Proof of Emotional Pain and Suffering Damages in Employment Discrimination Cases

Joshua Friedman

Revised June 23, 2006

I. Sources of legal authority for Emotional Pain and Suffering (EP&S) Damages

A. Title VII

1. 42 USCS § 1981a(b) amended Title VII in 1991 to allow recovery of compensatory (and punitive damages). Compensatory damages (which are broader that EP&S) under Title VII include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses,… Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964"

    a. Front pay is not considered compensatory damages and is therefore not capped. It is awarded in lieu of reinstatement. It can be awarded "when reinstatement is not an option -- whether because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries that the discrimination has caused the plaintiff." Pollard v. E. I. du Pont de Nemours & Co., 532 U.S. 843, 853 (U.S. 2001). If your client is completely disabled due to psychological injury and will never be able to work again, or is unable to return to her job due to a toxic work environment and is

unable to find an equivalent paying job elsewhere, you may be able to include as damages the economic value of remainder of her working life (as mitigated). *Broadnax v. City of New Haven,* 141 Fed. Appx. 18 (2d Cir. 2005)

2. EP&S is available only for claims of intentional discrimination. See 42 U.S.C. 1981a. Either party may demand a jury trial where plaintiff seeks compensatory or punitive damages. See 42 U.S.C. § 1981a(c). Relief is capped at $50,000 to $300,000 depending on size of employer. Cap is for compensatory & punitive damages combined. See 42 U.S.C. 1981a(b)(3) Court may not inform the jury of the limit. See 42 U.S.C. § 1981a(c)(2).

B. EP&S under other federal statutes:

1. 42 U.S.C. § 1981: EP&S and Punitive damages available and not limited by caps in 42 U.S.C. §1981a(b)(3). See 42 U.S.C. § I981a(b)(4).

2. Equal Pay Act: Not available. *See Overnight Motor Trans. v. Missel,* 316 US 572 (1942); *Brock v. Wackenhut Corp.,* 662 F.Supp 1482, 1488 (SDNY 1987).

3. Americans with Disabilities Act: Same as Title VII generally, but compensatory "damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business. 42 U.S.C §1981a (a)(3).

4. ADEA: Not available. Johnson v. A1 Tech Spec. Corp., 731 F.2d 143, 146-48 (2d Cir. 1984).

C. State law provides a potential source for

uncapped damages

1. The Workplace Fairness website describes almost all state employment discrimination statutes, and states whether unlimited pain and suffering and punitive damages are available. It also explains administrative exhaustion requirements, minimum number of employees and provides a citation to the state statute, in easy-to-use map format. www.workplacefairness.org/index.php?page=complaintharassment

2. State Common Law: Some states allow a cause of action against an employer based upon vicarious liability for the tortuous conduct of its employees, such as intentional infliction of emotional distress, or assault, where the employer was aware of, or should have been aware of the tortuous conduct but failed to stop it—even though the employee was acting outside the scope of his employment. *See, e.g., Morgan v. Fellini's Pizza, Inc.,* 64 F. Supp. 2d 1304, 1316 (D. Ga. 1999)(”an employer cannot be liable for the torts of its employees unless those torts were committed ‘within the scope of the actual transaction of the master's business for accomplishing the ends of his employment.’… However, Georgia law also provides that ‘an employer who possesses or who is possessed of knowledge of the employee's behavior ... [and] fails to correct such conduct ... essentially ratifies his employee's acts and may be held liable therefor.’).

a. *Morgan* is cited as an example. State laws vary greatly on negligent retention, hiring and supervision, and vicarious liability for tortuous conduct of employees. My practice is limited to hostile work and school environment cases, so I look to state tort law when there is no un-capped statutory source of law, however, for disparate treatment cases, many states have public policy

common law and other sources of law, which should be investigated as potential sources of un-capped EP&S damages.

3. There is no cap on First Amendment EP&S damages for government workers

D. In proving a Hostile Work Environment you must meet an additional standard of proof related to EP&S

1. You must prove that the conduct was objectively hostile. Under Title VII "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview. *Harris v. Forklift Sys.,* 510 U.S. 17, 21-22 (U.S. 1993)

2. And subjectively hostile. "Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Harris v. Forklift Sys.,* 510 U.S. 17, 21-22 (U.S. 1993)

E. What is the Standard of Review of EP&S Awards in Federal Court

1. Guidelines for review vary by circuit but seem to boil down to the circuits reserving the right to reduce awards that they find offensive

a. *See, e.g., Dilger v. CONRAIL,* 1997 U.S. App. LEXIS 30260 (2d Cir. 1997)("so high as to shock the judicial conscience"); *United States EEOC v. AIC Sec. Investigations,* 55 F.3d 1276, 1285 (7th Cir. 1995)("whether the award is 'monstrously excessive'; 'whether there is no rational connection between the award and the evidence, indicating that it is merely a product of the jury's fevered

imaginings or personal vendettas; n13 and whether the award is roughly comparable to awards made in similar cases'"); *accord, Zhang v. American Gem Seafoods, Inc.,* 339 F.3d 1020, 1040 (9th Cir. 2003) *cf. Ferrill v. Parker Group, Inc.,* 168 F.3d 468, 476 (11th Cir. 1999)("The standard of review for compensatory damages awards for intangible, emotional harm is 'deferential to the fact finder because the harm is subjective and evaluating it depends considerably on the demeanor of the witnesses.'").

2. Remittitur and the denial of a motion for a new trial are subject to an abuse of discretion standard

a. See, e.g., Parsons v. First Investors Corp., 122 F.3d 525, 1997 U.S. App. LEXIS 20983 (8th Cir., August 7, 1997, Filed); Hinds v. Titan Wheel Int'l, 45 Fed. Appx. 490, 2002 U.S. App. LEXIS 18364 (6th Cir., September 4, 2002, Filed); Dilger v. CONRAIL, 1997 U.S. App. LEXIS 30260 (2d Cir., October 31, 1997, Decided); Iles v. Autozone Stores Inc., 12 Fed. Appx. 627, 2001 U.S. App. LEXIS 5210 (10th Cir., March 29, 2001, Filed); Lampley v. Onyx Acceptance Corp., 340 F.3d 478 (7th Cir. 2003)

b. *Cooper Indus. v. Leatherman Tool Group,* 532 U.S. 424, 433 (U.S. 2001)(punitive damages: If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's "determination under an abuse-of-discretion standard.")

II. Threshold Requirements: what must you prove to obtain EP&S

A. Occasionally we see cases that hold or imply that it is necessary to present evidence of <u>physical</u> manifestations of mental injury or <u>medical testimony</u>, or that plaintiff's testimony alone is not

enough to in order to prove EP&S.

1. *Annis v. County of Westchester,* 136 F.3d 239, 249 (2d Cir. 1998)(Ordering a new trial on damages because no evidence of physical manifestations or treatment of EP&S based solely on plaintiff's testimony)

2. *Ortiz-Del Valle v. NBA,* 42 F. Supp. 2d 334, 341 (S.D.N.Y. 1999)(plaintiff not entitled to damages for emotional distress under Title VII. As in Annis*,* only evidence presented was her own testimony. Plaintiff did not offer testimony of a "single manifestation of her emotional damage.")

3. The Second Circuit clarified in *Patrolmen's Benevolent Ass'n of N.Y. v. City of New York,* 310 F.3d 43, 56 (2d Cir. 2002), what several district courts had already concluded, that "*Annis* should not be read to require physical symptoms of emotional distress," but not before *Annis* had caused considerable concern.

B. Nothing in Title VII or 42 U.S.C. 1981(b)[1] requires that psychological harm be proved through physical symptoms or medical testimony.

C. There are cases affirming mid-range EP&S verdicts based on the sole testimony of a plaintiff without proof of physical manifestations of EP&S. See, e.g.:

1. *Velez v. Roche,* 335 F. Supp. 2d 1022, 1038 (D. Cal. 2004)($300,000 under Title VII) "Finally, the Court takes guidance from the Ninth Circuit that HN19substantial emotional distress damages awards need not be supported by "objective" evidence and that the subjective testimony of the plaintiff, corroborated [**43] by others (including relatives), may be sufficient."

2. *Knight v. Metro. Gov't of Nashville & Davidson*

[1] "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses,…"

County, 136 Fed. Appx. 755, 762 (6th Cir. 2005) "Metro does not quarrel with the district court's instruction that the jury could award compensatory damages [$150,000]…Knight testified at trial regarding his emotional distress, financial hardship, and reduced standard of living resulting from his inability to return to the police force. See Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1215 (6th Cir. 1996) (holding that a "plaintiff's own testimony, along with the circumstances of a particular case, can suffice" to justify an award of compensatory damages).

D. The concept of "Garden Variety" emotional distress claim has taken hold in quite a few jurisdictions.

1. In a Garden Variety EP&S case, the plaintiff testifies in "conclusory" fashion regarding her EP&S, without attempting to corroborate her own testimony with other evidence. EP&S awards tend to be low because the evidence supporting EP&S is weak. In these cases the courts generally limit discovery of the plaintiff's mental state on the theory that the plaintiff has not put her mental state in issue. For example, these cases generally will not allow a Rule 35 mental examination of the plaintiff or intrusive discovery of her medical records. *Stevenson v. Stanley Bostitch,* Inc., 201 F.R.D. 551 (N.D. Ga. 2001)(collecting cases). EP&S damages in these cases tend to be much lower than in cases where attention is paid to the proof of EP&S.

2. Only the Second Circuit has extended the Garden Variety rule to regulate the amount of damages that can be award in garden variety cases to $30,000 or less. *See, e.g., Funk v. F&K Supply, Inc.,* 43 F. Supp. 2d 205, 226-28 (N.D.N.Y. 1999) (finding that awards of $ 850,000 and $ 450,000 for garden variety emotional distress deviated materially from what would be reasonable and granting remittitur reducing each amount to $ 30,000).

3. There is no authority in Title VII for a $30,000 cap. The Second Circuit rule can lead to absurd results. *See, eg, Patterson v. Balsamico,* 440 F.3d 104, 120 (2d Cir. 2006)(Section 1983), the where Court was reminded of its $30,000 limit in cases such as Patterson, where "the evidence of the harms suffered was limited to Patterson's testimony alone, and there was no evidence that any medical treatment was required," but refused to impose the cap because the claim was also brought under NY law.

III. Case Selection

A. If your client has trouble telling the truth, he will destroy his case and all the time and money you have invested will be wasted.

1. My retainer agreement states that: "You are required to be honest at all times. There should be no difference between what you would answer if I asked you a question when we are alone, and what you would answer when you are testifying on the witness stand. The key to success is being completely honest with your attorney and as a witness. If you lie, exaggerate or deviate in any way from the facts as you know them you will ruin your case."

2. My retainer agreement also instructs the client on the important things I am going to expect him to do, or not to do, from looking for work and keeping records of his job search, to not taking original documents from his employer, and giving the employer an opportunity to question his character.

C. From day one think about what makes your client tick, what you are going to tell the jury in your opening.

1. What sort of effort and sacrifice was required

by your client to get where she was before the discrimination? How much did what she had achieved mean to her? Did the discrimination affect her family and social life?

D. Look for treatment and talk to family, friends and coworkers, at the outset of the relationship with the client.

1. If someone did not seek help in some form, what she went through was probably not severe enough to warrant a large damage award. Loss of health insurance is a common factor in decisions to forgo psychological counseling, but the inquiry does not end there.

2. Ask your client "who went through this with you," and interview one or two of her witnesses. They should be able to describe what the plaintiff's was like before the discrimination, how she changed after the discrimination started, and how she changed after it ended (if it has ended).

3. Speak to <u>all</u> treating medical professionals and review all their records for the period beginning when the discrimination started to the present, to determine whether the client mentioned or was treated for stress on the job (or just stress). People mention job stress or symptoms or job stress at regular checkups and even dental visits, such as complaints about grinding teeth, or jaw pain, which may be diagnosed as Bruxism or aggravation of TMJ.

E. Hostile work environments produce the most severe emotional injuries. They also produce physical injuries, which most disparate treatment cases do not, in the case of sexually or racially motivated assaults, and environments intentionally created or maintained to aggravate existing disabilities (e.g.,

refusing to grant a smoke free environment to someone who has obstructive pulmonary disease).

IV. Use a Forensic Psychiatrist

A. Once you have identified a case where there is a prospect of a significant EP&S damages award, involve a forensic psychiatrist from the beginning

B. Factors to consider in selecting a forensic psychiatrist. Look for someone who:

1. Plays a significant role at a respected teaching institution, such as head of a forensic psychiatry program

2. Has a significant publication history regarding standards for evaluating the reliability of forensic psych expert methodology

3. Has been qualified in state & federal court as an expert in a substantial number of cases

4. Can be considered an expert's expert: teaches clinicians and judges regarding reliability of expert methodology; an "expert's expert"

5. Has been retained as an expert in Daubert challenges to other expert's testimony

6. Is psychodynamically & medically sophisticated: e.g. can separate out medication from stress effects and help examinees talk in an uncomfortable context about such stress related effects or side effects of medications as loss of sexual intimacy

7. Has an active patient practice which includes health care professionals: "a doctor's doctor"

8. You can talk with: the role of the expert is two fold: consulting & testifying.

C. None of these factors is *sine qua non* except the last. I favor MDs because they are harder to trip up on qualifications (e.g., "As a psychologist you have never studied alcohol metabolism, so you cannot say

whether …"). You may need a psychiatrist to separate out biological from psychosocial causes of symptoms such as impotence and to review & analyze the medical records accurately.

1. A forensic psychiatrist is going to add a lot more to the verdict than he is going to cost. A rough estimate of that cost would be between $5,000 and another $5,000 for testimony. If you are realistically hoping for a high six figure award for EP&S, which is going to support an even higher punitive damages award as a multiple of the EP&S award, the expert's cost is well justified.

a. If you consult with your forensic psychiatrist early on, he should be able to identify issues that typically arise when plaintiffs have the type of experience your client had, which will help you in preparing your client.

b. A forensic psychiatrist can suggest strategies for discovery, particularly depositions, identify potential weaknesses and pitfalls early on, and suggest ways of dealing with them.

c. A forensic psychiatrist will review all treatment, education and employment records; he will be qualified to testify about the meaning of these records, which may otherwise not be admissible as to mental injury

d. A forensic psychiatrist can provide a diagnosis, and testify as to how long the effects of the injury will persist

e. A forensic psychiatrist can identify additional types of EP&S which may not be apparent (loss of enjoyment of work was a new one for me—I gave up working for people because I hated it—but it is important).

f. Large pain and suffering awards are hard to defend on appeal. Having a forensic psychiatrist does not guarantee that you can defend your award, but it does make it more likely

V. Plaintiff's Deposition

A. Defense counsel frequently question the plaintiff broadly about all the bad things that have happened to him, in an attempt to establish that the plaintiff's present EP&S is the result of things other than defendant's illegal discrimination.

1. Prepare the plaintiff for this. Every plaintiff has had several bad experiences in his life other than the defendant's illegal conduct, and should be prepared to testify truthfully as to those experiences. No jury is going to find it credible that the only EP&S in plaintiff's life was the loss of her job. Nonetheless, it is important that plaintiff understand the use defendant plans to make of this testimony.

B. Another defense favorite in hostile work environment cases is to ask the plaintiff to "tell me every incident of harassment."

1. If your client experienced a few discrete incidents that were sufficiently severe that they constituted a hostile work environment, this is not a problem. However, more often, clients experience harassment on a regular basis, and can only remember several representative incidents. Do not allow you client to be boxed into conceding these were the only incidents.

2. Prepare the client to respond: "I cannot tell you every incident of harassment, because I was harassed several times a week for a year. I can tell you approximately how often I was harassed, they types of things that were said, by whom and where they occurred. There are several incidents I recall specifically, which I can describe…"

C. Defense counsel also have a penchant for separating the EP&S from the events giving rise to

the EP&S. After the plaintiff has finished explaining the harassment incidents at her deposition, the question I often hear is: "what effect did these events have on you, if any?"

1. Defense counsel would be very happy if the plaintiff confined himself to a two minute answer that mentioned feeling sad, headaches and difficulty sleeping.

2. This is where you want to let your adversary know that they have a potentially huge EP&S award to contend with.

3. It is important that your client be extremely well prepared to go back over all of the incidents of illegal conduct and testify, as to what happened, how she felt when it happened, the things that she did that exemplified how she felt (showering immediately, wearing a sack dress to work the next day), when and where she cried, and with whom.

4. It is very difficult to answer this question in the abstract. It is a lot easier for the witness to review the events to remind herself of what she felt when the discrimination was happening.

D. Eggshell Skull Plaintiffs: When defense counsel ask plaintiffs about other emotional trauma in order to prove that it was not the *discrimination* that caused the plaintiff's injuries, that question may create the opportunity to turn the facts elicited against the defendant.

1. "The 'eggshell skull' principle . . . is simply another way of stating that foreseeability is not an element of proximate cause. In Minnesota, it is well-settled that a tortfeasor is liable for all of its natural and proximate consequences. In other words, foreseeability does not limit an award of money damages. This includes damages assessed against a tortfeasor for harm caused to a plaintiff who happens to have a fragile psyche. Wakefield v.

NLRB, 779 F.2d 1437, 1438 (9th Cir. 1986) (administrative agency held that plaintiff's predisposition towards mental illness relieved defendant of responsibility for plaintiff's psychological disability, ignoring "time-honored legal principle" that a wrongdoer takes a victim as the wrongdoer finds the victim)" *Jenson v. Eveleth Taconite Co.,* 130 F.3d 1287, 1294-1295 (8th Cir. 1997). *But see Munn v. Algee,* 924 F.2d 568, 576 (5th Cir. 1991) (stating that "eggshell skull" doctrine has only been applied to pre-existing physical conditions and declining to extend the doctrine's scope), *accord, Ragin v. Macklowe Real Estate Co.,* 6 F.3d 898 (2d Cir. 1993).

2. If you are going to attempt to establish that prior trauma rendered your client an eggshell you may want to have your forensic testify as to a diagnosis of the injury caused by the prior trauma. *Testa v. Village of Mundelein,* 89 F.3d 443, 446-447 (7th Cir. 1996)("no professional testified that Testa had a pre-existing medical condition that would have made him more susceptible to injury from the defendants' conduct. Testa relied solely on his and his wife's testimony to describe his mental state. It was within the district court's discretion to decide that this evidence was insufficient to warrant an eggshell skull instruction.")

3. Time permitting, I will show two video clips from a deposition where the defendant opened the door to an eggshell approach, by asking the witness, in a hostile work environment case, about childhood experiences with racial discrimination. We will review the forensic psychiatrist's report, which is attached herewith, in which the psychiatrist shows how the trauma caused by racism when the plaintiff was a child, (testimony elicited by defense counsel), made him much more vulnerable to the racism he experienced at defendant's plant, and increased the plaintiff's injury beyond what he would otherwise have

suffered.

V. Plaintiff's Direct Case

A. Your client's trial testimony should present a complete before, during and after picture of how the discrimination ruined her life.

1. Have the client testify about what her life was like before the discrimination, how she relaxed with her family, friends and coworkers, how she enjoyed her work, the sacrifices she made to get where she was, working a second job, thrift, extra hours on the job. Let her paint a complete picture of her life, including the difficulties she overcame, and the pride and dignity she felt as a result.

2. Have the client testify about going through the discrimination, with whom she shared her pain and fears (some of these people may make effective witnesses), what it was like to make her complaints to an incredulous employer, how she felt when the discrimination continued, whom she cried with, how often, and how this stress affected her family.

3. Then have the client testify about how the discrimination changed her.

a. Clients should build on their previous testimony about what had meaning for them in their lives, and explain how the discrimination destroyed all of the enjoyment and fulfillment they obtained from their lives.

b. The client should explain how the discrimination invaded family relationships, including the bedroom, if applicable, how the anxiety and depression made it impossible for her to function as a mother, and as friend to her friends.

c. The client should explain how she

withdrew as a result of the discrimination, and its effects, and stopped functioning, including on the job as a result.

d. Have the client remind the jury about her goals, and passions and sources of self worth and dignity, and how all of these were destroyed.

4. In a sexual harassment case, a woman may experience flashbacks in the bedroom, and loose the ability to enjoy intimacy with her partner. It is important for her first to build the story of the relationship, and it's success, and then show how it was destroyed.

a. I had a client who was sexually assaulted by her employer. She had explained in her earlier testimony how long it had taken her to find her husband and a relationship in which she was fulfilled. After the assault and associated flashbacks, she testified that she was first unable to be intimate with her husband, and then unable to enjoy relations with him, which led to her divorce. This led to a large EP&S award.

b. This type of injury can be an issue for men or women in racially hostile work environment. Men and women can experience a loss of self worth and confidence that invades the bedroom.

5. Whether racial, sexual or any other type harassment, victims stop functioning as parents, and sometimes regret how they treat their children. Periods like these can destroy relationships with kids, and cause the kids permanent harm.

6. Depending on venue, a jury may be able to relate to problems developing with substance abuse, where for example a recovering abuser resumed using after a long period of abstinence. If this is an issue in a venue where an admission of

drug use is the death knell, your expert may be able to help by explaining it as self treatment.

7. You need not have a hostile work environment case to prove EP&S. The same techniques can be used in a disparate treatment case, where the victim was aware of the disparate treatment, and complained. The complaint, perhaps to the CEO through an "open door policy," may be a stepping stone to the client voicing his feelings during testimony.

8. Do not ask your client to discuss her feelings unrelated to her story. Constantly focus on a narrative that will allow her to express her feeling naturally. All that can be done by having her repeat what she told those whom she was close to, and her therapist.

B. Rely on the testimony of plaintiff's friends, relatives and coworkers

1. Corroborative testimony is important. It is particularly devastating to have people from different walks of the client's like give their unique perspectives on the changes the client went through during and after the discrimination.

2. Co-workers, even those still employed by the defendant, will sometimes corroborate these changes. It is the rare defense attorney who will prepare them to be on the watch for such questions.

3. It is very effective for several witnesses to give various perspectives: a parent, sibling, spouse and a best friend. See, e.g.,:

a. *Lampley v. Onyx Acceptance Corp.,* 340 F.3d 478, 484 (7th Cir. 2003): "Although Lampley found a new job two months after his termination, both he and his wife provided detailed testimony explaining the termination's negative effects on

Lampley's emotional state, some of which linger today. The jury was also told that Lampley sought church counseling one year after his termination. Moreover, Lampley testified that because his wife was pregnant at the time of his termination, he was especially stressed about the ability to deal with costs associated with child-rearing in light of his unemployment. Based on this evidence, a jury reasonably could have believed that$ 75,000 was necessary to fully compensate Lampley for his pain and suffering."

b. *United States EEOC v. AIC Sec. Investigations,* 55 F.3d 1276, 1286 (7th Cir. 1995): "Wessel claimed only emotional damages: basically depression, rage and fear resulting from his sudden firing. As the district court noted, Wessel's work was a very large part of his life. He took almost no vacations, and his son testified that he sometimes even put his company above his family. Coupled with that background, the evidence showed that Wessel's wrongful firing was emotionally wrenching, even though he underwent no formal psychological treatment. He was cut off from one of the major defining aspects of his life, and he was forced to watch his family suffer emotionally and financially as well.

c. Farfaras v. Citizens Bank & Trust, 433 F.3d 558, 563 (7th Cir. 2006): "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. The defendants objected to the use of the word "depressed." The district court overruled this objection. On September 2, 2004, the jury awarded Farfaras $ 100,000 for loss of dignity, humiliation, and emotional distress, $ 100,000 for pain and suffering…."

d. *Deloughery v. City of Chicago,* 422 F.3d 611, 620 (7th Cir. 2005): "The record can be read as the story of a highly motivated female police officer, with a family heritage in law enforcement, being frustrated in her quest for greater responsibility simply because she had asserted her right to be free from discrimination."

4. Having the plaintiff speak in an anguished voice and express suffering through facial expressions is not enough

a. *Akouri v. Fla. DOT,* 408 F.3d 1338, 1345-1346 (11th Cir. 2005)"Despite Akouri's characterization of his testimony as 'describing the pain' of not being promoted, Akouri not once described any 'pain.' The content of Akouri's testimony only went so far as to say that he was rejected the three times he applied for promotions that he believed he deserved. In our opinion, this testimony does not satisfy the requirement that the plaintiff must show actual injury by sufficient evidence... Accordingly, the district court did not err in reversing the jury's award of $552,000 in compensatory damages…"

C. The testimony of treating medical professionals can be very effective

1. A treating psychologist or psychiatrist is a fact witness. She can testify that your client tried to describe how she was treated at the defendant, she sobbed uncontrollably, hyperventilated, and had to be removed to a hospital and medicated because the experience of reliving the events was so traumatic.

a. A psychologist was allowed to testify that the plaintiff's anxiety score on the MPSS was "off the charts" and that she "had never seen such a high score."

2. A treating psychologist or psychiatrist can also be qualified to offer expert opinion, however, it is unlikely that you want two experts offering diagnoses, leave that to your forensic psychaitrist.

a. Another reason not to offer your treating psychologist or psychiatrist as an expert, is that if your client is still treating, if can interfere with the therapeutic relationship. Your client may be unaware that his therapist has diagnosed him with a narcissistic personality disorder.

3. If your treating psychologist did report a diagnosis, prepare her to be cross-examined on it. You should discuss her preparation with your forensic psychiatrist.

4. Medical treatment expenses can be recovered as compensatory damages, however, they may be more important to make concrete for a jury how serious the injury was. They can be introduced through treating medical professionals.

D. Your forensic psychiatrist can corroborate all of the client's testimony regarding the sources of joy and satisfaction in her life, and how the discrimination destroyed that.

1. He will be able to explain exactly how discrimination or harassment can and did cause such serious and long lasting injury.

E. Your opening and closing statements should focus on painting a picture of your client as a complete human being—just as her and her friends and family's trail testimony did.

1. Review the activities from which she derived pleasure, whether singing in the choir or going out with friends.

2. Review the struggles and sacrifices she made to achieve what she achieved, not only at work, but through education, and the sacrifices she made to have and support her family.

3. Talk about the value work held for her which

was central to her life, how if allowed her to have dignity—as an achiever and a good parent— and the pleasure she derived from work.

F. With the evidence you have presented, through your client, her family, friends, treating physician and forensic psychiatrist, the jury should be able to conclude that the defendant has permanently destroyed most of the satisfaction and joy your client obtained from her life, and you will have laid an evidentiary foundation that is defensible on appeal.

VII. Practice Pointers:

A. Ask your forensic psychiatrist whether she prefers to have the plaintiff's deposition transcript before she writes her report, whether she requires any other transcripts, and schedule expert report due dates accordingly.

B. If your client becomes tearful during the deposition, or becomes overwhelmed by emotion and has to leave the deposition, this is important information your forensic psychiatrist will miss unless you make a record of what happened. You can resume the deposition and state that the witness was tearful during the entire ten minute recess.

C. In preparing your client for her IME you may show her your expert's report, or you may discuss certain key points with her, if you prefer that her review of the report remain confidential.

D. Try to limit the IME to as little time as possible with a lunch break in the middle. You do not want your client being exhausted.

E. Remind her that she is entitled to take a break whenever she feels she needs one. IMEs can be very stressful. Be available by phone during the session if she has to take a break.

F. Tell the client that if she feels that the psychiatrist

does something inappropriate she may take a break and call you, if necessary, or write down any questions that troubled her when she gets home and email them to you.

G. Minnesota Multiphasic Personality Inventory (MMPI) is the most frequently used personality test in the mental health field. It can be scored by the defendant's expert, or sent out to be scored independently. Find out who scored it.

H. The Neurobehavioral Functioning Inventory (NFI) Family Form is a detailed survey that family members fill out. It asks about the plaintiff's emotional and physical well being. It gives an immediate picture of how family members perceived the effect of the discrimination on the plaintiff.

I. In some situations erectile dysfunction, loss of interest in sex, and other sexual problems may result from exposure to a hostile work environment. The McLean Hospital Human Sexuality Program Guided Interview Questionnaire will pick this up.