

Compensatory and Punitive Damages in Federal Civil Rights Actions

Mary Anne Sedey

Sedey & Ray, P.C.

3030 S. Grand Blvd.

St. Louis, MO 63118

314-773-3566

msedey@sedeyraylaw.com

I Emotional Distress Damages in Federal Civil Rights Action

- A. Some, but not All Federal Civil Rights Statutes Permit Recovery for Emotional Distress.

Uncapped emotional distress damages are recoverable under the post-Civil War Civil Rights Acts, 42 U.S.C. §§ 1981 and 1983. Patterson v. McLean Credit Union, 491 U.S. 164, 182 n. 4 (1989) (Section 1981); Hafer v. Melo, 502 U.S. 21, 31 (1991) (Section 1983).¹ The 1991 Civil Rights Act permits emotional distress damages in cases brought under Title VII, the Americans with Disabilities Act, 42 U.S.C. §12117(a), and the Rehabilitation Act of 1973, 29 U.S.C. §794(a)(1). *See, generally*, 42 U.S.C. § 1981A (1991). These damages are capped based on the size of the employer. 42 U.S.C. § 1981A(b)(3). The Age Discrimination in Employment Act does not provide for emotional distress damages. C.I.R. v. Schleier, 515 U.S. 323 (1995).

The 1991 Civil Rights Act refers to a variety of types of compensable injury that may be more or less appropriate given the kind of claim you are litigating: “emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses”. 42

¹ Compensatory damages are available under Section 1983 only against state and local officials sued in their *individual* capacities. They may not be recovered against these officials in their *official* capacities in a Section 1983 claim. Will v. Michigan Dept. of State

U.S.C. § 1981A (b)(3).

B. Expert Testimony is Not Required to Support an Emotional Distress Claim Under the Federal Civil Rights Acts.

Emotional distress damages are available even where the plaintiff has not sought medical treatment. “[M]edical testimony, although relevant, is not necessary. . . . [T]he plaintiff’s own testimony may be sufficient to establish humiliation or mental distress.” Williams v. TWA, 660 F. 2d 1267 (8th Cir. 1981). *See also* Hammond v. Northland Counseling Center, 218 F.3d 866 (8th Cir. 2000); Ross v. Douglas County, Nebraska, 234 F. 3d 391 (8th Cir. 2000).

The U.S. Supreme Court has noted with respect to emotional distress damages that “genuine injury in this respect may be evidenced by one’s conduct and observed by others.” Carey v. Piphus, 435 U.S. 247, 264 n. 20 (1978). The Eighth Circuit has held that a plaintiff’s own testimony may be adequate to support such an award and the testimony of family and friends is also probative. Kucia v. Southeast Arkansas Community Action Corp., 284 F. 3d 944, 947 (8th Cir. 2002) (plaintiff’s own testimony enough); Morse v. Southern Union Co., 174 F. 3d 917, 925 (8th Cir. 1999) (affirming \$100,000 emotional distress award where family members corroborated plaintiff’s testimony); Kim v. Nash Finch Co., 123 F. 3d 1046, 1065 (8th Cir. 1997) (award of \$100,000 affirmed where plaintiff, his wife and his son testified regarding anxiety, sleeplessness, stress, depression, high blood pressure, headaches and humiliation).

It is important to remember that a plaintiff must offer “specific facts as to the nature of his or her claimed emotional distress and its causal connection to the allegedly violative actions.”

Police, 491 U.S. 58., 71 (1989); Hafer, 502 U.S. at 31.

Hammond, 218 F.3d at 893; *see also*, Kim, 123 F. 3d at 1065.

C. Some Issues to Watch Out for When Experts Do Testify on Emotional Distress Issues.

(1) Psychologists May Testify.

Expert testimony must pass muster under Fed. R. Evid. 702. The authorities do not require the testimony of a psychiatrist and psychologists often testify in these cases effectively. Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1297-99 (8th Cir. 1997) (citing with approval a number of cases where psychologists testified about the causal connection between discriminatory conduct and emotional injury).

(2) Mental Health Experts May Not Testify On Issue of Plaintiff's Credibility.

In Nichols v. American National Ins., 154 F.3d 875 (8th Cir. 1998), the Eighth Circuit held that a psychiatric expert may not "comment on reliability [of plaintiff's testimony] in the guise of a medical opinion." The Court held, further, that testimony regarding "psychiatric credibility," "recall bias" and motivation to lie or exaggerate based on "secondary gain" is inadmissible because it invades province of jury.

(3) Plaintiff's Expert Can Testify Re: Future Emotional Distress Damages

A plaintiff can collect future emotional distress damages if he or she has evidence, probably from an expert, to support such an award. Kientzy v. McDonnell Douglas, 990 F. 2d 1051(8th Cir. 1993); Rowe v. Hussmann Corp., 381 F. 3d 775, 783 (8th Cir. 2004).

II. Punitive Damages in Federal Civil Rights Actions.

A. The Standard for Awarding Punitive Damages under the Federal Civil Rights Statutes.

Subject to caps, punitive damages are available against private employers under the 1991 Civil Rights Act, 42 U.S.C. § 1981A where “the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981A(b)(1). This standard is virtually identical to the traditional standard for uncapped punitive damages liability under 42 U.S.C. §§ 1981 and 1983. Smith v. Wade, 461 U.S. 30, 56 (1983).

In Kolstad v. American Dental Assoc., 527 U.S. 526 (1999), the United States Supreme Court held that, at least under the statutes that were amended by the 1991 Civil Rights Act, it is not enough to show that the conduct at issue was intentional in order to obtain punitive damages. Rather, “an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law” in order for a plaintiff to recover punitive damages. In so holding, the Court rejected the proposition that punitive damages are available only where the conduct at issue is egregious:

Egregious misconduct is often associated with the award of punitive damages but the reprehensible character of the conduct is not generally considered apart from the requisite state of mind.

527 U.S. at 538. The decision goes on to address the “proper legal standard for imputing liability to the employer in the punitive damages context,” holding that a plaintiff must show that “an employee serving in a managerial capacity committed the wrong acting in the scope of employment.” Further, an employer may escape liability for such conduct if the discriminatory conduct of its manager was contrary to the employer’s “good faith efforts” to comply with the

law. 527 U.S. at 543-545.

Applying this standard, the Eighth Circuit has upheld punitive damages awards under Kolstadt in the following circumstances:

- where an employer's managers ignored complaints of harassment, did not investigate repeated reports of harassment, failed to take action designed to stop the conduct, maintained policies that effectively served to punish the victims. Madison v. IBP Inc., 257 F.3d 780 (2001); *see also* Blackmon v. Pinkerson Security & Investigative Services, 182 F. 3d 629 (8th Cir. 1999).
- where the employee whose conduct was at issue was a manager with substantial authority who testified that he had "extensive" sexual harassment training and was familiar with the company's policies against harassment. Ogden v. Wax Works, Inc., 214 F.3d 999, 1010 (8th Cir. 2000).
- where an employer discriminates in contravention of its own policies against discrimination, since the mere existence of these policies does not mean that the employer escapes liability for punitive damages, particularly where the discriminatory conduct was reported to higher management who took little action. MacGregor v. Mallinckrodt, Inc. 373 F. 3d 923, 932 (8th Cir. 2004).
- applying the Kolstad standard to Fair Housing Act violations, where the owner testified that he had been in the rental business for 28 years and was aware of the Act's prohibitions. Badami v. Flood, 214 F. 3d 994 (8th Cir. 2000).
- in the ADA context, where managers admitted that they were aware of the requirements of the ADA and their own company's policy listing a flexible schedule as a possible accommodation to an employee's disability, but stated that they did not have to follow the policy. Foster v. Time Warner Entertainment Co., 250 F.3d 1189, 1196-97 (8th Cir. 2001).

III. The Eighth Circuit Has Recently Upheld Very Substantial Emotional Distress and Punitive Damages in Egregious Cases of Sexual and Racial Harassment.

In three recent harassment cases, the Eighth Circuit has upheld very substantial compensatory and punitive damages awards. These cases are worth looking at to get a feel for what the Court will uphold under the right circumstances:

Rowe v. Hussmann Corp., 381 F. 3d 775, 782 (8th Cir. 2004), upholding an award of \$500,000 in compensatory damages for emotional distress and \$1,000,000 in punitive damages in a sexual harassment case. The Court held that the awards were not excessive in light of the years-long harassment and the company's failure to take any action despite repeated complaints.

Williams v. ConAgra Poultry Co., 378 F. 3d 790, 796-97 (8th Cir. 2004), upholding an award of \$173,156 in compensatory damages and \$500,000 in punitive damages on a racially discriminatory termination claim and \$600,000 on the racial harassment claim, while reducing the punitive damage award on the harassment claim to \$600,000 from \$6,063,750. The Court notes that the evidence of harassment was egregious, there were contradictions in the testimony of managers and evidence of deliberate indifference because of the failure to take meaningful action after many complaints to upper management.

Baker v. John Morrell & Co., 382 F. 3d 816, 832 (8th Cir. 2004), upholding awards of \$839,470 in compensatory damages, and \$300,000 in punitive damages remitted from a verdict of \$650,000. In this case, the degrading comments, actions and physical assaults drove plaintiff to a suicide attempt and mental hospitalization, and the company denied a hostile environment even after years of this conduct.

IV. Some Representative Verdicts in the Eastern District of Missouri

The attached charts, compiled over the years by Plaintiff's employment lawyer Bill Moench, give some information about the range of emotional distress/punitive damages verdicts in this jurisdiction in the past ten years.

<i>Recent verdict/settlement/ consent decree amounts- harassment/discrim. cases</i>	<i>Type of Discrim.</i>	<i>Attorney(s)</i>	<i>Compensatory &/or punitive awards</i>	<i>Expert/Treating?</i>	<i>Appeal</i>
<i>Kim v. Nash Finch</i> (N.D. Iowa, Judge Melloy, 1994)	Employment: race, age, retaliation	Unknown	\$1.5 million reduced to caps	No treating or expert	Caps of \$100,000 upheld
<i>Kopfensteiner v. St. L. County</i> (E.D.Mo., Judge Stephen Limbaugh, 1996)	Sexual harassment and retaliation	Moench	\$165,000	No treating or expert	Settled before appeal
<i>Collins v. Mallinckrodt</i> (E.D.Mo., Judge Jean Hamilton, 1996)	Sexual harassment and retaliation	Wechsler Chackes	\$200,000	Treating, no expert	Unknown
<i>Smith v. Monsanto</i> (E.D.Mo., Judge G. Noce 1998))	Sex discrim./ retaliation	Van Amburg	\$500,000 reduced by judge to \$300,000	Treating	Settled on appeal
<i>Stokes v. Renal Treatment Centers</i> (E.D. Mo., Judge Catherine Perry, 1999)	Sexual harassment	Sedey Moench	\$200,000	Treating and expert testified	Settled before appeal
<i>Duncan v. GM</i> (E.D. Mo., Judge Carol Jackson, 1999)	Sexual harassment and retaliation	Ryals	\$1 million	No treating, no expert	Reversed
<i>Golleher v. District 837</i> (E.D. Mo. Judge Rodney Sippel, 2000)	Sexual harassment	Denner Lynn	\$300,000	Treating, no expert	Settled on appeal
<i>EEOC v. Wal-Mart</i> (S.D.II., Judge David R. Herndon, 2000)	sexual harassment, retaliation	Stith Kennedy	\$107,000	No expert or treating	Settled on appeal

<i>Recent verdict/settlement/ consent decree amounts- harassment/discrim. cases</i>	<i>Type of Discrim.</i>	<i>Attorney(s)</i>	<i>Compensatory &/or punitive awards</i>	<i>Expert/Treating?</i>	<i>Appeal</i>
<i>Madison v. IBP, Inc.</i> (S.D. Iowa, Judge Celeste Bremer, 2000)	Employment: sex and race, sexual harassment, retaliation	R. Conlin	\$266,750	No expert	Upheld
<i>Thompson v. National Chiropractic Insurance Company</i> (S.D. Iowa, Walters, 2000)	Sexual harassment, and retaliation	Paige Fiedler	\$290,000	Treating licensed social worker	Settled on appeal
<i>Hall, EEOC v. Missouri Highway</i> (E.D.Mo., Stephen Limbaugh, 2001)	Employment: age & sex , 1 st amd. retal.- consent decree	Spritzer Stith	\$185,000	No expert	Settled after post-trial motions were filed.
<i>EEOC, et al. v. Beverly Enterprises, et al.</i> (E.D. Mo., Judge Rodney Sippel, 2001)	racial harassment and retaliation- consent decree	Miller Stith Rothman Render	\$1.18 million for nine individuals	No expert	Settled before appeal.

<i>Recent verdict/settlement/ consent decree amounts- harassment/discrim. cases</i>	<i>Type of Discrim.</i>	<i>Attorney(s)</i>	<i>Compensatory &/or punitive awards</i>	<i>Expert/Treating?</i>	<i>Appeal</i>
<i>Millett v. City of Berkeley et al.</i> (E.D. Mo., Judge Rodney Sippel, 2002)	excessive force/stop and detain	Ryals	excessive force: \$70,000 against individual stop and detain: \$525,000 against City and individual	No expert or treating	settled before appeal
<i>Rowe v. Hussmann Corp.</i> (E.D. Mo., Judge Charles A. Shaw 2002)	sexual harassment	Falb	\$1.5 million	Treating psychologist	upheld on appeal in 2004

Information compiled by William E. Moench, William E. Moench & Associates, 2711 Clifton Avenue, St. Louis, Mo 63139,
314-647-1800, bmoench@swbell.net.