

# Compensatory Damages, Punitive Damages and Remittitur under federal, NY State and NY City Law

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Joshua Friedman, Esq.

In 1991, Congress amended Title VII to provide recovery for psychological injury and punitive damages. The amendment capped the sum of compensatory and punitive damage awards for intentional discrimination according to a sliding scale up to \$300,000. 42 USC § 1981a(b). The amendment also added the right to a trial by jury for compensatory and punitive damages. 42 USC § 1981a(c). At the same time Congress amended Section 1981, 42 USC § 1981, to allow for its use in cases of intentional employment discrimination. Congress expressly excluded § 1981 from the Title VII caps. 42 USC § 1981a(b)(4).

In 1991, the New York City Human Rights Law was amended to create the City Law as we know it. The new law provided uncapped compensatory and punitive damages for employment and other types of discrimination. Title 8 of the Administrative Code of the City of New York.

It has taken seventeen years for the courts to develop guidelines on what forms of conduct cause psychological injury and what evidence is necessary to establish it under federal, NY state and NY City Law. These guidelines, explored below, are plainly a work in progress.

## **Compensatory Damages**

### Types of Cases Where Serious Psychological Injury Is Likely

The conduct most likely to cause serious emotional injury is a hostile work environment created by a supervisor. The most common example likely to cause serious injury is severe sexual harassment with physical contact or a threat of such contact.

To understand why, consider the diagnostic criteria for PTSD:

- The victim experienced, witnessed, or has been confronted with an event or events that involve actual or threatened death or serious injury, or a threat to the physical integrity of oneself

or others and the victim's response involved intense fear, helplessness, or horror;

- Recurrent and intrusive distressing recollections or dreams, Intense psychological distress at exposure to events that remind the victim of the trauma; and
- Efforts to avoid thoughts, feelings, or conversations associated with the trauma, activities, places, or people that arouse recollections of the trauma, inability to recall an important aspect of the trauma, markedly diminished interest or participation in significant activities, feeling of detachment or estrangement from others, or restricted range of affect (e.g., unable to have loving feelings)

The harm is caused by the manager's power to terminate employment or destroy the victim's reputation and the knowledge that she has to come to work every day and endured what amounts to a form of torture. The feeling of helplessness is compounded when complaints do not end the harassment.

Such conduct can cause PTSD, major depression, and other serious psychological injury.

*See, e.g., Kondracke v. Commissioner*, 277 A.D.2d 953; 716 N.Y.S.2d 533; 2000 N.Y. App. Div. LEXIS 11599 (4th Dep't 2000)(\$400,000 award for emotional distress from Commissioner of NYSDHR under State law: remittitur denied; petitioner suffered from major depression, panic disorder, and post-traumatic stress disorder that were causally related to the harassment and discrimination endured at the Center over several months. The incidents of harassment and discrimination were numerous and continuous throughout their employment at the Center and included threats of physical harm by their co-workers.)

The effect is particularly acute in paramilitary organizations like police forces where the commanding officer has even greater power over the victim.

*Humig v. Dep't of Corrections*, \$850,000 compensatory damages award, Commissioner Gibson (the pattern of harassment and retaliation perpetrated by the officer's supervisors and co-workers caused serious emotional distress and jeopardized her life and

safety), [http://www.dhr.state.ny.us/pdf/Commissioner's%20Orders/humig\\_v\\_nys\\_dept\\_of\\_correctional\\_services.pdf](http://www.dhr.state.ny.us/pdf/Commissioner's%20Orders/humig_v_nys_dept_of_correctional_services.pdf), rev'd in part, *New York State Dept. of Correctional Services v. New York State Div. of Human Rights*, 2008 WL 2682073, 3 (N.Y.A.D. 3 Dept.) (N.Y.A.D. 3 Dept., 2008) (Reducing compensatory damages to \$200,000: "an award of compensatory damages must be based on pecuniary loss and emotional injuries actually suffered . . . Humig attended only four counseling sessions, and she does not claim that she took any leave or was prescribed any medication due to the resulting distress. . . ." (did the 3d Dep't mis-apply *Transit Authority* ?))

See, e.g., *Sorrenti v. City of New York*, 2007 WL 2772308, 8 (N.Y.Sup. 2007) (under the City Law) (Denying remittitur of \$491,706.00 jury verdict for psychological injury under the City Law: This court finds that the jury, among other proven factors, was able to assess the long term effects of Hall's harmful stereotyping of Sorrenti and discriminatory denial of Sorrenti's career opportunity with YSS has had on his mental and emotional state and which was compounded by CITY/NYPD employees' ongoing retaliatory acts of "abuse, intimidation and humiliation ..." , Sorrenti's episodes of suicidal ideation and current diagnosis of major reactive depression and Sorrenti's ongoing need for psychotropic medication.; and

*Katt v. City of New York*, 151 F.Supp.2d 313, 369 (S.D.N.Y., 2001) (denying remittitur of \$400,000 emotional distress award based on sexual harassment) (City Law) (The evidence established a sufficient basis from which a reasonable jury could find (and evidently did find) that the sexual harassment Katt experienced at the Seventh Precinct proximately caused her mental suffering. Katt testified that the sexual harassment caused, and continues to cause, severe emotional distress, which has manifested itself in various forms, including intestinal disorders and respiratory problems, vomiting, inability to hold down a job, and fear of intimate relationships with men. . . . Defendants cite no case in which a plaintiff in a similar circumstance-suffering from permanent mental disabilities, unable to work, unable to maintain sexual intimacy, unable even to perform household chores-was required to remit an award for compensatory damages for emotional distress comparable to the amount at issue here. An award of \$400,000 is no doubt a considerable one, but there was ample testimony in this case that the Seventh Precinct's pervasive and sexually hostile work environment has caused the plaintiff substantial and permanent psychological damage.)

Expert psychiatric testimony can be helpful in these cases in order to provide a diagnosis and an estimate of the duration of the injury.

One issue which frequently arises in sexual harassment cases is prior abuse (parental, spousal or rape being most common) and concomitant psychological injury. Should such vulnerability work to the plaintiff's or defendant's benefit? It will work to the defendant's benefit if defendant's discrimination merely exacerbated plaintiff's injury (caused by actions other than defendant's), in which case at most the defendant is responsible for the decline in plaintiff's mental condition caused by the discrimination. However, if the plaintiff was functioning well before the discrimination, without significant impairment caused by the prior trauma, the discrimination most likely caused suffering the plaintiff would not otherwise have experienced, in which case the plaintiff benefits from the eggshell doctrine.

*See e.g., Brady v. Wal-Mart Stores, Inc.*, 455 F.Supp.2d 157, 197 (E.D.N.Y. 2006), a failure to promote case with some hostile work environment aspects, the court remitted a much larger jury verdict under NY State law for emotional distress to \$600,000, noting "a lifetime of struggling with [cerebral palsy] left Brady particularly susceptible to emotional harm flowing from the discrimination to which the defendants subjected him. *See Bialik v. E.I. DuPont de Nemours & Co. Inc.*, 142 Misc.2d 926, 929, 539 N.Y.S.2d 605 (N.Y.App.Div.1988) (characterizing plaintiff as a " 'mental eggshell' ready to be cracked").

One earlier Second Circuit decision under federal law held that the eggshell skull doctrine has only been applied to pre-existing physical conditions and declined to extend the doctrine to psychological injury. *Ragin v. Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993).

Other conduct which can cause severe emotional injury is retaliation and constructive termination. The adverse conduct found in retaliation and constructive termination cases is often very similar to hostile work environment harassment.

*See, eg, Osorio v. Source Enterprises, Inc.*, 2007 WL 683985, 5 (S.D.N.Y.) (S.D.N.Y.,2007)(NY State and City Law \$4 million in compensatory damages for retaliatory termination: plaintiff testified at some length about the emotional distress and damage to reputation caused by the retaliation, including how defendant's retaliation caused her to feel depressed and anxious and to feel

embarrassed in front of others in the industry, as well as causing her difficulty during subsequent job interviews and professional events and the like. . . . Plaintiff, having risen from humble beginnings to the position of Editor-in-Chief of this prominent publication, only to be summarily dismissed in retaliation for filing a complaint of gender discrimination, might reasonably have suffered, as she averred, substantial emotional distress and reputational harm-and a jury, having found that such retaliation was intentional, could reasonably have concluded, under any standard, to award substantial damages.)

Termination cases where discrimination is established solely by circumstantial evidence are considerably less likely to produce severe emotional injury because they do not usually involve injurious harassing conduct. There are a number of exceptions, however, such as where the plaintiff is particularly vulnerable. See, eg.:

*Sogg v. Amer. Airlines, Inc.*, 193 A.D.2d 153; 603 N.Y.S.2d 21 (1<sup>st</sup> Dep't 1993)(Jury verdict of \$400,000 for emotional distress under NYSHRL: failure to promote and termination based on disability (heart condition) age and sex. 27-year career worked her way up to "second in command" only to be denied a deserved promotion and ultimately terminated. Plaintiff was particularly vulnerable because it was difficult for her to find another position)

*Ramirez v. New York City Off-Track Betting Corp.*, 1996 WL 210001, 5 (S.D.N.Y. 1996)(Remittitur of emotional distress verdict to \$500,000 under §1983: "the loss of employment, the loss of health insurance and benefits, and the emotional pain of being arbitrarily and summarily dismissed aggravated plaintiff's psychological problems to such an extreme extent that he ceased to be able to function in society. Further, there was substantial evidence to support a finding that this inability to function would persist indefinitely into the future.") *aff'd in relevant part, rev'd in part*, 112 F.3d 38 (2d Cir. 1997)

*In re New York City Transit Auth.*, 78 N.Y.2d 207, 577 N.E.2d 40, 573 N.Y.S.2d 49 (N.Y. 1991)(NY Court of Appeals reversing remittitur of NYSDHR Commissioner's award of \$450,000 for emotional distress: denial of light duty routinely offered to men resulted in pregnant bus driver's miscarriage)

*Cavagnuolo v. Baker & McKenzie*, 1993 WL 766865, 9 (N.Y. Div. of Human Rights Human Rights 1993)(\$500,000 from the

Commissioner for emotional distress and humiliation. Discriminatory termination of AIDS victim by law firm after his Kaposi's Sarcoma became visible. Defendant took from him the one thing left in his life of meaning)

### Evidence Necessary to Support Emotional Distress Awards

Psychiatric treatment is highly probative of serious psychological injury. However the absence of psychiatric treatment is not particularly probative of an absence of psychiatric injury.

People often suffer in silence. Many people will not or cannot due to lack of insurance seek medical attention for their emotional distress. Sometimes they tell their family physician they are having a lot of stress at work and receive a prescription for antidepressants. They may tell their dentist they are grinding their teeth at night and receive a bite plate. Or receive treatment for sexual dysfunction which they began to experience after the harassment. All of this evidence is probative of psychological injury and potentially admissible. But it is a common misconception that there is a requirement that the plaintiff demonstrate treatment to recover substantial damages for emotional distress.

In reversing the Second Department's initial conclusion that the \$450,000 award could not be sustained without evidence of treatment or physical manifestations, the New York Court of Appeals instructed the Appellate Division that:

The existence of compensable mental injury may be proved, for example, by medical testimony where that is available, but psychiatric or other medical treatment is not a precondition to recovery. Mental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct.

*In re New York City Transit Auth.*, 78 N.Y.2d 207, 577 N.E.2d 40, 573 N.Y.S.2d 49 (N.Y. 1991)(\$450,000 based solely on testimony of plaintiff); *Meacham v. Knolls Atomic Power Laboratory*, 381 F.3d 56, 78 (2d Cir. 2004)(accord \$125,000).

In addition to *Transit Authority*, and *Meacham*, *supra*, there are cases decided in state and federal court, under NY State and NYC Law which expressly recognize that the testimony of the plaintiff, often supported by the testimony of her friends, family or co-workers, is sufficient to support a

significant emotion distress award, without the testimony of a treating or expert medical provider. See, eg,:

*Osorio v. Source Enterprises, Inc.*, 2007 WL 683985, 5 (S.D.N.Y.) (S.D.N.Y.,2007)(Refusing to grant remittitur of \$4 million in compensatory damages under the City Law based on testimony of plaintiff)

*In Re Town of Hempstead*, 233 A.D.2d 451, 649 N.Y.S.2d 942 (2d Dep't 1996)(\$500,000 for sexual harassment under NY State law based on testimony of plaintiff and friend)

*New York City Police Dept. v DeLeon*, Sup Ct, NY County, July 28, 1992, Altman, J., Index No. 40191/92, *aff'd*, 201 AD2d 260, 608 N.Y.S.2d 827 (1994), *lv denied*, 83 NY2d 757) (\$250,000 based solely on testimony of victim of retaliation)

*119-121 East 97th Street Corp. v. New York City Com'n on Human Rights*, 220 A.D.2d 79, 85, 642 N.Y.S.2d 638, 642 (N.Y.A.D. 1 Dept.,1996)(Denying remittitur of \$100,000 emotional distress award by NYCCHR: "The testimony of the complainant alone will suffice to sustain an award for mental anguish (*Cullen v. Nassau County Civil Service*, 53 N.Y.2d 492, 497, 442 N.Y.S.2d 470, 425 N.E.2d 858). Further, evidence of mental treatment is *not* required for a finding of mental anguish [citing *DeLeon*, *supra*])).

*Broome v. Biondi*, 17 F.Supp.2d 211 (S.D.N.Y.,1997), a jury awarded \$114,000 each in emotional distress damages under the City Law to two tenants whose application to sublease a cooperative apartment was rejected on the basis of race, solely on their testimony of embarrassment and humiliation caused by the discriminatory approval process, being reduced to tears, and her husband's testimony as to his anger and shame for not having defended his wife.

In the Second Circuit, the term "Garden Variety" emotional distress implies a case in which the defendant is not entitled to a Rule 35 exam of the plaintiff by a psychiatrist because the plaintiff is not seeking compensation for permanent or serious psychiatric injury. It also implies that any award for emotional distress in excess of \$30,000 will ordinarily be reduced to that amount. *Patterson v. Balsamico*, 440 F.3d 104, 120 (2d Cir. 2006)(the Court was reminded of its \$30,000 limit in cases such where "the evidence of the harms suffered was limited to Patterson's testimony alone, and there

was no evidence that any medical treatment was required.")

Typically the plaintiff (and perhaps a family member) testifies that he felt poorly as a result of the discrimination. Another way to look at these cases is that the plaintiff, seeking to avoid exposing her private thoughts and feelings to public and expert examination, makes the decision to seek only modest damages for psychological injury.

However there are decisions under federal law in the Second Circuit upholding significant emotional distress awards, without medical testimony, supported only by the testimony of the plaintiff and a friend or family member to suggest that the Garden Variety doctrine is flexible. See, eg,:

*Phillips v. Bowen* 278 F.3d 103, 111 -112 (C.A.2 (N.Y.),2002)(affirming the district court's refusal to remit a \$400,000 emotional distress award for retaliation for exercising her first amendment rights: Plaintiff did not offer medical testimony or prove physical injury, however she "and her boyfriend testified in detail about her emotional distress, physical illness, and the effects of defendants' conduct on her lifestyle and relationships. Phillips' co-workers testified about the deterioration they observed in Phillips."

*Fink v. City of New York*, 129 F.Supp.2d 511, 538 (E.D.N.Y. 2001) (Remitting to \$175,000 an emotional distress award under the ADA, proved by the testimony of the plaintiff and his wife: The fact that Fink did not go to a psychiatrist when he experienced the symptoms of emotional distress to which he testified, an omission to which courts often seem to give significant weight, should not necessarily have led either a jury or this court to conclude that his symptoms were somehow more likely to be fabricated or insignificant. . . . It is not unreasonable to suppose that an individual such as Fink, a man used to working among men in the military and in the fire department" would not "have gone 'running off to some shrink,' and endured the stigma often associated with such visits" and "therefore, the absence of medical evidence should not be weighted too heavily against Fink.")

There is no \$30,000 cap under Title VII. The "Garden Variety" doctrine appears to be vulnerable to legal challenge. The fact that it has not been thus far suggests that it benefits some plaintiffs who are using it to avoid Rule 35 exams. The recent jury verdict in *Browne-Sanders v. MSG*, a sexual harassment and retaliation case, is an example. The jury awarded \$11.7 million in punitive damages but the plaintiff intentionally avoided



making a case for psychological injury.

### Practical Techniques for Accessing Psychological Injury

In personally injury cases the attorney has some well established tools for proving damages. He can put a radiologist on the stand to explain an X-Ray of a broken bone. There is usually not going to be a dispute in the case of a clear break.

Psychological injury is more difficult to prove. Psychiatrists cannot read minds, and conflicting expert testimony and reports in these cases are the rule. Because the assessment of suffering is inherently subjective it is not possible accurately to predict what amount a jury will award for psychological injury.

It is possible, however, to identify cases where an extremely large jury verdict for psychological injury is likely, and likely to be sustained by the court.

Severe psychological injury is usually accompanied by certain behavior and symptoms (DSM IV criteria for diagnosis of major depression and PTSD). It's usually noticed by friends, family and quite often co-workers (whose testimony juries often find more credible than expert testimony).

There are some common changes that victims of serious psychological injury undergo in behavior and physical function. Their socialization patterns change. The plaintiff may withdraw from friends and family. He or she may become angry with children for no apparent reasons, or stop seeing a circle of friends.

Victims of serious psychological injury frequently experience changes in appetite and weight, often accompanied by a purchase of new clothing to accommodate the weight change. There are often changes in sleep patterns, dreaming (nightmares waking the plaintiff). There may be hair loss or prolonged intestinal disturbance. Panic attacks accompanied by rapid heartbeat are not uncommon.

Loss of function is another common problem. A plaintiff may become tearful for no apparent reason, when exposed to stimuli which trigger flashbacks, and become unable to function on the job. For some, their depression is so deep they become completely unable to work and socialize.

One cannot value psychological injury the same way a personal injury lawyer values a torn meniscus. As discussed *infra*, even discrimination proved solely through circumstantial evidence, where there has been no hostile work environment, can produce significant awards, when compensatory and punitive damages are combined.

But if you are trying to figure out whether the plaintiff is likely to hit one out of the ball park, look to changes in the plaintiff's socialization and the types of problems described above.

### Large Awards for Emotional Distress Under the City Law are Surviving Judicial Review

The City Law and the Restoration Act are unlike any other remedial statutes. The legislative history of both acts makes plain that the City Council expressly chose to give plaintiffs more generous compensation for injuries than state or federal law. See, e.g., A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law," 33 Fordham Urb. L.J. 255 (2006)(The City Human Rights Law's purposes are said to be not only uniquely broad, they are uniquely broad *and remedial*." One of the core principles intended by the Council to guide decision makers is that "victims of discrimination suffer serious injuries, for which they ought to receive full compensation." (quoting the 2005 Committee Report at 5))

Since the Restoration Act was passed in October 2005, two of the three courts sustaining large emotional distress award expressly relied on the intent of the City Council in passing the Restoration Act, in denying remittitur motions.

A \$ 2 million compensatory damages award was sustained in *Jordan v. Bates Advertising Holdings, Inc.*, 11 Misc.3d 764, 770-771, 2006 N.Y. Slip Op. 26046, 4 - 5 (NY,2006), reversed on other grounds, 46 A.D.3d 440, 848 N.Y.S.2d 127, 2007 WL 4531803 (N.Y.A.D. 1 Dept.), expressly in reliance on the liberal policies behind the City Law and the Restoration Act. Justice Acosta, a former Commissioner of the NYCCHR, explained that:

[I]n enacting the more protective Human Rights Law, the New York City Council has exercised a clear policy choice which this court is bound to honor. The Administrative Code's legislative history clearly contemplates that the New York City Human Rights Law be liberally and independently construed with the aim of making it the most

progressive in the nation. Thus, the case law that has developed in interpreting both the state Human Rights Law and title VII of the Civil Rights Act of 1964 should merely serve as a base for the New York City Human Rights Law, not its ceiling. (See *also* Local Law No. 85 [2005] of City of New York § 1 [Local Civil Rights Restoration Act of 2005]; Council Report of Governmental Affairs Div, Comm. on General Welfare, Aug. 17, 2005.) In the present case, although plaintiff has clearly established her claims under the more restrictive state and federal standards, when possible, the court will conduct its analysis under the New York City Human Rights Law.

In *Sorrenti, supra*, the defendants objected to the \$491,706 as excessive and an alleged product of judicial bias evidenced by the court's instruction to the jury under the City Law. The court found that the defendants' reliance on the instruction was misplaced, because the allegedly biased liberal language was in the statute itself. In its opinion the court credited plaintiff's position that: the court properly instructed the jury with the proper statutory standard ( see New York City Human Rights Law ["HRL"] § 8-107[7] ) to apply when considering whether defendants retaliated against plaintiffs by subjecting them to adverse employment actions after they engaged in protected activity. . . . See N.Y.C. Adm.Code § 8-107 *et seq.*, as amended by the Local Civil Rights Restoration Act of 2005 ("LCRRA"). *Sorrenti v. City of New York* 2007 WL 2772308, 3 (N.Y. Sup.,2007)

In denying remittitur of a \$4 million award for compensatory damages in *Osorio v. Source Enterprises, Inc.*, 2007 WL 683985 (S.D.N.Y.) (S.D.N.Y.,2007) Judge Rakoff did not expressly cite the legislative history of the City Law, but it is unlikely an award of this size would have been sustained under State or Federal law standards of review. See *infra* for a discussion of State and Federal remittitur standards.

In 2004, prior to the passage of the Restoration Act, the court granted remittitur of a \$2 million jury award for emotional distress to \$1.1 million under State and City Law, in *Gallegos v. Elite Model Mgmt. Corp.*, 1 Misc.3d 907(A) (N.Y. Sup. Ct. 2004), *vacated on other grounds*, 28 A.D.3d 50 (N.Y. App. Div. 2005)(empanelling alternate jurors after deliberations began required new trial on damages). In explaining the emotional distress award the court stated, "The repeated failure to observe the non-smoking law in the light of petitioner's [asthma] and the tolerance of cruel practical jokes evinced a reckless disregard for the plaintiff's physical health and was reprehensible." 2004 N.Y. Slip Op. 50000(U) at 5. The court sustained an award of \$2.6 million for punitive damages without reduction. *Id.*

Also under the City Law, the First Department held that a victim of extremely crude sexual harassment was entitled to approximately \$600,000 for emotional distress. *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 256 A.D.2d 269, 271, 682 N.Y.S.2d 167 (1<sup>st</sup> Dep't 1998). Plaintiff saw a psychiatrist who testified at trial. *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d 795, 800, 669 N.Y.S.2d 122, 127 (N.Y.Sup.,1997). The jury initially awarded \$1.6 million in compensatory damages and \$5 million in punitive damages. The lower court granted remittitur to \$650,000 and \$3 million in punitive damages. The First Department reduced the punitive damages to \$1.5 million but allowed the plaintiff to keep all but \$50,000 of the compensatory award.

See also *Katt v. City of New York*, 151 F.Supp.2d 313, 369 (S.D.N.Y.,2001)(denying remittitur of \$400,000 under the City Law).

## **Punitive Damages**

### Statutory State of Mind Requirement

In *Kolstad v American Dental Assn.* (527 US 526, 529-530 [1999]), the Court held that "punitive damages [under Title VII] are limited . . . to cases in which the employer has engaged in intentional discrimination and has done so 'with malice or reckless indifference to federally protected rights of an aggrieved individual.'" According to the Court, "malice and reckless indifference" refer to "the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." (Id. at 535.) As the court held in *Hill v Airborne Frgt. Corp.* (212 F Supp 2d 59, 76 [ED NY 2002]), it is reasonable for juries to infer that employers have acted in violation of the law "simply by virtue of the well-established Supreme Court case law on discrimination and retaliation, the long standing statutory scheme proscribing such conduct, the size of [the employer defendant] and the *common knowledge in today's society that employment discrimination is impermissible.*" [italics added]

As a practical matter this standard will ordinarily not be difficult for plaintiffs to meet.

There is case law which holds (without explanation) that the state of mind requirement under Title VII and the City Law for the imposition of punitive damage is the same. As Justice Acosta held in *Jordan v. Bates Advertising Holdings, Inc.*, 11 Misc.3d 764, 776, 2006 N.Y. Slip Op. 26046, 9 (NY

Sup. 2006) *reversed on other grounds*, 46 A.D.3d 440, 848 N.Y.S.2d 127, 2007 WL 4531803 (N.Y.A.D. 1 Dept.), plaintiff must prove the employer's knowledge that it may be acting in violation of law:

In analyzing whether to sustain an award of punitive damages under the New York City Human Rights Law, state courts apply the same framework used by the federal courts in actions brought pursuant to title VII of the Civil Rights Act of 1964. (*Farias v Instructional Sys., Inc.*, 259 F3d 91, 101-102 [2d Cir 2001].)

Justice Acosta provided no explanation for his conclusion that Title VII case law should be imported to construe the more liberal City Law, and the case he cited for support, a pre-Restoration Act case, clearly misstates the law. See *Farias v. Instructional Systems, Inc.*, 259 F.3d 91, 101 (C.A.2 (N.Y.), 2001) (“discrimination claims brought under the Administrative Code are generally analyzed within the same framework as Title VII claims”).

As one commentator noted:

Given the City Human Rights Law’s overriding concern that covered entities be made to recognize the seriousness with which they must take their obligations, advocates will likely question why a defendant who recklessly disregards the risk that its conduct will harm the plaintiff should not, as a matter of local law, be liable for punitive damages. Such conduct is blameworthy regardless of whether the defendant is disregarding, as required by *Kolstad*, a known risk of violating the law.

A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law, 33 Fordham Urb. L.J. 255, 318 (2006).

However, as a practical matter, the standard will virtually always be met when the plaintiff proves intentional discrimination.

### Affirmative Defenses

In *Kolstad* the Supreme Court also created an affirmative defense to liability for punitive damages under Title VII when the defendant can show that “the discriminatory employment decisions of managerial agents . . . are contrary to the employer’s “good-faith efforts to comply with Title VII.” *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 545, 119 S.Ct. 2118, 2129 (U.S., 1999).

As Justice Acosta explained in *Jordan*, this safe harbor is unavailable as a defense to liability for punitive damages under the City Law because the City Law expressly allows only mitigation of the amount of punitive damages; it does not permit the defendant to avoid liability for punitive damages entirely:

"the New York City Human Rights Law has made good faith compliance procedures only a factor to be considered in mitigation of punitive damages, rather than a complete defense." (*Thompson v American Eagle Airlines, Inc.*, 2000 WL 1505972, \*11, 2000 US Dist LEXIS 14932, \*33 [2000]; Administrative Code § 8-107 [13] [e].) These safe harbor provisions allow an employer to plead and prove various factors where liability for discriminatory conduct is based "solely on the conduct of an employee, agent, or independent contractor." (§ 8-107 [13] [d].) Among the factors that can be pleaded is a "meaningful and responsive procedure for investigating complaints" and a "firm policy against such practices which is effectively communicated." (See Administrative Code § 8-107 [13] [d] [1] [i], [ii].) An employer, however, cannot mitigate damages simply by having a responsive procedure in writing. As the statute clearly and logically states, the procedure must be "meaningful."

*Jordan, supra*, 11 Misc.3d at 777-778.

Justice Acosta also explained why the defendant in *Jordan* was unable to rely on the mitigation factors to reduce the \$500,000 award of punitive damages:

although defendant had a nondiscriminatory policy in place, Bennett, the EEO compliance officer in this large and sophisticated national corporation, took no steps to discipline or otherwise counsel two supervisory personnel (one of whom plaintiff testified was Fidoten) whom he heard call plaintiff a "cripple."

*Jordan, supra*, 11 Misc.3d at 778.

The entire set of factors on which the jury must be instructed under the City Law are:

(d) Where liability of an employer has been established pursuant to this section and is based solely on the conduct of an employee, agent, or independent contractor, the employer shall be permitted to plead and prove that prior to the discriminatory conduct for which it was found liable

it had:

(1) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors, including but not limited to:

(i) A meaningful and responsive procedure for investigating complaints of discriminatory practices by employees, agents and persons employed as independent contractors and for taking appropriate action against those persons who are found to have engaged in such practices;

(ii) A firm policy against such practices which is effectively communicated to employees, agents and persons employed as independent contractors;

(iii) A program to educate employees and agents about unlawful discriminatory practices under local, state and federal law; and

(iv) Procedures for the supervision of employees and agents and for the oversight of persons employed as independent contractors specifically directed at the prevention and detection of such practices; and

(2) A record of no, or relatively few, prior incidents of discriminatory conduct by such employee, agent or person employed as an independent contractor or other employees, agents or persons employed as independent contractors.

These factors taken as a whole create a far greater burden of proof on the employer in order to mitigate a punitive damages award than the "good-faith efforts" standard created by the Court in *Kolstad*. In addition, they are unavailable when the defendant is directly liable, as opposed to vicariously liable, for the actions of its employees.

### The Constitutional Standard for Punitive Damages: Due Process

Reprehensibility and the ratio of compensatory to punitive damages are the constitutional factors most likely to be fought over by the parties in post-trial motions. However, as a practical matter, during mediation, the salient point is that even in fairly mundane cases punitive damages operate as a damages multiplier, and in a strong case, with extremely bad facts, they can easily produce a significant and defensible award in excess of policy limits.

Judge Lynch recently summarized the due process standard as follows:

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Supreme Court identified three “guideposts” for determining whether a punitive damage award is excessive: (1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the harm or potential harm and the punitive damages award, or in other words, the proportion or ratio of punitive damages to compensatory damages; and (3) the difference between the remedy and the civil penalties authorized or imposed in comparable cases. *Id.* at 574-75.

*Tse v. UBS Financial Services, Inc.*, 2008 WL 463719, 25 (S.D.N.Y. 2008).

As Judge Lynch noted, “*Gore* instructs that the Court should first consider the ratio of the punitive damages award to compensatory damages, including back pay.” *Id.* at 29

In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S.Ct. 1513, 1524 (U.S.,2003), the Court helpfully added that:

We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.

As a practical matter, most judges in NY are going to be leery of a jury award of punitive damages in excess of a multiple of four times compensatory plus economic damages, in the absence of conduct which is extremely reprehensible. However, as discussed below, there are cases which have upheld awards of close to the maximum of a ten-to-one ratio.

*Tse, supra*, is an example of how punitive damages act as a multiplier in a disparate treatment case based on circumstantial evidence; the type of case which is less likely to produce severe psychological injury.

The court reduced a \$500,000 economic damages award to \$45,000. Adding the \$56,000 the jury had awarded for emotional distress to the reduced \$45,000 for a total "compensatory" damage amount of \$101,000,



the court reduced the punitive damages award from \$3 million to \$300,000, which it now found comported with due process and State Farm. The plaintiff took \$401,000, which is an astounding accomplishment by her counsel, if you read the facts of this case carefully.

A case which involves a seriously abusive hostile work environment can produce a constitutionally permissible seven figure punitive damages award for a single plaintiff.

In *Gallegos v. Elite Model Mgmt. Corp.*, 781 N.Y.S.2d 624, 2004 WL 51604, 2004 N.Y. Slip Op. 50000(U), 5 (N.Y.Sup. 2004), the trial court sustained a \$2.6 million punitive damages award. The court explained:

The evidence adduced at trial was certainly sufficient to justify an award of punitive damages. Under *State Farm v. Campbell*, 538 US 408, 155 L.Ed2d 585 [2003], due process considerations make it necessary to consider the fairness of the awards. The most important consideration is the reprehensibility of the conduct. The repeated failure to observe the non-smoking law in the light of petitioner's [asthma] and the tolerance of cruel practical jokes evinced a reckless disregard for the plaintiff's physical health and was reprehensible. We are also instructed to consider the disparity between the harm endured by plaintiff and the difference between the punitive damages awards and the civil damages awards in similar cases. The Court holds that the reprehensibility of the defendants' conduct, combined with a \$2.6 million award for punitive damages as compared to a \$1.1 million dollar award for pain and suffering fully satisfied due process.

In *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 256 A.D.2d 269, 271 (1st Dep't 1998), where the operative compensatory damages award was about \$600,000, the First Department found that the \$2.5 million of punitive damages awarded by the jury met the reasonable relationship standard, "10 to 1 as an outside ratio," but nonetheless reduced the punitive damages award to \$1.5 million, about a 3 to 1 ratio.

The highest ratio of punitive to compensatory (including economic damages) found in a NY case in the Second Circuit was about 3.75 to 1 in *Greenbaum v. Handelsbanken*, 67 F.Supp.2d 228, 270-71 (S.D.N.Y., 1999).

In state court the highest ratio was close to 10 to 1, in *Bell v. Helmsley*, 2003 WL 1453108, 6 (N.Y.Sup.) (N.Y.Sup., 2003), where the compensatory

damages were \$54,000 and the Justice reduced the jury \$10 million expression of contempt for the Queen of Mean to \$500,000. In the court's analysis:

Finally, this Court must consider the requirement that the punitive damages bear a reasonable relationship to the amount of compensatory damages. This Court notes that in *BMW v. Gore*, *supra* (517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809), the Supreme Court of the United States suggested 10:1 as the *outside* ratio of punitive to compensatory damages. This Court deems this ratio appropriate in the instant matter given the nature of defendants' reprehensible conduct, the plaintiff's sustainable compensatory damages, the defendants' financial condition, and the likelihood that defendants will also bear the responsibility of a significant award of attorney's fees. The compensatory damages in this matter total some \$54,000 and under the circumstances the court deems \$500,000 to be the outer permissible limits on punitive exemplary damages and accordingly, reduces the award to that amount. *Id.* at 6.

The court provided this additional explanation: "Punitive damages, are not a game of Lotto and more particularly to the matter at hand, Mrs. Helmsley is not a 4 Billion Dollar piñata for every John, Patrick or Charlie to poke a stick at in the hopes of hitting the jackpot."

### **Remittitur under federal, State and NY City Law**

Remittitur is a procedure whereby a court offers the plaintiff the option of accepting a reduced damage award set by the court as an alternative to a new trial. It is applied when the court finds that the jury's award of damages was excessive. *Ramirez v. New York City Off-Track Betting Corp.*, 112 F.3d 38, 40 (2d Cir. 1997). As described more fully below, the standard of what constitutes excessive varies depending on whether the cause of action arises under federal, state or city law.

Remittitur is not an option when the court finds that the verdict on damages was infected by "fundamental error," *id.*, such as where the jury erroneously awards damages for a claim which was time barred.

### **Remittitur of Emotional Distress Awards under Federal Law**

The standard of review of jury verdicts rendered under federal laws, such as Section 1981 and Section 1983 (which do not cap damages), as well as

Title VII, is that remittitur should be granted only if the verdict "shocks the conscience of the court." *E.g. Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1011 (2d Cir. 1995).

If a district court finds the verdict warrants remittitur, it may reduce the award "only to the maximum amount that does not shock the conscience' to ensure that the jury's decision will be disturbed as little as possible. *Trademark Research Corp. v. Maxwell Online, Inc.*, 995 F.2d 326, 337 (2d Cir. 1993)." *Ramirez v. New York City Off-Track Betting Corp.* 1996 WL 210001, \* 5 (S.D.N.Y.) (S.D.N.Y.,1996)

As the US Supreme Court explained, appellate review of the district court's decision on remittitur is extremely deferential, and it makes no difference whether the appellate court reviews the district court's application of the federal "shocks the conscience" standard, or the appropriate NY State or NY City Law standard (see *infra*). "[P]ractical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of [the correct standard]. Trial judges have the "unique opportunity to consider the evidence in the living courtroom context, while appellate judges see only the cold paper record. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 438, 116 S.Ct. 2211, 2225 (U.S. 1996)(citations and quotes omitted)

#### Remittitur of Emotional Distress Awards under NY Executive Law § 296

We found no NY Court of Appeals decision determining the standard of review of Emotional Distress Awards under NY Executive Law § 296 from a jury verdict. The NY Court of Appeals announced the standard of review of an award of the Commissioner in Division of Human Rights in *NYC Transit Authority v. State Div. of Human Rights*, 78 N.Y.2d 207, 216-219 (N.Y. 1991), as (1) the existence of a compensable mental injury reasonably related to the wrongdoing, (2) whether the award was supported by some evidence of the magnitude of the injury, and (3) how the award compared with other awards for similar injuries.

The Second Circuit has now clarified that the *Transit Authority* standard should also be applied to review remittitur motions arising from a jury verdict. *Brady v. Wal-Mart Stores, Inc.*, 455 F.Supp.2d 157, 190 (E.D.N.Y. 2006), *aff'd, sort of, Brady v. Wal-Mart Stores, Inc.*, 2008 WL 2597936, 9 (2d Cir. 2008)("either the district court correctly applied the Transit Authority standard, or it erred in a way that harmed Appellee-by applying the "deviates materially" standard-but Appellee has not protested").

### Remittitur of Emotional Distress Awards under The City Law

Various courts have used different remittitur standards in reviewing emotional distress awards under the City Law, so the precise standard is not clear. What is clear is that it is a very generous and deferential standard.

The Restoration Act's focus was the "sense of the [City] Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law" (Restoration Act § 1). The Restoration Act specifically amended Section 8-130 of the Human Rights Law (the section that provides direction as to how to interpret the law) in two key respects: first, to characterize the purposes of the law as "uniquely broad and remedial," and, second, to direct that the provisions of the law be interpreted liberally to accomplish those purposes, regardless of whether counterpart state and federal provisions have been likewise liberally construed. There is no carve out for the damages provisions of the law, which are further reaching than the comparable federal and state laws. As such, any judge must exercise caution before acting as though the limitations in damage awards under state or federal law were applicable in the City Law context.

Finally, a warning against reflexively reducing verdicts is explicitly included in the legislative history. The Committee Report states, "Under the bill's provisions, a number of principles should guide decision makers when they analyze claims asserting violations of rights protected under the City's human rights law: discrimination should not play a role in decisions made by employers, landlords and providers of public accommodations; traditional methods and principles of law enforcement ought to be applied in the civil rights context; and victims of discrimination suffer serious injuries, for which they ought to receive full compensation."

The Council, therefore, had the protection of full compensation listed as one of the core principles that decision makers must always consider—a powerful indicator that the Council was more concerned about under-compensation than about over-compensation. Also, since the Council saw every discrimination injury (even "garden variety" injuries) as serious, the term "full compensation" must mean just that and it includes redress for relatively minor discrimination injuries. As discussed *supra*, there is evidence which suggests that state and federal courts are heeding to the Restoration Act and the dictate to award full compensation.

In addition, the City Law creates a mechanism whereby an employer can mitigate (but not avoid liability for) punitive damages, however, it is completely silent regarding a mechanism for mitigation of compensatory damages. This, too, is a legislative counterweight to reduction of compensatory damages verdicts.

In two cases denying remittitur under the City Law, the courts determined that the evidence on compensatory damages was sufficient to survive a motion for a new trial, and denied the remittitur motion as well, without comparing the size of the verdict with other awards.

In *Jordan v. Bates Advertising Holdings, Inc.*, 11 Misc.3d 764, 776, 816 N.Y.S.2d 310, 321-322 (N.Y.Sup. 2006), *reversed on other grounds*, 46 A.D.3d 440, 848 N.Y.S.2d 127, 2007 N.Y. Slip Op. 10465 (N.Y.A.D. 1 Dept. Dec 27, 2007), Justice and former NYCCHR Commissioner Acosta refused to reduce a \$2 million jury award for compensatory damages because there was adequate evidence in the record that the plaintiff had suffered the loss for which the award was made--unrebutted expert testimony. He went on to analyze the \$500,000 punitive damages award under the factors spelled out in the statute.

In *Osorio v. Source Enterprises, Inc.*, 2007 WL 683985 (S.D.N.Y., 2007), Judge Rakoff denied remittitur of a \$4 million compensatory damage award under NY City and State law. For evidentiary support, Judge Rakoff relied on the fact that the jury was entitled to credit plaintiff's testimony that defendant's termination of her employment in retaliation for complaining about sexual harassment, and concomitant loss of reputation, caused her significant emotional distress. 2007 WL 683985, 5.

Unfortunately, neither of these courts explained why they had chosen the standard of review they used, and the First Department reversed on liability in *Jordan*, so it did not have a chance to comment on the standard of review under the City Law of a jury verdict.

The First Department applied the three part test set forth by the Court of Appeals in *Transit Authority*, discussed *infra*, in denying remittitur of a \$100,000 emotional distress award of the Commissioner of the NYC CHR, in *119-121 East 97th Street Corp. v. New York City Com'n on Human Rights*, 220 A.D.2d 79, 87, 642 N.Y.S.2d 638, 643 (1st Dep't 1996).

In *Sorrenti v. City of New York*, 2007 WL 2772308, 8 (N.Y.Sup. 2007), the court noted that trial courts may apply the "material deviation standard" but

should exercise their discretion sparingly, and "undertake this review and analysis with caution not to rigidly adhere to precedents (because fact patterns and injuries in cases are never identical) and/or substitute the court's judgment for that of the jurors whose primary function is to assess damages," in denying remittitur of a \$491,706 emotional distress award.