

At the hearing, Plaintiff, a lifelong truck driver who holds extensive licenses, explained that he was employed by Defendant from approximately April 2014 to January 2015. He detailed a series of discriminatory incidents at the workplace, most of which he reported to his superiors. In the early months of his employment with Defendant, Plaintiff, an African American, recalled two specific incidents in which he was called “the N word” by coworkers. Plaintiff testified that these incidents, which he reported to his superiors, affected his mental health.

After these initial incidents, on May 29, 2014, Plaintiff was in a serious work-related accident. Plaintiff was sitting in his truck, which was legally parked, when another driver collided with him. Plaintiff went to help the other driver, who was gruesomely injured and died while Plaintiff was helping him.

Plaintiff himself was injured in the accident and missed about a week of work. Defendant promised to take care of Plaintiff’s medical needs privately (i.e., without Plaintiff filing a worker’s compensation claim). Defendant pressured Plaintiff to return to work quickly, and ultimately never followed through on its promise to provide for his medical needs.

After returning to work and in the remaining months of 2014, the discriminatory incidents continued. Plaintiff recalled at least three or four specific instances of being called “the N word,” including one directed at him over the company radio. Plaintiff continued to report the incidents and eventually brought them to Human Resources. Plaintiff testified that the work environment deteriorated, becoming increasingly uncomfortable and unsatisfying. In addition, Plaintiff’s truck, which he had “built up,” was taken from him and given to another non-African American employee. Plaintiff’s job assignments were reduced, and on several occasions he was called to jobs unnecessarily and given defective equipment. These incidents affected Plaintiff’s mental health and his coworker’s perception of him.

Throughout the end of 2014, Defendant denied Plaintiff medical treatment for injuries arising from the truck accident and Plaintiff testified that these denials were due to his race. In December 2014, Plaintiff made a formal request for worker's compensation. In January 2015, Plaintiff, giving up on Defendant's assurances of providing medical care, used his Veterans Affairs benefits and secured other medical treatment, which revealed two fractures in his back. Also that month, Defendant told Plaintiff that if he came back to work, he would not be given any work. Plaintiff stopped working for Defendant in January 2015.

Since January 2015, Plaintiff has been unable to work due to both his physical and mental conditions, which were worsened through the discriminatory incidents themselves along with Defendant's discriminatory failure to provide Plaintiff with medical care.

DISCUSSION

"Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e(e) *et. seq.*, prohibits discrimination on the basis of race, color, religion, sex, or national origin in federal and private employment." *Fitzgerald v. Sec'y, U.S. Dept. of Veterans Affairs*, 121 F.3d 203, 206 (5th Cir. 1997). Section 2000e-2(a)(1) makes it unlawful to "discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).

For an intentional violation of § 2000e-2, a court may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate." 42 U.S.C § 2000e-5(g)(1). When appropriate, courts award front pay, back pay, compensatory damages, punitive damages, and attorney's fees. *See* 42 U.S.C. § 1981a (providing for compensatory and punitive damages); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18

(1975) (holding that back pay should rarely be denied); *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 850 (2001) (awarding front pay); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (awarding attorney’s fees). Accordingly, this Court will analyze Plaintiff’s evidence in light of the damages requested while being mindful that “[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings.” FED. R. CIV. P. 54(c).

I. Back Pay

a. Whether Plaintiff is Entitled to an Award of Back Pay

As a threshold legal matter, the Court first concludes that Plaintiff is entitled to back pay. Once a plaintiff establishes that unlawful discrimination is the cause of his losses, he is entitled to back pay. *Albemarle*, 422 U.S. at 417–18. Back pay compensates the employee for what he would have earned absent the employers violation of Title VII. *Palasota v. Haggard Clothing Co.*, 499 F.3d 474, 482 (5th Cir. 2007), *order clarified* (Sept. 27, 2007). Back pay liability “accrues from the date of the commencement of the discriminatory course of conduct causing financial loss until the date damages are ‘settled.’” *Id.* Back-pay damages can be calculated at the average rate of pay that the employee received prior to the unlawful conduct of the employer. *Id.* at 486 (affirming award of back-pay at rate received prior to unlawful demotion). Title VII precludes the recovery of back-pay damages suffered more than two years prior to the filing of a charge of discrimination with the EEOC. 42 U.S.C. § 2000e-5(g)(1).

Various factors may affect the determination of a back pay award. *Palasota*, 499 F.3d at 486. Most important for present purposes is a plaintiff’s failure to mitigate damages—“[b]ack pay is tolled . . . for the period of time the plaintiff is employed in a comparable position,” and a plaintiff must make a reasonable and good faith effort to find such employment. *Id.* at 486–87. If the plaintiff simply chooses not to seek comparable employment, he has failed to mitigate his

damages, and his award of back pay must be reduced accordingly, but if the plaintiff's inability to find comparable employment is the result of the employer's discriminatory treatment, the plaintiff has not failed to mitigate and is eligible for back pay. *Fogg v. Gonzales*, 492 F.3d 447, 455 (D.C. Cir. 2007). Because the failure to mitigate is an affirmative defense, the burden of proof lies with the defendant to show that substantially equivalent work was available and that the employee did not exercise reasonable diligence to obtain it. *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 393 (5th Cir. 2003)

Initially, Plaintiff has established that Defendant's discrimination caused his damages. In this respect, the default judgment context makes this case unique in two ways. First, because of the default judgment, the Court must accept Plaintiff's factual allegations as true. *See Jackson v. FIE Corp.*, 302 F.3d 515, 524 (5th Cir. 2002) ("The defendant, by his default, admits the plaintiff's well-pleaded allegations of fact, is concluded on those facts by the judgment, and is barred from contesting on appeal the facts thus established." (internal quotations omitted)). Second, because of Defendant's default, there is no evidence contrary to Plaintiff's assertions at the damages hearing. Applying these two factors to the facts alleged and evidence presented, Plaintiff's injuries were caused by Defendant's discrimination. As Plaintiff explained at the hearing, he was injured in the May 2014 accident, and subsequently denied access to medical care by Defendant despite Defendant's assurances. And most importantly, Defendant's failure to provide Plaintiff with the necessary medical care was due to Plaintiff's race, which is shown by the pattern of discriminatory treatment Plaintiff suffered both before and after the accident.

Having established that his damages are caused by Defendant's discrimination, Plaintiff next must contend with his own failure to obtain employment since January 2015. Again, the default judgment context makes this case unique—Defendant has the burden of proof on the

affirmative defense of Plaintiff's failure to mitigate, but has abandoned its opportunity to carry this burden by defaulting.

Plaintiff's failure to obtain employment is caused by his physical and psychological inability to obtain employment, which in turn is caused by Defendant's discriminatory actions including the failure to provide medical treatment. The Fifth Circuit has framed the question of mitigation by asking "what amount could the employee have earned through the exercise of reasonable diligence?" *E.E.O.C. v. Exxon Shipping Co.*, 745 F.2d 967, 978 (5th Cir. 1984). This duty to mitigate requires a plaintiff to exercise only *reasonable* efforts in finding new employment. Plaintiff here was physically and mentally unable to work, such that *any* exercise of diligence would not have led to new employment or any earnings.²

Another conceptual difficulty, however, brings this case beyond the realm of a simple failure to mitigate—if Plaintiff would have been physically unable to work at all after January 2015, including for Defendant, how can he be entitled to any back pay from this period? The answer again is that Defendant *caused* Plaintiff's inability to work by discriminatorily refusing him medical care. On this point, the Court finds substantial guidance from *Gamboa v. Henderson*, 240 F.3d 1074 (5th Cir. 2000) (relying on *Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1155 (9th Cir. 1999)). In *Gamboa*, the Fifth Circuit reversed an award of back pay for a Title VII plaintiff who was unable to work after her termination due to fibromyalgia. *Id.* at *4. Back and front pay awards "str[uck] [the court] as inappropriate [where] the plaintiff claim[ed] that she is unable to work because she is disabled." *Id.* The court acknowledged an exception, however, that would allow the plaintiff to recover these damages if she carried the burden to show that the disability from which she suffered was caused by the defendant's

² Plaintiff explained that he has been a truck driver for the past 20 years. Before being a truck driver, he was in the Army, where he also drove trucks. Plaintiff's employable skill set seems limited to this work, which he has been physically and psychologically unable to perform since January 2015.

wrongful conduct. *Id.* Analyzing this exception, the Fifth Circuit reversed the district court as a legal matter for placing the burden on the defendant and as a factual matter for finding that the plaintiff's fibromyalgia was caused by her employer's wrongful conduct. *Id.* The only causation testimony presented was from a doctor, who admitted to not knowing the pathology of the disease and testified only that the disease was caused by the plaintiff's activities at her workplace.³ *Id.*

The rule recognized and applied by *Gamboa* is squarely on point—a Title VII plaintiff is seeking an award of back pay despite being unable to work, but argues that the Defendant's wrongful conduct caused the condition that renders him unable to work. The Court recognizes the factual oddity of such a situation, as there are few cases indeed where discriminatory actions by an employer render an employee physically unable to work. Yet that is precisely the case here and was precisely the allegation in *Gamboa*.

Here, Plaintiff has carried his burden to show that his inability to work is caused by Defendant's wrongful conduct in discriminating against him by failing to provide medical treatment. This failure caused Plaintiff emotional and mental harm, and caused his physical condition to deteriorate in the nearly 7 months between the May 2014 accident and his first visit to the doctor in January 2015, during which time he had two broken bones in his back.

b. Amount of Plaintiff's Back Pay Award

Having found that Plaintiff is entitled to back pay, the Court now turns to the evidence presented at the damages hearing to determine the size of that award. Plaintiff presented evidence showing that, while employed by Defendant, he earned \$4,995 every two weeks. Damages Hearing Exh. 1. Extrapolating this amount from February 2015 (Plaintiff's first

³ Even assuming the Fifth Circuit found the doctor's testimony credible and reliable, the doctor's testimony did not explain how the plaintiff's disability was the result of the employer's *wrongful* conduct as opposed to her simple activities in the workplace, and the Fifth Circuit did not address this failure.

unemployed month) to the present based on Plaintiff's monthly earnings of \$9,990 totals \$289,710, which must be reduced by two other amounts. First, Plaintiff received a net payment of \$38,034.35 in May 2016 for Temporary Income Benefits. Damages Hearing Exh. 2. Second, Plaintiff explained at the hearing that he began receiving \$1,652 per month in Social Security Disability in October 2016, which amounts to a total of \$14,868 received over nine months. Subtracting these amounts, Plaintiff is entitled to a back pay award of \$236,807.65.⁴

II. Front Pay

The Supreme Court explained that "front pay is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." *Pollard*, 532 U.S. at 843. Though Plaintiff's counsel alluded to a request for front pay at the damages hearing, Plaintiff makes no request for front pay in his complaint. Docket no. 1 at 7. As such, the Court cannot award Plaintiff front pay in this default judgment context.

III. Compensatory Damages

Title VII allows recovery of compensatory damages for actual pecuniary losses and intangible losses. Plaintiffs may recover for out-of-pocket costs including medical expenses. *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977) (affirming award of medical expenses). Intangible harms recoverable under Title VII include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3). However, damages for these losses are limited by a statutory cap determined by the size of the employer. *Id.* Because Defendant has more than 200 and fewer than 501 employees, Plaintiff may not recover in excess of \$200,000 for future pecuniary losses,

⁴ At the damages hearing, Plaintiff testified that he has defaulted on mortgage payments for certain properties that he owns. The amounts of default, however, are covered by this award of back pay—had Plaintiff been paid, he could have used these amounts towards his mortgages. Accordingly, Plaintiff is not entitled to duplicative awards of these amounts.

emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, other nonpecuniary losses, and punitive damages. 42 U.S.C. § 1981a(b)(3)(C).

a. Pecuniary Losses

At the damages hearing, Plaintiff provided evidence of payments he made to Veterans Affairs for medical treatment in the amount of \$833.02. Damages Hearing Exh. 1. At the hearing, Plaintiff only requested a total of \$783.02, which he represented to be the total amount of the payments reflected on the billing statements, though these statements reflect \$833.02. Though Plaintiff did not explain this discrepancy, there are some small amounts on the billing statements that do not appear related to his present injuries, making \$783.02 more reflective of amounts Plaintiff paid Veterans Affairs for treatment. Plaintiff also has an outstanding balance with Veterans Affairs of \$1,332.08. Thus, Plaintiff is entitled to \$2,115.10 for payments made to Veterans Affairs and his outstanding balance.

Plaintiff also testified that he has been seeing a chiropractor and has amassed an outstanding balance of \$950. He has two weekly visits scheduled at \$77 per visit for the rest of the year, totaling \$3,850 in expected payments. Accordingly, Plaintiff is entitled to \$4,800 for past and future chiropractic treatments.

Plaintiff also requires numerous medications from the accident, which cost him \$200 per month on average. He anticipates being on these medications for about another year and a half. Though he is entitled to recover for eighteen months' worth of medication for future expenses, amounting to \$3,600, the Court has no basis for awarding past amounts spent on medicine because Plaintiff has not submitted precise evidence detailing the length of time that he has been taking these medications. Accordingly, the Court awards \$3,600 for future expenses on medicine.

After his employment ended, Plaintiff visited a psychiatrist twice weekly at \$100 per visit, but stopped in June or July 2016 because he could no longer afford it. He testified that he still requires these visits, but has not been able to afford them. For past visits, though, he testified that these visits were billed as a copay through Veterans Affairs, which means that awards for past visits are covered in the award his Veterans Affairs balance and past payments. For future visits, Plaintiff provided no testimony regarding how long into the future he will require these visits, but explained that sessions last for 13 weeks total. Without a more reliable estimation of Plaintiff's future need for these sessions, the Court awards him \$2,600—two visits per week for 13 weeks at \$100 per visit.

In total, Plaintiff is entitled to \$13,115.10 for past Veterans Affairs payments and his current balance, past and future chiropractic visits, future medicine costs, and future psychiatrist visits.

b. Nonpecuniary Losses, Including Mental Anguish

For intangible harms, “an award of damages must be supported by competent evidence concerning the injury.” *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996) (citing *Carey v. Piphus*, 435 U.S. 247, 264 (1978)). Competent evidence may include the plaintiff's own testimony, the testimony of a medical professional, or evidence of treatment by a medical professional. *Id.* Such evidence must show “that an ordinarily sensitive person could have suffered the alleged harm. If the plaintiff meets this burden, then the defendant must ‘take the victim as he finds her, extraordinarily sensitive or not.’” *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 506 (1st Cir. 1996) (citing *Theriault v. Swan*, 558 A.2d 369 (Me. 1989)). A defendant is liable for all damages suffered by an extraordinarily sensitive plaintiff; however, a plaintiff may not recover for damages stemming from a prior injury. *Id.* (citing *Lovely v. Allstate Ins. Co.*,

658 A.2d 1091 (D. Me 1995)). The defendant bears the burden of showing that such damages were truly caused by the prior injury. *Id.* If the defendant is unable establish such a causal relationship, or the court cannot “apportion the damages, then the defendants are liable for the entire amount.” *Id.*

The Fifth Circuit has approved emotional damages awards of \$100,000 based on plaintiffs’ descriptions of depression, severe emotional distress, trouble sleeping, paranoia, marital and family problems, weight loss, and having consulted a psychologist. *See Thomas v. Texas Dept. of Criminal Justice*, 297 F.3d 361, 369–70 (5th Cir. 2002) (collecting cases). There, the court emphasized that the testimony of the plaintiff alone may support emotional damages, though several cases included testimony of others corroborating plaintiffs’ descriptions. *Id.* In contrast, the Fifth Circuit has remitted emotional damages awards to below \$100,000 in cases where plaintiffs’ testimony was uncorroborated, complaints commenced after discharge rather than after discrimination, and descriptions included vague statements of frustration, being “emotionally scarred,” and of having “t[aken] many doctors, many pills.” *Id.*

Because of the default, Defendant does not contest Plaintiff’s emotional damages or their causation. In his complaint, Plaintiff alleges emotional damages caused by overt racist comments and unfavorable treatment in comparison to colleagues of other races. Docket no. 1 at 4–5. During his employment, Plaintiff suffered a traumatic automobile accident, and alleges that race-based discrimination against him resulted in the denial of medical treatment and access to worker’s compensation, aggravating his physical and mental injuries. Docket no. 1 at 3. Plaintiff alleges that this exacerbation resulted in more severe mental anguish, suffering, and loss of enjoyment of life. Docket no. 1 at 3. In addition to the allegations of his complaint, Plaintiff testified to his mental harms at the damages hearing. He explained that he suffers from

nightmares, has difficulty sleeping, and regularly sees a psychiatrist. He is currently going through a divorce. He explained that after the accident he experienced heightened mistreatment in the workplace, as well as a continued denial of medical treatment, due to his race and prior reporting of mistreatment. Until June or July of 2016, Plaintiff had been visiting a psychiatrist twice weekly, but had to stop because he could not afford it.

It is difficult to parse out the exact causes of Plaintiff's emotional harms. Aside from distress resulting directly from his discriminatory treatment, Plaintiff also testified at the damages hearing about the trauma and gruesome nature of the May 2014 accident, indicating that at least some (if not most) of his mental anguish is caused by that accident rather than Defendant's discriminatory actions. Nevertheless, the burden of separating these exact causes is on Defendant, who has defaulted. Further, Plaintiff's mental distress seems severe, as evidenced by his testimony and the factual allegations of his complaint. Because Defendant must take Plaintiff as it finds him and does not dispute causation, this Court may find the Defendant liable for the entire amount of damages requested. Though Plaintiff has not put an exact number on the emotional distress he has suffered, the Court finds an award of \$25,000 appropriate.

c. Punitive Damages

Section 1981a of the Civil Rights Act of 1964 provides that an aggrieved party may recover punitive damages if he "demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to [plaintiff's] federally protected rights." 42 U.S.C. § 1981a. The Supreme Court has held that the reprehensibility of the conduct at issue is the most important factor in determining the suitability of punitive damages. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2004) The Court held that "punitive damages should only be awarded if the defendant's culpability, after

having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” *Id.* The Court directs lower courts to consider whether the harm caused by the conduct was physical, whether it endangered the health and safety of others, whether the target of the conduct was financially vulnerable, whether the conduct was repeated, and whether the conduct was the result of intentional “malice, trickery, or deceit.” *Id.* Given the damages already awarded and the failure of the Plaintiff to emphasize an award of punitive damages at the hearing, an award of punitive damages is denied.

IV. Attorney’s Fees and Costs

Congress has enacted the Civil Rights Attorney’s Fees Awards Act, “authorizing the district courts to award a reasonable attorney’s fee to prevailing parties in civil rights litigation.”

Hensley, 461 U.S. at 429 (citing 42 U.S.C. ' 1988). The Supreme Court explained that:

The amount of the fee, of course, must be determined on the facts of each case. On this issue the House Report simply refers to twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (CA5 1974). The Senate Report cites to *Johnson* as well and also refers to three district court decisions that “correctly applied” the twelve factors. One of the factors in *Johnson*, “the amount involved and the results obtained,” indicates that the level of a plaintiff’s success is relevant to the amount of fees to be awarded.

Id. at 429–430.

Plaintiff is entitled to attorney’s fees and costs. Should he desire to pursue these amounts, he should submit an application in accordance with the Local Rules.

CONCLUSION

It is ORDERED that Plaintiff Michael Brezell recover from Defendant Permian Trucking & Hot Shot d/b/a Wilbanks Energy Logistics the amount of \$274,922.75, with prejudgment interest at a rate of 5%, post-judgment interest at the rate of 1.23%, and costs and

attorney's fees, which must be sought by an application complying with the Local Rules. These amounts encompass the following awards:

- a) Back pay in the amount of \$236,807.65; and
- b) Compensatory damages in the amounts of \$13,115.10 for pecuniary losses and \$25,000 for mental anguish.

It is so ORDERED.

SIGNED this 17th day of July, 2017.

A handwritten signature in black ink, appearing to read 'Xavier Rodriguez', written over a horizontal line.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE