

Damages

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Backpay

- Legal Remedy
- Compensation employee would have received but for being discriminated against
- Mitigation Requirement

Mitigation

- Employee has a low burden of proof to show she has sought new employment.
- Burden then shifts to the employer to prove the employee has not mitigated.

Employer Burden of Proof

- Employer must show by a preponderance of evidence that the employee:
 - Rejected a substantially equivalent position;
 - Failed to use reasonable diligence in seeking a substantially equivalent position; or
 - Has contributed to the diminution of her income.

Substantially Equivalent Position

- Employee has duty to only accept a new job with **identical**:
 - Promotional opportunities;
 - Compensation;
 - Responsibilities;
 - Working conditions; and
 - Status.

Substantially Equivalent Position

- Employee demotion exception
- Subsequent employer layoffs
- Removal From the Labor Market
 - School matriculation
 - Self-employment
 - Post-employment misconduct

Vocational Counselors

- The obligation to demonstrate mitigation can be met by offering the testimony of a vocational counselor.

Maximizing Backpay Damages

- Use a vocational counselor to advise the client on the appropriate scope of her job search.
- Ensure clients begin looking quickly for post-termination employment.
- Ensure the client maintains a detailed mitigation log.

Compensatory Damages

- Pecuniary losses
 - E.g., moving expenses, job searches, medical or psychiatric treatment, etc.
- Non-pecuniary losses
 - E.g., emotional pain or suffering, mental anguish, injury to reputation (range of future economic opportunities have narrowed) or credit standing.

Emotional Distress

- Compensable emotional distress must be supported by evidence of an injury.
 - E.g., sleeplessness, anxiety, stress, depression, nervous breakdowns, etc.
- A proof differential exists between “garden variety” emotional distress and severe emotional distress.

Request for Medical Records

- Medical records can be protected by moving for a protective order.
- The defendant is only entitled to relevant medical records obtained using the least intrusive means possible.

Rule 35 Request for Mental Examination

- The majority rule is that the plaintiff claiming “garden variety” emotional distress will only have to submit to a mental exam if one of the following factors is present:
 - Plaintiff asserts cause of action for intentional or negligent infliction of emotional distress.
 - Plaintiff alleges a specific mental injury or disorder.
 - Plaintiff claims unusually severe emotional distress.
 - Plaintiff offers expert testimony in support of her claim for emotional distress
 - Plaintiff concedes her physical or mental condition is “in controversy”

Punitive Damages

- D.C. Standard
 - Plaintiff must prove by clear and convincing evidence that the employer committed a tortious act accompanied by malice.
- Federal Standard
 - Employer or employer's managerial agent engaged in intentional discrimination, by a preponderance of evidence, with malice or reckless indifference to the federally protected rights of the aggrieved individual

D.C. (HRA) Standard

- A showing of discrimination alone is insufficient.
- The defendant's act must be accompanied by fraud, ill will, recklessness, willful disregard of the plaintiff's rights, or other aggravating circumstances.
- Malice may be inferred from the defendant's acts and circumstantial evidence.

Federal Standard

- A showing of malice or egregious misconduct is sufficient but *not required*.
 - Reckless indifference
 - Employer has knowledge it *may* be acting in violation of federal law.

Federal Standard

- Vicarious liability
 - Managerial agent requirement
 - Amount of discretion the manager has in hiring, disciplining, and firing employees
 - Acting within the scope of employment
 - Good faith exception
 - Managerial agent acts contrary to employer's good faith efforts to comply with federal law

Questions?

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