

**AMERICANS WITH DISABILITIES ACT REMEDIES  
DAMAGES, INJUNCTIONS, REINSTATEMENT**

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**AMERICANS WITH DISABILITIES ACT REMEDIES**  
**DAMAGES, INJUNCTIONS, REINSTATEMENT**

Under the Americans with Disabilities Act, the plaintiff may be awarded the same remedies available under Title VII, namely lost wages and other equitable relief.<sup>1</sup> The 1991 Civil Rights Act amended the ADA to provide for the recovery of future wages, as well as compensatory damages such as damages for emotional pain, suffering, inconvenience, mental anguish and the loss and enjoyment of life.<sup>2</sup> Punitive damages are also available. The sum of compensatory and punitive damages are capped, based upon the size of the employer, from \$50,000 to \$300,000.<sup>3</sup> An employer may avoid compensatory and punitive damages by demonstrating good faith in attempting to identify and make reasonable accommodation of a disability.<sup>4</sup> Finally, plaintiffs may recover attorneys fees and costs including the costs of expert witnesses.<sup>5</sup> The following cases decided during the past year shed light on the remedies available under the Americans with Disabilities Act.

**I. DAMAGES**

**A. Compensatory Damages**

**Rizzo v. Children's World Learning Centers, Inc., 173 F.3d 254 (5<sup>th</sup> Cir. 1999)**

Hearing impaired former employee sued employer under the Americans with Disability Act. The jury awarded the plaintiff \$100,000.00 for past and future mental anguish and only \$182.00 in lost wages. Employer appealed arguing that the \$100,000.00 mental anguish award was excessive. The 5<sup>th</sup> Circuit disagreed noting that mental anguish is "an actual compensatory damage." The court held that \$100,000.00 for mental anguish resulting from malicious discrimination in violation of the ADA is not enough to shock the conscious."

**Farley v. Nationwide Mutual Ins. Co., \_\_\_ F.3d \_\_\_, 1999 WL1142914 (11<sup>th</sup> Cir. 1999)**

Former employee sued under the ADEA and ADA and obtained a judgment in the amount of \$585,120 which included back pay, one year of front pay, and compensatory damages of \$450,000. The trial court remitted the compensatory damages to \$300,000 and the former employer appealed claiming that the remittitur was insufficient. The former employee also appealed claiming entitlement to reinstatement in lieu of front pay.

The 11<sup>th</sup> Circuit held that compensatory damages of \$300,000 were supported by testimony of Farley's emotional pain and suffering provided by himself, his wife and his doctors. The court noted that its review of compensatory damages is deferential to the factfinder because "harm is subjective and evaluating it depends considerably on the demeanor of the witnesses."

As to Farley's claim that he should have been reinstated in lieu of receiving front pay, the Court of Appeals noted that so long as the equitable remedy chosen by the trial court is consistent with the statutory purposes of the ADA, the court has "broad discretion" in fashioning relief. The 11<sup>th</sup> Circuit did note that it has fashioned a rule of "presumptive reinstatement" in wrongful discharge cases and that reinstatement is the appropriate remedy except in extraordinary cases. In this case, the 11<sup>th</sup> Circuit upheld the front pay remedy in lieu of reinstatement in light of the trial court's finding that antagonism between Farley and Nationwide made reinstatement

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<sup>1</sup>42 U.S.C. § 12117(a)

<sup>2</sup>42 U.S.C. § 1981(a)(2), (b)(3) (1991)

<sup>3</sup>42 U.S.C. § 1981a(b)(3)

<sup>4</sup>42 U.S.C. § 1981(a)(3); EEOC Compliance Manual, 10.2.

<sup>5</sup>42 U.S.C. § 1988(b) and (c)

“not feasible.” The court warned, however, that the presence of some hostility between the parties such as that normally caused by a lawsuit, should not preclude a plaintiff from receiving reinstatement.

## **B. Punitive Damages**

### **Kolstad v. American Dental Association, \_\_\_\_ U.S. \_\_\_\_, 119 S.Ct. 2118 (1999)**

In age and ADA discrimination lawsuit, the United States Supreme Court clarified when punitive damages are available under Title VII and certain ADA cases. The court held that Title VII and the ADA establish a “two tier” award system in which compensatory damages are available for intentional disparate treatment and punitive damages are available for intentional discrimination “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” The later standard the court defined as pertaining to the employer’s knowledge “that it may be acting in violation of federal law, not its  
in other words, the court held that an employer must act “in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages.” The court refuted the argument that the egregious or outrageous acts were an additional requirement to an award of punitive damages holding only that such acts may serve as evidence supporting an inference of the “requisite evil motive.” The court also held that an employer is not vicariously liable for discriminatory employment decisions made by management employees “where these decisions are contrary to the employer’s good faith efforts to

### **Quint v. A.E. Staley Manufacturing Company, 172 F.3d 1 (1<sup>st</sup> Cir. 1998)**

Discharged employee with carpal tunnel syndrome sued under the ADA. The jury awarded her \$300,000.00 in compensatory damages and \$420,000.00 in punitive damages which the District Court reduced to \$300,000.00 pursuant to the statutory cap. Following a hearing on equitable relief, the District Court awarded Quint \$8,019.00 of her \$125,580.00 back pay claim. The court found that Quint failed to apply for other jobs after her discharge and thus held that she had not exercised reasonable diligence to mitigate back pay damages. On appeal, A.E. Staley argued that the jury erred in awarding \$300,000.00 in compensatory damages since there was no evidence of serious emotional harm stemming from her discharge. The court of appeals ignored this argument finding that since the punitive damage award was proper and in excess of the \$300,000.00 cap, there was no need to re-visit the compensatory damage issue. As to the appropriateness of punitive damages, the court applied the reckless indifference standard found in 42 USC §1981(A)(b)(1). There was evidence that the plant manager became upset about the plaintiff’s diagnosis and its potential adverse effect on the employee’s spotless work compensation record. The manager thereafter asserted that the employee was malingering and exerted pressure on the employee’s doctor to alter his diagnosis. The manager also produced a video tape which misleadingly understated the employee’s job duties and the manager rejected the employee’s physician’s recommendation that she cease work until further notice. Finally, the employee was fired after she failed to keep an appointment with the employer’s physician upon notice that the employer conceded was unreasonably short. These facts, the court of appeals held, were sufficient to show that the employer acted in reckless disregard to plaintiff’s federally protected rights.

As to the plaintiff’s back pay award, the court held that an ADA plaintiff is presumptively entitled to all back pay which would have accrued from the termination date to the entry of judgment, provided the employee exercises reasonable diligence to secure other suitable employment. In this case, the employee did not seek other work and the District Court correctly reduced the back pay award to a period ending on the date by which the District Court concluded the employee should have found other employment. The District Court also found that back pay under the ADA was not subject to a reduction by amounts the employee received as Aid to Families with Dependent Children and food stamps, since the Maine Human Rights Act does not provide “discretion to deduct from back pay awards any post determination collateral source payments.” Finally, the appellate court found that because reinstatement is the over-reaching preference among all equitable remedies under the Americans with Disabilities Act, the court erred when it denied the employee reinstatement on the basis of tensions between the employee and her former co-workers. The only record evidence of such tensions was the employer’s conclusory assertions where as other clear cut evidence at trial showed no antagonism among the employee’s co-workers at the time of her discharge.

### **EEOC v. WalMart Stores, Inc., 187 F.3d 1241 (10<sup>th</sup> Cir. 1999)**

The EEOC brought a claim on behalf of a hearing impaired worker against WalMart for violations of the ADA. The court awarded compensatory and punitive damages as well as attorney’s fees but denied injunctive relief. WalMart appealed the award of punitive damages as unsupported by the evidence and excessive. WalMart also denied vicarious liability based upon its supervisor’s

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conduct. The EEOC appealed the court's denial of injunctive relief. In considering the case, the 10<sup>th</sup> Circuit applied the Supreme Court's recent decision in Kolstad v. American Dental Association, \_\_\_\_ U.S. \_\_\_\_, 119 S.Ct. 2118 (1999).

The evidence showed that WalMart knew the claimant was hearing impaired at the time he was employed and that he would need an interpreter in certain circumstances. When the claimant refused to attend training sessions which he could not understand without the aid of an interpreter, his supervisors transferred him to a job as a receiving associate to a janitorial position. The next day the supervisors again failed to provide an interpreter to discuss the transfer and then suspended him when he objected to the perceived demotion. WalMart did provide an interpreter a week later to inform the claimant of his termination. WalMart's store manager, who approved the suspension, testified that he was familiar with the accommodation requirements of the ADA. From this evidence, the court held that a reasonable jury could have concluded that WalMart intentionally discriminated against the claimant "in the face of a perceived risk that its action would violate federal law."

The court then considered whether the supervisor's conduct ran contrary to WalMart's good faith efforts to comply with the ADA. The court noted that WalMart had a written policy against discrimination but held that a policy alone is not enough. In this case, the evidence showed that the claimant's direct supervisor received no training about disability discrimination. The personnel manager involved testified that during her seven years as a WalMart manager she also received no training in employment discrimination nor in the requirements of the ADA. She also failed to discuss the act with any of the employees under her supervision and did not have a copy of WalMart's ADA handbook. On these facts, the 10<sup>th</sup> Circuit held that WalMart "enjoys no protection from vicarious punitive liability for the conduct of its managerial agents." The court also found that an award of \$75,000.00 did not shock the judicial conscious since it fell within the range that Congress determined to be reasonable. Finally, the court acknowledged the EEOC's claim that the District Court erred in refusing to grant the Commission's motion for equitable relief. The EEOC asked for an order requiring WalMart to, inter alia, train its supervisors about the requirements of the ADA, and refrain from transferring, suspending or terminating qualified individuals, including those with hearing impairment, at its stores in New Mexico. The 10<sup>th</sup> Circuit held that the most important factor to consider in denying injunctive relief "is whether the facts indicate a danger of future violations of the act." The court held that on this record, there was sufficient evidence to find more than a mere possibility of recurrent violations sufficient to warrant a grant of injunctive relief.

### **Scott v. Estes, 60 F.Supp. 2d, 1260 (M.D. Alabama 1999)**

This case affirmed that a county as a government agency, is exempt from punitive damages under Title 7 and the ADA. (See 42 USCA §1981A(b)(a).

### **Conley v. Bidermann Industries U.S.A., Inc., 56 F.Supp. 2d 360 (S.D. N.Y. 1999)**

In this case, the district court upheld the jury's verdict of \$475,000.00 for back pay and benefits finding that the amount was not excessive given the employee's \$114,000.00 base salary. The court also held that the back pay did not have to be reduced by the amount the plaintiff received under settlement of a lawsuit brought under her long term disability policy because a jury could reasonably have taken the amount of settlement into account in calculating its final award of back pay. The court also upheld the jury's award of \$350,000.00 in punitive damages based upon (1) the company's false representation that there were no vacant positions for the employee to fill; (2) the employer's alteration of the employee's satisfactory performance evaluation; and (3) the employer's failure to engage in the interactive process for accommodations required by the ADA.

### **Powers v. Polygram Holding, Inc., 40 F.Supp. 2d 195 (S.D. NY 1999)**

The District Court granted summary judgment in an employer's favor on the employee's claim for punitive damages. The court found that because the employer sought legal advice regarding its obligations under the ADA and also requested and received information from the employee's physician in an attempt to accommodate the employee's needs and did not show any hostility toward accommodating the employee's disability, it had not acted with reckless indifference to the employee's federally protected rights.

## **C. Front Pay**

### **Davoll v. Webb, 194 F.3d 1116 (10<sup>th</sup> Cir. 1999)**

In a claim brought by disabled police officers against the City of Denver, the 10<sup>th</sup> Circuit held that although reinstatement is a preferred remedy under the ADA, front pay may be awarded when appropriate. In the circumstances, the court must specify an end

date and take into account any amounts that the employee could have earned using reasonable efforts. The court also discussed factors the court should consider in determining the appropriate front pay remedy including work life expectancy, salary and benefits at the time of termination, potential increases in salary, the reasonable availability of other work opportunities, and the period within which the plaintiff should become re-employed with reasonable efforts.

**Price v. Interstate Warehousing, Inc., 49 F.Supp. 2d 1081 (N.D. Ill. 1999)**

After receiving a demand letter from plaintiff's counsel, the employer sent plaintiff a letter offering to reinstate him on the condition he obtain a letter from his doctor releasing him to return to work without any restrictions. The District Court found that the conditional letter was insufficient to cut off the plaintiff's back pay award. Further, the court awarded prejudgment interest on the back pay award in the amount of \$3,052.58. As for front pay, the court held that because of the hostility between the parties and the likelihood of an appeal, reinstatement was not appropriate. The plaintiff had requested five years of front pay but the court awarded only two based upon its finding that it was unlikely the plaintiff could find an equivalent paying job to the one he held with the defendant. The court limited the front pay award to two years based upon the employee's demonstrated propensity to change jobs and the employer's contention that because its business had suffered a financial downturn it might have had to lay the employee off after two years. The court declined, however, to set off against the front pay award the plaintiff's earnings from a second job, holding that the plaintiff should not be punished for taking a second job.

**D. Back Pay**

**See Supra, Quint v. A.E. Staley Manufacturing Company, 172 F.3d 1 (1<sup>st</sup> Cir. 1998)**

**Hamlin v. Charter Township of Flint, 165 F.3d 426 (6<sup>th</sup> Cir. 1999)**

The 6<sup>th</sup> Circuit held that disability pension payments are collateral source benefits that should not have been deducted from a jury's damage award in a disability discrimination claim. As for attorney's fees, the trial court awarded the plaintiff only fifty percent of the amount requested because (1) the case was very close both at the summary judgment phase and at trial; (2) the employee had sued for \$1 million but the jury awarded only \$500,000.00; (3) the plaintiff had a contingency fee agreement with his attorneys; and (4) the court had to spend a great deal of time on "important matters" that counsel failed to properly identify or discuss. The court of appeals found that each of these factors was not relevant to the determination of an appropriate fee award.

**Flowers v. Komatsu Mining Systems, Inc., 165 F.3d 554 (7<sup>th</sup> Cir. 1999)**

Former employer argued that it should not be liable in back pay to former employee who, after his discharge, became disabled to a degree that he could no longer do his job with or without accommodation as evidenced by his statement to the Social Security Administration that he was disabled. The Court of Appeals recognized that the Supreme Court was about to decide Cleveland v. Policy Management Systems and therefore steered clear of the liability question surrounding social security disability applications. The court noted that in the 7<sup>th</sup> Circuit, receipt of social security disability benefits does not preclude a person from being a qualified person with a disability. Nevertheless, the SSA finding, the court concluded, "is not irrelevant to the ADA determination." In determining the appropriate amount of back pay, the 7<sup>th</sup> Circuit held that the District Court should consider representations made to the Social Security Administration. In this case, the court held that the trial court erred when it failed to take this evidence into account in mitigation of the back pay award.

The court also ruled on the collateral source rule and held that it is within the trial court's discretion to set off collateral source benefits, such as social security disability payments, from a prevailing plaintiff's award in an employment discrimination case. The court held that if the employer is the source of the funds at issue being paid to the plaintiff, then such payments can be deducted from the back pay award to a plaintiff in an employment discrimination case.

**Fredenburg v. Contra Costa County Department of Health Services, 172 F.3d 1176 (9<sup>th</sup> Cir. 1999)**

Former employee brought an action against the County under the ADA. The 9<sup>th</sup> Circuit held that the employee was not entitled to retain temporary disability benefits under California law, and at the same time, recover back pay for the same period under the ADA.

**See Supra, Conley v. Bidermann Industries U.S.A., Inc., 56 F.Supp. 2d 360 (S.D. N.Y. 1999)**

See Supra, Price v. Interstate Warehousing, Inc., 49 F.Supp. 2d 1081 (N.D. Ill. 1999)

## II. REINSTATEMENT

See Supra, Quint v. A.E. Staley Manufacturing Company, 172 F.3d 1 (1<sup>st</sup> Cir. 1998)

See Supra, Farley v. Nationwide Mutual Ins. Co., \_\_\_ F.3d \_\_\_, 1999 WL1142914 (11<sup>th</sup> Cir. 1999)

## III. INJUNCTIONS

Equal Employment Opportunity Commission v. Waffle House, Inc., 193 F.3d AL5 (4<sup>th</sup> Cir. 1999)

Here the 4<sup>th</sup> Circuit determined that the EEOC could seek a permanent injunction enjoining the employer from discharging individuals engaging in any employment practice that discriminates on the basis of disability and an order requiring Waffle House “to institute and carry out policies, practices and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present and lawful employment practices.” The court approved the EEOC request for injunction despite the charging parties’ agreement to arbitrate his own ADA claims.

Belk v. Southwestern Bell Telephone Co., 194 F.3d 946 (8<sup>th</sup> Cir. 1999)

Belk, an employee who wore a leg brace because of the residual effects of polio, applied for a new position with Southwest Bell as a customer service technician. Technicians at Southwest Bell are required to pass a number of physical tests including a leg lift test which Belk failed. The jury found that Southwest Bell intentionally discriminated against Belk. The jury awarded no money damages but the court issued a broad injunction preventing Southwest Bell from “engaging in any employment practice which discriminates against the plaintiff on the basis of his disability, including, but not limited to, the application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny the [desired] position to the plaintiff because of his disability. “And to” make such reasonable accommodations as are necessary under the circumstances in connection with the administration of any and all physical performance tests . . . that the plaintiff (and all other applicants, to include applicants with a disability) must successfully complete for placement in a desired CST position.” The District Court also awarded Belk his attorneys fees in prosecuting the claim.

Southwest Bell appealed the injunction and the Eighth Circuit vacated and remanded the decision for the court’s failure to give correct jury instructions but noted that Southwest Bell’s success on appeal “may indeed be short lived.” Because of their remand, the court found it unnecessary to address Southwest Bell’s argument that the District Court erred in granting injunctive relief in favor of Belk.

See Supra, EEOC v. WalMart Stores, Inc., 187 F.3d 1241 (10<sup>th</sup> Cir. 1999)

Barnes v. Broward County Sheriff’s Office, 190 F.3d 1274 (11<sup>th</sup> Cir. 1999)

Here the court entered summary judgment in favor of the plaintiff on his claim that pre-employment psychological testing violated the ADA and permanently enjoined the county from continuing such practice. The court, however, refused the plaintiff’s application for attorney’s fees finding that an ADA plaintiff who obtains injunctive relief that does not directly benefit him or her does not constitute a prevailing party entitled to attorney’s fees and the fact that the applicant conceivably could benefit from the injunction if he chose in the future to reapply does not make the plaintiff a prevailing party.

## IV. ATTORNEY FEES

Bercovitch v. Baldwin School, Inc., 191 F.3d 8 (1<sup>st</sup> Cir. 1999)

Defendant school district unsuccessfully applied for attorney’s fees after defending a claim brought by a suspended student under the American’s with Disabilities Act. The school district appealed and the court held that attorney’s fees may not be awarded to

a prevailing defendant under the ADA unless the defendant establishes that the plaintiff's suit was totally unfounded, frivolous, or otherwise unreasonable or that the plaintiff continued the litigation after it clearly became so. Even in these circumstances, the court held, the district court retains discretion to deny or reduce attorney's fees requests after considering all nuances of a particular case.

**See Supra, Hamlin v. Charter Township of Flint, 165 F.3d 426 (6<sup>th</sup> Cir. 1999)**

**Bruce v. City of Gainesville, Ga., 177 F.3rd 949 (11<sup>th</sup> Cir. 1999)**

Defendant city moved for attorney's fees under the ADA after summary judgment was entered in its behalf. The District Court awarded \$7,500.00 in attorney's fees and the employee appealed. The 11<sup>th</sup> Circuit applied the United States Supreme Court's decision in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), and found that under Title VII, a prevailing plaintiff should ordinarily be awarded attorney's fees, but a prevailing defendant should not receive fees unless the plaintiff's claim is "frivolous,"<sup>th</sup> Circuit found no reason for distinguishing between Title VII and ADA claims for purposes of the fee shifting statute. The court found that the plaintiff's belief that he had been terminated because of his disability was not unreasonable since he had worked for the city for more than two years and had received promotions and pay raises before his right hand was crushed by a broken safety cover. After taking medical leave and returning to work, the city told him that there was no work for him to perform. After he filed a complaint with the EEOC, the city gave him a job as a groundskeeper at the city's cemetery. On these facts, the court held that although the plaintiff's allegations were not enough to support denial of the city's motion for summary judgment, the lawsuit also was not so factually or legally groundless as to constitute a frivolous lawsuit from the outset.

**See Supra, Barnes v. Broward County Sheriff's Office, 190 F.3d 1274 (11<sup>th</sup> Cir. 1999)**

**Seawright v. Charter Furniture Rental, Inc., 39 F.Supp. 2d 795 (N.D. Tex. 1999)**

In a case where the court sanctioned the employee's attorney for failing to properly investigate the case prior to filing a complaint, the court did award the employer \$29,809.00 in attorney's fees under the fee shifting statute. The court's decision was based largely upon the employee's deception concerning the status of his association with an HIV positive roommate. Plaintiff claimed that he was terminated from his employment because of his association with the HIV positive roommate when, in fact, the roommate had died prior to plaintiff's termination from his employment. The court found that this conduct by the plaintiff warranted both attorney's fees to the employer and sanctions against his counsel.

## V. MISCELLANEOUS

**Martin v. Kansas, 190 F.3d 1120 (10<sup>th</sup> Cir. 1999)**

The 10<sup>th</sup> Circuit has confirmed that states are not immune under the 11<sup>th</sup> Amendment from the remedial measures of the ADA even though the ADA poses affirmative duties to make reasonable accommodations of the known disabilities of state employees. The court held that Congress' statutory waiver of 11<sup>th</sup> Amendment immunity in the ADA was a valid exercise of its Section 5 power to enforce the 14<sup>th</sup> Amendment.

**Fite v. Digital Equipment Corporation, 66 F.Supp. 2d 232 (D.Mass. 1999)**

Employer moved for an award of attorney's fees after obtaining a jury verdict and judgment in its favor in an ADA claim. The District Court denied the motion, ruling that a jury's finding that the defendant's version of the events was more credible than the plaintiff's was, without more, insufficient to justify an award of attorney fees in favor of the defendant in a civil rights case.