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EVALUATING EMOTIONAL DISTRESS DAMAGE AWARDS TO PROMOTE SETTLEMENT OF EMPLOYMENT DISCRIMINATION CLAIMS IN THE SECOND CIRCUIT*

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INTRODUCTION

Although the number of civil cases filed in our nation's federal courts rose sharply in the past decade,[1] the escalation of employment discrimination litigation has been particularly astounding.[2] The Second Circuit, which at last glance maintained the fifth largest docket of all the circuits,[3] has also experienced a surge in employment litigation.[4] As we enter a

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[1] For example, in 1993, the number of civil cases filed in federal district court was 229,850. *See Judicial Business of the United States Courts 1997* (visited Oct. 28, 1999) <http://www.uscourts.gov/judicial_business/contents.html>, at tbl. C-2A [hereinafter *Judicial Business*]. By 1997, that number had increased to 272,027. *See id.*

[2] In 1994, there were 15,965 employment civil rights cases commenced in the nation's federal district courts. *See Judicial Business of the United States Courts 1998* (visited Oct. 28, 1999) <http://www.uscourts.gov/dirrpt98/7, at tbl. C-2A [hereinafter *Judicial Business I*]. This number has increased steadily each year. The number of employment cases rose to 19,059 in 1995, to 23,152 cases in 1996, and to 23,735 cases by September 30, 1998. *See id.*

[3] As of September 30, 1999, there were 30,133 cases pending in the Second Circuit, which ranked behind only the Eleventh Circuit (47,295 cases), the Ninth Circuit (35,532 cases), the Fifth Circuit (35,216 cases), and the Sixth Circuit (34,815 cases). *See id.* at tbl. C-1. Specifically, the Southern District of New York had the most substantial docket with 11,676 cases, followed by the Eastern District of New York (8,982 cases), the District of Connecticut (3,939 cases), the Northern District of New York (3,077 cases), the Western District of New York (2,073 cases) and finally, the District of Vermont (386 cases). *See id.*

[4] Statistics reflecting the exact number of discrimination lawsuits filed in the Second Circuit during each year in the last decade are not available. Telephone

new millennium, the explosion of employment discrimination litigation that has gripped our federal courts in the last few years shows no signs of subsiding.

Employment discrimination lawsuits are often predicated on one or more federal statutes, including Title VII of the Civil Rights Act of 1964,[5] the Age Discrimination in Employment Act ("ADEA"),[6] §§ 1981 and 1983 of Title 42 of the United States Code,[7] and the American with Disabilities Act ("ADA").[8] Plaintiffs filing suit in New York district courts often supplement their federal claims with claims brought under New York's anti-discrimination statute, the New York Human Rights Law.[9] Because each of these statutes is specific with respect to the conduct it proscribes and the remedies afforded to aggrieved employees,[10] employment discrimination law is a complex legal maze. Among the various remedies available to discrimination plaintiffs,[11] compensation for emotional harm

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Interview with John Coffey, Deputy Circuit Executive, Office of the Executive for the Second Circuit (Jan. 28, 2000). While the number of civil rights cases filed in this circuit are available, statistics on employment discrimination can only be determined by performing the incredible task of analyzing every civil rights case docket sheet in this circuit. *Id.*

By way of analogy, however, a review of employment discrimination decisions reported and published on-line in Westlaw's Second Circuit database (CTA2-All) and the New York state and federal court database (NY-CS-All) for the period January 1, 1990, through December 10, 1999, supports the notion that employment discrimination litigation has increased in the Second Circuit in recent years. For instance, the query "employment w/5 discrim!" in the NY-CS-ALL database between the dates January 1, 1990 and December 10, 1999, revealed 3,741 reported employment discrimination decisions. Of these decisions, there were 198 reported decisions in 1990, 225 decisions reported in 1993, 472 decisions reported in 1996, 521 decisions reported in 1998, and between January 1, 1998 and December 10, 1999, there were 1,063 reported decisions. Similarly, the same query in the CTA2-ALL database revealed 489 employment litigation decisions published on-line for the period January 1, 1990, through December 10, 1999, and of these decisions, there were 23 reported cases in 1990, 31 reported cases in 1991, 71 reported cases in 1997, 87 reported cases in 1998, and 92 reported cases in 1999.

[5] 42 U.S.C. §§ 2000e-2(a)–2000e-2(d) (1964), *as amended by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074-76.

[6] 29 U.S.C. §§ 621-634 (1994).

[7] 42 U.S.C. §§ 1981, 1983 (1994).

[8] 42 U.S.C. §§ 12101-11217 (1995).

[9] N.Y. EXEC. LAW §§ 290-301 (McKinney 1993).

[10] *See infra* Part I.

[11] The remedies generally available under the discrimination statutes include awards for back pay (consisting of the salary and benefits that would have been realized but for the discrimination); reinstatement and/or front pay; and compensatory damages for out-of pocket expenses, emotional harm and mental anguish

and mental anguish ("emotional distress") is unique compared to other monetary remedies in that it is inherently difficult to quantify.[12] The lack of any mathematical formula with which to evaluate emotional distress claims understandably impedes meaningful settlement negotiations between parties, especially when plaintiffs' attorneys are aware that in the Second Circuit the slightest evidence of mental or emotional harm is sufficient to support a verdict and an award for emotional distress.[13] These factors, together with recent publicity surrounding discrimination suits filed against prominent corporations with deep pockets[14] and reports of multi-million dollar jury awards,[15] provide plaintiffs with little incentive to settle their

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("emotional distress"), loss of reputation and loss of enjoyment of life. *See generally* KENNETH W. TABER, EMPLOYMENT LITIGATION IN NEW YORK 547-62, 566-82 (West Pub. Co. 1996 & Supp. 1998).

[12] *See* New York City Transit Auth. v. State Div. of Human Rights, 78 N.Y.2d 207, 215, 573 N.Y.S.2d 49, 53 (1991) ("Throughout tort low, psychic injury–by nature essentially subjective–has prompted difficult questions of proof, both as to establishing the genuineness of any injury and as to fixing its dollars-and-cents valuation.").

[13] *See infra* Part II.C.

[14] *See, e.g., 14 Minority Officers Sue Police Force, Alleging Bias in Disciplinary Practices*, N.Y. TIMES, Sept. 10, 1999, at B3 (reporting on a group of police officers that sued the New York Police Department charging race discrimination and seeking damages); *Judge Approves Settlement for Black Farmers*, N.Y. TIMES, Apr. 15, 1999, at A29 (settlement that could total $2 billion for thousands of black farmers to redress years of discrimination, estimating $50,000 per farmer); *Suit Settled for $1.7 Million*, ASBURY PARK PRESS, Oct. 15, 1999, at B1 (plaintiff fired because of depression suffered after his wife was diagnosed with cancer settled discrimination suit under Family Leave Act for $1.7 million; jury had awarded $1.1 million in compensatory damages); *U.S. and Ford Settle Harassment Case*, N.Y. TIMES, Sept., 8, 1999, at A14 (reporting that Ford agreed to pay nearly $8 million in damages to women complaining of racial and sexual harassment at two factories); *Venator Group's Ex-Workers File EEOC Suit*, WALL ST. J., July 2, 1999, at B-8 (EEOC sought millions of dollars in suit against Woolworth for laying off hundreds of employees based on their age).

[15] *See, e.g., Anchorwoman Wins $8.3 Million Over Sex Bias*, N.Y. TIMES, Jan. 29, 1999, at B1 (reporting jury award of $8.3 million dollars for gender discrimination, nearly double of what plaintiff requested, and stating that the "verdict sent jolt through industry"); *Fired TV Anchor Awarded $7.3 Million from Station*, N.Y. TIMES, Apr. 7, 1999, at B5 (reporting $4.8 million compensatory damage award and $2.5 million punitive damage award to women who were demoted and forced to take leave due to a disability and who were retaliated against for complaining of discrimination towards other employees); *Jury Awards $12.7 million to a Woman Denied Tenure*, N.Y. TIMES, Jan. 19, 1999, at B2 (jury awarded former assistant professor at Trinity College $12.7 million for sex discrimination, $4 million in emotional distress damages); *Male Guard Wins His Sex Harassment Suit*, CHI. TRIB, May 30, 1999, at M5 (reporting jury award of $3.75 million to male state

lawsuits and even less incentive to estimate or negotiate the value of damages for their emotional distress.

Plaintiffs hoping to obtain a substantial award for their emotional distress may, however, be unaware of a common pitfall. Even if a plaintiff succeeds in obtaining a large verdict in federal court, a defendant may make a post-trial motion for either a new trial on damages, or for "remittitur" (or reduction) of the jury's damage award, or both, pursuant to Federal Rule of Civil Procedure 59.[16] While attorneys who practice employment litigation may be aware of the availability of this post-trial motion, defense attorneys may not appreciate how easy it is in the Second Circuit for an employment discrimination plaintiff to survive summary judgment and reach the jury on an emotional distress claim or that even the most minimal evidence of harm may be sufficient to succeed on such a claim. Furthermore, and more importantly, both plaintiffs and defendants are unlikely to appreciate how emotional distress damage awards actually fare at the end of litigation when attacked as excessive by a post-trial motion for remittitur. Attorneys representing clients in the early stages of discrimination lawsuits or consumed in trial preparation have little time or incentive to scrutinize this discrete area of the law.

A review of recent decisions by federal courts in the Second Circuit reveals that the courts' resolution of post-trial remittitur motions can be used by counsel and by courts to promote settlement. When employers argue that an emotional distress award is excessive and warrants a new trial, the district court must determine first what amount of damages is appropriate for a particular distress claim.[17] In order to do so, courts look for guidance to remitted damage awards rendered by other courts in similar cases.[18] As a result, a "continuum" or "spectrum" of emotional distress claims and corresponding damage awards has emerged in employment discrimination

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prison guard for supervisors' failure to protect him from sex harassment by female guard whose advances he rejected).

[16] Litigants seeking to challenge damages awarded for discrimination claims brought under the Human Rights Law as excessive must do so under section 5501(c) of New York's Civil Practice Law & Rules. *See* N.Y. C.P.L.R. 5501(c) (McKinney 1995).

[17] *See infra* notes 180-192.

[18] *See infra* notes 193-196.

cases in the Second Circuit. This continuum, which ranges from "garden-variety" emotional distress claims on one end of the spectrum to "egregious" claims on the other, has been acknowledged by the district courts within the Second Circuit[19] and is applied routinely to evaluate the worth of a plaintiff's emotional distress.[20]

The purpose of this Article is to facilitate settlement of discrimination claims or cases in which emotional distress is the plaintiff's sole claimed injury or in which litigants have reached an impasse because "unpredictable" emotional distress damages have become a sticking point in settlement negotiations.[21] This goal can be achieved by educating counsel and their clients about the ease with which emotional distress claims may be presented at trial, the slim evidence which may support a finding of emotional distress, and how emotional distress claims are evaluated by courts during post-trial proceedings. If litigants appreciate the likelihood that a discrimination plaintiff will reach the jury with his or her distress claim, the likelihood that the verdict will not be reversed or vacated by the court, and the range of damages to which a particular emotional distress award will likely be reduced by the court post-trial if the defendant makes a Rule 59 remittitur motion, litigants may be, and should be, more inclined to estimate and settle such claims prior to trial, since the amount of damages to be recovered has become somewhat predictable.[22]

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[19] *See*, Ortiz-Del Valle v. NBA, 42 F. Supp. 2d 334, 342 (S.D.N.Y. 1999); Bick v. City of New York, No. 95 Civ. 8781, 1998 WL 109283, at *25 (S.D.N.Y. Apr. 21, 1998); Shea v. Icelandair, 925 F. Supp. 1014, 1027-28 (S.D.N.Y. 1996); *see also* Funk v. F & K Supply, Inc., 43 F. Supp. 2d 205 (N.D.N.Y. 1999) (canvassing comparable cases and distinguishing cases upholding higher awards); Hollis v. City of Buffalo, 28 F. Supp. 2d 812, 826 (W.D.N.Y. 1998) (recognizing range of verdicts); Trivedi v. Cooper, No. 95 Civ. 2075, 1996 WL 724743, at *6-*9 (S.D.N.Y. Dec. 17, 1996) (applying spectrum of cases).

[20] *See infra* Part III.

[21] *See, e.g.*, Town of Hempstead v. State Div. of Human Rights, 233 A.D.2d 451, 452, 649 N.Y.S.2d 942, 943 (2d Dep't 1996) (Krausman, J., dissenting) ("[W]e are once again faced with the difficult task of attempting to place a dollars-and-cents valuation on mental pain and suffering, an essentially subjective injury which is often the only consequence of discriminatory conduct.") (citation omitted).

[22] This theory presumes that a defendant employer is willing to incur the expense of making a post-trial motion to reduce a plaintiff's emotional distress damages after trial. In fact, even if a defendant may not intend to do so, a defendant may bluff or use the availability of this motion and the results of the spectrum as leverage in settlement negotiations.

Toward this end, Part I provides a brief overview of some of the more frequently litigated federal employment discrimination statutes as well as the New York Human Rights Law. Geared toward those with little familiarity with employment discrimination jurisprudence, this Part provides a comparison of the conduct proscribed and the damages afforded under each statute.[23] Next, Part II discusses the general types of harm that have been a sufficient basis for discrimination plaintiffs' emotional distress awards. This Part also demonstrates how easy it is for a discrimination plaintiff to survive summary judgment, to reach the jury, and to present evidence at trial on an emotional distress claim that will withstand a motion for a directed verdict and be sufficient to support a verdict for emotional distress.[24] In fact, this Part concludes that, as long as a plaintiff's testimony is not limited to his or her subjective feelings and describes some physical manifestations of emotional distress, however slight or transient, the defendant will not be able to reverse or vacate the jury's verdict on the ground that the evidence was insufficient to support the verdict. Finally, Part III analyzes how plaintiffs' emotional distress awards fare in this circuit when attacked as excessive under Federal Rule 59. This Part examines federal courts' use of remittitur to reduce the awards[25] and presents the "spectrum" or "continuum" of evidence that the federal courts apply to determine a reasonable amount for a particular emotional distress damage award. This Part discusses a few of the standard or "benchmark" decisions which are apparently used by the courts to define the ends of the spectrum and various points along it. From this spectrum emerge several categories reflecting a particular range of damages awarded by the courts for varying degrees of harm based on the severity of the distress, the nature of the underlying conduct, and how the plaintiff presented his or her evidence at trial. This spectrum is intended to be used as a tool by counsel, their clients and courts conducting settlement conferences to gauge the strength of the plaintiff's

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[23] *See infra* notes 30-108 and accompanying text.
[24] *See infra* notes 109-177 and accompanying text.
[25] *See infra* notes 199-417 and accompanying text.

emotional distress claim in each particular case so that the expectations of recovery are realistic and will, hopefully, open the lines of communication during settlement.

I. OVERVIEW OF FEDERAL & NEW YORK EMPLOYMENT DISCRIMINATION STATUTES

While the term "Title VII" is virtually synonymous with employment discrimination, plaintiffs bringing suit in New York frequently assert discrimination claims pursuant to a number of other federal statutes, including the Age Discrimination in Employment Act ("ADEA"),[26] the Americans with Disabilities Act ("ADA"),[27] and §§ 1981 and 1983 of Title 42 of the United States Code ("§ 1981" and "§ 1983," respectively),[28] and pursuant to the New York Human Rights Law ("the HRL").[29] This Part provides a very brief comparison of the types of conduct proscribed by these statutes and the damages that are available under each.

A. *What Conduct is Prohibited?*

Title VII, the Civil Rights Act of 1964,[30] makes it unlawful for an employer to discriminate against an employee on the basis of his or her race, color, religion, sex or national origin with respect to decisions to hire, promote, transfer or terminate an employee.[31] Title VII does not, however, prohibit an employer from discriminating against an individual because of his or her age or disability. Instead, the ADEA,[32] which con-

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[26] 29 U.S.C.A. §§ 621-634 (West 1994).

[27] 42 U.S.C.A. §§ 12101-12117 (West 1995).

[28] 42 U.S.C.A. §§ 1981, 1983 (West 1994). There are a number of other federal statutes under which a disgruntled employee may seek to file an employment discrimination complaint, including the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 158(a)(3), 158(b)(2) (West 1998), the Equal Pay Act of 1963, 29 U.S.C. § 209 (West 1998), the Pregnancy Discrimination Act, Pub. L. No. 95-55, 92 Stat. 2016 (1978), the Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (West 1999), and the Family Medical and Leave Act of 1993, 29 U.S.C. §§ 2614(a)(1)–2614(a)(2), 2615(a)(2)–2615(b) (1993).

[29] N.Y. EXEC. LAW §§ 290-301 (McKinney 1993).

[30] 42 U.S.C. § 2000e (1995), *amended by* Civil Rights Act of 1991, § 104, Pub. L. No. 102-166, 105 Stat. 1074.

[31] *See id.* § 2000e-(2)(a)(1).

[32] Pub. L. No. 90-202, § 4, 81 Stat. 603 (codified as amended at 29 U.S.C.

tains language virtually identical to Title VII,[33] makes it unlawful for employers to discriminate against individuals over the age of forty on the basis of their age when making similar employment decisions.[34] The ADA prohibits employers from discriminating against a qualified, disabled individual with respect to employment decisions because of the individual's mental or physical disability.[35] Under the ADA, it is unlawful for an employer to fail to make reasonable accommodations for known physical or mental limitations of an otherwise qualified individual, unless the employer can demonstrate that making a reasonable accommodation would impose an undue hardship on the operation of the employer's business.[36]

Discrimination claims under these statutes are sometimes accompanied by claims under §§ 1981 and 1983. Section 1981, derived from the Civil Rights Act of 1866,[37] was intended to uproot the institution of slavery, eradicate its badges and incidents,[38] and guarantee the right to "make and enforce contracts" free of intentional discrimination.[39] For the last twenty-five years, § 1981 has been applied to remedy private sector

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§§ 621-634 (1967)).

[33] 29 U.S.C. § 623(a)(1) reads in pertinent part:

> (a) It shall be unlawful for an employer . . . (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age.

29 U.S.C. § 623(a)(1) (1994).

[34] *See id.* § 631(a); *see also* Renz v. Grey Adver., Inc., 135 F.3d 217, 221 (2d Cir. 1997).

[35] *See* 42 U.S.C. § 12112(a) (1995); *see also* Wernick v. Federal Reserve Bank, 91 F.3d 379, 383 (2d Cir. 1996); Connolley v. Bidermann Indus., U.S.A., Inc., No. 95-1791, 1999 WL 504908, at *3 (S.D.N.Y. July 15, 1999).

[36] *See* 42 U.S.C. § 12115(5)(A).

[37] 42 U.S.C. § 1981 (1994) (originally enacted as Act 1870, ch. 114, § 16, 16 Stat. 144, Rev. Stat. 1977), *amended by* Pub. L. 102-166, tit. I, § 101, 105 Stat. 1071 (1991).

[38] *See* Dawson v. Pastrick, 441 F. Supp. 133 (N.D. Ind. 1977), *aff'd in part, rev'd in part on other grounds*, 600 F.2d 70 (7th Cir. 1979).

[39] 42 U.S.C. § 1981(a) reads:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (1994).

racial employment discrimination[40] and has since been interpreted to include employment discrimination based on ethnicity or ancestry.[41] Section 1981 does not, however, proscribe discrimination based on sex or religion.[42]

Section 1983[43] furnishes a cause of action to remedy violations of federal rights created by the Constitution[44] and has two essential elements: (1) the defendant's conduct must have occurred while he or she was acting under color of state law[45] and (2) as a result of the defendant's actions, the plaintiff must have suffered a denial of federal statutory rights or constitutional rights or privileges.[46] Section 1983 is both broader and more narrow in scope than § 1981. On one hand, § 1983 is more narrow than § 1981 because since the defendant must be

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[40] *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); *see also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (prohibiting racial discrimination against white employees).

[41] *See* St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987). In 1991, Congress' enactment of the 1991 Civil Rights Act further expanded the types of claims which may be brought under § 1981 by adding subsection (b) which expressly defined the term "make and enforce contracts" to include the "making, performance, modification and termination of contracts, and the enjoyment of all benefits, privilege, terms, and conditions of the contractual relationship enjoyment." 42 U.S.C § 1981(b). As presently construed, § 1981 proscribes discrimination for terminations, failure to promote, harassment and other discriminatory conduct based on ethnicity and ancestry occurring during the employment relationship. *See* David A. Cathcart, *Emerging Standards Defining Contract, Emotional Distress and Punitive Damages in Employment Cases*, SB36 ALI-ABA 1507, 1551 (1997).

[42] *See* Runyon v. McCrary, 427 U.S. 160, 167 (1976) (dicta).

[43] 42 U.S.C. § 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1994).

[44] *See* Quinn v. Nassau County Police Dep't, 53 F. Supp. 2d 347, 354, (E.D.N.Y. 1999) (citing Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979)).

[45] The traditional definition of acting under color of state law in a § 1983 action requires that the defendant has exercised power "'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Quinn*, 53 F. Supp. 2d at 354-55 (quoting West v. Atkins, 487 U.S. 42, 49 (1988); United States v. Classic, 313 U.S. 299, 326 (1941)).

[46] *See* Eagleston v. Guido, 41 F.3d 865, 872 (2d Cir. 1994); Warren v. Fischl, 33 F. Supp. 2d 171, 176 (E.D.N.Y. 1999).

exercising power vested in him pursuant to state law, it does not reach private employment discrimination litigation. On the other hand, § 1983 does not contain any language limiting the conduct it proscribes, and thus has been applied to a wider range of discrimination than § 1981, including race discrimination[47] and discrimination based on sex and religion.[48]

Finally, the HRL, New York's anti-discrimination statute, prohibits discrimination in the terms, conditions and privileges of employment based on all of the factors prohibited by each of these federal statutes.[49] As discussed below, the presence of an HRL claim permits a plaintiff to recover damages that may not be available under a parallel federal statute (such as emotional distress damages on an ADEA claim) and also may permit the plaintiff to evade a statutory cap where the verdict and damages for emotional distress are awarded pursuant to certain federal statutes.

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[47] *See* Magee v. Nassau County Med. Ctr., 27 F. Supp. 2d 154 (E.D.N.Y. 1998) (§ 1983 race discrimination claim).

[48] *See* Annis v. County of Westchester, 36 F.3d 251 (2d Cir. 1994) (§ 1983 can, in certain circumstances, apply to sex discrimination); *Quinn*, 53 F. Supp. 2d at 356 (claim of sex discrimination by homosexual police officer against government employer is covered by § 1983 as an Equal Protection claim); Samuels v. New York State Dep't of Correctional Serv., No. 94 Civ. 8645, 1997 WL 253209 (S.D.N.Y. May 14, 1997) (same); *see also* Ghandour v. American Univ. of Beirut, No. 97 Civ. 7741, 1998 WL 856114 (S.D.N.Y. Dec. 9, 1998) (implying plaintiff could maintain a § 1983 discrimination claim based on religion but dismissing claim for failure to demonstrate one of the requisite elements); Laufer v. Community Sch. Bd. No. 8, 75 Civ. 1256, 1975 WL 3620, at *2 (S.D.N.Y. Oct. 17, 1975) (plaintiff's claim that his government employer deliberately infringed on his "right to be free from racial and religious discrimination in his employment within a public school system . . . is, of course, a violation of the equal protection clause of the fourteenth amendment").

[49] Section 296(1)(a) of New York Executive Law provides, in pertinent part:

> It shall be an unlawful discriminatory practice:
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> For an employer . . . because of age, race, creed, color, national origin, sex, disability, genetic predisposition or carrier status, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

N.Y. EXEC. LAW § 296(1)(a) (McKinney 1998).

B. *Damages Available to Prevailing Discrimination Plaintiffs*

While the purpose behind the compensation scheme in discrimination statutes is to make victims whole,[50] not every statute provides a successful plaintiff with the same relief. The traditional remedies available in employment cases include awards for back pay (lost salary and benefits that would have been received had the employment continued), reinstatement and/or front pay, compensatory damages for emotional distress and, in certain circumstances, punitive and liquidated damages.[51]

1. Back Pay

The purpose of back pay is to place an injured plaintiff in the same position he or she would have been in but for the defendant's discriminatory conduct.[52] A successful plaintiff will typically receive an award of back pay, which is available under Title VII,[53] the ADEA,[54] the ADA,[55] §§ 1981[56] and 1983,[57] and the HRL.[58] Back pay is measured as the amount

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[50] *See, e.g.*, Carrero v. New York City Hous. Auth., 890 F.2d 569, 580 (2d Cir. 1989) ("Title VII is the strongest solvent Congress used not only to remove the stain discrimination leaves on equality in the workplace, but also to make victims of discrimination whole.").

[51] *See supra* note 11.

[52] *See* Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 145 (2d Cir. 1993).

[53] *See* 42 U.S.C.A. § 2000e-5(g)(1) (West 1994) (expressly providing for back pay).

[54] The ADEA provides that courts may grant "such legal or equitable relief as may be approrpriate to effectuate the purpose of this chapter . . . ." 29 U.S.C.A. § 626(b) (West 1999). This language has been construed by the Second Circuit Court of Appeals to explicitly include awards of back pay. *See, e.g.*, Banks v. Traveler's Cos., 180 F.3d 358, 364 (2d Cir. 1999); Kirsh v. Fleet St., Ltd., 148 F.3d 149, 167 (2d Cir. 1998); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 727-28 (2d Cir. 1984).

[55] The remedies available under the ADA are the same as those available under Title VII. *See* 42 U.S.C. § 12117 (1995) (incorporating 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8 and 2000e-9).

[56] *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975).

[57] *See* Frank v. Relin, 851 F. Supp. 87 (W.D.N.Y. 1994) (in § 1983 action, employee fired in violation of constitutional rights was entitled to interest on back pay award); Blaine v. Board of Trustees, Onondaga Community College, 86 Civ. 903, 1991 WL 487237, at *12 (N.D.N.Y. Nov. 29, 1991) (awarding lost wages to § 1983 plaintiff discriminated against by employer in denying her a teaching position on the basis of her gender); *see also* Rao v. New York City Health & Hosps.

of money that the plaintiff would have received in salary and benefits from the date of the alleged discriminatory conduct to the date the judgment is entered in favor of the plaintiff.[59] Typical back pay awards take into consideration any circumstances that would have limited plaintiff's earnings, including a subsequent disability rendering plaintiff unable to work,[60] a subsequent layoff that would have included plaintiff,[61] and any earnings which plaintiff has received during the interim from alternative employment.[62] If a discrimination lawsuit is tried, evidence is likely to be introduced by the parties in support of a back pay award. Generally, this evidence will consist of the employer's compensation structure which will be used to calculate the salary and other fringe benefits the plaintiff would have received absent the adverse employment action.[63]

Prior to trial, back pay awards can be estimated by the litigants by using the salary and benefits plaintiff was earning at the time of the adverse employment action to calculating what the plaintiff would have earned had he or she remained

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Corp., 882 F. Supp. 321, 326 (S.D.N.Y. 1995).

[58] *See* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1190 (2d Cir. 1992) (upholding back pay awards under N.Y. HRL).

[59] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); Banks v. Traveler's Cos., 180 F.3d 358, 364 (2d Cir. 1999); Kirsch v. Fleet St., Ltd., 148 F.3d 149, 167 (2d Cir. 1998). Under New York law, the appropriate measure for back pay award is the difference between the amount of salary or wages the Plaintiff would had received had he continued to work for the Defendant, less any amount actually earned during the period between the date of discharge and the date of judgment. *See* Gleason v. Callanan Indus. Inc., 203 A.D.2d 750, 753, 610 N.Y.S.2d 671, 673-74 (3d Dep't 1994).

[60] *See* Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 145 (2d Cir. 1993).

[61] *See* Talada v. International Serv. Sys., 899 F. Supp. 936, 959 (N.D.N.Y. 1995).

[62] *See* Bonura v. Chase Manhattan Bank, N.A., 629 F. Supp. 353, 355 (S.D.N.Y. 1986). Any salary earned between the date of the wrongful action and the date of judgment is usually deducted from the amount of the back pay award. *See id.* at 361.

[63] *See, e.g.*, Ortiz-Del Valle v. NBA, 42 F. Supp. 2d 334, 343-44 (S.D.N.Y. 1999) (parties introduced conflicting charts into evidence in support of back pay award reflecting wages plaintiff would have earned absent discrimination); Carter v. Rosenberg & Estis, P.C., No. 95 Civ. 10439, 1998 WL 150491, at *14-*18 (S.D.N.Y. Mar. 31, 1998); Trivedi v. Cooper, No. 95 Civ. 2075, 1996 WL 724743, at *10 (S.D.N.Y. Dec. 17, 1996) (denying award of back pay where the parties agreed that no one promoted in the year the plaintiff was denied promotion had received any pay increase); Luciano v. Olsten Corp., 912 F. Supp. 663, 668-69 (E.D.N.Y. 1996) (affirming back pay award as comporting with formula for back pay proffered by plaintiff), *aff'd*, 110 F.3d 210 (2d Cir. 1997).

in the defendant's employ, accounting for any increases or decreases plaintiff would have received in each year subsequent to the adverse employment action[64]; and adding the salary plaintiff would have earned in each year from the time of the estimation or settlement conference until the date the parties believe the case will be ready for trial.[65]

2. Reinstatement or Front Pay

If a discrimination suit reaches trial, a court may also order the defendant to reinstate a former employee to his or her position or to the position plaintiff would have had absent the discrimination.[66] Reinstatement may not be feasible where the plaintiff's position no longer exists, where an innocent third party would be displaced, or where the parties' relationship is beyond repair.[67] While it is unsettled whether front pay is a legal or equitable remedy,[68] front pay consists of the salary and benefits the plaintiff would have received from the date of judgment to a reasonable date in the future but for the defendant's unlawful conduct.[69] An award of front pay is within the sound discretion of the district court, but it is only appropriate where the fact finder can predict that the plaintiff has no reasonable prospect of obtaining comparable alternative employment.[70] While front pay and reinstatement are usually alternative forms of relief, one district court has recently

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[64] This can be accomplished by calculating any salary increases that the plaintiff received in prior years or actual increases received by other employees in similar positions with similar skills for each year.

[65] For an example of how a back pay award may be calculated, see *Luciano v. Olsten Corp.*, 912 F. Supp. 663, 668 (E.D.N.Y. 1996) (noting formula for back pay award suggested by plaintiff). In any event, while litigants may disagree over the method of calculating a particular back pay award for purposes of settlement negotiations and through good faith negotiations, the parties can estimate both a maximum and a minimum award.

[66] *See, e.g.*, Losciale v. The Port Auth. of N.Y. and N.J., No. 97 Civ. 0704, 1999 WL 587928, at *7 (S.D.N.Y. Aug. 4, 1999); Shea v. Icelandair, 925 F. Supp. 1014, 1031 (S.D.N.Y. 1996) (ordering reinstatement even though the plaintiff's job had technically been abolished because the defendant lacked a rigid corporate structure).

[67] *See Shea*, 925 F. Supp. at 1030.

[68] *See infra* note 99 and accompanying text.

[69] *See* Whittlesey v. Union Carbide Corp., 742 F.2d 724, 728-29 (2d Cir. 1984); *see also* Dunlap-McCuller v. Riese Org., 980 F.2d 153, 159 (2d Cir. 1982).

[70] *See Whittlesey*, 742 F.2d at 729.

awarded both.[71] Front pay need not be awarded, however, when the court determines an award of back pay is sufficient to make the plaintiff whole.[72]

During settlement negotiations, defendants should always explore the possibility of reinstatement. If reinstatement is an option, it may provide the key to settling a case where a plaintiff with relatively few options is more interested in securing employment or where the relationship between the parties and at the employer's place of business has not changed significantly since the adverse employment action occurred. Where reinstatement is possible but does not settle a case, the employer may attempt to limit its liability to an award for back pay and emotional distress, and the plaintiff—holding fast to a large monetary award because he or she is fearful about the uncertainty of his or her future employment—may be more willing to accept a reduced monetary settlement for any remaining claims if presented with another employment opportunity. Furthermore, if the plaintiff accepts reinstatement but the case proceeds on the remaining claims, the fact that the plaintiff resumed his or her employment may bear on any emotional distress claim as a result of his employment, especially in hostile work environment cases.

Where reinstatement is not an option because the nature of discrimination litigation by an aggrieved employee has exacerbated ill-feelings between the parties, the parties should attempt to estimate a range of damages that plaintiff may recover for front pay. Front pay can be estimated in much the same way that damages for back pay can be calculated, by (1) starting with the plaintiff-employee's salary and benefits at the time of the employer's adverse employment decision, (2) predicting the number of years that the plaintiff would have remained in the defendant's employ, and (3) considering the employer's compensation structure and estimating average increases in salary and benefits over a number of years in the future.

With respect to the second factor, where the plaintiff's employment is defined by an employment contract, the parties can use the remaining term of the contract to determine how

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[71] *See Losciale*, 1999 WL 587928, at *6-*7.

[72] *See* Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 145 (2d Cir. 1993).

many years the plaintiff would have continued in the defendant's employ. In cases where a plaintiff is or was employed at-will, litigants will likely disagree over this factor. At-will employee-plaintiffs, seeking to maximize a front pay award, will no doubt take the position that they would have remained in the defendant's employ indefinitely, maybe even until retirement, and that possibly they would not have retired at 65, but would have continued as long as their health permitted. Defendants, on the other hand, are apt to argue that any expectancy by the plaintiff of continued employment is sheer speculation and that therefore no front pay award is appropriate. Any award of front pay will involve some degree of speculation.[73] It is difficult to determine how long a plaintiff would have worked absent some definitive subsequent event, such as a disability rendering plaintiff unable to work or a layoff that would have included plaintiff. However, Second Circuit case law provides some parameters. In *Whittlesey v. Union Carbide Corp.*,[74] the seminal case in the Second Circuit regarding front pay, the Court of Appeals upheld an award of front pay for a period of four years in favor of a 66-year-old at-will employee, finding that the facts did not involve some of the uncertainties which might surround a front pay award to a younger worker.[75] Also, an award of front pay for 20 years is not on its face speculative[76] and has been upheld by at least one court.[77] On the other hand, another district court has denied front pay awards for periods of 11 and 16 years, to employees ages 59 and 54, respectively, where it found the periods contemplated contained uncertainties that were absent in *Whittlesey*.[78]

3. Compensatory Damages

Although an adverse employment decision motivated by discriminatory animus is likely to cause emotional distress to

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[73] *See* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1189 (2d Cir. 1992).

[74] 742 F.2d 724 (2d Cir. 1984).

[75] *See id.* at 729.

[76] *See* Tanzini v. Marine Midland Bank, N.A., 978 F. Supp. 70, 81 (N.D.N.Y. 1997).

[77] *See id.*

[78] *See* Bonura v. Chase Manhattan Bank, 629 F. Supp. 353 (S.D.N.Y. 1986).

an aggrieved employee, including disappointment, loss of self-esteem, and feelings of insecurity regarding one's ability to perform his or her job effectively, compensatory damages were not always available under the various discrimination statutes for such harm.

Prior to November 21, 1991, compensatory damages were not available in Title VII or ADA cases. Plaintiffs asserting claims under these statutes could not recover for the traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation or other consequential injuries. That year, however, Congress enacted § 102 of the Civil Rights Act of 1991,[79] which expressly permits recovery for these injuries provided that the complaining party cannot recover under § 1981.[80] While compensatory damages are also available under §§ 1981 and 1983[81] and the HRL,[82] they are not recoverable under the ADEA.[83] Because compensatory damages are not available under the ADEA, plaintiffs complaining of age discrimination in federal court frequently assert an age claim under the HRL, which does provide for these damages.[84]

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[79] Pub. L. No. 102-166, § 102, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981a (1991).

[80] Section 1981a provides plaintiffs may recover compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, lost of enjoyment of life and other pecuniary losses," arising from intentional discrimination. 42 U.S.C. § 1981a(b)(3) (1994); *see also* Johnson v. Tower Air, Inc., 149 F.R.D. 461, 471 n.9 (E.D.N.Y. 1993).

[81] *See* Carey v. Piphus, 435 U.S. 247, 257-59 (1978) (compensatory damages are available under § 1983 but only where plaintiff demonstrates proof of actual injury); Ford v. Nassau County Executive, 41 F. Supp. 2d 392, 398 (E.D.N.Y. 1999) (allowing compensatory damages under § 1983); *see also* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975) (entitling § 1981 plaintiff is entitled to both equitable and legal relief, including compensatory damages).

[82] The HRL provides for "compensatory damages to the person aggrieved by [a wrongful employment] practice." N.Y. EXEC. LAW § 297 (4)(c)(iii) (McKinney 1999); *see* Patel vs. Lutheran Med. Ctr., Inc., 753 F. Supp. 1078 (E.D.N.Y. 1990) (plaintiff entitled to compensatory damages for violation of HRL § 296); Batavia Lodge No. 196, Loyal Order of Moose v. New York State Div. Of Human Rights, 35 N.Y.2d 143, 146, 316 N.E.2d 318, 319, 359 N.Y.S.2d 25, 27 (1974).

[83] *See* Commissioner v. Schleier, 515 U.S. 323, 335 (1995); *see also* Johnson v. Al Tecksch Specialities Steel Corp., 731 F.2d 143, 147-48 (2d Cir. 1984) (compensatory and punitive damages are unavailable under the ADEA).

[84] *See* Shea v. Icelandair, 925 F. Supp. 1014, 1020 (S.D.N.Y. 1996) (jury award for pain and suffering was necessarily rendered pursuant to HRL rather than the ADEA); *see also* Courtney v. City of New York, 20 F. Supp. 2d 655, 657 (S.D.N.Y.

4. Punitive and Liquidated Damages

Since 1991, punitive damages have been available in Title VII and ADA cases[85] where the defendant discriminated "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[86] Just this term, in *Kolstad v. American Dental Ass'n*,[87] the United States Supreme Court resolved a split among the circuits regarding the appropriate standard of proof needed to support a claim for punitive damages in Title VII cases.[88] In a 7-2 decision, the *Kolstad* Court held that punitive damages may be awarded in a Title VII case without a showing of both "egregious misconduct" and the employer's state of mind, endorsing the standard articulated by the Second Circuit[89] and rejecting the standard adopted by the District of Columbia Circuit[90] and the six other circuits that have addressed the issue.[91]

Punitive damages are also available in employment discrimination actions brought under §§ 1981[92] and 1983.[93] The standard for punitive damages in actions brought pursuant to §§ 1981 and 1983 is similar to the standard in the Civil Rights Act of 1991 which applies in Title VII and ADA cases: that is, where the defendant's conduct is "motivated by evil motive or

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1998) (same); Dedyo v. Baker Eng'g N.Y., Inc., No. 96 Civ. 7152, 1998 WL 9376 (S.D.N.Y. Jan. 13, 1998) (same).

[85] *See* Luciano v. Olsten Corp., 912 F. Supp. 663, 669 (E.D.N.Y. 1996) (citing 42 U.S.C. § 1981a(b)(1) (1994)), *aff'd*, 110 F.3d 210 (2d Cir. 1997).

[86] Luciano v. Olsten Corp., 110 F.3d 210, 219 (2d Cir. 1997) (citation omitted).

[87] 119 S. Ct. 2118 (1999).

[88] The *Kolstad* Court further held, that the employer may not be held vicariously liable for punitive damages based on a managerial employee's actions if the employer has made a good faith effort to comply with Title VII. *See id.* at 2129.

[89] *See* Luciano v. Olsten Corp., 110 F.3d 210, 219-20 (2d Cir. 1997) (rejecting contention that punitive damages requires showing of "extraordinary egregious" conduct).

[90] *See Kolstad*, 119 S. Ct. at 2124 ("We credit the en banc majority's effort to effectuate congressional intent, but in the end, we reject its conclusion that eligibility for punitive damages can only be described in terms of employer's 'egregious' misconduct.").

[91] *See* Robert P. Lewis, *Supreme Court Sets Standard for Punitive Damages Under Title VII*, 222 N.Y. L.J. 1 n.4 (1999).

[92] *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975) (acknowledging that punitive damages are available in § 1981 employment cases).

[93] *See* Quinn v. County of Nassau, 53 F. Supp. 2d 347, 350-52 (E.D.N.Y. 1999) (jury awarded $380,000 in compensatory and punitive damages in § 1983 employment discrimination action based on police officer's homosexuality).

intent, or when it involves reckless or callous indifference to the federally protected rights of others."[94]

Punitive damages are not, however, available under the ADEA. Instead, the ADEA provides that a plaintiff may recover liquidated damages where the employer's violation was "willful."[95] Violations of the ADEA are willful "if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."[96] Liquidated damages are awarded in an amount equal to double the plaintiff's back pay award.[97] Finally, the HRL does not provide for either liquidated or punitive damages.[98]

5. Statutory Caps

The 1991 Civil Rights Act limits a plaintiff's recovery of emotional distress damages rendered pursuant to Title VII and the ADA.[99] This mandatory statutory cap ranges from $50,000

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[94] Mathie v. Fries, 121 F.3d 808, 815 (2d Cir. 1997) (quoting Smith v. Wade, 461 U.S. 30, 56 (1983)); *see* Taylor v. Records, No. 94 Civ. 7689, 1999 WL 124456, at *24 (S.D.N.Y. Mar. 8, 1999).

[95] Paolitto v. John Brown E. & C., Inc., 953 F. Supp. 17, 21 (D. Conn. 1997); *see* Hazen Paper Co. v. Biggins, 507 U.S. 604, 615 (1993) (holding that "[the ADEA] provides for liquidated damages where the violation was 'wilfull'").

[96] McGinty v. State of New York, No. 98-9060, 1999 WL 777682, at *4 (2d Cir. Oct. 1, 1999).

[97] *See* 29 U.S.C. § 626(b) (1994); Dittmann v. Dyno Nobel Inc., No. 97-1724, 1999 WL 727464, at *4-*5 (N.D.N.Y. Sept. 10, 1999); Bonura v. Chase Manhattan Bank, N.A., 629 F. Supp. 353, 362 (S.D.N.Y. 1986); Travers v. Corning Glass, 76 F.R.D. 431, 436 (S.D.N.Y. 1977).

[98] *See* Thoreson v. Penthouse Int'l, Ltd., 80 N.Y.2d 490, 496-97, 606 N.E.2d 1369, 1371, 591 N.Y.S.2d 978, 980 (1992).

[99] *See* 42 U.S.C.A. § 1981a(b)(3) (West 1994). While awards for emotional distress are expressly subject to the statutory cap, there is currently a split among the circuits and within the Second Circuit as to whether front pay is legal or equitable relief and, therefore, subject to the cap. *See, e.g.*, Kramer v. Logan County Sch. Dist., 157 F.3d 620 (8th Cir. 1998) (finding front pay is equitable remedy and not compensatory award for lost salary and not subject to statutory cap); Hudson v. Reno, 130 F.3d 1193, 1204 (6th Cir. 1997). The Second Circuit has not addressed this issue. *See* Rivera v. Baccarat Inc., 34 F. Supp. 2d 870, 877 (S.D.N.Y. 1999). District courts in New York also appear to be split. *Compare Rivera*, 34 F. Supp. 2d at 877 (front pay is an equitable remedy and is excluded from the statutory cap), *with* Kim v. Dial Serv. Int'l Inc., No. Civ. A. 96-3327, 1997 WL 458783, at *15 (S.D.N.Y. Aug. 11, 1997), *aff'd on other grounds*, 159 F.3d 347 (2d Cir. 1998) (within the cap). Scholars also continue to grapple with the scope of the statutory cap. *See, e.g.*, Eileen Kukis, *The Future of Front Pay Under the Civil Rights Act of 1991: Will it be Subject to the Damages Cap*, 60 ALB. L.

to $300,000, depending upon the number of persons employed by the defendant.[100] In contrast, there is no cap with respect to damages awarded under the ADEA, §§ 1981[101] and 1983,[102] or the HRL.[103] A plaintiff may assert an HRL claim for the same conduct complained of under Title VII or the ADA to avoid the statutory cap.[104] In cases where a jury returns a verdict and a monetary award in excess of the applicable cap, a number of federal courts in New York have presumed that the jury has rendered its damage award pursuant to the HRL claim, rather than the federal claim.[105] These courts reach this conclusion by relying on the policy articulated by the Second Circuit that in employment cases, plaintiffs should recover under the theory of liability providing the most complete relief.[106] Despite the courts' allocation of emotional distress awards to the HRL to avoid the imposition of a statutory cap, federal courts resolving Rule 59 remittitur motions rely on damage awards rendered pursuant to both federal and HRL law claims.[107]

REV. 465 (1996).

[100] *See* Kukis, *supra* note 99, at 467.

[101] 42 U.S.C.A. § 1981a(b)(4).

[102] *See, e.g.*, Ismail v. Cohen, 899 F.2d 183 (2d Cir. 1990) (upholding $650,000 compensatory damage award in § 1983 case).

[103] *See, e.g.*, Anderson v. Yarp Restaurant, Inc., No. 94-7543, 1997 WL 27043, at *7 (S.D.N.Y. Jan. 23, 1997) (allocating compensatory damage award to HRL rather than Title VII claim and noting that such interpretation permits plaintiff to receive the full amount without exceeding the legal limits under Title VII).

[104] *See id.*

[105] *See, e.g.*, Bick v. City of New York, No. 95 Civ. 8781, 1998 WL 190283, at *22 (S.D.N.Y. Apr. 21, 1998) (allocating the jury's $750,000 award for emotional distress to plaintiff's HRL claim rather than her Title VII claim) (citing Magee v. United States Lines, 976 F.2d 821, 822 (2d Cir. 1992); *Anderson*, 1997 WL 27043, at *6-*7).

[106] *See Magee*, 976 F.2d at 822.

[107] *See, e.g.*, Shea v. Icelandair, 925 F. Supp. 1014, 1025-28 (S.D.N.Y. 1996) (relying upon federal and state decisions to determine whether damages for emotional distress were excessive under the Human Rights Law, i.e., whether the award deviates materially from other judgments under the HRL); Trivedi v. Cooper, 95 Civ. 2075, 1996 WL 724743, at *6 n.2 (S.D.N.Y. Dec. 17, 1996) ("I will use the Federal standard, but will still draw on New York case law in examining the size of awards given in similar cases.").

Since it is sometimes difficult to recall what conduct is prohibited by which statutes, what damages are available under each, and which statutes are subject to a mandatory statutory cap, this information is summarized in a chart appended to the end of this Article.[108]

II. ALLEGATIONS OF EMOTIONAL DISTRESS: WHAT HARM IS SUFFICIENT TO SUPPORT AN EMOTIONAL DISTRESS DAMAGE AWARD

The federal courts in this circuit have taken a very lenient approach with respect to the quality and quantum of proof that a discrimination plaintiff must produce in order to present "sufficient evidence" to support an award for emotional distress. While the federal courts have not joined the New York Court of Appeals in expressly articulating this policy,[109] the federal courts' relaxed approach becomes evident upon an examination of: (1) the nature of emotional distress claims and the types of harm ordinarily alleged by plaintiffs, (2) the ease with which a plaintiff can present proof of emotional distress at trial, and (3) the federal courts' routine denial of employer's post-trial motions to reverse or vacate the emotional distress award on grounds of insufficient evidence, even where the evidence of harm presented at trial was scant or thin.[110]

A. *The Nature of Emotional Distress Claims and Types of Harm*

Any time an individual or an employee is not hired, is terminated, demoted, passed over for a promotion, or is sub-

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[108] *See* Appendix, Table 1.

[109] *See* Batavia Lodge No. 196, Loyal Order of Moose v. New York State Div. of Human Rights, 35 N.Y.2d 143, 147, 316 N.E.2d 318, 319, 359 N.Y.S.2d 25, 25 (1974) (stating where an individual is the victim of intentional discrimination, he need not produce the quantum or quality of evidence generally required in order to prove he is entitled to compensatory damages for mental suffering and anguish).

[110] *See, e.g.*, Ginsberg v. Valhalla Anesthesia Assocs., P.C., No. 96 Civ. 6462, 1997 WL 669870, at *2 (S.D.N.Y. Oct. 28, 1997) (evidence sufficient to support plaintiff's emotional distress claim was "undisputably thin"); Trivedi v. Cooper, No. 95 Civ. 2075, 1996 WL 724743, at *9 (S.D.N.Y. Dec. 17, 1996) (court characterized evidence which supported plaintiff's emotional distress claim as "scant").

jected to a work environment that he or she deems hostile, an employee is apt to experience some type of "distress." At a minimum, a disgruntled employee is likely to experience hurt feelings, loss of self-esteem, and either insecurity about his ability to perform his job adequately or the fear of meeting present financial responsibilities while obtaining new employment. Because these are basic human reactions to an employer's adverse employment decision that will likely be present even if the employer's decision was not motivated by discriminatory animus, it is not surprising that plaintiffs often allege claims for emotional distress in discrimination cases.

While the emotional distress experienced by a discrimination plaintiff will vary in each case due to a particular plaintiff's emotional and mental strength and life circumstances, as well as the duration and severity of employer's conduct,[111] the types of distress for which plaintiffs seek damages in discrimination cases can be described in general terms. Discrimination plaintiffs almost always claim the conduct complained of caused them to feel angry or upset, hurt, shocked or devastated, inadequate and isolated.[112] Often, plaintiffs also

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[111] *See* McIntosh v. Irving Trust Co., 887 F. Supp. 662, 665 (S.D.N.Y. 1995) ("'[S]ensitivity or stoicism, as the case may be, is as variable and individualistic in its existence and in its degree as human beings.'") (citing Cullen v. Nassau, 53 N.Y.2d 492, 497, 425 N.E.2d 858, 861, 442 N.Y.S.2d 470, 473 (1981)).

[112] *See, e.g.*, Miner v. City of Glens Falls, 999 F.2d 655, 662 (2d Cir. 1993) (plaintiff felt inadequate, embarrassed, and "totally exacerbated"); Cowan v. Prudential Ins. Co., 852 F. Supp. 688, 690 (2d Cir. 1988) (plaintiff felt humiliated); Mahoney v. Canada Dry Bottling Co., No. 94-CV-2924, 1998 WL 231082, at *5 (E.D.N.Y. May 7, 1998) (plaintiff felt extremely disappointed, hurt, embarrassed and worried); Bick v. City of New York, 95 Civ. 8781, 1998 WL 190283, at *23 (S.D.N.Y. Apr. 21, 1998) (plaintiff felt "devastated"); Leibovitz v. New York City Transit Auth., 4 F. Supp. 2d 144, 153 (E.D.N.Y. 1998) (plaintiff felt anxious and depressed); Hollis v. City of Buffalo, 28 F. Supp. 2d 812, 826 (W.D.N.Y. 1998) (plaintiff felt exhausted and nervous); Carter v. Rosenberg & Estis, P.C., No. 95 Civ. 10439, 1998 WL 150491, at *20 (S.D.N.Y. Mar. 31, 1998) (plaintiff was very upset, angry, and "a mess"); Tanzini v. Marine Midland Bank, N.A., 978 F. Supp 70, 78 (N.D.N.Y. 1997) (plaintiff felt shocked, worried, and nervous); Luciano v. Olsten Corp., 912 F. Supp. 663, 673 (E.D.N.Y. 1996), *aff'd*, 110 F.3d 210 (2d Cir. 1997) (plaintiff felt hurt, shocked, upset and depressed); Binder v. Long Island Lighting Co., 847 F. Supp. 1007, 1028 (E.D.N.Y. 1994) (plaintiff testified that he felt "completely alone"); Kim v. Dial Serv. Int'l, No. 96 Civ. 3327, 1997 WL 458783, at *14 (S.D.N.Y. Aug. 11, 1997) (plaintiff felt "gloomy"); *McIntosh*, 887 F. Supp. at 664 (plaintiff felt humiliated, shocked, angry, embarrassed, terrible, and inadequate); Quality Care, Inc. v. Rosa, 194 A.D.2d 610, 611, 599 N.Y.S.2d 65, 66 (2d Dep't 1993) (plaintiff felt devastated, bad, and in a "real pickle"); Cosmos

complain that they have experienced psychological injuries such as a loss of self-esteem,[113] concern about the future,[114] little desire to socialize,[115] short-tempered-ness,[116] and deteriorating family relations.[117] Plaintiffs also complain of ordinary physical manifestations of their distress, such as sleepless nights,[118] loss of appetite,[119] crying, stomach or chest pains and headaches,[120] shortness of breath, hives, and skin blemishes.[121] Finally, on rare occasion, plaintiffs have complained that the employer's discriminatory conduct resulted in egregious emotional distress manifested by extremely shocking effects or physical consequences, such as suicide,[122] heart conditions, or the exacerbation of a pre-existing disease.[123]

B. *Reaching and Presenting Evidence of Emotional Harm to the Jury*

The few reported summary judgment decisions addressing emotional distress in employment cases confirm that it is rela-

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Forms, Ltd. v. State Div. of Human Rights, 150 A.2d 442, 442, 541 N.Y.S.2d 50, 51 (plaintiff felt emotionally and physically "screwed up").

[113] *See Cowan*, 852 F.2d at 690; *Luciano*, 912 F. Supp. at 674 (plaintiff felt purposeless); *McIntosh*, 887 F. Supp. at 664 (plaintiff felt inadequate because his wife had to support him).

[114] *See, e.g., Miner*, 999 F.2d at 662 (plaintiff claimed he was unable to provide for family); *Luciano*, 912 F. Supp. at 673 (plaintiff was worried about the future); *Binder*, 847 F. Supp. at 1028 (plaintiff could not make ends meet).

[115] *See, e.g., McIntosh*, 887 F. Supp. at 664 (plaintiff avoided holidays with family because he was embarrassed and ashamed).

[116] *See Tanzini*, 978 F. Supp. at 78.

[117] *See Miner*, 999 F.2d at 662 (tensions among family caused by loss of plaintiff's job); *Cowan*, 852 F.2d at 690 (plaintiff reported serious disagreements with wife).

[118] *See, e.g., Mahoney*, 1998 WL 231082, at *5; *Leibovitz*, 4 F. Supp. 2d at 153; *Tanzini*, 978 F. Supp. at 78; *Luciano*, 912 F. Supp. at 674; *Kim*, 1997 WL 458783, at *14.

[119] *See Luciano*, 912 F. Supp. at 674; *Kim*, 1997 WL 458783, at *14.

[120] *See* Hollis v. City of Buffalo, 28 F. Supp. 2d 812, 826 (W.D.N.Y. 1998) (chest pains, tearful); Carter v. Rosenberg & Estis, P.C., No. 95 Civ. 10439, 1998 WL 150491, at *20, *23 (S.D.N.Y. Mar. 31, 1998) (tearful, uncontrollable crying, vomitting); *Tanzini*, 978 F. Supp. at 78 (headaches); *McIntosh*, 887 F. Supp. at 664 (chest pains, stomach cramps); *Luciano*, 912 F. Supp. at 673 (crying).

[121] *See Carter*, 1998 WL 150491, at *20.

[122] *See Miner*, 992 F.2d at 662 (thoughts of suicide); Bick v. City of New York, No. 95 Civ. 8781, 1998 WL 190283, at *24 (S.D.N.Y Apr. 21, 1998) (suicide ideation).

[123] *See* Shea v. Icelandair, 925 F. Supp. 1014, 1022-29 (S.D.N.Y. 1996).

tively easy for a discrimination plaintiff to reach the jury with respect to an emotional distress claim. In order to survive summary judgment, a plaintiff must only allege symptoms of ordinary, transient distress.[124] Allegations of hurt feelings, thoughts of the discriminatory conduct, loss of sleep, and loss of appetite are sufficient to ensure that the plaintiff will be given the opportunity to present his or her claim to the jury.[125]

It is also relatively simple for a discrimination plaintiff to present evidence at trial to support a verdict and award for emotional distress because federal courts require plaintiffs to produce only minimal evidence to meet their burden of proof on an emotional distress claim in order to survive a judgment as a matter of law.

It is well settled that a compensatory damage award for emotional distress may be based on the plaintiff's testimony alone.[126] Courts have upheld awards for emotional harm in employment cases where only the plaintiff took the stand and testified how the adverse employment affected his or her mental or emotional condition.[127] A plaintiff does not need to have consulted a physician or have received medical or psychological treatment for the alleged distress,[128] nor does plaintiff need to present any medical proof of his or her distress or harm.[129]

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[124] *See infra* note 125.

[125] *See, e.g.*, Dedyo v. Baker Eng'g New York, Inc., No. 96 Civ. 7152, 1998 WL 9376, at *13 (S.D.N.Y. Jan 13, 1998) (denying motion for summary judgment to dismiss emotional distress claim without providing explanation for decision); Walker v. AMR Servs. Corp., 971 F. Supp. 110, 117 (E.D.N.Y. 1997) (denying motion for summary judgment to dismiss emotional distress claim where plaintiff's complaint alleged insomnia, depression, and psychological pain).

[126] *See* Binder v. Long Island Lighting Co., 847 F. Supp. 1007, 1028 (E.D.N.Y. 1994), *aff'd in part and reversed in part*, 57 F.3d 193 (2d Cir. 1995); Zerilli v. New York City Transit Auth., 973 F. Supp 311, 323 (E.D.N.Y. 1997). The rule is the same under New York law. *See* Bayard v. Riccitelli, 952 F. Supp. 977, 988 (E.D.N.Y. 1997) (award may by based on plaintiff's testimony alone) (citing Cullen v. Nassau County Civil Serv. Comm'n, 53 N.Y.2d 492, 497, 425 N.E.2d 858, 860-61, 442 N.Y.S.2d 470, 473 (1981)).

[127] *See, e.g.*, McIntosh v. Irving Trust Co., 887 F. Supp. 662, 664 (S.D.N.Y. 1995) (upholding award for emotional harm where the only evidence of mental anguish or emotional injury came from the plaintiff himself); *see also Zerilli*, 973 F. Supp. at 323; Binder v. Long Island Lighting Co., 847 F. Supp. 1007, 1028 (E.D.N.Y. 1994).

[128] *See, e.g., Miner*, 999 F.2d at 663 ("[A] prescription for medicine or a visit to a doctor can lend support to a claim for emotional distress; however, such evidence is neither required nor necessarily probative.").

[129] *See Zerilli*, 973 F. Supp. at 323 (rejecting argument that jury award was

A plaintiff may, but is also not required to, present lay or expert witnesses to corroborate his or her testimony.[130] Plain-

"sheer speculation" because there was no expert medical testimony; award based on lay testimony sufficient). The rule is the same under New York law. *See* New York City Transit Auth. v. New York State Div. of Human Rights, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991) ("The existence of a compensable mental injury may be proved . . . by medical testimony where that is available, but psychiatric or other medical treatment is not a precondition to recovery.").

[130] The prevailing view is that corroboration is not necessary. *See* Broome v. Biondi, 17 F. Supp. 2d 211, 224 (S.D.N.Y. 1997). A number of courts have upheld awards where the evidence of emotional distress was presented solely by plaintiff, implying that no corroboration is needed. *See McIntosh*, 887 F. Supp. at 664; *Zerilli*, 973 F. Supp. at 323; *Binder*, 847 F. Supp. at 1028. Some courts have also implied that corroboration is not needed by articulating a different standard which implies corroboration is one way to prove emotional distress. *See, e.g.*, Walker v. AMR Servs. Corp., 971 F. Supp. 110, 117 (E.D.N.Y. 1997) ("To recover . . . damages [for emotional distress], a plaintiff must present: a. credible testimony with respect to the claimed mental anguish; and b. corroboration, either by competent medical proof or by the circumstances of the case which affords some guarantee of the germaneness of the claim."); *see also* Leibovitz v. New York City Transit Auth., 4 F. Supp. 2d 144, 153 (E.D.N.Y. 1998) (same).

Although the Second Circuit has not expressly addressed this issue, one recent decision appears to suggest that a plaintiff is required to corroborate his testimony. *See* Annis v. County of Westchester, 136 F.3d 239, 249 (2d Cir. 1998). In *Annis*, after the Second Circuit vacated the jury's damage award for emotional distress on other grounds, *see id.* at 248-49, the court went one step further and stated: "We find that the only evidence of Annis's emotional distress—her own testimony—is insufficient to warrant an award of compensatory damages for that injury." *Id.* at 249. While this language appears to suggest that corroboration is necessary to support an award for emotional distress, at least one district court has expressly rejected this interpretation of *Annis*. *See* Mahoney v. Canada Dry Bottling Co., No. 94-CV-2924, 1998 WL 231082, at *54 (E.D.N.Y. May 7, 1998) (Block, J.) (stating that *Annis* should not be read so broadly to require corroborating testimony); *see also* Ortiz-Del Valle v. NBA, 42 F. Supp. 2d 334, 341 n.9 (S.D.N.Y. 1999) (failing to address whether *Annis* requires corroboration, but following *Mahoney* and indicating that *Annis* should not be read to so broadly). *But see* Bick v. City of New York, No. 95 Civ. 8781, 1998 WL 190283, at *23 (S.D.N.Y. Apr. 21, 1998) (distinguishing *Annis* from the New York rule and implying that under *Annis* a plaintiff's own testimony is insufficient to warrant an award of compensatory damages for mental anguish).

Upon closer scrutiny, however, it appears that the *Annis* decision has not altered the traditional principle that an employment discrimination plaintiff's testimony alone is sufficient to support an award for emotional distress. A review of the evidence presented by Annis at trial, which the Second Circuit failed to address in its opinion, reveals that the evidence consisted solely of Annis's subjective feelings of anger, humiliation, and degradation, and contained *no* evidence of any physical harm. *See Annis*, 939 F. Supp. at 239. Therefore, a more plausible reading of the Second Circuit's decision in *Annis* is that a plaintiff's uncorroborated testimony is insufficient where plaintiff fails to present even scant evidence of physical harm, such as tears, loss of sleep or weight, or stress.

This interpretation is consistent with the prevailing view and subsequent case

tiffs who choose to corroborate their testimony usually do so through a spouse or co-employee or someone who has provided them with counseling or treatment.[131]

The subjective nature of the harm that plaintiffs routinely claim to have suffered makes it difficult for defendants to disprove a plaintiff's testimony, which may at times be the sole evidence of harm. Logic dictates that while defense counsel may thoroughly cross-examine a plaintiff about his or her testimony, it may be difficult (if not impossible) to disprove or to raise sufficient doubt as to certain testimony, such as: (1) the plaintiffs' feelings of sadness, anger and depression; (2) the occurrence or severity of the plaintiffs' crying episodes; (3) how often a plaintiff has lost sleep; (4) the frequency of plaintiff's nightmares and flashbacks; or (5) any loss of appetite and other similar types of harm. Thus, a jury's finding that a plaintiff actually experienced emotional distress (and the jury's evaluation of the severity of that distress) will often depend on whether the jury finds the testimony of plaintiff and other witnesses credible.[132]

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law interpreting *Annis* is consistent with this view. *See Mahoney*, 1998 WL 231082, at *5-*6 (upholding $35,000 emotional distress award where the only physical manifestations of harm plaintiff suffered were two months of difficulty sleeping and loss of self-esteem); *Ortiz-Del Valle*, 42 F. Supp. 2d at 341 n.9 (applying *Annis* to dismiss $750,000 emotional distress award in gender discrimination suit where plaintiff only testified that she "felt ignored" and that her "dreams and goals were crushed" but failed to present any evidence of physical manifestations of harm).

[131] *See Zerilli*, 973 F. Supp. at 323 (co-workers); Tanzini v. Marine Midland Bank, N.A., 978 F. Supp. 70, 78 (N.D.N.Y. 1997) (wife); *Bick*, 1998 WL 190283, at *23 (therapist and co-worker).

[132] Generally, the standards that govern how a plaintiff may present his or her proof in support of an emotional distress claim in New York are the same in other circuits. *See* Price v. City of Charlotte, 93 F.3d 1241, 1251 (4th Cir. 1996) (noting in a racial employment discrimination action under § 1983 that "a survey of the case law reveals that a plaintiff's testimony, standing alone, may support a claim of emotional distress") (citing cases); *see also* Bolden v. Southeastern Pa. Transp. Auth., 21 F.3d 29, 33 & n.3 (3d Cir. 1993) ("[W]e are persuaded that the approach taken by our sister circuits which have dispensed with a requirement of expert testimony to corroborate a claim for emotional distress is more consistent with the broad remunerative purpose of the civil rights laws.").

C. *Sufficiency of Evidence of Harm at Trial: How Little is Enough?*

A discrimination plaintiff need not present substantial or egregious evidence of emotional distress to ensure that his or her claim is submitted to the jury and that he or she will succeed on the defendant's post-trial motion challenging the evidence of harm as insufficient. Instead, the plaintiff must present only minimal evidence of physical manifestations of the emotional harm. While it is not clear how little evidence is sufficient, the parameters are defined by two Second Circuit decisions directly addressing this issue and other federal trial court decisions considering defendants' post-trial motions under Rules 50 and 59 of the Federal Rules of Civil Procedure.

The Second Circuit has addressed what evidence is sufficient to support an emotional distress claim in discrimination cases in *Carrero v. New York City Housing Authority*[133] and *Annis v. County of Westchester*.[134] In *Carrero*, the Second Circuit provided some guidance as to what evidence will be sufficient to support an emotional distress claim, while in *Annis*, the court of appeals hinted at what evidence of harm is insufficient as a matter of law.

In *Carrero*, a Title VII and § 1981 hostile work environment action, the Second Circuit held that the trial court erred in finding plaintiff had failed to present sufficient evidence of emotional distress and denying plaintiff damages for her distress.[135] The court of appeals found that the record reflected that plaintiff presented sufficient evidence of "substantial humiliation, discomfort, stress and anxiety" and that she had twice visited a doctor and obtained a prescription for Valium.[136] Carrero also complained to others of anxiety and nervousness, experienced tension in her family relationships, and suffered a loss of self-confidence.[137] Furthermore, Carrero's co-workers independently supported her testimony that she

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[133] 890 F.2d 569, 581 (2d Cir. 1989).
[134] 136 F.3d 239 (2d Cir. 1998).
[135] *See Carrero*, 890 F.2d at 581.
[136] *Id.*
[137] *See id.*

had cried.[138] The Second Circuit held that this proof was not speculative and, if credible, was sufficient to support an award of emotional distress.[139]

In contrast, in January 1998, in *Annis*,[140] the Second Circuit held that the evidence presented in support of plaintiff's emotional distress claim was insufficient as a matter of law to support the jury's verdict.[141] The plaintiff prevailed on her § 1983 gender discrimination claim and the jury awarded her $266,000 in compensatory damages for pain and suffering against the County of Westchester and the former police commissioner for having been subjected to a hostile work environment.[142] The district court remitted the plaintiff's award for emotional distress to $100,001.[143] The County appealed.[144] The Second Circuit vacated and remanded the case for a new trial on damages on other grounds,[145] but not before it ruled:

> [W]e find that the only evidence of Annis's emotional distress—her own testimony—is insufficient to warrant an award of compensatory damages for that injury. She has not alleged *any physical manifestations of her emotional distress,* and, despite the discrimination, she remained a lieutenant with the County Police . . . . She testified that she needs and has had counseling, but introduced no affidavit or other evidence to corroborate her testimony. In short, *her testimony fails to establish that she suffers from any concrete emotional problems.*[146]

Nowhere in the *Annis* decision does the Second Circuit discuss the evidence of harm, if any, which Annis presented at trial.[147] The court also provides no guidance as to what kinds of physical manifestations of distress would be sufficient, or what types of problems are "concrete emotional problems."[148] The *Annis* court's failure to provide any context for its statements leaves open the question of how much evidence a dis-

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[138] *See id.*
[139] *See id.*
[140] 136 F.3d 239 (2d Cir. 1998).
[141] *See id.* at 251.
[142] *See* Annis v. County of Westchester, 939 F. Supp. 1115, 1118 (S.D.N.Y. 1996).
[143] *See id.* at 1121.
[144] *See Annis*, 136 F.3d at 239.
[145] *See id.* at 248.
[146] *Id.* at 249 (emphasis added) (citations omitted).
[147] *See id.* at 239.
[148] *Id.*

crimination plaintiff must present to defeat a motion for a directed verdict on an emotional distress claim. A review of the trial court's decision reveals that the only evidence of harm presented at trial consisted of Annis' own testimony about her feelings. Annis testified that she had felt "angry," "very humiliated," "degraded," and "very upset" after being insulted with profane language and after being told by a supervisor that he did not "give into any of this women's liberation sh-t."[149] Therefore, a more plausible reading of *Annis* is that a claim for emotional distress will be insufficient as a matter of law only where the record is *devoid* of any evidence of physical manifestation of harm. Although the Second Circuit did not expressly use this language, it is a more reasonable interpretation of *Annis*, is consistent with the few reported cases interpreting *Annis* for the sufficiency of plaintiff's evidence of emotional distress,[150] and the numerous decisions rendered prior to *Annis* which upheld verdicts for emotional distress supported by evidence of harm far less substantial than was deemed sufficient to support an award for distress by the Second Circuit in *Carrero*.[151]

For instance, in *Mahoney v. Canada Dry Bottling Co.*,[152] the district court rejected the defendant's argument that Mahoney's claim for distress was based on insufficient evidence in light of *Annis*.[153] The district court rejected this argument and distinguished *Annis* by finding that Mahoney's evidence was sufficient because he had suffered sleepless nights for at least two months.[154] While Mahoney's loss of sleep may have

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[149] *Annis*, 136 F.3d at 242.

[150] *See* Mahoney v. Canada Dry Bottling Co., No. 94-CV-2924, 1998 WL 231082 (E.D.N.Y. May 7, 1998) (distinguishing *Annis* to uphold $35,000 emotional distress award; unlike the plaintiff in *Annis*, plaintiff presented minimal evidence of physical manifestations of harm, including loss of self-esteem and sleep); *cf.* Ortiz-Del Valle v. NBA, 42 F. Supp. 2d 334, 341 n.9 (S.D.N.Y. 1999) (applying *Annis* to dismiss $750,000 emotional distress award under Title VII in gender discrimination suit where plaintiff had testified that she felt ignored and that her "dreams and goals were crushed"; like the plaintiff in *Annis*, plaintiff failed to present any evidence of physical manifestations of harm).

[151] *See, e.g.*, Miner v. City of Glens Falls, 999 F.2d 655 (2d Cir. 1993); Cowan v. Prudential Ins. Co., 852 F.2d 688 (2d Cir. 1988); Binder v. Long Island Lighting Co., 847 F. Supp. 1007 (E.D.N.Y. 1994), *aff'd*, 57 F.2d 193 (2d Cir. 1995).

[152] No. 94 Civ. 2924, 1998 WL 231082 (E.D.N.Y. May 7, 1998).

[153] *See id.* at *5.

[154] *See id.*

been considered a "physical manifestation" of his harm, which had been lacking in Annis, Mahoney's only other evidence of emotional harm consisted of his feelings of disappointment and embarrasment[155] and, therefore, was just as sparse as the evidence presented in *Annis*.

Similarly, in another case decided after *Annis*, *Ortiz-Del Valle v. National Basketball Ass'n*,[156] the district court applied *Annis* to dismiss plaintiff's emotional distress claim, finding that plaintiff was not entitled to any compensatory damages.[157] In *Ortiz-Del Valle*, the National Basketball Association ("NBA") was found to have discriminated against a female basketball referee in violation of Title VII and the HRL when it refused to hire her because of her gender.[158] The jury awarded Ortiz-Del Valle $850,000 in compensatory damages, including $750,000 for emotional distress.[159] The NBA, relying on *Annis*, moved the court for judgment as a matter of law that Ortiz-Del Valle was not entitled to any compensatory damages.[160] Defendants argued that the award "[was] based solely on plaintiff's self-serving testimony that she felt ignored, that her 'dreams and goals were crushed.'"[161] The district court agreed that this testimony was clearly insufficient evidence to support a finding that plaintiff suffered from concrete emotional problems, noting that "in this case, as in *Annis*, the only evidence of plaintiff's emotional distress was her own testimony."[162] The court noted that Ortiz-Del Valle, like Annis, offered no testimony about any physical manifestation

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[155] *See id.*

[156] 42 F. Supp. 2d 334 (S.D.N.Y. 1999).

[157] *See id.* at 341. It should be noted that while the *Ortiz-Del Valle* court held plaintiff was not entitled to damages for emotional distress under Title VII, pursuant to the *Annis* decision, the court found that plaintiff's evidence was sufficient to support a $20,000 award for her emotional distress on her HRL claim. *See id.* at 342. The *Ortiz-Del Valle* court appears to be the first to draw such a distinction, thereby suggesting that the federal standard for proof of emotional harm is more stringent than the standard applied by the state courts. Notably, the *Ortiz-Del Valle* court cites no authority in support of its distinction.

[158] *See id.* at 336.

[159] *See id.*

[160] *See Ortiz-Del Valle*, 42 F. Supp. 2d at 341.

[161] *Id.*

[162] *Id.*

of her emotional damage, nor did she offer any evidence that she needed or has undergone any psychiatric treatment.[163]

Therefore, it appears that in the wake of *Annis*, as long as a plaintiff's claim is not based solely on his or her subjective feelings and if the plaintiff describes some physical manifestations of emotional distress, however slight or transient, plaintiff will survive a motion for judgment as a matter of law.

Where the jury accepts the plaintiff's proof of emotional distress and renders an award for pain and suffering, defendants may, pursuant to Federal Rules of Civil Procedure 50 and 59, move to reverse or vacate the verdict, respectively, on the grounds that the verdict was not supported by sufficient evidence of harm.[164] Defendants moving for judgment as a matter of law ("JMOL")[165] under Rule 50 bear a heavy burden.[166] When deciding such motions, the court cannot weigh the evidence, pass on the credibility of witnesses, or substitute its judgment of the facts for that of a jury.[167] The court must also construe the evidence in the light most favorable to the plaintiff, and must give considerable deference to the jury's determinations.[168] JMOL may only be properly granted where either:

> (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair-minded [persons] could not arrive at a verdict against [it].[169]

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[163] *See id.*

[164] *See id.* at 334-44.

[165] Rule 50(2)(1) of the Federal Rules of Civil Procedure reads:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim . . . that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

FED. R. CIV. P. 50(2)(1).

[166] *See* Luciano v. Olsten Corp., 912 F. Supp. 663, 667 (E.D.N.Y. 1996), *aff'd*, 110 F.3d 210 (2d Cir. 1997).

[167] *See* Weldy v. Piedmont Airlines, Inc., 985 F.2d 57, 59-60 (2d Cir. 1993).

[168] *See* Scala v. Moore McCormack Lines, Inc. 985 F.2d 680 (2d Cir. 1993).

[169] Carter v. Rosenberg & Estis, P.C., No. 95 Civ. 10439, 1998 WL 150491, at *4 (S.D.N.Y. Mar. 31, 1998) (citations omitted).

Finally, district courts have been cautioned to be mindful that motions pursuant to Rule 50 should be "sparingly granted."[170]

Similarly, employers moving simultaneously under Rule 59 for a new trial on grounds that the jury's verdict was "against the weight of the evidence,"[171] a "seriously erroneous result,"[172] or a "miscarriage of justice"[173] are not likely to have a higher success rate. Although under Rule 59, the district court is free to weigh the evidence, need not view the evidence in the light most favorable to the plaintiff,[174] and may order a new trial even if there is "substantial" evidence to support the jury verdict,[175] the court must not set aside the verdict and grant a new trial on liability where the resolution of the issues depends on the assessment of the credibility of the witnesses.[176] In light of these stringent standards, the high subjectivity of plaintiff's proof, the fact that such claims often turn on the credibility of the witnesses, and the minimal amount of evidence that will sustain the jury's verdict, it is not surprising that defendants are often unsuccessful on these motions.[177]

Therefore, once a discrimination plaintiff alleges emotional distress, he or she will likely reach the jury, and if he or she presents minimal evidence of harm, it is unlikely that the defendant will be successful in challenging the verdict. Where a jury awards a plaintiff a substantial sum for emotional distress, the playing field is somewhat leveled, however, by the defendants' ability to move under Rule 59 for a new trial on damages and for remittitur on the ground that the damages

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[170] *Weldy*, 985 F.2d at 59 (citations omitted).

[171] Mahoney v. Canada Dry Bottling Co., No. 94 Civ. 2924, 1998 WL 231082, at *4 (E.D.N.Y. May 7, 1998).

[172] U.S. East Telecomm., Inc. v. U.S. West Communications Servs., Inc., 38 F.3d 1289, 1301 (2d Cir. 1994); Piesco v. Koch, 12 F.3d 332, 344 (2d Cir. 1993).

[173] Sorlocco v. New York City Police Dep't, 971 F.2d 864, 875 (2d Cir. 1992); Broome v. Biondi, 17 F. Supp. 2d 211, 222 (S.D.N.Y. 1997); *Carter*, 1998 WL 150491, at *4.

[174] *See* Song v. Ives Labs., Inc. 957 F.2d 1041, 1047 (2d Cir. 1992).

[175] *See id.*

[176] *See Piesco*, 12 F.3d at 345.

[177] *See, e.g.*, Funk v. F & K Supply, Inc., 43 F. Supp. 2d. 205, 223-24 (N.D.N.Y. 1999); Bick v. City of New York, No. 95 Civ. 8781, 1998 WL 190283, at *20 (S.D.N.Y. Apr. 21, 1998); Perdue v. City Univ., 13 F. Supp. 2d 326, 337 (E.D.N.Y. 1998); Zerilli v. New York City Transit Auth., 973 F. Supp. 311, 323-24 (E.D.N.Y. 1997).

are excessive. This is the defendant-employer's last chance to escape a substantial award for plaintiff's distress.

III. REMITTITUR AND REMITTED DAMAGE AWARDS: A SURVEY OF THE SECOND CIRCUIT'S VALUATION OF EMOTIONAL DISTRESS CLAIMS IN EMPLOYMENT CASES

The legal principles that federal courts apply in determining whether a defendant is entitled to a remittitur of a damage award have resulted in the emergence of a spectrum of emotional distress claims and corresponding damage awards in the Second Circuit. This Part explains the rules courts follow in determining whether to remit a damage award and then it sets forth the various categories along the spectrum to provide litigants with a reasonable gauge for measuring the strength of a particular plaintiff's emotional distress claim.

A. *Rule 59 Motion for New Trial on Damages and Remittitur*

Federal Rule of Civil Procedure 59(a) provides:

> A new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.[178]

An excessive damage award is one of the grounds which warrants a new trial under Rule 59.[179] The determination of whether a verdict is excessive is committed to the discretion of the trial court.[180] If the court determines that a verdict is excessive, it cannot simply reduce the award accordingly.[181] In-

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[178] FED. R. CIV. P. 59(a).

[179] *See* Tanzini v. Marine Midland Bank, N.A., 978 F. Supp. 70, 77 (N.D.N.Y. 1997) ("If a district court finds a verdict is excessive, it may order a new trial . . . .") (citing Tingley Sys., Inc. v. Norse Sys., Inc., 49 F.3d 93, 96 (2d Cir. 1995)). Courts may also grant a new trial, for example, where the verdict is a miscarriage of justice, *see* Atkins v. New York City, 143 F.3d 100, 102 (2d Cir. 1998), or where the jury was not adequately instructed on issues essential to the case. *See* Hilord Chem. Corp. v. Ricoh Elecs., Inc., 875 F.2d 32, 37-38 (2d Cir. 1989).

[180] *See* U.S East Telecomm., Inc. v. U.S. West Telecomm. Servs., Inc., 38 F.3d 1289, 1301 (2d Cir. 1994); Connolly v. Bidermann Indus. U.S.A., Inc., No. 95 Civ. 1791, 1999 WL 504908, at *5 (S.D.N.Y. July 15, 1999).

[181] *See* Lightfoot v. Union Carbide Corp., 110 F.3d 898, 914-15 (2d Cir. 1997)

stead, the court may either order a new trial on liability or damages, or under the practice of remittitur, it may condition the denial of a motion of a new trial on the plaintiff's acceptance of a reduced damage award.[182] "Remittitur" is simply "'the process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial'" on damages.[183]

Before a court orders a plaintiff to choose a remitted award or a new trial, it must first determine whether the verdict is excessive. Although it is well-settled that juries have a great amount of discretion in deciding whether to award damages[184] and that the calculation of damages on a given claim is properly within the jury's province,[185] it is equally well-settled that there is "an upper limit [on damages on a given claim,] and whether that has been surpassed is not a question of fact with respect to which reasonable [persons] may differ, but a question of law."[186] Furthermore, while courts pay deference to a jury's broad discretion to award damages, a jury cannot "abandon analysis for sympathy for a suffering plaintiff and treat an injury as though it were a winning lottery ticket."[187] A court will not permit a verdict to stand if it appears

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(trial court's reduction of jury award without offering plaintiff option of new trial on damages constituted a denial of plaintiff's constitutional right to a jury trial and was error).

[182] *See* Lee v. Edwards, 101 F.3d 805, 808 (2d Cir. 1996); Tingley Sys., Inc. v. Norse Sys., Inc., 49 F.3d 93, 96 (2d Cir. 1995).

[183] Earl v. Bouchard Transp. Co., 917 F.2d 1320, 1328 (2d Cir. 1990) (citation omitted); Broome v. Biondi, 17 F. Supp. 2d 211, 223 (S.D.N.Y. 1997) (citations omitted); Kim v. Dial Serv. Int'l, Inc., No. 96 Civ. 3327, 1997 WL 458783, at *4 (S.D.N.Y. Aug. 11, 1997) (citations omitted).

[184] *See* Bick v. City of New York, No. 95 Civ. 8781, 1998 WL 190283, at *20 (S.D.N.Y. Apr. 21, 1998).

[185] *See* Ismail v. Cohen, 899 F.2d 183, 186 (2d Cir. 1990); Carter v. Rosenberg & Estis, P.C., No. 95 Civ. 10439, 1998 WL 150491, at *4 (S.D.N.Y. Mar. 31, 1998); Kim, 1997 WL 458783, at *6.

[186] *Kim*, 1997 WL 458783, at *6; Mazyck v. L.I.R.R., 896 F. Supp. 1330, 1336 (E.D.N.Y. 1995) (quoting Dagnello v. L.I.R.R., 289 F.2d 797, 806 (2d Cir. 1961)).

[187] Scala v. Moore McCormack Lines, Inc., 985 F.2d 680, 684 (2d Cir. 1993) (citations omitted).

to be "motivated by passion or prejudice rather than a reasoned assessment of the evidence of injury presented at trial"[188] or if it represents a windfall to the plaintiff without regard for the actual injury.[189]

The standard that federal courts apply to determine whether an award is excessive depends on whether the plaintiff has been awarded damages on a federal or HRL discrimination claim.[190] When assessing awards rendered pursuant to federal law, the court will find a verdict excessive if it "shocks the judicial conscience."[191] Where the award is rendered pursuant to the HRL, the federal court will apply the New York standard, under which an award of damages is excessive if it "deviates materially from what would be reasonable compensation."[192]

To determine whether a particular jury award shocks the judicial conscience or materially deviates from other awards, trial courts are guided by emotional distress damage awards rendered in "similar cases,"[193] paying attention to the particular facts and circumstances of the other cases and comparing them to the current case.[194] Because the Second Circuit has held that a court should not limit its review of other awards to cases involving the same cause of action,[195] the term "similar

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[188] *Bick*, 1998 WL 190283, at *20 (internal quotations omitted) (citing Ramirez v. New York City Off-Track Betting Corp., 112 F.3d 38, 40 (2d Cir. 1997)).

[189] *See Carter*, 1998 WL 150491, at *5.

[190] *See Bick*, 1998 WL 190283, at *21 (citing Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 436 (1996)).

[191] *Scala*, 985 F.2d at 680. In diversity cases, a federal court must apply New York law to determine the excessiveness of a damage award. *See Gasperini*, 518 U.S. at 431. Furthermore, where federal courts consider the excessiveness of damages rendered pursuant to the HRL, federal courts look to remitted awards in both federal and New York cases interpreting the HRL. *See, e.g.*, Trivedi v. Cooper, 95 Civ. 2075, 1996 WL 724743, at *6 n.2 (S.D.N.Y. Dec. 17, 1996); Shea v. Icelandair, 925 F. Supp. 1014, 1025-28 (S.D.N.Y. 1996). Under New York law, the standard applied by the court to determine excessiveness is whether the award "deviates materially from what would be reasonable compensation." N.Y. C.P.L.R. § 5501(c) (McKinney 1995). The New York standard is less deferential to the jury's verdict than the federal standard. *See* Consorti v. Armstrong World Indus., 72 F.3d 1003, 1011 (2d Cir. 1995).

[192] N.Y. C.P.L.R. § 5501(c); *see Shea*, 925 F. Supp at 1021.

[193] Lee v. Edwards, 101 F.3d 805, 812 (2d Cir. 1996); Ismail v. Cohen, 899 F.2d 183, 186 (2d Cir. 1990).

[194] *See Scala*, 985 F.2d at 684.

[195] *See Ismail*, 899 F.2d at 186.

cases" appears to refer to the quality of the plaintiff's proof and not similar discriminatory conduct. Courts have also been cautioned against determining whether a verdict is excessive by "[balancing] the number of high and low awards and [rejecting] the verdict in the instant case if the number of lower awards is greater" to determine excessiveness.[196]

Where the damage award shocks the judicial conscience or materially deviates from what would be reasonable compensation, the trial court must then remit the award to the maximum amount that would not be excessive.[197] If a plaintiff agrees to accept remittitur he is ordinarily precluded from challenging it on appeal.

B. *Remittitur of Emotional Distress Claims in the Second Circuit*[198]

1. Generally

A review of recent case law in the Second Circuit reveals that, as a result of the federal courts' practice of looking to each other for guidance to determine whether an emotional distress award is excessive and to determine the amount to which an award should be remitted, a "spectrum" or "continuum" of emotional distress claims has emerged. This spectrum reflects the range of remitted damage awards based on particular quantums of harm and the manner by which the plaintiff presents his or her evidence of harm. The existence of this continuum, which ranges from "garden-variety" emotional

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[196] *Id.* at 187.

[197] *See* Pescatore v. Pan Amercian World Airways, 97 F.3d 1, 18 (2d Cir. 1996) (in federal question cases, the district court has the discretion to find an award excessive if it "'shock[s] the judicial conscience'") (alteration in original) (citations omitted); Earl v. Bouchard Transp. Co., 917 F.2d 1320, 1330 (2d Cir. 1990); Kim v. Dial Serv. Int'l, No. 96 Civ. 3327, 1997 WL 458783, at *5 (S.D.N.Y. Aug. 11, 1997), *aff'd*, 159 F.3d 1347 (2d Cir. 1998), *cert denied*, 119 S. Ct. 1030 (1999).

[198] Gardner v. Federated Dep't Stores, 907 F.2d 1348, 1354 (2d Cir. 1990). Statistics reflecting how often plaintiffs have accepted a remitted award rather than electing to proceed with a new trial would require conducting a case-by-case analysis of the docket. While these statistics would be interesting, this data is not necessary for the narrow purpose of this Article, which is to provide litigants with an understanding of what a federal court may determine a particular emotional distress claim is worth at the conclusion of the trial so that litigants can estimate the value of such claims prior to undertaking the task of preparing for trial.

distress claims on one end of the continuum to "egregious" distress claims on the other, has been acknowledged and applied by a number of federal district courts in this circuit to resolve motions for remittitur.[199] A review of the case law further reveals that federal courts routinely rely on a number of "benchmark" cases to evaluate the quality of proof and the value of the emotional distress award challenged. This Section presents the spectrum by discussing those cases repeatedly relied upon by federal courts in the Second Circuit to resolve these motions. It is designed to provide litigants with insight into the various ranges of damages the courts have created through the tool of remittitur. This section analyzes and discusses each case with respect to the statutory basis for the discriminatory claim, the evidence of harm presented by plaintiff at trial, the damages awarded by the jury for emotional distress, the court's valuation of plaintiff's harm and the remitted emotional distress award. However, for the reader's convenience, Table 2 at the end of this Article summarizes this information in a chart so that this continuum can be applied in a practical manner by litigants and by courts conducting settlement conferences to evaluate a particular distress claim.[200]

2. The Damage Award Continuum

At the low end of the continuum are what have become known as "garden-variety" distress claims in which district courts have awarded damages for emotional distress ranging from $5,000 to $35,000. "Garden-variety" remitted awards have typically been rendered in cases where the evidence of harm was presented primarily through the testimony of the plaintiff, who describes his or her distress in vague or conclusory terms and fails to describe the severity or consequences of the injury.[201] For purposes of this Article, the garden-variety claims

[199] Bick v. City of New York, No. 95 Civ. 8781, 1998 WL 190283, at *26 (S.D.N.Y. Apr. 21, 1998); *Kim*, 1997 WL 458783, at *12-*14; Shea v. Icelandair, 925 F. Supp. 1014, 1027 (S.D.N.Y. 1996); McIntosh v. Irving Trust Co., 887 F. Supp. 662, 666-68 (S.D.N.Y. 1995).

[200] *See* Appendix, Table 2.

[201] *See Bick*, 1998 WL 190283, at *25.

have been divided into low-end garden-variety claims ($5,000-$15,000 awards) and high-end garden-variety claims ($20,000-$35,000).

The middle of the spectrum consists of "significant" ($50,000 up to $100,000) and "substantial" emotional distress claims ($100,000). These claims differ from the garden-variety claims in that they are based on more substantial harm or more offensive conduct, are sometimes supported by medical testimony or evidence, evidence of treatment by a healthcare professional and/or medication, and testimony from other, corroborating witnesses.

Finally, on the high end of the spectrum are "egregious" emotional distress claims, where the courts have upheld or remitted awards for distress to a sum in excess of $100,000. These awards have only been warranted where the discriminatory conduct was outrageous and shocking or where the physical health of plaintiff was significantly affected.

a. *Low-End "Garden-Variety" Distress Claims*

At the low end of the continuum are emotional distress claims supported by evidence consisting primarily of plaintiff's vague, conclusory testimony of distress, including feelings of disappointment, shock, devastation, and anger. The cases that fall into this category and are frequently relied on to establish this end of the continuum include: *Binder v. Long Island Lighting Co.*,[202] *Luciano v. Olsten Corp.*,[203] *Miner v. City of Glens Falls*,[204] *Cowan v. Prudential Insurance Co. of America*,[205] *Borja-Fierro v. Girozentrale Vienna Bank*,[206] and *Carter v. Rosenberg & Estis, P.C.*[207] In these cases, courts have awarded damages ranging from $5,000 to $15,000.

While the federal courts resolving remittitur motions have also relied on a number of standard New York state court cases reducing emotional distress awards, this discussion fo-

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[202] 847 F. Supp. 1007, 1028 (E.D.N.Y. 1994), *aff'd in part, rev'd in part*, 57 F.3d 193 (2d Cir. 1995).

[203] 912 F. Supp. 663 (E.D.N.Y. 1996), *aff'd*, 110 F.3d 210 (2d Cir. 1997).

[204] 999 F.2d 655 (2d Cir. 1993).

[205] 852 F.2d 688 (2d Cir. 1988).

[206] No. 91 Civ. 8743, 1994 WL 240360 (S.D.N.Y. May 27, 1994).

[207] No. 95 Civ. 10439, 1998 WL 150491 (S.D.N.Y. Mar. 31, 1998).

cuses only on the federal cases because state decisions are typically devoid of any explanation as to the nature and extent of the emotional distress, the evidence of harm presented at trial to support the claim of distress, or the courts' reasoning in remitting the damages awards.[208]

In *Binder v. Long Island Lighting Co.*,[209] an age discrimination suit brought under the ADEA and the HRL by an engineer, the Second Circuit affirmed the district court's remittitur of a $498,000 jury award for emotional distress to $5,000.[210] Plaintiff, who was 58 years old and who had worked for Long Island Lighting Company ("LILCO") for over 30 years at the time he was terminated, prevailed on his claim that the defendant had wrongfully terminated him because of his age and had refused to find him similar employment within the company while other positions were given to younger employees.[211] Plaintiff's testimony was the only evidence presented in support of his emotional distress claim and was limited to feelings of isolation and inadequacy.[212] Plaintiff testified that "'it was difficult to get started,'" that he "'couldn't make ends meet,'" that his emotional distress stemmed from his "'inability to support [his] family,'" and that he "'was completely alone.'"[213] Plaintiff further testified that he "'resented the fact that [he]

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[208] *See, e.g.*, Quality Care, Inc. v. Rosa, 194 A.D.2d 610, 611, 599 N.Y.S.2d 65, 66 (2d Dep't 1993) (plaintiff testified that she was "'shock[ed],'" "'devastated,'" "felt bad," and "'in a real pickle,'" but absent any testimony regarding the duration, severity of consequences of plaintiff's condition, or evidence of any medical treatment, award of $10,000 was reduced to an award not to exceed $5,000) (alteration in original); New York State Office of Mental Retardation and Developmental Disabilities v. New York State Div. of Human Rights, 183 A.D.2d 943, 583 N.Y.S.2d 580 (3d Dep't 1992) (reducing award from $75,000 to $7,500); New York City Transit Auth. v. State Div. of Human Rights, 160 A.D.2d 874, 554 N.Y.S.2d 308, *amended by* 560 N.Y.S.2d 880 (2d Dep't 1990) (reducing award from $75,000 to $5,000); Empbanque Capital Corp. v. White, 158 A.D.2d 686, 551 N.Y.S.2d 957 (2d Dep't 1990) (reducing award from $35,000 to $5,000); Cosmos Forms, Ltd v. State Div. of Human Rights, 150 A.D.2d 442, 442, 541 N.Y.S.2d 50, 51 (2d Dep't 1989) (where plaintiff testified to feeling "'[e]motionally and physically screwed up,'" the court reduced the jury's award of $35,000 to $5,000).

[209] Binder v. Long Island Lighting Co., 847 F. Supp. 1007 (E.D.N.Y. 1994), *aff'd in part, rev'd in part*, 57 F.3d 193 (2d Cir. 1995).

[210] *See id.* at 1009.

[211] *See id.*

[212] *See id.* at 1028.

[213] *Id.*

was pushed out.'"[214] Plaintiff failed to describe any physical manifestations of harm.[215] The district court held that the award, based solely on the plaintiff's own limited testimony of emotional distress, was "grossly excessive" and reduced the award to $5,000.[216]

In *Miner v. City of Glens Falls*,[217] the Second Circuit upheld the district court's determination that a slightly higher award than that rendered in *Binder* was appropriate.[218] In *Miner*, the district court found that a $12,500 award in a § 1983 suit was not excessive for a police officer who was terminated without due process after "forming a religious scruple against carrying a firearm."[219] After awarding plaintiff summary judgment, the district court had held a two-day damage trial and awarded Miner $12,500 for his distress. Defendant appealed, arguing that only nominal damages should have been awarded.[220]

At the trial on damages, Miner and his wife testified about the nature and extent of his actual injuries.[221] Miner testified that he experienced feelings of inadequacy as a result of being unable to provide for his family, embarrassment while applying for public assistance in the presence of people who knew he had been a police officer, and stress caused by having to sell his newly purchased house.[222] Miner had also stated that he had considered committing suicide because he felt "totally exasperated with the situation."[223] Miner's wife testified about the effects of the job loss on the family's relationship and how his termination had caused tension between them.[224] The defendants presented no evidence at the damage trial.[225]

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[214] *Binder*, 847 F. Supp. at 1028.

[215] *See id.* In light of the Second Circuit's decision in *Annis v. County of Westchester*, 136 F.3d 239, 251 (2d Cir. 1998), it is unlikely that the evidence Binder presented to establish his distress would now be sufficient to withstand a judgment as a matter of law. *See supra* notes 133-164 and accompanying text.

[216] *See Binder*, 847 F. Supp. at 1028.

[217] 999 F.2d 655 (2d Cir. 1993).

[218] *Id.* at 662-63.

[219] *Id.* at 663.

[220] *See id.* at 662.

[221] *See id.* at 659, 662.

[222] *See Miner*, 999 F.2d at 662.

[223] *Id.*

[224] *See id.*

[225] *See id.* at 659.

On appeal, based on this evidence, the Second Circuit held that, except for Miner's thoughts of suicide, the anguish Miner had described had some objective correlation with events described by him and his wife,[226] and concluded that the district court's award of $12,500 was consistent with the magnitude of Miner's subjective injuries.[227]

A similar award was upheld in *Luciano v. Olsten Corp.*,[228] in which plaintiff, a successful executive, prevailed on her claims under Title VII and the HRL that her employer discriminated against her on the basis of her gender when she was both denied a promised promotion to vice-president and fired.[229] Luciano was awarded $11,400 for her emotional distress.[230] The defendant moved to remit the award to $5,000 and, relying principally on *Binder*, argued that the plaintiff's "garden-variety claim" could not exceed $5,000.[231] The district court, rejecting this argument, distinguished *Binder* by finding that Luciano had presented adequate evidence to support the jury's award of $11,400 for emotional distress.[232] Although the only evidence of Luciano's harm consisted of her testimony that she felt "hurt, shocked, upset, and overcome with sadness," Luciano also testified that she experienced a number of ordinary physical manifestations of harm.[233] Specifically, "she cried, worried about finances, had trouble sleeping and eating, and felt purposeless."[234] The *Luciano* court not only refused to reduce the $11,400 award, finding the evidentiary basis adequate, but it also opined that the evidence presented could have supported a damage award higher than $11,400.[235]

There are three reported decisions, spanning a little more than a decade, in which courts have held that a $15,000 emotional distress award is appropriate. In *Cowan v. Prudential Insurance Co. of America*,[236] an African-American insurance

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[226] *See id.* at 663.
[227] *See Miner*, 999 F.2d at 663.
[228] 912 F. Supp. 663 (E.D.N.Y.1996), *aff'd*, 110 F.3d 210 (2d Cir. 1997).
[229] *See id.* at 666-67.
[230] *Id.* at 667.
[231] *Id.* at 673.
[232] *See id.*
[233] *Luciano*, 912 F. Supp. at 673-74.
[234] *Id.*
[235] *See id.* at 673.
[236] 852 F.2d 688 (2d Cir. 1988).

agent was passed over for promotion several times in favor of caucasian employees and was ultimately fired. Cowan prevailed on his race discrimination claims under Title VII and § 1981 and was awarded $15,000 for his emotional distress.[237] The Second Circuit affirmed the award based on Cowan's testimony that his employer's failure to promote him caused him severe emotional distress, humiliation, and loss of self-esteem.[238] He further testified that his distress had caused his home life to suffer, spurred "serious disagreements" with his wife, and caused him to begin "drinking heavily."[239] Cowan's testimony was corroborated by his co-workers and his wife.[240] The district court determined that a $15,000 award was appropriate, finding that Cowan had caused some of his own humiliation and difficulties with co-workers and that he had declined to seek counseling.[241]

In *Borja-Fierro v. Girozentrale Vienna Bank*,[242] although the district court held that plaintiff had been harassed based on his race and national origin and had been fired in retaliation for complaining, the court remitted the jury's $180,000 award for emotional distress to $15,000.[243] Borja-Fierro was the only witness that had testified about his emotional distress.[244] The district court noted that Borja-Fierro's testimony had been "brief," "not particularly strong," and contained only a single reference to a visit to a psychologist.[245] Borja-Fierro also testified that his distress resulted from a combination of the problem he had at his job and a prior car accident.[246] The district court characterized his testimony as "vague and conclusory" and, after reviewing many state and federal court decisions, could find no award in a similar case which awarded more than $15,000 for similar evidence of harm.[247]

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[237] *See id.* at 689.
[238] *See id.* at 690.
[239] *Id.*
[240] *See id.*
[241] *See Cowan*, 852 F.2d at 690-91.
[242] No. 91 Civ. 8743, 1994 WL 240360 (S.D.N.Y. May 27, 1994).
[243] *See id.* at *2, *4.
[244] *See id.* at *3.
[245] *Id.*
[246] *See id.*
[247] *Borja-Fierro*, 1994 WL 240360, at *4.

Most recently, in *Carter v. Rosenberg & Estis, P.C.*,[248] the Southern District of New York reduced a $175,000 award to $15,000 where the plaintiff prevailed on a hostile work environment claim under Title VII but had presented only minimal evidence of harm.[249] Carter had testified that after she was terminated, she was ultimately forced to move out of her apartment and to sell, give away, or place in storage many of her possessions, including her furniture and her son's toys.[250] Money was "[v]ery tight" during this period and she "could not afford to maintain the apartment and [her] life . . . on unemployment."[251] The court noted that Carter's testimony—with two exceptions discussed below—comprised the only testimony of her emotional distress.[252] The sum total of that testimony was Carter's affirmation that she was "very upset," "a mess," and experienced a lot of "uncontrollable crying."[253] Carter further testified that she participated in weekly treatment sessions for approximately one year with "a sexual harassment expert."[254] Carter offered no testimony, however, as to the emotions she experienced while attending the group sessions, or whether they had any beneficial impact on her mental state.[255]

Carter's statements regarding her physical condition made clear that the physical manifestations she suffered were "minimal, if any."[256] Specifically, she claimed that she felt "very tired," had undergone blood tests, and vomited on two or three occasions.[257] Also, two days before she was fired, Carter felt physically ill due in part to a pulled back muscle.[258] Although she claimed that her "chest constricted" and she thought that she was having a heart attack, the court found there was no

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[248] No. 95 Civ. 10439, 1998 WL 150491 (S.D.N.Y. Mar. 31, 1998).
[249] *See id.* at *23-*25
[250] *See id.* at *19.
[251] *Id.*
[252] *See id.* at *20.
[253] *Carter*, 1998 WL 150491, at *20.
[254] *Id.*
[255] *See id.*
[256] *Id.*
[257] *Id.*
[258] *See Carter*, 1998 WL 150491, at *20.

indication in the record that Carter's "chest constriction" was in any way related to her termination, which had occurred some five months earlier.[259]

The district court also discredited the testimony of the social worker and physician that testified on Carter's behalf.[260] The social worker's testimony consisted of her observations of minimal harm couched in vague terms.[261] She testified that in group sessions Carter appeared "very anxious," "tearful at times," "very fidgety and hyper," "very sad," and "very angry."[262] There had also been "a deterioration in Ms. Carter's appearance" because "she became disheveled" and had skin problems.[263] The testimony of Carter's medical expert, a professor of counseling psychology at New York University, was also vague. The physician, who had interviewed Carter for only six hours more than a year-and-a-half after the alleged discrimination occurred, testified only that Carter was "very, very concerned and upset over her firing," that she was "extremely stressed," and that he thought that the experience had been "emotionally upsetting to her."[264]

According to the district court, Carter presented neither the quality nor quantity of evidence to support a $75,000 award.[265] The district court, relying on *Binder*, *Miner*, *Cowan*, and *Luciano* held that the $75,000 award shocked the judicial conscience.[266] The *Carter* court specifically noted that, as in many of the cases, the award here was based almost entirely on the testimony of the plaintiff alone.[267] The court further noted that the difficulty for Carter was that, absent further corroborating testimony regarding her mental anguish, her own limited statements on this subject were entirely insufficient to support the damage award because she gave no indication, or at least gave altogether inadequate detail, as to the magnitude, duration, or severity of her mental anguish.[268]

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[259] *Id.*
[260] *See id.*
[261] *See id.*
[262] *Id.*
[263] *Carter*, 1998 WL 150491, at *20.
[264] *Id.*
[265] *See id.* at *21.
[266] *See id.* at *21-*23.
[267] *See id.* at *23.
[268] *See Carter*, 1998 WL 150491, at *23.

The court characterized Carter's testimony as alluding only to "extremely minor perceived physical ailments (often proven unfounded)" that could have been related to either her termination or her mental distress from that event.[269] Most importantly,

> Carter offered no testimony that she suffered any of the sorts of serious mental and physical injuries—such as suicidal ideations, heavy drinking, deteriorating family relations, increased blood pressure, and difficulty sleeping—that afflicted the plaintiffs in the preceding cases, and which in any event supported only far smaller awards.[270]

Therefore, finding that Carter "lack[ed] substantial, specific, and corroborated evidence of the magnitude and duration of [her] mental anguish," the district court concluded that the jury must have been "forced to speculate in awarding [her] compensatory damages"[271] and reduced the award to $15,000.[272]

These cases indicate that where the evidence of plaintiff's emotional harm is limited to plaintiff's testimony, consisting primarily of descriptions of personal feelings, and where there are minimal manifestations of harm, such as crying, loss of sleep and appetite, and family tensions, plaintiffs are likely to have their emotional distress damage awards reduced to an approximate sum of $15,000.

b. *High-End "Garden-Variety" Distress Claims*

The emotional distress claims and awards that fall into the high-end "garden-variety" category tend to be claims supported by evidence very similar to the cases discussed above. However, the plaintiff's distress is usually corroborated by other witnesses and the physical manifestations of harm are slightly more significant. This category can be defined by four

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[269] *Id.*

[270] *Id.* (citing Cowan v. Prudential Ins. Co., 852 F.2d 688, 690 (2d Cir. 1988); Luciano v. Olsten Corp., 912 F. Supp. 663, 673-74 (E.D.N.Y. 1996), *aff'd*, 110 F.3d 210 (2d Cir. 1997); McIntosh v. Irving Trust Co., 887 F. Supp. 662, 664 (S.D.N.Y. 1995); Manhattan & Bronx Surface Transit Operating Auth., 220 A.D.2d 668, 669, 632 N.Y.S.2d 642, 644 (2d Dep't 1995)).

[271] *Carter*, 1998 WL 150491, at *23.

[272] *See id.* at *25.

cases, namely, *McIntosh v. Irving Trust Co.*,[273] *Kim v. Dial Service International Inc.*,[274] *Funk v. F & K Supply, Inc.*,[275] and *Mahoney v. Canada Dry Bottling Co.*[276]

In *McIntosh v. Irving Trust Co.*,[277] an African-American plaintiff prevailed on claims under Title VII, § 1981, and the HRL, charging that his employer discriminated against him based on his race when it failed to promote him and terminated him in retaliation for complaining about the alleged discriminatory treatment.[278] Plaintiff was awarded $219,428.00 by the jury for emotional distress.[279] The only evidence presented at trial regarding McIntosh's emotional injury was his testimony, which consisted of his "highly subjective" feelings.[280] Specifically, plaintiff testified he felt "humiliated" during a meeting where he was "interrogated" by a supervisor in an "accusatory manner" and that he felt "shocked" and "angry" when he was reprimanded for reasons he believed were unwarranted.[281] Plaintiff also "felt like dirt," was "embarrassed," and "felt terrible" when he was required to have daily meetings with his supervisor in front of his entire department.[282] McIntosh also complained of weakness in his legs, stomach cramps, and chest pains.[283] He stayed home from work for a few days and felt mentally "beaten down."[284] Finally, plaintiff testified that he felt so ashamed that he avoided holidays with his family, felt inadequate because his wife had to support him, and visited a doctor once while still employed.[285]

After noting that McIntosh did not testify that his life activities were curtailed in any way and that he did not present evidence of psychological help, the court concluded that

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[273] 887 F. Supp. 662, 664 (S.D.N.Y. 1995).
[274] No. 96 Civ. 3327, 1997 WL 458783 (S.D.N.Y. Aug. 11, 1997).
[275] 43 F. Supp. 2d 205 (N.D.N.Y. 1999).
[276] No. 94-CV-2924, 1998 WL 231082 (E.D.N.Y. May 7, 1998).
[277] 887 F. Supp. 662, 664 (S.D.N.Y. 1995).
[278] *See id.* at 663.
[279] *See id.*
[280] *Id.* at 664.
[281] *Id.*
[282] *McIntosh*, 887 F. Supp. at 664.
[283] *See id.*
[284] *Id.*
[285] *See id.*

plaintiff's evidence of emotional injury was "sparse" and that the jury had been forced to speculate in awarding damages.[286] The court, characterizing plaintiff's testimony as "conclusory,"[287] and describing his physical manifestations of harm as "short-lived," held that McIntosh's distress was similar to cases where compensatory damages were reduced substantially.[288] Accordingly, the district court reduced the damage award to $20,000.[289]

The proof of McIntosh's emotional harm differs only slightly from the evidence supporting the low-end garden-variety claims, except that McIntosh visited a physician and suffered from slightly more significant physical harm, such as stomach cramps and chest pains.

In *Kim v. Dial Service International, Inc.*,[290] the plaintiff, having proven he was unlawfully terminated because of his age, race, and national origin under Title VII, the ADEA, § 1981, and the HRL, was awarded $300,000 for his emotional distress, but the district court, finding that the award was not supported by the evidence, reduced the award to $25,000.[291] At trial, Kim testified that he felt "gloomy," had difficulty sleeping, lost his appetite and twenty pounds, and began drinking and taking sedatives.[292] Kim's wife corroborated his insomnia, drinking, and use of sedatives, and she added that he did not like to socialize as a result of the discrimination.[293] Noting that an award of $300,000 for emotional distress would be *unprecedented* and characterizing this evidence as "sparse," the *Kim* court relied on *Binder*, *Miner* and *McIntosh* to reduce the award to $25,000.[294] The district court also distinguished Kim's circumstances from cases in which courts found "sufficient substantiation" to uphold a $100,000 award, namely circumstances where the plaintiff attempted suicide.[295]

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[286] *Id.* at 664-65.

[287] *McIntosh*, 887 F. Supp. at 666.

[288] *Id.* (citing Borja-Fierro v. Girozentrale Vienna Bank, No. 91 Civ. 8743, 1994 WL 240360, at *3 (S.D.N.Y. May 27, 1994)).

[289] *See id.* at 669.

[290] No. 96 Civ. 3327, 1997 WL 458783, at *12-*13 (S.D.N.Y. Aug. 11, 1997).

[291] *See id.* at *13.

[292] *Id.* at *14.

[293] *See id.*

[294] *See id.* at *12-*14.

[295] *Kim*, 1997 WL 458783, at *13-*14.

In *Funk v. F & K Supply, Inc.*,[296] two female plaintiffs, Funk and Michetti, sued for sexual harassment and sex-based constructive discharge under Title VII and the HRL.[297] They were awarded $850,000 and $450,000, respectively, by the jury for their emotional distress.[298] The district court, however, determined that the awards were excessive and reduced both to $30,000.[299]

In support of her emotional distress claim, Michetti testified that the sexual harassment by her supervisor caused her to "get sick about coming to work," that she was so scared and shaken so badly that she almost urinated in her pants after one incident, and that she felt "cheap, disrespected and confused" after another incident.[300] Michetti also testified that she felt that she had no control over her life, that she cried, and that she was depressed.[301] Michetti experienced headaches, loss of appetite, vomiting, diarrhea, and stomach pains.[302]

Funk's testimony was similar. She testified that she had experienced nightmares and flashbacks, that she was humiliated and degraded, and that she cried.[303] At trial, former coworkers also testified to the women's reactions at work.[304] The court noted that there was a paucity of evidence regarding the magnitude, severity, and duration of the emotional anguish suffered by the plaintiffs.[305] Relying on *McIntosh*, *Luciano*, *Kim*, *Tanzini*, and *Binder*, and distinguishing the plaintiffs' harm from more egregious circumstances where treatment was on-going, a physical condition was exacerbated, or there were suicidal tendencies, the court reduced the awards to $30,000 each.[306]

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[296] 43 F. Supp. 2d 205 (N.D.N.Y. 1999).

[297] *See id.* at 212.

[298] *See id.*

[299] *See id.* at 227-28.

[300] *Id.* at 223.

[301] *See Funk*, 43 F. Supp. 2d at 223.

[302] *See id.*

[303] *See id.*

[304] *See id.*

[305] *See id.* at 227.

[306] *See Funk*, 43 F. Supp. 2d at 228. Courts have also found awards of $30,000 appropriate in *Tanzini v. Marine Midland Bank, N.A.*, 978 F. Supp. 70, 78 (N.D.N.Y. 1997), and *Hollis v. City of Buffalo*, 28 F. Supp. 2d 812 (W.D.N.Y. 1998). In *Tanzini*, the court reduced an emotional distress award of $200,000 to

Finally, on the high end of the "garden-variety" category lies *Mahoney v. Canada Dry Bottling Co.*,[307] in which a 38-year old African-American salesman was awarded $35,000 for his emotional distress after proving he was discriminated against because of his age and race when he was denied a promotion and retaliated against for complaining.[308] The district court denied the defendant's remittitur motion and upheld the award, rejecting the defendant's argument that plaintiff did not provide an adequate basis for the award in the record.[309]

At trial, Mahoney testified that, because he was transferred to an undesirable sales route, he "could not make a living and support his family."[310] Although "embarrassed," "extremely disappointed," "hurt," and worried about the future, plaintiff only lost some sleep for approximately two or three months.[311] Plaintiff's testimony was corroborated to some extent by a co-worker, who explained that plaintiff had "lost his fire at work."[312] Mahoney did not provide any medical testimony or evidence.[313] The court held, however, that the evi-

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$30,000 in an age discrimination action brought under the ADEA and the HRL. *See Tanzini*, 978 F. Supp. at 70. The only evidence of harm presented at trial was the testimony of plaintiff and his spouse. *See id.* at 78. Plaintiff testified that he had been in a state of shock after his termination, that he did not leave the house for one week, that he suffered memory loss, and that he suffered sleepless nights. *See id.* Plaintiff also experienced nervousness and became short-tempered. *See id.* His wife corroborated his testimony. *See id.* The court, finding that the evidence of harm was similar to that of plaintiffs in *McIntosh*, *Luciano*, *Binder*, and *Borja-Fierro* reduced the $200,000 award to $30,000. *See Tanzini*, 978 F. Supp. at 80.

Similarly, in *Hollis*, the court awarded $30,000 for emotional distress to plaintiff after a bench trial in a Title VII and HRL sexual harassment case. *See Hollis*, 28 F. Supp. 2d at 827. Plaintiff had testified that she "felt exhausted," was a nervous wreck, and experienced distress which resulted in hives, shortness of breath and chest pains, and that her home life was affected. *Id.* Plaintiff's testimony was corroborated by several co-workers; however, she offered no medical testimony or evidence. *See id.* at 826. After surveying a number of recent cases, including *Mahoney*, the court determined $30,000 was an appropriate award. *See id.* at 827.

[307] No. 94-CV-2924, 1998 WL 231082 (E.D.N.Y. May 7, 1998).

[308] *See id.* at *1.

[309] *See id.* at *5.

[310] *Id.*

[311] *Id.*

[312] *Mahoney*, 1998 WL 231082, at *3.

[313] *See id.* at *5.

dence presented was sufficient to support the verdict and that the $35,000 was reasonable.[314] Notably, the evidence presented in *Mahoney* differed from the evidence held insufficient to support any award in *Annis* only with respect to plaintiff's testimony that he lost sleep.[315]

A review of the evidence presented in support of the low-end and high-end garden-variety claims indicates that there is very little difference between these categories. The cases yielding slightly higher awards, however, appear to be more recent cases that contain some, although not particularly strong, corroborating testimony by at least one other witness, usually the plaintiff's spouse or a co-worker. None of the claims in either category were supported by medical evidence or testimony.

One may also reconcile the differences between these categories by acknowledging the effect of inflation on a jury's perception of what is reasonable; while damage awards of $5,000 to $15,000 may have been appropriate a few years ago, such nominal awards may not be reasonable today.[316] Notably, since *Binder*, not one federal court has remitted a damage award to a sum of $5,000 for emotional distress, and at least one court has noted that where emotional distress is supported by evidence similar to that in *Binder*, $35,000 appears now to mark the "low end" of the continuum.[317] Where plaintiff testifies to his or her emotional harm and where that testimony describes common symptoms of distress associated with any adverse employment decision, where the physical manifestations of such harm are transient, and where there is some corroboration, even absent medical proof or expert testimony, plaintiffs are likely to recover somewhere between $15,000 to $35,000 if an employer makes a post-trial motion.

c. *Significant Emotional Distress Claims*

The emotional distress claims for which courts have awarded significant damage awards ranging from $50,000 to

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[314] *See id.* at *6-*7.

[315] *See id.*

[316] *See* Luciano v. Olsten Corp., 912 F. Supp. 663 (E.D.N.Y. 1996), *aff'd*, 110 F.3d 210 (2d Cir. 1997).

[317] *See Mahoney*, 1998 WL 231082, at *6 ("[$35,000] falls to the low end of the range of awards.").

approximately $85,000 do not differ greatly from the garden-variety distress claims with respect to the evidence of harm presented. Distress claims in this category, however, do appear to differ from garden-variety claims in two ways: either with respect to the nature of the underlying discriminatory conduct or with respect to how the evidence of harm is presented at trial. With respect to the nature of the discriminatory action, garden-variety distress claims appear to be based upon an employer's one-time decision that adversely affects a particular employee, such as a decision to terminate or not to promote the employee. In contrast, where emotional distress claims are predicated on an employer having subjected plaintiff to numerous episodes of harassment, constituting a pattern of discrimination over a period of time, such distress appears to warrant a more substantial award. The cases in this category include, *Trivedi v. Cooper*,[318] *Leibovitz v. New York City Transit Authority*,[319] and *Perdue v. City University of New York*.[320]

In *Trivedi v. Cooper*,[321] the district court remitted a $700,000 compensatory damage award to $50,000 in favor of an East Asian Indian plaintiff who filed claims under §§ 1981 and 1983 and the HRL for harassment and failure to promote on the basis of his race, national origin, and for retaliation.[322] Despite the fact that the district court found that the plaintiff had introduced "scant" evidence on the issue of emotional distress, that he had failed to present evidence of psychological counseling, or physical manifestations of distress, the court awarded plaintiff $50,000.[323] Trivedi asserted that his supervisor assigned him to menial tasks in the research lab where he worked, prevented him from collaborating with other researchers, did not give him work that would lead to publication, prevented him from attending professional seminars and conferences, and barred him from using the computer and the library.[324] The court determined that the evidence presented at trial demonstrated that the work Trivedi was given was un-

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[318] No. 95 Civ. 2075, 1996 WL 724743 (S.D.N.Y. Dec. 17, 1996).
[319] 4 F. Supp. 2d 144 (E.D.N.Y. 1998).
[320] 13 F. Supp. 2d 326 (E.D.N.Y. 1998).
[321] No. 95 Civ. 2075, 1996 WL 724743 (S.D.N.Y. Dec. 17, 1996).
[322] *See id.* at *1.
[323] *Id.* at *9.
[324] *See id.* at *5.

likely to lead to career advancement.[325] Trivedi testified that he had felt "starved of professional growth" and that he felt "insulted," "indignant," "unhappy," and "emotionally upset."[326] While the court determined that plaintiff's statements were "patently insufficient" to uphold a $700,000 award, the court focused on Trivedi's evidence that established that for many years, his supervisor had used racial slurs in speaking to him, including ridiculing him as a "brown nigger."[327] The court concluded that under these circumstances an award of $50,000 was "generous."[328]

In a recent case of first impression, *Leibovitz v. New York City Transit Authority*,[329] a female employee was permitted to recover damages for emotional distress for having been subjected to a hostile work environment under Title VII and the HRL, although she herself was not a target of sexual harassment, and was awarded $60,000.[330] Leibovitz claimed that she suffered emotional distress from a hostile environment in which other women were harassed.[331] Specifically, Leibovitz, a Deputy Superintendent for the Transit Authority, had been assigned to a car inspection and cleaning shop where she learned that a number of female car cleaners had accused a male supervisor of sexual harassment.[332] She spoke with a number of members of upper management about the charges, but there was a delay in the Authority's investigation of plaintiff's allegations.[333] Finding that Leibovitz had standing to bring a hostile work environment claim,[334] the court concluded that she had presented sufficient evidence of widespread gender-based harassment about which the Authority was indifferent, passive and acted in an unconcerned manner.[335] The jury awarded plaintiff $60,000 for her emotional

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[325] *See id.* at *1.
[326] *Trivedi*, 1996 WL 724743, at *9.
[327] *Id.* at *2.
[328] *Id.* at *9.
[329] 4 F. Supp. 2d 144 (E.D.N.Y. 1998).
[330] *See id.* at 146.
[331] *See id.*
[332] *See id.*
[333] *See id.* at 147.
[334] *See Leibovitz*, 4 F. Supp. 2d at 147.
[335] *See id.* at 151-53.

distress.[336] After trial, the district court rejected the defendant's motion for remittitur.[337] Relying on plaintiff's testimony that she had been depressed, unable to sleep, gained weight, and suffered anxiety and other symptoms of depression, and her psychiatrist's corroborating testimony, the court upheld the $60,000 award.[338]

Similarly, in *Perdue v. City University of New York*,[339] a female basketball coach was awarded $85,000 for emotional distress under Title VII for her gender discrimination and hostile work environment claims.[340] The district court upheld the award.[341] Perdue provided extensive evidence of the disparate treatment she endured for years because of her gender.[342] Although no one demanded that she "do the laundry," during the last two years of her employment she "was washing uniforms with the manager from the men's team."[343] Her office was the equivalent of a broom closet; whereas, the men's coach had two offices.[344] She also had a more limited budget for housing, dining, recruiting, equipment, athletic undergarments and uniforms.[345] Unlike the men's coach, she had to clean the gym for her games.[346] She also had inferior practice times, fewer assistants, and no team locker room.[347] Perdue had also been subjected to sexual slurs and improprieties, such as commentary about the size of her breasts.[348] As a result, Perdue felt disgraced, embarrased, scared, concerned for her future, belittled, and disrespected.[349] Perdue also presented evidence that the significant stress she experienced aggravated her pre-existing back injury, requiring her to visit a chiropractor and physician, who prescribed pain medication.[350] Based

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[336] *See id.* at 153.
[337] *See id.*
[338] *See id.*
[339] 13 F. Supp. 2d 326 (E.D.N.Y. 1998).
[340] *See id.* at 331.
[341] *See id.* at 337.
[342] *See id.* at 333-34, 337.
[343] *Id.* at 336.
[344] *See Perdue*, 13 F. Supp. 2d at 336.
[345] *See id.*
[346] *See id.*
[347] *See id.*
[348] *See id.*
[349] *See Perdue*, 13 F. Supp. 2d at 337.
[350] *See id.*

on this evidence, the court determined that the jury's $85,000 award for her emotional distress was not excessive.[351]

This range of damage awards has also been typically upheld where plaintiff is not the sole witness, presents corroborating testimony (usually with a psychologist, psychiatrist or medical healthcare professional), and testifies that he or she took medication for his or her condition. One such case is *Weissman v. Dawn Joy Fashions, Inc.*[352] In *Weissman*, the district court remitted the jury's $95,000 emotional distress award to $65,000 because it was excessive in light of the evidence presented at trial.[353] While the court did not describe plaintiff's testimony in detail, it justified the $65,000 award by highlighting that, at trial, the plaintiff had called the psychologist who had treated him weekly for a year as a witness, who confirmed plaintiff's statements of depression, isolation, and problems in his marriage.[354] The psychiatrist also confirmed that although the plaintiff had improved, he was not cured at the time he discontinued his treatment.[355] Distinguishing this evidence from the evidence presented in the "'garden-variety mental-anguish claims,'"[356] but finding that the plaintiff's mental anguish was far less serious than in cases where plaintiffs had testified about attempted suicides, had taken antidepressant medication, or had years of treatment, the district court reduced the damages to $65,000.[357]

d. *Substantial Emotional Distress Claims*

Courts have awarded damages for emotional distress in the sum of $100,000 only in cases where the employer's discriminatory conduct has caused plaintiff stress which manifested itself in the form of severe emotional or physical reactions.

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[351] *See id.*
[352] No. 95 Civ. 1841, 1999 WL 144488 (S.D.N.Y. Mar. 17, 1999).
[353] *See id.* at *2.
[354] *See id.* at *1.
[355] *See id.*
[356] *Id.* (citation omitted).
[357] *See Weissman*, 1999 WL 144488, at *2.

Examples of leading cases in this category are *Marfia v. T.C. Ziraat Bankasi, New York Branch*[358] and *Bick v. City of New York*.[359]

In *Marfia*, the Second Circuit upheld a $100,000 pain and suffering award for a bank employee who, because of his Italian national origin, was fired from his job in the New York branch of a Turkish bank.[360] Although the district court's opinion contains limited information regarding the evidence of Marfia's pain and suffering, Marfia presented testimony that he had tried to kill himself by pointing a loaded gun to his head and was stopped only by his 15-year-old son.[361] Plaintiff thereafter spent two weeks in a hospital on "suicide watch."[362]

In *Bick*, a female sergeant sued the New York Police Department for harassment, gender discrimination and retaliation under Title VII and the HRL.[363] Her claims arose out of her having filed and prosecuted a number of misconduct charges against the Department, which were based in part on complaints of harassment by another female police officer.[364] The jury awarded Bick $750,000 for pain and suffering, but the district court determined that the award was excessive and reduced it to $100,000.[365] At trial, Bick testified that she felt "devastated" and that she sought counseling from the unit that provides counseling services for officers.[366] Bick had also been "unable to overcome her sense of despair" and continued to seek help from the police department counselor for an entire year, until she sought treatment from a trained social worker.[367] At the time of trial, Bick had had forty-five counseling sessions and was still in treatment.[368] She had also sought treatment from a psychiatrist who had prescribed anti-depres-

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[358] 903 F. Supp. 463, 465-67, 471 (S.D.N.Y. 1995), *vacated on other grounds*, 100 F.3d 243 (2d Cir. 1996).

[359] No. 95 Civ. 8781, 1998 WL 190283 (S.D.N.Y. Apr. 21, 1998).

[360] *See Marfia*, 903 F. Supp. at 471.

[361] *See id.* at 467.

[362] *Id.*

[363] *See Bick*, 1998 WL 190283, at *1.

[364] *See id.*

[365] *See id.* at *27.

[366] *Id.* at *23.

[367] *Id.*

[368] *See Bick*, 1998 WL 190283, at *23.

sant medication.[369] The plaintiff's social worker corroborated Bick's distress, describing her as suffering from anxiety, depression and feelings of powerlessness, and that she had been humiliated, experienced disrupted sleep and weight gain, and suffered from "suicidal ideation."[370] She further testified that while Bick had made progress and was less depressed, she still needed treatment.[371] After comparing the evidence of Bick's emotional distress to evidence presented in other cases, the court reduced the damages award from $750,000 to $100,000, distinguishing *Bick* from the garden-variety claims and from cases where the awards exceeded $100,000.[372]

e. *Egregious Emotional Distress Claims*

Finally, the high end of the continuum is defined by decisions in which federal district courts have remitted damages to a final award in excess of $100,000. Two of the cases frequently cited by courts which apparently establish this end of the spectrum are *Shea v. Icelandiar*[373] and *Ramirez v. New York City Off-Track Betting Corp.*[374]

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[369] *See id.*

[370] *Id.* at *24.

[371] *See id.*

[372] *See id.* at *25-*27.

[373] 925 F. Supp. 1014 (S.D.N.Y. 1996).

[374] No. 93 Civ. 0682, 1996 WL 210001 (S.D.N.Y. Apr. 30, 1996), *aff'd in part, vacated in part*, 112 F.3d 38 (2d Cir. 1997); *see also* Quinn v. Nassau County Police Dep't, 53 F. Supp. 2d 347 (E.D.N.Y. 1999) (ruling that a $250,000 emotional distress award was not excessive for former police officers' § 1983 hostile work environment claim for pervasive, shocking harassment based on his homosexuality which lasted a number of years); Town of Hempstead v. State Div. of Human Rights, 233 A.D.2d 451, 649 N.Y.S.2d 942 (2d Dep't 1996) (upholding a $500,000 award where the plaintiff, who had been the victim of childhood sexual abuse, was subjected to sexual harassment which caused her severe continuing emotional distress, including a fear of going out alone); Tiffany & Co. v. Smith, 224 A.D.2d 332, 638 N.Y.S.2d 454 (1st Dep't 1996) (upholding a $300,000 award where plaintiff continued to suffer severe depression, anorexia, and insomnia); New York City Transit Auth. v. State Div. of Human Rights, 181 A.D.2d 891, 581 N.Y.S.2d 426 (2d Dep't 1992) (upholding award of $450,000; plaintiff who had previously suffered miscarriage and other pregnancy problems had been discriminated against on four separate occasions over a year, including employer's refusal to restrict duties in accordance with physician's directions, plaintiff suffered anguish, guilt, depression, and anger, and mental distress continued until time of trial and would continue the rest of her life; considered a "shocking" instance of discrimination).

In *Shea*, an employee who was demoted based on his age in violation of the ADEA and the HRL received an award of $175,000 for his emotional distress,[375] which the court remitted from a $250,000 jury award.[376] Shea had been an employee of Icelandair since 1956 and was demoted and then terminated at the age of 63.[377] He claimed that he had been the target of a campaign to force his retirement which consisted of repeated, unwarranted complaints from his supervisors that his work performance had been unsatisfactory and that he had mishandled cargo transactions.[378] Plaintiff was also routinely excluded from department meetings.[379] In reviewing the evidence to determine an appropriate award, the district court noted that the most important factor which set this case apart from others involving emotional distress is the fact that Icelandair's discriminatory conduct had had physical consequences.[380] Six months after Shea was demoted, he was diagnosed with Parkinson's Disease, and at the time of trial Shea was experiencing a number of debilitating symptoms including muscle spasms, insomnia, slurred speech, rigidity, tremors, and loss of balance.[381] Shea testified that the disease was worsening, that he had balance problems and fell around the house, and that he had to be careful when walking.[382] Shea also testified that he felt upset and sick, experienced sleep problems, and was unable to hold down his food.[383]

Shea also testified that these symptoms had significantly altered his lifestyle.[384] Once an active sportsman, he could no longer participate in leisure activities such as biking, golfing, and gardening, and could no longer perform a variety of tasks

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[375] *See Shea*, 925 F. Supp. at 1019.
[376] *See id.* at 1029.
[377] *See id.* at 1018.
[378] *See id.* at 1019.
[379] *See id.*
[380] *See Shea*, 925 F. Supp. at 1022.
[381] *See id.*
[382] *See id.*
[383] *See id.* at 1024.
[384] *See id.*

around the house.[385] The discrimination also had a devastating effect on him emotionally and he claimed that he "dreaded the future."[386]

Plaintiff's harm was corroborated by two expert medical witnesses.[387] The first expert testified at length that there was a relationship between stress and the aggravation of Parkinson's Disease.[388] The expert further concluded that the stress Shea suffered was caused by the demotion and termination and had caused the onset of the disease.[389] The second expert, Shea's cardiologist, testified that Shea had suffered cardiac symptoms as the result of the defendant's conduct and that the recent onset of chest pain was exacerbated by stress at work.[390]

Plaintiff sought medical treatment from a doctor for headaches, stomach aches, and depression and presented the doctor's notes at trial.[391] Plaintiff also was prescribed medication for his continued depression.[392] However, plaintiff did not obtain psychological treatment.[393] The court concluded that the plaintiff's personal and professional lives were affected by the demotion.[394] Although the plaintiff told his wife of the demotion, he did not reveal it to his children until a year later or to other family members until three years later.[395] He stopped attending most family gatherings, and his relationship with his wife suffered as plaintiff became short-tempered and angry in the period following his demotion.[396] The court determined that there was "compelling evidence" of emotional distress.[397]

Furthermore, in comparing the evidence supporting Shea's emotional distress with evidence supporting other awards, the

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[385] *See Shea*, 925 F. Supp. at 1022.
[386] *Id.*
[387] *See id.* at 1022-23.
[388] *See id.*
[389] *See id.*
[390] *See Shea*, 925 F. Supp. at 1023.
[391] *See id.*
[392] *See id.*
[393] *See id.*
[394] *See id.* at 1024.
[395] *See Shea*, 925 F. Supp. at 1024-25.
[396] *See id.*
[397] *Id.* at 1024.

court found that Shea had presented a much more compelling set of facts than those garden-variety emotional distress claims because of the magnitude of physical manifestations of plaintiff's distress.[398] The humiliation, shame, and fear that Shea experienced after he was demoted continued until the date of the trial more than five years later.[399] After examining those cases in which "the conduct resulted in significant emotional pain and suffering" the court determined that limited remittitur was warranted and reduced the $250,000 award to $175,000.[400]

In *Ramirez*, the court determined that the plaintiff was entitled to an award for emotional distress in excess of $100,000 where he had presented similar evidence of egregious emotional distress.[401] Ramirez sued his employer, the New York City Off-Track Betting Corporation ("OTB") for employment discrimination and retaliation in violation of Title VII and § 1983.[402] The jury found in plaintiff's favor and awarded him $2.58 million.[403] The OTB moved for a new trial and remittitur.[404] The district court upheld the verdict but reduced the award to $1,934,375.[405] Specifically, the emotional distress damage award was remitted from $1,145,625 to $500,000.[406]

In evaluating Ramirez's damages for emotional distress, the court noted that he had had a pre-existing psychiatric condition that had not adversely affected his ability to work at his job prior to his dismissal[407] and that his employment "tethered him to a stable existence."[408] At trial, the "[d]ramatic" emotional distress suffered by Ramirez was established by Ramirez's testimony and the testimony of his psychiatrist and girlfriend.[409] Ramirez's psychiatrist testified that

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[398] *See id.* at 1025.
[399] *See id.* at 1027.
[400] *Shea*, 925 F. Supp. at 1029.
[401] *See* Ramirez v. New York City Off-Track Betting Corp., No. 93 Civ. 0682, 1996 WL 210001 (S.D.N.Y. Apr. 30, 1996), *aff'd in part, vacated in part*, 112 F.3d 38 (2d Cir. 1997).
[402] *See id.* at *1.
[403] *See id.*
[404] *See id.*
[405] *See id.* at *5.
[406] *See Ramirez*, 1996 WL 210001, at *5-*7.
[407] *See id.* at *8 n.3.
[408] *Id.* at *7.
[409] *Id.* at *6.

after his dismissal Ramirez was "unable to function," "was not in good shape when he left [the doctor's care], that he "never got better," and that his condition was static.[410] Plaintiff also testified that his emotional distress was on-going.[411] Ramirez's girlfriend testified that when he was released from the hospital after being fired, he was incoherent, hurt, and lost his self-esteem.[412] She also testified that he slept a lot, that he occasionally stayed up all night, that he did not wash, and that the incident "took his whole self away from him."[413]

In determining appropriate damages, the district court noted that: "The job provided him not only with the ability to obtain the monetary means and health benefits necessary to seek treatment, but also, on a more abstract level, it gave him the link with mainstream society that kept him a stable and productive person."[414] The district court further held that when that tie was severed, Ramirez lost both his ability and incentive to stay on an even keel, that the psychological damage Ramirez suffered was so substantial that it rendered him unemployable, and that his inability to function in society would persist indefinitely into the future.[415] Characterizing this evidence of emotional distress as "[d]ramatic" and "substantial," the court determined that the maximum damages that could have been awarded without shocking the conscience was $500,000.[416] The court did note, however, that an award of this amount would not be appropriate for emotional damages caused by improper termination except under the most unusual circumstances.[417]

Federal courts routinely distinguish emotional distress claims before them from the distress suffered by Shea and Ramirez. As a result, plaintiffs appear to be awarded damages for emotional distress in excess of $100,000 on rare occasion;

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[410] *Id.*

[411] *See Ramirez*, 1996 WL 210001, at *8 n.3 (Plaintiff testified, *inter alia*, that he "[had not] really recovered completely.").

[412] *See id.* at *8 n.11.

[413] *Id.*

[414] *Id.* at *7.

[415] *See id.* at *6-*7.

[416] *See Ramirez*, 1996 WL 210001, at *6-*7.

[417] *See id.* Apparently, the *Ramirez* decision has defined $500,000 as the high end of the damages spectrum for emotional distress damage awards in employment cases in this circuit.

therefore, future plaintiffs seeking similar awards should be mindful of different values courts assign to degrees of emotional distress. Similarly, while litigation may cost an employer a tremendous amount of money, employers should be aware that absent egregious harm such as suicide attempts, plaintiff's inability to function in society, or causation or aggravation of a serious and degenerative disease, the value of a plaintiff's emotional distress is likely to be fixed at less than $100,000, and if it is a garden-variety distress claim, that is, transient harm unsupported by medical proof or expert testimony, such a claim may not be worth more than $15,000-$30,000.

CONCLUSION

It is not difficult for a discrimination plaintiff to survive summary judgment and thus reach the jury with respect to a claim for emotional distress. Once the plaintiff has reached the jury, it is also not difficult for the plaintiff to obtain a favorable verdict by presenting only slight or scant evidence of emotional distress. Discrimination plaintiffs, who institute and continue to litigate discrimination actions expecting very substantial emotional distress awards should, however, be advised that these expectations are unrealistic. Emotional distress awards are not unpredictable; rather, federal courts in the Second Circuit rely on precedent to determine what are appropriate monetary awards in the context of remittitur. These cases provide litigants and courts with one possible tool to evaluate emotional distress claims in their own cases. This spectrum is but one way to analyze the various range of damages awarded by federal courts in recent years for emotional distress claims in discrimination suits. There will, of course, be other perspectives as to how these cases should be analyzed or categorized to justify the damages awarded by courts. In any event, this spectrum presents litigants and courts engaging in settlement conferences with the opportunity to gauge the strength of a particular claim so that a range of damages can be identified as a starting point for negotiations. If, in the early stages of litigation, parties understand how remittitur operates and appreciate how a federal district court in this circuit is likely to evaluate the claims, parties may be inclined to achieve a more expedient settlement of these cases.

APPENDIX

TABLE 1

STATUTE	PROSCRIBES DISCRIMINATION BASED ON	DAMAGES			
		Back and Front Pay*	Compensatory (including emotional distress)	Punitive or Liquidated	Does Statutory Cap Apply?
Title VII	race, color, religion, sex, and national origin	Yes	Yes**	Punitives**	Yes
ADEA	age (over 40 years old)	Yes	No	Liquidated (2x back pay award)	No
ADA	mental or physical disability	Yes	Yes**	Punitives**	Yes
§ 1981	race, ethnicity, and ancestry in private-sector employment	Yes	Yes	Punitives	No
§ 1983	race, gender, and religion where defendant acts under color of state law and deprives employee of civil or constitutional rights	Yes	Yes	Punitives	No
NY HRL	age, race, creed, color, national origin, sex, disability, genetic predisposition, or marital status	Yes	Yes	No	No

* A number of circuits and New York courts are split over whether front pay is legal or equitable relief and therefore subject to a mandatory statutory cap. *See supra* note 99.

** Not available prior to 1991.

TABLE 2

A. Low-End "Garden-Variety" Emotional Distress Claims ($5,000-$15,000):

Case	Statutory Basis and Claim	Plaintiff sole witness? (others?)	Medical Evidence	Expert?	Evidence of Effects of Adverse Action on Plaintiff	Damages Awarded
Binder	ADEA and HRL (age)	Yes	No	No	Felt inadequate and isolated.	$5,000 (remitted from $498,000)
Luciano	§ 1983 (religion)	No (wife)	No	No	Felt hurt, shocked, upset, sad, and worried; cried; lost sleep and appetite.	$11,400 (upheld jury award)
Miner	§ 1983 (religion and due process deprivation)	No (wife)	No	No	Felt inadequate and embarrassed; considered suicide; experienced family tension.	$12,500 (upheld district court award)
Cowan	Title VII and § 1981 (race)	No (wife and co-workers)	No	No	Felt humiliated; lost self-esteem; experienced family problems; began drinking heavily.	$15,000 (upheld award after bench trial)
Borja-Fierro	Title VII and HRL (race, national origin, and retaliation)	Yes	No	No	No discussion of evidence; reference to one visit with psychologist.	$15,000 (remitted from $180,000)
Carter	Title VII (hostile work environment)	No (social worker and expert)	No	Yes (physician)	Felt "very upset," sad and anxious, was "a mess"; cried; sought therapy for 1 year; minimal physical harm: tired, chest pains, disheveled, and skin blemishes.	$15,000 (remitted from $175,000)

TABLE 2-*Continued*

B. High-End "Garden Variety" Distress Claims ($20,000-$35,000):*

Case	Statutory Basis and Claim	Plaintiff sole witness? (others?)	Medical Evidence	Expert?	Evidence of Effects of Adverse Action on Plaintiff	Damages Awarded
McIntosh	Title VII, § 1981, and HRL (race and failure to promote)	Yes	No	No	"Sparse evidence"; felt humiliated, angry, and embarrassed; weak legs; stomach cramps; chest pains; avoided family gatherings and socializing; visited doctor once.	$20,000 (remitted from $219,000)
Kim	Title VII, ADEA, § 1981, and HRL (race, religion, and national origin)	No (wife)	No	No	"Sparse evidence"; felt gloomy, lost sleep, began drinking, took sedatives, avoided socializing, and gained weight.	$25,000 (remitted from $300,000)
Funk (two plaintiffs)	Title VII and HRL (sex harassment and hostile work environment)	No (co-workers)	No	No	A. *Michetti*: Felt sick about coming to work, was scared, shook badly; felt cheap and disrespected; suffered from lack of control over her life, depression, headaches, loss of appetite, vomiting, diarrhea, and stomach pains. B. *Funk*: Had nightmares and flashbacks; felt humiliated and degraded; cried.	$30,000 (remitted from $850,000 and $450,000)
Mahoney	Title VII and ADEA (age, race, and retaliation)	No (co-worker)	No	No	Felt embarrassed, extremely disappointed, hurt, and worried; lost sleep for 2-3 months.	$35,000 (jury award upheld)

* For additional cases in this range, see *supra* note 306.

TABLE 2-*Continued*

C. Significant Emotional Distress Claims ($50,000-$85,000):

Cases	Statutory Basis and Claim	Plaintiff sole witness? (others?)	Medical Evidence	Expert?	Evidence of Effects of Adverse Action on Plaintiff	Damages Awarded
Trivedi	§§ 1981 and 1983 (harassment and denial of promotion based on race, national origin, and retaliation)	Yes	No	No	"Scant evidence"; no physical manifestations of distress; felt "starved" for professional growth, insulted, unhappy, and upset; subjected to racial slurs and pattern of harassment over many years.	$50,000 (remitted from $700,000)
Leibovitz	Title VII and HRL (hostile work environment)	No (expert)	No	Yes (psychiatrist)	Felt depressed, lost sleep, gained weight, and felt anxious in environment where other women were harassed.	$60,000 (jury award upheld)
Weissman	Basis not specified	No (expert)	No	Yes (psychologist)	Felt depressed and isolated; had marriage problems; visited therapist weekly.	$65,000 (remitted from $95,000)
Perdue	Title VII (gender and hostile work environment)	Yes	Yes (evidence that stress aggravated pre-existing back injury)	No	Felt disgraced, embarrassed, scared, worried about future, and belittled; visited chiropractor and physician; took pain medication; back injury aggravated; subjected to disparate treatment, sexual slurs, and comments about breasts.	$85,000 (jury award upheld)

TABLE 2-*Continued*

D. Substantial Emotional Distress Claims ($100,000):

Cases	Statutory Basis and Claim	Plaintiff sole witness? (others?)	Medical Evidence	Expert?	Effects of Adverse Action	Damages Awarded
Marfia	Title VII (national origin)	Yes	No	No	Limited evidence in decision; attempted suicide and hospitalized on suicide watch.	$100,000 (upheld jury award)
Bick	Title VII and HRL (harassment, gender discrimination, and retaliation)	No (social worker)	No	No	Felt devastated; sought counseling; unable to overcome despair; took anti-depressants, lost sleep, and gained weight; thought of suicide; plaintiff still undergoing treatment at time of trial.	$100,000 (remitted from $750,000)

TABLE 2-*Continued*

E. Egregious Emotional Distress Claims (over $100,000):*

Cases	Statutory Basis and Claim	Plaintiff sole witness? (others?)	Medical Evidence	Expert?	Effects of Adverse Action	Damages Awarded
Shea	ADEA and HRL (age: forced retirement and discharge)	No (experts)	Yes	Yes (cardiologist and doctor)	Diagnosed with Parkinson's disease; experienced muscle spasms, insomnia, slurred speech, tremors, and loss of balance; significantly altered lifestyle; "dreaded the future"; felt sick, lost sleep and appetite; sought medical treatment; presented doctors' notes; took medication; avoided socializing; family relations deteriorated; became short-tempered and angry; emotional distress continued for more than 5 years.	$175,000 (remitted from $250,000)
Ramirez	Title VII and § 1983 (retaliation)	No (girlfriend and expert)	Yes	Yes (psychiatrist)	"Dramatic" evidence; discharge aggravated pre-existing psychiatric condition; distress on-going and would persist indefinitely; unable to function in society; plaintiff was hospitalized, incoherent, hurt, and lost self-esteem and sleep; lost ability to obtain health benefits.	$500,000 (remitted from $1,145,625)

* *See also supra* note 374.