

CHAPTER 2

TITLE VII EQUITABLE DAMAGES

More than a decade after enactment of the Civil Rights Act of 1991, the equitable relief provisions of Title VII continue to play a substantial role in providing remedies to victims of unlawful acts of employment discrimination. This is because equitable remedies are excluded from the statutory caps contained in the 1991 Act. This chapter will discuss those traditional remedies and, to some extent, their relationship to damages permitted under the 1991 amendments. Although Title VII did not provide an exhaustive list of remedies available to remedy the effects of employment discrimination, it did specifically list some forms of relief. These included injunctive and declarative relief, reinstatement, and hiring employees, with or without back pay. It also includes prophylactic actions to prevent future civil rights violations, including training and education of the employer's managers and employees.

I. TRAINING

Training for managers found responsible for creating or tolerating discrimination in the workplace has long been an element of relief considered by the EEOC to remedy the effects of discrimination. However, the extent to which the Commission takes this method of relieving the environmental factors that contribute to discrimination can be seen in *Leos v. Potter*, 07A40017 (September 27, 2004). In *Leos*, the agency failed to meet its obligation to provide an interpreter to a profoundly deaf employee. The administrative judge took the unusual step of making a site visit to the agency's facility before ordering extensive EEO training. The agency argued on appeal that this training was cost prohibitive. Rejecting the agency's argument, the Commission reasoned:

The AJ ordered the agency to conduct five hours of EEO training, over a four-month period, focusing on the Rehabilitation Act, including an employer's obligation to make reasonable accommodations, and stressing that singling out of a disabled employee, via teasing and ridicule, to include shooting rubber bands at them, is prohibited. The AJ intended the training to be corrective, curative and preventive, and ordered that all employees at complainant's facility, as well as truck and vehicle drivers using the North Dock, be included in the training. We have carefully considered the agency's arguments regarding the cost of such training (\$189,000.00), and its argument that the training should only be limited to those responsible for the discrimination and mistreatment of complainant. However, we are persuaded that training for all employees is indicated in this case. Specifically, we find that the AJ visited complainant's facility, and based on her on-site observations, as well as record evidence, including hearing testimony, the AJ concluded that an atmosphere condoning ridicule of deaf employees existed facility-wide. Accordingly, in order to change this work environment, we find that training regarding the rights of the disabled for the entire facility is appropriate, and should include sensitivity training. We additionally find that the agency may use its discretion in determining how it will provide this training, and encourage the use of more cost effective means.

The EEOC routinely includes an order requiring agencies found to have discriminated to provide appropriate EEO training to supervisors, managers, and occasionally line employees. The agency may also be ordered to consider appropriate discipline for responsible supervisors or managers. Providing appropriate EEO, diversity, or other applicable training does not replace the requirement to consider discipline and it is not unusual to see the Commission remind agencies of this fact. *See, e.g., Arizola v. Ridge*,

07A30132 (February 4, 2004), where the Commission's order regarding relief noted that:

The agency shall consider taking appropriate disciplinary action against the responsible management official(s). The Commission does not consider training to be disciplinary action.

There are countless other examples where the EEOC aggressively ordered EEO training as a remedy. For example, in *Davis v. Chertoff*, 0720060003 (June 18, 2007), the Commission affirmed an AJ's decision ordering, *inter alia*, that the agency establish and conduct compulsory EEO training programs for all managers and staff at its San Ysidro facility. But the Commission went further and explicitly required that "All supervisors will receive special training with respect to the definition of sexual harassment and the necessity of taking prompt, adequate and effective action upon learning of the possible existence of sexual harassment." An interesting sidebar in *Davis* is that the Commission also required the agency to take other preventive steps, including requiring that the:

agency will establish and implement policies and procedures relating to sexual harassment, complaint investigative procedures involving the prompt, adequate and effective disposition of allegations of such harassment, and advisories concerning corrective measures, including discipline and dismissal, to be undertaken when sexual harassment has been found to have occurred. Such policies and procedures must comport with EEOC guidelines.

The Commission will generally defer to the AJ's determination of the nature and duration of EEO training appropriate as relief. *See, e.g., Hahn v. Potter*, 0720050032 (February 28, 2007) (affirming an AJ order for the agency to "conduct EEO training consisting of a minimum of two hours for all managers and supervisors at the facility"); *Wade v. Gonzales*, 07A60057 (May 9, 2006) (affirming an AJ order for the agency to "provide 16 hours of EEO training, with a focus on the Pregnancy Discrimination Act and the agency's anti-harassment policy, to all supervisors and managers at complainant's facility.") The *Wade* case is interesting for another reason. On a request for reconsideration the Commission rejected an argument by the Department of Justice asserting that "the Commission's prior decision involved a clearly erroneous interpretation of material fact or law" because the responsible management official had retired from the agency and the managers were not working at the institution at any relevant time to this case and "Thus, there can be no supervisors in need of training." *Wade v. Gonzales*, 05A60813 (August 23, 2006). In dismissing DOJ's reasoning as unpersuasive, the Commission explained:

In our prior decision, we stated that "the RMO's conduct toward complainant was observed by many witnesses, including supervisors, managers, and co-workers. However, no one took any measures whatsoever to address this situation, which took place frequently, over a period of many months." In addition, our prior decision properly set forth that "the Commission may properly order an agency to provide relevant EEO training to employees as a measure to prevent future occurrences of discrimination." We note that our prior decision also cited *Horkan v. United States Postal Service*, EEOC Appeal No. 01976837 (April 6, 2000). In *Horkan*, the Commission ordered the agency to provide EEO training for all employees at the facility, not just those employees involved in the unlawful harassment. Finally, the Commission notes that in *Wild*, it stated that "[training] is meant to educate employees concerning the requirements of the law in order to avoid future violations. In appropriate cases the Commission will order training of all employees at a facility, even those having no demonstrated involvement with the prior discriminatory acts." Based on these circumstances, the Commission finds that its prior decision with respect to the issue of training was proper.

II. PURGING EMPLOYER'S RECORDS OF NEGATIVE INFORMATION

Among the equitable relief available under Title VII, a victim of discrimination is, of course, also entitled to have the employer's records purged of negative information that is the result of the discriminatory conduct. An interesting discussion of the extent and limits of cleaning the victim's record can be found in *Herawi v. State of Ala. Dept. of Forensic Sciences*, 330 F. Supp.2d 1305, 1309 (M.D. Ala. 2004). In *Herawi*, an Iranian employee who was unlawfully discharged sought to remove from the employer's file certain employment records reflecting poor performance and the decision to terminate because of work related reasons (rather than discriminatory reasons). The court agreed that the purposes of Title VII would not be properly served unless the documents were expunged, but concluded that the documents could be kept by the employer under seal. The court stated:

When an employee has been discriminated against and when the employee's personnel file contains documents that reflect that discrimination, courts have ordered that such documents be removed from the employee's file. *See, e.g. Brusco v. United Airlines, Inc.*, 239 F.3d 848, 863-64 (7th Cir. 2001); *EEOC v. HBE Corp.*, 135 F.3d 543, 557-58 (8th Cir. 1998). Indeed, it may be that, in such a case, 'expungement' is required. "By refusing to expunge discriminatory or retaliatory discipline from a successful plaintiff's personnel file, a court may force the plaintiff to bear the brunt of h[er] employer's unlawful conduct for the rest of h[er] working career, which certainly contravenes the goal of making a plaintiff whole through equitable remedies." *Brusco*, 239 F.3d at 863-64.

The court's discretion to expunge the personnel file of a successful plaintiff is not limitless, however. First, the plaintiff must specify the documents to be expunged. *Jones v. Rivers*, 732 F. Supp. 176, 178 (D.D.C. 1990). Second, and more crucially, in order to be subject to expungement, the documents or records must be related to the illegal discrimination. *Sands v. Runyon*, 28 F.3d 1323, 1331 (2d Cir. 1994).

The court agrees with *Herawi* that the documents in her department personnel file reflect either the illegal discrimination and retaliation found by the jury or the pretextual reasons offered by the department for its termination decision. It would be inconsistent with Title VII's remedial scheme to allow these documents to affect negatively *Herawi's* future employment prospects.

Herawi's file contains, for example, the negative "employee probationary performance appraisal" of *Herawi* conducted by *Ward* along with four memoranda written by *Ward* documenting incidents that *Ward* characterized as reflecting *Herawi's* poor performance and inability to work within the department's rules. The preponderance of the evidence at trial showed that *Ward's* assessment of *Herawi* was infected by her anti-Iranian prejudice. To leave these documents in *Herawi's* file, such that, in the future, a prospective employer could easily access them, would risk extending the impact of *Ward's* prejudice.

Herawi's file also contains a number of documents which explicitly state that *Herawi's* termination was for work-related reasons. *Downs's* letter to *Herawi* informing her of her termination, for example, states: "The reason for your [termination]...is that you continue to require additional training in autopsy procedures and failure to properly use the chain of command." The jury explicitly found that *Herawi's* termination was motivated by illegal discrimination and that, but for that discrimination, she would not have been terminated. To allow these documents to remain readily available in *Herawi's* personnel file would perpetuate the falsehood that she was fired for a reason other than discrimination and saddle her with the professional stigma of having been terminated for cause.

Notwithstanding, the court does not agree with *Herawi* that the department's proposal with respect to the 12 documents, to the extent that the files will be

removed from her personnel and retained separately under seal, is inadequate. Under the department's proposal, it seems unlikely that the documents will ever see the light of day at all, much less be used in a way that would perpetuate the illegal discrimination found in this case.

In addition to expunging negative employment records that were a result of discrimination, courts are also willing to seal trial records containing unfounded and damaging statements about victims of discrimination. In *Villescas v. Abraham*, 285 F. Supp.2d 1248 (D. Colo. 2003), the court's equitable relief award included sealing the portions of the record in two cases in which the plaintiff testified. The court previously found, as a matter of law, that the evidence established retaliatory adverse action by the defendant, and awarded plaintiff compensatory damages, attorney fees, and costs. On appeal, the Tenth Circuit reversed the district judge's damages and attorney fees award, without overturning the findings of fact and conclusions of law. The district court again heard the case after plaintiff moved for equitable relief and attorney fees.

The court recalled its disdain of defendant's trial tactics when it initially heard the case, *id.* at 1252:

[T]hroughout this case, the government has called Mr. Villescas an adulterer, an incestuous person, throughout this case, in the pleadings in this case. Now we get to trial—you know, 'We never said he was an adulterer'.... It's outrageous.... You have littered the paper in this case, which is now public record, calling Mr. Villescas an adulterer, a nepotist. I'm sorry, it's just outrageous. And then to all of a sudden pull this. You know, it's almost like Harry Potter's invisible cloak. Pull it over yourselves and say, 'Oh no, we didn't do anything like that.' It's just outrageous.... [I]t's so slick. It's so slick it's greasy.

Because of this harm to plaintiff, the court determined that equitable relief was appropriate, stating, "it is axiomatic that a matter of equity will not suffer a wrong without a remedy." The district judge cited his own "broad authority to construct appropriate equitable relief and... duty to render a decree that will eliminate the discriminatory effects of past actions and prevent future discrimination." *Villescas*, 285 F. Supp.2d at 1255.

The court noted that a defendant found to be in violation of a civil rights statute "has a heavy burden to avoid equitable relief," and went on to explain:

It can only avoid such relief by providing "clear and convincing proof that there is no reasonable probability of further noncompliance with the law." *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 926 (11th Cir. 1990).

Id. Finding that defendant failed to meet its heavy burden, and noting that the public availability of the statements made against plaintiff constitutes continuing retaliation, the court ordered the portions of the records in both cases that contained disparaging statements about plaintiff sealed.

Similarly, it may be appropriate to enjoin an employer from maintaining or disseminating information that reflects poorly on an employee or former employee where such information would not otherwise exist but for the discrimination. *See, e.g., Sands v. Runyon*, 28 F.3d 1323, 1331 (2nd Cir. 1994); *Herawi v. State of Ala. Dept. of Forensic Sciences*, 330 F. Supp.2d 1305, 1309 (M.D. Ala. 2004).

III. REQUIRING EMPLOYER TO APOLOGIZE

How many times have practitioners in the federal employment arena heard employees insist that the relief they desired most was an apology from the agency? While practitioners often scoff at the idea of providing such relief, there is ample precedent for requiring a federal agency to apologize to the victim of discrimination. For example, in *Villescas v. Abraham*, 285 F. Supp.2d 1248, 1256-57 (D. Colo. 2003), the district court