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HOW TO SCREEN FOR SUCCESS IN EMPLOYMENT CASES

Robert M. Rosen¹

INTRODUCTION

The objective of this paper and the attached materials is to give the 'nuts-and-bolts' of successfully screening cases for employment law practice. Real estate brokers often say that the three most important factors in a piece of property are location, location and location. The three most important factors in employment law are *case selection*, *case selection* and *case selection*. Statistics have shown that the cost of employment litigation from the time of filing an Equal Employment Opportunity Commission ("EEOC") complaint or a state charge process, including a jury trial and verdict, not including any appeals, can range from \$50,000 on the low side to \$250,000 and

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Mr. Rosen has been certified as a mediator by the Nassau County Bar Association, Employment Law and Alternative Dispute Resolution Panel; has qualified as a mediator for the United States Federal Courts; has completed the Eastern District of New York's Mediation Program; nad has completed Cornell University's Labor Management Mediation Program to be certified as a mediator.

Mr. Rosen acted as a mediator for the EDNY's mediation panel in age, sexual harassment, and Americans with Disability Act cases; he has been appointed as mediator for the pro bono case panel by the New York State Division of Human Rights; and he has mediated an Americans with Disability Act case for failure to provide a reasonable accommodation to a school teacher in her school district.

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up in legal fees. This does not include disbursements, deposition fees and expert fees.

THE INTAKE PROCESS

One thumb rule that should be recognized is that 20% of the cases bring in 80% of the fees. Selecting that 20% is extremely important. How should one concentrate on selecting the critical 20%? Begin with an intake questionnaire, such as the copy included in the materials.² Everyone in the office can use a good questionnaire, because a standardized form articulates the issues, focuses attention on the potential issues at an early stage, and assesses the client's willingness to assist in the litigation.³

Many attorneys spend a substantial portion of their day speaking to potential clients. In general, they feel that the telephone interview wastes more time than it is worth. As a result, many firms use legal assistants to conduct initial interviews by giving them certain guidelines to follow. Those guidelines should be clearly spelled out in the intake sheets used by the legal assistant.

Generally, when a potential client telephones a receptionist, the receptionist can refer the client to a legal assistant or an associate assigned by daily rotation to take incoming calls. The person taking the call should generate a report, and give the report to the partner or associate in charge of reviewing new cases. An attorney should be assigned to handle client questions for emergency situations immediately, or to promptly contact such a client, especially for severance packages review or statute of limitation date issues.

Attorneys must decide whether or not to charge a consultation fee. If so, one should charge no less than the summons and complaint filing fee for the federal courts, which today is \$150. Alternatively, charge up to the hourly-billing rate. If the client cannot afford to pay a minimum of \$150, that is

² See *infra* table T.3 for a sample telephone inquiry form and intake questionnaire.

³ See *infra* table T.4 for a sample confidential employment questionnaire.

usually a good indication that the client cannot afford to pay the disbursements on his or her case.

An attorney's office should keep a log to track the source of the incoming call. Calls come from many different sources, e.g., a yellow pages ad, a response to a professional ad in the local bar association paper, other attorneys, or advocate groups that may refer cases to the office. Preferably on the computer, start a memo file containing all the information supplied by a potential client.

Because retainers and fee agreements *should always be in writing* and signed by the client and a member of the firm, an attorney should decide whether to give legal advice on the phone, without meeting the client, or not. Set time and number limits for the daily intakes, e.g. some attorneys do two one-hour intakes per day. Do not attempt to take comprehensive notes initially. First, get an overview of what happened as the case unfolds. If necessary, have the prospective client mail a history of what happened, together with a computer disk (when possible) containing comprehensive facts. Use the facts to draft the complaint, prepare document requests, etc.

THE CASE'S THEORY STARTS AT CASE SELECTION

What makes a good plaintiff? A good plaintiff possesses the best qualities of a good storyteller, including a likeable personality and an ability to fully describe events, thoughts and feelings in an intelligent and emotionally compelling fashion. A good plaintiff also exhibits a sense of humor during difficult situations. The client must be emotionally open in a public forum. An emotionally expressive plaintiff will evoke more compassion, empathy and understanding from the jury or bench. If damages for pain and suffering are sought for emotional distress, the client must possess the ability to fully describe his or her emotional trauma in a sympathetic manner. The client must understand the legal theories in order to withstand vigorous cross-examination, and must handle questions different from those prepared for during their direct testimony. The client must appeal to the jury as honest, reliable, confident and open.

Clients who are prone to anger, bitterness and hostility usually turn jurors off.

Prepare the theory of the case by using a set of pattern jury instructions during the intake process. For example, in an age discrimination case, review the necessary elements set forth in the jury instructions. As the facts are told, mentally draft the pleadings. Assess the plaintiff's damages right from the beginning and determine how to prove those damages.

Consider disparate treatment versus disparate impact.⁴ The majority of age discrimination claims arise from the individual client's experience as a worker. The worker finds that she no longer receives juicier job assignments and instead sees them going to younger colleagues. She then wonders if perhaps her age has something to do with it. One of the most logically compelling tests of an adverse action against an employee based on an impermissible bias is whether all members of the protected class are similarly downgraded. Logically, if an employer is prejudiced against older workers, all older workers over the critical age will experience similar negative treatment.

Thus, evaluation of an individual allegation of age discrimination should include considering that this prejudice is possibly part of a practice or pattern. An analysis of a possible age claim is incomplete without inquiring if other similarly situated employees were treated similarly.

If others also suffer to a greater or lesser extent than the complainant, a claim of disparate impact and possible class relief may lie. Class relief can obviously represent appreciably greater damage awards. Under these circumstances, consider what the employer will raise as its defense, its legitimate non-discriminatory business reason for its actions.

One invaluable tool for analysis of potential case success is a set of jury instructions in the area of law of the case. For

⁴ *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (contrasting disparate treatment where "[t]he employer simply treats some people less favorably than others because of their [age]" with disparate impact involving "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.")

example, the elements of a *prima facie* case under the Age Discrimination in Employment Act ("ADEA"),⁵ are found in a set of jury instructions for those issues. For a federal law, see the Federal Civil and Criminal Jury Practice and Instructions;⁶ for State law, see the state's pattern jury instructions for civil litigation.⁷

The Jury Verdict Reporter has recently published a new section on damage awards in employment law cases.⁸ This can be used as a tool to substantiate the value of the case against other cases that have been reported. Two other publications are also invaluable. One is the National Employment Lawyer's Association ("NELA/NY") Employee Advocate Newsletter, which may be obtained by becoming a member of NELA/NY.⁹ The other publication is the Employment Discrimination Report, published by the Bureau of National Affairs ("BNA"),¹⁰ which will give you invaluable information on verdicts and settlements of cases around the country. These publications will give you an idea of what your case may be worth if you plan to pursue it.

⁵ 29 U.S.C. §§ 621-34 (1995).

⁶ 3 DEVITT, BLACKMAR & WOLFF, FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL (4th ed. 1987).

⁷ See, e.g., New York Pattern Jury Instructions, Civil 9:1 – 9:4 (West Supp. 2000).

⁸ See, e.g., THE NEW YORK JURY VERDICT REPORTER, vol. XVIII/10 (Sept. 13, 2000) (reporting jury award in favor of Doctor who alleged racial discrimination in employment against hospital); vol. XVIII/8 (Aug. 14, 2000) (reporting \$891,800 verdict in the Eastern District in employment discrimination case); vol. XVII/15 (Oct. 14, 1999) (reporting damages in the amount of \$1,500,000 awarded, under Americans with Disabilities Act ("ADA"), to employee with leg prosthesis).

⁹ Contact Shelley Leinhardt at (212) 317-2291 for a membership application.

¹⁰ Bureau of National Affairs, 1231 25th Street, N.W., Washington, D.C. 20037.

CASE SELECTION IDEAS FOR YOUR CONSIDERATION

In making an analysis of the facts the client presents at an intake interview, determine hidden causes of action that may not become apparent on the surface and may, at times, be more valuable than the original claim that the client first presented. Sometimes hidden claims may be extremely lucrative for the client. When the defendant is a large corporation, these claims may also lead to claims for other employees.

If a Fair Labor Standards Act¹¹ claim, or other state wage claims, or an Employee Retirement Income Security Act¹² ("ERISA") claim are uncertain, consult other attorneys who work in this area and have more knowledge of the validity of such a claim. Then make a judgment whether or not to pursue that claim in negotiations or litigation.

Another case selection consideration is the defendant's ability to pay damages. Normally a Fortune 500 company should not have a problem paying damages, but they too go into bankruptcy sometimes. When pursuing a small company with twenty-five or fewer employees, especially with borderline finances, consider whether the judgment may be worthless. If the defendant cannot pay damages, the case is not worth the time.

A tiny employer of less than fifteen employees is barely covered under New York Human Rights Law.¹³ Careful analysis of the time necessary to try the case, against the potential recovery, is important.

Because of the amount of legal time invested in the preparation of a case, three questions should be considered:

- Does the case justify the amount of time necessary?
- Can the office afford to carry a case with that large an investment in time?
- Can the time be tracked to quantify the firm's investment?

The case should also be critically evaluated from the following additional questions:

¹¹ 29 U.S.C. §§ 201-19 (1995).

¹² 29 U.S.C. §§ 1001-1461 (1995).

¹³ N.Y. EXEC. LAW §§ 290-300 (McKinney 1993).

- Will the case withstand a summary judgment motion under federal or state law?
- Will extensive discovery be required?
- Will the out-of-pocket expenses be high?
- What will be the cost for depositions and expert witnesses?
- What is the employer's background?
- Are there past cases against the employer?
- Who is the defense counsel?
- Does the client have exposure to areas of damage and will the client permit damage control exercises?
- What first impression instinctively arises from the case?
- Does a detailed written chronology of the events provide focus and understanding of the case?
- Does the client relate events succinctly and can he clearly explain documents in the litigation?
- Can honest communication be elicited from the client and is the client a strong witness?

Conduct the in-person interview in private; allow no interruptions, no third parties, including spouses, significant others, family members or friends to be present. Such persons may encumber the prospective client's ability to communicate. Judge the client's narration as if the client were presenting direct testimony before a jury. If the client is not educated, conduct the interview at the client's level of understanding so that the client's appeal to the jury can be assessed.

When undertaking case selection, it is a big mistake *not* to consider the defendant's thinking in order to anticipate their defense to the case. The attorney must find the other side's vulnerabilities and exploit them. Envision the defendant's management position, understand their motives, and see if those motives make sense as legitimate, non-discriminatory business reasons.

Do not make excessively high settlement demands. Determine whether or not the defendant considers this a 'case in principle,' i.e., one that the defendant wants to use as an example for other current or former employees, thus dissuading them from commencing legal action. In such a case, the defendant's

objective is to prevent future litigation, and will likely spend what it takes to win.

If, however, the defendant's perspective is that the case is an "economic case," then they will try to settle the case where there is good evidence of company liability, rather than undertake expensive and time consuming litigation. By determining whether your case is a principle case or an economic case, you can adjust your negotiation and litigation strategies accordingly.

When rejecting a case, send a letter declining representation and advising the client to seek the advice of other counsel, or refer the client to a state or federal agency.¹⁴ Decline the representation in plain language and confirm in the letter that neither legal advice, nor an opinion of the merits of the case is expressed. Be sure, however, to advise the client in the letter of the applicable Statute of Limitations, to prevent malpractice.

In multi-client litigation, be concerned about the presence of a conflict of interest. If there is a conflict, advise the client in the letter, and withdraw. In some cases such as a small recovery case or a discharge case where a new job has been found, it may be better to refer the client back to the State Division of Human Rights,¹⁵ or EEOC.¹⁶

It may be worth the effort not to get involved in these types of cases. Similarly, a case near the expiration of the Statute of Limitations may not be worth the effort to save either.

¹⁴ See *infra* table T.5 for a sample declination letter.

¹⁵ The New York State Division of Human Rights is an executive agency "responsible for developing civil rights legislation and policy for the State of New York, and for promoting awareness of civil rights issues and remedies." *The New York State Division of Human Rights* (visited Sept. 18, 2000) <<http://www.nysdhr.com/hist.html>>. The Division's Headquarters are located at One Fordham Plaza, Fourth Floor, Bronx, New York 10458. *Id.*

¹⁶ The EEOC was established under Title VII of the Civil Rights Act of 1964, and enforces "the principal federal statutes prohibiting employment discrimination . . ." *U.S. Equal Employment Opportunity Commission* (last modified Nov. 3, 1997) <<http://www.eeoc.gov/overview.html>>. The EEOC's Headquarters are located at 1801 L Street, N.W., Washington, D.C. 20507. *Id.*

Beware of cases with findings and determinations of “no probable cause” at the State Division of Human Rights,¹⁷ or a dismissal of the charge process at EEOC.¹⁸ Think long and hard before taking such a case.

The federal courts and its judiciary are not averse to assessing sanctions under Rule 11 of the Federal Rules of Civil Procedure¹⁹ against attorneys who file frivolous lawsuits in this area. It is incumbent upon plaintiff’s counsel to conduct a pre-investigation filing of all claims to determine whether a prima facie case can be substantiated on any grounds.²⁰

¹⁷ The New York State Division of Human Rights “serves as an alternative to the court system for resolving discrimination claims.” *The New York State Division of Human Rights* (visited Sept. 18, 2000) <<http://www.nysdhr.com/hist.html>>.

¹⁸ A function of the EEOC is to determine, through the investigation of charges, whether there is “reasonable cause to believe that discrimination has occurred” It then seeks to facilitate a voluntary resolution between the parties involved, but can also file suit in federal court. *U.S. Equal Employment Opportunity Commission* (last modified Nov. 3, 1997) <<http://www.eeoc.gov/overview.html>>.

¹⁹ FED. R. CIV. P. 11(c) (Supp. 2000), which states in pertinent part, “the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.” *Id.* Federal Rule of Civil Procedure 11(b) provides that an attorney is required to certify to the court that, to the best of the attorney’s “knowledge, information and belief, formed after an inquiry reasonable under the circumstances,” the lawsuit or accompanying documents are not presented to cause “unnecessary delay or needless increase in the course of the litigation;” the claims are “warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of a new law;” the allegations are supported by the evidence; and the denials of allegations are warranted.” FED. R. CIV. P. 11(b)(1)-(4) (Supp. 2000).

²⁰ See *Gartenbaum v. Beth Isr. Med. Ctr.*, 26 F. Supp. 2d 645 (S.D.N.Y. 1998) (finding in this racial discrimination case that plaintiff’s attorney had failed to demonstrate that he made an adequate and reasonable investigation of the plaintiff’s claim before filing suit. However, the court declined to impose sanctions until discovery was completed). *Id.* at 647-49; see also *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87 (2d Cir. 1999) (vacating and remanding the order awarding \$25,000.00 in attorneys fees to be paid to defendant’s counsel by plaintiff’s attorney).

By suing the supervisor, the defense is spread. An alliance between the employer and the supervisor and between the two attorneys representing each of them is formed. Their interests are aligned in fact, even where their interests may not have been naturally aligned. Sometimes self-interest motivates the supervisor, and that interest is not always consistent with the company's interest. By suing the supervisor, he may be pushed into the arms of the employer. The employer may pay for the supervisor's defense, thus preventing an advantageous wedge from forming between the supervisor and the employer. By suing the supervisor, he or she becomes a named party and is entitled to attend every deposition and hear everyone's testimony. Therefore, the supervisor will be prepared for his or her deposition.

Most importantly, in federal jurisdictions the supervisor cannot be sued personally.²¹ However, under State Human Rights Law (New York Executive Law),²² the supervisor can be sued for aiding or abetting discrimination. Check and see if state statutes permit suits against supervisors. Determine what will be gained before naming the supervisor. Ask: *Does the supervisor have funds to pay the judgment?* If not, why bother?

²¹ See *Berry v. North Ala. Elec. Coop.*, 61 Fair Empl. Prac. Cas. (BNA) 1331 (N.D. Ala. May 10, 1993) (opining that there is no personal liability of supervisors); *United States EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (upholding the district's court's opinion that individuals who do not independently meet the ADA's definition of 'employer' cannot be held liable under the ADA). *Id.* at 1278; *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986) (stating that, "[l]iability under Title VII does not automatically follow, however we must instead proceed cautiously, recognizing that it is only employers who are subject to statutory liability."). *Id.* at 442. See also *Falbaum v. Pomerantz*, 891 F. Supp. 986 (S.D.N.Y. 1995) (stating in connection with an ADEA claim that, ". . . the specific definition of 'employer' support the conclusion that Congress intended to hold employers, but not individual employees, liable for acts of discrimination in employment."). *Id.* at 991.

²² N.Y. EXEC. LAW § 296(6) (McKinney 1993) which states in pertinent part, "[i]t shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this article, or to attempt to do so." *Id.*

Determine whether to assert a claim of intentional infliction of emotional distress. The standard of proof is so high that the defendant will probably win a procedural victory if the cause of action is dismissed, thus weakening an emotional distress defense in court. Legal fees may be denied if this cause of action is dismissed. If the client is subjected to a Rule 35²³ examination because emotional distress is an issue, do not make the standard of the independent medical examination of the defendant higher than it really is. There is no real substantive basis in employment law pleading when compensatory damages can be obtained for emotional distress under Title VII.²⁴

<u>Number of Employees</u>	<u>Applicable Cap</u>
501 or more	\$300,000
201 to 500	\$200,000
101 to 200	\$100,000
15 to 100	\$50,000

Section 102(b)(3)²⁵ provides that the sum of compensatory damages and punitive damages “shall not exceed” the statutory limits “for each complaining party.” This suggests that a plaintiff cannot circumvent the applicable cap by aggregating separate damage awards against multiple defendants.²⁶

²³ FED. R. CIV. P. 35(a), which states in pertinent part, “Order for Examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party’s custody or legal control.”

²⁴ 42 U.S.C. § 2000 (1964) (amended 1991).

²⁵ 42 U.S.C. § 1981a(b)(3)(c) (1994).

²⁶ See, e.g., *United States EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (noting that 42 U.S.C. § 1981 (b) caps the total amount of compensatory and punitive damages that can be awarded in favor of one plaintiff, against a particular defendant depending on the number of employees the defendant employs) *Id.* at 1279; see also *Anderson v. Yarp Restaurant, Inc.*, 1997 WL 27043 (S.D.N.Y. 1997) (categorizing the jury award so as to permit the plaintiff to recover the entire amount without exceeding the permissible cap, the court held \$65,000 represented compensatory damages

Perform a background check of the employer. Find out whether or not the employer has been sued in any other cases for a similar claim in order to see reported cases on damages or locate witnesses for the case.

Create a time line to clarify the sequence of events between various individuals as the fact pattern unfolds. Organize your documents in chronological order; usually the documents themselves show the flow of the case and the facts of the case without the testimonial evidence to support them. Documents organized in a chronological order from all sources show all the interaction of the various parties and players involved in the case. A complete analysis of the documents is essential. The one who controls the documents can, in most circumstances, control the case.

Once the case is selected, anticipate a counterclaim or an "after acquired evidence" defense when preparing the pleading.²⁷

Always discuss reinstatement with the client. The employer is set up for a monetary damage settlement and maximized front pay request if the employer prohibits reinstatement. The best way to minimize the front pay request is to forget to demand

under New York Human Rights Law § 296 and \$50,000 represented punitive damages under Title VII. *Id.* at *7; *Solomon v. Godwin & Carlton, P.C.*, 898 F. Supp. 415 (N.D. Tex. 1995) (reducing total compensatory and punitive damage award against two separate defendants to a total of \$200,000 because the employer employed fewer than 501 employees).

²⁷ See *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352 (1995). Defendant in an age discrimination claim defended on the ground that plaintiff had removed and copied several confidential documents during her final year of employment. *Id.* at 355. The district court held that the plaintiff's misconduct were grounds for termination and neither back pay nor any other remedy was available. *Id.* The Supreme Court reversed and remanded, holding that an employee discharged in violation of the ADEA is not barred from all relief solely on the ground that after-acquired evidence has been discovered, more evidence is needed as to the severity of the wrongdoing. *Id.* at 364; see also *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545 (10th Cir. 1999) (refusing to extend the after-acquired evidence theory to post termination conduct that would have resulted in dismissal from employment); *Russell v. Microdyne Corp.*, 65 F.3d 1229 (4th Cir. 1995) (reversing the district court's grant of summary judgment in favor of the defendants based on the discovery of false information on the plaintiff's resume and job application which was obtained through discovery).

reinstatement, because front pay is an equitable remedy in lieu of reinstatement. Therefore, always request reinstatement.²⁸

Also, never have the client refuse, under oath, to consider an offer of reinstatement. If the client refuses, the court will hold that the client has waived his or her right to reinstatement, and possibly front pay.²⁹ If the client gets an unconditional offer of reinstatement, be sure to accept it. An unconditional offer of reinstatement made to a plaintiff, and not accepted, will toll the plaintiff's claim for back pay as a matter of law.³⁰ In order to be considered an unconditional offer, the plaintiff must be offered reinstatement to his or her former position with the same wages and benefits as prior to termination.

MONETARY RELIEF

Determine which laws are applicable to the case to determine damages. Look for and consider all relevant federal and state statutes and how they impact the case, as well as common law theories. Determine if there are causes of action under federal laws such as:

- The National Labor Relations Act³¹
- Title VII of the Civil Rights Act of 1964 (see Amendment 1991)³²

²⁸ See *EEOC v. HBE Corp.*, 135 F.3d 543 (8th Cir. 1998). In reducing the front pay award in a racial discrimination claim, the court stated, "While the district court properly concluded that front pay was appropriate because the animosity shown between the parties made reinstatement impracticable, the size of the award was greater than the evidence justified." *Id.* at 555.

²⁹ See *Wildman v. Lerner Stores Corp.*, 771 F.2d 605 (1st Cir. 1985) (holding that future damages should not be awarded unless reinstatement is impracticable or impossible); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980) (refusing to address the issue of future damages in lieu of reinstatement because the plaintiff had disclaimed any specific desire for reinstatement).

³⁰ *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (holding that an employer charged with discrimination in hiring can toll the continuing accrual of back pay liability by offering the claimant the job previously denied).

³¹ 29 U.S.C. §§ 151-91 (1988).

³² 42 U.S.C. § 2000 (1964) (amended 1991).

- Sections 1981 through 1983 of Title 42 of the United States Code³³
- The Employee Retirement Income Security Act of 1974³⁴
- The Immigration Reform and Control Act³⁵
- The Americans with Disabilities Act³⁶ (“ADA”) of 1990
- The Age Discrimination in Employment Act of 1967³⁷
- The Fair Labor Standards Act³⁸
- The Occupational Safety and Health Act³⁹
- The Family and Medical Leave Act of 1993⁴⁰
- The Workers’ Compensation Act⁴¹
- The Rehabilitation Act, Section 504⁴²
- The Equal Pay Act⁴³
- The Older Workers Benefit Protection Act⁴⁴ (“OWBPA”) under ADEA.

Or New York State statutes such as:

- New York State Human Rights Law, Section 296⁴⁵
- The New York Corrections Law, Sections 750 through 755⁴⁶
- The New York Minimum Wage Law and Wage and Wage Payment Laws⁴⁷

³³ 42 U.S.C. §§ 1981-1983 (1994).

³⁴ 29 U.S.C. §§ 1001-1461 (1995).

³⁵ 8 U.S.C. § 1255a (1986).

³⁶ 42 U.S.C. §§ 12101-213 (1991)

³⁷ 29 U.S.C. §§ 621-34 (1995).

³⁸ 29 U.S.C. §§ 201-19 (1995).

³⁹ 29 U.S.C. §§ 651-678 (1995).

⁴⁰ 29 U.S.C. § 2651 (1995).

⁴¹ 5 U.S.C. §§ 8101-8193 (1995). *See also*, N.Y. WORK. COMP. LAW §§ 1-430.12 (McKinney 1999).

⁴² 29 U.S.C. § 794 (1995).

⁴³ 29 U.S.C. § 206(d) (1995).

⁴⁴ 29 U.S.C. § 621(f) (1995).

⁴⁵ N.Y. EXEC. LAW § 2961 (McKinney 1999).

⁴⁶ N.Y. CORRECT. LAW §§ 750-755 (McKinney 1999).

⁴⁷ N.Y. LABOR LAW § 650 (McKinney 1999).

Also determine if there are some common law claims such as, breach of contract, negligence or slander/libel.

The charts in Table One summarize the remedial differences for monetary relief.⁴⁸ Be aware of these differences when selecting cases. When choosing a case, consider the damages that can be recovered, as well as the liability.⁴⁹

For example, Section 1981 of Title 42 of the United States Code⁵⁰ empowers courts not only to award back pay, but they may also award compensatory and punitive damages. Section 1981 covers intentional racial and ethnic discrimination, including anti-Semitism. Gender discrimination is not covered, and most religious discrimination is not covered. There are no monetary caps under Section 1981 claims as there are under Title VII. Therefore, if an African American or Hispanic plaintiff brings a claim, he or she could claim far more relief by suing under Section 1981 than by suing under Title VII. An identical injury can produce vastly different awards, depending upon whether the plaintiff is limited to Title VII or is able to claim relief under Section 1981.⁵¹

Courts have routinely held that economic compensatory damages and punitive damages are not available under the Equal Pay Act,⁵² and the Age Discrimination in Employment Act.⁵³ Back pay may be awarded under these statutes where the violation is willful, and double back pay may be awarded as liquidated damages. Awards of liquidated damages frequently

⁴⁸ There is a split among the federal circuits on the question of whether nominal damages are available. *Compare* Landgraf v. USI Film Prods., 968 F.2d 427, 431 (5th Cir. 1992) (denying nominal damages), *aff'd on other grounds*, 511 U.S. 244 (1994); Griffith v. Colorado Div. of Youth Serv., 17 F.3d 1323, 1327 (10th Cir. 1994) (denying nominal damages); Jackson & Coker, Inc. v. Lynam, 840 F. Supp. 1040, 1053 (E.D. Pa. 1993) (denying nominal damages), *aff'd*, 31 F.3d 1172 (3d Cir. 1994) *with* Parton v. G.T.E. N., Inc., 971 F.2d 150, 154 (8th Cir. 1992) (nominal damages available). See *infra* table T.1.

⁴⁹ This consideration impacts case selection, e.g. whether or not attorneys fees will be awarded.

⁵⁰ 42 U.S.C. § 1981 (1994).

⁵¹ See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 180-82 (1989).

⁵² 29 U.S.C. § 206 (1998).

⁵³ 29 U.S.C. §§ 621 et. seq. (1999).

carry with them the denial of prejudgment interest on back pay on the theory that the doubling of back pay serves the same function.⁵⁴

Where there are different remedies, plaintiffs should think strategically about which claims to present under the different statutes and their damage potentials. For example, unequal pay for equal work can be made both under Title VII and the Equal Pay Act. The Equal Pay Act also contains a potential monetary remedy not present in Title VII: employers cannot equalize pay downward (taking males' advantages away from them and bringing them down to women's pay levels), but can only equalize pay upward by bringing women up to men's pay levels.⁵⁵

Private, state and local officials can be sued in their personal capacities for intentional racial discrimination in violation of Section 1981,⁵⁶ and for intentional discrimination based on race, color, national origin, sex or religion, in violation of Section 1983,⁵⁷ subject to the "qualified immunity defense."⁵⁸

CLIENT RELATIONS – SOME SUGGESTIONS

- Return all clients' phone calls and keep the client advised of major developments in the case.
- Copy clients on all letters regarding the case.

⁵⁴ See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985) (holding that legislative history of ADEA indicates Congress intended for liquidated damages to be punitive in nature); See also, *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1101-02 (3d Cir. 1995) (noting split in Circuit Courts of Appeals on issue of whether pre-judgment interest may be awarded along with liquidated damages in ADEA actions and citing cases).

⁵⁵ See 29 U.S.C. § 206(d) (1998). This subsection provides, in relevant part: "... an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." *Id.*

⁵⁶ 42 U.S.C. § 1981 (1994).

⁵⁷ 42 U.S.C. § 1983 (1994).

⁵⁸ See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (holding defense of qualified immunity available to government executive officers in section 1983 action).

- Maintain strict and accurate time records in the event you are the prevailing party and want to be reimbursed for your fees.
- Be honest with the client and let the client make the decisions.
- Send monthly bills with a description of services even if it is in narrative form; at least it gives the client some idea of what is happening with the case on a month-to-month basis as the legal services on the bill grow.
- Start talking about settlement to the client immediately when the case comes into the office. The sooner you talk about settlement, the more the client feels there may be some way to resolve the issue.
- Create a chronology of events.
- Determine whether or not there is a sexual harassment policy of the employer, and if one exists, how it is important to your case.
- Understand the decisions in *Faragher v. City of Boca Raton*⁵⁹ and *Jansen v. Packaging Corp. of Am.*⁶⁰ in your case selection considerations to see if the employer may be subject to liability.
- Determine if the harassment was by a supervisor. If so, follow the chart in Table Two to determine whether there may be liability.⁶¹
- Obtain statements from other victims of harassment or corroboration from employees or former employees who witnessed the adverse employment action.
- Always determine whether or not your client has kept a diary, or knows of others who have. Obtain copies to use on direct or cross-examination.

⁵⁹ 524 U.S. 775 (1998).

⁶⁰ 123 F.3d 490 (7th Cir. 1997), *cert. denied sub nom.* Ellerth v. Burlington Indus., 524 U.S. 951 (1998) *and aff'd sub nom.* Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

⁶¹ See *infra* table T.2.

- Determine whether your client reported the incidents to a doctor, psychiatrist, psychologist, or social worker.
- Determine whether your client made any internal complaints, and, if so, to whom.
- Determine whether the client made statements to friends and/or family members contemporaneously while the events were unfolding, or sought legal advice.
- Try to corroborate each fact and get fact witnesses.
- Seek out former employees or supervisors.
- Identify the manner, terms and conditions of how your client's employment has been affected as a result of the harassment.
- If your client sought help for emotional trauma, discuss it with his or her spouse, family members, friends, co-workers, members of his or her bowling team, etc., to determine how the client acted.
- If you are going to use an expert, retain the expert early in the case so you can work in conjunction with the expert, and so the expert will be guided by what is necessary for you to prove in the courtroom.

CASE SELECTION GRUNT WORK

Explore fully with your client all aspects of damages at the case intake – dates and circumstances, and dates of hire; review documents, employment agreements, acceptance letters, job descriptions, resumes, applications, salary and salary increases, positions held, representations by the employer, witnesses to representations, employees' handbooks, personnel policy manuals, and affirmative action documents.

Be sure to see disciplinary memos, awards and commendations. Explore the failure to promote the client and why. Determine which, if any, unlawful acts the employer has undertaken, who the decision-makers are and their identities, and

the reasons they gave as legitimate non-discriminatory business reasons for the actions against your client. In other words, make sure you review every single piece of paper in the client's personnel file in order to understand exactly what the record is. Also, if there has been a charge filed with the EEOC or the State Division of Human Rights, examine all documents filed by the employer and the employee with the agency in question.

In the event you must practice damage control, explore fully and completely with your client his prior employment history and why he or she left various jobs. If there is trial litigation involving the client, examine it fully until you understand it and there will be no surprises.

Instruct the client that he or she is to speak to no one except you with regard to any information on the case, and advise your client that he or she is to give you the good, bad and the ugly about the situation so that you know how to fully represent him or her. If the client has sought and received psychological counseling other than just for his or her job situation, review those records completely; every single page must be reviewed to see if there are any skeletons in the closet which may come back to haunt you. Obtain treatment records from all doctors and review those, so that you are not surprised during discovery.

Assess with your client his or her financial solvency and how strong the case is on the merits. Try to prepare an accurate budget so that the client will know approximately how much the case will cost.

In assessing damages for economic loss, consider the following categories: loss of wages and salaries; commissions; stock plans; stock options; bonuses; vacation pay; retirement pay; ESOP; auto allowance; front pay; lost pension benefits, 401K, etc. Also, be sure to advise your client of his or her obligation to mitigate damages. Failure to mitigate damages could cut off back and front pay and other benefits.⁶² In fact, if the client is

⁶² See *Dailey v. Societe Generale*, 108 F.3d 451 (2d Cir. 1997); *EEOC v. Pape Lift, Inc.*, 115 F.3d 676 (9th Cir. 1997); *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117 (2d Cir. 1996); *Fair v. Red Lion Inn*, 943 P.2d 431 (Colo. 1997). See also *infra* table T.6 for sample letter to client regarding client's duty to mitigate damages.

unemployed and you decide to take the case, it is necessary to inform the client about his duty to mitigate.⁶³ See Appendix C, Tab D, for a sample form.

THE COMPONENTS OF A BACK PAY AWARD FOR CASE SELECTION

There is a strong presumption favoring an award of back pay.⁶⁴ An employer's good faith is not an acceptable reason to deny back pay.⁶⁵ If an employer were allowed to defend against a back pay claim on the grounds that it had not been predicted a given practice would be found unlawful, it would defeat the "make whole" purpose of back pay awards.⁶⁶

A jury is not required to accept an expert's evaluation of earnings lost because of discrimination even where the employer puts on no evidence of its own, particularly where the expert witness was cross-examined about the problems in this evaluation.⁶⁷

Sections 1981 and 1983 can be used to seek equivalent relief, such as injunctive relief and back pay or legal damages such as compensatory damages for stress, humiliation, discrimination and punitive damages. Therefore, in a Section 1981 or 1983 case, you can seek both types of relief.⁶⁸ There can be no 'double dipping' under the Equal Pay Act or the Age Discrimination in Employment Act.

Back pay includes lost earnings and benefits and measurable accoutrements of lost earnings and back pay. Back pay includes

⁶³ See *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (standing for the principle that the client must use reasonable diligence in finding other suitable employment).

⁶⁴ *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (holding that, given the finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination).

⁶⁵ *Id.* at 421.

⁶⁶ *Id.*

⁶⁷ See *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 995 (10th Cir. 1994).

⁶⁸ See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975).

not only straight salary, but also interest, overtime, shift differentials and fringe benefits, such as vacation and sick pay, which items are normally included in back pay. There also can be adjustments to pensions for members of a class who retired during this time and should also be included.⁶⁹ Back pay awards are to make the plaintiff whole as to what they would have earned in the absence of discrimination, including any wage increases or increases in benefits.

Where discrimination results in the loss of health insurance, the employer may be required to pay the victim's medical insurance premiums and any unreimbursed medical expenses normally covered by the employer's insurance.⁷⁰

It has also been held that back pay can include the value of the employer- provided housing loss because of discrimination.⁷¹

Section 706(g) of Title VII of the Civil Rights Act of 1964 provides only a two-year back pay accrual prior to the filing of the charge with the Commission. However, a back pay award may be subject to the continuing violation theory,⁷² which has also been extended to the Fair Housing Act.⁷³

TERMINATION OF THE BACK PAY PERIOD

The back pay of a victim of discrimination may terminate under several different scenarios: a) The victim leaves the job market for reasons having nothing to do with the discrimination; b) The victim leaves the employer for reasons having nothing to do with the discrimination, such as termination for misconduct; c) The victim becomes physically incapacitated or otherwise unable to perform the essential functions of the job, is terminated and the reasons for termination are not traceable to prior

⁶⁹ See *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 263 (5th Cir. 1974).

⁷⁰ See *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836, 841 (6th Cir. 1994).

⁷¹ See *EEOC v. Imperial Management Co.*, 777 F. Supp. 1389, 1393 (W.D. Tenn. 1991).

⁷² See *Cornwell v. Robinson*, 23 F.3d 694 (2d Cir. 1994); *Gallagher v. Delaney*, 139 F.3d 338 (2d Cir. 1998); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 (2d Cir. 1998).

⁷³ See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982).

discrimination; d) The victim accepts a higher paying job and either remains in that employment or loses a job through misconduct; e) The victim refuses to accept comparable employment under comparable conditions.⁷⁴ However, the job offered must be truly comparable in responsibility, working conditions and opportunities for promotion. The shift conditions must be the same. The party must have the same limitations that one had for child care arrangements, a reasonable commuting time, etc.⁷⁵ The test is how reasonable the reason for rejection was from the standpoint of the employee, not necessarily of the employer.

It has also been held that front pay may not be available, for example, in an ADEA claim where liquidated damages were awarded for the injury.

The plaintiff has the duty to mitigate and if plaintiffs fail to mitigate under Section 706(g) of Title VII of the Civil Rights Act of 1964, Section 2000 E-5(g) of Title 42 of the United States Code⁷⁶ states: "Interim earnings or amounts earned with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."⁷⁷

The plaintiff has the burden to show his or her actual earnings, but the employer must assist by providing information in its possession. In this instance, failure to mitigate a claim, shifts the burden to the defendant to explain the failure to provide the plaintiff with the necessary information.⁷⁸

MITIGATION BY COLLATERAL BENEFITS

Generally, collateral public benefits such as unemployment compensation benefits, welfare and food stamps, are not included

⁷⁴ See *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (holding that the rejection of a job offer by the defendant without any condition that the victim withdraw her case ended the back pay award).

⁷⁵ See *Mitchell v. Humana Hospital-Shoals*, 942 F.2d 1581 (11th Cir. 1991).

⁷⁶ The Civil Rights Act of 1964, 42 U.S.C.A. §2000e-5(g) (2000).

⁷⁷ *Id.*

⁷⁸ See *Marks v. Prattco, Inc.*, 633 F.2d 1122, 1125 (5th Cir. 1981); *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1559 (5th Cir. 1985).

in interim earnings and are not used as partial offsets to an award of back pay.⁷⁹ Where a plaintiff receives unemployment compensation benefits during a period in which he or she does not actively seek employment, the amount of those benefits will be deducted from the back pay award.⁸⁰

PREJUDGMENT INTEREST

An award of prejudgment interest is an essential component of an adequate back pay award.⁸¹

The Civil Rights Act of 1991 enacted a new Section 1981(a) damage remedy.⁸² Section 1981(a) is not a liability statute but only provides for additional benefits in connection with intentional violations of Title VII, the Americans with Disabilities Act, and Section 501 of the Rehabilitation Act of 1973, including classes involving federal agency employees. Section 1981 actions are limited to intentional discrimination and have no application to disparate-impact discrimination.

THE RIGHT TO A JURY TRIAL

You can mix legal and equitable claims only in a federal court complaint. Be very careful not to mix legal and equitable claims in a state court complaint, or you will waive your right to a jury trial. For example, back pay determinations under Title VII have traditionally been viewed as similar to an accounting in equity and are not subject to a jury trial. However, the court may use advisory juries, if necessary.

A jury trial is available for actions at law for damages (other than back pay) under Section 1983 of the United States Code.⁸³ A jury trial is also available for legal issues under the Equal Pay Act and ADEA. Finally, jury trials are available under the Civil

⁷⁹ *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 364-65 (1951); *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104 (8th Cir. 1994).

⁸⁰ *See Miller v. Swissre Holding, Inc.*, 771 F. Supp. 56 (S.D.N.Y. 1991).

⁸¹ *See Loeffler v. Frank*, 486 U.S. 549 (1988).

⁸² 42 U.S.C.A. §1981(a) (2000).

⁸³ 42 U.S.C.A. §1981(b)(4)(c) (2000).

Rights Act of 1991, but there are no damage or jury trials for disparate impact discrimination.

PUNITIVE DAMAGES

Back pay, if considered for the purpose of punitive damages, is based on the egregiousness and the nature of the conduct.⁸⁴

To determine punitive damages, plaintiff must show, for example, the nature, extent and severity of the harm, the duration of the conduct, the existence and frequency of similar past action, evidence of concealment or cover-up, and proof of retaliatory actions. In determining punitives, the following financial factors should be considered: a) the revenue and liabilities of the business; b) the fair market value of the assets; c) the market value of the liquid assets; d) the projected earnings of the employer; and e) the resale value of the company.⁸⁵

QUALIFIED IMMUNITY OF PUBLIC OFFICIALS

State and local government officials may be sued in their personal capacities under 42 U.S.C. § 1981 and § 1983 for actions taken under the color of law. In these cases, be aware of the absolute and qualified immunity of state and local officials who are sued in their personal capacities.⁸⁶ Also, a Section 1981 claim may not be asserted against state or federal agencies or officials for damages.⁸⁷

⁸⁴ See Restatement (Second) of Torts § 908(2) (2000); *EEOC v. Gaddis*, 733 F.2d 1373 (10th Cir. 1984).

⁸⁵ See *EEOC v. HBE Corp.*, 135 F.3d 543 (8th Cir. 1998) (discussing punitive damage awards).

⁸⁶ See *Hafer v. Melo*, 502 U.S. 21 (1991); *Burns v. Reed*, 500 U.S. 478 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

⁸⁷ See *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989); *Brown v. Gen. Serv. Admin.*, 425 U.S. 820 (1976).

RULE THIRTY-FIVE AND EMOTIONAL DISTRESS DAMAGES

In emotional distress cases, a Rule 35 mental examination will boost the compensatory damages for stress and humiliation caused by discrimination and emotional distress, if proven. Plaintiffs making claims for emotional distress should be aware that the defendant may make a Rule 35 Federal Civil Procedure demand for a mental examination of before a physician, psychiatrist or psychologist of the defendant's choosing.⁸⁸

To determine whether your client has a claim for emotional distress damages, take into consideration the following symptoms: headaches, stomach distress, insomnia, loss of appetite, nightmares, fatigue, decreased energy, loss of the sense of taste, smell, hearing and sight, digestion problems, cold sweats, blurred vision, rapid pulse, shortness of breath, loss of concentration, weight gain or loss, excessive sleeping, resumption of smoking, slowdown, chronic pain, nervous tics and shaking sensations. You may want to give your client a symptoms checklist and questionnaire with regard to emotional distress damages.⁸⁹

Find out if the client has ever experienced any of the following in the past: anxiety, stress, sadness, emptiness, constant crying, slurred speech, helplessness, loss of interest in hobbies, sex or food, fears, irritability, feelings of guilt, depression, thoughts of suicide, wanting death to occur, wanting an automobile accident to happen, memory problems, indecisiveness, hopelessness, pessimism, withdrawal, humiliation, emotional distress, shame, disorientation or suicide attempts.⁹⁰

⁸⁸ See *Bridges v. Eastman Kodak Co.*, 850 F. Supp. 216 (S.D.N.Y. 1994).

⁸⁹ See Tab E.

⁹⁰ One of the books to read to understand emotional distress injuries is *Mental and Emotional Injuries in Employment Litigation* by James J. McDonald, Jr., and Francine B. Kulick, published by the Bureau of National Affairs, Inc. (BNA), Washington, D.C. In evaluating any aspect of emotional distress damages, you should make use of the *Diagnostic and Statistical Manual of Mental Disorder*, Fourth Edition (DSM-IV) (1994), published by the American Psychiatric Association (APA), Washington, D.C. It contains a

RETAINERS

Always have your retainer agreement in writing. Set forth clearly in the retainer agreement what the client is agreeing to such as: hourly rates, contingency fees, flat fees, and, actual services you will perform. Clearly spell out how disbursements are to be handled and the client's responsibility for same.⁹¹

TIME SHEETS AND WHY

Failing to keep detailed contemporaneous time records as the case progresses is a common mistake made by attorneys. The burden of proof is on you as counsel to show that the number of hours spent on the case is reasonable. Keeping detailed contemporaneous time records is the single most important step you can take to insure that you ultimately recover reasonable attorney's fees, if your client prevails.⁹²

Remember, in federal practice, the Lodestar method is used for attorneys fees applications to determine the amount of attorneys fees the losing party should pay.⁹³ Accurate time records are vitally important, as they are part of your client's damages. In utilizing the Lodestar method, obtain affidavits from highly respected members of the employment bar who are in a position to know the rates in the community.⁹⁴

classification of mental disorders that was developed by the APA to provide clear descriptions of diagnostic categories without engaging in an analysis of the causes of mental disorder.

⁹¹ See *infra* table T.8 for sample fee arrangement, and T.9 for sample retainer agreement.

⁹² A super time billing program to use is "Time Slips." They can be reached at 1-800-285-0999.

⁹³ See *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Blum v. Stenson*, 465 U.S. 886, 901-902 (1984); *G.M. ex rel R.F. v. New Britain Bd. of Educ.*, 173 F.3d 77 (2d Cir. 1999); *Quaratino v. Tiffany & Co.*, 166 F.3d 422 (2d Cir. 1999).

⁹⁴ See *Bridges v. Eastman Kodak, Co.*, No. 91-7985, 1996 WL 47304, at *11 (S.D.N.Y. Feb. 6, 1996), *affirmed* at 102 F.3d 56 (2d Cir. 1996).

TAXATION OF DAMAGE AWARDS

Back pay and front pay awards are taxable, as are emotional distress and punitive damages awards. As plaintiff's counsel, you must be very careful about alerting clients of the tax aspects and advising a course of action at case selection. A word to the wise: DON'T. Instead, advise the client to consult a tax attorney or accountant specializing in these matters.

In litigating compensatory damage awards, compensatory damages refer to all loss recoverable as a matter of right including all damages beyond nominal damages, other than punitive or exemplary damages. An award can include actual loss in time or money, bodily pain and suffering, permanent disfigurement, disabilities or loss of health, injury to character and reputation and mental anguish. A compensatory damage award will be awarded only for a harm caused by the defendant's unlawful termination.⁹⁵ There must also be proof of the compensatory injury. It will not be presumed. No compensatory damages will be awarded for violation of a right where no injury is present.⁹⁶ However, under *Harris v. Forklift Systems, Inc.*,⁹⁷ medical testimony is not essential to recover for emotional distress, though in a real and practical sense, it greatly enhances the award.

One of the most difficult things to determine is the monetary value of compensatory damages and presenting it to a jury.⁹⁸ A plaintiff's own testimony may be sufficient to establish humiliation or emotional distress.⁹⁹

Be aware that a plaintiff's claim for non-pecuniary, compensatory damages will open the plaintiff to broader discovery under Rule 35 of the Federal Rules of Civil Procedure

⁹⁵ See *Contardo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 753 F. Supp. 406 (D. Mass. 1990).

⁹⁶ See *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 (1986).

⁹⁷ 510 U.S. 17 (1993).

⁹⁸ See *EEOC v. FLC & Bros. Rebel, Inc.*, 663 F. Supp. 864 (W.D. Va. 1987), *aff'd* at 846 F.3d 70 (4th Cir. 1987).

⁹⁹ See *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977); *Shuman v. Standard Oil Co.*, 453 F. Supp. 1150, 1154 (N.D. Cal. 1978).

(e.g., access to medical and psychological records, plaintiff's sexual history, access to family members, friends, and others who are aware of the symptoms or injuries of which the plaintiff claims). Defendants will always try to explore a plaintiff's pre-existing emotional state so that they can establish that the plaintiff's symptoms existed prior to the discriminatory conduct. This is similar to contributory negligence theory under personal injury law.

CREATIVE ALLOCATION TO THE TAX EFFECT ON DAMAGE AWARDS

On August 20, 1996, the Small Business Job Protection Act of 1996 became law.¹⁰⁰ This Act directly affected the taxability of damage awards under the amending Section 104(a)(2) of the Internal Revenue Code.¹⁰¹ As a result, a damage award for a non-physical injury or sickness including emotional distress is now taxable. The same is true for punitive damages. The structure of the settlement can be very important in saving your client considerable taxes. You must advise your client to seek the advice of a tax counselor. A physical injury is exempt from taxation. However, there must be medical proof of the injury.¹⁰²

Under the ADEA, where there is no injury, it's a pure monetary economic release statute and would not be excluded under 104(a)(2).

There are some practice tips that you may consider to void or avoid the tax liability in discrimination cases. For example, a physical touching case or a forcible sexual intercourse case that could be considered an assault and battery would result in an injury claim and avoid taxation of the award.

¹⁰⁰ Small Business Job Protection Act of 1996, Pub.L. No. 104-188, 110 Stat. 1755.

¹⁰¹ 26 U.S.C.A. §104(a)(2) (2000).

¹⁰² *Comm'r v. Schleier*, 515 U.S. 323 (1995) (holding that a taxpayer must show that before the recovery can be excludable under Section 102(a)(2), the injury is based upon a tort arising out of personal injury and not an emotional injury).

There could be an allocation of the award – some allocated to a tort, some allocated to back pay. Be careful not to make the award appear suspicious to the Internal Revenue Services, which may view it as a scheme to avoid taxes. If, for example, there is a state law battery assault claim, you may want to allocate a larger amount to the state claim, avoiding the tax liability under the federal claim. Regardless of the allocation, you must analyze your case properly and realistically to determine what claims will survive on the merits as to taxation, so that your client is not subjected to a future audit.

As you all know, as a result of this Act, plaintiffs are demanding higher settlements to compensate for the taxation of the recovery. Defendants, of course, are not receptive to these demands, which will ultimately lead to fewer settlements and more litigation. This is one area where plaintiffs and defendants are united in trying to get the Act reversed.

TABLE ONE

**MONETARY RELIEF AND DAMAGE CHART FOR
EMPLOYMENT LAW CASES**

Statute	Type of Discrimination	Type of Respondent	Type of Monetary Relief
Title VII of the Civil Rights Act of 1964, prior to the 1991 Act	Disparate impact and disparate treatment	All types	Reimbursement for economic losses only; back pay, front pay, fringe benefits, and prejudgment interest (except for Federal agencies)
Same	Disparate treatment	Discriminatory officials (where allowed)	Same
Same, after the 1991 Act	Disparate treatment	Private (and discriminatory officials, where allowed)	Economic losses, plus compensatory and punitive damages subject to caps based on the respondent's number of employees
Same, after the 1991 Act	Disparate treatment	Federal, State and local government agencies	Economic losses, plus compensatory damages subject to caps based on the respondent's number of employees
Americans with Disabilities Act	Disparate impact	Private, State and local government agencies	Same as Title VII

Statute	Type of Discrimination	Type of Respondent	Type of Monetary Relief
American with Disabilities Act	Disparate treatment	All types	Same as Title VII after the 1991 Act; no punitive damages against public agencies
42 U.S.C. § 1981	Disparate treatment	Private	Economic losses, plus compensatory and punitive damages (no caps)
42 U.S.C. § 1981	Disparate treatment	State agencies	None
42 U.S.C. § 1981	Disparate treatment	Local government agencies	None, unless intentional discrimination was the official purpose; if so, economic losses plus compensatory damages (no caps)
42 U.S.C. § 1981	Disparate treatment	Discriminatory officials of private or of State or local government agency	Economic losses, plus compensatory and punitive damages (no caps)
42 U.S.C. § 1981	Disparate treatment	Federal agencies	None
42 U.S.C. § 1981	Disparate treatment	Discriminatory officials of private or of State or local government agencies	Economic losses, plus compensatory and punitive damages (no caps)
42 U.S.C. § 1981	Disparate treatment	Federal agencies	None

Statute	Type of Discrimination	Type of Respondent	Type of Monetary Relief
42 U.S.C. § 1983	Disparate treatment	Private	None, unless there was State action; if there was State action, economic losses, plus compensatory and punitive damages (no caps)
42 U.S.C. § 1983	Disparate treatment	Federal or State agencies	None
42 U.S.C. § 1983	Disparate treatment	Local government agencies	None, unless intentional discrimination was the official purpose; if so, same as § 1981
42 U.S.C. § 1983	Disparate treatment	Discriminatory officials of State or local government agencies	Economic losses, plus compensatory and punitive damages (no caps)
Age Discrimination in Employment Act	Disparate impact (to extent available) and disparate treatment	Private, State and local government agencies	Economic losses, (often without interest), plus an equal additional amount if the violation was willful; question on compensatory damages for non-economic injuries in disparate treatment case

Statute	Type of Discrimination	Type of Respondent	Type of Monetary Relief
Age Discrimination in Employment Act	Disparate impact (to extent available) and disparate treatment	Federal agencies	Economic losses (without interest); question on compensatory damages in disparate treatment cases
Equal Pay Act	All types	Private, State and local government agencies	Economic losses (often without interest), plus an equal additional amount if the violation was willful; question on compensatory damages for non-economic injuries
Equal Pay Act	All types	Federal agencies	Economic losses (without interest), plus an equal additional amount if the violation was willful; question on compensatory damages
Title IX, Education Amendments of 1972	Disparate treatment	Private	Economic losses, plus compensatory and punitive damages (no caps)

Statute	Type of Discrimination	Type of Respondent	Type of Monetary Relief
Title IX, Education Amendments of 1972	Disparate Treatment	State and local government	Economic losses, plus compensatory damages (no caps)
Title VI of the Civil Rights Act of 1964	Disparate impact (under regulations only)	All types	Economic losses only
Title VI of the Civil Rights Act of 1964	Disparate treatment	Private	Economic losses, plus possible compensatory damages and punitive damages (no caps on either)
Title VI of the Civil Rights Act of 1964	Disparate treatment	State and local government	Economic losses, plus possible compensatory damages (no caps)
§ 504, Rehabilitation Act	Disparate treatment	Private	Economic losses, plus possible compensatory damages and punitive damages (no caps)
§ 504, Rehabilitation Act	Disparate treatment	State and local government	Economic losses, plus possible compensatory damages (no caps)
Family Medical Leave Act of 1993 (29 U.S.C. § 2601, <i>et seq.</i>)	All	Private, Federal, State and local government agencies. Must have at least fifty employees	Economic Losses and interest, liquidated damages

Statute	Type of Discrimination	Type of Respondent	Type of Monetary Relief
Fair Labor Standards Act(29 U.S.C. § 201, <i>et seq.</i>)	Wages and salary	All	Wages, salary, attorneys fees, liquidated damages
New York State Labor Law § 190, <i>et al.</i>	Wages and salary	All	Wages, salary, attorneys fees and interest
Immigration Reform and Control Act (29 U.S.C. § 1324a, <i>et seq.</i>)	All	State and local government	Economic losses; back pay shall not accrue from a date more than two years prior to the date of the filing of a charge with Special Counsel
Older Workers (29 U.S.C. § 626(f))	Disparate treatment	Private, Federal, State and local government agencies	Same as ADEA
Occupational Safety Health Act of 1970 (29 U.S.C. § 651)	----	All	None; the Act does not create a private right of action for damages
Employee Retirement Income Security Act (29 U.S.C. § 1001, <i>et seq.</i>)	Disparate treatment	All	Economic losses, punitive damages if malicious or wanton disregard.
Workers Compensation Act(33 U.S.C. § 901)	----	All	Economic loss, compensation for lost earning pwr.

Statute	Type of Discrimination	Type of Respondent	Type of Monetary Relief
New York City Human Rights Law	All	Private, State and local government agencies	Economic losses, compensatory and punitive damages
New York City Correction Law	Disparate treatment	Private, State and local government agencies	Economic losses, prejudgment interest.
National Labor Relations Act (29 U.S.C. § 151, <i>et seq.</i>)	All	Private	Economic Losses

TABLE TWO

**THE FARAGHER/ELLERTH AFFIRMATIVE DEFENSE:
SUPERVISORY HARRASSMENT UNDER § 219(2)(d)**

		NO	YES
		Liability	No Liability
NO	YES	Did the harassment result in a tangible employment action?	
NO	YES	Was the harassment severe liability or pervasive enough?	
NO	YES	Did the employer take reasonable care to prevent sexual harassment?	
NO	YES	Did the employer take reasonable care to correct promptly the sexual harassment?	
NO	YES	Did the plaintiff fail liability to take advantage of any Preventive or corrective opportunities?	

TABLE THREE

SAMPLE TELEPHONE INQUIRY FORM AND INTAKE
QUESTIONNAIRE

TELEPHONE INQUIRY

Date: _____

Initial Telephone Inquiry By: _____

Employee: _____
(Last) (First) (Middle)

Address: _____

Telephone: Home: _____ Work: _____

Can Be Called At Work? _____ Age: _____

Employer: _____

Employer's Address: _____

Employer's Telephone: _____

Employee's Claim: _____

Adverse Employment Action: _____ Date: _____

Reason Given: _____

Union Employee? _____ Written Employment
Contract? _____

Policy Manual or Handbook? _____

Grievance Filed? _____ Date: _____ Outcome: _____

Charge Filed? _____ With Whom? _____

Length of Employment: _____ Last Salary: _____

Current or Last
Position: _____

Referred By: _____

Refer Case? _____ To Whom? _____ Reject Case? _____

Evaluate Case: _____

Accept Case? _____ Hold: _____

Letter Sent? _____ Date: _____

By: _____

INTAKE QUESTIONNAIRE

Date: _____
 Referred By: _____
 Name: _____ Telephone: (H) _____ (W) _____
 Employer: _____
 Title: _____
 Salary: _____ Per: _____
 Age: _____

Age Discrimination/Discharge _____
 Retaliation (EEOC) _____
 Race/Discharge _____
 National Origin/Discharge _____
 Race/Harassment _____
 Religion/Discharge _____
 Race/Failure to Hire/Promote _____
 Protected Concerted Protests of Working Conditions _____
 Sexual Harassment _____
 Worker Comp. Retaliation _____
 Sex Discrimination/Discharge _____
 Pension/Health Benefits _____
 Sex Discrimination/Failure to Hire/Promote _____
 Forced Retirement _____
 Pregnancy _____
 Wage/Hour Overtime Paycheck/Vacation Dispute _____
 Handicap Discrimination (180 day) _____
 Libel/Slander _____
 Handicap _____
 Invasion of Privacy _____
 Unemployment Compensation _____
 Bad References _____
 Federal Employee Case _____
 Intentional Infliction of Emotional Distress _____
 State/Municipal Case _____
 Detrimental Reliance _____
 Absenteeism Discharge _____
 Fraud _____
 Other Discharge _____
 Contract Dispute _____
 Other Non-Discharge _____
 Waiver/Settlement Analysis _____
 Other Non-Labor _____
 Date of Main Complaint _____

What Does Employer Say Is Reason For Discharge?

Brief Description of Main Complaint:

Other Complaints:

Has CP Filed EEOC Charge? If So, When? _____

Name of Investigator/Charge Number: _____

Present Status: _____

Has CP Received HRTS? If so, Date of HRTS: _____/Date
Received: _____

Has CP Ordered File Pursuant to FOIA/Section 837? _____

When? _____

Has CP's Case Been Dismissed? If so, When? _____

What Did Determination Letter Say?

Did CP File With Determination Review Program? If so, When?

What Was the Outcome?

Has CP Filed Court Case? _____ **When?** _____

Does CP Have Another Job? _____

Where/What Is It? _____

Rate of Pay: _____

When Did CP Become Employed? _____

Is CP on Unemployment Compensation? _____

Action Taken:

Referred to State Bar: _____

Other Attorney Referral to: _____

Sent Attorney List: _____

**Recommend Filing Charge Within the Following Days of Notification of
Adverse Action:**

EEOC (300 days) _____

TCHR (180 days handicap) _____

NLRB (protected concerted – 6 mos.) _____

Wage & Hour (DOL) _____

TEC _____

When? _____

(e.g., ASAP, Next Month, etc.)

Call Office Back In _____ Days

Set Up Office Appointment For: _____

(Date and Time)

Recommend Following Action re: Agency Investigation:

Cautioned re: Following Statute of Limitation:

90 days from receipt of NRTS; 300 days to file EEOC charge; 1 year libel/slander action; 2 year tort and age discrimination.

Other: _____

Other Action Taken:

TABLE FOUR
SAMPLE EMPLOYMENT QUESTIONNAIRE

Please take your time to answer the following questions as accurately and completely as possible. If a question is inapplicable, simply write N/A. At the end of the questionnaire there is additional room to supplement your answers or to add any additional information you think is relevant to your potential claim.

Name: _____ Date: _____
Address: _____

Telephone (home) _____ (work) _____
Social Security Number: _____ Date of Birth: _____
I believe I have a claim against

(employer and/or individuals)

(address)

because of the following actions: (Very Important: please give approximate date for each action)

The person(s) who took this action on behalf of the employer was/were: (name and title)

Approximately how many people work for the employer?

To your knowledge, is your employer or the parent corporation experiencing financial problems? _____. If so, please explain:

I was told by my employer that the reason for this action was:

I believe that the real reason my employer took this action was:

The following people would have knowledge of my situation. (Please give name, address, phone, relationship, and indicate whether each person will be helpful or adverse to you. Also, indicate how each person is aware of your situation.)

Did you complain of the actions listed in your response to question 5a? _____
If yes, to whom?

(name, title and date)

Did you make any complaint in writing? _____
What was his or her response?

When were you hired? _____

By whom were you hired? _____

Was there a written job application? _____ If yes,
does it contain any exaggerations or inaccuracies by you as to your education,
qualifications, work history, etc? _____ If so, please specify:

What was your position at the time you were hired?

When did the adverse action happen? (Exact date, if possible.)

When did you first become aware or suspect that your employer was dissatisfied with you (give date and circumstances)?

What was the very first date you were given any kind of notice of this adverse action?

What kind of notice did you get? (Verbal, written, etc.)

Prior to the adverse action, did you receive other warnings (verbally or in writing) or were you placed on probation? (Attach copies of all relevant documents.)

Do you know if someone else holds your former position or the position you were seeking? _____. If so, please state his or her name, gender, race, approximate age and/or disability (if applicable).

What do you know about this person's qualifications?

If no one holds your former position, who does the job functions you performed. If more than one person, list all by name, gender, race, age and/or disability (if applicable).

What do you know about the person(s) who perform(s) your job functions?

If you were discharged:

Were any other employees terminated at or about the same time?

_____ If so, how many, if any,
were in your department? _____

Did you sign a resignation letter or release? (If so, please attach.) _____

Did you receive severance pay? _____ If
so, for how many weeks? _____ Is there a severance plan?

Did you seek unemployment compensation? _____

If so, did your employer contest your rights to benefits? _____

What was the outcome? _____

Have you sought re-employment with the same employer or another
employer? _____ (Please be sure to document your search efforts.)

Have you obtained another job? _____
If so, when, with whom, and is the job comparable to your former position
(i.e., salary, responsibility, benefits)? _____

Since your termination, have you talked to anyone who still works at the
company about your wrongful treatment? _____

If so, give details (who, what was said, etc.).

Since your termination, have you told anyone at the company that you are
thinking of taking legal action against the company? _____

If so, who, when, and what was said?

Were you ever discharged or forced to resign from prior employment?

If so, please explain:

What is the most recent position you held with the company?

What is/was your last salary (include any bonus or other incentive pay as a separate figure)?

Please describe your most recent job responsibilities:

How many other employees perform the same or similar functions?

Did your employer take similar action against any of the employees listed in No. 9d above? If yes, please identify the employee(s) by name, race, gender, age, and/or disability (if applicable).

Please explain why the circumstances in their situations were similar:

Was there an appeal or review of the above adverse action? _____
If so, give the dates, persons involved, and explain:

Were there any particularly outrageous circumstances surrounding your
adverse employment action? _____ If so,
please describe:

If you made any complaint in writing to management, attach a copy of the
documents relating to your complaint.

Over the last five years . . .

Who has directly supervised you and when has he or she supervised you?
(Provide approximate dates.)

Have you had any problems with this/these person(s)? _____
If yes, please explain:

Who was your last immediate supervisor? _____
Have you had any problems with this person? _____
If yes, please explain:

Check the statements which apply to you:

_____ I have a written job contract or agreement. (If yes, please attach.)

_____ I have a letter or document discussing the terms of my employment. (If yes, please attach and indicate the date you received it.)

_____ The company has an employee handbook or manual. (If yes, please attach and answer questions (i) through (iii):

(i) Does the employee handbook or manual have any provision(s) relating to your claim? _____ If so, please identify all of them:

(ii) Does the manual set forth grounds for discharge? _____ If so, please identify the appropriate sections of the manual where the grounds are set forth:

(iii) Does the manual have a progressive disciplinary procedure? (I.e., verbal warnings or written warnings prior to discharge.)

_____ I have not seen an employee handbook or manual, but I have been told that the company has progressive discipline (i.e., verbal warnings, written warnings, probation, etc.).

_____ I have received written performance evaluations. (If so, please attach.) If so, was there a time period when those evaluations suddenly changed?

There must be good or just cause before an employee can be terminated. If so, please state all reasons you believe this is true.

Were any promises or representations relating to job security made to you at the time of hiring or during the course of your employment?

_____ If so, state what promises or representations were made, when they were made, and who made them:

At hiring or during the course of your employment, were you given assurances of job security?_____ If so, state what assurances you were given, when they were given and who gave them:

Were those promises, representations, or assurances ever put into writing?

_____ If so, attach copies of the documents.

What actions, if any, did you take in reliance upon these promises, representations, and/or assurances (i.e., move, resign your former position, stay with the company instead of looking for or taking another job, etc.)?

Did you reject other job offers to take this position? _____

If so, explain: _____

Why did you accept the job with this employer? _____

What financial harm have you suffered as a result of relying on the promises, representations and/or assurances?

Employment history with this employer:

What, if any, transfers or reassignments did you receive during the course of your employment? (Please give approximate dates and identify the positions by title.)

What promotions or demotions did you receive during the course of your employment? (Please give approximate dates and identify the positions by title.) _____

Please indicate the amount of any pay increases or decreases that you have received during the last five years. (Please indicate which increases are merit increases.)

Did you receive any awards or commendations? _____ If so,
please explain:

Have you ever taken legal action or made charges against the employer (filed a
discrimination charge or complaint)? _____ If so, give the
dates and explain: _____

Do you believe you were discriminated against because of your sex, age, race,
national origin, marital status, pregnancy, sexual harassment, sexual
orientation, religion, and/or disability? _____ If so, please
indicate which applies _____

What evidence do you have to support your belief?

Have you filed a charge with the Equal Employment Opportunity Commission
(EEOC) or the State Commission on Human Rights and Opportunities?

_____ If so, please attach and answer questions (i) through (iii):

(i) When did you file your charge? _____

(ii) What is the present status of your charge? _____

(iii) Did you receive a Right to Sue letter? _____ If so,
when? _____ (If you have copies of the
Charge and/or Right to Sue letter, please attach.)

Have you made an appointment with the EEOC and/or the State Commission
on Human Rights and Opportunities to file a discrimination charge?

_____ If so, please identify the date, time and
location of the meeting:

Did you file a complaint with any other agency about your employment?

_____ If so, please explain: _____

Have you filed a lawsuit? _____ If so, please
enclose a copy of the complaint.

Had you been subjected to discriminatory treatment before the present
occurrence? _____ If so, please explain: _____

Did you ever protest this treatment? (When, to whom, what was the result?)

If you believe you were discriminated against because of a disability, please
answer the following questions:

What is the nature of your disability or disabilities? _____

How long have you had the disability? _____

Was your employer aware that you had a disability? _____

Do you have a record of having a disability? (i.e., medical records,
employment records, etc.?) _____

Was your employer aware of your record(s) of having a disability?

Did your employer consider you to be a person with a disability even though you did not have a disability? _____ If so, please explain:

Did you ever ask your employer to provide you with an accommodation for your disability? If so, please describe your request(s), including the approximate cost of any accommodations requested.

Did you ever discuss with your employer any accommodations for your disability? If so, please describe those discussions in detail:

What, if any, attempt did your employer make to provide you with a job accommodation for your disability?

If you were required to complete a job application, did the application contain any questions relating in any way to an applicant's disability? (For example, please identify any disabilities you have which might affect your ability to perform the job.)

Did you ever file a workers' compensation claim? If so, please describe the basis for the claim and what was the result of your claim?

Do you believe your employer retaliated against you or "got even" with you for any of the following reasons:

For refusing to perform an illegal, improper, or unethical act? _____

If so, what were you asked to do and by whom?

For reporting unethical or illegal conduct at work to management or an outside agency/authority? _____ If so, please explain:

For exercising rights you believe to be protected by law or for exercising free speech rights? _____ If so, please explain:

Does your employer have any written work rules or policies? _____

(If so, please attach.)

Do you believe your employer violated its own procedures or policies in the action it took? _____ If so, please explain:

- _____ Weight Loss
- _____ Weight Gain
- _____ Insomnia
- _____ Feelings of Agitation
- _____ Fatigue and Loss of Energy
- _____ Difficulty Concentrating
- _____ Headaches
- _____ Body Pain
- _____ Shortness of Breath
- _____ Dizziness
- _____ Heart Palpitations
- _____ Trembling or Shakiness
- _____ Sweating
- _____ Choking
- _____ Nausea, Abdominal Distress
- _____ Chest Pain
- _____ Feeling Out of Control

Did you seek medical attention (including psychologists and/or psychiatrists)?

_____ If so, please explain: _____

Was your employment covered by a collective bargaining agreement?

_____ If so, please answer questions (i) and (ii):

(i) Did you file a grievance or ask your union to file a grievance on your behalf? _____

(ii) Did your union refuse to pursue your grievance or refuse to take the grievance to arbitration? _____ If so, please explain why: _____

What amount of compensation do you think you have lost up until now as a result of the company's action?

Have you lost any company benefits as a result of the company's action?

_____ If so, please explain: _____

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What non-financial losses and/or injuries have you and your family suffered due to the company's actions?

Do you have medical insurance coverage? _____
 Do you have medical bills that have not been covered? _____
 If so, please describe:

Are you currently employed? _____ If
 so, please state the employer's name, the date you were hired, and your
 current salary:

Have you ever been involved in litigation before? _____
 If so, please give dates and the subjects of the lawsuits or charges:

Other than what you have already described, have you ever had a serious
 dispute with any employer? _____ If so, give the name
 of the company, dates, details and outcome:

Why did you select _____ (firm name) _____? (If you were
 referred by an attorney, please give the attorney's name and address.)

Have you contacted other attorneys or agencies regarding your present claim?
_____ If so, whom and when?

Did the attorney or agency contact your employer?

If there is any information you were unable to fit on the lines provided, please continue your response on the following lines after identifying the number of the question. (If this space is not sufficient, please attach any necessary pages.)

Is there any additional information that you have not already provided which you think we should be aware of when making our determination about possibly representing you? If so, please explain:

(NAME) _____ (DATE) _____

TABLE FIVE
SAMPLE DECLINATION LETTER

[Date]

[Name]
[Address]

Dear _____:

Thank you for consulting with our law firm with respect to your employment matter. We are declining to represent you in connection with your matter.

There is a Statute of Limitations in employment discrimination cases which requires you to file your claim of employment discrimination with the State Division of Human Rights within one year of the discriminatory event(s). In addition, you must file with the Equal Employment Opportunity Commission ("EEOC") no later than 240 days, or perhaps 300 days in certain cases, after the last incident of discrimination occurred in order to preserve your rights to thereafter file a lawsuit under federal law.

Alternatively, you must file your lawsuit under the New York State law no later than three (3) years after the last incident of discrimination occurred, if you have elected not to file a complaint with the State Division of Human Rights or the EEOC.

If you fail to comply with the aforesaid Statute of Limitations dates, you will be precluded from advancing your claim in the future.

We strongly urge you to seek other legal advice in order to protect your rights as stated above.

We wish you the best of luck, and if we can ever be of assistance to you in any other matter, kindly contact the undersigned herein.

Again, best of luck!

Very Truly Yours,

(attorney's name & signature)

**TABLE SIX
SAMPLE CLIENT LETTER REGARDING DUTY TO
MITIGATE DAMAGES**

[Date]

[Name]
[Address]

Re: (Plaintiff v. Defendant)

Subject: Duty to “Mitigate” or Reduce Damages

Dear _____:

Now that your lawsuit is proceeding in court, I want to take this opportunity to remind you of your obligation to look for work and to keep meticulous records of such job search. The most basic component of damages in an employment discrimination lawsuit or wrongful dismissal lawsuit is lost earnings. As I have previously mentioned, generally, your damages are measured by what you would have earned from your former employer from the date of your wrongful dismissal until the date of trial, less any earnings you receive from part time or full time employment before trial.

You must look for employment comparable in pay and responsibility to your former job. You cannot sit back and let your damages build up and hope that you will recover the amount of your lost salary at trial. If you do not look for work or are unavailable for work during a period of time, you most probably will not be able to recover your lost salary for that period. This is a duty which most courts require of you. Our courts call this the “Duty to Mitigate Damages.”

During the course of the lawsuit, the attorney for your former employer will ask what steps you have taken to find work. That lawyer will ask you specifically the following questions:

- Where have you looked for work?
- What were the positions you have sought, applied for, or inquired about?
- What is the name of each individual with whom you have spoken about that job?

- What was each response you received from your application?
- Were you interviewed?
- What were the results of the interview?
- Did you turn down any employment offers? If so, why?

The lawyer will ask whether you have prepared a resume to submit to potential employers. You will be asked whether you have placed your name at an employment agency. In short, you will be asked about every single action you have taken since your dismissal to find suitable, replacement employment.

I recommend that you keep a list of every job you look for, apply for, or express interest in. You should keep a list of all companies you contact, the date you did so, and the position you sought. This means telephone inquiries are very important. In all likelihood, you will not be actually interviewed for every job for which you apply. If you know the starting salary of the position and are interviewed for that job, that information is also important. If you make a telephone call to a potential employer, you should list that information.

I recommend that you do the following:

Notebook: Purchase a three ring binder immediately and keep all information in the notebook regarding your efforts to obtain employment. For example, you should clip the newspaper pages (keep the entire page) that list all want ads that you pursue, indicating the date of publication, the name of the paper or the publication, and the page where it was published; keep a copy of your letter responding to the ad as well as a copy of any response; and keep notes of all follow-up with regard to the ad (e.g., telephone calls, interview notes). Put this letter in your job hunting notebook so that you can always refer to it.

Public Employment Service: Determine whether the Employment Commission ("EC") has comparable jobs listed by prospective employers. If so, register with the TEC and record these activities in your notebook in chronological order.

EC (Unemployment Benefits): Make and keep a Xerox copy of all EC forms and EC records that you turn in to the EC to claim your benefits and indicate that you are searching for work. Note, it is highly recommended that you do more than the bare minimum job search efforts you are required to do for EC benefits. **Fair warning:** it is much easier to keep a copy of such records than for you to try to get them from the EC at a later date.

Search Firms/Headhunters: Register with several private employment agencies (headhunters). Find one that specializes in your line of work. There is a directory of search firms by line of work/industry. The

name of the directory is *The Directory of Executive Recruiters*, published by Kennedy and Kennedy, Inc. It can be found in any good public library.

Resume: Prepare a resume. Do not lie or puff on your resume. Do not omit information. Do not inflate the description of your duties and responsibilities with your prior employers. Do not misrepresent your education. The company lawyer will examine that resume with you in great detail at your deposition.

Employment Applications: Answer all of the questions on your employment applications honestly. Do not lie about your job duties or responsibilities to prior employers. Do not lie about the reasons for termination. If the answer is embarrassing you might answer, "To be discussed at job interview." Or, for example, if the employer asserts that you were laid off for economic reasons but you contest this, you might respond, "Employer told me economic lay off." Also, it is normally not wise to disparage your former employer during interviews and it is not necessary to volunteer that you are suing your former employer at your job interviews.

Network: Network with friends, acquaintances, former co-workers, professional associations, church groups and other associations of which you are a member for possible job vacancies. Record those efforts in detail in your notebook with the dates in chronological order. Many new jobs are found as a result of personal contacts and/or contacts with professional associations.

Want Ads – General: Read the want ads every day. Clip those pages that show ads that describe jobs for which you are qualified. Call or write as the ad requires. Retain a copy of your letter. Place the newspaper page, a copy of your cover letter, and your notes regarding any follow up in the notebook.

Want Ads – Special Days: Purchase the Sunday edition of the newspaper. You can get the Sunday edition of the paper on Saturday at most convenience stores. Read the classified ads, and also the ads in the business section of the paper and be ready to send out resumes on Saturday so that it reaches the employer on Monday or Tuesday morning.

Specialized Want Ads: Many trade, business and professional magazines carry want ads. Buy the publications applicable to your profession or industry and check the ads. Retain copies of all publications that you buy.

Job Offers: Think carefully before you reject any job that is offered to you. You have a duty to accept comparable employment. The legal definition of comparable employment can be very technical, but basically it means similar job duties in a similar field with perhaps a somewhat similar

salary. If you are offered a job which you think is comparable but have any questions as to the impact of accepting or turning down the job, you may call this law office and we will attempt to explain the law to you.

Accepting Lower Paid Employment: This may be a reality for you given the nature of today's economy. Whether you choose to do so or not is your decision. Please call us if you want advice on the impact of accepting such an offer on your lawsuit. If you do accept employment and you assert in your lawsuit that the new job is not comparable to your past employment, either in salary or benefits or both, you must continue to search for higher paying employment during the course of the lawsuit, and must still keep all job search records of such search.

Job Interviews: With regard to all job interviews, record in your notebook the date of the interview, the address of the company, the name and title of the person who interviewed you, the substance of the conversation, the title of the job for which you interviewed, its salary, and any other pertinent details.

Telephone Calls: Record in your notebook all telephone calls that you make regarding possible employment. Record the date, the person called, his/her job title, the company, the job you called about, its salary, and the substance of the conversation.

Computers: Your job search will be assisted greatly if you use a computer to generate your cover letters. If you have your cover letter on a computer, it will only take you five to ten minutes to adapt that letter if you see an ad to which you wish to respond.

Job Fairs: Attend job fairs. Keep detailed records of all companies with whom you interview at job fairs, including the name of the recruiter and the date of the interview.

Other Organizations: There are some other organizations that assist people to find work whom you should contact. Sometimes a church group or professional association of the AARP may sponsor a job hunt group or fair. Ask around.

Answering Machine: If you do not already have one, install an answering machine to ensure that you do not miss any calls from prospective employers. This is a must. Leave the answering machine on during business hours. This is also helpful to us, as we may need to reach you at home and if so, we want to be able to leave a message for you.

School: Many clients, after being terminated, consider going back to school to enhance their skills and recycle themselves into a new career. You

should understand that the company will argue that, by going back to school, you have removed yourself from the employment marketplace and thus have failed to mitigate your damages. We advise that in any event you structure any schooling so that you can continue to seek full time employment and continue to be available for full time work. Do not cease your efforts to find comparable work. Do both concurrently (e.g., go to school at night or go to school during the day but look for day and evening jobs comparable to the job that you previously had).

Self-Employment: Some clients, after being terminated, consider establishing their own businesses or going into business with others. You may do so, but we strongly recommend that you continue the effort to find comparable employment even as you start up your business. It is also critical to keep very good business records of all your start up expenses and all sales and other income you make in your new business.

Career Change: Many clients, after being terminated, consider making a career change. You may do so, but once again, we strongly recommend that, while attempting to do so, you continue to seek employment in your old line of work.

Insurance: Generally, the courts require that you attempt to obtain replacement insurance for the coverage you received with your prior employer. If you have made no sincere effort to obtain replacement insurance, the court may refuse to allow you to seek as part of your damages either replacement costs or bills incurred which insurance would have covered.

Obviously, not everyone can obtain replacement insurance. But, you cannot assume that you cannot afford it. We urge you to get written estimates on the cost from insurance agents. Again, keep copies of all such conversations, documents and notes relating to insurance coverage.

Generally, if your former employer employed twenty employees, it had to offer to continue your group health insurance at the group rate for eighteen months. These are called your COBRA rights. Your employer is required to advise you of these rights in a COBRA letter to you. You must pay the entire premium, however, for the coverage, and you must follow the instructions for obtaining COBRA coverage provided by your employer to the letter, including all deadlines established for opting such coverage.

Be advised that if you have a pre-existing condition, the insurance carrier for a subsequent employer may choose not to cover the condition for a period of time (typically one year). If you are on COBRA coverage and your eighteen months of COBRA rights have not expired, you can continue on your

old employer's policy for the full eighteen months at your expense, and thus avoid, somewhat, the problem with the pre-existing condition.

If your spouse is employed, he/she may be able to add you to his/her policy. The duty to mitigate requires that you exercise this option unless you can demonstrate that your family could not afford the additional premium.

Life Insurance: Once again, the courts require that you attempt to obtain replacement insurance if you wish to allege the loss of insurance as one of your damages. At a minimum, you should get two or three written quotations of the cost of replacement insurance. Again, you must establish that you made the effort to secure alternative coverage. If you cannot afford such coverage, we must establish that as well.

Unemployment Compensation: While most courts do not treat the receipt of unemployment as an offset, it is important to keep all records of your application, wage printouts, all correspondence to and from the EC, and copies of how much you received from the EC.

Your former employer may fight your application for unemployment and the proceedings (i.e., hearings), may have an impact upon subsequent litigation. Thus, the unemployment proceedings may be a crucial event and you should consult with us during the employment compensation proceedings. If you already have had an unemployment compensation hearing relating to your discharge, advise us promptly so that we may order a copy of the taped transcript of the hearing as that is important evidence in your case.

Termination From a Subsequent Job: If you are terminated from a subsequent job, your former employer may argue that you were fired for cause, and thus you have voluntarily removed yourself from the marketplace. Therefore, you need to be very cautious so as not to create a "cause" for discharge from a subsequent employer. Also, your employee work evaluations at the new job may become an issue, so try to get as positive an evaluation as you can. If you are fired from any subsequent job, you should immediately consult with counsel, and must immediately begin again a good faith effort to find another job.

Counseling: Courts are generally not sympathetic with the argument that, "I was too depressed" after the discharge to look for work, or that, "I was a discouraged worker," or that, "the economy is at fault." If you are too depressed to conduct an effective job search, you must seek counseling and/or support groups to help you get back on your feet both financially and emotionally. Remember – success is the best revenge. Landing a new job is a great antidote for depression, and will also show your former employer the mistake it made in letting you go. Keep at the job search and obtain counseling if you need it during this time of stress.

Privacy of Lawsuit Information: Generally, it is not wise to advise your new employer or your new co-workers of the litigation against your former employer until and unless it becomes absolutely necessary to take time off from work for a court hearing. Your lawsuit is your private business and you should be extremely circumspect as to whom you advise of that fact.

It is also not wise to say too much to your former co-workers who are still employed with the defendant as to your lawsuit. If you do, make notes of the conversations. No matter how good a friend you consider a former co-worker to be, counsel for the defendant may obtain his/her name from you at a deposition and interrogate your him/her to find out damaging information to your case. Remember, "loose lips sink ships."

Pay Stubs: It is absolutely critical for you to keep copies of each pay stub, receipt, or cash payment for any employment of any kind that you receive money for after your discharge. Also, keep copies of any benefit description or benefits handbook given by a new employer. We need all of your pay stubs so that we may work up your back pay and make a demand on your former employer as to how much your former employer owes you.

Rejection Letters: Save each rejection letter and the envelopes in which they came, and each postcard or other notification that a potential employer received your application. During the course of this litigation, you will need to give us all of your records including all such rejection letters.

Income Taxes: You must pay your income taxes on time. If you have had a past problem of non-payment, you must bring that to our attention so that we may help you straighten out your IRS income tax records. It is critical that you are scrupulously honest in filling out your tax return. (That is, if you received money in cash for odd jobs, tips, or temporary work, you must report it on your taxes. You must also report all income from whatever source derived, including temporary jobs and your EC benefits, on your tax form.)

Your lawsuit involves a potential for you to receive a great deal of money, but ultimately only if the jury believes your version of events. If you cheat on your taxes or otherwise lie in your job search materials, the employer's attorney will assert that you are a liar and a cheat whom the jury should not believe regarding your discharge from the job.

In short, it is simply not worth it to try to cut corners with the IRS, the EC, or any other institution. Honesty is always the best policy and honesty is absolutely essential when you decide to litigate a case against your former employer. I cannot emphasize this enough.

Copies of Income Taxes: It is quite difficult to get your income tax records from the IRS. We will need all such records, so please make a copy of each tax form, each separate schedule, and each W-2 from for you and/or your spouse before you file.

While we understand that looking for work and keeping records is difficult, until you find a new job, looking for work is your job. Approach it with the same dedication that you would to any new employer.

Just as importantly, you must keep the records listed above in an organized fashion for the sake of our law firm and for the court. No court is going to take merely your word that it is difficult or impossible to find a job – you must prove it to the court by showing each and every effort that you have made to obtain employment. You will also find your job search easier if you have the job hunting notebook outlined above and keep the detailed records outlined above.

If you should have any questions please feel free to contact us so that we may be of assistance to you in your job search. As indicated in this letter, this is a critical part of your lawsuit.

Very Truly Yours,

(attorney's name & signature)

TABLE SEVEN
SAMPLE SYMPTOMS CHECKLIST

(Client's Name)

A) AT THE TIME OF THE INCIDENT:

How Has This Incident Impacted You Emotionally?

1) Have you experienced any of the following physical symptoms?

- _____ Headaches
- _____ Blurred Vision
- _____ Stomach Distress
- _____ Rapid Pulse
- _____ Insomnia/Sleeplessness
- _____ Shortness of Breath
- _____ Loss of Appetite
- _____ Loss of Concentration
- _____ Nightmares
- _____ Weight Gain
- _____ Weight Changes (up/down)
- _____ Oversleeping
- _____ Fatigue
- _____ Resumed Smoking
- _____ Decreased Energy
- _____ Slowed Down
- _____ Lost Sense of Taste, Smell, Hearing Sight, Feeling
- _____ Chronic Pain
- _____ Digestion
- _____ Nervous Ticks
- _____ Cold Sweats
- _____ Faint, Light-Headed
- _____ Shaking Sensations
- _____ Other

(2) Have you experienced any of the following emotional problems?

- _____ Anxiety
- _____ Memory –Problem Recalling Names
- _____ Stress
- _____ Indecisive – Problem Making Decisions
- _____ Sadness
- _____ Hopelessness
- _____ Emptiness
- _____ Pessimism
- _____ Constant Crying

- ☐ Withdrawn
☐ More Worrying Than Usual
☐ Severe Loss of Self-Esteem
☐ Slowed Speech
☐ Worthlessness
☐ Helplessness
☐ Embarrassment
☐ Loss of Interest In ___ Hobbies ___ Sex ___ Food
☐ Humiliation
☐ Insecurity
☐ Fear
☐ Emotional Distress
☐ Irritability
☐ Shame about
☐ Feelings of Guilt
☐ Paranoia about
☐ Thoughts of Suicide
☐ Disorientation
☐ Wanting Death to Happen
☐ Wanting to Injure Others
☐ Wanting "Accident" to Happen
☐ Other

(3) Did any of the problems lead you to:

- ☐ Obtain Counseling
☐ Take Medication
☐ Need Hospitalization

(4) Did you lie awake at night worrying about finances, your career, your family, your reputation, or your future?

___ Constantly ___ Occasionally ___ Seldom ___ Never

(5) Did you awaken during the night and find you were having nightmares?

___ Constantly ___ Occasionally ___ Seldom ___ Never

Briefly describe the pattern of recurring nightmares:

(6) Briefly describe any significant changes in your relationship with:

i) your spouse/significant other:

ii) your children:

iii) your parents:

iv) your friends:

(7) Did you find yourself suddenly isolated – without a support system?

_____ Yes _____ No _____ Don't know

(8) Did you find yourself unable to cope with daily responsibilities?

_____ Yes _____ No _____ A little

Briefly describe the pattern of difficulties:

(9) Has your loss of a job really jeopardized your future?

_____ Family's Income – temporary? or permanent?

_____ Kids' survival _____

_____ College? For whom? _____

_____ Is it likely a "fear of the future" is taking hold?

_____ Career _____

_____ What are your alternatives to a lawsuit?

_____ Unemployment compensation _____

_____ new job _____

_____ loans from banks, relatives, friends _____

B) AT PRESENT:

(10) Are you currently experiencing any of the physical symptoms previously mentioned?

_____ Yes _____ No _____ Don't know

(11) Are you currently experiencing any of the emotional problems previously mentioned?

_____ Yes _____ No _____ Don't know

Which ones?

(12) Are you currently receiving counseling as a result of the incident?

_____ Yes _____ No

(13) Were you anxious that co-workers, family and/or friends would discover you had been terminated?

_____ Yes _____ No _____ Don't know

Why?

(14) Did you find that you had to tell a future employer that you had been terminated for a certain reason?

_____ Yes _____ No _____ Don't know

(15) Do you currently experience anxiety that your family and/or friends will discover you were terminated? _____ Yes _____ No _____ Don't know
Why?

(16) Have your family and/or friends discovered you were terminated?

_____ Yes _____ No _____ Don't know

If yes, how was your termination discovered? _____
Briefly describe their reactions:

(17) What impact has this incident had upon your reputation today? Briefly describe what has changed:

We understand the following questions are very personal, but you may expect them to come up if you are claiming emotional suffering in addition to wage losses. If they are too painful and embarrassing, skip questions 9 through 10(d) and go to section C. (You can tell us in person and in confidence.)

(18) Are you currently receiving professional counseling for any other causes?

_____ Religious

_____ Marital

_____ Financial

_____ Parent/Child

_____ Emotional

_____ Spouse/Child

_____ Alcohol/Chemical Dependency

_____ Other Abuse

Any informal counselor?

_____ Minister

_____ Friend

_____ Social Worker

(19) a) Have you ever been a victim of:

Sexual Abuse? _____ Yes _____ No

Mental Abuse? _____ Yes _____ No

Family Abuse? _____ Yes _____ No

(b) Are you an adult child of an alcoholic?

_____ Yes _____ No

(c) Are you currently taking any physician-prescribe medication?

_____ Yes _____ No

If so, what are you taking?

What is it prescribed for?

(20) Are you currently using any non-physician prescribed drugs?

_____ Yes _____ No

If so, what are you taking?

C. REPUTATION DAMAGE:

(21) What was your reputation with your employer like before the incident(s):

(a) What has changed?

In whose eyes? _____ friends _____ colleagues _____ spouse _____ own

_____ Prospective Employers: What do they say?

_____ Don't call us, we'll call you.

_____ Do they stare and remain silent?

_____ Do they frown and suggest you sue?

_____ Did they ask about your reason for leaving your last job? If so, what did you tell them?

(b) Is your reputation really connected to the loss of that job?

_____ Yes _____ No _____ Don't know

(c) How do you think you will prove it?

(d) Are there any other possible causes for your diminished reputation?

_____ What are they? _____

(e) Have you ever been a party to a lawsuit before?

_____ Yes _____ No

(f) If so, briefly describe the facts and outcome of the lawsuit:

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(g) Are you currently a party to any other lawsuit?

_____ Yes _____ No

If so, briefly describe the facts of the lawsuit:

(h) Do you anticipate being a party to any other lawsuit in the immediate future?

_____ Yes _____ No If so, briefly describe the facts of the anticipated lawsuit: _____

TABLE EIGHT
FEE ARRANGEMENTS

**Maintaining A Plaintiff's Employment Practice: Fee Agreements and
Other Ways of Making Money¹⁰³**

Joe Garrison's paper and forms address most of the nuts and bolts of operating a plaintiff's employment practice. Since Joe does not talk in depth about fee agreements, I have addressed these issues in this paper.

Over the years, I have refined and re-refined the fee agreements I use. Every time I think that I have the 'perfect' agreement for a particular Client, there is always some contingency that I discover at the time of settlement which was not addressed in the fee agreement. The key to drafting a good fee agreement is to *plan ahead*. You need to think of all the possibilities in terms of what type of relief might or could be obtained with respect to the particular Client, and what could happen to cause your relationship with your Client to go sour, before you enter into a fee agreement with that Client. For example:

Will the Terminated Client Accept Reinstatement as Part of a Settlement? Sometimes a Client is very convincing when s/he tells you that they will *never* go back to work for the Employer. Then, some weeks/months pass during which the Client remains out of work, and an offer of reinstatement is made either as the only settlement offer or along with some type of monetary relief. The Client who claimed that s/he would *never* go back to work is interested. Moreover, if that offer is unconditional (and not part of a settlement), your Client most likely is obligated to accept reinstatement, as s/he won't be able to collect any back pay beyond the date of that offer.

Your fee agreement needs to address these two contingencies. How you 'value' the reinstatement for purposes of settlement is up to you; I usually value it as one year's salary (although I frequently reduce the amount at settlement time).

With respect to unconditional reinstatement (as opposed to part of your settlement), your fee agreement definitely needs to address this contingency. One possibility is to have a clause in every agreement which states that if the Client voluntarily abandons his/her claims because s/he has mitigated the damages or for other reasons, the Client is obligated to pay you the higher of his/her regular hourly rate for all work performed to date or 33-1/3% of the value of the last settlement offer made by the Employer.

¹⁰³ By Vicki Lafer Abrahamson. Reprinted from NELA National Convention.

Is the Client Seeking a Pay Increase or Promotion? The pay discrimination cases are oftentimes the best cases. However, the value of these cases is not always great. Because the value of these cases (in terms of actual lost salary and benefits) is frequently less than the cost of defense, the cases are usually settled. This should not deter you, however, from accepting the case. You simply need to draft a fee agreement which would allow you to at least recover your hourly fee. Such a provision will require that your Client either pay the attorneys fees him/herself or negotiate for the attorneys fees. At the same time, you want to have the option of recovering a greater amount, particularly if liquidated, and compensatory or punitive damages are a possibility. I would recommend that you (a) specifically value a promotion or salary increase in the fee agreement, and (b) in the situation in which you are actually in court, provide that you are entitled to the greater of the regular hourly rate or 33-1/3% of the gross value of the settlement.

Does the Fee Agreement Address the Possibility of the Client Mitigating Damages? This contingency can be addressed with language regarding a Client's abandonment of his or her claims (discussed above) and by providing that the Client is obligated to pay the greater of your regular hourly rate or the contingency value of the last settlement offer made by the Employer.

Does the Fee Agreement Address the Possibility of the Attorney's Withdrawal or the Client's Substitution of the Attorney? Most standard fee agreements provide that if the Client substitutes counsel, the client must pay the Attorney for all work performed to date. The term 'substitution of counsel' is often vague because the Attorney may need to withdraw (e.g., because s/he cannot get along with the Client). The Attorney needs to make sure not only that the fee agreement addresses this possibility, but also that the fee agreement allows the Attorney the possibility of collecting more than his or her regular hourly rate in these circumstances. For example, what if the client fires you or makes the relationship so unbearable that you fire the client, immediately after the Employer offers your Client \$300,000 in settlement (in a case where the Attorney has spent substantially less than \$100,000 in fees)? I would suggest that you provide in the 'substitution of counsel' provision, as well as in a provision which addresses the Client's rejection of a reasonable settlement, that the Attorney is entitled to the greater of his or her regular hourly rate or 33-1/3% of the gross value of the last settlement offered by the Employer.

Does the Fee Agreement Cover a Situation in Which the Client Fails to Disclose Pertinent Facts to the Attorney? While we all would like to pride ourselves on selecting only the best clients, unfortunately, this is a pipe dream, not reality. Accordingly, we need to protect ourselves in situations in which the Client has failed to disclose critical facts and/or has lied about them. I would recommend a provision which provides for the ability to withdraw

representation and the obligation of the Client to immediately pay for all fees (computed at the regular hourly rate) and costs incurred to date.

Does the Fee Agreement Clearly State How to Treat Attorneys Fees Payments by the Employer? In a settlement situation, the Attorney frequently asks that attorneys fees be paid as part of the settlement. The issues is whether this amount (if separately treated in the settlement agreement) is counted toward the 'pot' from which the contingency is computed. I state that the Attorney is entitled to a percentage of the 'gross value of the settlement.' Since attorneys fees paid add to the gross value of the settlement, the attorneys fees are lumped together with the other fees for purposes of determining the contingency amount due. If the attorneys fees are then directly paid to me, I then deduct that amount from the contingency amount owed by the Client.

Does the Fee Agreement Provide For the Timing of the Payment to the Attorney? While I have never had a problem, I would recommend that the fee agreement specifically provide when the payment must be made to the Attorney, particularly in these days when structured settlements are popular. If your Client cannot make the payment until s/he receives the payment in the future, the Attorney always has the option of waiving the time period set forth in the agreement.

Does the Fee Agreement Set Forth the Attorneys' Current Hourly Rates? For fee petition purposes, it is always helpful to set forth in the fee agreement the Attorney's current hourly rate. However, the Client needs to also be advised that hourly rates may change as time passes and that s/he will be required to pay, when applicable, the hourly rate in effect at the time the services is incurred.

**TABLE NINE
SAMPLE OF RETAINER**

[Date]

[Name]
[Address]

Re: [_____]

Dear _____:

This letter will confirm our understanding that you have formally retained (firm name) [Depending on the case, use the following language:]

[Standard Retainer] to represent you in an action against [name of defendant employer] for [_____] discrimination.

[Article 78 Proceeding] to represent you in the filing of a Notice of Intention to File a claim and an Article 78 proceeding in State Supreme Court [_____] County, on your behalf against [name of defendant employer].

[Limited Retainer to File a Charge With EEOC Only] to represent you to negotiate your claim against [name of defendant employer] for violation of your rights under Civil Rights Law 1964, as amended, based on sexual harassment.

[Limited Retainer for Investigation Only] to represent you only to negotiate your claim against [name of defendant employer] for race discrimination.

Retainer Fee

We have agreed to represent you in this matter for a retainer fee of \$ _____, payable as follows: *[specify in detail the extent of your representation of the client:]*

[Filing Charge and Commencement of Suit] The sum of \$ _____ shall be payable upon the signing of this retainer; and shall be for the purpose of filing all charges with EEOC and representing you during the charge investigation process with the EEOC.

Upon conclusion of the proceedings before EEOC and upon issuance of the Right to Sue Letter, the balance of the retainer of \$ _____ shall be paid at the rate of \$ _____ per month for a period of _____ months commencing on the first of the month after the issuance of the EEOC's Right To Sue Letter.

This retainer fee shall include representing you and assisting you in prosecuting any and all claims for discrimination with either the State Division of Human Rights or the Equal Employment Opportunity Commission (EEOC), and the commencement of any lawsuit in federal or state court to enforce your rights. Our retainer will also include the preparation of any letters necessary

to be sent to [name of defendant employer] arising out of your termination as [title of client's position].

[Investigation and Commencement of Suit] We agree that this retainer agreement shall be in two (2) parts.

The first part of the retainer, i.e., the sum of \$_____, is for the investigation of your complaint against [name of defendant employer], and to explore the possibility of reaching an amicable pre-litigation settlement of this matter with [name of defendant employer].

The second part of the retainer, i.e., the sum of \$_____ is for the representation of you in any lawsuit that will be filed on your behalf in federal court.

By this agreement, the law firm of [firm name] hereby confirms the receipt of the first part of the retainer, i.e., the sum of \$_____.

The second part of the retainer, i.e., the amount of \$_____ shall be paid within thirty (30) days after the date the law firm of [firm name] informs you that this matter cannot be resolved without resort to litigation.

[Article 78 Proceeding] We have agreed to represent you in this matter for a retainer fee of \$_____. The sum of \$_____ shall be payable upon the signing of this retainer. Thereafter, the balance of \$_____ will be billed to you after the initial \$_____ has been expended.

Our fee will be limited to preparing all necessary papers to file a Notice of Intention to File a claim and preparing an Article 78 proceeding in the State Supreme Court [_____] County, including but not limited to, filing the Petition, Memorandum of Law, Reply Petition, and any other documents necessary, as well as oral argument if required by the court.

[Filing of Charge with EEOC] We have agreed to represent you in this matter for a retainer fee of \$_____. The sum of \$_____ shall be payable upon the signing of this retainer.

Our retainer agreement is specifically limited to our investigating and filing a claim with the Equal Employment Opportunity Commission (EEOC) and attempting to reach a settlement with your employer.

After resolution of the charge process with EEOC, if you wish to commence a private lawsuit in federal or state court in connection with these claims, we will have to reach a *separate* and *different* retainer agreement with respect to our firm representing you in such a lawsuit.

[Investigation Only] We have agreed to represent you in this matter for a retainer fee of \$_____.

It is specifically understood by you that our representation shall be limited only to investigating and then attempting to negotiate a settlement of this matter on your behalf.

Our retainer agreement is specifically limited to our attempting to resolve the problem on an informal basis, rather than on a formal basis by our starting any court proceeding or filing any claim with either the New York State Department of Human Rights or the Equal Employment Opportunity

Commission (EEOC) or the commencement of a private lawsuit on your behalf.

In the event it is your desire to file a claim with any of the aforesaid agencies, or if you wish to commence a lawsuit in connection with these claims, we will have to reach a *separate and different* agreement with respect to our firm representing you in those matters.

Contingency Fee

[In addition to the retainer amount, in most cases a contingency fee is also used.]

You agree to pay us a contingency fee of 33-1/3% of all sums recovered on your behalf for back pay, front pay, pension contributions, cash benefits, or the value of non-cash benefits, including any sums awarded to you for compensatory and punitive damages in a federal or state court proceeding, or by any federal or state agency, or in settlement.

The retainer fee you have paid us, plus any award of legal fees by court order or settlement, will be credited against this contingency fee. Any open disbursements due our firm will be deducted from your share of the proceeds, not 'off the top' from the gross sums recovered.

[Cases on a contingency basis do not require the "Retainer Fee" paragraph and instead will be labeled "Contingency Fee"]

Contingency Fee [ONLY]

You agree to pay us a contingency fee of 33-1/3% of all sums recovered on your behalf for back pay, front pay, pension contributions, cash benefits, or the value of non-cash benefits, including any sums awarded to you for compensatory and punitive damages in your federal court proceeding or in settlement.

Any award of legal fees by court order or settlement will be credited against this contingency fee. Any open disbursements due our firm will be deducted from your share of the proceeds, not 'off the top' from the gross sums recovered.

Periodic Billing Rate

Our periodic billing for fees will be based upon an hourly charge of \$_____ per hour for [name of partner], \$_____ per hour for all associates, \$_____ per hour for the services of senior paralegal personnel (depending upon the nature of the work performed), and \$_____ per hour for time expended by other paralegals. To the extent that associate lawyers or paralegal personnel time is utilized, your overall fee will be lower. You will not be billed for clerical or secretarial time (*with the exception of overtime, when necessary*).

However, if our legal services for you continues for one year beyond the date of this agreement, we will render future monthly statements at

the hourly rate then applicable, which you agree to pay upon presentation of our statement.

Hourly Billing Rate Defined

The hourly billing rate will include time spent on your file doing any one or all of the following:

- All phone conferences relative to your case;
- Attendance at conferences with your employer or your union;
- Attendance at court hearings;
- Dictation of correspondence and legal work in connection with your matter;
- Preparation, review and revision of documents in your matter;
- Legal research;
- Attendance at conferences with client, attorneys and expert witnesses in connection with this matter;
- Attendance at any pre-trial conferences;
- Hearings;
- Trial; and
- Post-trial proceedings and memorandums of law.

The client further understands that the hourly rates apply to all time expended relative to the client's matter, including but not limited to, office meetings and conferences, telephone calls and conferences, either placed by or placed to the client, or otherwise made or had on the client's behalf or related to the client's matter, preparation, review and revision of correspondence, responses, affidavits and affirmations, or any other documents, memoranda, or papers relative to the client's matter, legal research, conferences, file review, preparation time, travel time, and any other time expended on behalf of or in connection with the client's matter.

Disbursements Paid By Client

You agree to pay all out-of-pocket disbursements advanced on your behalf that will be billed to you separately during the course of these proceedings and are payable when billed. These disbursements are for filing and index fees, postage, photocopies, faxes, messenger services, long distance phone calls, process server fees, secretary's overtime, electronic research service, examination before trial fees, subpoena fees and possible fees of expert witnesses, if needed in the prosecution of this action. Payment of major disbursements will be requested from you in advance.

It is understood and agreed that from the gross sums collected, either by way of settlement and/or jury verdict or verdict by the court, there shall be deducted from *your share* of the settlement proceeds the full amount of any and all open disbursements that have been advanced by the law firm of [firm name], and remain unpaid at the time of the settlement, before disbursement of the settlement proceeds in this matter.

Gross Sums

Gross sums are defined as all sums recovered in your case for back pay, front pay, liquidated damages, pre-judgment interests, non-cash benefits as defined below, attorneys fees, compensatory damages, and punitive damages. All of these sums shall be added together to determine the gross sums recovered in this case. Once those gross sums are ascertained, the contingency fee shall be applied to the gross sum, and you shall be given a credit against that amount for any legal fees that you have paid to our office in accordance with this retainer.

Non-Cash Benefit

In the event of the receipt of a non-cash benefit, including, without limitation, reinstatement, letter of recommendation, expungement of files, pension credit, health insurance coverage, unemployment compensation, and disability benefits (state and federal), the value of that benefit shall be added to the gross fees against which the 1/3 contingency fee is applied.

Withdrawal of [Firm Name] and Attorneys Fees

Failure to pay the sum set forth above, the unreasonable refusal to follow [firm name]'s recommendations concerning settlement or unforeseen adverse development, new adverse law or new adverse facts, or failure to cooperate with [firm name] shall be deemed grounds for our firm to withdraw as your counsel.

You agree not to discuss this case with others, except with the consent of [firm name].

You agree not to waive attorneys fees and costs of this litigation unless [firm name] gives you written permission for such waiver.

Adverse Ruling of Law

In the event the Department of Human Rights, an Administrative Law Judge of the Human Rights Commission, or the Human Rights Commission or EEOC, makes a determination adverse to you claim which has the effect of extinguishing your claim, unless an appeal or other review is prosecuted by [firm name], [firm name] shall not be obligated to pursue such review procedure should [firm name] decide that such appeal or review procedure would be unlikely to succeed, or there is little or no basis for review.

Appeals

Your fees do not include any appeals that may have to be taken or defended in this matter arising out of any court order or decision rendered by a state or federal court or a state or federal agency. A separate fee arrangement shall be agreed upon in the event of an appeal.

Payment of Settlement Funds

[Firm Name] is authorized to receive payment of any judgment or settlement on your behalf.

After Acquired Evidence

In the event you have not been truthful with counsel concerning material matters (e.g., job application statements, resume statements, job history, education, degrees, prior criminal record, etc.), and as a result, the settlement value of the case declines sharply, counsel may unilaterally increase the fee to be charged, or may withdraw from the case.

Non-Payment of Fees and Disbursements

If you do not pay our retainer fees or disbursements, as contemplated by this Agreement, within ten (10) days after your receipt of our billing to you, then we may treat your failure to do so as your decision to terminate our services for you, and we may withdraw as your attorneys.

Division of Work

It is impossible to determine in advance the amount of time that will be required to bring your case to the point of either being settled, or being tried by a court or jury. We shall use our best judgment to determine the amount of time, and who is to perform the legal services to prosecute your case. We will keep you fully informed of all events that take place in your case.

You understand that an associate who may be assigned to your matter may do all pre-trial work such as preparation of motions and discovery documents and may conduct some preliminary hearings and handle the necessary depositions. However, it is understood that a partner will represent you at the trial of this action and at all major court appearances.

Taxation of Employment Settlement or Judgment Funds

As I have explained to you, any funds received by you in settlement of your employment case, or from a judgment in your favor after trial, are taxable as ordinary income under the current IRS guidelines. Our firm recommends that you seek tax advice from a tax attorney or accountant of your choosing to make certain that you fully understand the tax ramifications of any settlement or judgment funds you may receive in this case.

No Guarantees

You acknowledge that we have made no guarantees regarding the disposition of any phase of the matter or matters for which we have been retained, as all of our expressions relative to your matter are only our opinions. You further acknowledge that you have read this retainer and fully understand its terms.

We believe that the foregoing correctly sets forth our understanding and if you concur, we would appreciate you signing and returning the original copy of this Retainer Agreement to us in the enclosed envelope, together with your retainer check [*unless strictly on contingency or payment in advance*] to

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be made payable to our firm. A duplicate copy of this letter is provided for your records.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

(attorney's name & signature)

THE FOREGOING RETAINER AGREEMENT AND ABOVE RECOVERY
FEE SCHEDULE IS UNDERSTOOD AND AGREED TO:

Dated: _____

Client's Signature: _____

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