# REGIONAL ATTORNEYS' MANUAL

## PART 2

## INITIATING LITIGATION

**OFFICE OF**
**GENERAL COUNSEL**

**APRIL 2005**

## PART 2. INITIATING LITIGATION

### TABLE OF CONTENTS

Sec. Page

# REGIONAL ATTORNEYS' MANUAL

## PART 2

## INITIATING LITIGATION

### SECTION I

### EEOC LAWS, REGULATIONS, AND GUIDANCE ON THE WEB

## SECTION I
## EEOC LAWS, REGULATIONS, AND GUIDANCE ON THE WEB

Contents

## A. STATUTES ENFORCED BY EEOC

The EEOC enforces the Age Discrimination in Employment Act of 1967 (ADEA), Titles I and V of the Americans with Disabilities Act of 1990 (ADA), the Equal Pay Act of 1963 (EPA), Sections 501 and 505 of the Rehabilitation Act of 1973, and Title VII of the Civil Rights Act of 1964 (Title VII). The EEOC's Web site, http://www.eeoc.gov/, has the text of these statutes (http://www.eeoc.gov/abouteeo/overview_laws.html) as well as summary information on the groups and types of discriminatory practices covered by the statutes.

## B. EEOC REGULATIONS

The Commission's regulations implementing and interpreting the statutes it enforces are printed at 29 C.F.R. Parts 1600 through 1691. For the text of EEOC's regulations, see the EEOC's Web site at http://www.eeoc.gov/policy/regs/index.html. For the *EEOC's Questions and Answers on the Uniform Guidelines on Employee Selection Procedures*, see http://www.uniformguidelines.com/questionandanswers.html.

## C. EEOC GUIDANCE AND OTHER RESOURCES

Most of the EEOC's recent enforcement guidance and related documents are available on the EEOC's Web site at http://www.eeoc.gov/policy/guidance.html. New sections of the EEOC's Compliance Manual are available at http://www.eeoc.gov/policy/compliance.html. Text of memoranda of understanding entered into between EEOC and other agencies (including the Department of Labor, the Department of Justice, the National Association of Attorneys General, and the National Labor Relations Board) regarding various EEO issues are available at http://www.eeoc.gov/policy/mou.html.

# REGIONAL ATTORNEYS' MANUAL

## PART 2

## INITIATING LITIGATION

### SECTION II

### PREFILING PROCEDURES

## SECTION II
## PREFILING PROCEDURES

Contents

## A. TRANSMISSION OF CONCILIATION FAILURES TO DEPARTMENT OF JUSTICE

In transmitting Title VII and ADA conciliation failures against public employers to the Department of Justice for litigation consideration, the legal unit should prepare as an attachment to EEOC Form 256 a memorandum recommending for or against litigation containing a sufficient discussion of the facts and law to support the recommendation. A copy of EEOC Form 256, *Transmittal of EEOC Case to the Department of Justice,* is shown in the appendix hereto.

**APPENDIX**

## EEOC FORM 256:
## TRANSMITTAL OF EEOC CASE TO THE DEPARTMENT OF JUSTICE

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**TRANSMITTAL OF EEOC CASE TO THE DEPARTMENT OF JUSTICE**

***(The attached charge involves state/local government or political subdivisions, including public educational institutions.)***

| **TO:** | **FROM:** *(District name/address)* |
|---|---|
| **THE ATTACHED** ☐ **CHARGE** ☐ **THIRD PARTY CHARGE IS REFERRED FOR A DETERMINATION TO SUE PURSUANT TO:** ☐ *Section 706 (f)(1) or* ☐ *Section 706 (f)(2)* | |

**EEOC CHARGE NUMBER**

| **NAME/ADDRESS OF CHARGING PARTY TO WHOM NOTICE IS TO BE ADDRESSED** | **NAME/ADDRESS OF AGGRIEVED PERSON TO WHOM NOTICE IS TO BE SENT** |
|---|---|
| | |

**NAME/ADDRESS OF RESPONDENT(S)**

**DISTRICT DIRECTOR/REGIONAL ATTORNEY RECOMMENDATIONS/REMARKS**

| **DATE** | **TELEPHONE NUMBER** *(Use FTS number)* | **DISTRICT DIRECTOR** *(Typed Name)* | **SIGNATURE** |
|---|---|---|---|
| | | | |

**FOR DEPARTMENT OF JUSTICE USE**

| **DATE EEOC FORM 256 RECEIVED** | **DATE NOTICE ISSUED TO PARTIES** |
|---|---|
| | |

**STATUS**

## B. FILING SUIT IN STATE COURT

Regional Attorneys must receive approval from the General Counsel before filing suit in state court, even if the case is otherwise within the Regional Attorney's redelegated litigation authority.

## C. PRESUIT INTERVIEWS OF CHARGING PARTIES AND OTHER CLAIMANTS

Charging parties should be interviewed by a legal unit attorney prior to submission of a presentation memorandum or notice of intent to file under the Regional Attorney's redelegated authority. Where practicable, other individuals who will have significant roles in the litigation as either witnesses or claimants should also be interviewed before litigation is recommended or a notice of intent submitted.

Interviews should be conducted in person where possible, even if this requires out of city travel by either the attorney or the claimants. At a minimum a telephone interview must take place. The interview should explore the individual's basis for recovery as well as other knowledge he or she may have relevant to the suit, such as information on the respondent's operations and employment practices and on other individual and class claims.

The attorney should also discuss with the claimant the relief to which he or she may be entitled (including the effect of any personal bankruptcy on such relief), and should obtain at least general information on backpay accrual, mitigation, and any pecuniary compensatory damages the claimant may have incurred. The attorney should discuss the standards for obtaining nonpecuniary compensatory damages and the kinds of inquiries the defendant will be entitled to make about the claimant if such damages are sought. (See the legal discussion on nonpecuniary compensatory damages in subsection D. of this section of the *Manual*.) A copy of the information sheet on nonpecuniary compensatory damages in the appendix that follows should be given to the claimant at the end of the interview. Although the Commission brings suit to further the public interest in preventing employment discrimination, the considerations relevant to seeking compensatory damages for a particular individual are unique to that person. Thus, claims for nonpecuniary compensatory damages should be made only for individuals who have given their express consent following a thorough discussion with a legal unit attorney regarding the possible consequences of such a claim, and who have had at least a week to think about the matter after receiving the information sheet.

Finally, the attorney should explain during the interview the Commission's public interest role in the litigation, the possibility that the Commission's and the claimant's interests may diverge during the litigation, and the claimant's individual suit and intervention rights, if any. In ADEA and EPA cases, the claimant should be informed

that EEOC's suit will cut off any private right of action he or she may have. See the discussion of these matters in subsection E. of this section of the *Manual*.

## APPENDIX

## INFORMATION SHEET ON NONPECUNIARY COMPENSATORY DAMAGES

When the EEOC files a lawsuit alleging that a defendant engaged in intentional discrimination, the agency generally may seek monetary recovery for injuries which individuals suffered as a result of defendant's unlawful conduct. The monetary relief may include what are known as "nonpecuniary compensatory damages." These are damages for intangible injuries such as emotional distress, mental anguish, inconvenience, and similar harm suffered by a victim of discrimination. The monetary relief an individual may be awarded for such intangible injuries may not exceed a specified amount that depends on the number of people employed by the defendant.

When the EEOC files a lawsuit, EEOC attorneys, in consultation with the individuals for whom the agency will be seeking relief, will determine whether these individuals have claims for nonpecuniary compensatory damages under appropriate legal standards, and if so, whether such damages should be sought from defendant. The EEOC will seek these damages on behalf of an individual only if he or she agrees that EEOC may do so.

There are a number of issues which you, as an individual harmed by defendant's discriminatory conduct, should carefully consider before deciding whether to ask the EEOC to seek nonpecuniary compensatory damages on your behalf. First, the EEOC will have to be able to prove at trial that you suffered the injuries for which the damages are sought. This means that you must be prepared to testify in great detail at a deposition,* and possibly before a judge and jury, about the injuries you suffered. These injuries may, in some instances, relate to highly personal and private matters. For example, defendant's unlawful discrimination may have caused marital problems between you and your spouse, or you may have sought counseling or medical treatment for emotional problems caused by the discrimination. While the EEOC trial attorney will object to improper questions, procedural rules generally permit the defendant to ask very detailed questions concerning the damages claim. Some

---

* Depositions are pretrial proceedings in which you are placed under oath and defendant's attorney is permitted to ask you any questions he or she believes are relevant to your claim. Your responses are recorded by a court reporter and can be introduced at trial.

individuals may not wish to testify about such matters, and therefore would not want to seek recovery for such injuries.

Often, your detailed testimony alone will not be enough to prove the damages and you will be asked to identify witnesses who can corroborate that you suffered the injuries. Such witnesses might include your family members, friends, coworkers, and physician or therapist. Defendant will be permitted to ask these witnesses the same kinds of questions about your personal life that it will be asking you.

Also, in some instances where such damages are sought, the defendant may be able to seek information concerning seemingly unrelated matters. You are not entitled to compensatory damages unless EEOC can prove that defendant's unlawful actions actually caused your injuries. Therefore, defendants are generally given an opportunity to prove that some other situation in your life caused the claimed damages. Based on this general rule, the defendant may be permitted to inquire into a variety of personal matters, including those involving your family, friends, and coworkers. For example, if you contend that defendant's unlawful actions caused you mental anguish and depression, defendant may be able to ask you and your witnesses about personal matters that may have caused such depression, such as family problems or illness. Defendant, however, is not permitted to delve into such issues solely to harass or embarrass you, and the EEOC trial attorney will ask the court to terminate such questioning.

Finally, depending on the type of damages claimed, defendant may be able to have the court require you to be examined by a physician designated by defendant. You would be required to respond to the physician's questions, and the examination would be disclosed to defendant and might become part of the public record in the case.

In sum, by seeking nonpecuniary compensatory damages, you and possibly your family, friends, coworkers, and physicians or therapists may be required to provide testimony concerning matters of a personal, private, or sensitive nature. The extent to which this may be required depends upon the specific damages claimed, the facts of the case, defendant's strategy, and the court's view on these matters. The EEOC trial attorney will seek to limit such inquiries to only those the EEOC believes are permissible under the applicable rules and case law, but it is up to the judge to decide the ultimate scope of these inquiries.

Assuming you have a valid claim for nonpecuniary compensatory damages, as determined by the EEOC attorneys assigned to the case, you should very carefully

consider all of the above issues in deciding whether or not to have the EEOC assert such a claim. This may include, if you wish, consulting with others who may be impacted by your decision, such as your spouse or other family members. Once you have made your decision, you should advise the EEOC trial attorney, so that he or she may include the appropriate damages claim, if any, in the EEOC's suit. Finally, bear in mind that while a claim for these damages may generally be removed from the case as litigation progresses and the case develops, it may be difficult to add a claim for damages which was not initially included in the suit.

## D. NONPECUNIARY COMPENSATORY DAMAGES: ISSUES FOR REVIEW WITH CLAIMANTS PRIOR TO FILING SUIT

Contents

## D. NONPECUNIARY COMPENSATORY DAMAGES: ISSUES FOR REVIEW WITH CLAIMANTS PRIOR TO FILING SUIT

1. Introduction

This memorandum is intended to assist trial attorneys in preparing for and conducting interviews of charging parties and other claimants on the question of whether to seek nonpecuniary compensatory damages, as provided in the Civil Rights Act of 1991 (42 U.S.C. §1981a). See subsection C. of this section of the *Manual*, *Presuit Interviews of Charging Parties and Other Claimants*.

2. Areas of Inquiry as to Scope of Damages

There are a variety of nonpecuniary compensatory damage claims which may be asserted on behalf of a claimant. To assess whether such a claim should be made, trial attorneys must discuss with each claimant the type and extent of damages he or she incurred. After briefly explaining the nature of nonpecuniary compensatory damages, the trial attorney should review the specific types of damages individuals in employment discrimination cases may allege, including emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, fright, shock, humiliation, indignity, apprehension, marital strain, loss of self-esteem, anxiety, depression, loss of respect of one's friends and family, isolation, and grief.

There are a number of common observable physical consequences to these types of injuries, such as increased use of alcohol, crying, sleeplessness, fatigue, headaches, gastrointestinal problems, and sudden and uncharacteristic loss of weight. This list is not inclusive and claimants who identify emotional distress type injuries should be subjected to careful inquiry as to any possible physical manifestations in order to determine whether they have sustained compensable injuries. Before asking claimants to discuss their personal situations, the trial attorney should remind claimants that seeking compensatory damages is a choice and that they are not obligated to discuss their injuries and other personal matters if they decide not to seek such damages. See *Presuit Interviews of Charging Parties and Other Claimants*, in subsection C. of this section of the *Manual*.

Claimants should be advised that the amount of damages awarded, if any, will likely be determined largely by the nature and severity of their proven injuries, and of course, the statutory caps. *Compare, e.g., Smith v. Northwest Mutual Financial Acceptance, Inc.*, 129 F.3d 1408, 1416-17 (10th Cir. 1997) (jury award of compensatory damages was reduced to the statutory cap, but otherwise upheld, where the plaintiff testified that her termination caused "nausea, migraines, humiliation, degradation, loss of self respect, consumption of sleeping pills, frequent crying, loss of a loan officer career, and stress in [her] relationship with her daughter," and "[t]he record reveal[ed] that plaintiff's testimony was in part corroborated by independent, objective testimony" from "two of plaintiff's co-workers [who] testified from personal knowledge"), *with Vadie v. Mississippi State University*, 218 F.3d 365, 375-77 (5th Cir. 2000) (jury award of nonpecuniary compensatory damages was reduced to the statutory cap by the district court; however, the Fifth Circuit reversed the award and ordered that the case be "remand[ed] for a new trial on retaliation damages unless [the plaintiff] accepts a remittitur . . . reducing the damages award to $10,000," because "the award is entirely disproportionate to the injury sustained," where the plaintiff testified merely that he "bec[a]me sick, physically, mentally, and everything" when informed that he was not selected a permanent position on the faculty, and where "none of [his claims were] corroborated by medical evidence or any other witnesses"). *See also Evans v. Port Auth. of New York & New Jersey*, 273 F.3d 346 (3d Cir. 2001) (in a Section 1981 and Title VII failure to promote race discrimination case, jury awarded $1.15 million in pain and suffering damages which was remitted to $375,000; appellate court affirmed reduced award reasoning that jury award was excessive and while $375,000 is "well above most emotional distress awards," *id.* at 355, "this was not a typical case." *Id.* at 356; award was supported by plaintiff's testimony about the physical and emotional toll of working under discriminatory conditions as well as the demeanor and testimony of the employer's witnesses.)

3. Areas of Inquiry as to Proof of Damages

a. Evidence of Damages

(1) Proof Standards

It is important that the claimant understand that nonpecuniary compensatory damages will not be awarded solely based on proof of an unlawful employment practice. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 416-17 (5th Cir. 1998) (Title VII and Section 1981; "compensatory damages for emotional distress and other forms of intangible injury will not be presumed from mere violation of constitutional or statutory

rights"). Nor will damages be awarded solely based on an assertion that the claimant suffered mental anguish as a result of defendant's unlawful conduct. *Bailey v. Runyon*, 220 F.3d 879, 881 (8th Cir. 2000) ("Conclusory statements give the finder of fact no adequate basis from which to gauge the nature and circumstances of the wrong and its effect on the plaintiff"). *See, e.g., Forshee v. Waterloo Industries, Inc.*, 178 F.3d 527, 531 (8th Cir. 1999) (reversing an award of emotional distress damages, where "plaintiff's testimony did not identify and describe the kind of severe emotional distress that warranted the award [where she] suffered no physical injury, she was not medically treated for any psychological or emotional injury, and no other witness corroborated any outward manifestation of emotional distress"). Nonetheless, mere assertions of nonpecuniary compensatory damages may be sufficient in a few instances where defendant's conduct is particularly severe, long-term, and egregious. *See e.g., Berger v. Iron Workers Reinforced Rodmen Local 201*, 170 F.3d 1111, 1138 (D.C. Cir. 1999) (Title VII and Section 1981; "in appropriate circumstances the infliction of emotional distress may be inferred from the circumstances of the violation," and "courts may properly . . . award damages to compensate for that distress"; upholding "extremely modest awards . . . rang[ing] from $2,500 to $25,000," based on the testimony of 18 African-American "claimants, who were experienced [construction workers], [that they] suffered emotional distress by having to subject themselves to an unnecessary training program for up to two years before being permitted to take the union entrance exam").

In all cases, the EEOC bears the burden of proving that the claimant actually suffered the damages alleged, and that the defendant's unlawful conduct caused the injuries. *See Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215 (6th Cir. 1996) ("To be eligible for compensatory damages, [the plaintiff] was required to prove that [defendant] caused her emotional distress"); *Karcher v. Emerson Electric Co.*, 94 F.3d 502, 509 (8th Cir. 1996) (the testimony of plaintiff and her treating psychologist "tied [plaintiff's] depression and emotional stress to her job-related problems" and provided "adequate proof of causation"). Where evidence shows that the unlawful employment practice was only a partial cause of the claimant's injuries, the recovery of nonpecuniary compensatory damages may be affected. *See Merriweather v. Family Dollar Stores of Indiana*, 103 F.3d 576, 581 (7th Cir. 1996) ("[W]e reject the defendant's argument that [the plaintiff] was required to quantify how much of her distress was due to her firing, or even establish that most of her distress stemmed from the firing [; however,] the only rational reading of the record is that [defendant] was only partially responsible for [her] emotional harm [and i]n such circumstances, damages must be reduced accordingly"; award of damages reduced by 25 percent).

(2) Claimant's Testimony

The testimony of the claimant alone, if sufficiently specific, may be enough to meet the burden of proving an actual injury caused by the defendant. *See, e.g., Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 836-37 (8th Cir. 2001) (holding that a reasonable jury could have found that plaintiff was entitled to compensatory damages even though the only evidence he presented was his own testimony that immediately after he was terminated he felt "empty," like he lost his best friend and that there was "a hole in his chest"; despite the absence of medical or expert evidence, a plaintiff's own testimony may provide ample evidence when heard in combination with the circumstances surrounding the plaintiff's termination); *Mathieu v. Gopher News Company*, 273 F.3d 769, 782-83 (8th Cir. 2001) (testimony by a former customer services manager that he lost his job of thirty-four years, was forced to reduce his standard of living, and had become depressed was sufficient to support a jury's award of $165,000 for emotional distress, despite the fact that he did not offer expert testimony; the testimony of a medical expert is not a prerequisite for recovery for emotional harm and a plaintiff's own testimony, along with the circumstances of a particular case, can suffice to sustain the plaintiff's burden); s*ee also Price v. City of Charlotte*, 93 F.3d 1241, 1254 (4th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) (based on a comprehensive survey of circuit case law, the court concluded that "a plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress"); *Williams v. Trader Publishing Co.*, 218 F.3d 481, 486 (5th Cir. 2000) (upholding a jury award of $100,000, where plaintiff "testified specifically as to her emotional distress due to the [sex discriminatory] discharge from her position [with defendant] resulting in sleep loss, beginning smoking, and a severe loss of weight"; "[s]uch evidence, although solely the testimony of the plaintiff, is sufficiently specific to support the jury's determination of compensatory damages"). *But cf. Brady v. Fort Bend County*, 145 F.3d 691, 720 (5th Cir. 1998) ("When a plaintiff's testimony is particularized and extensive, such that it speaks to the nature, extent, and duration of the claimed emotional harm in a manner that portrays a specific and discernable injury, then that testimony alone may be sufficient"; court, however, "affirm[ed] the district court's decision to grant judgment as a matter of law in favor of the [employer] on the mental anguish awards," where "the plaintiff's testimony in this case is vague, conclusory, and uncorroborated[, and thus] cannot legally support mental anguish damages").

(3) Corroborating Witnesses

As the cases demonstrate, a claimant is more likely to prevail on a claim for nonpecuniary compensatory damages where the damages are corroborated in some

fashion, whether by a spouse or other family members, co-workers, friends, a therapist and/or a physician. *See, e.g., O'Neal v. Ferguson Construction Co.*, 237 F.3d 1248, 1257 (10th Cir. 2001) (Title VII and Section 1981; upholding a jury award of $300,000 for emotional distress, where the plaintiff "testified at trial that he began seeing a psychiatrist before being terminated but could not afford further treatment after his termination; [h]e further testified about his inability to sleep and loss of appetite which continued through trial. [His wife] corroborated [his] statements, testifying that his condition had gotten worse since his termination[, and] that her husband was more worried and very unhappy"); *Foster v. Time Warner Entertainment Co., L.P.*, 250 F.3d 1189 (8th Cir. 2001) (holding that personal testimony of terminated supervisor who had prevailed on retaliation claim was sufficient to establish $75,000 emotional distress damages award where corroborated by husband); *Dodoo v. Seagate Technology, Inc.*, 235 F.3d 522, 532 (10th Cir. 2000) (Plaintiff "testified that he has trouble sleeping and wakes up with his heart pounding, not knowing where he is. In addition, he testified that he worked very hard to position himself well in America after immigrating to this country, but has felt that he was not recognized for his efforts. After having worked for [defendant] for 18 years, [plaintiff] feels it is too late for him to start his career over with another employer. [Plaintiff] has sought the counsel of his wife, minister and friends to deal with these issues, and their testimony supports his claims of emotional distress. All of that evidence forms a sufficient basis to support the jury's award of emotional distress damages in the amount of $125,000"); c*f. Giles v. General Electric Company*, 245 F.3d 474, 487-89 (5th Cir. 2001) (held that testimony by machinist with back problem and testimony from co-worker regarding the physical and mental problems that employers' refusal to allow return to work had caused plaintiff, although specific enough for an award of compensatory damages, was not sufficient to merit an award of $300,000; plaintiff testified that he had trouble sleeping, suffered headaches and marital difficulties, lost the prestige and social connections associated with his position and his service as treasurer of the local union; his co-worker testified that the plaintiff appeared "despondent, depressed, down and absolutely utterly discouraged about not being able to come back to work"; court ordered award reduced to $150,000 or a new trial on damages).

Corroboration may be especially important where the employer questions a claimant's assertion of nonpecuniary compensatory damages by presenting witnesses who challenge his testimony. *See Bruso v. United Airlines, Inc.*, 239 F.3d 848, 857 (7th Cir. 2001) ("It is within the jury's province to evaluate the credibility of witnesses who testify as to emotional distress, and we shall not disturb those credibility determinations on appeal. If the jury disbelieved [the plaintiff's] challenged testimony regarding the humiliation, anger, and depression he experienced following his demotion, as it was free to do, it was not obligated to award him compensation"). Psychotherapists often

provide invaluable corroboration of a claimant's assertion of nonpecuniary compensatory damages. *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1298 (8th Cir. 1997), *cert. denied*, 524 U.S. 953 (1998) ("this court and others have recently noted the probative value of expert psychological proof regarding causation of the claimant's depression and emotional distress"). However, "[m]edical or other expert evidence is not required to prove emotional distress." *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065, 75 FEP Cases 1741 (8th Cir. 1997) (upholding an award of $100,000 "for mental anguish and loss of enjoyment of life," where the claimant, "his wife and his son testified about the anxiety, sleeplessness, stress, depression, high blood pressure, headaches, and humiliation he suffered after he was [unlawfully] not promoted and [suffered retaliation] after he filed the employment discrimination charge"). *But cf. Koster v. Trans World Airlines, Inc.*, 181 F.3d 24, 35-36 (1st Cir. 1999) ("Although testimony from a mental health expert is not required to sustain an award for emotional distress, the absence of such evidence is useful in comparing the injury to the award of damages"; thus, even though the plaintiff "had trouble sleeping and was anxious" and his "family life suffered" during his temporary furlough, the court ordered a large remittitur in lieu of a new trial, because "[t]here was no evidence that [plaintiff] ever sought medical treatment or suffered any long-term depression or incapacitation").

It is important to ascertain from the claimant whether he or she knows of witnesses to substantiate compensatory damages, whether such witnesses may be willing to testify, and perhaps most importantly, whether the claimant is prepared to have such testimony elicited not only in a deposition, but in court before a jury. To the extent that the claimant is able to provide corroborative witnesses, the EEOC's ability to prove damages will be significantly enhanced.

b. Permissible Scope of Defendant's Inquiries

(1) Waiver of Psychotherapist-Patient Privilege

The claimant should be advised that as a general rule, the defendant will be able to probe in discovery and at trial with respect to all elements of the claimant's nonpecuniary compensatory damages claim. By including a physical, mental or emotional condition as an element of claimant's damages, the claimant is essentially waiving any claim of privilege or confidentiality with respect to evidence relevant to the nature and extent of the damages. This waiver may be especially troubling to claimants in the context of psychotherapy treatment.

The Supreme Court has "h[e]ld that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are

protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." *Jaffee v. Redmond*, 518 U.S. 1, 15, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (action under Section 1983). Like other testimonial privileges, such as those between physician and patient or attorney and client, the *Jaffee* Court acknowledged in a footnote that "the patient may of course waive the protection." 518 U.S. at 15, n.14.

Most courts have found waiver of the psychotherapist-patient privilege where the plaintiff alleges severe emotional distress and seeks monetary damages for psychological injury in an action brought under Title VII and/or the Americans with Disabilities Act. *See, e.g., Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) ("a plaintiff waives the psychotherapist-patient privilege by placing his or medical condition at issue"; upholding discovery sanctions and dismissal of a Title VII action alleging sex discrimination, sexual harassment and retaliation, "with allegations of extreme emotional distress," where plaintiff refused to provide signed medical releases for any doctors, psychiatrists, psychologists, and counselors she had consulted during the period covered by her complaint); *Jackson v. Chubb Corp.*, 193 F.R.D. 216, 225 (D. N.J. 2000) (holding that a "plaintiff waives the psychotherapist-patient privilege by placing his/her mental or emotional condition at issue;" requiring the plaintiff in a Title VII race discrimination case to produce mental health records up to the time of trial, where damages sought for alleged continuing emotional distress; but stating in dicta that a garden-variety emotional distress claim does not trigger the patient-litigant exception); *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568-69 (S.D. Cal. 1999) (same in an ADA case; "[Plaintiff] can testify to her emotions near the incident, and the defendant is free to cross examine her about the depth of her emotional damage and other factors in her life at that time. But to insure a fair trial, particularly on the element of causation, the court concludes that defendant should have access to evidence that [plaintiff's] emotional state was caused by something else. Defendant must be free to test the truth of [plaintiff's] contention that she is emotionally upset because of the defendant's conduct. Once [she] has elected to seek such damages, she cannot fairly prevent discovery into evidence relating to an element of her claim"); *EEOC v. Danka Indus., Inc.*, 990 F.Supp. 1138, 1142 (E.D. Mo. 1997) ("Plaintiffs in this action are seeking damages for emotional distress resulting from sexual harassment. Therefore, the mental condition of the plaintiffs is directly related to the issue of damages. Defendant is entitled to discover to what extent the plaintiffs' mental condition, prior to the alleged harassment, may have contributed to any emotional distress for which they now seek damages"); *Vann v. Lone Star Steakhouse & Saloon, Inc.*, 967 F.Supp. 346, 349-350 (C.D. Ill. 1997) (Title VII sexual harassment; "Plaintiff has waived the psychotherapist-patient privilege by placing her mental condition in issue and by disclosing [her therapist] as an expert witness who will give opinion testimony at trial. All documents relating to the treatment of plaintiffs, including [the therapist's] personal

notes, must be disclosed"); *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Pa. 1997) (Title VII and ADA; where the plaintiff seeks damages for injury to her mental condition, "to hide . . . behind a claim of privilege when that condition is placed directly at issue would simply be contrary to the most basic sense of fairness and justice").

Other courts have adopted a narrower interpretation of whether the psychotherapist-patient privilege is waived by assertion of a claim for compensatory damages. In *Ruhlmann v. Ulster County Department of Social Services*, 194 F.R.D. 445, 450 (N.D. N.Y. 2000) (ADA), the court held that "a party does not put his or her emotional condition in issue by merely seeking incidental, 'garden variety,' emotional distress damages, without more." *See id.* at n.6 ("[G]arden-variety emotional distress . . . is ordinary or commonplace emotional distress . . . which [is] simple or usual [in a discrimination case]. In contrast, emotional distress that is not garden-variety may be complex, such as that resulting in a specific psychiatric disorder, or may be unusual, such as to disable one from working"). The court rejected "the purported broad view [that] seeking emotional distress damages is sufficient to bring emotional condition into issue, opening the door for discovery into psychiatric records." *Id.* at 449 ("[a] close reading . . . reveals that many of the cases espousing the broad view distinguish between cases in which significant emotional harm is alleged or the mental condition is at the heart of the litigation, and a claim for 'garden variety emotional distress."); *Krocka v. City of Chicago*, 193 F.R.D. 542 (N.D. Ill. 2000) (holding that the plaintiff could retain the psychotherapist-patient privilege by limiting his claim for emotional distress damages to embarrassment and humiliation); *Santelli v. Electro-Motive*, 188 F.R.D. 306, 308-09 (N.D. Ill. 1999) (holding that the plaintiff preserved the psychotherapist-patient privilege by self-imposed limitations on the scope of her emotional distress claim; plaintiff would only be permitted to testify to humiliation, embarrassment, anger and upset brought about by defendant's discriminatory actions; no testimony allowed with regard to plaintiff's symptoms, i.e., sleeplessness, nervousness, depression); *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225 (D. Mass. 1997) (federal and state gender discrimination and retaliation claims; court held that the psychotherapist-patient privilege is waived only where the plaintiff either calls her therapist as a witness, or introduces in evidence the substance of any therapist-patient communication).

(2) Rule 35 Examinations

Claimants should also be advised that the defendant may be able to require that a claimant submit to a physical or mental examination in accordance with Rule 35(a) of the Federal Rules of Civil Procedure. Rule 35(a) permits a court to order such an examination "on motion for good cause shown" when the mental or physical condition of a person is "in controversy." Thus, if a claimant alleges some physical or mental

injury as part of a compensatory damage claim, the court may find that the claimant's mental and/or physical condition is in controversy and that defendant should be permitted an independent assessment of that condition. *See, e.g., Greenhorn v. Marriott Intern., Inc.*, 2003 WL 1697765 * 2 (D. Kan. March 27, 2003) (granting defendant's motion to compel Rule 35 exam of sexual harassment plaintiff where allegations of emotional distress are "sufficiently serious and sweeping such that the average lay person might not be able to evaluate properly the nature, extent and cause of the injuries" and because plaintiff identified her own expert witness to testify as to her depression and post traumatic stress disorder); *Bethel v. Dixie Homecrafters, Inc.*, 192 F.R.D. 320 (N.D. Ga. 2000) (the court granted defendants' motion "to compel plaintiff to submit to an examination by a licensed psychiatrist . . . assisted by a licensed psychologist" in a case "alleging gender discrimination and retaliation in violation of Title VII," where "[p]laintiff also asserted state law claims of intentional infliction of emotional distress," and sought compensatory damages based on "claims that she suffered extreme and severe emotional distress," *id.* at 321; "[g]iven the nature of plaintiff's claims, the fact that she has squarely placed her mental condition in controversy, and because of the existence of treating health care professionals who may testify on plaintiff's behalf, and the existence of other life events that may be contributing factors to her emotional distress, the court finds that defendants have affirmatively established good cause for the mental examination." *Id.* at 323).

A majority of courts "will not require a plaintiff to submit to a medical examination unless, in addition to a claim for emotional distress damages, one or more of the following factors is also present: (1) plaintiff has asserted a specific cause of action for intentional or negligent infliction of emotional distress; (2) plaintiff has alleged a specific mental or psychiatric injury or disorder; (3) plaintiff has claimed unusually severe emotional distress; (4) plaintiff has offered expert testimony in support of her claim for emotional distress damages; and (5) plaintiff concedes that her mental condition is 'in controversy' within the meaning of F. R. Civ. P. 35(a)." *Fox v. Gates Corp.*, 179 F.R.D. 303, 307 (D. Colo. 1998) (ruling that "[p]laintiff shall not be required to submit to an independent medical examination" in an ADA case, where she only "makes what some courts refer to as a 'garden variety' claim for emotional distress damages resulting from defendant's refusal to hire her," *id.* at 309, 307), citing, *inter alia, Turner v. Imperial Stores*, 161 F.R.D. 89 (S.D. Cal. 1995) (Title VII and state law allegations of race and sex discrimination; the court ruled that plaintiff had "not placed her mental condition 'in controversy' within the meaning of Rule 35(a) . . . [merely] by claiming damages for 'humiliation, mental anguish, and emotional distress' . . . which she says that she suffered as a result of defendants' actions alleged in her complaint," *id.* at 98). *Accord, Ricks v. Abbott Laboratories*, 198 F.R.D. 647, 649-50 (D. Md. 2001) (Title VII and ADA; "agree[ing] with the *Fox* standard and apply[ing it [in a] garden variety case" where

"plaintiff has expressly stated that she 'does not intend to introduce expert psychiatric evidence;'" the court thus refused to order that plaintiff submit to a mental examination, but also ruled that "[p]laintiff is prevented from introducing expert testimony as to her mental state[, or] lay testimony to establish that she suffers from any disorder or that she experienced unusually severe emotional distress as a result of defendant's actions"). The trial attorney should inform the claimant that the EEOC will oppose independent medical examinations that we believe are not appropriate under applicable case law, but that the court will make the ultimate decision as to whether a Rule 35 exam is permissible.

(3) Preexisting Conditions and Intervening Circumstances

(a) In General

Perhaps the issue of greatest potential concern to claimants will be the extent to which private, personal and seemingly unrelated matters are likely to become issues in litigation. It is important that claimants be advised that defendants will likely argue that issues such as alcohol use, intimate relationships, etc., are relevant and permissible areas of inquiry. A plaintiff seeking an award for compensatory damages must prove that the damages were caused by defendant's misconduct. Defendant will seek to avoid plaintiff's damage claim by showing that the injuries at issue were caused by some intervening incident or pre-existing situation, and not by defendant's actions. Thus, defendant will likely be entitled to some discovery with respect to whether its alleged unlawful conduct actually caused the claimed injuries, or whether the injuries may be attributed to some other cause. Instructive in this regard are the many court decisions requiring claimants to disclose their psychotherapy records (see discussion above) because the defendants' successful discovery requests in those cases overrode a recognized privacy privilege.

(b) Fed. R. Evid. 412

In any case presenting allegations of sexual harassment or other sexual misconduct, Rule 412 of the Federal Rules of Evidence limits the admissibility of evidence at trial on issues concerning the claimant's sexual activities. Courts have unanimously "h[e]ld that Rule 412, which explicitly includes civil cases involving sexual misconduct, encompasses sexual harassment lawsuits." *Wolak v. Spucci*, 217 F.3d 157, 160 (2d Cir. 2000); *see Adams v. Goodyear Tire & Rubber Co.*, 184 F.R.D. 369, 375 (D. Ky. 1998) ("The Advisory Committee Notes [on the 1994 revision] make clear that Rule 412 now applies to civil cases involving sexual misconduct, and to Title VII sexual harassment cases in particular"). *See, e.g.*, *Holt v. Welch Allyn, Inc.*, 2000 WL

98118 (N.D. N.Y. January 11, 2000) (in Title VII sexual harassment case, court held that evidence governed by Rule 412 regarding either plaintiff's workplace conduct or conduct with named defendant would be admissible at trial but evidence of nonwork-related sexual conduct was inadmissible); *Socks-Brunot v. Hirschvogel Inc.,* 184 F.R.D. 113 (S.D. Ohio 1999) (applying the rule to bar the admissibility of sexual conduct evidence offered by defendant in a case where plaintiff alleged that she was subjected to a hostile work environment based upon sexual harassment in violation of Title VII and state law). Moreover, "[a]lthough Rule 412 controls the admissibility of evidence rather than its discoverability, numerous courts have applied the rule to decide discovery motions." *Williams v. Bd. of County Commissioners*, 192 F.R.D. 698, 704 (D. Kan. 2000) (in sexual harassment lawsuit, plaintiff not required to answer interrogatory seeking information about sexually transmitted diseases, the age at which she first had intercourse and the names and addresses of those persons with whom she had been sexually active within the last five years; court found that marginal relevance of information sought was outweighed by potential harm to plaintiff including unjustified invasion of privacy, potential for public and private embarrassment and likelihood of significant prejudice based on improper sexual stereotyping); *Howard v. Historic Tours of America*, 177 F.R.D. 48, 51 (D. D.C. 1997) (plaintiff in sexual harassment action was not compelled to answer interrogatory asking whether she had sexual relationships with employees not named as harassers; court stated that "[o]ne of the purposes of Fed.R.Evid. 412 was to reduce the inhibition women felt about pressing complaints concerning sexual harassment because of the shame and embarrassment of opening the door to an inquiry into the victim's sexual history. This shame and embarrassment . . . exists equally at the discovery stage as at trial and is not relieved by knowledge that the information is merely sealed from public viewing").

Despite the protections of Fed. R. Evid. 412, however, "relevance not admissibility is the appropriate inquiry with regard to whether or not the information sought by [defendant] is discoverable." *Herchenroeder v. Johns Hopkins University*, 171 F.R.D. 179, 181 (D. Md. 1997) (allowing discovery on the plaintiff's "past sexual behavior" in the workplace, where the court was "persuaded that the information sought . . . has some relevance, as contemplated by Fed. R. Civ. P. 26(b), to [plaintiff's] Title VII and defamation claims against the defendants, and is also relevant with respect to the credibility of [plaintiff and a] critical witness on her behalf," *id.* at 182); *see Muniu v. Amboy Neighborhood Center, Inc.*, 2001 WL 370226 (E.D. N.Y. March 11, 2001) (despite plaintiff's objections, court allowed defendant to question plaintiff about her alleged past sexual conduct in the workplace because Rule 412 governs admissibility of evidence of victim's sexual behavior but not discoverability of information). Where the claimant seeks compensatory damages under Title VII for emotional distress allegedly caused by sexual harassment, courts have allowed such discovery if it appears that

specific lines of inquiry are relevant to its defense against damages claims, and the information sought may be admissible under the exceptions in Fed.R.Evid. 412(b)(2). *See Barta v. City and County of Honolulu*, 169 F.R.D. 132 (D. Haw. 1996) (where an alleged sexual harassment victim claimed that her values as a strict Mormon made her especially vulnerable to the infliction of emotional distress due to sexual harassment, the court permitted discovery regarding her sexual conduct while on duty at the workplace and conduct involving the alleged harassers, but otherwise barred discovery relating to her conduct off duty and outside the workplace); *Sanchez v. Zabihi*, 166 F.R.D. 500 (D. N.M. 1996) (permitting certain "narrowly tailored" inquiries into the plaintiff's sexual activities in the workplace, where she claimed to have suffered emotional distress due to unwelcome sexual advances, but the defendant claimed that she was "the sexual aggressor" who made advances toward the defendants). It should be noted that in all of these cases, protective orders were issued to bar disclosure of sexual-conduct information obtained through discovery. *Herchenroeder*, 171 F.R.D. at 182-83; *Barta*, 169 F.R.D. at 137-38; *Sanchez*, 166 F.R.D. at 502-03.

In *Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620 (D. Kan. 1999), the plaintiff argued that Fed. R. Evid. 412 also applied to a mental examination sought pursuant to Fed. R. Civ. P. 35, and thus fought to bar defendant's psychiatrist "from inquiring into her private, nonwork-related sexual activities" (*id.* at 626). The court rejected this attempt to limit the mental examination, because plaintiff's psychologist "has opined that alleged actions or inactions of defendant proximately caused the emotional distress of plaintiff[; t]o validly assess her mental state, the examiner must have leave to make relevant inquiries[; t]o prohibit inquiry into private sexual activities may unreasonably restrict exploring the history of plaintiff relevant to this case[; and, i]nquiries about private, non-work-related sexual activity appear relevant to evaluate the cause and extent of psychological injuries alleged by plaintiff" (*id.* at 627-28).

(c) Affect on Damages

Discovery, including Rule 35(a) examinations, may disclose to defendant that a claimant had pre-existing conditions or intervening situations which could have been the cause of claimant's damages. Defendant will attempt to use such conditions or situations to argue against an award of compensatory damages or to reduce the size of any award. *See, e.g., Merriweather v. Family Dollar Stores of Indiana*, 103 F.3d 576, 581 (7th Cir. 1996) (reducing an award of compensatory damages by 25 percent, where evidence "makes clear that [defendant's] retaliation was just one of several factors which affected [plaintiff's] emotional state[; o]ther factors relating to her emotional distress during this tumultuous period in her life, but unrelated to defendant, included the death of [plaintiff's] father, being evicted from her apartment, and being unable to

find a suitable job [after she was fired for nondiscriminatory reasons]"); *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568 (S.D. Cal. 1999) (discussing cases where monetary awards for emotional harm were reduced or reversed based on evidence of pre-existing conditions and intervening situations which either contributed to or were the proximate cause of the plaintiff's injuries).

Because pre-existing or intervening conditions will likely impact any compensatory damages award, trial attorneys should carefully review with claimants any and all personal problems and situations which defendant may contend are the actual cause of any claimed injuries for which compensatory damages may be sought. Claimants should be explicitly advised that these otherwise personal areas of their lives will likely be subject to disclosure both in discovery and at trial. On the other hand, the "egg-shell plaintiff" theory is likely to apply in these cases, and defendant should be held accountable for compensatory damages due to a particular claimant's unusual or heightened sensitivity resulting in more substantial damages than might typically be expected. *See, e.g., Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215 (6th Cir. 1996) (upholding a statutory-cap award of damages for emotional injuries suffered due to a Title VII and Pregnancy Discrimination Act violation) (finding that plaintiff, as a young, unwed mother who was walking an 'economic tightrope' and who had just discovered she was pregnant for a second time, was in a particularly vulnerable position and was highly dependent on her job. Vulnerability is relevant in determining damages . . . [and] is particularly relevant in this case, because her supervisors had direct knowledge of her vulnerability before they discharged her. The trial judge did not err, therefore, in considering the unusual economic and emotional sensitivity of this plaintiff.").

4. Conclusion

Prior to filing a complaint, trial attorneys should devote sufficient time to reviewing with claimants issues that may arise relating to a claim for nonpecuniary compensatory damages. Trial attorneys must work with claimants to determine if such damages were suffered, and the nature of the injuries should be reviewed in detail. The trial attorney should then carefully explore all factors which may have a bearing on proving such damages, including the availability of corroborating witnesses or documentary evidence, and the extent to which pre-existing or intervening conditions have a bearing on damages. The applicable damage cap and the variability of compensatory damages awards should be discussed. The trial attorney should also ensure that the claimant fully understands that by claiming compensatory damages,

certain aspects of his or her personal life will likely be subject to disclosure during discovery and at trial.

## E. NOTICE TO CHARGING PARTIES OF COMMISSION SUITS

Prior to filing suit under any of the statutes the Commission enforces, a legal unit attorney should notify the charging party(ies) by telephone. In ADEA and EPA cases charging parties should be reminded that the Commission's suit will terminate their right to file a private action under those statutes.

Within a week of filing suit in Title VII and ADA cases, the legal unit attorney should send a letter to the charging party(ies), enclosing a copy of the filed complaint and explaining their statutory right to intervene in the action. The letter should describe the Commission's claims and, where applicable, the relief the Commission will be seeking for the charging parties, but should also explain that the agency's purpose in filing suit is to further the public interest in preventing employment discrimination and that it is possible the Commission's objectives and the charging parties' interests will diverge during the litigation. Although charging parties should not be encouraged to intervene, the letter should explain that if they do intervene they will be able to pursue individual relief separately if at any point in the litigation the agency's interests do diverge from theirs. The letter should also inform the charging parties that although they have a statutory right to intervene, the court could deny intervention if their request is made too long after the Commission's suit is filed. A model letter is attached in the appendix.

Related Resources on Web

| Title | Description and inSite Address |
|---|---|
| ADA | Text of Titles I and V of the Americans with Disabilities Act of 1990 (ADA). http://www.eeoc.gov/policy/ada.html |
| Title VII of the Civil Rights Act of 1964 | Text of Title VII, a statute enforced by the EEOC. Title VII bars employment discrimination based on race, color, national origin, sex, and religion. http://www.eeoc.gov/policy/vii.html |

## APPENDIX

## MODEL LETTER NOTIFYING CHARGING PARTY OF COMMISSION TITLE VII/ADA SUIT

[CP's name and address]

RE: [case name, civil action number, and court]

Dear [Mr./Ms._____]

On [filing date] the United States Equal Employment Opportunity Commission filed a lawsuit under Title VII of the Civil Rights Act of 1964 [or ADA] against [defendant's name] based upon the charge of employment discrimination you filed with the EEOC on [date]. The EEOC's suit alleges [claims in complaint]. The suit was filed in [court], and is styled [case name and civil action number]. A copy of EEOC's complaint is enclosed. Under section 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1), you have a right to intervene as a party in the EEOC's suit and to be represented by your own attorney.

EEOC will be seeking the following individual relief for you in its suit against [defendant's name]: [relief sought for CP]. However, EEOC's primary purpose in filing this suit is to further the public interest in preventing employment discrimination. It is possible that at some point in the EEOC's prosecution of the suit, you will disagree with the agency's decisions regarding the relief to which you are entitled in the case, or with some other aspect of EEOC's litigation strategy. Because EEOC's first obligation is to the public interest, the agency may decide to act in a manner that you believe is against your individual interests. If you have intervened in the suit, you will be able pursue your individual interests separately if the EEOC's interests diverge from yours at any point.

You should try to make your decision regarding intervention fairly soon, because even though you have an unconditional right to intervene if you do so in a timely manner, the court can deny you the right to intervene if the case has progressed substantially by the time you request intervention. Feel free to call me at [trial attorney's

phone number] if you have any questions about the EEOC's suit. I look forward to working with you in this case.

Sincerely yours,

[trial attorney's name and title]

Enclosure

## F. ADDING PARTIES TO PREVIOUSLY APPROVED ACTIONS

Regional Attorneys must receive approval from the Office of General Counsel before adding parties to any case approved by the General Counsel or the Commission or to a case previously submitted as a notice of intent to file within the Regional Attorney's redelegated litigation authority.

# REGIONAL ATTORNEYS' MANUAL

## PART 2

## INITIATING LITIGATION

### SECTION III

### DELEGATED LITIGATION AUTHORITY

## SECTION III
## DELEGATED LITIGATION AUTHORITY

Contents

## A. DELEGATION OF LITIGATION AUTHORITY TO THE GENERAL COUNSEL UNDER THE NATIONAL ENFORCEMENT PLAN

In section V. of the National Enforcement Plan (NEP), the Commission delegated litigation authority to the General Counsel "[w]ith the goals of increasing strategic enforcement for the General Counsel and field attorneys, freeing the Commission to focus on policy issues, and increasing the efficiency and effectiveness of [the Commission's] litigation program." Section V. provides in relevant part:

> [T]he Commission delegates to the General Counsel the decision to commence or intervene in litigation in all cases except the following:
>
> a) Cases involving a major expenditure of resources, e.g. cases involving extensive discovery or numerous expert witnesses and many pattern-or-practice or Commissioner's charge cases;
>
> b) Cases which present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals;
>
> c) Cases which, because of their likelihood for public controversy or otherwise, the General Counsel reasonably believes to be appropriate for submission for Commission consideration; and
>
> d) All recommendations in favor of Commission participation as *amicus curiae* which shall continue to be submitted to the Commission for review and approval.
>
> [T]he Commission ratifies its decision to give the General Counsel the authority to redelegate to regional attorneys the authority to commence litigation. The Commission encourages such redelegation of litigation authority as appropriate.

## B. REDELEGATION OF LITIGATION AUTHORITY TO THE REGIONAL ATTORNEYS

1. Scope of Redelegation

The General Counsel has redelegated authority to Regional Attorneys to file and settle direct suits raising claims under Title VII, the Equal Pay Act, and the Age Discrimination in Employment Act that meet the following criteria:

- projected costs of litigation through trial are less than $50,000;
- relief is sought for fewer than 20 individuals, including charging parties and other individuals who have been identified or are expected to be identified as victims of discrimination;
- the case does not fall within any of the categories of cases identified in the NEP over which the Commission has retained sole authority to approve litigation.

Prior to filing suit under their redelegated authority, Regional Attorneys must comply with the notice of intent procedures described in subsection C. below.

2. Limits of Redelegation

The following categories of cases, although delegated to the General Counsel under the NEP, are not redelegated to the Regional Attorneys and must be submitted to the Office of General Counsel for a litigation determination by the General Counsel:

- all interventions;
- all cases raising a claim under the Americans with Disabilities Act;
- cases in which the projected costs of litigation through trial equal or exceed $50,000;
- cases seeking relief for 20 or more individuals, regardless of projected costs.

## C. FIVE-DAY NOTICE PROCEDURE FOR REDELEGATED CASES

1. Notice of Intent to File under Redelegated Authority

Prior to filing a case within his or her redelegated authority, a Regional Attorney must submit to Litigation Management Services (LMS) a notice of intent to file under redelegated authority. A copy of the notice form is attached as an appendix to this subsection of the *Manual*.

2. Notice Procedure

E-mail the notice of intent to file under redelegated authority to the legal unit's LMS liaison (or designated substitute if he or she is out of the office), who will acknowledge receipt by return e-mail. If an OGC headquarters staff member does not contact the legal unit about the case, the Regional Attorney may file suit following the expiration of 5 business days from LMS' acknowledgment of receipt of the notice. If someone in OGC contacts the legal unit prior to the expiration of the 5-day period, the Regional Attorney can file suit only if expressly authorized by OGC.

## APPENDIX

## NOTICE OF INTENT TO FILE UNDER REDELEGATED AUTHORITY

(a) Name of proposed defendant(s):

(b) Charge Information:

(1) Charging party's name;

(2) Charge number;

(3) Filing date.

(c) Court in which case will be filed:

(d) Statute(s):

(e) Bases and issues:

(f) Whether case is class or individual:

(g) Case Description:

(1) Respondent's operations, including the jobs held or sought by the claimants and an estimate of the size of the workforce at the facility where the violations occurred;

(2) Facts supporting EEOC's claims;

(3) Respondent's principal defenses and EEOC's responses;

(4) Legal issues or proof elements that may pose particular difficulties.

(h) Conciliation:

(1) Date(s) LOD(s) issued, conciliation proposal(s) mailed, and conciliation failure letter mailed;

(2) Relief requested by EEOC (for monetary relief, break out, as appropriate, (a) punitive damages, (b) compensatory damages, (c) damages cap, (d) back pay, including basis for back pay amount, and (e) any other monetary relief);

(3) Relief offered by Respondent;

(4) Reasons for conciliation failure.

(i) Projected litigation budget (expenses you expect to incur during the current fiscal year and next fiscal year):

(1) Current fiscal year;

(2) Next fiscal year.

(j) Indicate whether the case creates a potential for controversy or adverse publicity and, if so, explain. This includes controversies arising from local newsworthiness as well as from the nature of the claims in the suit:

## D. PRESS RELEASES

As with all new case filings, legal units must provide a draft press release on redelegated cases to LMS and the Office of Communications and Legislative Affairs (OCLA) at least two full days prior to filing the case in court. After filing the complaint, the final press release should be sent to LMS and OCLA at the time of its distribution to the public. Section I.C.4. of Part 1 of the *Manual* contains detailed instructions regarding issuance of press releases on new case filings.

# REGIONAL ATTORNEYS' MANUAL

## PART 2

## INITIATING LITIGATION

### SECTION IV

### LITIGATION REQUIRING HEADQUARTERS APPROVAL

## SECTION IV
## LITIGATION REQUIRING HEADQUARTERS APPROVAL

Contents

## A. APPLICATION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

Except where related to pending litigation, field legal units must obtain approval from the Office of General Counsel (OGC) before filing an Application for a Temporary Restraining Order (TRO) or a Preliminary Injunction, even if the type of case otherwise falls under the Regional Attorney's redelegated authority. Contact your liaison attorney in Litigation Management Services to discuss the reason(s) why you want to seek a TRO or preliminary injunction and when you would like to file. Your liaison attorney will let you know what written information you need to submit to OGC.

## B. SUITS REQUIRING AUTHORIZATION BY THE COMMISSION OR GENERAL COUNSEL

For suits requiring authorization from the Commission or the General Counsel, the legal unit must submit a presentation memorandum (PM) to the Office of General Counsel.* The appendix to Part 2, section IV.C. of the *Manual* contains the PM format.

Section V. of the Commission's National Enforcement Plan (NEP) describes four categories of cases in which the Commission has reserved litigation authority. These are set out in Part 2, section III.A., above. In addition, the General Counsel has retained litigation authority in the categories of delegated cases described in subsection III.B.2., above. When in doubt regarding whether a case requires authorization from the Commission or the General Counsel, consult your Litigation Management Services liaison.

* Mail three hard copies of the PM file to the supervisor of Litigation Advisory Services. Simultaneously e-mail him or her a copy of the text of the PM.

## C. PRESENTATION MEMORANDA

The presentation memorandum (PM) is the legal unit's assessment of a case to the General Counsel or Commission, and is one of the few legal unit work products reviewed by the Commissioners. It is important that the PM be analytically sound and factually accurate, as well as candid. All significant problems in a case should be addressed.

For PMs submitted to the Office of General Counsel (HQ), use the format in the appendix that follows.*

* To recommend intervention, submit a separate cover memorandum with the PM that provides all of the information specified in Part 2, Section IV.D. of the *Manual*.

**APPENDIX**

**PM FORMAT**

**Presentation Memorandum**

**To:** _____
**General Counsel**

**From:** _____, **Regional Attorney**
_____ **Field Office**

**Subject:** **EEOC v. [Name of Respondent]**
**Charge No. _____**

## I. PRELIMINARY INFORMATION

**A. Proposed claims**[1]

**B. Court where suit will be filed**

**C. Proposed defendant(s)**

**1. Name of each proposed defendant**

**2. Location of facility**

---

[1] Reference to applicable statutory provisions should be included here. Specify whether the recommended claims challenge a policy or are on behalf of an individual or class and, if class, define the scope of the class and the approximate number of putative claimants. *See* Part 1, section I.D. of the *Manual* (*Reporting to OGC*) for the definition of a "class" case. Also, for each basis indicated, identify the race, ethnicity, gender, religion, age, or impairment.

3. **Size of workforce**[2]

4. **Nature of business**

D. **Name of charging party**

E. **Justification for filing suit**[3]

## II. ADMINISTRATIVE HISTORY

A. **Date of charge**

B. **Date of letter of determination**

C. **Claims determined cause**[4]

D. **Conciliation history**

a. **Date of conciliation failure**

b. **EEOC's proposal**[5]

---

[2] Be as specific as possible; "more than 15 employees" is not sufficient.

[3] Include a discussion of whether the claims recommended for litigation raise strategic or emerging issues or National Enforcement Plan priorities, and how the case fits within your office's litigation docket. In addition, where applicable, identify whether the case involves an underserved population or would be filed in an underserved geographic area.

[4] If litigation is not recommended on any issue on which the Commission found cause in the letter of determination, explain why here.

[5] Include the amount of monetary relief sought for each category of damages and the nature of injunctive relief sought, and briefly explain the basis for the proposal.

**c. Respondent's best offer**

**d. Reason for rejection of Respondent's best offer**

## III. SUMMARY AND ANALYSIS OF PROPOSED SUIT

**A. Summary of theory of liability[6]**

**B. Anticipated defenses[7]**

**C. Chronology of facts[8]**

---

[6] This section should summarily outline how we will prove our claims. In ADA cases, this section should state the theory(ies) for ADA coverage. For example:

> "The Commission's primary theory of ADA coverage is that Charging Party is actually disabled in that she has mental impairments (PTSD and depression) that substantially limit the major life activities of sleeping, eating, caring for herself and thinking/concentrating. In the alternative, we would argue that she has a record of or was regarded as having a disability. We would argue that Respondent's denial of continued leave for her hospitalization supports a claim of failure to accommodate and disparate treatment."

[7] This section should summarily outline all anticipated defenses, including defenses which, although not yet raised by respondent, may be expected to be asserted at trial. For example:

> "Respondent may argue that Charging Party is not substantially limited in any major life activity, and that her sporadic need for lengthy amounts of leave rendered her unqualified. Respondent may also argue that it satisfied its duty of reasonable accommodation by granting leave for her earlier hospitalizations and that granting any additional leave would have created an undue hardship."

[8] The discussion of facts generally should be in chronological order. The discussion should identify and discuss significant facts in dispute, as well as facts that

**D. Legal Analysis**[9]

**E. Relief sought**

**F. Confirmation of charging party interview and credibility assessment**[10]

**G. Breakdown of estimated litigation costs**[11]

## IV. LIST OF ATTACHED DOCUMENTS[12]

**A. Charge(s) and charging party's statement(s)**

**B. Respondent's position statement(s)**

---

conflict with applicable theories of liability. The discussion should also identify evidentiary gaps, discuss any significant credibility issues, and incorporate any significant facts learned after the investigation closed.

[9] This section should include a discussion of all key substantive and procedural issues. Cite to significant authority, including case law and the Commission's position as set forth in regulations, policy guidance, and the compliance manual. In ADA cases, whether the charging party and any other claimants are disabled is always a key issue. The discussion of disability status should identify all major life activities affected and how the evidence shows a substantial limitation in each identified major life activity.

[10] Identify whether the charging party was interviewed in person by the legal unit. If the legal unit has not interviewed the charging party in person, include an explanation in this section. *See* Part 2, section II.C. of the *Manual* (*Presuit Interviews of Aggrieved Parties*).

[11] Include itemized costs through trial for depositions, expert witnesses, travel expenses, and other significant items. If the use of expert witnesses is anticipated, specify the type of expert and briefly explain the role of the expert.

[12] Each page of the attachments should be numbered.

**C. Investigative memoranda**

**D. Letter(s) of determination**

**E. Other key documents**[13]

**F. Draft complaint**

## V. FIELD OFFICE CONTACTS

**cc: _____, Office Director**

[13] Other key documents generally include documents relevant to significant legal issues, significant factual disputes, and credibility.

## D. STANDARDS FOR COMMISSION INTERVENTION IN PRIVATE ACTIONS

1. Form of Request

All recommendations for intervention require a presentation memorandum (PM). In a separate cover memorandum to the PM, the legal unit should set out background information about the private lawsuit, an explanation of the case's general public importance, an assessment of the other factors supporting intervention, and a discussion of the legal unit's understanding with private counsel regarding the Commission's role in the litigation. The background information provided about the private lawsuit should include the following: 1) name, court, and civil action number; 2) date of court filing; 3) claims alleged in private lawsuit; 4) date charge(s) was filed and a description of the Commission's investigative efforts on the charge(s); 5) furthest stage reached in the administrative process and an explanation of why the private action was filed before the Commission was in a position to file suit; 6) current status of private lawsuit; and, 7) name of private counsel.

2. Certification of Public Importance

Under both Title VII and the ADA, intervention by the Commission is contingent on the agency's certification that the case is of "general public importance." The certification consists of a statement executed by the General Counsel, an example of which is contained in the Appendix that follows. An original certification for the General Counsel's signature should be included with all Title VII and ADA PMs. Certifications are not required for interventions in ADEA and EPA cases, but those cases should generally meet the same public importance standard.

Normally, to be considered of "general public importance," a case should directly affect a large number of aggrieved individuals, involve a discriminatory policy or practice requiring injunctive relief, or have potential for addressing significant legal issues.

3. Other Factors Relevant to Intervention

The factors listed below should be considered in determining whether to recommend intervention and should be discussed in the cover memorandum to the PM. They are not exhaustive, and any other relevant factors should also be discussed. The

conditions for certifying that the case is of general public importance must be met before considering the factors in this section.

a. The Commission's contribution to the success of the litigation – This is the most important factor, and can include personnel and financial resources. For example, if a case that warrants litigation by the Commission is filed by the charging party before the agency has completed its administrative processes, there is no reason in principle why the Commission should not expend as much resources litigating as an intervenor as it would have spent filing on its own, if its participation is necessary to a successful resolution of the case. However, the Commission should never intervene principally to fund a case. The work of Commission attorneys on the case must be substantial both in time spent and in the importance of their tasks. Where a trial occurs, Commission attorneys should have significant roles in the courtroom.

b. Private counsel's ability to litigate the case effectively without the Commission's participation – This is related to a. above, and includes general competence as an attorney, related litigation experience, and financial resources. Even where private counsel is highly skilled and able to fund the case adequately, Commission intervention may be appropriate if it significantly increases the likelihood of success in an important case. This may be true, for example, if the case is particularly large or complex, or if there is a need for injunctive relief beyond that being sought by the private plaintiff(s). But if the results of the private action are not likely to be affected by the Commission's participation, intervention should not be recommended.

c. Relationship to the private bar – It is in the Commission's interest for private attorneys to accept meritorious cases under the statutes the agency enforces. To the extent that intervention in a particular case may encourage such private litigation (separate, of course, from the particular case in question), this is a factor favoring intervention.

d. Whether a motion to intervene would be considered timely by the court – Where factor a. above is satisfied, this should seldom be a consideration, since intervention will normally have to occur early in the case for the Commission to play a significant role in the litigation.

4. Relationship with Private Counsel

Prior to recommending intervention, the legal unit must have a firm understanding with private counsel regarding the Commission's role in the litigation,

including personnel and financial commitments, litigation strategy, relief sought, and the Commission's nonconfidentiality policy on settlements. Although it is not possible to guarantee the absence of disagreements later in the litigation, particularly regarding matters such as the value of the private plaintiffs' claims, the clearer the understanding between the parties prior to the Commission's decision regarding intervention the better. Where the Commission and the private plaintiffs are not in agreement on a fundamental aspect of the litigation, intervention should not be recommended, although it may be appropriate in such circumstances to recommend amicus curiae participation.

In the PM, the legal unit should confirm that the above matters were discussed with private counsel and should summarize the understanding between the parties.

As with all litigation related matters, feel free to discuss potential intervention recommendations with your Litigation Management Services liaison attorney prior to deciding whether to submit a PM.

5. Web Resources

| Title | Description and Web Address |
|---|---|
| Federal EEO Laws | Text of the statutes enforced by the EEOC, on the Commission's web site. http://www.eeoc.gov/abouteeo/overview_laws.html |

**APPENDIX**

**MODEL CERTIFICATE OF PUBLIC IMPORTANCE FOR TITLE VII AND ADA INTERVENTIONS**

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

| | | |
|---|---|---|
| [Name of Plaintiff], | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| | ) | |
| v. | ) | Civil Action No. _____ |
| | ) | |
| [Name of Defendant(s)], | ) | **CERTIFICATION OF GENERAL** |
| | ) | **PUBLIC IMPORTANCE PURSUANT** |
| Defendant(s). | ) | **TO 42 U.S.C. §2000e-5(f)(1)** |
| | ) | |
| _____ | ) | |

**CERTIFICATION**

Upon review of the facts of this case, I have determined that it raises issues of general public importance regarding allegations that the defendant(s) violated [Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. or Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq.] by [set out claim(s)].

DATED THIS _____ day of _____ 200 ___.

_____
General Counsel

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
1801 L Street, NW.
Washington, DC 20507

## E. COMMUNICATING WITH COMMISSIONERS ON CASES PENDING LITIGATION AUTHORIZATION

If a field office unit legal unit receives an inquiry from a Commissioner's office concerning a case that has been submitted to the Office of General Counsel in headquarters for litigation authorization, but has not yet been authorized, the legal unit should consult with Litigation Advisory Services (LAS) staff before responding unless this is impracticable under the circumstances. The legal unit should inform LAS staff of the substance of any conversation with a Commissioner's office immediately following such conversation.

## F. NOTIFICATION OF LITIGATION AUTHORIZATION

No suit that must be authorized by the General Counsel or the Commission may be filed without written authorization from the Office of General Counsel in headquarters.