not provided any explanation for awarding front pay rather than reinstatement.

Farley v. Nationwide Mutual Insurance Co., 197 F.3d 1322, 1338–40, 10 AD Cases 87 (11th Cir. 1999), affirmed the trial court’s decision to award the ADA and ADEA plaintiff a year’s front pay in lieu of reinstatement. The court recognized the presumption in favor of reinstatement, but stated:

Farley suffers from several stress-induced long-term disabilities including post-traumatic stress disorder, alcoholism, and depression. Both Farley and his psychologist testified that his symptoms were heavily influenced by his workplace environment. Farley also testified about the debilitating effects on his physical and mental condition that resulted from the pervasive verbal abuse he endured from his former supervisors. According to Farley, colleagues and supervisors would call him one of the “crazies” and demean his mental condition and job performance. In a particularly egregious incident, one of his supervisors posted a cartoon labeling Farley as “Just Plain Nuts” on the company bulletin board for all Nationwide employees to see. On this record, we find that Farley’s hostile work environment, coupled with his stress-induced disabilities, created sufficient special circumstances to support the trial court’s award of front pay in lieu of reinstatement.

Id. at 1339. The court stated that the presence of “some hostility” attendant to many lawsuits “should not normally preclude a plaintiff from receiving reinstatement,” and added: “Defendants found liable of intentional discrimination may not profit from their conduct by preventing former employees unlawfully terminated from returning to work on the grounds that there is hostility between the parties. . . . To deny reinstatement on these grounds is to assist a defendant in obtaining his discriminatory goals.” Id. at 1339–40 (citations omitted). The court stated that the facts here were unusual. Id. at 1340.
3. **Awards of Front Pay Where Liquidated Damages Are Awarded**

*Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1349–51, 88 FEP Cases 628 (11th Cir. 2000), affirmed the judgment on a jury verdict for the discharged ADEA plaintiff. The court held that an award of liquidated damages “does not influence whether or not front pay is also awarded,” contrasting the positions of the Seventh and Eleventh Circuits. *Id.* at 1349 n.13.

*Farley v. Nationwide Mutual Insurance Co.*, 197 F.3d 1322, 1340 (11th Cir.), affirmed the award of front pay in lieu of reinstatement and did not disturb the award of liquidated damages on the plaintiff’s ADEA claim. The court held that the amount of the front pay award should not be doubled in liquidated damages.

4. **“Unclean Hands” Defense**

*Fogg v. Gonzales*, 492 F.3d 447, 455, 100 Fair Empl.Prac.Cas. (BNA) 1601 (D.C. Cir. 2007), affirmed the denial of front pay based on plaintiff’s “unclean hands,” “because, in testimony before the Congressional Black Caucus and on his website, he had misrepresented himself as a deputy U.S. Marshal after he had been discharged.” *Id.* at p. *7 (citation omitted). Judge Henderson concurred.

5. **Length of Front Pay Award**

*Salitros v. Chrysler Corp.*, 306 F.3d 562, 570, 13 AD Cases 1057 (8th Cir. 2002), affirmed the judgment for the ADA retaliation plaintiff for $445,516 in front pay, “representing seven years worth of wages and benefits, up to September 8, 2007, Salitros’s anticipated retirement date.”

*Belk v. City of Eldon*, 228 F.3d 872, 883 (8th Cir. 2000), cert. denied, 532 U.S. 1008 (2001), affirmed the judgment on a jury verdict for the First Amendment retaliation plaintiff, including $119,000 for ten years of front pay, a reduction from the jury verdict of $310,000. The plaintiff had been the City Clerk and Assistant to the City Administrator. The court explained the lower court’s calculation: “The court calculated the difference between Belk’s current salary and her salary during her employment with the city of Eldon, multiplied that difference by ten years, and discounted that amount to a present value of $119,000. Nothing in the record suggests that ten years is an unreasonable length of time in this case. In fact, the district court particularly noted that Belk’s limited education and Eldon’s rural location would make it difficult for Belk to find a job that would compensate her as well as her employment with the city.”

*Gotthardt v. National Railroad Passenger Corp.*, 191 F.3d 1148, 1155–56, 80 FEP Cases 1528 (9th Cir. 1999), affirmed the district court’s calculation of the $603,928.37 front pay award (the present value) awarded to the Title VII sexual harassment plaintiff. The district court had found that the plaintiff, a train engineer, would have qualified for the Capitol Run if it had not been for the sexual harassment she suffered to the point of being diagnosed with Post-Traumatic Stress Disorder and leaving her job just before her check ride on the Capitol Run, that she would have continued to work for eleven years until she reached the mandatory retirement age of 70 on September 15, 2008, and that she had no duty to mitigate her damages. *Id.* at 1155. The court began its discussion of the calculation of front pay by rejecting the defendant’s
argument that its financial losses might lead to a shutdown of the Capitol Run prior to September 15, 2008, because the defendant had introduced no evidence of its financial prospects. *Id.* at 1155 n.10. The court affirmed the district court’s finding that the plaintiff was an experienced engineer who had the necessary skills and abilities to work the Capitol Run. “For example, senior Amtrak engineers who had trained or evaluated Gotthardt testified that she was a highly capable engineer, and there was evidence that the Capitol Run was less challenging than other Amtrak routes.” *Id.* at 1156. Although the plaintiff had missed several months of work because of a severely cut finger and because of disciplinary suspensions that were unrelated to the harassment, and although the district court did not take this explicitly into account in making its front pay award, the court held that there was no error in finding that the plaintiff would have worked steadily until the mandatory retirement age because “there was no evidence that Gotthardt was particularly likely to suffer similar injuries or become subject to similar disciplinary suspensions.” *Id.* The court also held that the plaintiff had no duty to find other employment because it was unlikely that she would succeed. “Although an eleven-year front pay award seems generous, the district court explicitly found that Gotthardt would be unable to work in the future, taking into account her age (59), her educational and vocational background, and, especially, her health. Dr. Rivoire’s testimony supported the court’s finding that Gotthardt’s medical condition would render her unable to return to work.” *Id.*

*Davoll v. Webb*, 194 F.3d 1116, 1143–45, 9 AD Cases 1533, 24 EB Cases 1088 (*10th Cir.* 1999), affirmed in part, and reversed in part, the judgment on a jury verdict for the ADA plaintiffs. The court reversed the limitation on all plaintiffs’ front-pay awards to two years, and remanded the case with instructions that the district court “articulate the specific bases for the end date for each plaintiff, taking into consideration the factors we have outlined above.” *Id.* at 1145. The court stated generally:

Numerous factors are relevant in assessing front pay including work life expectancy, salary and benefits at the time of termination, any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which a plaintiff may become re-employed with reasonable efforts, and methods to discount any award to net present value. . . . A court may also consider a plaintiff’s future in the position from which he was terminated. . . . A front pay award should reflect the individualized circumstances of the plaintiff and the employer.

*Id.* at 1144 (citations omitted). The trial court accepted the testimony of plaintiffs’ vocational expert as to the plaintiffs’ work life expectancies and earnings capacity based on their educational levels, disabilities, ages, and genders. “He then looked at how much each plaintiff would have earned had he or she been reassigned to a city government position for which he or she was qualified, since those positions pay considerably more than non-city jobs. He took the difference between the annual city salaries and the annual projected future earnings for each plaintiff, accounting for cost of living and merit increases, to determine the amount of front pay each plaintiff deserved per year.” *Id.* The court stated that this method “accounts for one’s duty to mitigate damages because a plaintiff will receive only the difference between the city salary and his or her earning capacity, not what he or she actually earns.” The differences were substantial, and were supported by the trial record. “For example, at the time of trial in late 1996, after a lengthy and extensive job hunt Mr. Davoll had a job that paid $24,000 a year, and
Mr. Escobedo earned $8.50 per hour. Had Mr. Davoll been reassigned to a city position for which he was qualified, his salary and benefits for 1997 would have been worth over $56,000; Mr. Escobedo’s salary and benefits would have been worth over $51,000. Denver presented no evidence to counter Dr. Vogenthaler’s assessment.” *Id.* The trial court then imposed a two-year ceiling on front pay, however, without citing any information in the record to support the limitation and citing instead to two district court decisions in other cases. Reversing, the court of appeals stated: “Because the purpose of front pay is to make each plaintiff whole, the district court must look at the individualized circumstances of each plaintiff. A flat rule awarding front pay for a specific period, no matter how long or short, would defeat the purpose of the award.” *Id.* at 1145. While two years might be appropriate here, the lower court was obligated to show that its decision was based on more than “‘mere guesswork.’” *Id.* (citation omitted).

### 6. Ability to Work as Condition of Front-Pay Entitlement

*EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 732, 18 AD Cases 1793 (5th Cir. 2007), reversed the award of $200,000 in front pay to the ADA charging party, where his physical condition had deteriorated so sharply in the years since his termination that at the time of judgment he was no longer able to work.

*Salitros v. Chrysler Corp.*, 306 F.3d 562, 570, 13 AD Cases 1057 (8th Cir. 2002), affirmed the judgment for the ADA retaliation plaintiff for $445,516 in front pay, “representing seven years worth of wages and benefits, up to September 8, 2007, Salitros’s anticipated retirement date.” The court rejected defendant’s argument that the award of front pay was an abuse of discretion as to periods in which plaintiff is unable to work, because “Chrysler’s argument depends on its assertion that it did nothing to cause Salitros to go on medical leave.” *Id.*

### 7. Necessity of Hearing

*Salitros v. Chrysler Corp.*, 306 F.3d 562, 570, 13 AD Cases 1057 (8th Cir. 2002), affirmed the judgment for the ADA retaliation plaintiff for $445,516 in front pay, “representing seven years worth of wages and benefits, up to September 8, 2007, Salitros’s anticipated retirement date.” The court held that the defendant was not prejudiced by the absence of a hearing on front pay, or by the lower court’s reliance on charts that were not received in evidence. It stated that the award of front pay was a matter for the court. It added: “Salitros’s expert testified at trial about his sources and the methodology he used in preparing back pay exhibits. Chrysler had the opportunity to cross examine Salitros’s expert about the information and assumptions on which the back pay exhibits were based. The front pay exhibits were obviously prepared using the same methodology, simply extended for future years. After Salitros filed the affidavit with the exhibits attached, Chrysler did not move to strike the exhibits or ask the court for an evidentiary hearing, but waited to object until the district court had already ruled on the front pay motion.” *Id.* at 571.

### 8. Mitigation

*Tobin v. Liberty Mutual Insurance Co.*, 553 F.3d 121, 137, 21 AD Cases 769 (1st Cir. 2009), affirmed the judgment on a jury verdict for the ADA and Massachusetts-law plaintiff.
The court of appeals upheld the jury’s award of $440,000 in back pay and in front pay running to the date of plaintiff’s planned retirement at age 62, a year and a half after the verdict. The court held that a plaintiff’s duty to mitigate was not absolute:

A victim of employment discrimination ordinarily has the duty to mitigate damages by seeking alternative employment. . . . However, the employer may be held responsible for the entire amount of lost salary notwithstanding the employee's failure to obtain another job “[i]f the employer's unlawful conduct caused the employee's inability to mitigate damages.” . . . In other words, if an employee is unable to work because of a disability “caused” by the employer, the employee may obtain compensation for the resulting lost pay.

_EEOC v. Bd. of Regents of University of Wisconsin System_, 288 F.3d 296, 304, 88 FEP Cases 1133 (7th Cir. 2002), affirmed the judgment for the EEOC. The court rejected defendant’s argument that it was entitled to a new trial on mitigation, because the charging parties failed to apply for employment with the defendant. The court stated: “But they had explanations for their failure to apply to the very organization which just terminated them. For one thing, after just being terminated for alleged deficiencies in their performance and skills, they had no reason to believe they would be hired if they did apply.” Finally, the court noted that two charging parties had re-applied with the defendant, and had not been hired.

_Belk v. City of Eldon_, 228 F.3d 872, 883 (8th Cir. 2000), _cert. denied_, 532 U.S. 1008 (2001), affirmed the judgment on a jury verdict for the First Amendment retaliation plaintiff, including $119,000 for ten years of front pay, reduced from the jury verdict of $310,000. The court rejected defendant’s argument that the front pay should have been mitigated by plaintiff’s farming income, because Belk had begun making her agricultural investments while still employed by the City, and farming income was supplemental to her salary. “Because the purpose of awarding front pay is to compensate the plaintiff for what she would have had but for

_Id. at 141_ (citations and footnote omitted). The court held that plaintiff made a sufficient showing for a rational jury to accept, particularly because of the devastating psychological consequences of being placed on probationary status each time plaintiff returned from disability leave:

This evidence allowed the jury to find that the lack of support reflected in the company's final denial of accommodations further exacerbated Tobin's stress and precipitated his total inability to function in the workplace. Although the company points to other stressors in Tobin's life that could have contributed to his disability-including family conflicts and additional medical issues-the jury was free to credit the evidence showing a link between Tobin's status at work and his mental condition. Based on that evidence, the jury could have concluded that Liberty Mutual's refusal to accommodate Tobin's disability in early 2001 denied him a last chance to avoid the termination with which he had been threatened, increasing the stress that, in turn, exacerbated his functional difficulties. Losing the job predictably resulted in more anguish, and the jury could have found that it caused further deterioration of his functional abilities.

_Id. at 143._
her wrongful termination, the district court was correct in not penalizing Belk for farming income that she would have had in any case.”

_Henderson v. Simmons Foods, Inc._, 217 F.3d 612, 617–18, 83 FEP Cases 279 (8th Cir. 2000), affirmed the judgment on a jury verdict for the Title VII sexual harassment and constructive-discharge plaintiff. The plaintiff left her job at a chicken processing plant because the defendant did not take adequate corrective action despite her repeated complaints of hostile-environment harassment. She applied for employment with more than thirty non-poultry employers, although she had no training or experience outside the poultry industry. The court rejected the defendant’s argument that her $15,000 back pay award was improper because her failure to apply for poultry-related jobs meant that she had failed to mitigate her damages. It held that she had tried to obtain numerous positions commensurate with her education and skill levels. “Simmons has proffered no evidence that Henderson refused a position that was substantially similar to her previous employment or that she failed to use reasonable care in obtaining a suitable position.” _Id._ at 618.

_Greene v. Safeway Stores, Inc._, 210 F.3d 1237, 1244–45, 82 FEP Cases 1306, 24 EB Cases 1417 (10th Cir. 2000), rejected the defendant’s argument that the lower court erred in failing to instruct the jury on mitigation, and that mitigation required the plaintiff to hold onto his stock and hope that the market value would not decrease. The court observed that the defendant had consented to a proximate cause instruction in lieu of a mitigation instruction, so that the plain error rule applied. The court held that the lower court’s instruction on proximate cause sufficed under the plain error rule.

9. **Deduction for Sick Leave or Collateral Benefits**

_Salitros v. Chrysler Corp._, 306 F.3d 562, 570, 13 AD Cases 1057 (8th Cir. 2002), affirmed the judgment for the ADA retaliation plaintiff for $445,516 in front pay, “representing seven years worth of wages and benefits, up to September 8, 2007, Salitros’s anticipated retirement date.” The court denied any reduction for the value of plaintiff’s sick leave or collateral benefits, because the defendant’s actions had made plaintiff sick. _Id._ at 573–74.

_Gotthardt v. National Railroad Passenger Corp._, 191 F.3d 1148, 1156–57, 80 FEP Cases 1528 (9th Cir. 1999), affirmed the district court’s refusal to reduce the Title VII sexual harassment plaintiff’s $603,928.37 front pay award (the present value) by the present value of disability benefits for which she might become eligible in the future. Recognizing the conflict among the Circuits, the court held that it was unnecessary to decide the legal question because the defendant had offered only speculation as to whether the plaintiff might receive such benefits in the future.

10. **Ending Date**

_Alexander v. City of Milwaukee_, 474 F.3d 437, 452–53, 99 FEP Cases 961 (7th Cir. 2007), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. The court held that the lower court erred in ending
front pay at retirement or after two years’ service as Captain, because the proper stopping point under the lost-chance method is when a plaintiff obtains the right to compete on an equal footing, regardless of selection. The court stated: “We note that, because the City promotes officers to captains only when a vacancy in the rank of captain arises, the frequency of this availability should be among the relevant considerations in determining when each of the seventeen plaintiffs, and in particular, those who have not yet been promoted or have not yet retired, would have an unimpeded promotional opportunity.”

*Fine v. Ryan International Airlines*, 305 F.3d 746, 756, 89 FEP Cases 1543 (*7th Cir.* 2002), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff, and denied plaintiff’s cross-appeal from the denial of reinstatement. The court held that plaintiff’s stipulation that all damages ceased as of a certain post-employment date waived any claim for reinstatement. Plaintiff had entered into the stipulation in order to avoid discovery into the circumstances of her resignation from a subsequent employer. The court explained:

Fine argues that her stipulation was intended to apply only to money damages, not to equitable remedies such as reinstatement. That is not, however, what the stipulation says. It refers to “any damages” without drawing a distinction between legal and equitable relief. Even more importantly, Fine herself created the endpoint for Ryan’s responsibility when she took the new job. It makes no sense to make Ryan her employer of last resort for life, if it bears no responsibility for the actions of later employers. Both because of the stipulation and for the latter reason, we agree with the district court’s decision to deny reinstatement.

11. **Calculation**

   a. **Reduction of Front Pay Award to Present Value**

   *Skalka v. Fernald Environmental Restoration Management Corp.*, 178 F.3d 414, 426 (*6th Cir.*), reversed the judgment for ADEA plaintiff Skalka and remanded it for a remittitur or new trial on damages. The court held that the award of Skalka’s pension benefits must be reduced to present value.

   *Gotthardt v. National R.R. Passenger Corp.*, 191 F.3d 1148, 1152–53 (*9th Cir.*), affirmed the district court’s award of $603,928.37 in front pay (the present value) to the Title VII sexual harassment plaintiff.

   b. **Proof by Plaintiff’s Own Testimony**

   *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 510–11 (*9th Cir.* 2000), affirmed under Washington law the jury’s award of $100,000 in back pay, because the plaintiff testified that she would have received between $130,000 and $200,000 more in salary if she had been promoted to one of the positions denied to her, and the jury could reasonably have determined that she was denied promotions in retaliation for her complaints.
c. Front Pay and the Caps on Damages under the 1991 Civil Rights Act

*Pollard v. E.I. du Pont De Nemours & Company*, 532 U.S. 843, 85 FEP Cases 1217 (2001), held that front pay is not an element of compensatory damages under the 1991 Act, and is not subject to the damages caps.

I. Prejudgment Interest

1. Entitlement

*O'Rourke v. City of Providence*, 235 F.3d 713, 737, 85 FEP Cases 1135 (*1st Cir.* 2001), reversed the lower court’s grant of judgment as a matter of law to defendant after the first trial, directed reinstatement of the first jury’s verdict for the Title VII sex discrimination and sexual harassment plaintiff, and affirmed the award of prejudgment interest because it was “within the district court’s discretion to order make-whole relief.” (Citation omitted.)

*Fine v. Ryan International Airlines*, 305 F.3d 746, 757, 89 FEP Cases 1543 (*7th Cir.* 2002), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff, but held that the lower court erred in calculating prejudgment interest on plaintiff’s back pay award only until June 30, 2000, although final judgment was not entered until November 22, 2000. “It is the latter date which is relevant for the calculation.” (Citation omitted.) It concluded: “The judgment of the district court is MODIFIED to reflect a prejudgment interest rate of 8.47% on the judgment of backpay, running through the date of judgment, November 22, 2000.” *Id.*

*Frazier v. Iowa Beef Processors, Inc.*, 200 F.3d 1190, 1194, 5 WH Cases 2d 1445 (*8th Cir.* 2000), relied on Federal law to uphold the award of prejudgment interest on an Iowa-law retaliatory discharge claim. The court stated the general rule under Circuit precedent: “[a]s a general rule, prejudgment interest is to be awarded when the amount of the underlying liability is reasonably capable of ascertainment and the relief granted would otherwise fall short of making the claimant whole because he or she has been denied the use of money which was legally due.” (Citation omitted.) The court added: “Generally, prejudgment interest should be awarded “unless exceptional or unusual circumstances exist making the award of interest inequitable.” *Id.* (citation omitted).

2. Rate of Interest

*Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111, 1139 (*D.C. Cir.*)(*per curiam*), affirmed the use of a 6% annual rate of prejudgment interest, compounded annually since October 21, 1972, on back pay to a class of African-American rodmen discriminatorily denied membership in the union. The court rejected plaintiffs’ argument that they should have had the benefit of a variable or larger rate, because they had earlier conceded that such a rate would make them whole.

*Conetta v. National Hair Care Centers, Inc.*, 236 F.3d 67, 77–78, 85 FEP Cases 578 (*1st Cir.* 2001), affirmed the lower court’s refusal to set aside the entry of default on plaintiffs’ retaliatory discharge claim, holding that defendant failed to show good cause, and affirmed the
award of prejudgment interest. Plaintiff had sued under Title VII and Rhode Island law, and the default judgment was undifferentiated. On reconsideration, the lower court used the statutory Rhode Island 12% rate of prejudgment interest. The court stated that defendant did not dispute that the statutory state rate is by virtue of Rhode Island law mandatory on state-law claims, and continued: “Here, however, the applicable federal and state claims appear to be wholly symmetrical so far as Diane Conetta’s claims are concerned (at least National does not suggest otherwise). Thus, it is fair to treat the judgment as affording her an option to have it rest on federal or state law, whichever affords her the better interest rate.” *Id.* at 78 (emphasis in original; citation omitted). The court distinguished a case in which Massachusetts law gave the judge discretion as to whether to award prejudgment interest. *Id.*

*Thomas v. iStar Financial, Inc.*, 629 F.3d 276, 279-80, 110 Fair Empl.Prac.Cas. (BNA) 1761 (2d Cir. 2010) (*per curiam*), was a case brought under Title VII and under the New York City Human Rights Law. The court rejected plaintiff’s argument that prejudgment interest should have been based on the New York rate of prejudgment interest, rather than on the Federal rate. “As the district court stated, and we now hold, judgments that are based on both state and federal law with respect to which no distinction is drawn shall have applicable interest calculated at the federal interest rate.” *Id.* at 280 (citations omitted). The court distinguished wage and hour cases in which liquidated damages are awarded, because interest is not available on FLSA claims where liquidated damages are awarded, but is available on New York labor Law claims where liquidated damages are awarded. “They stand for the proposition that where prejudgment interest can only be awarded on the basis of what is solely a state claim, it is appropriate to use the state interest rate.” *Id.* at 280 n.2.

**Comment on Thomas v. iStar Financial:** New York has a 9% rate of prejudgment interest. In light of *Thomas*, plaintiff’s attorneys in New York should think about using a verdict form in discrimination cases that distinguishes between awards under State law and awards under Federal law.

*Williams v. Trader Publishing Co.*, 218 F.3d 481, 488, 83 FEP Cases 668 (5th Cir. 2000), affirmed the judgment on liability for the Title VII gender discrimination plaintiff, and upheld the awards of prejudgment and postjudgment interest. The lower court awarded prejudgment interest at the rate of 10%, and postjudgment interest at the rate of 5.407%. *Id.* at 484. Because the defendant did not challenge the rate of interest below, the court reviewed the award for plain error. The court stated that it had previously approved the Federal rate of interest as making the plaintiff whole, but that this was not the exclusive rate that can be used for this purpose. “Considering the total circumstances of this case, we conclude that the district court’s imposition of a somewhat higher rate of interest (apparently based on the state interest rate), even if error, was not plain error affecting the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 488.

*Caffey v. Unum Life Ins. Co.*, 302 F.3d 576, 589-90, 29 Employee Benefits Cas. 1971 (6th Cir. 2002), affirmed the lower court’s award of postjudgment interest on the award of prejudgment interest, and held that postjudgment interest starts to run on the portion of an initial award that is not later changed, without regard to whether the initial award is appealable.

*Blankenship v. Liberty Life Assur. Co. of Boston*, 486 F.3d 620, 627-28, 40 Employee
Benefits Cas. 2239 (9th Cir. 2007), an ERISA case involving wrongful denial of disability benefits, affirmed the lower court’s award of prejudgment interest at the 10.01% rate paid in the personal account from which plaintiff had had to withdraw personal funds because of the defendant’s failure to pay benefits, and ordered that the interest be compounded monthly.

E.E.O.C. v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1276, 89 Fair Empl.Prac.Cas. (BNA) 522 (11th Cir. 2002), cert. denied, 539 U.S. 941 (2003), affirmed the lower court’s award of prejudgment interest and order that the interest be compounded. The court stated: “Additionally, Joe's maintains that the district court erred both in crediting the back pay calculation of the EEOC's expert economist and in compounding interest. These arguments are meritless and do not warrant further discussion. The district court did not abuse its discretion for any of the reasons advanced by Joe's.”

J. Compensatory Damages

1. Entitlement

Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565, 570–71, 13 AD Cases 1345 (3rd Cir. 2002), affirmed the judgment on a jury verdict for the ADA and Pennsylvania-law plaintiff in the amount of $450,000 in economic damages, and $1.55 million in compensatory damages for emotional distress. See the discussion of this case below. The court affirmed the denial of remittitur:

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].” . . . . The district court found this standard to be met because Gagliardo produced evidence from her co-workers and family demonstrating the effects her problems with CLI had on her life. This testimony tied Gagliardo’s pain and suffering to her early employment problems after she was diagnosed with MS and detailed their subsequent worsening effect on her life. The testimony demonstrated the effects of the mental trauma, transforming Gagliardo from a happy and confident person to one who was withdrawn and indecisive. Because this evidence establishes a reasonable probability that Gagliardo incurred the emotional damages, we hold that the trial court did not abuse its discretion by allowing the jury’s verdict to stand. . . . Therefore, we affirm the district court’s denial of CLI’s motion for a new trial. In addition, in light of this evidence we also hold the trial court did not abuse its discretion in finding the jury’s verdict is not so excessive as to be unsupportable or offend the conscience of the court, and therefore denying remittitur.

Bryant v. Aiken Regional Medical Centers Inc., 333 F.3d 536, 546–47, 92 FEP Cases 233 (4th Cir. 2003), cert. denied, 540 U.S. 1106 (2004), affirmed the Title VII and § 1981 award of $50,000 in compensatory damages for emotional distress. The court held that plaintiff’s own testimony provided an adequate basis for the award: “We have held that a plaintiff’s testimony, standing alone, can support an award of compensatory damages for emotional distress. . . . Such testimony must ‘establish that the plaintiff suffered demonstrable emotional distress, which must be sufficiently articulated.’ . . . The testimony cannot rely on ‘conclusory statements that the plaintiff suffered emotional distress’ or the mere fact that the plaintiff was wronged. . . . Rather,
it must indicate with specificity ‘how [the plaintiff’s] alleged distress manifested itself.’ . . . The plaintiff must also ‘show a causal connection between the violation and her emotional distress.’” (Citations omitted.) The court held that plaintiff’s testimony was adequate, and that it was not undermined by her decision to rely on faith and prayer instead of seeking professional therapy:

Bryant was sufficiently specific about the emotional trauma she suffered as a result of ARMC’s actions. She explained that she was “embarrassed, frustrated, and angry,” “very disgusted,” and that she “didn’t feel very good about coming to work.” She also testified that this distress inflicted a series of specific physical ailments on her: “frequent headaches, insomnia, irregular menstrual cycles, nausea, [and] vomiting.” ARMC argues that we should discount her testimony because she did not seek medical attention for the physical symptoms she was suffering. But Bryant testified that she had always been taught to believe that “anything can be handled through prayer and faith” and to “rely on [her family] for strength.” She therefore chose to address “the signs and symptoms of what stress could do to a person” through “prayer and faith” and “through talking with [her] family.” That was an understandable way for Bryant to respond to the situation in which she found herself. It is also worth noting, as the district court observed, that Bryant “was herself a medical professional whose opinion as to her own condition the jury was entitled to consider.”

We further reject ARMC’s suggestion that the degree of Bryant’s distress was unreasonable. She was working multiple jobs and trying to better herself by pursuing further education in her field. As ARMC’s former director of surgical services testified, Bryant was known even outside ARMC as a capable employee. But in applying for jobs that she qualified for, she was stonewalled for almost one year. Her emotional distress was a reasonable reaction to this mystifying frustration of her professional career.

_Id._ at 547.

2. _Waiver of Appeal as to Amount_

_Rodriguez-Marin v. Rivera-Gonzalez_, 438 F.3d 72 (1st Cir. 2006), affirmed the damages awarded by the jury: “The jury awarded Rodriguez back pay of $3,500 per month, $180,000 in compensatory damages, and $120,000 in punitive damages against Dávila. The jury awarded Escobar back pay of $3,306 per month, $105,000 in compensatory damages, and $195,000 in punitive damages against Dávila.” _Id._ at 79. The court rejected defendants’ argument that the compensatory damages were excessive. The court stated that “defendants were obliged to present the facts in the light most favorable to the verdict but failed to do so,” and failed to cite the appropriate law. _Id._ at 84. The court held: “Given the defendants’ failure to specify the applicable law and their failure to present the facts in the light most favorable to the verdict, this argument is not sufficiently developed and thus waived.” _Id._ The court then added that the verdict was supported by the record, and stated at 84 n.6: “Rodriguez testified that as a result of her demotion and transfer to a dangerous, high-security prison, she sought emotional therapy through state insurance. Defendants stated that Rodriguez voluntarily decided to seek state benefits and was not compelled to do so. Escobar testified that as a result of her demotion she was forced to seek psychological help, she needed medication to sleep well, and her credit was
harmed. Defendants argue, without any evidentiary support, that Escobar’s emotional condition was not the result of defendants’ actions but caused by her poor credit history and divorce.”

3. **Amount, in the Absence of Expert Testimony**

_Tobin v. Liberty Mutual Insurance Co._, 553 F.3d 121, 144-45, 21 AD Cases 769 (1st Cir. 2009), affirmed the judgment on a jury verdict for the ADA and Massachusetts-law plaintiff. The court of appeals upheld the jury’s award of $500,000 in emotional-distress damages:

The district court did not abuse its discretion in allowing the jury's verdict to stand. Although Liberty Mutual argues that Tobin “failed to present any evidence even hinting that his psychological condition was worsened by Liberty Mutual's failure to accommodate his disability,” other than his “own, self-serving testimony,” we already have explained why the jury permissibly could conclude that the company's denial of accommodations caused his total disability. As recounted above, both Tobin and Kantar testified that at the time of trial—five years after he left the company—Tobin continued to suffer severe emotional distress from Liberty Mutual's failure to provide reasonable accommodations that the jury found would have enabled him to successfully perform his job. Moreover, Tobin had spent thirty-seven years at the company—his entire working life. Kantar observed that “his identity has been connected with Liberty Mutual” and that being “a sales rep for Liberty Mutual [is] ... part of who he is.” Kantar reported that Tobin was “devastated” by the way the termination occurred, perceiving it as a betrayal. Tobin also was told incorrectly on the day of his termination that he and his family no longer had health insurance coverage, information that was particularly alarming in light of his wife's ongoing treatment for breast cancer.FN33

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FN33. Tobin was told two days later that his coverage would, in fact, continue. He described the intervening period as “two days of turmoil.”

_Schandelmeier-Bartels v. Chicago Park District_, 634 F.3d 372, 111 Fair Empl.Prac.Cas. (BNA) 739, 78 Fed.R.Serv.3d 1023 (7th Cir. 2011), reversed the district court’s grant of judgment as a matter of law, and reinstated the jury verdict on liability for the Caucasian Title VII racial discrimination plaintiff. The court held, however, that the jury’s award of $200,000 in compensatory damages was excessive and that no award above $30,000 would have been reasonable. The court explained at p. 389:

We do consider Schandelmeier's testimony concerning the emotional impact of the discriminatory acts that were directed at her, including Adams's racist tirade and her termination. Although Adams's rants on July 31st and August 1st were understandably offensive and disturbing to Schandelmeier, those incidents were also isolated. She was not subjected to such incidents throughout her employment with the Park District, but only twice, and she did not testify to any lasting physical or emotional effects resulting from Adams's abuse. Regarding her termination, she testified that she was “disturbed,” “devastated” and “upset” to be losing her job, but she also testified that she found a new job just 10 days later. Schandelmeier did not testify to any lasting emotional or physical ill-effects from losing her job with the Park District.
The court also surveyed other awards. Plaintiff did not rely on any expert.

*Farfaras v. Citizens Bank and Trust of Chicago*, 433 F.3d 558, 565, 97 FEP Cases 391 (7th Cir. 2006), affirmed the judgment on a jury verdict for the Title VII and State-law sex discrimination and sexual harassment plaintiff for $200,000 in compensatory damages and $100,000 in punitive damages against the individual State-law defendants, $50,000 against the corporate Title VII defendant, $9,314.48 in lost wages, and $436,766.75 in attorneys’ fees and costs. The compensatory damages included $100,000 for pain and suffering and $100,000 for the loss of dignity. The court held that the award was not excessive despite the lack of expert testimony, because there was adequate evidence of the effect of defendants’ harassment on plaintiff. The court described the evidence: “Farfaras and other witnesses testified that as a result of the defendants’ actions, Farfaras lost self-esteem, gained weight, had problems sleeping, changed demeanor, and became nervous. Although Farfaras never consulted a medical professional about her unhappiness, Farfaras’s friend Yonia Yonan testified that Farfaras had been ‘very depressed’ beginning early in the year 2000.” *Id.* at 563. The court held that the award was roughly comparable to awards in similar cases, and explained:

Although we cannot completely analogize the damage award in this case to an identical case with either a similar or dissimilar verdict, such an exact analogy is not necessary. “Awards in other cases provide a reference point that assists the court in assessing reasonableness; they do not establish a range beyond which awards are necessarily excessive. Due to the highly fact-specific nature of Title VII cases, such comparisons are rarely dispositive.” . . . Some of the cases presented by the defendants appear more egregious with lower damages, while some of the cases presented by Farfaras appear less egregious with higher damages. Our responsibility, however, is not to fit this case into a perfect continuum of past harms and past awards. Rather, our role in reviewing awards for abuse of discretion is to determine if the award in this case was roughly comparable to similar cases, such that the instant award was not so beyond the pale as to constitute an abuse of discretion.

*Id.* at 565–67.

*Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 836, 12 AD Cases 513 (8th Cir. 2001), affirmed the award of $12,500 in emotional-distress damages on the plaintiff’s ADA claim and the award of an equal amount on his State-law claim. The court stated that medical or other expert evidence is not necessary to support an ADA emotional-distress award. The plaintiff can rely on his or her own testimony, but must introduce specific facts supporting the claim of emotional distress. The court stated:

Webner testified that he was emotionally devastated by losing his job—a termination Titan told him explicitly was because of his disability. He testified that immediately after he was terminated he felt “empty,” like he lost his best friend and that there was “a hole in his chest.” . . . He also testified that he was scared that he would be unable to pay his bills and was frustrated with his inability to find other regular work for six months. Titan contends that Webner’s self-serving testimony about his reaction after he was terminated is insufficient to sustain the jury’s award of emotional distress damages. We disagree. As previously stated a plaintiff’s own testimony may provide
ample evidence when heard in combination with the circumstances surrounding the plaintiff’s termination. Furthermore, “[a]wards for pain and suffering are highly subjective and the assessment of damages is within the sound discretion of the jury, especially when the jury must determine how to compensate an individual for an injury not easily calculable in economic terms.” We will not disturb the jury’s award of emotional distress damages to Webner on his disability claim.

Id. at 836–37.

Madison v. IBP, Inc., 257 F.3d 780, 802–03, 86 FEP Cases 77, 80 E.P.D. ¶ 40,628 (8th Cir. 2001), vacated and remanded for reconsideration in light of National R.R. Passenger Corp. v. Morgan, 536 U.S. 919 (2002), affirmed the award of $266,750 for emotional distress damages, because the evidence supporting the award was much better developed than in cases in which the courts have ordered remittiturs. The court described the evidence:

Madison presented voluminous evidence that she suffered severe emotional distress as a result of the harassment and discrimination she endured after January 13, 1993. She was subjected to egregious and humiliating conduct which wreaked havoc on her emotional health and caused her great anguish which manifested itself physically. The taunting and harassment made her feel humiliated, hurt, and degraded. The undisputed evidence indicated that Madison was made so distraught by the behavior of fellow employees and managers that she often left her work station in tears. Her family life was affected by what went on in the plant. Her working conditions strained her relationship with her husband and nearly caused the breakup of their marriage. The couple separated several times during the course of her employment at IBP. Madison also testified that as a result of her stressful work environment, she lost weight, had trouble sleeping and frequent headaches, and broke out in hives. The evidence about the physical and emotional effects on Madison was corroborated by her family and several coworkers. Keith Ratcliffe, a minister who counseled Madison on at least four occasions during these events, described her as depressed and emotionally drained because of her experiences at IBP.

Id. at 802.

4. Mitigation

Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 91, 17 AD Cases 769 (1st Cir. 2006), affirmed the judgment for the ADA harassment plaintiff on a jury verdict for $76,000 in compensatory damages and $160,000 in punitive damages. The court relied on plaintiff’s repeated internal complaints in rejecting defendant’s argument that plaintiff failed to mitigate his damages.

5. Allowing Post-Verdict Amendment to Complaint to Justify Award of Compensatory Damages

Baker v. John Morrell & Co., 382 F.3d 816, 830–32 (8th Cir. 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment and
retaliation plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys’ fees and costs, a total of $1,386,632. Plaintiff filed suit only under Title VII, and after the verdict moved to amend her complaint to add a claim under the Iowa Civil Rights Act, which provides for uncapped compensatory damages but no punitive damages. That would allow her to keep all of her compensatory-damage award, and $300,000 of her punitive-damage award. District Judge Mark Bennett ultimately granted the motion under Rules 15(b) and 54(c), Fed. R. Civ. Pro., and the court of appeals affirmed. The court noted the agreement of the parties that the proof and legal standards under Title VII and the ICRA were identical, stated that the amendment was not inconsistent with defendant’s position through the litigation, held that an issue can be tried by consent even if the evidence is also relevant to an issue within the pleadings, and held that Judge Bennett did not abuse his discretion in holding that the amendment reflected the issues tried by consent, i.e., without objection., Id. at 831. The court held in the alternative that the amendment was also permitted under Rule 54(c), as relief to which the plaintiff was entitled even if she did not demand it in her pleadings. It stated that there are limits on such a use of Rule 54(c), and that the rule cannot be applied so as to prejudice the other side. “For example, if the pleading failure denies the opposing party the ‘opportunity to make a ‘realistic appraisal of the case, so that [their] settlement and litigation strategy [could be] based on knowledge and not speculation,’ the amendment may properly be denied.” Id. at 831–32 (citations and some internal quotation marks omitted). The court rejected Morrell’s claim that it would have settled the case if it had known of its larger exposure:

Morrell contends it was prejudiced by Baker’s failure to plead an ICRA claim because had it known damages would not be capped under Title VII it may have settled the claim instead of risking a verdict in excess of the cap. Morrell, however, has failed to present any evidence to show its settlement strategy was affected by the Title VII cap. Indeed, aside from Morrell’s bare assertion, we have no reason to believe it would have been any more inclined to settle this claim irrespective of whether an ICRA claim was pleaded. Furthermore, Morrell was well aware throughout the course of the litigation Baker was demanding an amount to settle the claim well in excess of the Title VII caps. Surely, this fact alone put Morrell on notice Baker was seeking a verdict in excess of $300,000. In light of the liberal policy in favor of Rule 54(c) amendments, and because it is undisputed Baker proved an ICRA claim, we will not permit Morrell’s bare assertion of prejudice to thwart the amendment.

Id. at 832. The obduracy of defendant’s litigation position—denying a hostile environment even after years of degrading comments, actions, and physical assaults drove plaintiff to a suicide attempt and mental hospitalization—may have contributed to this holding.

6. **Foreseeability**

*Thomas v. iStar Financial, Inc.*, 629 F.3d 276, 281, 110 Fair Empl.Prac.Cas. (BNA) 1761 (2d Cir. 2010) (per curiam), was a case brought under Title VII and under the New York City Human Rights Law. The court rejected plaintiff’s argument that his compensatory damages should have included damages for his inability to close on a house: “Likewise, evidence that Thomas had asked for an advance on his bonus some eight months before he was fired was an insufficient basis for a reasonable jury to find that damages related to Thomas’s inability to close
on a house were reasonably foreseeable to the defendants. *See Hadley v. Baxendale*, 9 Exch 341, 156 ER 145 (Eng.1854).”

**Comment on Thomas v. iStar Financial and Hadley v. Baxendale:** Did we ever think we would see that case cited as a rule of decision in an employment case? Keep those first-year notebooks around!

7. **Irrelevance of Defendants’ Ability to Pay**

*Acevedo-Garcia v. Monroig*, 351 F.3d 547, 570–72 (1st Cir. 2003), involved claims of political discrimination and deprivation of due process brought by 82 former municipal employees. The lower court severed the plaintiffs into four groups, and tried the first 20 plaintiffs, and entered judgment on an award of $6,356,400 in compensatory damages “against a municipality whose entire annual budget in 1996-97 was only $4,529,327,” with the claims of 62 plaintiffs left to be tried. *Id.* at 570. The court upheld the award as not excessive. *Id.* at 571–72.

8. **Other Decisions as to Amount**


*McCombs v. Meijer, Inc.*, 395 F.3d 346, 95 FEP Cases 1 (6th Cir. 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. Plaintiff recovered $25,000 in compensatory damages and spent $9,482.00 in expert witness fees, of which she recovered $4,532.50. She thus received $2.64 in damages for every dollar she spent in expert witness fees.

*Moore v. Freeman*, 355 F.3d 558, 564, 9 WH Cases 2d 321 (6th Cir. 2004), an FLSA retaliation case, affirmed an award of $40,000 in emotional-distress damages, stating: “Though the award could be reasonably described as fulsome, we cannot say that it is clearly excessive. The plaintiff in this case submitted evidence that the stress of losing his job demoralized him, strained his relationships with his wife and children, and negatively affected his sleeping habits and appetite.”

*Worth v. Tyer*, 276 F.3d 249, 268–69, 87 FEP Cases 994 (7th Cir. 2001), affirmed the Title VII sexual harassment verdict for the plaintiff. The court held that the plaintiff’s evidence of emotional distress—lack of sleep, humiliation, distress, lost wages, etc.—were significant enough to support the jury’s award of compensatory damages in the amounts of $20,000 for retaliatory discharge, $2,500 for sexual harassment, and $50,000 for battery.

*Rowe v. Hussmann Corp.*, 381 F.3d 775, 94 FEP Cases 520 (8th Cir. 2004), affirmed the jury verdict for the Title VII and Missouri Human Rights Act sexual harassment plaintiff in the amounts of $500,000 in compensatory damages and $1 million in punitive damages. The court relied on the fact that the harassment had continued over a period of four years, with no more than a seven-month gap. The harasser had repeatedly touched plaintiff’s breasts and buttocks, and defendant did nothing for a long period of time although plaintiff complained two or three times a month. The harasser threatened to rape and kill her. Defendant told plaintiff she should
be more understanding of the harasser since he only had an eighth-grade education, never fired the harasser, and ultimately transferred plaintiff to a position where the harasser occasionally came into her vicinity.

*Sellers v. Mineta*, 350 F.3d 706, 712–14, 92 FEP Cases 1665 (*8th Cir.* 2003), upheld the award of $15,000 in compensatory damages from defendant co-worker John Joseph to plaintiff for an incident in which he had pinched her buttocks, and upheld the award of $50,000 in compensatory damages and $50,000 in punitive damages for plaintiff’s assault and battery tort claims for his alleged attempt to rape her.

*Eich v. Board of Regents for Central Missouri State University*, 350 F.3d 752, 762–64, 92 FEP Cases 1812 (*8th Cir.* 2003), held that the award of $200,000 in non-economic damages was proper, and reversed the lower court’s order that plaintiff accept a remittitur to $10,000 or that there be a retrial. The court set forth plaintiff’s testimony, and held that the $200,000 award did not shock the conscience, at 763–64:

> It’s very frustrating to know that that behavior I was subjected to would be allowed to happen for so long, so many times and nothing be done to correct it. They didn’t care anything about what I contributed to the university. They put in my job performance or my job performance reviews I am a valuable employee of the university but when I turned to them for help it was like I was nothing. There is just no way to really describe everything that I have been through, the volume, the intense situations, the rejection of my requests for help. There is just, there is really no words to describe how completely and totally devastating everything that has happened to me has been. It’s completely destroyed everything.

Judge Smith concurred in part and dissented in part. *Id.* at 764–67.

*Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1040, 92 FEP Cases 641 (*9th Cir.* 2003), *cert. denied*, 541 U.S. 902 (2004), affirmed the § 1981 jury verdict for $360,000 in compensatory damages and $2,600,000 in punitive damages, $86,000 in lost wages on the on the breach of contract claim, and a remitted $86,000 in double damages for willful withholding of wages and benefits under Washington law. The verdict form for compensatory damages did not distinguish between economic and non-economic damages, and defendant challenged the award for emotional distress. The court rejected defendants’ contention that the jury could not award damages for a discretionary annual $25,000 bonus:

> We hold that the jury reasonably could have awarded bonuses for these years; the evidence in the record demonstrates that in 1998, the year before he was terminated, Zhang exceeded his performance goal and had the highest sales of any American Gem employee. The jury reasonably could have concluded that Zhang would have continued his outstanding work performance, entitling him to bonuses in each of the following four years and an additional $100,000 in economic damages. Thus the jury could have awarded up to $236,845 in economic damages, leaving only $123,155 in compensation for emotional distress.
In any event, the court held, the damages for emotional distress would be proper regardless of whether they amounted to $223,155 or $123,155. The court rejected defendants’ argument that emotional distress must be supported by objective evidence and held that a plaintiff’s unsupported testimony alone can be sufficient. In the case at bar, plaintiff’s testimony was enough to support substantial damages:

Zhang’s testimony alone is enough to substantiate the jury’s award of emotional distress damages. Zhang testified that the job at American Gem was “my dream, working in this country,” and that when he was terminated, he was “troubled,” and “couldn’t believe” it. He testified that when American Gem sent letters to his suppliers stating that he had been terminated, the Chinese version of the letters made it seem like “I was either criminal or something very bad.” He stated that the termination “very, very hurt my dignity and reputation,” because the letters went to suppliers in Dalian, China, his hometown, and “people think there must be something wrong, because Wei is doing something wrong in the States.” He testified that people from China called him, concerned about the letters, and that American Gem “ruined my future business. Because doing business in China, your reputation and your credibility is the key.” Despite the fact that his testimony was hampered by language and translation problems, the jury obviously could have gleaned that he was greatly hurt and humiliated by his termination and the manner in which it was carried out. Under Passantino, this testimony is more than sufficient to support a substantial compensatory damage award for emotional distress. The award of compensatory damages was not “grossly excessive or monstrous.” . . . The district court committed no error, let alone a clear abuse of discretion, in denying the motion for a new trial on this basis.

_Id. at 1040–41 (citation omitted).

Hardeman v. City of Albuquerque, 377 F.3d 1106, 21 IER Cases 1096 (10th Cir. 2004), affirmed the judgment for $3.6 million in favor of the racial discrimination and First Amendment retaliation plaintiff.

K. **Liquidated Damages**

Liquidated damages under the FLSA are compensatory, not punitive. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707–08 (1945), stated:

We have previously held that the liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 62 S. Ct. 1216, 86 L. Ed. 1682. It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living ‘necessary for health, efficiency, and general well-being of workers'FN19 and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being.
Liquidated damages under the ADEA are punitive, not compensatory. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125, 36 FEP Cases 977 (1985), stated: “The legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature.”

*Cross v. New York City Transit Authority*, 417 F.3d 241, 252–57, 96 FEP Cases 239 (2d Cir. 2005), held that defendant’s status as a public agency did not exempt it from an award of liquidated damages. *Id.* at 256–57. The court rejected defendant’s argument that liquidated damages are unavailable unless plaintiffs show that a decisionmaker had actual knowledge of the ADEA, holding that “reckless disregard” is an alternative basis for finding liability. The court stated:

In this case, the evidence was sufficient to support a jury finding that the defendants recklessly disregarded federal law prohibiting age discrimination. Viewed in the light most favorable to the plaintiffs, the evidence shows that Transit Authority supervisors who made age-hostile remarks to and about Cross and Francis deliberately afforded these men less training than younger provisional Maintainers in order to have an excuse to demote them. The creation of a calculated subterfuge to support an adverse employment action supports an inference that the employer knew or recklessly ignored the fact that their real reason for demoting the plaintiffs—age—was unlawful.

*Id.* at 253 (citations omitted). The court also relied on the fact that the union had complained of racial discrimination against these older African-American employees:

Further supporting this inference is evidence that the union specifically complained to defendants that their treatment of Cross and Francis was impermissibly discriminatory. Although these complaints apparently focused on plaintiffs’ race rather than age, the fact that defendants ignored the warning and proceeded to demote plaintiffs, to replace them with younger Helpers, and to place these younger hires in a structured training program strengthens the inference that the defendants were “indifferent” to whether federal law proscribed age discrimination; their “calculated” purpose was to develop a corps of young Maintainers.

*Id.* (citation omitted).

*Hildebrandt v. Illinois Department of Natural Resources*, 347 F.3d 1014, 1031, 92 FEP Cases 1441 (7th Cir. 2003), affirmed in part and reversed in part the grant of summary judgment to the Title VII and § 1983 gender discrimination defendants. The court held that liquidated damages under the Equal Pay Act are compensatory in nature, to compensate for the hard-to-calculate losses of not having received the proper pay in time.

*Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771, 777–78, 87 FEP Cases 219, 81 E.P.D. ¶ 40,807 (7th Cir. 2001), affirmed the jury’s award of liquidated damages to the ADEA plaintiff. The court rejected the defendant’s argument that liquidated damages were improper because the hiring manager was ignorant of the ADEA. “Phillips’s general manager did testify that he was not aware that it was illegal to discriminate on the basis of age, but as this circuit has held, leaving managers with hiring authority in ignorance of the basic features of the discrimination
laws is an ‘extraordinary mistake’ for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference.” *Id.* at 778. The court rejected the defendant’s argument that the printed message on its application forms, acknowledging that the ADEA prohibits discriminating against applicants over the age of 40, demonstrates a good-faith effort to comply and bars the imposition of liquidated damages. “However, this evidence appears more harmful to Phillips than helpful, because the jury could easily have concluded that printing this statement on the application but then making no effort to train hiring managers about the ADEA shows that Phillips knew what the law required but was indifferent to whether its managers followed that law.” *Id.*

*Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 322, 99 FEP Cases 974 (6th Cir. 2007), reversed the grant of judgment as a matter of law to the ADEA retaliation defendant but upheld the lower court’s denial of a requested instruction on liquidated damages, because there was no evidence of a knowing violation of law.

L. **Punitive Damages**

1. **State Farm v. Campbell**

*State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), reversed in a 6-3 decision the award of $145 million in punitive damages for bad-faith failure to defend an accident claim, where plaintiffs’ post-remittitur award for compensatory was only $1 million. The Court held that the award was excessive and violated the Due Process Clause. Discussing its concerns with punitive damage awards, the Court stated:

> Our concerns are heightened when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded. Vague instructions, or those that merely inform the jury to avoid “passion or prejudice” . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.

*Id.* at 1520. The Court elaborated on the three standards it had set forth in *BMW v. Gore*, 517 U.S. 559 (1996).

The first factor is the degree of reprehensibility of the defendant’s conduct. The Court found that defendant’s alteration of records to make its insureds appear less culpable, and its false pretrial assurances to its insureds that their assets would be safe if the case went to trial (contrasting with its post-trial statement that they should put their house up for sale), and the evidence of a pattern of such conduct, justified an award of punitive damages even after taking into account the amount of the compensatory damages. *Id.* at 1521. However, this is only economic harm. The Court took sharp exception to plaintiffs’ reliance on evidence that this conduct was part of a nationwide pattern, and that this case was an occasion to punish State Farm for the nationwide pattern, particularly in light of the fact that “much of the out-of-state conduct was lawful where it occurred.” *Id.* at 1522. There was no specific instruction that the evidence could be considered only for background purposes:

> Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant’s action in the State where it is tortious, but that conduct
must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.

*Id.* at 1522–23 (citation omitted). The Court held that there was no link between the award and the injury for which the award was made, and that the absence of such a link created the risk that multiple awards of punitive damages might be made for the same conduct:

For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells’ harm. A defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. 65 P.3d at 1149 (“Even if the harm to the Campbells can be appropriately characterized as minimal, the trial court’s assessment of the situation is on target: ‘The harm is minor to the individual but massive in the aggregate’ “). Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. Gore, supra, at 593, 116 S.Ct. 1589 (BREYER, J., concurring) (“Larger damages might also ‘double count’ by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover”).

*Id.* at 1523. The Court held that, for the same reasons, the award could not be justified on the ground that the defendant was a recidivist. While recidivism justifies a higher award, and while recidivism need not be shown by identical situations, “the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length.” The Court said that these problems were exacerbated by the introduction of “even more tangential” evidence on the personal life of an employee and on the corruption of employees by the practices challenged. *Id.* “In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.” *Id.* at 1524.

The second Gore factor is the ratio between harm or potential harm to the plaintiff and the punitive damages award. The Court refused to apply a bright-line rule, but stated:

Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due
process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . or, in this case, of 145 to 1.

Id. at 1524 (citations omitted). The Court stated that there may be exceptions justifying higher awards:

Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where “a particularly egregious act has resulted in only a small amount of economic damages.” Ibid.; see also ibid. (positing that a higher ratio might be necessary where “the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine”). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.

In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio. The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them. The compensatory damages for the injury suffered her, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element. See RESTATEMENT (SECOND) OF TORTS § 908, Comment c, p. 466 (1977) (“In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant’s act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both”).

Id. at 1524–25. The Court held that the defendant’s wealth does not justify deviation from these standards.

The third Gore standard is the relationship between the punitive damages award and civil penalties authorized or imposed in comparable cases. The Court stated that a criminal penalty shows that the state regards the conduct as serious, but that it has less utility than other factors in determining the amount of the award. Id. at 1526.
2. Punitive-Damage Amounts After State Farm: Civil Rights Cases

Rodriguez-Marin v. Rivera-Gonzalez, 438 F.3d 72, 84 (1st Cir. 2006), affirmed the punitive damages awarded by the jury: “The jury awarded Rodríguez back pay of $3,500 per month, $180,000 in compensatory damages, and $120,000 in punitive damages against Dávila. The jury awarded Escobar back pay of $3,306 per month, $105,000 in compensatory damages, and $195,000 in punitive damages against Dávila.” Id. at 79. The court held that the award was reasonable:

The jury found that Dávila intentionally demoted plaintiffs because of their political affiliation. Dávila’s act also jeopardized plaintiffs’ livelihood. As a result of their demotions, Rodríguez’s salary was reduced by 60 percent and Escobar’s salary was reduced by 43 percent. Both plaintiffs suffered harms to their professional careers, were unable to meet their financial obligations because of their reduced salaries, and suffered emotional distress for which they sought medical attention.

Id. at 85. In addition, the multiple of compensatory damages, and their magnitude, was favorable.

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 102–03 (1st Cir. 2003), cert. denied, 541 U.S. 972 (2004), a § 1983 case challenging adverse employment actions motivated by political discrimination, the court relied on Campbell to uphold the jury’s award of $250,000 in punitive damages “given the reprehensibility of defendants’ conduct and the resultant injuries inflicted on Rivera and his family,” although the employee plaintiff received only $26,400 in economic damages and $125,000 in compensatory damages.

EEOC v. Federal Express Corp., 513 F.3d 360, 376, 20 AD Cases 204 (4th Cir. 2008), affirmed the award of $8,000 in compensatory damages and $100,000 in punitive damages for a failure to accommodate the charging party’s profound deafness by providing a certified ASL translator for meetings and important documents. The court rejected defendant’s challenge to the reprehensibility factor:

Although Lockhart suffered no physical harm from the actions complained of, his supervisors at FedEx were plainly indifferent to the fact that their failure to accommodate his disability could jeopardize his safety, and potentially implicate the safety of others. Because Lockhart was denied the ADA accommodations necessary for him to understand and participate in employee meetings and training sessions, he consistently missed updates about important subjects such as workplace safety, handling dangerous goods, interpreting hazardous labels, and potential anthrax exposure. Finally, Lockhart's supervisors were familiar with the mandate of the ADA and perceived the risk that their conduct was unlawful. Under the evidence, the jury was thus entitled to find that FedEx higher management officials, including Cofield and Hanratty, had acted reprehensibly with respect to Lockhart's need for ADA accommodations.

Id. at 377. The court also rejected defendant’s argument that the 12.5 ratio of punitive to compensatory damages was unconstitutionally excessive, holding that such ratios are merely...
instructive and do not establish bright lines. *Id.* at 377–78. Moreover, the court held that the fact the total award was well below the $300,000 statutory cap showed it was reasonable.

*Abner v. Kansas City Southern R. Co.*, 513 F.3d 154, 165, 102 FEP Cases 616 (*5th Cir.* 2008), affirmed the award of $125,000 in punitive damages to the Title VII and § 1981 racial harassment plaintiffs, although the jury did not award compensatory damages and no back pay was involved. The court reviewed recent decisions, and stated: “We similarly refuse to strike down the jury award here, as it fell well below the cap, and there is no indication that it resulted from jury bias or insufficient evidence of malice.”

*Williams v. Kaufman County*, 352 F.3d 994, 1016 (*5th Cir.* 2003), a case involving illegal strip searches of individuals without individualized probable cause, affirmed an award of $100 in nominal damages and $15,000 in punitive damages for each plaintiff. The court stated that the ratio between compensatory and punitive damages is less important in § 1983 civil rights cases than in other cases, and stated that ratios between punitive and compensatory damages do not apply to cases in which nominal damages are awarded.

*Lincoln v. Case*, 340 F.3d 283, 293 (*5th Cir.* 2003), a Fair Housing act case, affirmed the reduction of a punitive-damage award of $100,000 to $55,000 (the amount of the maximum civil penalty for first-time findings of violations) where the award of compensatory damages was only $500. The court rejected the argument that the $500 award was for nominal damages, and held that it was make-whole relief. The court’s discussion of reprehensibility emphasized that greater punitive damages are appropriate where there is a pattern of wrongdoing, or where the defendant falsely stated the apartment was unavailable, or where the defendant has taken advantage “of someone who is relatively unsophisticated or financially vulnerable.” (Citation omitted.) False statements to employees are very common, but under *Weaver* may constitute the “trickery or deceit” that will justify a higher award of punitive damages. As to the ratio, the court squarely rejected the argument that that 10 to 1 is the highest permissible ratio.

Case argues that any ratio of compensatory damages to punitive damages greater than 10:1 requires remittitur. We disagree. In *Watson*, this Court stated that “[t]here is no particular disparity between punitive and actual damages that will automatically result in our declaring a punitive damages award unconstitutional.” . . . Although the Supreme Court recently reminded lower courts of appeal that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process,” it once again declined to impose “a bright-line ratio which a punitive damages award cannot exceed.” *Campbell*, 123 S. Ct. at 1524. As we explained in *Watson*, the ratio merely gives the Court “an idea whether the size of the award is suspect.”

(Citations omitted.) The court thought that higher ratios may be more common in housing than in employment cases, because the actual injuries can be low in a housing case.

*Morgan v. New York Life Insurance Co.*, 559 F.3d 425, 441-43, 105 FEP Cases 1217 (*6th Cir.* 2009), affirmed the judgment of age discrimination liability and the $6 million compensatory-damages award under the Ohio Civil Rights Act, and held that plaintiff had shown entitlement to punitive damages under Ohio law. The court remanded the award of $10 million.
in punitive damages and held that the lower court should not award more in punitive damages than the $6 million awarded in compensatory damages.

Farfaras v. Citizens Bank and Trust of Chicago, 433 F.3d 558, 567, 97 FEP Cases 391 (7th Cir. 2006), affirmed the judgment on a jury verdict for the Title VII and State-law sex discrimination and sexual harassment plaintiff for $200,000 in compensatory damages and $100,000 in punitive damages against the individual State-law defendants, $50,000 against the corporate Title VII defendant, $9,314.48 in lost wages, and $436,766.75 in attorneys’ fees and costs. The court rejected defendants’ attack on the punitive-damage award. “The defendants openly boasted of their substantial wealth and indicated their belief that this wealth allowed them to flout the law and harass a young woman. One purpose of punitive damages is to dissuade defendants who are unaffected by compensatory damages from the misapprehension that they are beyond the reach of civil penalties.” The court also relied on the fact that the punitive-damages award was only half of the compensatory-damages award.

Lust v. Sealy, Inc., 383 F.3d 580, 590, 94 FEP Cases 645 (7th Cir. 2004), affirmed the judgment on a jury verdict for the Title VII sex discrimination plaintiff, but held that the award of $273,000 in punitive damages was excessive in light of defendant’s remedial efforts, and that $150,000 is the most that could be sustained. The court affirmed the award of $27,000 in compensatory damages, and held that the caps made it unnecessary to address the ratio between the punitive and compensatory damage awards. “When Congress sets a limit, and a low one, on the total amount of damages that may be awarded, the ratio of punitive to compensatory damages in a particular award ceases to be an issue of constitutional dignity . . . .” (Citations omitted.) The court also stated:

As we emphasized in Mathias, moreover, capping the ratio of compensatory and punitive damages makes sense only when the compensatory damages are large, which the statutory cap on total damages in employment discrimination cases precludes. Suppose Lust had been emotionally sturdier and incurred only $10 in emotional injury from the delay in her promotion to Key Account Manager. Would Sealy argue that in that case the maximum award of punitive damages would be $100? So meager an award would accomplish none of the purposes, discussed in Mathias, for which punitive damages are validly awarded.

Id. at 591. The case cited is Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 675–78 (7th Cir.2003). The court went on to state that imposing the maximum penalty in a case involving “slight, because quickly rectified, discrimination” would “impair marginal deterrence.” Id. Its argument is that employers in such a situation would have no incentive to avoid further discrimination “It’s as if the punishment for robbery were death; then a robber would be more inclined to kill his victim in order to eliminate a witness and thus reduce the probability of being caught and punished, because if the murdering robber were caught he wouldn’t be punished any more severely than if he had spared his victim.” Id.

Williams v. ConAgra Poultry Co., 378 F.3d 790, 796–97, 94 FEP Cases 266 (8th Cir. 2004), affirmed the judgment on a jury verdict for the Title VII, § 1981, and Arkansas Civil Rights Act racial harassment and termination plaintiff, including the remitted awards of $173,156 in compensatory damages and $500,000 in punitive damages on the termination claim
and compensatory damages of $600,000 on the harassment claim, but ordered that the punitive-damage award on the harassment claim be remitted to $600,000 from the jury’s verdict of $6,063,750. The court rejected defendant’s argument that it should not be liable for punitive damages, relying on incidents affecting the plaintiff, incidents affecting others of which the plaintiff was not aware, and relying on the egregiousness of the harassment. The court held that a reasonable jury could find malice from these facts and from the fact that ConAgra managers were inconsistent in their reasons for firing plaintiff:

As we noted above, there was substantial evidence of egregious racial harassment at the El Dorado plant, and although Mr. Williams did not testify to being aware of this activity, it could be probative of the state of mind of ConAgra’s managers in firing him. Furthermore, at trial there were contradictions in the testimony of ConAgra managers with respect to the basis for Mr. Williams’s firing. Thus, in this case the same evidence that the jury used to support its finding of racial motivation in Mr. Williams’s discharge also supports an inference of intentional and malicious conduct by ConAgra.

Id. at 796. The court also held that there was sufficient evidence to support a jury determination of reckless indifference on plaintiff’s harassment claim, because plaintiff made many complaints to upper management about his supervisor’s harassment, over several years, and no meaningful action was taken. The court held that the $6,063,750 punitive-damage award on the harassment claim was unconstitutionally excessive “for three interrelated reasons.” “First, in upholding the award the district court improperly relied on evidence of misconduct by ConAgra unrelated to Mr. Williams’s claim. Second, the punitive damages award is far in excess of what analogous statutes would allow. Finally, the ratio of punitive damages to compensatory damages far exceeds the levels that the Supreme Court has suggested are consistent with due process.” Id. at 796. As to the first, the court stated:

Tying punitive damages to the harm actually suffered by the plaintiff prevents punishing defendants repeatedly for the same conduct: If a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative punitive damages award. Where there has been a pattern of illegal conduct resulting in harm to a large group of people, our system has mechanisms such as class action suits for punishing defendants. Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff, however, deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure.

That does not mean that conduct in other cases is always irrelevant when assessing the defendant’s reprehensibility. An incident that is recidivistic can be punished more harshly than an isolated incident. . . . In determining what constitutes a previous example of the same conduct, however, we must be careful not to let the exception swallow the rule. By defining his or her harm at a sufficiently high level of abstraction, a plaintiff can make virtually any prior bad acts of the defendant into evidence of recidivism. . . .

The Supreme Court has therefore emphasized that the relevant behavior must be
defined at a low level of generality. “[E]vidence of other acts need not be identical to have relevance in the calculation of punitive damages,” id., but the conduct must be closely related.

Id. at 797 (emphasis in original). The question whether particular incidents are sufficiently factually and legally similar is not always simply, as the court’s application of the standard shows:

In upholding the punitive damages award on the harassment claim, we find that the district court improperly relied on evidence of harassment not suffered by Mr. Williams that was insufficiently similar to his experiences to be evidence of recidivism under the narrow exception set forth in State Farm. In particular, the district court relied extensively on the testimony of Mr. Johnican who stated that he saw black dolls hung from nooses around the plant. He also reported invitations to KKK barbecues and seeing a long racist joke about keeping black individuals out of heaven posted in the factory. Another black employee, James Atkins, testified that he was invited on KKK hunting trips, where he was to serve as the hunted. He also testified to seeing nooses left about the factory. Tasha Moore testified that female black employees who responded favorably to sexually suggestive banter were extended the privileges of white employees, while black women who did not respond favorably were, along with other black employees, given less favorable treatment. Mr. Williams never testified to being aware of these events, let alone being the target of similar behavior. We hold that this misconduct is insufficiently similar to that of which Mr. Williams was the object to count as evidence of its recidivist character.

The district court did, however, identify evidence that would fall within the State Farm recidivism exception. Mr. Atkins testified that white managers were extended privileges, like travel at company expense, unavailable to black employees. Ms. Moore testified that black employees were given shorter breaks than white employees. These instances are factually similar to the disparate work assignments that Mr. Williams testified about. Mr. Johnican testified to the widespread use of racist language of the kind that Mr. Williams complained of. Once the evidence has been subject to the winnowing required by State Farm, ConAgra’s conduct in Mr. Williams’s case remains reprehensible, but it is less appalling than the general picture of ConAgra’s misconduct that the district court drew.

Id. at 797–98. The court stated that “it would be inappropriate for the courts simply to extend the Title VII limitations to § 1981 cases under the guise of interpreting the Constitution,” and continued: “In this case, the award of punitive damages alone on the harassment claim was $6,063,750, more than twenty times the Title VII limit. We do not hold that there is any constitutionally required ratio between § 1981 damages awards and the Title VII cap, but so huge a discrepancy when coupled with the other infirmities that we discern in this award is telling and hard to ignore.” Id. at 798. The court then addressed the ratio between compensatory and punitive damages, and held that there was no simple test. “Rather, the mathematics alerts the courts to the need for special justification. In the absence of extremely reprehensible conduct against the plaintiff or some special circumstance such as an extraordinarily small compensatory
award, awards in excess of ten-to-one cannot stand.” *Id.* It held that this case did not present such an extreme, and continued:

Mr. Williams’s large compensatory award also militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *State Farm*, 538 U.S. at 425, 123 S. Ct. 1513. Mr. Williams received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on Mr. Williams’s harassment claim be remitted to $600,000.

*Id.* at 799.

*Bains LLC v. Arco Products Co.*, 405 F.3d 764, 770–71 (9th Cir. 2005), affirmed the judgment of liability and the award of $50,000 in compensatory damages for losses caused by breach of contract and $1 in nominal damages for racial discrimination pursuant to the rule that a corporation cannot claim emotional distress damages, but held that the award of $5 million in punitive damages to the Sikh-owned plaintiff was excessive and that the most that could be allowed was between $300,000 and $450,000. The court limited its prior holdings:

Flying B argues that we should sustain the $5 million amount under *Swinton*, because there we upheld a $1 million punitive damages for racial harassment where the compensatory damages award was $35,600. That argument is not persuasive for several reasons. First, *Swinton* involves a much lower award, $1 million instead of $5 million, and less than one-third the ratio—punitive damages that were only 28, not 100, times the compensatory damages. Second, we decided *Swinton* before the Supreme Court decided *State Farm*, which limits *Swinton*. *State Farm* emphasizes and supplements the *BMW* limitation by holding that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” In *Zhang v. American Gem Seafoods, Inc.*, a post-*State Farm* § 1981 race discrimination case, we took note that “few awards exceeding a single digit ratio” will satisfy due process, although this is not a “brightline rule,” and upheld the award because it was only seven times the amount of compensatory damages.

We need not rely solely on the ratio, because the third *BMW* guidepost—which looks to the difference between the amount of punitive damages awarded and the civil penalties authorized or imposed in comparable cases—provides us with another measure that restrains the permissible amount. Both pre-*State Farm* in *Swinton*, and post-*State Farm* in *Zhang*, we noted that the $300,000 statutory limitation on punitive damages in Title VII cases was an appropriate benchmark for reviewing § 1981 damage awards, even though the statute did not apply to § 1981 cases.

Flying B argues that the huge corporate assets of ARCO justify a higher award than might be justified for a defendant less able to pay it. A punitive damages award is supposed to sting so as to deter a defendant’s reprehensible conduct, and juries have traditionally been permitted to consider a defendant’s assets in determining an award that
will carry the right degree of sting. But there are limits. “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award,” and “cannot make up for the failure of other factors, such as ‘reprehensibility,’ to constrain significantly an award that purports to punish a defendant’s conduct.”

Thus what we are left with is a case of highly reprehensible conduct, though not threatening to life or limb, that caused economic harm to a corporation. The jury found $50,000 of actual harm, and, as this is not the “rare case” for which State Farm leaves room, the ratio approach suggests that punitive damages could not, consistent with due process, exceed $450,000. Comparing the award to the civil penalty authorized in Title VII for comparable harm suggests that Congress regards $300,000 as the highest appropriate amount in somewhat comparable cases. The conclusion we reach is that the district court must, to comply with State Farm (which came down after the district court had ruled) and BMW, reduce the amount of punitive damages to a figure somewhere between $300,000 and $450,000.

Id. at 776–77 (footnotes omitted).

Comment: State Farm refused to establish the bright line the panel in this case sees, and the panel overlooked important qualifications in State Farm precluding the panel’s insistence on a ratio of less than ten. The panel also ignored the Congressional purpose in enacting a damages cap exclusively for Title VII and some ADA and Rehabilitation Act cases, while failing to do so for § 1981, a statute amended by the Civil Rights Act of 1991 but left without a damages cap. Plaintiffs’ attorneys should seek en banc review of any decision following the reasoning above, and should in the meantime be careful to preserve their arguments for larger damages in the event that this aspect of Flying B is overruled.

Bell v. Clackamas County, 341 F.3d 858, 867–68, 92 FEP Cases 879 (9th Cir. 2003), reversed the trial court’s reduction of 42 U.S.C. § 1981 and § 1983 punitive-damage awards against defendant deputies who were fellow employees of the plaintiff, and who had retaliated against him for his complaints of racial discrimination. The court remanded the punitive damages with instructions that the trial court evaluate the individual reprehensibility of each individual defendant’s conduct, and that it consider evidence of each defendant’s financial net worth to the extent that the deputy would not be reimbursed by the County for the punitive damage award against him.

Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1043–44, 92 FEP Cases 641 (9th Cir. 2003), cert. denied, 541 U.S. 902 (2004), an individual Title VII and § 1981 case involving anti-Asian discrimination, affirmed the award of $2.6 million in punitive damages, $360,000 in compensatory damages for emotional distress, and $193,000 in lost wages and wages unlawfully withheld. The court observed that intentional racial discrimination was far more reprehensible than the mere economic harm involved in BMW v. Gore and Campbell. It added: “Racial discrimination often results in large punitive damage awards.” Id. at 1043 (citations omitted). The court found that the seven-to-one ratio was permissible. Id. at 1044. The court refused to consider the $300,000 punitive-damages cap in the Civil Rights Act of 1991 as a civil penalty.
limiting the permissible size of the punitive-damages award under § 1981 because Congress had refused to cap such damages under § 1981. It held that the ratio between the $2.6 million punitive-damages award and the $300,000 cap was reasonable. *Id.* at 1044–45.

*Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1282–85, 102 FEP Cases 716 (11th Cir. 2008), affirmed the lower court’s refusal to order a remittitur on the jury award of $500,000 in punitive damages, on top of the award of $27,160.59 in back pay and $27,160.59 in damages for mental anguish for the Title VII and § 1981 retaliation plaintiff.

One factor that suggests that the misconduct of Bagby Elevator was reprehensible is that Goldsmith suffered both economic harm and emotional and psychological harm. Goldsmith's relationships with his family suffered, he attended counseling after his termination, and his termination made him feel “hurt” and “upset.” . . . The record also establishes that Goldsmith was financially vulnerable and had to borrow money after he was terminated.

Another factor that suggests that the misconduct of Bagby Elevator was reprehensible is that Bagby Elevator engaged in a pattern of retaliatory and discriminatory misconduct. Three other employees who had filed EEOC charges or complained about racial slurs were terminated before Goldsmith. There also was substantial evidence, as discussed above, that Bagby Elevator engaged in a pattern of reckless indifference to its employees’ federal rights.

*Id.* at 1283. The court also rejected defendant’s argument that the 9.2-to-1 ratio of punitive to compensatory damages (including back pay) was excessive. The court stated that a higher ratio could also have been upheld. It noted that Bagby had 150 employees, and a Title VII damages cap of $100,000. It held that “an award of five times that amount is not excessive.” *Id.* at 1284.

*Bogle v. McClure*, 332 F.3d 1347, 92 FEP Cases 16 (11th Cir. 2003), cert. dismissed, 124 S. Ct. 1168 (2004), affirmed an award of $500,000 in compensatory damages and $2 million in punitive damages to each plaintiff Caucasian librarian harmed by racial discrimination in violation of § 1983. As to reprehensibility, the court stated:

Appellants’ wrongdoing was more than mere accident. There was evidence that, in the face of repeated warnings, Appellants intentionally discriminated against the Librarians on the basis of race and used trickery and deceit to cover it up under the guise of a “reorganization.” Furthermore, Appellants intentionally discriminated against the Librarians with full knowledge of recent cases of employment discrimination brought by Caucasian employees against other Fulton County officials which resulted in jury verdicts for the plaintiffs or settlements. A reasonable jury could have concluded from the evidence that Appellants knew that transferring the Librarians on the basis of race was illegal, were warned not to make the transfers, and knew that other Fulton County officials had been caught and punished for making employment decisions on the basis of race; yet Appellants intentionally discriminated against the Librarians and concocted the “reorganization” plan to hide their discriminatory motives. Repeatedly, courts have found intentional discrimination to be reprehensible conduct under *Gore*’s first guidepost.
Id. at 1361 (citation omitted). The court found the 4:1 ratio to be permissible notwithstanding the large compensatory-damage awards, in light of the reprehensibility of the conduct. It rejected the argument that the $300,000 damages cap for Title VII claims should limit the damages awarded under § 1983. The court emphasized that Congress had refused to apply the same caps to § 1983 claims despite the opportunity to do so. “Furthermore, although the punitive damages awarded here are more than the damages available under Title VII for analogous conduct, the difference is not enough, by itself, to suggest that the punitive damages award violates due process.” Id. at 1362.

3. Punitive-Damage Amounts After State Farm: Other Cases

Exxon Shipping Co. v. Baker, 554 U.S. 471, 515 (2008), a Federal maritime law case, held that in light of the substantial compensatory damages awarded, a 1:1 punitive damages ratio was appropriate:

Applying this standard to the present case, we take for granted the District Court's calculation of the total relevant compensatory damages at $507.5 million. . . . A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount.

Justice Scalia, joined by Justice Thomas, concurred. Id. at 515. Justice Stevens concurred in part and dissented in part. Id. at 516-23. Justice Ginsburg concurred in part and dissented in part. Id. at 523-25. Justice Breyer concurred in part and dissented in part. Id. at 525-26.

Disorbo v. Hoy, 343 F.3d 172 (2d Cir. 2003), reversed a $400,000 compensatory-damage award to the female plaintiff for her serious injuries, holding that $250,000 would be adequate, and reversed the $1.275 million punitive-damages award and held that a reasonable amount would be $75,000 based on other awards, because only one police officer beat the plaintiff woman, and he stopped beating and choking her when she was about to lose her vision.

Romanski v. Detroit Entertainment, L.L.C., 428 F.3d 629 (6th Cir. 2005), was a § 1983 unlawful arrest case. Plaintiff was visiting the Motor City Casino, found a nickel in slot machine tray, and tried to use it to play on another machine. She was arrested. The jury awarded $279.05 in compensatory damages, and $875,000 in punitive damages against the casino. The court required a remittitur to $600,000 or a new trial, saying that $600,000 was enough to deter similar conduct and was in line with similar awards.

Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003) (Posner, J.), upheld an award of $186,000 apiece, and $5,000 in compensatory damages apiece, to two plaintiffs bitten by bedbugs. The court held that one of the factors supporting the award was the zealous nature of the defense. It explained:

And still today one function of punitive-damages awards is to relieve the pressures on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. An example is deliberately spitting in a person’s face, a criminal assault but because minor readily deterrable by the levying of what amounts to a civil fine through a suit for damages for the tort of battery. Compensatory damages would not do the trick in such a case, and this for three reasons: because they are difficult to determine in the case of acts that inflict largely dignitary harms; because in the spitting
case they would be too slight to give the victim an incentive to sue, and he might decide instead to respond with violence—and an age-old purpose of the law of torts is to provide a substitute for violent retaliation against wrongful injury—and because to limit the plaintiff to compensatory damages would enable the defendant to commit the offensive act with impunity provided that he was willing to pay, and again there would be a danger that his act would incite a breach of the peace by his victim.

When punitive damages are sought for billion-dollar oil spills and other huge economic injuries, the considerations that we have just canvassed fade. As the Court emphasized in Campbell, the fact that the plaintiffs in that case had been awarded very substantial compensatory damages—$1 million for a dispute over insurance coverage—greatly reduced the need for giving them a huge award of punitive damages ($145 million) as well in order to provide an effective remedy. Our case is closer to the spitting case. The defendant’s behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional. And the defendant may well have profited from its misconduct because by concealing the infestation it was able to keep renting rooms. Refunds were frequent but may have cost less than the cost of closing the hotel for a thorough fumigation. The hotel’s attempt to pass off the bedbugs as ticks, which some guests might ignorantly have thought less unhealthful, may have postponed the instituting of litigation to rectify the hotel’s misconduct. The award of punitive damages in this case thus serves the additional purpose of limiting the defendant’s ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is “caught” only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.

Finally, if the total stakes in the case were capped at $50,000 (2 x [$5,000 + $20,000]), the plaintiffs might well have had difficulty financing this lawsuit. It is here that the defendant’s aggregate net worth of $1.6 billion becomes relevant. A defendant’s wealth is not a sufficient basis for awarding punitive damages. . . . That would be discriminatory and would violate the rule of law, as we explained earlier, by making punishment depend on status rather than conduct. Where wealth in the sense of resources enters is in enabling the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33–40 percent contingent fee.

In other words, the defendant is investing in developing a reputation intended to deter plaintiffs. It is difficult otherwise to explain the great stubbornness with which it has defended this case, making a host of frivolous evidentiary arguments despite the very modest stakes even when the punitive damages awarded by the jury are included.

As a detail (the parties having made nothing of the point), we note that “net worth” is not the correct measure of a corporation’s resources. It is an accounting artifact that reflects the allocation of ownership between equity and debt claimants. A firm financed largely by equity investors has a large “net worth” (= the value of the equity
claims), while the identical firm financed largely by debt may have only a small net
worth because accountants treat debt as a liability.

_Id._ at 676–78 (citations omitted).

*Quigley v. Winter*, 598 F.3d 938 (8th Cir. 2010), affirmed the jury verdict under the Fair
Housing Act, and held that the plaintiff tenant had established sexual harassment by the landlord
and thus a hostile housing environment. The jury awarded $250,000 in punitive damages, and
the lower court reduced the award to $20,527.50. The court explained the lower court’s
reduction: “The district court noted the punitive damages award was more than eighteen times
the compensatory damages award ($13,685.00) and found the award was excessive and did not
comport with due process. The district court reduced the award to $20,527.50, which amounted
to one and a half times the compensatory damages award, ‘for the simple reason that [Winter's]
conduct ... can be considered only as to what he said and did directly to [Quigley].’” _Id._ at 953.
The Eighth Circuit held that the jury should be presumed to follow the instruction that its award
should be based only on defendant’s conduct towards Quigley, and held that the conduct was
reprehensible but a single-digit multiplier was appropriate. Relying on the penalty structure of
$55,000 for first-time violations in cases brought by the Attorney General, the court stated:

> While we agree with the district court that the jury’s punitive damage award was
> excessive, we disagree with the district court’s assessment that $20,527.50, which is one
> and a half times the compensatory award, sufficiently reflects the reprehensibility of
> Winter’s conduct. We conclude an appropriate punitive damages award in this case is
> $54,750. This amount is four times greater than Quigley’s compensatory damages
> ($13,685.00), which we find is an appropriate ratio under the circumstances of this case.
> This amount comports with due process, while achieving the statutory and regulatory
> goals of retribution and deterrence. See *Campbell*, 538 U.S. at 425.

_Id._ at 955-56.

4. **Entitlement Where No Compensatory or Nominal Damages Are
   Awarded**

_Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 87 FEP Cases 456, 81 E.P.D. ¶ 40,800
(2nd Cir. 2001), affirmed the judgment on a jury verdict for the Title VII hostile-environment
plaintiff. The jury did not award any compensatory or nominal damages, but did award the
statutory maximum of $100,000 in punitive damages. The court summarized the law of the
Circuits:

> The plain language of the statute does not expressly state whether punitive
damages are available absent an award of actual damages, and the Courts of Appeals that
have considered the question have reached different results. The Seventh Circuit holds
that punitive damages may be awarded in a Title VII case absent an award of actual or
compensatory damages. See *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008,
1010-11 (7th Cir. 1998) (Easterbrook, J.) (affirming jury award of punitive damages
without actual damages and apparently without nominal damages). And, under an
analogous provision of the Fair Housing Act, the Third Circuit has held that punitive
damages are available absent awards of actual or nominal damages. See Alexander v.
Riga, 208 F.3d 419, 430-34 (3d Cir. 2000), cert. denied, 531 U.S. 1069, 121 S. Ct. 757,
148 L. Ed. 2d 660 (2001). By contrast, under the First Circuit’s rule, “punitive damages
award must be vacated absent either a compensatory damages award, or a timely request
for nominal damages.” Kerr-Selges v. Am. Airlines, Inc., 69 F.3d 1205, 1215 (1st Cir.
1995). Similarly, on the question of punitive damages under the Fair Housing Act, the
Fourth and Fifth Circuits have held that punitive damages are not available absent a
compensatory damages award. See Louisiana ACORN Fair Hous. v. LeBlanc, 211 F.3d
298, 303 (5th Cir. 2000) (recognizing that punitive damages are not available in absence
of actual damages unless there has been a constitutional violation), cert. denied, [532
U.S. 904] __ U.S. __ (2001); People Helpers Found., Inc. v. City of Richmond, 12 F.3d
1321, 1327 (4th Cir. 1993).

Id. at 357. Further surveying the law, the court found that there was no consensus on the
common-law rule. “The requirement of actual damages has been described by commentators as
the majority rule, see PROSSER & KEETON ON THE LAW OF TORTS § 2, at 14 (5th ed. 1984), but it
has also been sharply criticized, see id; see also RESTATEMENT (SECOND) OF TORTS § 908 cmt.
(c) (1979) ( ‘[It is not essential to the recovery of punitive damages that the plaintiff should have
suffered any harm, either pecuniary or physical.’).’).” Id. at 358. The court distinguished the
general concerns about allowing awards of punitive damages without proof of actual harm: “In
Title VII cases, however, the statutory maxima capping punitive damage awards strongly
undermine the concerns that underlie the reluctance to award punitive damages without proof of
actual harm.” Id. at 359. The court continued:

Furthermore, the objectives of punitive damages by definition differ from the
objectives of compensatory damages. There is some unseemliness for a defendant who
engages in malicious or reckless violations of legal duty to escape either the punitive or
deterrent goal of punitive damages merely because either good fortune or a plaintiff’s
unusual strength or resilience protected the plaintiff from suffering harm. It is often
“precisely [in the cases where no actual harm is shown] that the policy of providing an
incentive for plaintiffs to bring petty outrages into court comes into play.” PROSSER &
KEETON ON TORTS § 2, at 14; see also RESTATEMENT (SECOND) OF TORTS § 908 cmt.
(c).

As for nominal damages, they are generally no more than symbolic. The need for
such a symbol of opprobrium in the absence of compensatory damages disappears where
the factfinder has signified its opprobrium by making an express award of punitive
damages. And to make enforcement of the jury’s award of punitive damages turn on
whether the jury also awarded purely symbolic nominal damages carries a likelihood of
defeating the jury’s intention as the result of confusion.

In conclusion, in Title VII cases, we see no reason to make award of actual or
nominal damages a prerequisite to the award of punitive damages. We hold that in Title
VII cases, where the factfinder has found in a plaintiff’s favor that the defendant engaged
in the prohibited discrimination, punitive damages may be awarded within the limits of
the statutory caps if the defendant has been shown to have acted with a state of mind that
makes punitive damages appropriate, regardless whether the plaintiff also receives an
award of compensatory or nominal damages.

*Corti v. Storage Technology Corp.*, 304 F.3d 336, 341–43, 89 FEP Cases 1477 (4th Cir. 2002), affirmed the judgment on a Title VII RIF jury verdict for $100,000 in punitive damages, back pay, and prejudgment interest. The court held that punitive damages may be awarded for a Title VII violation even without an award of compensatory damages, where actual harm is shown by the award of back pay. The court explained:

Unlike compensatory damages at common law, compensatory damages under §1981a are defined to omit back pay, which is “the most obvious economic damage in a wrongful discharge case.” . . . The omission occurs under the 1991 Act to prevent double recovery. . . . For this reason, the court instructed the jury that “[i]n calculating damages, you may not consider any wages or benefits that Ms. Corti may have lost. The award of lost pay or benefits should you find StorageTek liable, will be determined by the Court.” . . We believe that the award of back pay clearly establishes that Corti suffered injury. [FN12] Because back pay awards serve a similar purpose as compensatory damage awards, the “familiar tort mantra” that punitive damages may not be assessed in the absence of compensatory damages will not aid StorageTek in this case. . . . [FN13]. In Title VII cases, a jury’s punitive damage award will stand even in the absence of compensatory damages if back pay has been awarded.

FN12. StorageTek has not offered, nor can we find, any reason to disallow punitive damages merely because the court, not the jury, is responsible for awarding back pay under the statutory scheme.

FN13. After *Hennessy*, the Seventh Circuit went further, holding that a punitive damage award survives even without an award of back pay. See *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998); see also *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 357 (2d Cir. 2001). Because back pay was awarded in the case at hand, we need not reach this question today.

*Id.* at 342–43. Judge Niemayer concurred. *Id.* at 343–45.

*Abner v. Kansas City Southern R. Co.*, 513 F.3d 154, 102 FEP Cases 616 (5th Cir. 2008), affirmed the award of $125,000 in punitive damages to the Title VII and § 1981 racial harassment plaintiffs, although the jury did not award compensatory damages and no back pay was involved. The court stated at 160: “We agree with the conclusion of several of our sister circuits that a punitive damages award under Title VII and § 1981 need not be accompanied by compensatory damages. We base our holding on the language of the statute, its provision of a cap, and the purpose of punitive damages under Title VII.” The court relied in part on the provisions of the Civil Rights Act of 1991 treating compensatory and punitive damages as independent. It continued:

The grounding of punitive damages between the high threshold of culpability for an award and a cap of the amount in any event upholds Congress’s purpose in enacting the 1991 amendments to Title VII—to provide “additional remedies,” in the form of damages, to prevent discrimination in the workplace while mitigating the risk of
disproportionate awards. Injury that results from discrimination under Title VII is often difficult to quantify in physical terms; preventing juries from awarding punitive damages when an employer engaged in reprehensible discrimination without inflicting easily quantifiable physical and monetary harm would quell the deterrence that Congress intended in the most egregious discrimination cases under Title VII. Indeed, there is some unseemliness for a defendant who engages in malicious or reckless violations of legal duty to escape either the punitive or deterrent goal of punitive damages merely because either good fortune or a plaintiff's unusual strength or resilience protected the plaintiff from suffering harm.

*Id.* at 163–64 (footnotes omitted). The court rejected defendant’s argument that the result violated *BMW v. Gore* and was unconstitutional:

As we see it, the combination of the statutory cap and high threshold of culpability for any award confines the amount of the award to a level tolerated by due process. Given that Congress has effectively set the tolerable proportion, the three-factor *Gore* analysis is relevant only if the statutory cap itself offends due process. It does not and, as we have found in punitive damages cases with accompanying nominal damages, a ratio-based inquiry becomes irrelevant. Accepting this analysis makes the sufficiency of evidence to support the statutory threshold a determinant of constitutional validity.

*Id.* at 164 (footnote omitted). The court then described the racial harassment that had occurred over the ten-year period from 1995 to 2005, and held that it was enough to support punitive damages:

Here, Plaintiffs, supervisors, and other witnesses testified to incidents of racially discriminatory behavior that occurred within the ten-year time frame of evidence permitted by the court. Elgie Abner testified about picking up a toolbox on which someone had written, “You lazy ni________s” and that, when he presented the box to a supervisor, the supervisor laughed. He also testified that a cement pillar in the workshop contained a large marking of “KKK” for a number of years, as did the fuel tanks and roofs of many locomotives in the shop, and that in May of 2005, “Abner is a lazy racist” was written on the walls in the bathroom of the workshop. “Ni________r go home” and “Lazy ni________s” were also written on the walls. Harry Brooks testified that foreman Gary Moore would, on the night shift, wait until a large thunderstorm came and then, laughing, send the workers out in the storm. He also testified that an electrical wire in the form of a noose was hanging outside of the workshop, that there was graffiti in the workshop bathrooms that said, “Ni________s stink” and “Ni________s go home,” and that supervisors “knew” of the graffiti and the noose. Napoleon Player testified that a supervisor called him “boy” in 1995 and that Gary Moore referred to him as a “rice-eating Ethiopian” and said that he was going to run two “black a________es off.” In 1995, Moore also allegedly referred to Napoleon Player's shift as the “c________n shift.” Napoleon Player also testified that he did not recall receiving any racial harassment training prior to retiring in June of 2003. Mr. Odom similarly testified that “the first [racial harassment policy] I got was ... if I'm not mistaken, August 2003.” Donald Harville testified that a company surgeon told him, when he arrived late for work in November of 2001, “That's it for you and your ni________buddies.” This and other evidence supports the jury's conclusion that KCSR supervisors
caused and/or failed to properly respond to numerous instances of racially derogatory behavior in the workplace.

Id. at 164–65 (footnotes omitted). The court then held that no award of nominal damages was required in order to support the award of punitive damages:

With respect to the district court’s award of nominal damages of $1 to each Plaintiff, we find such formalities to be unnecessary. We have required a district court to grant a plaintiff $1 in nominal damages when her constitutional rights were violated. Other circuits, however, have found that a jury verdict of liability under Title VII did not require a court to award a nominal damages award in the absence of a request that the jury determine nominal damages or a request for additur by the judge. Because the award of actual or punitive damages is capped under Title VII, we do not require a ceremonial anchor of nominal damages to tie to a punitive damages award.

Id. at 165 (footnotes omitted).

Hertzberg v. SRAM Corp., 261 F.3d 651, 656 n.3 (7th Cir. 2001), cert. denied, 2002 WL 232975, 70 USLW 3395, 70 USLW 3514 (U.S., Feb. 19, 2002) (No. 01–829), affirmed the award of $20,000 in punitive damages to the Title VII sexual harassment plaintiff in a case in which no compensatory damages were awarded, and in which the awards of back pay and front pay were reversed.

Salitros v. Chrysler Corp., 306 F.3d 562, 569, 13 AD Cases 1057 (8th Cir. 2002), affirmed the judgment for $100,000 in punitive damages for the ADA retaliation plaintiff where no back pay or compensatory damages were awarded. The court held that the award of front pay served the same function as an award of compensatory damages, in terms of demonstrating injury, and was sufficient to support the punitive-damage award.

Juarez v. ACS Government Solutions Group, Inc., 314 F.3d 1243, 90 FEP Cases 1104 (10th Cir. 2003), affirmed the judgment for the plaintiff in the amounts of $22,500 in back pay and $250,000 in punitive damages for racial and national origin discrimination in a RIF.

5. Entitlement Where Defendant Has Tried to Cover Up Its Acts

United States v. Space Hunters, Inc., 429 F.3d 416, 427–28 (2d Cir. 2005), reversed the denial of punitive damages under the Fair Housing Act, holding that there was ample evidence of malice or reckless indifference in defendant’s recidivism, erasing tape recordings of calls, use of vulgarity to drive away disabled applicants, and likelihood of future violations. The court explained:

First, there can be no dispute that McDermott was generally—indeed acutely—aware of the FHA. A consent judgment had been previously entered against him in which he was “personally” enjoined from violating the FHA, expressly including discriminating in housing on the basis of a disability. And the State of New York revoked his real estate license in 1997, in part because of FHA violations. Moreover, McDermott’s letters to HUD during the course of its investigation into Toto’s complaint demonstrate a vast, if skewed, awareness of the FHA. Thus, McDermott cannot argue that he did not know
about the FHA.

Second, the Government presented evidence that defendants “discriminate[d] in the face of a perceived risk that [their] actions ... violate[d]” the FHA. For example, the jury could have inferred that McDermott knew he was acting improperly based on the fact that he erased his recordings of the telephone conversations at issue in this case—recordings that he purportedly made to protect himself from allegations of misconduct. Cf. EEOC v. Wal-Mart Stores, Inc., 156 F.3d 989, 993 (9th Cir. 1998) (stating that evidence of a defendant’s actions to cover up discriminatory conduct can support an inference that the defendant acted with reckless indifference to a federally protected right).

Third, the record is awash with evidence of “egregious” and “outrageous” acts by defendants that could support an inference of the requisite “‘evil motive.’” McDermott did not simply hang up on relay calls. He used profanity “to chase them away from continuing to call back.” He told Toto to “eat shit, asshole”—not the most judicious of remarks—and that Space Hunters does not do business with disabled people. McDermott also threatened Toto with harassment charges if he called Space Hunters again. And McDermott told the HUD investigator that “if a disabled person, a hearing impaired person would come to [his] office . . . they would not gain entry into the building.”

Finally, given McDermott’s history, this case is particularly appropriate for consideration of punitive damages. “[T]he purpose of punitive damage awards is to punish the defendant and to deter him and others from similar conduct in the future.” McDermott is an FHA recidivist.

(Citations omitted.)

Fine v. Ryan International Airlines, 305 F.3d 746, 755, 89 FEP Cases 1543 (7th Cir. 2002), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff. The court held that plaintiff was entitled to the reduced $300,000 judgment for compensatory and punitive damages, reduced from the jury award of $6,000 in compensatory damages and $3.5 million in punitive damages. The court explained plaintiff’s entitlement:

There is more than sufficient evidence here to sustain the adjusted award of punitive damages. Ryan had an antidiscrimination policy of which all its managers were aware. That policy required employees to refer complaints of discrimination by supervisors to McGoldrick for investigation. McGoldrick, however, did not play her assigned role. Instead of investigating Fine’s accusations, she immediately turned Fine’s letter over to Looney. In addition, McGoldrick’s letter to Fine openly indicated that she was terminated for writing the October 2 letter, but Looney recorded in her personnel file that she was terminated for poor attendance and interpersonal skills. The jury obviously found the latter explanation to be pretextual, which permitted it to infer that Looney was aware that terminating Fine for her report of sex discrimination violated federal law. And there is no argument here that Looney was acting contrary to company policy or outside
the bounds of his authority, as President Ron Ryan himself concurred with Looney’s decision to fire Fine.

Worth v. Tyer, 276 F.3d 249, 269, 87 FEP Cases 994 (7th Cir. 2001), affirmed the Title VII sexual harassment verdict for the plaintiff. The court affirmed the punitive-damages awards of $5,000 for Title VII sexual harassment, $25,000 for retaliatory discharge, and $50,000 for battery in a case involving improper touching for two days, including touching the plaintiff’s breast near the nipple and maintaining the contact for several seconds, lying to police investigators about the incident, and lying in court papers about the incident for three years and not amending the papers until 13 days before the trial.

Beard v. Flying J, Inc., 266 F.3d 792, 799, 87 FEP Cases 1836 (8th Cir. 2001), affirmed the award of $12,500 in punitive damages for sexual harassment because “Flying J did nothing to discipline Mr. Krout despite the fact that Mr. Snider testified that he believed the allegations of harassment made against Mr. Krout. Flying J’s management, furthermore, stated that Mr. Krout did nothing wrong, and even accused the women of conspiring to remove Mr. Krout, again despite the fact that the manager responsible for investigating the allegations thought that they were credible.”

Juarez v. ACS Government Solutions Group, Inc., 314 F.3d 1243, 90 FEP Cases 1104 (10th Cir. 2003), affirmed the judgment for the plaintiff in the amounts of $22,500 in back pay and $250,000 in punitive damages for racial and national origin discrimination in a RIF. The court relied heavily on comparative evidence and evidence of bias against Mexicans by Mr. Nesmith. The court stated:

Applying these standards, we hold that Appellee presented sufficient evidence that ACS terminated Appellee despite a recognized risk of violating Title VII. Appellee presented evidence that Mr. Nesmith and other supervisory employees had received some EEO training and that Mr. Nesmith was the Equal Employment Opportunity Officer at the Fort Sill site. In conjunction, Appellee presented evidence that could lead the jury to conclude that Mr. Nesmith was involved in the RIF decision.

Id. at 1246. The court continued:

In addition, Appellee presented evidence of cover-up after the discriminatory action. Appellee introduced evidence that the Human Resources Department actively participated with management-level employees to cover up the discriminatory discharge of Appellee by giving a false reason for his discharge. Even though cover-up after the fact does not necessarily import previous evil intent, in the instant case, the jury could infer that the cover-up was planned prior to the discriminatory discharge.

Based on the evidence presented, the jury could determine that the merit spreadsheet was used merely in an attempt to justify the termination of certain individuals. Even though eight categories were supplied by Human Resources, ACS chose to use only six of those categories in rating employees. . . . The two categories supposedly not used in the RIF decision were tenure and past performance evaluation.
score. The jury could infer that these categories were intentionally excluded in an attempt to justify terminating Appellee.

Appellee also presented proof that ACS’s Human Resources Department failed to provide more detailed instructions and guidelines in the RIF or to review and monitor the RIF selection process. The totality of the evidence allowed the jury to determine “that the defendant acted with malicious, willful or gross disregard of a plaintiff’s rights over and above intentional discrimination.”

Id. at 1247.

6. **Entitlement Where Accommodation Was the Issue**

_Gagliardo v. Connaught Laboratories, Inc._, 311 F.3d 565, 570–71, 13 AD Cases 1345 (3rd Cir. 2002), affirmed the judgment on a jury verdict for the ADA plaintiff in the amount of $300,000 in punitive damages, holding that the defendant’s failure to provide a reasonable accommodation for the plaintiff justified the award. The court stated:

As the trial court concluded, Gagliardo produced sufficient evidence of CLI’s reckless indifference toward her statutory disability rights. Gagliardo presented evidence that CLI—through its employees—was aware she had MS. For example, Gagliardo produced evidence that her last supervisor, Judith Stout, and CLI’s human resources representative, Christine Kirby, discussed Gagliardo’s MS prior to Gagliardo’s dismissal. Gagliardo also produced evidence that Stout requested information concerning MS. She also offered evidence that she advised CLI of the limitations her condition imposed on her ability to perform her job and that a high level CLI employee—herself an MS sufferer—counseled Gagliardo regarding the impact of the disease. In addition, Gagliardo produced evidence that she had requested accommodation on multiple occasions and that CLI refused to act on any of those requests. Finally, Gagliardo demonstrated that CLI was aware of her federal disability rights, as Christine Kirby testified she was familiar with the ADA and responsible for ensuring CLI followed the ADA. In sum, there was sufficient evidence to support the jury’s award of punitive damages.

Id. at 573.

_Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc._, 439 F.3d 894, 903–04, 17 AD Cases 1153 (8th Cir. 2006), reversed the punitive damages award on a jury verdict to the ADA plaintiff. The court stated that Federal law imposes “[a] formidable burden” on plaintiffs seeking punitive damages, and continued:

Although we concluded sufficient evidence supports the jury's finding Dr Pepper intentionally and unlawfully discriminated against Canny by failing to accommodate him, Dr Pepper's conduct did not, as a matter of law, rise to the level of malice or reckless indifference.

Dr Pepper did not offer Canny reassignment to an available position in the warehouse because Dr Pepper believed Canny's poor vision created a safety risk to Canny
and to others. Dixson based that safety concern on a serious arm injury sustained by another employee in the warehouse just six months earlier. Dixson also testified she had “very, very serious concerns about [Canny’s] safety if he was operating . . . a forklift.” Dixson said she logically equated Canny’s inability to operate a motor vehicle, with an inability to operate motorized equipment in the plant. Dixson testified, “I believe that the basis of our decision to disallow [Canny] to drive a forklift would be substantiated by an OSHA investigator or by [a] medical professional as putting [Canny] and the other employees at undue risk.” Dr Pepper reasonably perceived itself caught between federal regulations under the Occupational Safety and Health Administration and federal law under the ADA, and made a culpable, but not malicious or reckless, decision based upon safety concerns.

Although these reasons are not enough to escape liability under the ADA, they do not constitute the type of malicious intent or reckless indifference required to support an award of punitive damages.

(Citations omitted.)

7. **Other Questions of Entitlement**

*Arrieta-Colon v. Wal-Mart Puerto Rico, Inc.*, 434 F.3d 75, 90, 17 AD Cases 769 (1st Cir. 2006), affirmed the judgment for the ADA harassment plaintiff on a jury verdict for $76,000 in compensatory damages and $160,000 in punitive damages. The court rejected defendant’s argument that there was no evidence supporting vicarious liability, where plaintiff had repeatedly complained to store-level officials:” Wal-Mart argues that any conscious wrongdoing by supervisors could not be imputed to Wal-Mart because there was a lack of evidence that the managers who taunted Arrieta and ignored his complaints were acting within the scope of their employment. We reject this argument; we agree with the district court that, on these facts, a reasonable jury could have found that the supervisors were acting in the scope of their employment.”

*Thomas v. iStar Financial, Inc.*, 629 F.3d 276, 281, 110 Fair Empl.Prac.Cas. (BNA) 1761 (2d Cir. 2010) (per curiam), was a case brought under Title VII and under the New York City Human Rights Law. Plaintiff lost on his racial discrimination claim at trial, but prevailed on his retaliation claim. The court held that the defendant company subjected itself to punitive-damage liability by allowing an antagonist of plaintiff’s to participate in the decision to terminate him: “Similarly, the record reveals sufficient evidence for a jury find that iStar was reckless—and thus susceptible to punitive damages—by allowing Baron to participate in the decision to terminate Thomas when senior officials at the company knew the two men did not get along.”

*Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 359, 87 FEP Cases 456, 81 E.P.D. ¶ 40,800 (2d Cir. 2001), affirmed the judgment on a jury verdict for $100,000 in punitive damages for the Title VII hostile-environment plaintiff. The court stated:

Plaintiff testified not just that she was the victim of persistent egregious sexual harassment by a supervisor, but also that she notified company officials about the harassment as early as September 1993—just two months into her employment and over
one year before Adchem took any remedial action. Adchem’s theory of the case, to be sure, was that plaintiff did not effectively notify company officials of the sexual harassment until November 1994, and that the earlier complaints had really only been complaints about other problems that were only tangentially related to plaintiff’s relationship with Collin Mars. Nonetheless, the jury could rationally have credited plaintiff’s version that, in spite of her complaints to company officials, the company did nothing to protect her from the abuse for many months.

*Springer v. Henry*, 435 F.3d 268, 281, 23 IER Cases 1658 (3d Cir. 2006), affirmed the judgment on a jury verdict for the First Amendment retaliation plaintiff. Defendant appealed the award of punitive damages. The court held that the requirements for punitive damages are disjunctive, and that plaintiff’s evidence of Henry’s displays of emotion adequately showed that her conduct was callous or malicious:

The jury finding of callous or malicious behavior also is supported by Henry’s attitude toward Dr. Springer and the medical staff in general. Dr. Sylvester testified that Henry viewed her interactions with the medical staff, including Dr. Springer, as “adversarial.” . . . Three witnesses—Henry, Dr. Sylvester, and Dr. Springer—testified that Henry was upset and unhappy with Dr. Springer. Dr. Springer testified that during meetings of the DPC Governing Body Henry was “angry and spoke [to him] with a lot of emotion,” . . . Based on its observations at trial, the jury could have concluded that Henry acted vindictively.

*Le v. University of Pennsylvania*, 321 F.3d 403, 407–09, 91 FEP Cases 310 (3d Cir. 2003), affirmed the judgment for plaintiff, and held that punitive damages were appropriately awarded where plaintiff claimed that his supervisor was racially biased and the decisionmaker reassigned the same supervisor to plaintiff after satisfying himself the supervisor was not racist by watching his interactions on the basketball court with a racially diverse team. The court stated: “The decisionmaking process used by Dr. Palladino could easily have been viewed by the jury as demonstrating ‘reckless indifference’ towards Le’s federally protected rights. Also, there was additional evidence that Le presented a lengthy rebuttal in response to a bad performance review, which was then cursorily handled by the University’s administration. Further, the District Court noted that upon receiving Le’s complaint, and before concluding its investigation, the administration failed to counsel and advise Le’s supervisors and colleagues about the evils of discrimination. In all, sufficient evidence exists to support the jury’s verdict.”

*EEOC v. Federal Express Corp.*, 513 F.3d 360, 20 AD Cases 204 (4th Cir. 2008), affirmed the award of $100,000 in punitive damages for a failure to accommodate the charging party’s profound deafness by providing a certified ASL translator for meetings and important documents. The court described the four Lowery factors relevant to entitlement to punitive damages:

1. That the employer's decision maker discriminated in the face of a perceived risk that the decision would violate federal law;
2. That the decision maker was a principal or served the employer in a managerial capacity;
3. That the decision maker acted within the scope of his employment in making
the challenged decision; and

(4) That the employer failed to engage in good-faith efforts to comply with the law.

Id. at 372. The court noted that defendant admitted the second and third factors were met, and challenged only the first and fourth factors. The court continued:

Here, the instructions (to which FedEx did not object) did not specify who—for example, Hanratty, Cofield, Thompson, or someone else—could be considered as a relevant FedEx managerial official. Therefore, if the jury could have found that any one of them perceived the risk that their failure to accommodate Lockhart would violate the ADA, we are not entitled to vacate the punitive damages award for lack of sufficient evidence to support the first Lowery finding.

Id. at 373. The court held that Hanratty was aware of defendant’s ADA compliance policy, and that Cofield had contacted other FedEx supervisors seeking clarification on ADA reasonable accommodations. Id. at 373–74. The court held that the jury could find that the first factor was met. The court also rejected defendant’s argument that the mere existence of its ADA policy required a finding that it engaged in good-faith compliance efforts. “Unfortunately for FedEx, the mere existence of an ADA compliance policy will not alone insulate an employer from punitive damages liability. Rather, in order to avoid liability for the discriminatory acts of one of its management officials, an employer maintaining such a compliance policy must also take affirmative steps to ensure its implementation.” Id. at 374. The court held that higher-level officials were aware of the problem:

On the evidence, the jury was entitled to find that FedEx failed to sufficiently take affirmative steps to ensure the implementation of its ADA compliance policy with respect to Lockhart. In this case, FedEx managerial officials shared responsibility for the failed implementation of the policy with the company's managerial agents at the FedEx-BWI Ramp. For example, through Cofield, at least three higher FedEx officials received notice that a deaf package handler had requested or was in need of ADA accommodations at the FedEx-BWI Ramp. As noted, Cofield initiated contact in 2001 with an official in FedEx's legal department to clarify FedEx's ADA obligations with respect to Lockhart. In 2002, he contacted Connors at “corporate headquarters” twice, and he contacted Arrington, the Senior Personnel Representative for the FedEx-BWI Ramp, at least once, concerning the need to provide ADA accommodations for Lockhart. Furthermore, Connors—as well as Hanratty—was placed on notice of ADA compliance problems at the FedEx-BWI Ramp when Lockhart filed his charge of discrimination with the EEOC in October 2001.

Id. at 375. The court noted that defendant did not even provide the charging party with a copy of its ADA reasonable-accommodation request form until three years after he started work, the same month he was fired.

EEOC v. E.I. Du Pont de Nemours & Co., 480 F.3d 724, 733, 18 AD Cases 1793 (5th Cir. 2007), affirmed the award of $300,000 on a jury verdict for the ADA charging party, holding that punitive damages were permissible where back pay has been awarded, even if no
other legal compensatory damages are awarded. It held that awards of back pay and front pay serve a compensatory function. The court also gave short shrift to defendant’s argument that the EEOC had failed to show malice or reckless disregard of the law:

There was sufficient, albeit disputed, evidence to support the jury finding that DuPont intentionally discriminated against Barrios with malice or with reckless disregard for her rights. DuPont was aware of its responsibilities under the ADA. Yet, viewed in the light most favorable to the verdict, DuPont made Barrios’s job more difficult. The company placed Barrios’s printer over one hundred feet from her desk in spite of her walking difficulties, whereas other lab clerks’ printers were adjacent to their desks. DuPont refused to allow Barrios to demonstrate her ability to evacuate before she was terminated—for inability to evacuate. The company spent years trying to convince Barrios to retire on disability. But the crowning evidentiary blow against DuPont is that after Barrios attempted to get her job back, a DuPont supervisor stated that he no longer wanted to see her “crippled crooked self, going down the hall hugging the walls.” The supervisor’s denial of this remark under oath, like DuPont’s rejoinder to other negative evidence, was subject to the jury’s credibility assessment. The jury likewise could have rejected DuPont’s good-faith defense based on the conclusory assertions by two DuPont employees that they comply with the law.

(Citation omitted.)

Morgan v. New York Life Insurance Co., 559 F.3d 425, 440-41, 105 FEP Cases 1217 (6th Cir. 2009), affirmed the judgment of age discrimination liability and the $6 million compensatory-damages award under the Ohio Civil Rights Act, and held that plaintiff had shown entitlement to punitive damages under Ohio law. Its description appears quite similar to Federal law. The court relied on comparators to show entitlement to punitive damages:

The record includes evidence that New York Life consciously disregarded Morgan's right to be free from age discrimination. While New York Life correctly argues that courts should not second guess a company's business decisions, the record establishes quite clearly that the company found extenuating circumstances in certain instances when a younger managing partner had performance issues. This was not the case with Morgan (or other older managing partners).

Parker v. General Extrusions, Inc., 491 F.3d 596, 603-04, 100 Fair Empl.Prac.Cas. (BNA) 1489 (6th Cir. 2007), reversed the lower court's grant of judgment as a matter of law to the Title VII sexual harassment defendant. The court held that the evidence as to the actions of the Human Relations Manager in hushing things up allowed the jury to award punitive damages against defendant:

It is unnecessary to take issue with the district court's conclusion that Maloney bore no malice toward Parker, because a review of the record indicates quite clearly that Maloney was, at the very least, recklessly indifferent to her plight. Significantly, after Maloney received the first complaint from the plaintiff regarding the metal throwing incident with Rendes, Maloney immediately took Rendes's side without any investigation. When he finally did investigate, he simply spoke to Rendes and, based on
Rendes's denial of any wrongdoing, took no disciplinary action whatever.

After Parker complained to Maloney again, this time about the intercom incident, Rendes was initially told that he had been accused of sexual harassment. However, Rendes was not ultimately punished for sexual harassment, but instead was written up for the relatively minor offense of “horseplay.” Rendes testified that at the meeting about this incident, Maloney “chuckled” when Rendes made a sexually offensive comment about Parker in Maloney's presence. Importantly, Rendes testified that after this meeting he got the impression that management was “looking for a reason to get [Parker] out” because she “complained.” When asked to clarify whether he specifically meant her complaints about sexual harassment, Rendes said that it related to Parker “trying to get me on sexual harassment.” Parker testified that Maloney told her about the result of the meeting in a public place, in front of other employees, in an effort to embarrass her.

In response to Kopkash's e-mail to Maloney regarding the fan incident with Eli Rodriguez, Maloney looked into the circumstances but did nothing to stop the foreman from punishing Parker for absenteeism. Informed about the letter from Parker's counsel, Maloney did undertake investigation, but neither he nor higher-up management assigned the investigation to someone else, despite the fact that Maloney himself was named as part of the basis for the complaint.

Without question, oversights such as these, whether intentional or merely reckless in the extreme, could lead a jury to infer that the investigation was not taken seriously. Finally, although Parker's departure from the company hindered Maloney's investigation into the final incident with Malwori, Maloney admitted that he had told the foreman to tell Parker that he would investigate the next day, but then did not come in the next day and, moreover, lied about his reason for doing so. Additionally, Harvey Toy testified that in his role as Parker's advocate, he questioned Maloney about Parker's complaints, and Maloney replied, “This is a mill-type environment. If she doesn't like it here, she can go get a job somewhere else.” The overt callousness of this response could only have convinced the jury that Maloney did not take Parker's complaints seriously.

*Alexander v. City of Milwaukee*, 474 F.3d 437, 453–54, 99 FEP Cases 961 ([7th Cir. 2007]), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. The court held that plaintiffs were entitled to punitive damages:

As the plaintiffs correctly note, there is some evidence in the record that the defendants at times failed to require the Chief to comply with their policies mandating that he submit various paper records to the Board along with a candidate for promotion. . . . During the liability phase, the jury found the personal participation of the Commissioners in discrimination, and this finding would suggest that the jury concluded that the Commissioners had done more than simply evaluate single candidates that had come before them, as the statute requires. The plaintiffs’ also produced evidence of the apparent racial animus of Chief Jones of which the Commissioners were aware,
introduced the 2001 Dimow report. This evidence could be interpreted as having put the Commissioners on notice that the promotional policies in effect in the Police Department, over which they had authority, were resulting in a quickly changing racial make-up exhibiting an under-representation of white males on the command staff. Taking that evidence in the light most favorable to the plaintiffs and in light of the jury’s verdict, the Commissioners knew about a problem, failed to act to control it, as the responsibility of their office required them to do, and knowingly participated in its continuance. This evidence permitted a jury to find reckless or callous indifference to the federally protected rights of the plaintiffs, and we must therefore conclude that the district court did not abuse its discretion in submitting the issue of punitive damages to the jury.

_EEOC v. Indiana Bell Telephone Co._, 256 F.3d 516, 526–28, 86 FEP Cases 1, 80 E.P.D. ¶ 40,590 (7th Cir. 2001) (en banc), affirmed the judgment of liability for sexual harassment, holding that the employer’s asserted reason for not taking effective action against the alleged harasser—that he would file a grievance under the collective bargaining agreement and be reinstated—was irrelevant on liability but was relevant to the issue of the employer’s state of mind with respect to a punitive damages award. The court held that its exclusion was prejudicial error, and remanded the case for a new trial on punitive damages.

_Chalfant v. Titan Distribution, Inc._, 475 F.3d 982, 991–92, 18 AD Cases 1601 (8th Cir. 2007), affirmed the judgment on a jury verdict for the ADA plaintiff, holding that plaintiff was entitled to the $100,000 awarded for punitive damages. The court noted that defendant’s President testified that he and corporate counsel were aware of the law on disability discrimination. The court continued:” Titan also had knowledge of the federal disability discrimination laws because it had been a defendant in two federal disability discrimination cases that were ultimately appealed to our circuit.” _Id._ at 991 (citations omitted). The court continued:

Along with this strong evidence of Titan’s familiarity with disability discrimination laws at the time it made the decision, Titan’s inconsistent behavior at the time of the decision and its inability to explain its behavior could lead a reasonable jury to infer that Titan knew it might be acting in violation of federal law. In short order, Titan accepted that Chalfant passed his physical, notified him that he would be hired, changed the results of his physical to “failed” and notified him that he would not be hired. Until Luthin’s sudden memory improvement at trial, no one at Titan could say who made the decision to alter the outcome of the physical examination from “pass” to “fail,” and no one from Titan ever explained the impetus for that change. Instead, each person simply denied that he or she had any involvement at all in the decision not to hire Chalfant. A reasonable jury could infer that this unusual decision-making process occurred because Titan was aware at the time it decided not to hire Chalfant that it “may [have been] acting in violation of federal law.”

_Id._ at 991–92 (citation omitted).

_Altern v. Tobacco Superstore, Inc._, 475 F.3d 931, 942–43, 99 FEP Cases 1127 (8th Cir. 2007), affirmed the judgment for the Title VII racial-discrimination and retaliation plaintiff, but held that plaintiff was not entitled to punitive damages because plaintiff’s insubordination was not enough to justify defendant’s failure to promote her, but was enough to disprove malice. The
court relied on the fact that other employees were fired for insubordination, but “TSI gave some deference to Allen and transferred her, rather than terminating her as TSI terminated Lovell.” *Id.* at 943. The court also relied on an “I was overwhelmed” defense, stating:

In addition, the record depicts TSI as a rapidly growing company with inadequate, rather than malicious, personnel procedures. Cobb testified when he started with TSI in 1993, TSI had only one store, and by 2003, TSI had eighty-two stores. Cobb further testified TSI opened eleven stores during the eight-week period beginning December 15, 2001, which suggests most of TSI’s growth occurred after 2002. Cobb explained the focus of the business was on profits rather than on the make-up of store personnel. Cobb also explained in 2001 and 2002, to advance at TSI, an employee would ask to be considered for a management position. Although TSI’s rapid growth and promotion practices fail to justify the racial disparity within TSI’s management personnel, those practices demonstrate justifiable business reasons or ineptness and not racial malice or reckless indifference directed toward Allen. Neither Allen nor the record before us demonstrates TSI acted with the requisite state of mind to support an award of punitive damages.

*Id.* Judge Smith dissented in part as to this holding. *Id.* at 945–46.

*Salitros v. Chrysler Corp.*, 306 F.3d 562, 569, 13 AD Cases 1057 (8th Cir. 2002), affirmed the judgment for the ADA retaliation plaintiff and found that plaintiff had shown an adequate basis for the award of $100,000 in punitive damages:

Chrysler’s manager Richard Haynes was quoted as saying he was going to teach Salitros a lesson, in circumstances that support the inference that the lesson to be learned was either not to file EEOC charges or not to protest work assignments that he thought exceeded his medical restrictions. Haynes testified that he had received training on the Americans With Disabilities Act. A jury could conclude that Haynes acted in reckless indifference to whether he was violating Salitros’s federally protected rights. Haynes’s malice may be imputed to Chrysler because he was serving in a managerial capacity and acting in the scope of his employment.

(Citations omitted.)

*Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 837–38, 12 AD Cases 513 (8th Cir. 2001), reversed the award of $100,000 in punitive damages on the plaintiff’s ADA claim and the award of an equal amount on his State-law claim. The plaintiff had twice injured his back on the job, and been off for long periods. At the time of his termination, he was working in a different job with an accommodation that eased the strain on his back, and was meeting his production target. When his attorney filed a proceeding to require the company to allow videotaping of his work station for purposes of a workers’ compensation claim, the defendant fired the plaintiff and stated it was because of his “disability.” The court held that there was insufficient evidence of malice or reckless disregard:

Titan’s stated reasons for terminating Webner—that his back injury precluded him from performing all but light duty tasks, Titan was fearful that Webner would reinjure his
back, and Titan did not have a job suited to his disability—while culpable, do not rise to the level of maliciousness required to sustain the jury’s award of punitive damages. Instead, Titan’s actions are consistent with an employer acting to protect itself against the possible sporadic absence of an employee.

*Id.* at 837.

*Bains LLC v. Arco Products Co.*, 405 F.3d 764, 774 (*9th Cir.* 2005), affirmed the judgment of liability and the award of compensatory damages, but held that the award of $5 million in punitive damages to the Sikh-owned plaintiff was excessive and that the most that could be allowed was between $300,000 and $450,000. The court rejected defendant’s argument that it could not be held liable for punitive damages because only a low-level attendant had engaged in discrimination:

The district court reviewed the evidence with care, and concluded, correctly, that the jury could find that Davis was not a mere gas station attendant, but a supervisor. While ARCO claims that Davis had no managerial responsibilities, the evidence demonstrated that Davis had direct control over the daily fuel hauling operation and fuel carriers. Moreover, immediately after the termination of the contract, Davis himself took credit for getting Flying B terminated, bragging to non-Flying B drivers about his part in “kick[ing] those ragheads out” of the facility.

Even were Davis not a supervisor, there can be no question under the evidence that Lawrence was. Lawrence was ARCO’s official in charge of the Seattle terminal and, as Tim Reichert testified, Lawrence had full authority over safety issues at the terminal, including the power to lock Flying B out of the facility. The jury could conclude that when Flying B first complained to Lawrence about Davis’s racial harassment, Lawrence simply made excuses for Davis’s behavior and did nothing about it. And when Flying B repeated its complaints several times, Lawrence did nothing to restrain Davis, but instead terminated Flying B without even the thirty-days notice required by the contract.

Davis testified that Lawrence was present on occasions when he called the Flying B drivers “ragheads.” The jury did not have to conclude, as ARCO urges, that Lawrence locked out Flying B only for safety violations. The jury could conclude, to the contrary, that Lawrence perceived a conflict between Flying B and Davis—over Davis’s harassment and intentional delays of those he called “ragheads”—and that Lawrence chose to back up Davis. That suffices for corporate liability. If a company official with sufficient authority to subject the company to vicarious liability backs-up a racist employee's racially-motivated conduct instead of protecting the victim from the employee, then the company is liable, even if the supervisor’s motivation is non-racial, such as loyalty to his subordinate or a desire to avoid conflict within the company. A written antidiscrimination policy does not insulate a company from liability if it does not enforce the antidiscrimination policy and, by its actions, supports discrimination.

(Footnote omitted).
8. **Action Taken Pursuant to Legal Advice**

*Farias v. Instructional Systems, Inc.*, 259 F.3d 91, 102 (2nd Cir. 2001), affirmed the judgment of liability on a jury verdict for Title VII retaliation plaintiff Robinson, and affirmed the denial of punitive damages. Defense counsel had advised the defendant not to offer a severance payment because the plaintiff had filed an EEOC charge. The court held that “whether or not the advice was appropriate, action taken pursuant to advice that the action is consistent with the law is insufficient to support an award of punitive damages under the standard articulated in *Kolstad*.”

9. **Vicarious Liability**

*Hertzberg v. SRAM Corp.*, 261 F.3d 651, 661–62 (7th Cir. 2001), cert. denied, 2002 WL 232975, 70 USLW 3395, 70 USLW 3514 (U.S., Feb. 19, 2002) (No. 01–829), affirmed the award of $20,000 in punitive damages to the Title VII sexual harassment plaintiff, rejecting the defendant’s argument that it could not be held liable for punitive damages because the plaintiff had complained unsuccessfully to her supervisor and to the plant manager, but had not complained to the company President, the last step in the company’s internal complaint procedure. The court first described Circuit precedent applying *Kolstad* on the question of vicarious liability. In pertinent part, including its footnote 9, it stated:

This court applied the *Kolstad* standard in *Bruso v. United Airlines, Inc.*, 239 F.3d 848 (7th Cir. 2001). In *Bruso*, we discussed *Kolstad*’s “three-part framework for determining whether an award of punitive damages is proper under the statutory standard.” 239 F.3d at 857. The first step requires the plaintiff to “demonstrate that the employer acted with the requisite mental state.” *Id.* However, we continued, [t]he employer need not be aware that it is engaging in discrimination. Instead, it need only act in the face of a perceived risk that its actions will violate federal law. A plaintiff may satisfy this element by demonstrating that the relevant individuals knew of or were familiar with the antidiscrimination laws and the employer’s policies for implementing those laws. *Id.* at 857-58 (internal quotation marks and citations omitted).9 Once the plaintiff has met this burden, the plaintiff “must demonstrate that the employees who discriminated against him are managerial agents acting within the scope of their employment.” *Id.* However, even if the plaintiff meets these burdens, “the employer may avoid liability for punitive damages if it can show that it engaged in good faith efforts to implement an antidiscrimination policy.” *Id.*

9Another way a plaintiff may meet this burden is “by showing that the defendant’s employees lied, either to the plaintiff or to the jury, in order to cover up their discriminatory actions.” *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858 (7th Cir. 2001).

The court held that there was evidence that the plaintiff’s supervisor and plant manager knew about the antidiscrimination laws. *Id.* at 662–63. It held that Lester was not a managerial agent for purposes of punitive damages liability, because he “had little discretion in hiring, disciplining or terminating employees that reported to him.” *Id.* at 663. It held that the jury could reasonably
find that Plant Manager Margelos was a managerial agent because he “hired the staff for the Elk Grove Village plant, he took care of personnel issues and he had the authority to discipline and terminate the employment of those who worked for him, directly or indirectly.” Id. Finally, the court held that a reasonable jury could reject the defendant’s “good faith” defense because the plaintiff’s co-worker made over a hundred demeaning comments about women in four months, the plaintiff’s supervisor told her she was being too emotional and put his hand on her knee, and the Plant Manager failed to follow the company’s policy by failing to put the complaint in writing, and never did take meaningful action. Id. at 655, 663–64.

Bains LLC v. Arco Products Co., Bains LLC v. Arco Products Co., 405 F.3d 76 (9th Cir. 2005), affirmed the judgment of liability and the award of compensatory damages, but held that the award of $5 million in punitive damages to the Sikh-owned plaintiff was excessive and that the most that could be allowed was between $300,000 and $450,000. The court rejected defendant’s argument that it could not be held liable for punitive damages because only a low-level attendant had engaged in discrimination:

The district court reviewed the evidence with care, and concluded, correctly, that the jury could find that Davis was not a mere gas station attendant, but a supervisor. While ARCO claims that Davis had no managerial responsibilities, the evidence demonstrated that Davis had direct control over the daily fuel hauling operation and fuel carriers. Moreover, immediately after the termination of the contract, Davis himself took credit for getting Flying B terminated, bragging to non-Flying B drivers about his part in “kick[ing] those ragheads out” of the facility.

Even were Davis not a supervisor, there can be no question under the evidence that Lawrence was. Lawrence was ARCO’s official in charge of the Seattle terminal and, as Tim Reichert testified, Lawrence had full authority over safety issues at the terminal, including the power to lock Flying B out of the facility. The jury could conclude that when Flying B first complained to Lawrence about Davis’s racial harassment, Lawrence simply made excuses for Davis’s behavior and did nothing about it. And when Flying B repeated its complaints several times, Lawrence did nothing to restrain Davis, but instead terminated Flying B without even the thirty-days notice required by the contract.

Davis testified that Lawrence was present on occasions when he called the Flying B drivers “ragheads.” The jury did not have to conclude, as ARCO urges, that Lawrence locked out Flying B only for safety violations. The jury could conclude, to the contrary, that Lawrence perceived a conflict between Flying B and Davis—over Davis’s harassment and intentional delays of those he called “ragheads”—and that Lawrence chose to back up Davis. That suffices for corporate liability. If a company official with sufficient authority to subject the company to vicarious liability backs-up a racist employee's racially-motivated conduct instead of protecting the victim from the employee, then the company is liable, even if the supervisor’s motivation is non-racial, such as loyalty to his subordinate or a desire to avoid conflict within the company. A written antidiscrimination policy does not insulate a company from liability if it does not enforce the antidiscrimination policy and, by its actions, supports discrimination.

Id. at 774 (footnote omitted).
Swinton v. Potomac Corp., 270 F.3d 794, 810, 87 FEP Cases 65 (9th Cir. 2001), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. The plaintiff was subjected to a frequent barrage of racist slurs and jokes, some of them in the presence of a member of management. The court agreed with other Circuits that “the inaction of even relatively low-level supervisors may be imputed to the employer if the supervisors are made responsible, pursuant to company policy, for receiving and acting on complaints of harassment.” Here, such an official not only listened to the racist slurs but laughed at the jokes and told some himself.

Wilbur v. Correctional Services Corp., 393 F.3d 1192, 1205 (11th Cir. 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury’s answers to the special interrogatories removed any basis for the award of damages. The court held that, even assuming the claim for punitive damages was not moot, the lower court did not err in dismissing it. It reasoned that, although plaintiff’s supervisors may have acted with malice or reckless indifference towards her, “she failed to establish a sufficient basis for imputing their conduct to CSC.” (Citation omitted.) The court added:

And, in this Circuit, “punitive damages will ordinarily not be assessed against employers with only constructive knowledge of harassment.” . . . In order to ground liability in an employer, the plaintiff must establish that “the discriminating employee was high[er] up the corporate hierarchy” or that “higher management countenanced or approved his behavior.” . . . Even if, as Wilbur asserts, CSC’s corporate office had notice of the alleged sex discrimination as of February 2002, when she complained to CSC’s human resources department, Wilbur has offered nothing to establish that CSC’s higher management “countenanced or approved” the offending behavior of Wilbur’s supervisors. Moreover, to hold otherwise seems irreconcilable with the jury’s finding that CSC had “exercised reasonable care to prevent and correct promptly any sexually harassing behavior in the work place.” . . . Therefore, even if the issue is not moot, we conclude that the district court did not err in dismissing Wilbur’s punitive damages claim.

(Citation omitted.)

Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1280, 87 FEP Cases 1209 (11th Cir. 2002), reversed the award of $50,000 in punitive damages against the Title VII and § 1981 racial and ethnic harassment defendant because the plaintiff had not complained and the defendant’s constructive knowledge of the harassment, while sufficient for liability, was not sufficient for punitive damages.

10. Good-Faith Defense

Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 554 F.3d 164, 175-76, 105 FEP Cases 494 (1st Cir. 2009), affirmed the judgment on a jury verdict for the Title VII and Puerto Rican law sexual harassment plaintiff. The court held that defendant did not preserve its argument that plaintiff had failed to show entitlement to the $300,000 in punitive damages awarded under Title VII, because its Rule 59 motion and its motion for judgment as a matter of law did not present any developed argument on this point. “In its new trial and remittitur motion, AEELA did not provide any developed argumentation as to why
Monteagudo should not be entitled to punitive damages. Further, AEELA did not cite any cases for its proposition that punitive damages are unwarranted. ‘[T]heories not raised squarely in the district court cannot be surfaced for the first time on appeal.’” Id. at 176 (citations omitted). The court held that the lower court did not commit plain error in failing to grant remittitur:

From our review of the record, AEELA has not provided sufficient proof that it had in place an “active mechanism for renewing employees' awareness of the policies through either specific education programs or periodic re-dissemination or revision of their written materials”; FN13 “testimony by appellants' witnesses that indicated that supervisors were trained to prevent discrimination from occurring;” or “examples in which their anti-discrimination policies were successfully followed.” FN14 Id. (providing a non-exhaustive list of ways an employer could demonstrate good faith compliance). While having all of these factors is not necessary to qualify for the defense, see id., AEELA has not provided sufficient evidence that it fulfilled any of these factors. Thus, the district court did not commit plain error in upholding the punitive damages award and denying a new trial on damages.

FN13. Notably, Monteagudo testified that she had never been offered a seminar on sexual harassment and that she was unaware if any sexual harassment seminars had been given to her supervisors.

FN14. We acknowledge that AEELA was rebuffed by the district court in its attempt to show how its policy was successfully implemented in 2005. However, as we noted in assessing AEELA's evidentiary claim above, this evidence was not proffered to show that AEELA should not have been liable for punitive damages. Rather, AEELA attempted to introduce Medina's testimony in order to bolster its Faragher-Ellerth defense. This was evidence which the district court was within its discretion to exclude. Even if the district court had considered the 2005 corrective measure AEELA had employed pursuant to its policy, the district court still did not commit plain error in upholding the punitive damages award. This is because AEELA failed to provide sufficient evidence of other indicators of good faith compliance and because the 2005 corrective measure occurred three years after the sexual harassment in this case. See id.

Id. at 176.

Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 90, 17 AD Cases 769 (1st Cir. 2006), affirmed the judgment for the ADA harassment plaintiff on a jury verdict for $76,000 in compensatory damages and $160,000 in punitive damages. The court rejected defendant’s argument that any evidence of good faith bars punitive damages: “Wal-Mart’s position is wrong and would allow companies to pay lip service to the law while blatantly violating it.” The court added: “On these facts, a jury could easily conclude that the open door policy was a sham designed to give the appearance, but not the reality, of an effort to comply with the law, and that Wal-Mart acted with reckless disregard of Arrieta’s rights.”

Bryant v. Aiken Regional Medical Centers Inc., 333 F.3d 536, 548–49, 92 FEP Cases 233 (4th Cir. 2003), cert. denied, 540 U.S. 1106 (2004), reversed the Title VII and § 1981 award of
$210,000 in punitive damages. The court held that defendant had made a good-faith attempt to comply with the law:

... ARMC had an extensively implemented organization-wide Equal Employment Opportunity Policy. That policy, a version of which was included in the employee handbook, stated that “all persons are entitled to equal employment opportunity regardless of race” and that “it is and shall continue to be our policy to provide promotion and advancement opportunities in a non-discriminatory fashion.” ARMC also created a grievance policy encouraging employees to bring forward claims of harassment, discrimination, or general dissatisfaction, and employees were explicitly informed that they would not be retaliated against for making a complaint. There was also a carefully developed diversity training program that included formal training classes and group exercises for hospital employees. And ARMC voluntarily monitored departmental demographics as part of an ongoing effort to keep the employee base reflective of the pool of potential employees in the area. These widespread anti-discrimination efforts, the existence of which appellee does not dispute, preclude the award of punitive damages in this case.

Hatley v. Hilton Hotels Corp., 308 F.3d 473, 477, 89 FEP Cases 1861 (5th Cir. 2002), reversed the grant of judgment as a matter of law on plaintiffs’ Title VII sexual harassment claims but affirmed the denial of punitive damages. The court held that, notwithstanding the inadequacy of the defendant’s handling of plaintiffs’ internal harassment complaints and earlier complaints filed by others, the defendant made out its affirmative defense:

Davidson was arguably an agent in a managerial capacity, and she may have acted with malice or reckless indifference to the rights of the plaintiffs within the scope of her employment. However, these actions were contrary to Bally’s good faith effort to prevent sexual harassment in the workplace, as is evidenced by the fact that Bally’s had a well-publicized policy forbidding sexual harassment, gave training on sexual harassment to new employees, established a grievance procedure for sexual harassment complaints, and initiated an investigation of the plaintiffs’ complaints. These actions evidence a good faith effort on the part of Bally’s to prevent and punish sexual harassment.

Parker v. General Extrusions, Inc., 491 F.3d 596, 605, 100 Fair Empl.Prac.Cas. (BNA) 1489 (6th Cir. 2007), reversed the lower court’s grant of judgment as a matter of law to the Title VII sexual harassment defendant. The court held that the good-faith defense was not simply established by the mere existence of a written policy, and was for the jury. It stated: “Here, the plaintiff put on evidence disputing the extent of any sexual harassment training, as well as proof calling into question not only the credibility but the very sincerity of enforcement efforts on the defendant's part.”

Madison v. IBP, Inc., 257 F.3d 780, 795, 86 FEP Cases 77, 80 E.P.D. ¶ 40,628 (8th Cir. 2001), petition for cert. filed, 70 USLW 3445 (U.S., Dec. 19, 2001) (No. 01–985), held that the plaintiff had shown enough evidence to support an award of punitive damages by showing egregious harassment, repeated complaints, and repeated failures to act on the complaints. The court rejected the company’s argument that it was entitled to the defense for good-faith efforts to
comply, inasmuch as it had adopted a policy and engaged in regular training of its managers. The court stated:

Madison presented a great deal of evidence from which the jury could find that IBP employees in a managerial capacity acted with malice or reckless disregard to her civil rights in failing to protect her from illegal conduct or to promote her. The evidence indicated that supervisors and managers were among those who harassed and abused her. High level employees such as Personnel Director Alberto Olguin and Plant Manager Larry Moser, both of whom had authority to terminate employees, ignored her complaints about illegal harassment and discrimination, failed to investigate whether her civil rights were being violated, and did not document illegal behavior or discipline perpetrators. The company’s EEO Coordinator, Bernielle Ott, was present at a mediation session at which Madison told Ott and other IBP representatives that she was being physically and verbally harassed almost daily and that she had been repeatedly denied promotions because of her sex. Neither Ott nor any other company representative took action to investigate these allegations or to ensure that Madison’s civil rights were not being violated.

IBP contends that it should escape liability for punitive damages because it made good faith efforts to comply with federal employment laws. The company presented evidence at trial that it had a corporate policy prohibiting racial and sexual discrimination and harassment, that it maintained an affirmative action plan, and that it put on an annual two hour training session for plant managers on the “Legal Aspects of Supervision.” There was also evidence, however, that the written corporate policies were not carried out at the Perry plant and that the company did not make good faith efforts to comply with federal civil rights laws.

Employers have an “affirmative obligation” to prevent civil rights violations in the workplace. . . There was evidence that IBP did not have effective procedures in place to encourage employees to come forward with employment complaints or to protect them from retaliation. Madison and other employees complained to management on many occasions that their civil rights were being violated, but management did not take reasonable care to investigate or stop such behavior. There was evidence that Personnel Director Olguin, the manager charged with addressing employee grievances, conflicts, and disciplinary matters, did not investigate many complaints of harassment and discrimination. On at least fourteen occasions, an employee was counseled for engaging in harassing conduct, but nothing was recorded in his personnel file. Training Coordinator Mike Miller ignored Madison’s reports that male line workers were grabbing and fondling her, did nothing to discipline her harassers, and relied on an unsubstantiated report from one line worker that Madison had willingly engaged in horseplay on the line. When Madison informed Assistant Personnel Director Sue Menhusen that she was being harassed, Menhusen’s response was that many of the Hispanic males working at the plant “haven’t been in the country for very long” and “don’t take direction very well from females.” There was also evidence that IBP maintained policies which actually served to punish victims and discourage them from reporting illegal behavior, such as telling an alleged harasser the identity of a complainant and putting “counseling for sexual harassment” notations in the personnel files of any complaining employee.
Id. at 795–96 (citation omitted).

Swinton v. Potomac Corp., 270 F.3d 794, 810–11, 87 FEP Cases 65 (9th Cir. 2001), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. The plaintiff prevailed on a negligence theory of liability, rather than vicarious liability, because his chief harasser, while a supervisor, was not in the chain of command over the plaintiff. As described above, the affirmative defense was not available to the defendant. The court rejected the defendant’s argument that punitive damages were inappropriate because of its “written materials forbidding harassment and putting in place anti-harassment procedures.” Id. at 810. The court seemed to treat the unavailability of the affirmative defense to liability in a harassment case as tantamount to the unavailability of a good-faith defense to punitive damages, but any such suggestion would be dictum because it also relied on the ineffectiveness of the policy:

Surely, U.S. Mat cannot claim to have implemented its anti-harassment policy in good faith (even if it were conceived in good faith) when the very employee (Stewart) charged with carrying it out vis-a-vis Swinton laughed along with the “nigger” jokes, did nothing to stop them, and never reported the repeated incidents to higher management. U.S. Mat made a considered judgment to place responsibility for reporting on an employee’s direct supervisor. It could well have required some other supervisor or manager further up the chain to be the point of contact. And it could have impressed upon its supervisors, like Stewart, whom it tasked with accepting complaints of harassment, the (we would hope) obvious point that repeatedly subjecting a black employee to “nigger” jokes is wholly unacceptable, and at odds with basic anti-discrimination principles. But it chose not to, and U.S. Mat cannot now be heard to protest that Stewart’s position was too “low-level” to warrant imputation of his actions or inaction to the company.

Id. at 811.

Harsco Corp. v. Renner, 475 F.3d 1179, 1189–90, 99 FEP Cases 1145 (10th Cir. 2007), affirmed the judgment of liability on a jury verdict for the Title VII sexual harassment plaintiff, but reversed the award of punitive damages where defendant had adequate policies and plaintiff failed to link local managers’ inactions to defendant. “Harsco Corporation submitted substantial evidence showing that the company established comprehensive policies and training procedures in an effort to comply with Title VII. In response, Ms. Renner alleges that her supervisors were not properly trained, but the only evidence she provides of that faulty training is the fact that her supervisors did not comply with the company’s policies and procedures in various respects. If failure of supervisors to comply with company policy were sufficient evidence to prove the lack of a good-faith effort to train, the Kolstad defense would be effectively eliminated.” Id. at 1189. The court rejected plaintiff’s argument that defendant’s HR manager was aware of the harassment, because it was based on one remark at trial, and more than a “scintilla of evidence” was needed. Id. at 1189–90. The court rejected plaintiff’s argument that Kolstad did not apply on the ground that this was assertedly a direct-liability case rather than a vicarious-liability case, finding that she waived the theory by failure to mention it before her reply brief on appeal, and failing to object to a Kolstad instruction at trial. Id. at 1190.
Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1280–82, 102 FEP Cases 716 (11th Cir. 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation plaintiff. Plaintiff was fired immediately after he refused to sign an agreement to arbitrate his pending charge. Because he was willing to arbitrate future claims, the dispute was only about arbitration of his pending employment discrimination claim. The court held that there was sufficient evidence that Bagby was recklessly indifferent to plaintiff’s Federally guaranteed rights in requiring him to sign the arbitration agreement and refusing to allow a modification that would have excluded his pending claim. The court held that the evidence on plaintiff’s underlying racial harassment case also showed recklessness. Id. at 1280–81. The court rejected defendant’s argument that its policy on harassment barred the imposition of punitive damages, because the policy existed in name only:

Bagby Elevator contends that it attempted in good faith to comply with the civil rights laws because it adhered to an antidiscrimination policy, but the record supports the finding of the jury that the antidiscrimination policy of Bagby Elevator was totally ineffective. Goldsmith introduced evidence that managers at Bagby Elevator, namely, Steber and Bowden, had actual notice that white employees had uttered racial slurs in the workplace but did not discipline those employees. Goldsmith offered proof that other employees who had filed EEOC charges and complained of racial slurs were soon afterward terminated. Goldsmith testified that the policy was ineffective and that it did not stop Farley from making racial comments because supervisors did not follow the policy. Arthur Bagby, president and owner of Bagby Elevator, testified that he was not “that good on the [antidiscrimination] policy,” and he admitted that he did not know how he would discipline a supervisor for using racial slurs or failing to discipline an employee for using racial slurs. Both Bowden and Steber acknowledged that the policy did not prevent Farley from making a racial slur, and Steber testified that Farley could have been, but was not, terminated for making one racial slur. Goldsmith testified that Bagby Elevator did not provide training regarding discrimination in the workplace.

Id. at 1281–82.

11. Effect of Post-Event Remediation

Lust v. Sealey, Inc., 383 F.3d 580, 585, 94 FEP Cases 645 (7th Cir. 2004), affirmed the judgment for the Title VII promotional discrimination plaintiff except for punitive damages. The court stated in dictum that the general tort rule barring evidence of curative actions as showing the steps that could have been taken earlier to avoid injury, is not limited to tort cases and could reasonably be applied in employment discrimination cases as well. It reduced the award of punitive damages from the statutory cap to $150,000, stating:

We are concerned that to uphold the award of the maximum damages allowed by the statute in a case of relatively slight, because quickly rectified, discrimination would impair marginal deterrence. If Sealy must pay the maximum damages for a relatively minor discriminatory act, it has no monetary disincentive (setting aside liability for back pay) to escalate minor into major discrimination. It’s as if the punishment for robbery were death; then a robber would be more inclined to kill his victim in order to eliminate a witness and thus reduce the probability of being caught and punished, because if the
murdering robber were caught he wouldn’t be punished any more severely than if he had spared his victim. . . . In light of this consideration and this court’s treatment of punitive-damages awards in similar cases, we believe that the maximum such award that would be reasonable in this case would be $150,000.

(Citation omitted.)

Swinton v. Potomac Corp., 270 F.3d 794, 811–17, 87 FEP Cases 65 (9th Cir. 2001), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. The plaintiff was subjected to a frequent barrage of racist slurs and jokes, some of them in the presence of a member of management. The defendant argued that it was entitled to a new trial because the lower court had excluded evidence of one of the post-suit steps it had taken to remedy discrimination. The court stated that evidence of post-charge remediation “would not automatically bar the imposition of punitive damages,” that the trial judge acts as a gatekeeper as to the relevance of the evidence, and that the jury can decide that the evidence is either window-dressing designed to avoid an award of punitive damages, or bona fide evidence of repentance “lessening the need for additional deterrence in the form of punitive damages.” Id. at 815 (footnote omitted). In the case at bar, the trial judge allowed evidence of the post-charge investigation conducted by the company, and only barred evidence that the defendant put all of its supervisors and managers through anti-harassment training two months after the plaintiff filed suit. The court held that the trial court did not abuse its discretion in excluding this evidence and explained: “Such evidence, if introduced, would have done little, if anything, to undermine the uncontroverted evidence that, even after everyone in management became fully cognizant of Swinton’s allegations, no one—not Pat Stewart, none of those at U.S. Mat who had witnessed the harassment and had done nothing about it, and none of the workers who had actually hurled the epithet ‘nigger’ at Swinton—was ever fired, demoted, or in any way disciplined.” Id. at 816 (footnote omitted). Nor was the court persuaded that the exclusion of the evidence was prejudicial in light of the jury argument of plaintiff’s counsel, because the company did nothing in response to the harassment, because the defendant made no contemporaneous objection and the “plain error” standard was not satisfied, because the company did introduce evidence of its investigation, and because the argument actually referred to the company’s failure to take action prior to the harassment of the plaintiff. Id. at 816–17.

12. Instructions

Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 89–90, 17 AD Cases 769 (1st Cir. 2006), affirmed the judgment for the ADA harassment plaintiff on a jury verdict for $76,000 in compensatory damages and $160,000 in punitive damages. The court held that the following instruction was close enough to Kolstad to be permissible:

In order to find punitive damages, you must find that the acts of the Defendant which proximately caused actual damages to the Plaintiff were maliciously or wantonly done. If you so find, you may add to the award of actual damages such amount as you shall agree to be proper as punitive damages.

An act or failure to act is maliciously done if prompted or accompanied by ill-will, spite or grudge, either toward the injured person individually or towards all persons
in one or more groups or categories of which the injured person is a member. An act or failure to act is wantonly done if done in reckless or callous disregard of, or indifference to the rights of one or more persons, including the injured person.

*Alexander v. City of Milwaukee*, 474 F.3d 437, 454–55, 99 FEP Cases 961 (*7th Cir.* 2007), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. The court held that plaintiffs were entitled to punitive damages, but that the jury should have been instructed to award punitive damages in accordance with each defendant’s actual fault:

> We note that the punitive damages award was equal with respect to each Commissioner and with respect to Chief Jones, apparently irrespective of the fact that some Commissioners sat on the Board over a significantly smaller number of promotions than others and the concededly discriminatory acts of Chief Jones. “[P]unitive damages should be proportional to the wrongfulness” of each defendant’s actions. . . . Although the jury was instructed to consider the “reprehensibility of the Defendants’ conduct” and the likelihood that a defendant would repeat the conduct absent an award of punitive damages . . . it should have been more clearly instructed that each individual defendant’s actions and fault must serve as the basis for fashioning an appropriate punitive damages award.

13. **Amount**

*McCombs v. Meijer, Inc.*, 395 F.3d 346, 359, 95 FEP Cases 1 (*6th Cir.* 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. Plaintiff recovered $100,000 in punitive damages. The court rejected defendant’s argument that the lower court erroneously admitted evidence of its gross annual sales, because high volume does not mean high profit. The court held that defendant had not shown it was prejudiced, or that it was unable to pay the award. Judge Gilman dissented.

*Alexander v. City of Milwaukee*, 474 F.3d 437, 454, 99 FEP Cases 961 (*7th Cir.* 2007), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. The court held that plaintiffs were entitled to punitive damages, and that *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), did not require any reduction in the punitive damages because the compensatory damages were relatively low, and the *State Farm* ratios do not apply in such instances.

See the discussion of *Lust v. Sealey, Inc.*, 383 F.3d 580, 590-91, 94 FEP Cases 645 (*7th Cir.* 2004), in the section below on “The Damages Caps in the 1991 Act.”

*Fine v. Ryan International Airlines*, 305 F.3d 746, 755–56, 89 FEP Cases 1543 (*7th Cir.* 2002), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff. The court held that plaintiff was entitled to the reduced $300,000 judgment for compensatory and punitive
damages, reduced from the jury award of $6,000 in compensatory damages and $3.5 million in punitive damages. The court explained its approval of the amount:

Ryan’s protestations notwithstanding, there was more than enough evidence for the jury to find its conduct sufficiently egregious to justify the maximum legally possible punitive damages award. Indeed, that is what the jury’s very high monetary assessment signaled. (It is therefore not necessary for us to consider whether punitive damages awards that must be adjusted because of the statutory cap should simply be lopped off at the maximum, or if they should be reduced to a number less than or equal to the statutory cap based on a proportional assessment of culpability.) This was not a case where there was a “smidgin” of retaliation, such as a temporary suspension or minor loss of pay. Instead, Ryan, having recently informed its female pilots to put complaints of sexual harassment and discrimination in writing, terminated Fine within 24 hours of its receipt of her complaint on these subjects precisely because she had written the letter. Nor can Ryan credibly argue that its actions were the result of a rogue supervisor, since its general counsel and the president of the company both concurred in the decision. To accept Ryan’s position here we would essentially have to hold that the statutory maximum for punitive damages could never be awarded in a Title VII complaint where the plaintiff prevailed only on her retaliation claim. We see no evidence that Congress sought to enact such a rule, and we decline to endorse it. The damages award is affirmed.

Rowe v. Hussmann Corp., 381 F.3d 775, 94 FEP Cases 520 (8th Cir. 2004), affirmed the jury verdict for the Title VII and Missouri Human Rights Act sexual harassment plaintiff in the amounts of $500,000 in compensatory damages and $1 million in punitive damages. The court relied on the fact that the harassment had continued over a period of four years, with no more than a seven-month gap. The harasser had repeatedly touched plaintiff’s breasts and buttocks, and defendant did nothing for a long period of time although plaintiff complained two or three times a month. The harasser threatened to rape and kill her. Defendant told plaintiff she should be more understanding of the harasser since he only had an eighth-grade education, never fired the harasser, and ultimately transferred plaintiff to a position where the harasser occasionally came into her vicinity.

Swinton v. Potomac Corp., 270 F.3d 794, 817–22, 87 FEP Cases 65 (9th Cir. 2001), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. The plaintiff was subjected to a frequent barrage of racist slurs and jokes, some of them in the presence of a member of management. The verdict affirmed by the court was for $5,612 in back pay, $30,000 in emotional-distress damages, and $1,000,000 in punitive damages. Id. at 801. The court rejected the defendant’s argument that its failure to stop the racial slurs and jokes was not reprehensible “because it was, at the end of the day, nothing more than ‘joking.”’ It stated that the plaintiff made clear on the witness stand that he did not consider the language a joke. “The only African-American employee of about 140 at the U.S. Mat plant, he was subject to daily abuse featuring the word “nigger,” “perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 784 (10th ed.1993).’’ Id. at 817. The court observed that the jury’s verdict did not consider it a laughing matter “and we do not hesitate before agreeing.” Id. The court also rejected the defendant’s argument that the plaintiff had not complained, because the plant official who was the company’s “proxy” for receiving complaints
observed the harassment and did nothing to stop it. *Id.* at 817–18. The court recognized that verbal slurs and jokes are not as serious as actual violence or the threat of violence, but held that “the highly offensive language directed at Swinton, coupled by the abject failure of Potomac to combat the harassment, constitutes highly reprehensible conduct justifying a significant punitive damages award.” *Id.* at 818. The court combined the back pay and compensatory damages awards to obtain a total compensatory damages package of $35,600, and calculated the ratio of punitive to compensatory damages as 28 to 1. The court stated: “This is precisely the type of case posited by the Court in *BMW*—the low award of compensatory damages supports a higher ratio of punitive damages because of ‘particularly egregious’ acts and ‘noneconomic harm that might have been difficult to determine.’” *Id.* The court emphasized that plaintiff’s counsel warned the jury not to go “hog wild,” had stated that an award of ten million dollars would be wrong, and that they should be more moderate. In light of these admonitions, the court took the verdict of one million dollars as a verdict calculated to punish unlawful conduct and deter its repetition. *Id.* at 819. The court next turned to the magnitude of the harm, and stated:

> But for Swinton’s decision that he couldn’t take it any longer and thus had to quit, nothing in the record suggests that U.S. Mat would have done anything to address a workplace replete with racial and ethnic slurs, not only about blacks, but also directed at other minorities and ethnic groups. The fact that the harm from unchecked racial harassment occurring day after day cannot be calculated with any precision does not deflate its magnitude.

*Id.* The court surveyed the decisions of other Circuits and held that, in light of the low compensatory award, the ratio of 28 to 1 was constitutionally permissible. *Id.* at 819–20. Finally, the court refused to reduce the award in light of the analogous cap on damages for Title VII violations. While the Title VII cap weighs in favor of a reduction, “we also hasten to add that Congress has not seen fit to impose any recovery caps in cases under § 1981 (or § 1983), although it has had ample opportunity to do so since the 1991 amendments to Title VII.” *Id.* at 820.

*Juarez v. ACS Government Solutions Group, Inc.*, 314 F.3d 1243, 90 FEP Cases 1104 (10th Cir. 2003), affirmed the judgment for the plaintiff in the amounts of $22,500 in back pay and $250,000 in punitive damages for racial and national origin discrimination in a RIF.

*Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477, 89 FEP Cases 1861 (5th Cir. 2002), reversed the grant of judgment as a matter of law on plaintiffs’ Title VII sexual harassment claims but affirmed the denial of punitive damages. The court held that, notwithstanding the inadequacy of the defendant’s handling of plaintiffs’ internal harassment complaints and earlier complaints filed by others, the defendant made out its affirmative defense:

Davidson was arguably an agent in a managerial capacity, and she may have acted with malice or reckless indifference to the rights of the plaintiffs within the scope of her employment. However, these actions were contrary to Bally’s good faith effort to prevent sexual harassment in the workplace, as is evidenced by the fact that Bally’s had a well-publicized policy forbidding sexual harassment, gave training on sexual harassment to new employees, established a grievance procedure for sexual harassment complaints,
and initiated an investigation of the plaintiffs’ complaints. These actions evidence a good faith effort on the part of Bally’s to prevent and punish sexual harassment.

14. Waiver of Challenge to Amount

*Thomas v. iStar Financial, Inc.*, 629 F.3d 276, 279, 110 Fair Empl.Prac.Cas. (BNA) 1761 (2d Cir. 2010) (*per curiam*), was a case brought under Title VII and under the New York City Human Rights Law. Plaintiff lost on his racial discrimination claim at trial, but prevailed on his retaliation claim. The jury awarded $1.6 million in punitive damages award on the retaliation claim, and the trial court granted defendants’ Rule 59 motion for a new trial on punitive damages, holding that $190,000 was the largest amount constitutionally permissible. Plaintiff then joined with defendant in petitioning for a reduction of the punitive-damages award to $190,000. The petition was granted, and plaintiff appealed. The court held: “It is settled law that ‘a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted.’” *Id.* (citations omitted). The court held that plaintiff could not escape this rule by petitioning, or joining with defendant in petitioning, for a reduction. *Id.*

*Local Union No. 38, Sheet Metal Workers’ Intern. Ass’n, AFL-CIO v. Pelella*, 350 F.3d 73, 89–90, 173 LRRM 2673, 173 LRRM 2843 (2d Cir. 2003), held that the LMRDA defendant waived its right to challenge an award of $25,000 in punitive damages, where only $1 was awarded in nominal damages, because the union had not raised the issue in the lower court. The court held that it made no difference that *State Farm* was not decided until the appeal, because *State Farm* discussed precedents predating the judgment as well as later precedents.

*Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1122, 21 IER Cases 1096 (10th Cir. 2004), affirmed the judgment for $3.6 million in favor of the racial discrimination and First Amendment retaliation plaintiff. The court held that defendants waived their right to challenge the constitutionality of the amount of the award of punitive damages by raising it in only a perfunctory fashion below. The court rejected defendants’ argument that they preserved the constitutional argument by citing *BMW v. Gore* in a footnote, while disclaiming anything other than discretionary review of the amount of the award.

M. The Damages Caps in the 1991 Act

*Lust v. Sealey, Inc.*, 383 F.3d 580, 590-91, 94 FEP Cases 645 (7th Cir. 2004), affirmed the judgment for the Title VII promotional discrimination plaintiff except for punitive damages. The court rejected defendant’s argument that the award of punitive damages was unconstitutionally excessive, although it did reduce the amount, holding that the cap on damages eliminates any question of unconstitutional excess. It stated:

The purpose of placing a constitutional ceiling on punitive damages is to protect defendants against outlandish awards, awards that are not only irrational in themselves because out of whack with any plausible conception of the social function of punitive damages but potentially catastrophic for the defendants subjected to them and, in prospect, a means of coercing settlement. That purpose falls out of the picture when the
legislature has placed a tight cap on total, including punitive, damages and the courts honor the cap.

*Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1170, 93 FEP Cases 94 (**10th Cir.** 2003), affirmed the judgment for the ADEA and Title VII plaintiff. The court rejected defendant’s argument that allowing liquidated damages under the ADEA, on top of a full $300,000 recovery for compensatory damages under Title VII, violated the 1991 Act’s caps on damages.

**N. Re-Allocation of Jury Awards to Maximize Damages**

*Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 554 F.3d 164, 174-75, 105 FEP Cases 494 (**1st Cir.** 2009), affirmed the judgment on a jury verdict for the Title VII and Puerto Rican law sexual harassment plaintiff, and held that the lower court did not abuse its discretion in denying remittitur of the compensatory damages. “Here, the jury awarded Monteagudo $333,000 in compensatory damages without apportioning the award between the Puerto Rico and the Title VII claims. The jury also awarded Monteagudo $300,000 in punitive damages under Title VII. Upon Monteagudo's motion, the district court issued an order allocating $1 of the compensatory damages award to the Title VII claims and the remaining $332,999 to the claims under Puerto Rico laws 17, 69, and 100. The district court then doubled the amount awarded pursuant to the Puerto Rico claims as required by Puerto Rico law, resulting in a total award amount of $965,999.” *Id.* at 174 (footnote omitted). The court upheld the compensatory damages at 174-75:

With respect to compensatory damages, we hold that the jury's award here of $333,000 was neither “grossly excessive” to “shock the conscience” of this court, nor was it “exaggeratedly high.” Admittedly the jury was generous in awarding this amount; however, the district court did not abuse its discretion in deciding that the award was proportionate to harm suffered by Monteagudo. As we expressed above, as a result of the sexual harassment she endured for several months, Monteagudo felt “like a piece of meat” and wept every evening. After her constructive discharge, she testified that she suffered from depression and an inability to sleep.

(Footnote omitted.)

*Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 570–71, 13 AD Cases 1345 (**3rd Cir.** 2002), affirmed the judgment on a jury verdict for the ADA plaintiff in the amount of $2.3 million in compensatory and punitive damages, unapportioned as between the State and Federal claims. Plaintiff had a virtually identical claim under Pennsylvania law, which allows uncapped compensatory damages but not punitive damages. The court affirmed the allocation of the punitive damages to the ADA claim, its reduction to $300,000, and the allocation of all $450,000 in economic damages, and all $1.55 million in compensatory damages for emotional distress to the State-law claim. The court explained:

Importantly, the ADA also contains such a prohibition: “Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State . . . that provides greater or equal protection for the rights of individuals
with disabilities than are afforded by this chapter.” 42 U.S.C. § 12201(b) (2000). Here, the PHRA, with its similar language and applicability, clearly provides a cause of action nearly identical to that of the ADA. The fact that the PHRA does not contain a damages cap further indicates that it was intended to provide a remedy beyond its federal counterpart, the ADA. As the courts in Passantino and Martini recognized, subjecting such state law claims to the federal cap would effectively limit a state’s ability to provide for greater recovery than allowed under the corresponding federal law. Passantino, 212 F.3d at 510; Martini, 178 F.3d at 1349–50. Imposing such a limitation would violate the federal law’s prohibition on limiting state remedies. Id.

The court further upheld the apportionment of damages between the Federal and State claims:

In this case, given the similarity of the claims and the jury’s unapportioned award of damages, it is reasonable to infer that the jury intended to award its entire verdict to Gagliardo. Because there is no cap under the PHRA, it was entirely reasonable for the trial court to apportion the damages so as to allow Gagliardo to recover the entire jury award, as reduced by the district court.

Id. at 571. The court distinguished situations in which a plaintiff sues for the same conduct under multiple Federal statutes. Id.

Baker v. John Morrell & Co., 382 F.3d 816, 832 n.4 (8th Cir. 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment and retaliation plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys’ fees and costs, a total of $1,386,632. Plaintiff filed suit only under Title VII, and after the verdict moved to amend her complaint to add a claim under the Iowa Civil Rights Act, which provides for uncapped compensatory damages but no punitive damages. That would allow her to keep all of her compensatory-damage award, and $300,000 of her punitive-damage award. District Judge Mark Bennett ultimately granted the motion under Rules 15(b) and 54(c), FED. R. CIV. PRO., and the court of appeals affirmed. The court held that it would not consider the permissibility of allocating all $300,000 in Title VII damages to punitive damages, without a compensatory award under Title VII, because defendant did not raise the issue.

Madison v. IBP, Inc., 257 F.3d 780, 804–05, 86 FEP Cases 77, 80 E.P.D. ¶ 40,628 (8th Cir. 2001), petition for cert. filed, 70 USLW 3445 (U.S., Dec. 19, 2001) (No. 01–985), held that the caps on damages in the Civil Rights Act of 1991 are constitutional. However, the court refused to apply the caps to plaintiff’s § 1981 and State-law claims. Id. at 803–04. The court affirmed the lower court’s decision to allocate all of the plaintiff’s compensatory damages to her State-law claim so that they would not count under the caps. It explained:

In granting Madison’s motion for reallocation of her sex based damages, the district court observed that the verdict had not tied the question of damages to a particular statute, that the standard of liability under all three statutes was the same, and that allocation would permit Madison to recover more of the damages awarded by the jury. Appellate courts have approved the allocation of damages between state and federal claims in cases such as this where the standards of liability are the same and the jury has
not been asked to distinguish between statutes in assessing damages. The D.C. Circuit concluded in a similar situation that there was no reason why the plaintiff could not recover her judgment under the local Human Rights Act, “since the local law contains the same standards of liability as Title VII but imposes no cap on damages.” Martini v. Federal National Mortgage Ass’n, 178 F.3d 1336, 1349 (D.C. Cir. 1999) The Martini court noted that the standards of liability for the plaintiff’s local and federal claims were the same, and it reasoned that if courts were not permitted “to treat damages under federal and local law as fungible where the standards of liability are the same, [it] would effectively limit the local jurisdiction’s prerogative to provide greater remedies for employment discrimination than those Congress has afforded under Title VII.” Id. at 1349–50.

The Ninth Circuit has also approved allocation of compensatory damages to a plaintiff’s state law claims where the verdict form permitted the jury to award damages on state and federal civil rights claims without specifically distinguishing them. See Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493 (9th Cir. 2000). Since “the jury had awarded damages without differentiating between the claims, the awards were effectively fungible, and the district court’s action was entirely within its discretion and consistent with the jury’s verdict.” Id. at 509.

We find the reasoning in Martini and Passantino persuasive and consistent with federal policy. Title VII states that nothing in its provisions “shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State ...” 42 U.S.C. § 2000e–7. To prohibit courts from allocating damages after a jury verdict finding liability under both federal and state law would conflict with the statutory framework of Title VII and the congressional policy to deter discrimination and harassment. See Kimzey, 107 F.3d at 576 (“no language in Title VII indicat[es] that its upper limit is to be placed on awards under state anti-discrimination statutes”). The jury in this case found for Madison on both her state and federal sexual harassment and discrimination claims, and no persuasive reason has been shown why she should be prevented from receiving her award for compensatory damages under ICRA instead of under the federal statutes. The trial court did not err in its allocation of Madison’s compensatory damages for sex based violations to her state law claims.

Id. at 801–02.

O. Fees and Expenses

1. Bars to Entitlement

Buckhannon Board and Care Home, Inc., v. West Virginia Department of Health and Human Resources, 530 U.S. 1304, 121 S. Ct. 1835, 11 AD Cases 1300 (2001), rejected the “catalyst” theory as a basis for entitlement to a fee award under 42 U.S.C. § 1988. The court held that obtaining relief pursuant to a court order or approval of a settlement that changes the legal relationship of the parties is essential requirement for “prevailing party” status and thus for entitlement to fees under the wording of this statute, which parallels the wording of many fee-
award provisions. The court rejected as far-fetched petitioners’ argument that defendants would avoid their fee obligations by voluntarily tendering full relief, and thus mooting the action before judgment. “And petitioners’ fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant’s change in conduct will not moot the case. Even then, it is not clear how often courts will find a case mooted: ‘It is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice’ unless it is ‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.’” Sole v. Wyner, 551 U.S. 74 (2007), a § 1983 case involving nudist “performance art,” unanimously held that plaintiffs who prevail in obtaining a preliminary injunction but lose on the merits are not entitled to attorney’s fees under 42 U.S.C. § 1988. The Court held: “A plaintiff who achieves a transient victory at the threshold of an action can gain no award under that fee-shifting provision if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded.” Sole v. Wyner, 551 U.S. 74 (2007), at 78. The Court expressed no view as to cases in which the grant of a preliminary injunction is not followed by a loss on the merits. The Court stated in note 3 that the opinion was consistent with the views of both the majority and the dissenters in Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U. S. 598, 600 (2001).

2. **FLSA Plaintiff Denied Fees for Lack of Collegiality**

Sahyers v. Prugh, Holliday & Karatinos, P.L., 560 F.3d 1241, 14 WH Cases 2d 1000 (11th Cir. 2009), affirmed the complete denial of attorneys’ fees in an FLSA case that settled when plaintiff accepted an offer of judgment for $3,500 plus fees and expenses. Plaintiff’s demand in settlement discussions had been in the $25,000 to $35,000 range, and she had refused to provide discovery to set forth the amount of time on which she claimed unpaid overtime was due. The court stated at 1245-46:

The district court's inherent powers support its decision here. Defendants are lawyers and their law firm. And the lawyer for Plaintiff made absolutely no effort—no phone call; no email; no letter—to inform them of Plaintiff's impending claim much less to resolve this dispute before filing suit. Plaintiff's lawyer slavishly followed his client's instructions and—without a word to Defendants in advance—just sued his fellow lawyers. As the district court saw it, this conscious disregard for lawyer-to-lawyer collegiality and civility caused (among other things) the judiciary to waste significant time and resources on unnecessary litigation and stood in stark contrast to the behavior expected of an officer of the court. The district court refused to reward—and thereby to encourage—uncivil conduct by awarding Plaintiff attorney's fees or costs. Given the district court's power of oversight for the bar, we cannot say that this decision was outside of the bounds of the district court's discretion.

(Footnotes omitted.)
3. **Grounds for Entitlement**

*Harsco Corp. v. Renner*, 475 F.3d 1179, 1191, 99 FEP Cases 1145 (**10th Cir.** 2007), affirmed the judgment of liability on a jury verdict for the Title VII sexual harassment plaintiff, and affirmed the vacation of the award of punitive damages where defendant had adequate policies and plaintiff failed to link local managers’ inactions to defendant. Plaintiff had requested appellate attorneys’ fees in her opening brief. The court stated: “We have discretion to award attorney fees when we deem it appropriate, but a prevailing party is not automatically entitled to an award of attorney fees.” The court granted the fees because plaintiff had successfully defended her verdict.

4. **Enhancements to Lodestar**

*Perdue v. Kenny A. ex rel. Winn*, __ U.S. __, 130 S.Ct. 1662, 176 L.Ed.2d 494, 109 Fair Empl.Prac.Cas. (BNA) 1, 93 Empl. Prac. Dec. ¶ 43,877 (2010) (Alito, J.), reversed the enhancement of a fee award in a § 1983 class action involving a challenge to foster child services in two Georgia counties, on behalf of 3,000 children. The relief obtained was equitable, not monetary. Plaintiff’s counsel petitioned for a doubling of their lodestar to reflect the high quality of their work. The district court made cuts to the lodestar, resulting in a lodestar of $6 million, and then granted a 75% enhancement. The Supreme Court described the district court’s reasoning at 1670:

The court then enhanced this award by 75%, concluding that the lodestar calculation did not take into account “(1) the fact that class counsel were required to advance case expenses of $1.7 million over a three-year period with no ongoing reimbursement, (2) the fact that class counsel were not paid on an on-going basis as the work was being performed, and (3) the fact that class counsel’s ability to recover a fee and expense reimbursement were completely contingent on the outcome of the case.” . . . The court stated that respondents' attorneys had exhibited “a higher degree of skill, commitment, dedication, and professionalism ... than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench.” . . . The court also commented that the results obtained were “‘extraordinary’ ” and added that “[a]fter 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale.” . . . The enhancement resulted in an additional $4.5 million fee award.

The Eleventh Circuit affirmed. The 5-Justice majority strongly endorsed the lodestar approach as providing a more objective basis for awarding and reviewing fees than the old standard of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (**5th Cir.** 1974). The Supreme Court described the virtues of the lodestar approach at 1672:

Although the lodestar method is not perfect, it has several important virtues. First, in accordance with our understanding of the aim of fee-shifting statutes, the lodestar looks to “the prevailing market rates in the relevant community.” . . . Developed after the practice of hourly billing had become widespread . . . the lodestar method produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the
hour in a comparable case. Second, the lodestar method is readily administrable . . .; and unlike the Johnson approach, the lodestar calculation is “objective” . . . and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results.

(Emphasis in original.) The Court described, at 1672-73, six rules that it gleaned from prior decisions, which in its view supported the presumptive use of the lodestar approach as sufficient to attract capable attorneys and reflecting both the complexity and difficulty of the case and the qualities of counsel. The Court said at 1674 that enhancements are possible but rare: “In light of what we have said in prior cases, we reject any contention that a fee determined by the lodestar method may not be enhanced in any situation. The lodestar method was never intended to be conclusive in all circumstances. Instead, there is a ‘strong presumption’ that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee.” The Court held that the first inquiry is whether the superior results are attributable to the attorneys’ superior performance and commitment of resources, which alone might justify an enhancement, or to factors that cannot justify an enhancement, such as “inferior performance by defense counsel, unanticipated defense concessions, unexpectedly favorable rulings by the court, an unexpectedly sympathetic jury, or simple luck.” Id. The Court held that the next inquiry is “whether there are circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation.” It did not shut the door entirely on such a possibility, but was limiting: “We conclude that there are a few such circumstances but that these circumstances are indeed ‘rare’ and ‘exceptional,’ and require specific evidence that the lodestar fee would not have been ‘adequate to attract competent counsel,’ Blum, supra, at 897, 104 S.Ct. 1541 (internal quotation marks omitted).” Id. The Court described those circumstances:

First, an enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation. FN5 This may occur if the hourly rate is determined by a formula that takes into account only a single factor (such as years since admission to the bar) FN6 or perhaps only a few similar factors. In such a case, an enhancement may be appropriate so that an attorney is compensated at the rate that the attorney would receive in cases not governed by the federal fee-shifting statutes. But in order to provide a calculation that is objective and reviewable, the trial judge should adjust the attorney's hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate.

Respondents correctly note that an attorney’s “brilliant insights and critical maneuvers sometimes matter far more than hours worked or years of experience.” . . . But as we said in Blum v. Stenson, 465 U.S. 886, 898, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), “[i]n those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates.”

Second, an enhancement may be appropriate if the attorney’s performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted. As Judge Carnes noted below, when an attorney agrees to represent a civil rights plaintiff who cannot afford to pay the attorney, the attorney presumably understands that no reimbursement is likely to be received until the successful resolution of the case, 532 F.3d, at 1227, and therefore enhancements to compensate for delay in reimbursement for expenses must be reserved for unusual cases. In such exceptional cases, however, an enhancement may be allowed, but the amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses.

Third, there may be extraordinary circumstances in which an attorney’s performance involves exceptional delay in the payment of fees. An attorney who expects to be compensated under § 1988 presumably understands that payment of fees will generally not come until the end of the case, if at all. . . . Compensation for this delay is generally made “either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value.” Missouri v. Jenkins, 491 U.S. 274, 282, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) (internal quotation marks omitted). But we do not rule out the possibility that an enhancement may be appropriate where an attorney assumes these costs in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense. In such a case, however, the enhancement should be calculated by applying a method similar to that described above in connection with exceptional delay in obtaining reimbursement for expenses.

Id. at 1674-75. True to past form, the Court ignored utterly the difference between being paid, win or lose, and being paid only in the event one prevails. The Court rejected the 75% enhancement as essentially arbitrary. It noted that the enhancement would bring the top hourly rate to $866 an hour and there was no evidence that this was an appropriate rate in the relevant legal market. It rejected Justice Breyer’s suggestion that the average rate of all counsel was below the market average hourly rate, since this merely reflected that a disproportionate share of the work was done by counsel at a lower hourly rate. The Court held that the enhancement could not be based on the extraordinary outlays of counsel, since there was no calculation of the amount of the enhancement attributable to this factor. The Court’s war with economic reality is shown in the following paragraph at 1676:

The District Court pointed to the fact that respondents' counsel had to make extraordinary outlays for expenses and had to wait for reimbursement . . . but the court did not calculate the amount of the enhancement that is attributable to this factor. Similarly, the District Court noted that respondents' counsel did not receive fees on an ongoing basis while the case was pending, but the court did not sufficiently link this factor to proof in the record that the delay here was outside the normal range expected by attorneys who rely on § 1988 for the payment of their fees or quantify the disparity. Nor did the court provide a calculation of the cost to counsel of any extraordinary and unwarranted delay. And the court's reliance on the contingency of the outcome contravenes our holding in Dague. . . .
The Court rejected the trial court’s comparison of the performance of counsel to that of counsel in other, unnamed cases, since such an impressionistic basis undermined objectivity and the ability of an appellate court to review the award. *Id.* at 1676. “In addition, in future cases, defendants contemplating the possibility of settlement will have no way to estimate the likelihood of having to pay a potentially huge enhancement.” *Id.* The Court then again expressed its rejection of economic reality, at 1676-77:

Section 1988 serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights. But unjustified enhancements that serve only to enrich attorneys are not consistent with the statute's aim. FN8 In many cases, attorney's fees awarded under § 1988 are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based. Instead, the fees are paid in effect by state and local taxpayers, and because state and local governments have limited budgets, money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services. Cf. *Horne v. Flores*, 557 U.S. ----, ----, 129 S.Ct. 2579, 2593-2594, 174 L.Ed.2d 406 (2009) (payment of money pursuant to a federal-court order diverts funds from other state or local programs).

FN8 Justice BREYER's opinion dramatically illustrates the danger of allowing a trial judge to award a huge enhancement not supported by any discernible methodology. That approach would retain the $4.5 million enhancement here so that respondents' attorneys would earn as much as the attorneys at some of the richest law firms in the country. *Post*, at ---- - ----. These fees would be paid by the taxpayers of Georgia, where the annual per capita income is less than $34,000, *see* Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2010, p. 437 (2009) (Table 665) (figures for 2008), and the annual salaries of attorneys employed by the State range from $48,000 for entry-level lawyers to $118,000 for the highest paid division chief, *see* Brief for State of Alabama et al. as Amici Curiae, 10, and n. 3 (citing National Association of Attorneys General, Statistics on the Office of the Attorney General, Fiscal Year 2006, pp. 37-39). Section 1988 was enacted to ensure that civil rights plaintiffs are adequately represented, not to provide such a windfall.

The Court remanded the case for further proceedings. Justice Alito wrote the majority opinion, joined by the Chief Justice and Justices Scalia, Kennedy, and Thomas. Justices Kennedy and Thomas also wrote separate concurring opinions. Justice Breyer concurred in part and dissented in part, joined by Justices Stevens, Ginsburg, and Sotomayor.

See the discussion of *Quigley v. Winter*, 598 F.3d 938, 956-59 (*8th Cir.* 2010), in the section below on “Reasonable Time.”

5. **Procedure for Resolving Fees in Common-Fund Class Actions**

*Staton v. Boeing Co.*, 313 F.3d 447, 454–45, 90 FEP Cases 641 (*9th Cir.* 2002), reversed the grant of final approval to a settlement for several reasons. One reason was the court’s concern about the settlement’s provisions on attorneys’ fees:
The parties negotiated the amount of attorneys’ fees as part of the settlement between the class and the Company. They included as a term of the proposed decree the amount of attorneys’ fees that class counsel would receive. The action falls under the terms of two fee-shifting statutes. By negotiating fees as an integral part of the settlement rather than applying to the district court to award fees from the fund created, Boeing and class counsel employed a procedure permissible if fees can be justified as statutory fees payable by the defendant.

Boeing and class counsel did not, however, seek to justify the attorneys’ fees on this basis but instead made a hybrid argument: They maintained that the award is an appropriate percentage of a putative “common fund” created by the decree even though common funds, as opposed to statutory fee-shifting agreements, usually do not isolate attorneys’ fees from the class award before an application is made to the court. The district court approved the fee on that common fund basis.

The incorporation of an amount of fees calculated as if there were a common fund as an integral part of the settlement agreement allows too much leeway for lawyers representing a class to spurn a fair, adequate and reasonable settlement for their clients in favor of inflated attorneys’ fees. We hold, therefore, that the parties to a class action may not include in a settlement agreement an amount of attorneys’ fees measured as a percentage of an actual or putative common fund created for the benefit of the class. Instead, in order to obtain fees justified on a common fund basis, the class’s lawyers must ordinarily petition the court for an award of fees, separate from and subsequent to settlement.

In order to assess the reasonableness of the attorneys’ fees awarded by the decree, the district court compared the amount of the fees to the amount of the putative common fund and determined what percentage of this fund the fee amount constituted. This comparison is a permissible procedure when a court is determining the reasonableness of fees taken from a genuine common fund. In conducting the comparison, however, the district court included in the value of the putative common fund the inexact and easily manipulable value of injunctive relief. Such relief should generally be excluded from the value of a common fund when calculating the appropriate attorneys’ fee award, although the fact that counsel obtained injunctive relief in addition to monetary relief for their clients is a relevant circumstance to consider in determining what percentage of the fund is reasonable as fees. We hold further, therefore, that parties may not include an estimated value of injunctive relief in the amount of an actual or putative common fund for purposes of determining an award of attorneys’ fees.

The court held that “there is no preclusion on recovery of common fund fees where a fee-shifting statute applies.” Id. at 476. It cited the following authority:

See Brytus v. Spang & Co., 203 F.3d 238, 246-247 (3d Cir. 2000) (holding that common fund funds can be appropriate in both settled and litigated cases where statutory fees are available); Cook v. Niedert, 142 F.3d 1004 (7th Cir. 1998) (approving fees measured by common fund rather than statutory principles where statutory fees were available); Florin v. Nationsbank, 34 F.3d 560, 564 (7th Cir. 1994) (common fund
principles “properly control a case which is initiated under a statute with a fee shifting provision, but is settled with the creation of a common fund.”); Skelton v. General Motors Corp., 860 F.2d 250, 256 (7th Cir. 1988) (“[W]hen a settlement fund is created in exchange for release of the defendant’s liability both for damages and for statutory attorneys’ fees, equitable fund principles must govern the court’s award of the attorneys’ fees.”); 1 Mary Francis Derfner and Arthur D. Wolf, Court Awarded Attorney Fees, ¶ 2.05[7] at 2-81 (2001) (“[T]he mere fact that a fee-shifting statute is implicated in the action does not ensure that fees will be awarded under that statute…. [F]ees may be taxed against the [settlement] fund under the common fund doctrine.” (citing Skelton and Florin)).

Id. at 476 n.18. The court explained the nature of such a recovery: “In contrast to fee-shifting statutes, which enable a prevailing party to recover attorneys’ fees from the vanquished party, the common fund doctrine permits the court to award attorneys’ fees from monetary payments that the prevailing party recovered in the lawsuit. Put another way, in common fund cases, a variant of the usual rule applies and the winning party pays his or her own attorneys’ fees; in fee-shifting cases, the usual rule is rejected and the losing party covers the bill.” Id. at 476–77. The court noted that a risk multiplier is allowed in common-fund fee awards, and stated that the Ninth Circuit has generally determined that a reasonable fee would constitute 25% of a common fund. Id. at 477. It explained the operation of a common-fund recovery in a fee-shifting case:

Application of the common fund doctrine to class action settlements does not compromise the purposes underlying fee-shifting statutes. In settlement negotiations, the defendant’s determination of the amount it will pay into a common fund will necessarily be informed by the magnitude of its potential liability for fees under the fee-shifting statute, as those fees will have to be paid after successful litigation and could be treated at that point as part of a common fund against which the attorneys’ fees are measured. Conversely, the prevailing party will expect that part of any aggregate fund will go toward attorneys’ fees and so can insist as a condition of settlement that the defendants contribute a higher amount to the settlement than if the defendants were to pay the fees separately under a fee-shifting statute.

Id. at 478 (footnote omitted). However, “if the parties invoke common fund principles, they must follow common fund procedures and standards, designed to protect class members when common fund fees are awarded.” Id. The court elaborated, id. at 481:

We hold, therefore, that in a class action involving both a statutory fee-shifting provision and an actual or putative common fund, the parties may negotiate and settle the amount of statutory fees along with the merits of the case, as permitted by Evans. In the course of judicial review, the amount of such attorneys’ fees can be approved if they meet the reasonableness standard when measured against statutory fee principles. Alternatively, the parties may negotiate and agree to the value of a common fund (which will ordinarily include an amount representing an estimated hypothetical award of statutory fees) and provide that, subsequently, class counsel will apply to the court for an award from the fund, using common fund fee principles. In those circumstances, the agreement as a whole does not stand or fall on the amount of fees. Instead, after the court
determines the reasonable amount of attorneys’ fees, all the remaining value of the fund belongs to the class rather than reverting to the defendant.

Id. at 481. Judge Trott dissented. Id. at 487.

6. **Reasonable Time**

*Farfaras v. Citizens Bank and Trust of Chicago*, 433 F.3d 558, 569, 97 FEP Cases 391 (7th Cir. 2006), affirmed the judgment on a jury verdict for the Title VII and State-law sex discrimination and sexual harassment plaintiff for $200,000 in compensatory damages and $100,000 in punitive damages against the individual State-law defendants, $50,000 against the corporate Title VII defendant, $9,314.48 in lost wages, and $436,766.75 in attorneys’ fees and costs. The court rejected defendants’ objections to plaintiff’s counsel’s time records:

We begin our analysis of the defendants’ claim for a reduction by noting that the parties did not comply with Local Rule 54.3 of the Northern District of Illinois. Defendants’ counsel claimed before the district court that its billing records were irrelevant. This position is inconsistent with the letter and spirit of Local Rule 54.3. The rule’s purpose is to avoid exactly the type of hypocritical objections presented by the defendants. Although the defendants object to the use of block billing and “vague” descriptions by Farfaras’s counsel, the defendants’ counsel used similarly vague descriptions and block billing. Although “block billing” does not provide the best possible description of attorneys’ fees, it is not a prohibited practice.

*Quigley v. Winter*, 598 F.3d 938, 956-59 (8th Cir. 2010), affirmed the jury verdict under the Fair Housing Act, and held that the plaintiff tenant had established sexual harassment by the landlord and thus a hostile housing environment. The court held that the lower court erred in failing to conduct a lodestar analysis and in limiting the fee award to $20,000 because of concerns about defendant’s ability to pay. Rather than remand the case, it awarded $78,044.33 in fees itself. The court accepted counsel’s hourly rates but cut their hours by a third because the case was too heavily lawyered and too many attorneys moved in and out of the case. Judge Gruender dissented from the failure to remand the fee issue. Id. at 959-60.

See the discussion of *Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245, 1257–60, 16 AD Cases 1197 (10th Cir. 2005), in the section below on “Need to Exercise Billing Judgment.”

7. **Problems with Recordkeeping**

*Bishop v. Gainer*, 272 F.3d 1009, 1020, 87 FEP Cases 920 (7th Cir. 2001), affirmed the denial of part of the attorneys’ fees sought by plaintiffs: “The district court awarded plaintiffs over $238,000 in attorneys fees and costs. He denied a request for additional fees arising out of hundreds of hours of long-distance telephone calls. He said he could not assess the reasonableness of the request because counsel refused to describe in general terms the substance of the calls. We fail to see an abuse of discretion in this decision.”
8. **The Relevant Community for Hourly Rates**

*Mathur v. Board of Trustees of Southern Illinois University*, 317 F.3d 738, 90 FEP Cases 1537 (7th Cir. 2003), reversed the fee award for two of plaintiffs’ attorneys because the lower court erred in using Southern Illinois local rates for their time instead of the Chicago rates they customarily charged. The court held that the out-of-town attorney’s rate is presumptively the rate that should be used, unless there is evidence that local attorneys were able to perform as well as visiting counsel and there was no reason why local counsel should not have been engaged.

9. **Need to Exercise Billing Judgment**

*Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245, 1257–60, 16 AD Cases 1197 (10th Cir. 2005), affirmed the fee award to the ADA plaintiff notwithstanding the 35 points of error raised by one side or the other. “Ms. Praseuth filed a motion seeking attorneys’ fees in the amount of $1,011,280.00 plus expenses in the amount of $132,639.00. The district court reduced the amounts requested by approximately two-thirds, awarding Ms. Praseuth attorneys’ fees of $336,025.50 and expenses of $97,581.11.” *Id.* at 1249. The court stated: “The fee applicant should exercise billing judgment with respect to the number of hours worked and billed. . . . Billing judgment consists of winnowing hours actually expended down to hours reasonably expended.” *Id.* at 1257. The court objected to the huge chunks of time charged by plaintiffs’ counsel for extremely basic research:

> Ms. Praseuth’s attorneys requested fees for over 200 hours spent during the six months prior to the commencement of this litigation doing background research and educating themselves generally about the ADA. These hours included time for work described as follows: “Skimmed and reviewed first six chapters of Cal Practice Guide, Federal Civil Procedure Before Trial, to refresh on federal rules and law,” and “Reviewed Chapters 7 through 10 and Chapter 11 in the Rutter Group Treatise Federal Civil Procedure in Before Trial ... preparation for litigation.” Ms. Praseuth’s attorneys devoted 50 hours to drafting the EEOC charge. They spent 160 hours drafting the complaint. They then filed a motion to amend the complaint, expending over 42 hours on the amendment.”

*Id.* at 1257–58. The court held that “time spent reading background material designed to familiarize an attorney with an area of law is presumptively unreasonable. . . . When counsel is inexperienced, a losing party should not be obligated to pay for that counsel’s legal education.” *Id.* at 1258 (citations omitted). The court held that local rates in Wichita, Kansas, were properly applied to counsel from California: “While a party is free to select counsel from any locality, absent a clear showing that the matter could not reasonably have been handled by counsel from the locality, rates above the prevailing local hourly rates should not be applied.” *Id.* at 1259 (citations omitted). The court then addressed the question of competing excesses:

As already noted, Ms. Praseuth’s attorneys sought compensation for enormous amounts of time, including a truly remarkable number of hours spent on relatively straightforward tasks. Rubbermaid’s attorneys, on the other hand, defended this action very aggressively on every conceivable front. After protracted proceedings memorialized by 531 docket entries in the district court record, the district judge found that “both the
plaintiff and the defendants have engaged in an extreme and unnecessary amount of briefing” in this case. Our own, first-hand knowledge of the parties’ approach to this appeal amply supports the correctness of that finding.

Given the excesses on both sides of this case, the district court was called upon to avoid penalizing Rubbermaid by awarding fees for the huge amounts of time devoted to the matter by Ms. Praseuth’s counsel; at the same time, the district court was called upon to avoid penalizing Ms. Praseuth by denying compensation for legal services necessitated by Rubbermaid’s noticeably aggressive defense. We conclude that the district court’s fee award appropriately balanced these competing considerations. An aggressive litigation strategy carries with it certain risks, one of which is that a party pursuing an aggressive strategy may, if it loses, find itself required to bear a portion of the attorneys’ fees incurred by the other party in responding to that aggressiveness.

*Id.* at 1260. Finally, the court held that the trial court did not abuse its discretion in denying prejudgment interest on the fees. *Id.*

10. **Discounts for Partial Success, and Need to Avoid Double Discounts**

*Farias v. Instructional Systems, Inc.*, 259 F.3d 91, 102–03 (2nd Cir. 2001), affirmed the judgment of liability on a jury verdict for Title VII retaliation plaintiff Robinson, affirmed the denial of punitive damages, and vacated and remanded the fee award. The lower court had awarded $37,194.97 in attorneys’ fees and costs instead of the $132,193.75 in attorney’s and paralegal fees $3,406.59 in costs that had been sought. “To arrive at that amount, the court (i) cited several grounds for reducing the number of hours reasonably expended in the litigation for purposes of calculating the lodestar, and (ii) adjusted the lodestar further downward to reflect Robinson’s limited success.” *Id.* at 103. The court of appeals held that the lower court’s opinion did not make clear whether it had doubly discounted plaintiffs’ fees for limited success, and remanded the award for clarification, with leave to revisit the entire award, and directed that any new appeal be resolved by the same panel.

*Fine v. Ryan International Airlines*, 305 F.3d 746, 756–57, 89 FEP Cases 1543 (7th Cir. 2002), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff, and denied plaintiff’s cross-appeal from a 10% reduction in the lodestar for failure to prevail on the discrimination claim. The court observed that the plaintiff was fully successful, in that because of the cap on damages she received as much relief as she would have been able to receive if she had prevailed on the discrimination claim. The court held that the reduction might have been based on the lower court’s view that plaintiff’s counsel wasted some time pursuing less promising theories of recovery, and that such a view would not be an abuse of discretion.

11. **Refusal to Discount for Partial Success**

*Salitros v. Chrysler Corp.*, 306 F.3d 562, 576–77, 13 AD Cases 1057 (8th Cir. 2002), affirmed the judgment for the ADA retaliation plaintiff for $445,516 in front pay, “representing seven years worth of wages and benefits, up to September 8, 2007, Salitros’s anticipated retirement date.” The court affirmed the fee award, holding that plaintiff was entitled to fees because she recovered on her retaliation claim, even if she lost her discrimination claim, and
rejecting the defendant’s contention that the award should be cut because of issues on which plaintiff did not prevail. “The magistrate judge considered this argument and concluded that the claims shared a common core of facts and therefore the fees should not be reduced for failure to prevail on every theory. Accepting this recommendation was not an abuse of the district court’s discretion.” Id. at 577 (citation omitted).

Webner v. Titan Distribution, Inc., 267 F.3d 828, 838, 12 AD Cases 513 (8th Cir. 2001), affirmed the award of attorneys’ fees. The court rejected the defendant’s argument that it was unreasonable to require it to pay for two attorneys at depositions, because the workers’ compensation and ADA issues were intertwined, and it was reasonable to have attorneys specializing in workers’ compensation and fair-employment litigation each present at the depositions. “Titan further contends that the district court should have reduced the attorneys’ fees by 50% because Iowa law does not provide for an award of attorneys’ fees in a wrongful termination case. The district court agreed in part and reduced the amount of fees Webner sought but by only 10%. The court concluded that the evidence Webner submitted was interrelated and overlapped between the two claims, therefore further reduction was not appropriate.” The court of appeals agreed, stating that the most important factor is that the plaintiff won.

El-Hakem v. BJY Inc., 415 F.3d 1068, 1076, 96 FEP Cases 84, 10 WH Cases 2d 1313 (9th Cir. 2005), cert. denied, 547 U.S. 1004 (2006), affirmed the judgment for the § 1981 and Title VII plaintiff for $15,000 in compensatory damages and $15,000 in punitive damages because of a hostile working environment based on race and national origin. The court affirmed the lower court’s decision not to apportion attorneys’ fees. It explained: “There was no gross disproportion in the time expended by El-Hakem’s counsel as between BJY and Young because the claims against the two defendants were virtually interchangeable. Neither was there a need to apportion the fee award as to the respective claims, because only a small percentage of the total hours expended was attributable to the state law wage claim, a portion of which was successful.” (Citation and footnote omitted.)

Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1291–92, 102 FEP Cases 716 (11th Cir. 2008), affirmed the lower court’s award of approximately $160,000 in fees to the successful Title VII and § 1981 retaliation plaintiff, who recovered $500,000 in punitive damages, $27,160.59 in back pay, and $27,160.59 in damages for mental anguish. The court held that the lower court did not abuse its discretion in declining to reduce the award because plaintiff had lost approximately half the issues. The court stated at 1292:

The district court did not abuse its discretion. A review of the record establishes that evidence supporting Goldsmith's successful claim of retaliation was inextricably intertwined with evidence supporting his unsuccessful claims, and the punitive damages award was supported by evidence underlying the unsuccessful claims. The “me too” evidence was admissible both as evidence of the intent of Bagby Elevator to retaliate against Goldsmith and as evidence of Goldsmith's hostile work environment claim. The evidence regarding Goldsmith's failure to promote claim provided the basis for Goldsmith's first EEOC charge, which was in turn necessary for Goldsmith to prove his claim of retaliation. The evidence regarding the EEOC investigation and cause determination supported all of Goldsmith's claims. Because Goldsmith's successful claim
of retaliation was related to his unsuccessful claims and he “won substantial relief,” we conclude that the refusal of the district court to reduce the amount of attorney's fees and costs was not an abuse of discretion.

12. Costs and Expenses

Mota v. University of Texas Houston Health Science Center, 261 F.3d 512, 530, 86 FEP Cases 1140, 81 E.P.D. ¶ 40,728 (5th Cir. 2001), held that investigation fees were recoverable under Title VII, that the costs of videotaped depositions were not recoverable, and that mediation fees were not recoverable.

Little v. Mitsubishi Motors North America, Inc., 514 F.3d 699, 102 FEP Cases 977 (7th Cir. 2008) (per curiam), affirmed the lower court’s award under 28 U.S.C. § 1920 of the costs of both video-taping and stenographically transcribing depositions. The court also held that the costs of computerized research were recoverable under § 1920.

EEOC v. Bd. of Regents of University of Wisconsin System, 288 F.3d 296, 302, 88 FEP Cases 1133 (7th Cir. 2002), affirmed the judgment for the EEOC. The court affirmed the award of witness fees for the charging parties, holding that the EEOC was the only party filing the suit and the charging parties were merely nonparty witnesses for whom the EEOC was seeking relief.

P. Sanctions

Peterson v. Archstone Communities LLC, 637 F.3d 416, 111 Fair Empl.Prac.Cas. (BNA) 1772 (D.C. Cir. 2011), reversed the dismissal of the pro se plaintiff’s case, holding that the failure to appear at a single motions hearing did not justify dismissal of the action. The court rejected defendant’s argument that plaintiff had also filed baseless discovery motions, because defendant’s opposition to plaintiff’s motion for appointment of counsel had represented to the court that plaintiff was doing a good job of representing herself: “In a pleading opposing Peterson's motion for appointment of counsel to represent her in the district court, Archstone advised the court as follows: ‘[C]ounsel for Archstone has observed that Ms. Peterson has, to date, ably drafted and responded to motions, participated in discovery conferences, and otherwise capably represented herself in this matter.’ . . . And the district court, in denying Peterson's motion for appointment of counsel, found that her ‘motions display not only a workable familiarity with the Federal Rules of Civil Procedure and the local rules of this Court, but also her ability to represent herself adequately.’ . . . ” Id. at 419.

Lamboy-Ortiz v. Ortiz-Velez, 630 F.3d 228 (1st Cir. 2010), reversed the award of $130,000 in defendants’ attorneys’ fees against the civil rights political-discrimination and due process plaintiffs, affirmed the imposition of sanctions on plaintiff’s counsel under 28 U.S.C. § 1927, and reduced the amount of the sanctions from over $64,936 to $5,000. The court held that the lower court improperly emphasized the failure of plaintiff’s evidence at trial, and did not adequately consider the information known to plaintiff at the time the Complaint was filed. Id. at 237-38. Examining the record itself, the court noted that some of the evidence supporting plaintiffs had been excluded at trial because of the failure to provide English translations, or other problems that did not affect the reasonableness of reliance on the substance of the evidence. The court concluded: “Overall, it was reasonable for the plaintiffs to attribute a
political motive to the apparent campaign of harassment against them, given the undisputed hostility between members of the NPP and PDP in Sabana Grande, the intimations of a connection between the Mayor and Vargas-Santiago, and the apparent absence of any legitimate explanation for the excessively punitive response from the police administration to Vargas-Santiago's allegations against the plaintiffs.” *Id.* at 239 (citation omitted).

In sum, our review of the record finds the evidence available to plaintiffs at the time of filing easily sufficient to support the reasonableness of their suit. We are left to choose between one of two possible conclusions concerning the basis for the district court's contrary assessment. First, the district court may have failed to give any consideration to the evidence we have discussed above, relying solely upon the plaintiffs' ultimate inability to support their case at trial as a proxy for the reasonableness of their suit at the outset—in other words, a pure application of hindsight logic. Second, the court may have duly considered all available evidence of reasonableness, but substantially discounted it in light of the failure of proof at trial. The choice between the two makes little difference. In either case, it is clear that the court gave significant weight to a factor that should have received little or no consideration in its analysis . . . and we therefore must conclude that the court abused its discretion.

*Id.* at 241 (citations omitted). In the next step of its analysis, the court cautioned that a finding that an originally reasonable claim was prosecuted after it became untenable was particularly prone to impermissible hindsight analysis. “Thus, while a court need not find bad faith to justify an award of fees for the continuation of a clearly untenable claim . . . it must at a minimum find that, following the filing of the claim, circumstances changed to such an extent that a reasonable person could not help but conclude that the claim was no longer viable. Such a change would include, for example, the receipt of evidence in the course of discovery establishing a complete defense, or a development in the controlling law that foreclosed the claim.” *Id.* at 241-42 (citation omitted). The court held that plaintiff’s survival of summary judgment may or may not bear on the reasonableness of the claim, depending on the extent to which it was based on the merits. *Id.* at 242. Ordinarily, however, one would not expect to see an untenable claim survive a summary judgment on the merits, as occurred in the case at bar. *Id.* The court reversed the fee award. Turning to the sanctions against plaintiff’s counsel, the court first held that it had jurisdiction to consider the appeal despite the failure to name plaintiff’s counsel as an appellant in the Notice of Appeal, since it was clear from the Notice that an appeal was sought from the order awarding fees against plaintiff and sanctioning plaintiff’s counsel, and it was clear that an appeal was sought as to the sanctions against counsel. Under the 1993 amendment to Rule 3, F.R.A.P., this was sufficient. *Id.* at 243-44. The court held that Rule 11, Fed. R. Civ. Pro., was not available as a basis for sanctions because defendants had not filed a 21-day “safe harbor” motion, and the lower court had not on its own initiative issued an order to show cause why Rule 11 sanctions should not be imposed. *Id.* at 244-45. The court continued:

Even if these procedural safeguards had been satisfied, Rule 11 could not provide a proper basis for the court's award of sanctions. The court's order detailed three separate grounds for sanctions, but only the first of these—the vexatious conduct of plaintiffs' counsel—was adequately supported. The court cited as additional or alternative grounds (1) the filing of “frivolous claims ... with no basis in fact” and (2) the filing of “frivolous appeals.” Our holding that the plaintiffs' suit had adequate foundation at the time of
filing forecloses the “frivolous claims” argument, and the court made no findings sufficient to support its characterization of plaintiffs' prior appeals as “frivolous.” Moreover, it is Federal Rule of Appellate Procedure 38, not Federal Rule of Civil Procedure 11, that authorizes sanctions for the filing of frivolous appeals.

Id. at 245 (footnote omitted). The court held that Rule 11 could not reach the attorney misconduct basis for sanctions, because the misconduct in question did not involve the filing of papers, to which Rule 11 was restricted. Id. The court held, however, that § 1927 was well-suited to the types of vexatious conduct at issue:

The types of litigation conduct we have previously found vexatious and unreasonable—e.g., attempting to introduce evidence on irrelevant matters in the face of numerous admonitions to desist, and “engag[ing] in obfuscation of the issues, hyperbolism and groundless presumptions,” . . . —pervade the record here. At trial, attorney González repeatedly ignored evidentiary rulings, pressing forward to ask questions identical to those barred, often just moments prior, by the trial judge. On one occasion, attorney González refused to leave the sidebar when ordered to after an adverse ruling, forcing the judge to remove the jury from the room and censure the attorney for his obstinacy and manifest disrespect. Attorney González further persisted, in contravention of his obligations as an officer of the court, in making blatant misrepresentations and referring to matters not established by evidence in the record. This misconduct evoked a string of warnings from an admirably patient trial judge, starting with an order near the outset of the case instructing plaintiffs' counsel to “refrain from making injurious remarks” and “avoid unnecessary rhetoric irrelevant to the issues of the case,” and proceeding to multiple, on-the-record admonishments and threats of sanction during trial.

Id. at 246 (footnote omitted). The court held that, where the district court made no effort to calculate the additional costs to defendants arising from the misconduct but simply took a third of the total fee award, the sanctions award must be considered solely in relation to deterrence. Id. at 247-48. The court stated that, while a “lasting sting” was appropriate for deterrence, counsel could be deterred by something short of a financial disaster:

There can be no doubt of the need for a sanction that will signal to attorney González the seriousness of his misconduct and deter similar behavior in the future. Nonetheless, we find $64,936 to exceed what is reasonably necessary for these purposes. The sum lies far outside the mainstream in this circuit, where sanctions typically amount to less than $10,000. Moreover, the sanction appears likely to impose an unjustifiable hardship on attorney González, who, according to counsel's representations to the court, operates a small law office in partnership with his son, and for whom $64,936 would likely threaten financial disaster. Accordingly, we modify the sanction to $5,000, a sum we deem sufficient to deter similar conduct by attorney González in the future and place other potential offenders on notice of the consequences of such conduct.

Id. at 248-49 (footnotes omitted).
Agiwal v. Mid Island Mortgage Corp., 555 F.3d 298, 105 FEP Cases 873 (2d Cir. 2009), affirmed the dismissal with prejudice of the pro se plaintiff’s Complaint as a sanction for willful and repeated failures to comply with discovery requests despite numerous warnings from the court.

Parker v. Sony Pictures Entertainment, Inc., 260 F.3d 100, 111–14, 12 AD Cases 1 (2d Cir. 2001), affirmed the grant of judgment as a matter of law to the ADA defendant but reversed the award of attorneys’ fees to the defendant. The court held that the sanction of a fee award to the defendant was improper where the plaintiff proceeded in good faith to trial, based on the same evidence that had held the court on an earlier appeal to reverse the grant of summary judgment to the defendant. There were no intervening factors that would have deprived of its good-faith character a decision to proceed to good faith on a claim previously adjudged trialworthy. The court rejected the lower court’s distinction between summary judgment and trial, to the effect that on summary judgment a defendant is required to prove a negative and at trial the plaintiff is required to prove a positive. The court cited Reeves and held that the standards for summary judgment and judgment as a matter of law were the same.

EEOC v. Agro Distribution, LLC, 555 F.3d 462, 468, 21 AD Cases 788 (5th Cir. 2009), affirmed the award of $225,000 in attorneys’ fees against the EEOC in favor of the ADA defendant. The court held that the EEOC had not engaged in reasonable efforts to conciliate the case. It stated: “By repeatedly failing to communicate with Agro, the EEOC failed to respond in a reasonable and flexible manner to the reasonable attitudes of the employer. The EEOC abandoned its role as a neutral investigator and compounded its arbitrary assessment that Agro violated the ADA with an insupportable demand for compensatory damages as a weapon to force settlement.” The district court awarded fees for the period of time after the charging party’s deposition revealed that he was not significantly limited in any major life activity.

Garner v. Cuyahoga County Juvenile Court, 554 F.3d 624, 646-47, 105 FEP Cases 507 (6th Cir. 2009), said it all in its Conclusion:

For all of the reasons set forth above, we AFFIRM the portion of the district court's judgment (1) finding that the employees' claims were frivolous under 42 U.S.C. § 1988, and (2) finding that Attorney Frost engaged in conduct sanctionable under 28 U.S.C. § 1927. On the other hand, we REVERSE the portion of the district court's judgment (1) holding the employees jointly and severally liable for $660,103.49 in attorney fees awarded under 42 U.S.C. § 1988, and (2) holding Attorney Frost jointly and severally liable for the same fees as a sanction under 28 U.S.C. § 1927.

With respect to the attorney fees to be imposed on the employees under 42 U.S.C. § 1988, we REMAND with instructions to (1) determine the point in time when each employee's claim clearly became frivolous (which might simply be at the close of discovery), (2) calculate, on an individual basis, the attorney fees owed by each employee after that point in time, and (3) consider any new information proffered by the employees regarding their inability to pay, as well as relevant evidence on this issue that already exists in the record.

With respect to the attorney fees to be imposed on Attorney Frost under 28 U.S.C.
§ 1927, we REMAND with instructions to (1) determine the point in time when the pursuit of each of her clients’ claims became unreasonable and vexatious, (2) calculate the attorney fees owed by her after that point in time, (3) decide whether that liability should be joint and several with each of her clients, and (4) consider any proof that she may wish to present regarding her inability to pay.

In summary, we AFFIRM in part and REVERSE in part the judgment of the district court, and REMAND the case for further proceedings consistent with this opinion.

Sanctions for Improper Deposition Conduct: Redwood v. Dobson, 476 F.3d 462, 467–70 (7th Cir. 2007), censured three attorneys, and admonished one attorney, for improper deposition conduct. Defense counsel asked thoroughly improper questions, and were sanctioned. Plaintiff’s counsel should have stopped the deposition and sought relief from the court, but instead repeatedly directed the witness not to answer even though the question did not call for privileged information. The Federal claims in the case were frivolous, but their merit is immaterial. What is material is that, as the Seventh Circuit observed in beginning its opinion, “This case is a grudge match.” Charles Danner and Jude Redwood represented plaintiffs Jude and Erik Redwood. Defendant Harvey Welch was former counsel for Erik Redwood in a criminal matter ending in Redwood’s conviction. Erik Redwood is white, Welch is African-American, and the two scuffled after Erik Redwood was convicted and called his criminal counsel a “shoe-shine boy.” Redwood filed a State-court battery claim against Welch, who was represented by Marvin Gerstein. That case settled. With an unsuccessful hate-crime prosecution and Redwood’s demand that Welch admit ineffective assistance of counsel so that Redwood could get his conviction overturned, things went rapidly downhill. The Redwoods brought § 1983 and § 1985 claims against Welch and Gerstein. The Redwoods also sued Elizabeth Dobson, an Assistant State’s Attorney, and Officer Troy Phillips of the Urbana Police Department. Roger Webber represented Gerstein. Just to make things clear, Jude Redwood is Erik’s wife, and is both a plaintiff—claiming loss of consortium—and counsel for Erik. And making things even more clear, they are jointly suing Erik Redwood’s former counsel in the criminal matter (Welch), and counsel’s counsel in the State-court battery case (Gerstein). To aficionados of crazy cases, it doesn’t get much better than this. The court’s opinion is well worth setting out:

A profusion of motions and cross-motions for sanctions—and the conduct underlying some of these motions—demonstrates the extent to which counsel have allowed personal distaste to displace dispassionate legal analysis. Most depositions are taken without judicial supervision. Witnesses often want to avoid giving answers, and questioning may probe sensitive or emotionally fraught subjects, so unless counsel maintain professional detachment decorum can break down. That happened here; the results were ugly.

Gerstein’s deposition was taken by Charles L. Danner on behalf of both Redwoods, though Jude Redwood attended and sometimes acted as counsel in addition to her role as a plaintiff. Gerstein’s counsel was Roger Webber, though Gerstein himself peppered the transcript with legal arguments. The deposition began badly when Danner spent the first 30 pages or so of the transcript exploring Gerstein’s criminal record—
mostly vehicular violations. Danner made no effort to explain how these questions could lead to admissible evidence, and they got under Gerstein’s skin. After Gerstein spontaneously refused to answer some of the questions (remarking “That’s none of your business”), Webber began instructing Gerstein not to answer.

Webber gave no reason beyond his declaration that the questions were designed to harass rather than obtain information—which may well have been their point, but Fed.R.Civ.P. 30(d) specifies how harassment is to be handled. Counsel for the witness may halt the deposition and apply for a protective order, see Rule 30(d)(4), but must not instruct the witness to remain silent. “Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).” Fed.R.Civ.P. 30(d)(1). Webber violated this rule repeatedly by telling Gerstein not to answer yet never presenting a motion for a protective order. The provocation was clear, but so was Webber’s violation.

*    *    *

Danner’s conduct of this deposition was shameful—not as bad as the insult-riddled performance by Joe Jamail that incensed the Supreme Court of Delaware, see Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 52–57 (Del. 1994), but far below the standards to which lawyers must adhere. Gerstein, Webber, and Klaus were goaded, but their responses—feigned inability to remember, purported ignorance of ordinary words (the “consult” episode was not the only one), and instructions not to respond that neither shielded a privilege nor supplied time to apply for a protective order—were unprofessional and violated the Federal Rules of Civil Procedure as well as the ethical rules that govern legal practice.

*    *    *

Mutual enmity does not excuse the breakdown of decorum that occurred at Gerstein’s deposition. Instead of declaring a pox on both houses, the district court should have used its authority to maintain standards of civility and professionalism. It is precisely when animosity runs high that playing by the rules is vital. Rules of legal procedure are designed to defuse, or at least channel into set forms, the heated feelings that accompany much litigation. Because depositions take place in law offices rather than courtrooms, adherence to professional standards is vital, for the judge has no direct means of control.

Sanctions are in order, but they need not be monetary. See Fed.R.Civ.P. 30(d)(3), 37(a)(4), (b)(2). Because the arguments pro and con have been fully ventilated in this court, and none of the attorneys has asked for a hearing under Fed. R.App. P. 46(c), we see no need to drag out this controversy with a remand. Attorneys Danner, Gerstein, and Webber are censured for conduct unbecoming a member of the bar; attorney Klaus is admonished. (We differentiate in this way because a censure is the more opprobrious label, see In re Charge of Judicial Misconduct, 404 F.3d 688, 695-96 (2d Cir.2005), and
Klaus’s misconduct is substantially less serious than that of the other lawyers.) Any repetition of this performance, in any court within this circuit, will lead to sterner sanctions, including suspension or disbarment.

*Id.* at

**Vacation of Default Sanction Affirmed:** *Sun v. Board of Trustees of University of Illinois*, 473 F.3d 799, 811–12, 99 FEP Cases 897 (*7th Cir.* 2007), affirmed the lower court’s vacation of its own entry of default judgment as a sanction for defense counsel’s discovery violations, because the penalty was unduly harsh. The court explained:

While defendants’ attorneys were by no means paragons of responsible lawyering, their involvement in the discovery process was consistent and ongoing. Although counsel should have promptly complied with the court’s orders to answer outstanding interrogatories, their delay was not so extreme as to warrant an entry of default. Likewise, although the district court tried to use less drastic sanctions by twice imposing monetary penalties, it brought out the heavy artillery too soon. Instead of entering a default, punishing the defendants and giving the plaintiff a windfall, the district court should have imposed increased monetary sanctions against the attorneys who had caused the discovery delays.

*Allen v. Chicago Transit Authority*, 317 F.3d 696, 702, 90 FEP Cases 1229 (*7th Cir.* 2003), rejected the defendant’s argument that plaintiff Leonard’s appeal should be dismissed without consideration of the merits because Leonard had not finished paying his $4,000 sanction for having perjured himself in the case. The court held that this was inappropriate because “there has been no determination that Leonard’s continuing failure to pay is willful, which it is not if he simply does not have any money.” The court also rejected defendant’s arguments that the appeal should be dismissed, or none of Leonard’s testimony should be believed, because of the perjury. “It undermines the witness’s testimony; but obviously there are cases, perhaps the majority, in which a witness’s testimony is a compound of truth and falsity. Perjury is a circumstance to be weighed by the jury in determining a witness’s credibility rather than a ground for removing the issue of credibility from the jury by treating the witness’s entire testimony as unworthy of belief.” *Id.* at 703.

*EEOC v. Liberal R-II School District*, 314 F.3d 920, 90 FEP Cases 1032 (*8th Cir.* 2002), reversed the grant of summary judgment to the defendant, holding that there was direct evidence of discrimination. See the discussion of this case above. The court also reversed the district court’s award of $47,333 in fees and expenses to the defendant under the Equal Access to Justice Act, because the defendant has not yet prevailed and because the EEOC’s position was, in any event, substantially justified. It did not reach the question whether the EAJA is available to employers who prevail in ADEA cases against the EEOC.

**Denial of Sanction Affirmed:** *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 936, 99 FEP Cases 1127 (*8th Cir.* 2007), affirmed the trial court’s refusal to grant judgment for the losing Title VII defendant as a sanction for plaintiff’s testimony about two incidents where her testimony was successfully impeached by surveillance videotapes. Defendant won as to those two incidents, but lost as to others. The court explained: “Although impeachment may be clear
and beneficial, the degree of benefit is properly for the trier of fact. Furthermore, like the district
court, we do not find the discrepancies between Allen’s testimony and the events as depicted on
the surveillance videotapes to be so egregious as justify dismissing Allen’s claims.” The court
also held that any claim of falsified application was not material because defendant did not rely
on applications. Judge Smith concurred in part and dissented in part. Id. at 945–46.

*Harris v. Maricopa County Superior Court*, 631 F.3d 963, 978, 111 Fair Empl.Prac.Cas.
(BNA) 503 (9th Cir. 2011), reversed the award of $125,000 in attorneys’ fees and expenses to
the prevailing defendant. The court held that the lower court erred by dividing fees for “general”
work on the case equally across all causes of action, and held that some causes of action were
frivolous, some were not frivolous. The court held, for example, that plaintiff’s hostile-
environment claim was sufficiently frivolous to justify a fee award against plaintiff because he
only alleged conduct sufficient to make out a disparate-treatment claim, and did not allege severe
and pervasive conduct. The court also held that fees could only be awarded to defendants for
work done exclusively on the frivolous claims:

As we have already explained, in a civil rights action with multiple claims, only some of
which are groundless, a defendant is entitled only to those fees attributable exclusively to
defending against plaintiff’s frivolous claims. If the work is performed in whole or in part
in connection with defending against any of plaintiff’s claims for which fees may not be
awarded, such work may not be included in calculating a fee award. Accordingly, the
fees properly attributable to this claim, if any, would be quite minimal.

*B.K.B. v. Maui Police Department*, 276 F.3d 1091, 1106–09, 87 FEP Cases 1306 (9th
Cir. 2002), affirmed the award of $5,000 in attorney’s fee sanctions against both the defendant
and its counsel under 28 U.S.C. § 1927 and the court’s inherent power for knowing and reckless
violation of Rule 412 and having misled the court about the testimony after plaintiff’s counsel
had made an anticipatory objection. The court also affirmed the sanction of $5,000 in emotional-
distress damages for the plaintiff because of the emotional stress caused by the humiliation of
hearing this evidence come in. The nature of the violation is discussed above in the section on
Rule 412. The court held that the lower court “clearly erred in stopping short of explicitly
finding that the defendant’s lawyers acted in bad faith,” and that the violation was “knowing and
intentional.” Id. at 1106–07. The court held that § 1927 was satisfied because the defense
counsel’s misconduct caused a mistrial and a sanctions proceeding, and thus multiplied
proceedings, and because the lower court’s finding of recklessness was sufficient to support
sanctions under the statute. Id. at 1107. The court stated that § 1927 sanctions could also be
based on the frivolous nature of the defendant’s Rule 412 argument. Id. at 1107 n.8. Turning to
the second award, the court stated: “Here, regardless of whether defense counsel’s behavior
constituted bad faith *per se*, we readily find that counsel’s reckless *and* knowing conduct in this
case was tantamount to bad faith and therefore sanctionable under the court’s inherent power.”
Id. at 1108. The court held that the fees and emotional-distress damages assessed by the lower
court were proper sanctions. Id. at 1108–09.

*Norelus v. Denny’s, Inc.*, 628 F.3d 1270, 111 Fair Empl.Prac.Cas. (BNA) 4 (11th Cir.
2010), affirmed the trial court’s imposition of sanctions jointly and severally on plaintiff and on
plaintiff’s counsel, in the amount of $387,738.45, for making 868 changes to plaintiff’s
deposition testimony through a letter claiming errata, and for pursuing plaintiff’s claim despite
knowledge of plaintiff’s changing story and despite fact witnesses who testified that some of plaintiff’s contentions could not possibly be true because of the physical layout of the workplace. For example, the court stated:

From the deposed witnesses' descriptions of the restaurants involved, it is inconceivable that gross sexual harassment and misconduct could have occurred on a near-daily basis for nearly a year, as Norelus claimed it did, without any witnesses having seen or heard anything. According to Boleda, there is “no way anything is going to happen in that little tiny restaurant and [some employees are] not going to see what's going on.” Another waitress, Michele Stewart, explained that “everything is open. Employees are all over the restaurant.” She agreed that “[t]here's no way” the conduct Norelus alleged could have occurred without some employee seeing something. Line cook Martin testified that it would be “impossible” for the conduct alleged to occur without people knowing because the restaurant is “too small.”

Id. at 1275-76. Plaintiff admitted lying in her deposition and asked what was wrong with that, and in her deposition denied allegations in her Complaint. The court stated that the witnesses on whom plaintiff relied uniformly failed to corroborate her claims, described the evidence against plaintiff as a “mountain,” and criticized plaintiff’s counsel for continuing to believe their client despite her shifting stories, the lack of corroborating evidence, and the strength of the evidence against her claims. Plaintiff’s counsel did arrange for a lie detector test to be administered to plaintiff. The examiner found that plaintiff was lying about some matters, but not about her core allegations. Id. at 1277. Plaintiff’s counsel also arranged for plaintiff to be examined by a clinical psychologist. “They selected Dr. Astrid Schutt-Aine, a psychologist who spoke Haitian French Creole, to perform the evaluation. She was of the opinion that Norelus' symptoms were consistent with those exhibited by people suffering from Post-Traumatic Stress Disorder. The record contains no evidence, however, that Dr. Schutt-Aine formed any opinion about the source or nature of any trauma Norelus had suffered.” Id. The errata sheet was compiled by using plaintiff’s brother as a translator, having an associate read the questions and the brother translate the questions and plaintiff’s answers. Id. The court continued:

The finished product errata “sheet” was actually sixty-three sheets that made 868 changes to Norelus' deposition testimony. The reason given for more than 500 of the 868 changes to Norelus' deposition testimony was merely that Norelus “[d]id not understand what was being asked.” The reasons given for most of the other changes in Norelus' testimony were classified into three broad categories: “poor translation by interpreter,” “clarification of response,” and “refreshed recollection.” At the end of the lengthy errata sheet Norelus signed a sworn statement certifying that she had read the transcript of her deposition and that it “is a true and accurate recording of the proceedings had at the time and place designated with the exceptions, if any, on the ERRATA sheet.”

Id. at 1278. This was about four weeks before the start of trial. The court held that “the improper submission of the massive errata document rendered the eight days spent on Norelus' deposition a waste of time and money to say nothing of the time the attorneys were forced to spend on the issues created by the document itself,” and that this violated 28 U.S.C. § 1927. The court identified the specific issue it was deciding:
The issue is not whether bringing the action in the first place was sanctionable. The issue
is not even whether continuing to pursue the case after all of Norelus' witnesses refused
to corroborate her claims was sanctionable. The issue is whether creating and submitting
the sixty-three page errata document and then continuing to press forward with Norelus' claims, which had been left completely unsupported once the errata document rendered
her testimony useless, constituted conduct sanctionable under § 1927.

Id. at 1291-92. The court stated that plaintiff and her counsel were not being sanctioned for the
lack of corroborating witnesses, although it would have been likely that there would have been corroborating witnesses if plaintiff’s testimony had been true:

... this is not a case where the claimed harassment occurred only when the victim and
abusers were behind closed doors or in a manner in which there likely would be no
corroboration. To the contrary, Norelus claimed not only that her managers sexually
harassed her virtually every day for eleven months, but also that they regularly raped her
and forced her to perform oral sex on a near-daily basis. She claimed most of the abuse
occurred in one of two relatively small restaurants where there were few, if any, places to
hide. If the alleged acts actually happened, they happened where many of them would
have been seen or heard by other employees. This is a case where the plaintiff claimed
that at least seven of her co-workers witnessed at least some of sexual abuse during the
eleven months it allegedly had occurred over and over again. This is not a case in which
it is unreasonable to expect corroborating evidence. It is a case in which, if the plaintiff's
story were true, it would be incredible not to have some corroborating evidence.

Id. at 1292. The court held that the fees and costs incurred by defendants were a proper part of
the sanctions award. Id. at 1297-1302. District Judge Bowen, sitting by designation, declined to
join Part III-C of the opinion. Id. at 1302. Judge Tjoflat dissented. Id. at 1302-12.

457 F.3d 1180, 98 FEP Cases 1617 (11th Cir. 2006), reversed $400,000 in sanctions against
counsel for plaintiff in an unsuccessful sexual harassment lawsuit, because the lower court
engaged in plenary review of findings of fact made by a magistrate judge who had conducted an
evidentiary hearing, and did not conduct an evidentiary hearing of her own. The court stated at
1184: “After thorough review, we conclude that the district court committed reversible error
when, after referring the issue of sanctions to a magistrate judge for an evidentiary hearing and
Report and Recommendation, the district court discarded numerous findings of fact and
credibility determinations made by the magistrate judge and substituted its own findings of fact
on bad faith, without conducting any evidentiary hearing. The district court also abused its
discretion in ordering the Amlongs to pay 10 percent back interest on a portion of the sanctions,
and we, therefore, reverse that portion of the sanctions award too.”

Q. Taxes

1. Attorneys’ Fees

Commissioner v. Banks, 543 U.S. 426, 94 FEP Cases 1793 (2005), held that, when a
client’s recovery constitutes gross income, the client must pay income tax on the part of the
recovery paid directly to the attorney as a contingent fee for services performed in obtaining the taxable income, under a contingent fee arrangement. The Court left some issues open, such as the tax effect of a court-awarded fee. It is important to keep in mind that this rule does not apply to the fees that generated nontaxable income or other nontaxable relief, such as an injunction.

Congress has passed, and the President has signed, the provision of the Civil Rights Tax Relief Act barring the double taxation of attorneys’ fees and costs. Sec. 703 of the American Jobs Creation Act of 2004, creates an above-the-line deduction for attorneys’ fees and costs. It is not subject to the Alternative Minimum Tax or the 2%-of-adjusted-gross-income exclusion.

The bill applies to a wide variety of civil rights and employment statutes, including Title VII, the ADA, the ADEA, the NLRA, the FLSA, the Rehab Act, § 510 of ERISA, Title IX, the Employee Polygraph Protection Act, WARN, the FMLA, USERRA, §§ 1981, 1983, and 1985, the Fair Housing Act of 1968, Federal whistleblower claims, and a beautiful catch-all: “Any provision of Federal, State, or local law, or common law claims permitted under Federal, state, or local law—(i) providing for the enforcement of civil rights, or (ii) regulating any aspect of the employment relationship . . . .”

It is doubly prospective: “The amendments made by this section shall apply to fees and costs paid after the date of enactment of this Act with respect to any judgment or settlement occurring after such date.”

2. **The Civil Rights Tax Fairness Act Glitch**

The Civil Rights Tax Fairness Act has a technical glitch in its wording. It defines adjusted gross income as not including “Any deduction allowable under this chapter for attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving a claim of unlawful discrimination . . . . The preceding sentence shall not apply to any deduction in excess of the amount includible in the taxpayer’s gross income for the taxable year on account of a judgment or settlement (whether by suit or agreement and whether as lump sum or periodic payments) resulting from such claim.”

The first sentence seems to require an “action,” but the second sentence also refers to suits and agreements.

The question is whether the CRTRA protects attorneys’ fees paid in connection with a settlement or arbitration or mediation or even an EEOC conciliation before a lawsuit is filed.

The IRS has not yet come up with any regulations.

- Plaintiffs’ attorneys should urge clients with pre-suit settlements about this question, give them information in writing, and urge them to consult a tax adviser.

3. **Emotional-Distress Damages**

*Murphy v. Internal Revenue Service*, 493 F.3d 170 (D.C. Cir. 2007), overturned its own earlier decision and held that the Constitution allows imposition of the income tax on emotional-distress damages unrelated to earnings.
4. **“Grossing Up” Awards to Compensate for the Additional Taxes**

_Eshelman v. Agere Systems, Inc._, 554 F.3d 426, 441-42, 21 AD Cases 865 (3d Cir. 2009), affirmed the award of an additional amount to compensate the ADA plaintiff for the additional taxes due on her lump-sum recovery, stating:

We hold that a district court may, pursuant to its broad equitable powers granted by the ADA, award a prevailing employee an additional sum of money to compensate for the increased tax burden a back pay award may create. Our conclusion is driven by the “make whole” remedial purpose of the antidiscrimination statutes. Without this type of equitable relief in appropriate cases, it would not be possible “to restore the employee to the economic status quo that would exist but for the employer's conduct.”

(Citation omitted.) The court accepted the uncontradicted evidence of plaintiff’s economics expert and upheld the $6,893.00 award “to compensate her for the negative tax consequences of receiving a lump sum back pay award.” _Id._ at 442-43.

_Fogg v. Gonzales_, 492 F.3d 447, 455, 100 Fair Empl.Prac.Cas. (BNA) 1601 (D.C. Cir. 2007), reversed the lower court’s order “grossing up” the monetary award by 14% to compensate for the higher rate of taxes when several years of back pay are received in a single year. Quoting a 1994 case, the court stated: “Absent an arrangement by voluntary settlement of the parties, the general rule that victims of discrimination should be made whole does not support 'gross-ups' of backpay to cover tax liability. We know of no authority for such relief.” Judge Henderson concurred.

5. **Tax Disputes Do Not Affect Finality of Settlement**

_Rivera v. Baker West, Inc._, 430 F.3d 1253, 97 FEP Cases 4 (9th Cir. 2005), affirmed the dismissal of the Title VII plaintiff’s claims pursuant to a settlement agreement, rejecting plaintiff’s argument that defendant had not complied with the settlement agreement because it withheld taxes despite his being a former employee, holding that the recovery should be construed as a back-pay recovery, and rejecting his argument that his back pay recovery was a tort recovery in a personal-injury case.