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COMMENTS

YOU HURT MY FEELINGS, NOW PAY UP:

SHOULD OBJECTIVE EVIDENCE BE REQUIRED TO SUPPORT CLAIMS FOR EMOTIONAL DISTRESS DAMAGES IN EMPLOYMENT DISCRIMINATION CASES?

Imagine that you are a mid-level manager for a large, international corporation. You have been with The Company for over ten years and have consistently received satisfactory to superior performance evaluations. According to The Company's policies and procedures, you should be eligible to receive any one of several promotions. However, before you are promoted, a new upper-level management team is put in place. The members of this team make derogatory comments about your race, which is different from theirs, and exclude you from management meetings, which you have previously attended. Additionally, they assign some of your existing clients to other managers because they supposedly fear that you favor clients that are of your race. Your remaining clients are given company publications omitting your name and are told that all managers have been replaced, even though you still manage their accounts. Despite being the most productive manager at The Company, you do not receive bonuses or promotions that other, less-qualified managers receive. You are finally fired, in public, for handing out business cards while on vacation with former coworkers who now work for The Company's competitors. The Company sends letters to your foreign clients, telling them you were fired. While most terminated employees are given a severance package and time to take home their personal belongings before leaving, you are not. Instead, your company car is immediately confiscated, your salary is suspended, and The Company re-

tains your personal items. You subsequently sue The Company for race discrimination.

At trial, you present sufficient evidence to prove The Company and upper-management discriminated against you based on your race. You present evidence of your lost wages, which the jury awards to you. You also claim that you suffered emotional distress as a result of The Company's treatment of you. You testify that you were troubled by your termination and that you could not believe you were fired. You also testify that your reputation and dignity have been damaged by the way you were treated. You offer no other evidence to support your claim for emotional distress. Is this testimony alone sufficient to support a jury award for emotional distress damages, or will you need to present some objective evidence of your emotional injuries? The answer, at least according to some courts, may depend on the court hearing your case.

The preceding hypothetical is based on the recent case, *Zhang v. American Gem Seafoods, Inc.*¹ There, the terminated employee, Zhang, also testified² that people in his hometown in China thought "there must be something wrong, because [Zhang] is doing something wrong in the States."³ He further stated that his business future in China was ruined because "your reputation and your credibility is the key."⁴ In determining that this testimony alone was sufficient to support an award of over \$100,000 for emotional damages, the United States Court of Appeals for the Ninth Circuit noted that "[w]hile objective evidence requirements may exist in other circuits, such a requirement is not imposed by the case law in . . . the Ninth Circuit, or the Supreme Court."⁵ Thus the court concluded that in some circuits, including the Ninth Circuit, a plaintiff's testimony, by itself, is sufficient to support an award for emotional distress damages in employment discrimination cases. The court felt that in other circuits, however, a plaintiff may also be required to present some form of objective evidence of his emotional injuries in order to prevail on a claim for emotional distress.⁶

While the court in *Zhang* stated that the Supreme Court does not require objective evidence in such cases, the Supreme Court

¹ 339 F.3d 1020 (9th Cir. 2003).

² In addition to the testimony presented in the preceding hypothetical.

³ *Zhang*, 339 F.3d at 1040.

⁴ *Id.*

⁵ *Id.* (quoting *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 513 (9th Cir. 2000)).

⁶ See, e.g., *Patrolmen's Benevolent Ass'n v. City of New York*, 310 F.3d 43, 55 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 2076 (2003); see also discussion *infra* Part II.A.

has not actually directly addressed this issue.⁷ Thus, the circuit and district courts have been left to fashion their own rules regarding the standard of proof necessary to sustain damages for emotional distress. The results have been inconsistent, with no clear guidelines for determining how much, if any, objective evidence is needed in any particular situation.

This Comment argues that objective evidence is not, and should not be, necessary to support an award of damages for emotional distress that results from employment discrimination. Part I discusses the United States Supreme Court decision in *Carey v. Piphus*,⁸ to which most courts look in trying to determine the sufficiency of emotional distress evidence. Part II explores the different approaches taken by the circuit courts and by the Equal Employment Opportunity Commission ("EEOC") regarding objective evidence and concludes that, contrary to the Ninth Circuit's assertion in *Zhang*, few circuits actually require objective evidence to prove emotional distress claims. Part III examines how emotional distress evidence is handled in tort cases outside the employment context and, again, determines that objective evidence is not a requirement in such cases.⁹ Finally, this Comment concludes that objective evidence should not be necessary to support an award for emotional distress damages in employment discrimination cases.

I. CAREY V. PIPHUS

The case to which most courts look in determining the sufficiency of the evidence regarding emotional distress is *Carey v. Piphus*.

A. Facts of the Case

Carey involved a freshman at a Chicago high school, Jarius Piphus, who was suspended from school for allegedly smoking marijuana on school grounds during school hours. The principal claimed he saw Piphus and another student sharing an "irregularly shaped" cigarette, though the principal never saw the cigarette up close. Piphus, supported by his family, insisted that he had merely

⁷ Instead, the Court has noted in passing that injuries from emotional distress are "essentially subjective" but "may be evidenced by one's conduct and observed by others." *Carey v. Piphus*, 435 U.S. 247, 264 n.20 (1978). Unfortunately, the Court has not clarified whether purely subjective evidence, in the form of the plaintiff's testimony, would be sufficient evidence of such injury.

⁸ 435 U.S. 247 (1978).

⁹ For purposes of this Comment, such cases include those where a tort claim for emotional distress is made separately from, and in addition to, an employment discrimination claim under Title VII of the Civil Rights Act of 1964 or 42 U.S.C. § 1981.

been smoking a regular cigarette. Nevertheless, he was suspended from school for twenty days without a hearing to determine whether or not he was actually smoking marijuana. His mother subsequently filed suit against the principal, the superintendent of schools, and the school board under 42 U.S.C. § 1983 ("Section 1983"),¹⁰ alleging that Piphus had been suspended without due process in violation of the Fourteenth Amendment.¹¹

Similarly, Silas Brisco, a sixth grade student at a Chicago elementary school, was suspended from school for twenty days because he refused to remove his earring, in violation of a school policy prohibiting males from wearing earrings. Brisco was suspended after his mother supported his refusal to remove the earring. Like Piphus, Brisco's mother subsequently filed suit against the principal, the superintendent of schools, and the school board under Section 1983. The two cases were consolidated for trial.¹²

B. The Court's Approach to Emotional Distress.

Both students claimed that damages for emotional distress caused by the due process deprivations could be presumed, and therefore did not present any evidence regarding any emotional distress they had suffered. The United States Supreme Court held that damages for emotional distress are available for a constitutional violation only if the plaintiff provides evidence that he suffered *actual injury* as a result of the violation.¹³ The Court found that distress¹⁴ is a "personal injury familiar to the law" that is generally proved by showing the nature of the harm, the circumstances under which it occurred, and the consequent effect on the plaintiff.¹⁵ Emotional distress injuries cannot be presumed to result from a violation of the plaintiff's rights, as these plaintiffs had

¹⁰ Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (2000).

¹¹ *Carey*, 435 U.S. at 249-50.

¹² *Id.* at 250-51.

¹³ *Id.* at 255 ("[D]amages are available under [§ 1983] for actions 'found . . . to have been violative of . . . Constitutional rights and to have caused compensable injury . . .'" (citations omitted)).

¹⁴ Distress includes "mental suffering or emotional anguish." *Id.* at 264 n.20.

¹⁵ *Id.* at 263-64.

claimed. Instead, there must be “proof that such injury actually was caused.”¹⁶

In making this determination, the Court noted that emotional injuries are “essentially subjective,” but that they are generally proven “by one’s conduct and observed by others.”¹⁷ Unfortunately, this statement could have two meanings. It could mean that a plaintiff must present evidence of his distress along with evidence that this distress was observed by others.¹⁸ On the other hand, it may be sufficient for a plaintiff to testify as to how his distress manifested itself as long as he testifies that the distress was so severe as to be observable by others. The only guidance the Court gave was to note that the jury must be “guided by appropriate instructions” and that “competent evidence” must be presented to support the claim.¹⁹

By stating that the claim must be supported by “competent evidence,” without more, the Court implied that any evidence, whether subjective or objective, is sufficient to prove emotional injury, as long as such evidence convinces the trier of fact by a preponderance of the evidence that the injury actually occurred. This view is supported by the Court’s recognition that emotional injuries are “essentially subjective” and that they *may* be proved by “one’s conduct and observed by others.”²⁰ If, after noting that emotional injuries are subjective in nature, the Court wanted to impose a different standard of proof on the plaintiff, such as requiring objective evidence in addition to the plaintiff’s own testimony, it easily could have done so.²¹ Instead, the Court used language indicating that objective evidence is one method for proving emotional injuries, but it is not the only method available. Thus, where a plaintiff’s testimony is sufficiently detailed to convince a jury by a preponderance of the evidence that an emotional injury occurred as a result of the wrongful conduct, that testimony should be sufficient to justify an award of damages for that emotional distress.

¹⁶ *Id.*

¹⁷ *Id.* at 264 n.20.

¹⁸ Such evidence could take the form of corroborating testimony of family, friends, or co-workers.

¹⁹ *Carey*, 435 U.S. at 264 n.20 (“[A]n award of damages must be supported by competent evidence concerning the injury.”).

²⁰ *Id.*

²¹ For example, the Court could have specified that emotional injuries *must* be proven by evidence of the observations of others.

II. CAREY HAS CREATED CONFUSION AMONG THE LOWER COURTS.

The Supreme Court's holding in *Carey*, while concerning claims under Section 1983, has been applied to claims of emotional distress resulting from alleged employment discrimination under both Title VII²² and 42 U.S.C. § 1981 ("Section 1981").²³ Unfortunately, the Court's failure to clarify whether objective evidence is a necessity or merely an option for proving emotional damages has created great confusion among the lower courts. This confusion has caused courts to interpret earlier decisions as requiring objective evidence when those decisions are really based on the sufficiency of the evidence presented, whether subjective or objective. For example, the *Zhang* court noted, after referring to *Price v. City of Charlotte*,²⁴ that "objective evidence requirements may exist in other circuits," but not in the Ninth Circuit.²⁵ The clear implication in the court's statement is that the Fourth Circuit's decision in *Price* requires objective evidence to support claims of emotional distress. However, that simply is not the case. Instead, the *Price* court recognized that plaintiff testimony alone may not be sufficient to support an award of emotional damages.²⁶ The court did not state that plaintiff testimony is *never* sufficient to support an emotional damage award in the absence of objective evidence. The Ninth Circuit is not alone. As demonstrated below, other courts and commentators have similarly declared that courts require objective evidence when in fact those courts have no such requirement.

A. A Few Courts Purportedly Require Objective Evidence.

The following cases are a few of those in which objective evidence is purportedly required. In each case, however, an argument can be made that the courts do not actually require objective evidence to support an award of emotional distress damages. Instead, the courts are generally noncommittal, basing their decisions on the facts of each case.

²² 42 U.S.C. §§ 2000e to 2000e-17 (2000). Title VII prohibits discrimination in employment based on race, sex, religion, color, or national origin. See 42 U.S.C. § 2000e-2.

²³ See, e.g., *Patterson v. PHP Healthcare Corp.*, 90 F.3d 927, 940 (5th Cir. 1996) ("[W]e read *Carey* to require a plaintiff to present the same level of competent evidence under a Title VII emotional distress claim as is required to sustain a finding for emotional distress under §§ 1981 and 1983."). Section 1981 prohibits racial discrimination in the making and enforcement of contracts, including employment contracts. See 42 U.S.C. §§ 1981, 1981a.

²⁴ 93 F.3d 1241 (4th Cir. 1996).

²⁵ *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1040 (9th Cir. 2003).

²⁶ See *Price*, 93 F.3d at 1251.

1. *The Second Circuit Comes Closest to Requiring Objective Evidence.*

The United States Court of Appeals for the Second Circuit, in *Patrolmen's Benevolent Ass'n v. City of New York*,²⁷ comes the closest to actually requiring objective evidence. In upholding a jury award of \$50,000 to each plaintiff for emotional damages resulting from alleged race discrimination, the court stated that a "plaintiff's subjective testimony, standing alone, is generally insufficient to sustain an award of emotional distress damages."²⁸ The court noted that the lower court's jury instruction stated that a plaintiff, in order to be eligible for emotional distress damages, must either present evidence of "physical manifestations of emotional suffering" or corroborating testimony of the emotional suffering.²⁹ However, medical expert testimony is not required, even though it is likely to be helpful.³⁰ Thus, while the court seems to prefer corroborating testimony, its use of the word "generally" implies that it may not always require such testimony if the plaintiff's testimony is sufficiently detailed, especially if the emotional distress has caused the plaintiff to suffer physically as well.

2. *At First Glance, the Third Circuit May Appear to Require Objective Evidence, but It Does Not.*

*Spence v. Board of Education*³¹ is another case where, at first reading, it appears that the court requires objective evidence in order for an award of emotional distress damages to be upheld. The United States Court of Appeals for the Third Circuit affirmed remittitur of emotional distress damages of \$22,060 where plaintiff's evidence consisted mainly of her own testimony regarding her depression and humiliation resulting from a job transfer. Plaintiff also testified that "she had lost her motive to be creative."³² The court noted that there was no evidence that the plaintiff's peers held her in any less esteem, nor was there evidence that she suffered physically as a result of her distress.³³ The court also

²⁷ 310 F.3d 43 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 2076 (2003).

²⁸ *Id.* at 55 (citing several other Second Circuit cases).

²⁹ *Id.* at 49 n.4, 50. The lower court specified that a plaintiff's testimony regarding physical manifestations of emotional suffering would *not* have to be corroborated in order to support emotional distress damages. *Id.* at 49 n.4. The lower court also specified that these requirements only applied to constitutional claims arising under Section 1981 and Section 1983, not to claims arising under Title VII. *Id.*

³⁰ *See id.*

³¹ 806 F.2d 1198 (3d Cir. 1986).

³² *Id.* at 1201.

³³ *Id.*

noted the plaintiff's failure to present any evidence that she sought psychiatric counseling.³⁴

Since the plaintiff remained employed and did not suffer a reduction in pay, the court determined that "neither the circumstances nor the testimony established that there was a reasonable probability, rather than a mere possibility, that damages due to emotional distress were in fact incurred as a result of the transfer."³⁵ The court concluded that, "*on the facts of this case*, the district court did not err in finding that the evidence was too speculative to support a \$22,060 award of emotional distress damages."³⁶ In reaching this conclusion, the court expressly refused to decide whether a plaintiff's testimony alone would ever be sufficient to support an award for emotional distress.³⁷ Thus, the Third Circuit does not necessarily *require* objective evidence to support an award for emotional damages, but instead considers the merits of the particular evidence presented in each case. By refusing to decide the issue, the court specifically left open the possibility that a plaintiff's testimony, in some situations, will be sufficient to support emotional distress damages.

3. *Three Other Courts Are Cited as Requiring Objective Evidence When They Really Do Not.*

Courts in at least three other cases have been referred to as requiring objective evidence when in fact they do not.³⁸ In *Patterson v. PHP Healthcare Corp.*,³⁹ the United States Court of Appeals for the Fifth Circuit vacated two emotional distress awards that had been based solely on the two plaintiffs' testimony. The court noted that the testimony did not meet "the specificity required by *Carey*."⁴⁰ The court further stated that the required specificity "*may* include corroborating testimony or medical or psychological evidence in support of the damage award."⁴¹ The court's use of the word "may" indicates that such corroboration or medical evidence is not a mandatory requirement for proving emotional dis-

³⁴ *Id.*

³⁵ *Id.* (internal quotation omitted).

³⁶ *Id.* (emphasis added).

³⁷ *Id.* ("We need not decide whether a verdict for emotional distress may ever be supported solely by a plaintiff's own testimony.").

³⁸ At least one pair of commentators has represented that these three cases stand for the proposition that a plaintiff's testimony, standing alone, is not sufficient to support more than a nominal award for emotional distress damages. See JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, JR., *THE LAW OF EMPLOYMENT DISCRIMINATION* 577 (5th ed. 2001).

³⁹ 90 F.3d 927 (5th Cir. 1996).

⁴⁰ *Id.* at 939.

⁴¹ *Id.* at 940 (emphasis added).

tress, but may instead be necessary only when the plaintiff's testimony is not detailed in terms of the nature and extent of the distress.⁴² The court solidified its view on this subject in a later case in which it held a plaintiff's testimony, alone, to be sufficient to support an award of damages.⁴³

Similarly, the United States Court of Appeals for the Tenth Circuit has been viewed as requiring objective evidence when it really does not. In *Fitzgerald v. Mountain States Telephone & Telegraph Co.*,⁴⁴ the court vacated an award of emotional distress damages as "clearly excessive" and remanded the case to the district court for a new trial on the damages issue.⁴⁵ The two plaintiffs had been awarded \$250,000 each in emotional distress damages, where "[n]o treating physicians or psychologists testified and both Plaintiffs continue[d] to work in their chosen field."⁴⁶ Instead, one plaintiff testified that she was "devastated," stripped of her dignity, and suffered more frequent occurrences of stress-related herpes simplex as a result of the alleged discrimination.⁴⁷ The other plaintiff testified that he "felt angry and insulted, experienced headaches and missed more than three weeks of work" because of the same discrimination.⁴⁸

While it would appear that the court's decision to vacate the award was based on the absence of corroborating testimony on behalf of either plaintiff, a closer reading shows otherwise. The court was actually concerned that the situation surrounding the alleged racial incident⁴⁹ was itself an "incendiary climate" that "originated from a variety of sources," not just the accused.⁵⁰ Because of the "hot button" issues involved in that situation, the court felt that the damage awards had been "tainted by passion and

⁴² The court also stated that since one of the plaintiffs had "failed to present sufficient competent testimony *and/or* other evidence to demonstrate the nature and extent of emotional harm," her testimony alone failed to satisfy the *Carey* specificity requirement. *Id.* at 941 (emphasis added).

⁴³ *See Vadie v. Miss. State Univ.*, 218 F.3d 365, 376-77 (5th Cir. 2000) (stating that a failure to provide medical evidence or corroborating testimony by witnesses is "not necessarily fatal if the evidence is otherwise sufficient"); *see also Brady v. Fort Bend County*, 145 F.3d 691, 720 (5th Cir. 1998) ("Under *Patterson* it does not matter what type of evidence is used to satisfy *Carey*'s specificity requirement, so long as that standard is successfully met."); *infra* Part II.B.

⁴⁴ 68 F.3d 1257 (10th Cir. 1995).

⁴⁵ *Id.* at 1266.

⁴⁶ *Id.* at 1265.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ The two plaintiffs were participating in a diversity training session at the time of the incident. *See id.* at 1260.

⁵⁰ *Id.* at 1266.

prejudice.”⁵¹ Without this passion and prejudice, it is not at all clear that the court would have required objective evidence to support emotional distress damages.

Finally, in *Vance v. Southern Bell Telephone & Telegraph Co.*,⁵² the United States Court of Appeals for the Eleventh Circuit’s decision to affirm the district court’s ruling, that \$500,000 in emotional distress damages was excessive, was not based on the lack of evidence of emotional harm.⁵³ Instead, the court was concerned with causation, determining that the district judge had correctly taken into account the “other unpleasant factors in [plaintiff’s] life which almost certainly contributed to her mental distress.”⁵⁴ The court also noted that the plaintiff was not so emotionally harmed that she could not work or lead a normal life.⁵⁵ Based on *these factors*, the court agreed that the damages awarded were grossly excessive. The court did not state, or even infer, that plaintiff’s testimony was insufficient to support any award for emotional damages. Consequently, it is not at all clear that the Eleventh Circuit requires objective evidence in order to sustain an award for emotional damages.

B. Some Courts Clearly Do Not Require Objective Evidence.

Unlike the cases discussed *supra*, there are several cases in which courts clearly do not require objective evidence. For example, in *Smith v. Northwest Financial Acceptance, Inc.*,⁵⁶ the United States Court of Appeals for the Tenth Circuit stated that the plaintiff’s testimony, though not “exceedingly graphic or detailed,” constituted substantial evidence when considered in light of the totality of the circumstances of her case.⁵⁷ The plaintiff testified about the nature and extent of the emotional harm she suffered as a result of the sexual harassment she suffered at work.⁵⁸ The court disagreed with the employer’s argument that plaintiff was required

⁵¹ *Id.* The court noted that “the record may support a compensatory damage award.” *Id.*

⁵² 863 F.2d 1503 (11th Cir. 1989).

⁵³ The only evidence presented at trial was the plaintiff’s own testimony that she suffered emotional distress due to an allegedly racially hostile work environment.

⁵⁴ *Vance*, 863 F.2d at 1516.

⁵⁵ *Id.*

⁵⁶ 129 F.3d 1408 (10th Cir. 1997).

⁵⁷ *Id.* at 1416. The court did note that plaintiff’s coworkers testified that she was “hurt, visibly shaken, and on the verge of tears,” though it only mentioned this in passing while noting that other Tenth Circuit cases have not required any corroborating testimony. *Id.* (citing *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1265-66 (10th Cir. 1995); *Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989)).

⁵⁸ The nature of the harm included “nausea, migraines, humiliation, degradation, loss of self-respect, sleeplessness, consumption of sleeping pills, frequent crying, loss of loan officer career, and stress in Plaintiff’s relationship with her daughter.” *Smith*, 129 F.3d at 1416.

to present medial testimony regarding her suffering, stating that presenting such testimony is not the sole method of proving emotional distress. Instead, the cumulative evidence, along with the context of the offensive behavior that caused the harm, must be considered.⁵⁹ Considering plaintiff's testimony and the "intimate office setting" in which the harassment occurred, the court held that the district court did not abuse its discretion in denying the employer's motion for remittitur.⁶⁰ Clearly then, objective evidence is not required for emotional damages to be awarded in the Tenth Circuit.

As noted previously, the Fifth Circuit has made it clear that objective evidence is not a requirement for obtaining a damage award for emotional distress. In *Brady v. Fort Bend County*,⁶¹ the court stated that a plaintiff's testimony alone may be sufficient to support an emotional damage award when that 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."⁶² The court determined that the plaintiffs' one-word answers to leading questions regarding their injuries were "vague, conclusory, and uncorroborated," and that under *Carey*,⁶³ *Patterson*,⁶⁴ and *Price*,⁶⁵ the testimony was insufficient to support an award for emotional distress.⁶⁶ The court was careful to point out that it was not holding that a plaintiff could never prove emotional distress through his own testimony.⁶⁷ Thus, objective evidence is not a required element of a plaintiff's emotional distress claim in the Fifth Circuit.

C. The EEOC Does Not Require Objective Evidence.

In 1992, the EEOC provided its position, in the form of an Enforcement Guidance Decision, on the availability of compensatory damages for emotional distress arising out of employment discrimination.⁶⁸ Before setting forth the legal parameters for computing emotional distress damages, the EEOC noted that compensatory damages, including those for emotional distress, may be

⁵⁹ *Id.* at 1417.

⁶⁰ *Id.*

⁶¹ 145 F.3d 691 (5th Cir. 1998).

⁶² *Id.* at 720.

⁶³ *Carey v. Phipps*, 435 U.S. 247 (1978).

⁶⁴ *Patterson v. PHP Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996).

⁶⁵ *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir. 1996).

⁶⁶ *See Brady*, 145 F.3d at 720.

⁶⁷ *Id.*

⁶⁸ Enforcement Guidance: Compensatory and Punitive Damages Available Under §102 of the Civil Rights Act of 1991, E.E.O.C. Decision No. 915.002 (July 14, 1992), 1992 WL 189089.

awarded for “any proximate consequences which can be established with requisite certainty.”⁶⁹ The EEOC also confirmed that emotional injury is not presumed to follow from a discriminatory act. Instead, the existence, nature, and extent of the emotional injury must be proved.⁷⁰ Additionally, the EEOC recognized that emotional injuries may manifest themselves in a variety of ways, including anxiety, stress, humiliation, and excessive fatigue.⁷¹ The EEOC also gave examples of possible physical manifestations of such injuries.⁷²

While the EEOC “will typically require medical evidence of emotional harm,” it did recognize and accept that “evidence of emotional harm may be established by testimony” and that a “[p]laintiff’s own testimony may be solely sufficient to establish humiliation or mental distress.”⁷³ The EEOC recommended, however, that the plaintiff would be wise, in conciliation negotiations, to present corroborating testimony from coworkers, supervisors, friends, or family, as the plaintiff’s testimony alone in those situations may not be sufficient for emotional distress damages.⁷⁴ Therefore, although objective evidence is recommended during the conciliation process, the EEOC specifically does not require objective evidence in all situations, and recognizes that courts do not require such evidence either.

III. EMOTIONAL DISTRESS CLAIMS OUTSIDE THE EMPLOYMENT CONTEXT

Not only is objective evidence not generally required by courts in determining whether emotional distress damages are warranted in employment discrimination cases under Title VII and Section 1981, but courts do not generally require such evidence of emotional distress in cases outside the employment context, either. For example, in *Daskalea v. District of Columbia*,⁷⁵ the United States Court of Appeals for the District of Columbia Circuit relied on *Price*⁷⁶ in upholding an award of \$350,000 for emotional distress that resulted when the plaintiff was sexually assaulted while in jail. The court noted that neither lasting physical harm, nor expert testimony, was required, since there was un rebutted evidence

⁶⁹ *Id.* at *4.

⁷⁰ *Id.* at *5.

⁷¹ *Id.*

⁷² *See id.* (including ulcers, gastrointestinal disorders, hair loss, and headaches).

⁷³ *Id.* at *6 (citing *Gunby v. Penn. Elec. Co.*, 840 F.2d 1108, 1121-22 (3d Cir. 1988); *Williams v. TransWorld Airlines, Inc.*, 660 F.2d 1267, 1273 (8th Cir. 1981)).

⁷⁴ *Id.* at *7.

⁷⁵ 227 F.3d 433 (D.C. Cir. 2000).

⁷⁶ *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir. 1996).

concerning the nature of the assault and the extent of the emotional harm that the plaintiff suffered. The court further found that the plaintiff's emotional injuries were not surprising or unexpected given the nature of the assault, and that "it does not take an expert to confirm the jury's common sense with respect to both their existence and cause."⁷⁷ Hence, objective evidence was not required for the jury to conclude that the plaintiff had suffered emotional harm and that such harm was compensable.

Of course, many claims for intentional infliction of emotional distress⁷⁸ arise under state law. Even so, objective evidence of the nature and extent of the emotional harm generally is not required. In Ohio, for instance, a plaintiff must prove he suffered "serious emotional distress" that was "both severe and debilitating."⁷⁹ Thus, where a plaintiff merely alleges emotional distress, without alleging or offering evidence that the distress was severe, emotional distress damages will be denied.⁸⁰ However, there is no indication that courts applying Ohio law would require objective evidence under this standard. Instead, the trier of fact must decide whether the distress was such that "a reasonable person, normally constituted, would be unable to cope adequately" under the circumstances.⁸¹ It is left for the trier of fact to use its common sense to decide whether the evidence, either subjective or objective, adequately supports the claim for emotional distress.

Similarly, Mississippi does not require physical or bodily injury to support a claim for emotional distress. Instead, the distress must be "so severe that no reasonable man could be expected to endure it."⁸² However, mere conclusory statements will not suffice. For example, the Fifth Circuit reversed a jury award of emotional damages that was based on the plaintiff's testimony that she was "jittery, upset, unnerved, depressed, crying, emotional, mortified, terribly upset, bothered tremendously, and very badly hurt."⁸³ This testimony, without more, was insufficient to sustain the emo-

⁷⁷ *Daskalea*, 227 F.3d at 444.

⁷⁸ This Comment does not address claims for negligent infliction of emotional distress because physical injury, or the fear thereof, is generally required. *See, e.g., Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 206-07 (2d Cir. 1984) (holding that evidence of fear of physical injury was inadequate where it was unclear that airline passenger was aware of the impending crash until just moments before it occurred). The issues attendant with proving physical injuries, or the fear of such injuries, are outside the scope of this Comment.

⁷⁹ *See Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1139 (6th Cir. 1995) (citing several Ohio Supreme Court cases).

⁸⁰ *Id.*

⁸¹ *Id.* (citing *Gagne v. N.W. Nat'l Ins. Co.*, 881 F.2d 309, 317 (6th Cir. 1989)).

⁸² *See, e.g., Burroughs v. FFP Operating Partners, L.P.*, 28 F.3d 543, 549 (5th Cir. 1994) (internal quotation omitted).

⁸³ *Id.*

tional damages.⁸⁴ In making its determination, the court did recognize that a plaintiff's testimony, alone, may be sufficient to support an award of damages under Mississippi law. However, the testimony here did not meet the relatively high standard required.⁸⁵

The law in Texas is less restrictive than that in Mississippi. To succeed on a claim for emotional distress in Texas, a plaintiff need only testify that she suffered such ailments as insomnia, nervousness, and paranoia as a result of the offending conduct. Such was the testimony offered in *Dean v. Ford Motor Credit Co.*,⁸⁶ in which the United States Court of Appeals for the Fifth Circuit found sufficient evidence to support an award of emotional distress damages. It should be noted that state laws generally require plaintiffs to prove their emotional distress was severe.⁸⁷ There is no such severity requirement for emotional distress claims that arise under Title VII or Section 1981. Consequently, to the extent that courts are reluctant to award damages based solely on a plaintiff's testimony for claims of intentional infliction of emotional distress under state law, courts should be more willing to award damages for emotional distress based on such testimony under Title VII and Section 1981.

CONCLUSION

In its recent decision in *Zhang v. American Gem Seafoods, Inc.*,⁸⁸ the United States Court of Appeals for the Ninth Circuit stated that although objective evidence of emotional distress is not required in the Ninth Circuit, it is required in some circuit courts to support an award of damages for such distress. As this Comment has demonstrated, that statement is not entirely true. There is some confusion over the standard of proof required for emotional distress damage claims; the confusion has caused courts to interpret earlier decisions as requiring objective evidence when those decisions are really based on the sufficiency of the evidence presented, whether subjective or objective. In fact, most courts do not require objective evidence to support awards for emotional damages, as long as the plaintiff's testimony is sufficiently detailed as to the nature and extent of the emotional harm. This is the correct stance on the issue. As discussed *supra*, the Supreme Court did *not* create an objective evidence requirement when deciding *Carey*

⁸⁴ *Id.*

⁸⁵ *Id.* (citing *Lyons v. Zale Jewelry Co.*, 150 So. 2d 154, 155 (Miss. 1963)).

⁸⁶ 885 F.2d 300, 307-08 (5th Cir. 1989).

⁸⁷ *See, e.g., id.*; *see also Burroughs*, 28 F.3d at 549; *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1139 (6th Cir. 1995).

⁸⁸ 339 F.3d 1020 (9th Cir. 2003).

v. Piphus. Indeed, the language the Court used lends itself more to the opposite interpretation: Subjective evidence, in the form of the plaintiff's own testimony, may be sufficient as long as it convinces the trier of fact by a preponderance of the evidence that emotional harm was indeed sustained. Requiring objective evidence in every instance where emotional distress is claimed would put a heightened burden on the plaintiff that was not intended by the Supreme Court.

In addition, since objective evidence is not clearly required even for claims of intentional infliction of emotional distress, where the plaintiff is often required to prove his distress was severe, no reason exists why the plaintiff in a Title VII or Section 1981 case should have to bear a higher evidentiary burden. Granted, it seems unlikely that a plaintiff would have difficulty presenting corroborating testimony from friends or family of the plaintiff's emotional injuries. However, this should not be an absolute requirement. Instead, as the Supreme Court noted, the trier of fact should be reminded that mere conclusory statements will not be sufficient to support a claim for distress. The plaintiff must produce evidence regarding the nature and extent of the emotional injuries that is sufficient to prove its existence by a preponderance of the evidence. While this may include corroborating testimony or medical expert testimony, it should not be mandated if the plaintiff's testimony, alone, would satisfy the requirement.

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