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EEOC REGIONAL ATTORNEYS MANUAL

D. NONPECUNIARY COMPENSATORY DAMAGES:

The Federal Employee Advocate is publishing here the EEOC's guidance on emotional distress/non-pecuniary damages from the EEOC's Regional Attorney's Manual. The law firm of Josh F. Bowers, P.C. has extensive experience representing Federal employees who suffered damages due to discrimination and wrongful employment actions.

Disclaimer

The legal information in this article is intended as a general overview of this issue and is subject to change; it is not meant to serve as legal advice in any particular situation. The law is in a constant state of change as Congress amends statutes; Federal Agencies issue and amend regulations, and the courts issue decisions interpreting the laws and regulations. We recommend you consult a licensed lawyer who is knowledgeable about the area of law in question before you take action to address a legal matter.

EEOC REGIONAL ATTORNEY'S MANUAL

D. NONPECUNIARY COMPENSATORY DAMAGES:

Contents

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

1. Introduction

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

2. Areas of Inquiry as to Scope of Damages

There are a variety of nonpecuniary compensatory damage claims which may be asserted on behalf of a claimant. To assess whether such a claim should be made, trial attorneys must discuss with each claimant the type and extent of damages he or she incurred. After briefly explaining the nature of nonpecuniary compensatory damages, the trial attorney should review the specific types of damages individuals in employment discrimination cases may allege, including emotional pain and

suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, fright, shock, humiliation, indignity, apprehension, marital strain, loss of self-esteem, anxiety, depression, loss of respect of one's friends and family, isolation, and grief.

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

Claimants should be advised that the amount of damages awarded, if any, will likely be determined largely by the nature and severity of their proven injuries, and of course, the statutory caps. Compare, e.g., *Smith v. Northwest Mutual Financial Acceptance, Inc.*, 129 F.3d 1408, 1416-17 (10th Cir. 1997) (jury award of compensatory damages was reduced to the statutory cap, but otherwise upheld, where the plaintiff testified that her termination caused "nausea, migraines, humiliation, degradation, loss of self-respect, consumption of sleeping pills, frequent crying, loss of a loan officer career, and stress in [her] relationship with her daughter," and "[t]he record reveal[ed] that plaintiff's testimony was in part corroborated by independent, objective testimony" from "two of plaintiff's co-workers [who] testified from personal knowledge"), with *Vadie v. Mississippi State University*, 218 F.3d 365, 375-77 (5th Cir. 2000) (jury award of nonpecuniary compensatory damages was reduced to the statutory cap by the district court; however, the Fifth Circuit reversed the award and ordered that the case be "remand[ed] for a new trial on retaliation damages unless [the plaintiff] accepts a remittitur . . . reducing the damages award to $10,000," because "the award is entirely disproportionate to the injury sustained," where the plaintiff testified

merely that he "bec[a]me sick, physically, mentally, and everything" when informed that he was not selected a permanent position on the faculty, and where "none of [his claims were] corroborated by medical evidence or any other witnesses"). See also *Evans v. Port Auth. of New York & New Jersey*, 273 F.3d 346 (3d Cir. 2001) (in a Section 1981 and Title VII failure to promote race discrimination case, jury awarded $1.15 million in pain and suffering damages which was remitted to $375,000; appellate court affirmed reduced award reasoning that jury award was excessive and while $375,000 is "well above most emotional distress awards," *id.* at 355, "this was not a typical case." *Id.* at 356; award was supported by plaintiff's testimony about the physical and emotional toll of working under discriminatory conditions as well as the demeanor and testimony of the employer's witnesses.)

3. Areas of Inquiry as to Proof of Damages

a. Evidence of Damages

(1) Proof Standards

It is important that the claimant understand that nonpecuniary compensatory damages will not be awarded solely based on proof of an unlawful employment practice. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 416-17 (5th Cir. 1998) (Title VII and Section 1981; "compensatory damages for emotional distress and other forms of intangible injury will not be presumed from mere violation of constitutional or statutory rights"). Nor will damages will be awarded solely based on an assertion that the claimant suffered mental anguish as a result of defendant's unlawful conduct. *Bailey v. Runyon*, 220 F.3d 879, 881 (8th Cir. 2000) ("Conclusory statements give the finder of fact no adequate basis from which to gauge the nature and circumstances of the wrong and its effect on the plaintiff"). *See, e.g.*, *Forshee v. Waterloo Industries, Inc.*, 178 F.3d 527, 531 (8th Cir. 1999) (reversing an award of emotional distress damages, where "plaintiff's testimony did not identify and describe the kind of severe emotional distress that warranted the award [where she] suffered no physical injury, she was not medically treated for any psychological or emotional injury, and no other witness corroborated any outward manifestation of emotional distress"). Nonetheless, mere assertions of nonpecuniary compensatory damages may be sufficient in a few

instances where defendant's conduct is particularly severe, long-term, and egregious. *See e.g., Berger v. Iron Workers Reinforced Rodmen Local 201*, 170 F.3d 1111, 1138 (D.C. Cir. 1999) (Title VII and Section 1981; "in appropriate circumstances the infliction of emotional distress may be inferred from the circumstances of the violation," and "courts may properly . . . award damages to compensate for that distress"; upholding "extremely modest awards . . . rang[ing] from $2,500 to $25,000," based on the testimony of 18 African-American "claimants, who were experienced [construction workers], [that they] suffered emotional distress by having to subject themselves to an unnecessary training program for up to two years before being permitted to take the union entrance exam").

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

(2) Claimant's Testimony

The testimony of the claimant alone, if sufficiently specific, may be enough to meet the burden of proving an actual injury caused by the defendant. *See, e.g., Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 836-37 (8th Cir. 2001) (holding that a

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

(3) Corroborating Witnesses

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

able to come back to work"; court ordered award reduced to $150,000 or a new trial on damages).

Corroboration may be especially important where the employer questions a claimant's assertion of nonpecuniary compensatory damages by presenting witnesses who challenge his testimony. See *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 857 (7th Cir. 2001) ("It is within the jury's province to evaluate the credibility of witnesses who testify as to emotional distress, and we shall not disturb those credibility determinations on appeal. If the jury disbelieved [the plaintiff's] challenged testimony regarding the humiliation, anger, and depression he experienced following his demotion, as it was free to do, it was not obligated to award him compensation"). Psychotherapists often provide invaluable corroboration of a claimant's assertion of nonpecuniary compensatory damages. *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1298 (8th Cir. 1997), *cert. denied*, 524 U.S. 953 (1998) ("this court and others have recently noted the probative value of expert psychological proof regarding causation of the claimant's depression and emotional distress"). However, "[m]edical or other expert evidence is not required to prove emotional distress." *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065, 75 FEP Cases 1741 (8th Cir. 1997) (upholding an award of $100,000 "for mental anguish and loss of enjoyment of life," where the claimant, "his wife and his son testified about the anxiety, sleeplessness, stress, depression, high blood pressure, headaches, and humiliation he suffered after he was [unlawfully] not promoted and [suffered retaliation] after he filed the employment discrimination charge"). *But cf. Koster v. Trans World Airlines, Inc.*, 181 F.3d 24, 35-36 (1st Cir. 1999) ("Although testimony from a mental health expert is not required to sustain an award for emotional distress, the absence of such evidence is useful in comparing the injury to the award of damages"; thus, even though the plaintiff "had trouble sleeping and was anxious" and his "family life suffered" during his temporary furlough, the court ordered a large remittitur in lieu of a new trial, because "[t]here was no evidence that [plaintiff] ever sought medical treatment or suffered any long-term depression or incapacitation").

It is important to ascertain from the claimant whether he or she knows of witnesses to substantiate compensatory damages, whether such witnesses may be willing to testify, and perhaps most importantly, whether the claimant is prepared to have

such testimony elicited not only in a deposition, but in court before a jury. To the extent that the claimant is able to provide corroborative witnesses, the EEOC's ability to prove damages will be significantly enhanced.

b. Permissible Scope of Defendant's Inquiries

(1) Waiver of Psychotherapist-Patient Privilege

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

The Supreme Court has "h[e]ld that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." *Jaffee v. Redmond*, 518 U.S. 1, 15, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (action under Section 1983). Like other testimonial privileges, such as those between physician and patient or attorney and client, the *Jaffee* Court acknowledged in a footnote that "the patient may of course waive the protection." 518 U.S. at 15, n.14.

Most courts have found waiver of the psychotherapist-patient privilege where the plaintiff alleges severe emotional distress and seeks monetary damages for psychological injury in an action brought under Title VII and/or the Americans with Disabilities Act. *See, e.g., Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) ("a plaintiff waives the psychotherapist-patient privilege by placing his or medical condition at issue"; upholding discovery sanctions and dismissal of a Title VII action alleging sex discrimination, sexual harassment and retaliation, "with allegations of extreme emotional distress," where plaintiff refused to provide signed medical releases for any doctors, psychiatrists, psychologists, and counselors she had consulted during the period covered by her complaint); *Jackson v. Chubb Corp.*, 193 F.R.D. 216, 225 (D. N.J. 2000) (holding that a "plaintiff

waives the psychotherapist-patient privilege by placing his/her mental or emotional condition at issue;" requiring the plaintiff in a Title VII race discrimination case to produce mental health records up to the time of trial, where damages sought for alleged continuing emotional distress; but stating in dicta that a garden-variety emotional distress claim does not trigger the patient-litigant exception); *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568-69 (S.D. Cal. 1999) (same in an ADA case; "[Plaintiff] can testify to her emotions near the incident, and the defendant is free to cross examine her about the depth of her emotional damage and other factors in her life at that time. But to insure a fair trial, particularly on the element of causation, the court concludes that defendant should have access to evidence that [plaintiff's] emotional state was caused by something else. Defendant must be free to test the truth of [plaintiff's] contention that she is emotionally upset because of the defendant's conduct. Once [she] has elected to seek such damages, she cannot fairly prevent discovery into evidence relating to an element of her claim"); *EEOC v. Danka Indus., Inc.*, 990 F.Supp. 1138, 1142 (E.D. Mo. 1997) ("Plaintiffs in this action are seeking damages for emotional distress resulting from sexual harassment. Therefore, the mental condition of the plaintiffs is directly related to the issue of damages. Defendant is entitled to discover to what extent the plaintiffs' mental condition, prior to the alleged harassment, may have contributed to any emotional distress for which they now seek damages"); *Vann v. Lone Star Steakhouse & Saloon, Inc.*, 967 F.Supp. 346, 349-350 (C.D. Ill. 1997) (Title VII sexual harassment; "Plaintiff has waived the psychotherapist-patient privilege by placing her mental condition in issue and by disclosing [her therapist] as an expert witness who will give opinion testimony at trial. All documents relating to the treatment of plaintiffs, including [the therapist's] personal notes, must be disclosed"); *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Pa. 1997) (Title VII and ADA; where the plaintiff seeks damages for injury to her mental condition, "to hide . . . behind a claim of privilege when that condition is placed directly at issue would simply be contrary to the most basic sense of fairness and justice").

Other courts have adopted a narrower interpretation of whether the psychotherapist-patient privilege is waived by assertion of a claim for compensatory damages. In *Ruhlmann v. Ulster County Department of Social Services*, 194 F.R.D. 445, 450 (N.D. N.Y. 2000) (ADA), the court held that "a

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

(2) Rule 35 Examinations

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

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

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

'in controversy' within the meaning of Rule 35(a) . . . [merely] by claiming damages for 'humiliation, mental anguish, and emotional distress' . . . which she says that she suffered as a result of defendants' actions alleged in her complaint," *id.* at 98). *Accord, Ricks v. Abbott Laboratories*, 198 F.R.D. 647, 649-50 (D. Md. 2001) (Title VII and ADA; "agree[ing] with the *Fox* standard and apply[ing it [in a] garden variety case" where "plaintiff has expressly stated that she 'does not intend to introduce expert psychiatric evidence;'" the court thus refused to order that plaintiff submit to a mental examination, but also ruled that "[p]laintiff is prevented from introducing expert testimony as to her mental state[, or] lay testimony to establish that she suffers from any disorder or that she experienced unusually severe emotional distress as a result of defendant's actions"). The trial attorney should inform the claimant that the EEOC will oppose independent medical examinations that we believe are not appropriate under applicable case law, but that the court will make the ultimate decision as to whether a Rule 35 exam is permissible.

(3) Preexisting Conditions and Intervening Circumstances

(a) In General

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

(b) Fed. R. Evid. 412

In any case presenting allegations of sexual harassment or other sexual misconduct, Rule 412 of the Federal Rules of Evidence limits the admissibility of evidence at trial on issues concerning the claimant's sexual activities. Courts have unanimously "h[e]ld that Rule 412, which explicitly includes civil cases involving sexual misconduct, encompasses sexual harassment lawsuits." *Wolak v. Spucci*, 217 F.3d 157, 160 (2d Cir. 2000); *see Adams v. Goodyear Tire & Rubber Co.*, 184 F.R.D. 369, 375 (D. Ky. 1998) ("The Advisory Committee Notes [on the 1994 revision] make clear that Rule 412 now applies to civil cases involving sexual misconduct, and to Title VII sexual harassment cases in particular"). *See, e.g., Holt v. Welch Allyn, Inc.*, 2000 WL 98118 (N.D. N.Y. January 11, 2000) (in Title VII sexual harassment case, court held that evidence governed by Rule 412 regarding either plaintiff's workplace conduct or conduct with named defendant would be admissible at trial but evidence of nonwork-related sexual conduct was inadmissible); *Socks-Brunot v. Hirschvogel Inc.*, 184 F.R.D. 113 (S.D. Ohio 1999) (applying the rule to bar the admissibility of sexual conduct evidence offered by defendant in a case where plaintiff alleged that she was subjected to a hostile work environment based upon sexual harassment in violation of Title VII and state law). Moreover, "[a]lthough Rule 412 controls the admissibility of evidence rather than its discoverability, numerous courts have applied the rule to decide discovery motions." *Williams v. Bd. of County Commissioners*, 192 F.R.D. 698, 704 (D. Kan. 2000) (in sexual harassment lawsuit, plaintiff not required to answer interrogatory seeking information about sexually transmitted diseases, the age at which she first had intercourse and the names and addresses of those persons with whom she had been sexually active within the last five years; court found that marginal relevance of information sought was outweighed by potential harm to plaintiff including unjustified invasion of privacy, potential for public and private embarrassment and likelihood of significant prejudice based on improper sexual stereotyping); *Howard v. Historic Tours of America*, 177 F.R.D. 48, 51 (D. D.C. 1997) (plaintiff in sexual harassment action was not compelled to answer interrogatory asking whether she had sexual relationships with employees not named as harassers; court stated that "[o]ne of the purposes of Fed.R.Evid. 412 was to reduce the inhibition women felt about pressing complaints concerning sexual harassment because of the shame and embarrassment of opening the door to an inquiry into the victim's sexual history.

This shame and embarrassment . . . exists equally at the discovery stage as at trial and is not relieved by knowledge that the information is merely sealed from public viewing").

Despite the protections of Fed. R. Evid. 412, however, "relevance not admissibility is the appropriate inquiry with regard to whether or not the information sought by [defendant] is discoverable." *Herchenroeder v. Johns Hopkins University*, 171 F.R.D. 179, 181 (D. Md. 1997) (allowing discovery on the plaintiff's "past sexual behavior" in the workplace, where the court was "persuaded that the information sought . . . has some relevance, as contemplated by Fed. R. Civ. P. 26(b), to [plaintiff's] Title VII and defamation claims against the defendants, and is also relevant with respect to the credibility of [plaintiff and a] critical witness on her behalf," *id.* at 182); see *Muniu v. Amboy Neighborhood Center, Inc.*, 2001 WL 370226 (E.D. N.Y. March 11, 2001) (despite plaintiff's objections, court allowed defendant to question plaintiff about her alleged past sexual conduct in the workplace because Rule 412 governs admissibility of evidence of victim's sexual behavior but not discoverability of information). Where the claimant seeks compensatory damages under Title VII for emotional distress allegedly caused by sexual harassment, courts have allowed such discovery if it appears that specific lines of inquiry are relevant to its defense against damages claims, and the information sought may be admissible under the exceptions in Fed.R.Evid. 412(b)(2). *See Barta v. City and County of Honolulu*, 169 F.R.D. 132 (D. Haw. 1996) (where an alleged sexual harassment victim claimed that her values as a strict Mormon made her especially vulnerable to the infliction of emotional distress due to sexual harassment, the court permitted discovery regarding her sexual conduct while on duty at the workplace and conduct involving the alleged harassers, but otherwise barred discovery relating to her conduct off duty and outside the workplace); *Sanchez v. Zabihi*, 166 F.R.D. 500 (D. N.M. 1996) (permitting certain "narrowly tailored" inquiries into the plaintiff's sexual activities in the workplace, where she claimed to have suffered emotional distress due to unwelcome sexual advances, but the defendant claimed that she was "the sexual aggressor" who made advances toward the defendants). It should be noted that in all of these cases, protective orders were issued to bar disclosure of sexual-conduct information obtained through discovery. *Herchenroeder*, 171 F.R.D. at 182-83; *Barta*, 169 F.R.D. at 137-38; *Sanchez*, 166 F.R.D. at 502-03.

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

(c) Affect on Damages

Discovery, including Rule 35(a) examinations, may disclose to defendant that a claimant had pre-existing conditions or intervening situations which could have been the cause of claimant's damages. Defendant will attempt to use such conditions or situations to argue against an award of compensatory damages or to reduce the size of any award. *See, e.g., Merriweather v. Family Dollar Stores of Indiana*, 103 F.3d 576, 581 (7th Cir. 1996) (reducing an award of compensatory damages by 25 percent, where evidence "makes clear that [defendant's] retaliation was just one of several factors which affected [plaintiff's] emotional state[; o]ther factors relating to her emotional distress during this tumultuous period in her life, but unrelated to defendant, included the death of [plaintiff's] father, being evicted from her apartment, and being unable to find a suitable job [after she was fired for nondiscriminatory reasons]"); *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568 (S.D. Cal. 1999) (discussing cases where monetary awards for emotional harm were reduced or reversed based on evidence of pre-existing conditions and intervening situations which either contributed to or were the proximate cause of the plaintiff's injuries).

Because pre-existing or intervening conditions will likely impact any compensatory damages award, trial attorneys should carefully review with claimants any and all personal problems and situations which defendant may contend are the actual cause

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

4. Conclusion

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