# NOTHING "GARDEN VARIETY" ABOUT IT: MANIFEST ERROR AND GROSS DEVALUATION IN THE ASSESSMENT OF EMOTIONAL DISTRESS DAMAGES

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*[T]he genuine emotional pain associated with [housing] discrimination should not be devalued by unreasonably low compensatory damage awards, especially when one considers the difficulty a plaintiff faces in establishing that he or she was a victim of housing discrimination.*[1]

*Broome v. Biondi,* 17 F. Supp. 2d 211, 226 (S.D.N.Y. 1997)

*The Restoration Act echoes Broome's message that the genuine pain associated with discrimination claims should not be undervalued. The City Human Rights Law's purposes are said to be not only uniquely broad, they are "uniquely broad and remedial." One of the core principles intended by the Council to guide decision makers is that "victims of*

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1. Broome v. Biondi, 17 F. Supp. 2d 211, 226 (S.D.N.Y. 1997).

*discrimination suffer serious injuries, for which they ought to receive full compensation."*[2]

Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*

## INTRODUCTION

Sixty-five years ago, in *Brown v. Board of Education*,[3] the United States Supreme Court expressly recognized that discrimination causes profound and *indelible* emotional distress: "To separate [African American children] from others of similar age and qualifications solely because of their race *generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone*."[4] Twenty years later, the Court acknowledged that an action to redress discrimination "may also be likened to an action for defamation or intentional infliction of mental distress."[5]

Acknowledging this emotional distress and awarding appropriate compensatory damages is of paramount importance in discrimination cases. Absent more tangible forms of harm, emotional distress is often the only basis for compensating plaintiffs for the pain, stigma, humiliation, and psychological turmoil caused by discriminatory acts.[6] Unfortunately, courts and tribunals examining emotional distress claims all too often devalue those claims, even referring to one category of such claims as merely "garden variety."[7] This very terminology reflects a fundamental misapprehension of the nature of emotional distress, and a trivialization of its consequences. It is therefore unsurprising that the jurisprudence

2. Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 FORD. URB. L.J. 255, 309 (2006) (citations omitted).

3. Brown v. Board of Education, 347 U.S. 483, 494 (1954).

4. *Id.* at 494 (emphasis added).

5. Curtis v. Loether, 415 U.S. 189, 195 n.10 (1974).

6. *See*, *e.g.*, Helen A. Anderson, *The Psychotherapist Privilege: Privacy and "Garden Variety" Emotional Distress*, 21 GEO. MASON L. REV. 117, 126 (2013) ("Compensatory damages for pain, suffering, and mental distress are often a major – if not the only – part of the damages sought [in civil rights cases]."); Deirdre M. Smith, *An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in the Federal Courts*, 58 DEPAUL L. REV. 79, 84 (2008) (emotional distress damages "comprise a substantial portion of civil matters in which plaintiffs seek recovery for personal injury"); Victor M. Goode and Conrad A. Johnson, *Emotional Harm in Housing Discrimination Cases: A New Look at a Lingering Problem*, 30 FORD. URB. L. J. 1143, 1157 (2003) [hereinafter, "Goode & Johnson"] ("[M]any victims must rely on their emotional harm claim as their primary basis for economic compensation.").

7. *See infra* Section I.B.

relating to "garden variety" emotional distress damages is repeatedly, and often egregiously, flawed.

The purpose of this article is not, however, to proffer subjective arguments in favor of the proper valuation of emotional distress claims. Instead, this article argues that the case law is already out there: on no fewer than seven occasions, the Second Circuit has affirmed the appropriateness of six-figure awards for "garden variety" emotional distress claims, and numerous lower court decisions have done the same. In addition, the Second Circuit has repeatedly rejected the low, inaccurate, and outdated range for such damages – $5,000 to $35,000 – that courts to this day continue to cite as authoritative. Indeed, following the Second Circuit's lead, courts have repeatedly affirmed a range of $30,000 to $125,000, a range that, as this article demonstrates, must now be adjusted upwards for accuracy and inflation.

In a concatenation of errors, however, courts are repeatedly citing flawed and outdated lower court decisions, often decades old, while ignoring Second Circuit (and contemporary district court) precedents directly on point. This phenomenon is self-replicating, moreover, with one flawed lower court decision spawning another. Similarly, courts are failing to adjust relevant awards for inflation, despite the passage of years, even decades, and despite the Second Circuit's express directive on the appropriateness of this practice.

At the New York City Human Rights Commission ("HRC" or the "Commission"), the problem is particularly pronounced. Pursuant to the Local Civil Rights Restoration Act of 2005, comparable human rights decisions are meant to serve as a floor beneath which the New York City Human Rights Law ("HRL") should never fall, and adjudicators are directed to ensure full compensation for victims of discrimination in order to further the law's uniquely broad and remedial purpose. Instead, the Commission is consistently and grossly devaluing emotional distress damages, ignoring the precedents that should serve as a guidepost and a floor, and repeating the same errors in research and calculation of damages.

It is high time to correct this glaring injustice. Focusing on the Second Circuit and the HRC, this article aims to assist courts and tribunals in properly assessing emotional distress claims based upon all of the relevant precedents. To avoid continued error, moreover, this article provides an analysis of where the courts and tribunals are getting it wrong. Part I offers a brief overview of discrimination and "garden variety" emotional distress damages. Part II sets the record straight, providing an analysis of the current and prevailing rates of compensation for such damages. Part III examines precisely how courts in the Second Circuit have gotten

it wrong, while Part IV does the same for the HRC. A brief Conclusion follows.

## I. DISCRIMINATION AND EMOTIONAL DISTRESS

### *A. Emotional Distress Damages in Discrimination Cases*

Plaintiffs in civil rights cases may seek compensatory damages for emotional distress under federal, state, and local laws.[8] Indeed, as noted, emotional distress is often the only basis for compensating plaintiffs in these cases.[9] Emotional distress can include humiliation, depression, embarrassment, frustration, anger, shock, and a host of other emotional or psychic harms, including trauma, lack of self-esteem, social isolation, loss of confidence, and diminished relationships. Emotional distress can also give rise to physical manifestations, including sleeplessness, nightmares, loss of appetite and weight loss, headaches, forgetfulness, tearfulness, stomach and chest pains, hives and skin rashes, hair loss, and even suicidal ideation and hopelessness.[10]

Because emotional distress damages are "not susceptible to mathematical formulation,"[11] courts evaluate the reasonableness of emotional distress awards based upon a review of "awards in other cases involving similar injuries, bearing in mind that any given judgment depends on a unique set of facts and circumstances."[12] In doing so, courts in the Second Circuit utilize three tiers or categories of emotional distress claims:

> garden-variety, significant and egregious. In "garden variety" emotional distress claims, the evidence of mental suffering is generally limited to the testimony of the plaintiff, who describes his or her injury in vague or conclusory terms, without relating either the severity or

8. *See*, *e.g.*, Fair Housing Act. 42 U.S.C. § 3613(c)(1); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981a(a)(1), (b)(3); Connecticut Human Rights Law, Conn. Gen. Stat. § 46a-104; New York State Human Rights Law, N.Y. EXEC. LAW § 297(9); New York City Human Rights Law, N.Y. City Admin. Code §§ 8-120(a)(8), 8-502(a).

9. *See supra* note 6 and accompanying text.

10. *See, e.g.,* Feltmeier v. Feltmeier, 207 Ill. 2d 263, 276 (Ill. Sup. Ct. 2003) ("Emotional distress includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.") (citation omitted); Megan I. Brennan, *Evidence, Social Psychology, and Health Care: Scalpel Please: Cutting to the Heart of Medical Records Disputes in Employment Law Cases*, 41 WM. MITCHELL L. REV. 992, 995 (2015); Goode and Johnson, *supra* note 6, at 1156–57.

11. Mathie v. Fries, 935 F. Supp. 1284, 1305 (E.D.N.Y. 1996), *aff'd* 121 F.3d 808 (2d Cir. 1997).

12. Scala v. Moore McCormack Lines, Inc., 985 F.2d 680, 684 (2d Cir. 1993) (citation and internal quotations omitted). *See* Goode & Johnson, *supra* note 6, at 1204–05 ("It is difficult to read an opinion in a case awarding emotional harm damages that does not rely on or cite to the range of awards previously made by other courts.").

> consequences of the injury. Such claims typically lack extraordinary circumstances and are not supported by any medical corroboration.
>
> "Significant" emotional distress claims differ from the garden-variety claims in that they are based on more substantial harm or more offensive conduct, are sometimes supported by medical testimony and evidence, evidence of treatment by a healthcare professional and/or medication, and testimony from other, corroborating witnesses. Finally, "egregious" emotional distress claims generally involve either outrageous or shocking discriminatory conduct or a significant impact on the physical health of the plaintiff.[13]

This article focuses on the initial tier, but first, a digression is warranted regarding terminology, for "language is power," and there is an urgent need to modernize the language that courts utilize when discussing emotional distress damages.

### *B. "Garden Variety" Emotional Distress Damages: A Misnomer*

Use of the term "garden variety" for the first tier of emotional distress damages is as ubiquitous as it is unfortunate, demeaning as it is inaccurate. There is nothing "garden variety" about the experience of discrimination. Discrimination is never "commonplace" or "forgettable," common synonyms for this phrase.[14] Even a cursory review of "garden variety" cases makes this apparent. In *Barham v. Wal-Mart Stores, Inc.*,[15] for instance, the plaintiff prevailed at trial in his claim that the defendant "knowingly refused to re-hire [him] for retaliatory reasons, in violation of both company policy and federal law."[16] The defendant's actions were so malicious that "[t]he jury appropriately found that a significant punitive damages award [was] warranted in this case."[17] Indeed, the plaintiff explained that "Walmart's refusal to re-hire him in his old position prevented him from visiting his child, making child support payments, and attending court dates, resulting in the loss of joint custody in 2011."[18] Because the plaintiff failed, *inter alia*, to present "medical evidence"[19] of

13. Olsen v. Cty. of Nassau, 615 F. Supp. 2d 35, 46 (E.D.N.Y. 2009) (citations and internal quotations omitted); *accord* Barham v. Wal-Mart Stores, Inc., 3:12-CV-01361, 2017 U.S. Dist. LEXIS 139565, at *6–7 (D. Conn. Aug. 30, 2017).

14. Oxford Living Dictionaries, Synonyms of garden-variety in English, https://en.oxforddictionaries.com/ thesaurus/garden-variety.

15. 3:12-CV-01361 (D. Conn. Aug. 30, 2017).

16. *Id.* at *12–13 (citation omitted).

17. *Id.* at *11–12.

18. *Id.* at *8.

19. *Id.* at *7.

his harm, however, the court categorized this as a "garden variety" emotional distress claim.[20]

Similarly, in *Stevens v. Rite Aid Corp.*,[21] owing to a discriminatory discharge, the plaintiff "was no longer able to financially provide for his family[,] which was very troubling for him because he had a difficult childhood growing up in poverty."[22] His wife testified that he "could not eat, lost weight to the extent that he 'looked like, you know, a cancer patient,'"[23] and suffered from sleeplessness and nightmares.[24] There was, however, "no medical testimony or evidence corroborating the emotional distress that Plaintiff suffered."[25] Hence, "[w]hile Plaintiff's and his wife's testimony about the emotional effects of discharge at age 57 was compelling, it did not elevate it beyond the 'garden variety' category."[26]

There are many words to describe the distress of losing custody of one's child or the ability to provide for one's family. "Garden variety," "forgettable," and "commonplace" are not among them. Not surprisingly, commentators have pointed out that the "garden variety" concept is culturally insensitive, for the effects of discriminatory behavior are "likely much more severe than judges, especially those from privileged backgrounds, usually imagine."[27] Indeed, "the ordinary, normal victim of discrimination is a figment of judicial imaginations; it conjures up the image of a person who has never experienced discrimination but who is suddenly the victim of a discriminatory episode."[28] The concept and term "garden variety" fail to account for the cumulative effects of discriminatory acts,[29] and thus the term "effectively tells civil rights plaintiffs that something is wrong with them when they suffer more than the 'reasonable dominant group.'"[30]

20. *Id.* at *9.

21. 6:13-CV-783, 2015 U.S. Dist. LEXIS 127312 (N.D.N.Y. Sept. 23, 2015).

22. *Id.* at *56–57.

23. *Id.* at *57.

24. *Id.*

25. *Id.*

26. *Id.*

27. Anderson, *supra* note 6, at 140.

28. *Id.* at 141.

29. *See id.* at 140 ("Any concept of 'normal emotional distress' needs to take into account the cumulative impact of discrimination over a lifetime."); Michael D'Ambrosio, *The Psychotherapist-Patient Privilege in Prison Litigation: How Can You Claim "Garden Variety" Emotional Distress When the Flowers Are Made Out of Steel?*, 43 FORD. URB. L.J. 915, 958 (2016) ("Any concept that accounts for 'normal' mental or emotional distress must account for the accumulated experiences of discrimination and oppression.").

30. D'Ambrosio, *supra* note 29, at 959. *See also* Goode & Johnson, *supra* note 6, at 1162 ("Because people of color inevitably develop the capacity to persevere in spite of assaults on

In addition, the categorization of emotional distress damages is based upon the *evidence proffered* by the plaintiff.[31] The question whether the plaintiff has fully corroborated or related the severity and consequences of the injury is, however, very different from the question whether the injury was in fact "commonplace" or "forgettable." Some plaintiffs may choose not to seek therapy, rendering it impossible to proffer corroborating professional evidence. As one commentator explains, "there are several reasons why one does or does not seek therapy, which may have little to do with the severity of the emotional distress."[32] Others opt not to proffer evidence of psychological distress to avoid opening the door to deeply personal matters, particularly mental health records. In the Second Circuit, plaintiffs who limit their emotional distress claims to the "garden variety" can preserve the therapist-patient privilege and avoid discovery of this information.[33] Still others may have difficulty relating the extent of their trauma, which is, ironically, a hallmark of trauma.[34] The result is that in all of these instances, even where the plaintiffs' suffering is profound, their claim will be categorized as "garden variety."

their dignity, this very capacity can create the impression that the emotional harm that they experience is not severe.").

31. *Id. Accord* Lewis v. Am. Sugar Ref., 14-civ-02302, 2018 U.S. Dist. LEXIS 153272, at *78 (S.D.N.Y. Aug. 17, 2018) ("Evidence in a garden-variety claim is generally provided by the plaintiff, who describes the mental suffering in vague or conclusory terms, without relating either the severity or consequences of the injury.") (citations and internal quotations omitted).

32. Smith, *supra* note 6, at 114. "[O]nce litigation is inevitable," moreover, "a plaintiff may decide to discontinue psychotherapy for the very reason that her records would be subject to discovery, only to find that the defendant can successfully argue that the alleged emotional distress was minimal as demonstrated by the plaintiff's failure to seek treatment." *Id.*

33. *See* Sims v. Blot, 534 F.2d 117, 141 (2d Cir. 2008); D'Ambrosio, *supra* note 29, at 958 ("[P]laintiffs who have sought psychotherapy in the past may only claim 'garden variety' emotional distress unless they are willing to disclose their entire mental health history to the defendant."); Anderson, *supra* note 6, at 134.

34. *See*, *e.g.*, Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 275 (5th ed. 2013) (an individual living with trauma "commonly makes deliberate efforts to avoid thoughts, memories, feelings, or talking about the traumatic event"); Sarah Katz & Deeya Haidar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 389–90 (2015) ("[C]lients with trauma experience can make terrible witnesses for a variety of reasons. First, . . . the client may be unable to present a linear narrative. Second, the client may not remember key elements of what occurred; while this may make a trier of fact question client's credibility, it is a normal trauma reaction. Third, a client's emotions or lack thereof may unnerve or misguide the trier of fact: the client may appear with a flat affect; or the client may want to tell the full story in a rush of hysterical emotion; or the client may appear angry (thus making her seem like the aggressor) or the client may simply disassociate and not be able to articulate what happened at all.").

The term "garden variety" is thus both trivializing and inaccurate, as courts and commentators have acknowledged.[35] It should be abandoned, as it is here, in favor of a simple, value-neutral nomenclature: "Tier One," "Tier Two," and "Tier Three" damages, in place of the terms "garden variety," "significant," and "egregious."

## II. CURRENT AND PREVAILING RATES FOR TIER ONE DAMAGES: CORRECTING THE RECORD

For decades, courts in the Second Circuit have provided guidance on the appropriate awards for Tier One emotional distress damages in discrimination (and analogous) cases. This includes at least seven Second Circuit decisions in the last 15 years establishing an appropriate range for such damages extending well into the six figures, with an admonition that these figures should be increased over time for inflation. The problem is that lower courts are routinely missing some or *all* of these controlling decisions, even going so far as to suggest that there is "conflicting guidance"[36] among the district courts on the appropriate range of Tier One damages. As the following demonstrates, given the clear, express, and repeated guidance of the Second Circuit, the perceived conflict among the district courts is in fact manifest error, the result of missing the relevant Second Circuit precedents.

Over two decades ago, in *Broome v. Biondi*,[37] Judge Robert Carter of the Southern District of New York explained that "the genuine emotional pain associated with [housing] discrimination should not be devalued by unreasonably low compensatory damage awards, especially when one considers the difficulty a plaintiff faces in establishing that he or she was a victim of housing discrimination."[38] Affirming a jury award of

35. *See* Vera v. Alstom Power, Inc., 189 F. Supp. 3d 360, 377 n.5 (D. Conn. 2016) ("By use of the term 'garden variety,' the Court does not mean to trivialize Ms. Vera's emotional distress. The Court uses the term only to contextualize this case within the applicable case law."); Doe v. Mulcahy, Inc., Civil No. 08-306, 2008 U.S. Dist. LEXIS 81911, at *2 n.2 (D. Minn. Oct. 14, 2008) ("To the extent that use of the 'garden variety' phrase diminishes or belittles the very real emotional distress a plaintiff can experience when an employer violates civil rights laws, the Court notes its distaste for the phrase."); Smith, *supra* note 6, at 113 ("'Garden-variety emotional distress' is a legal term, not a psychiatric term, and it is not a particularly useful construction.").

36. *See*, *e.g.*, Poliard v. Saintilus Day Care Ctr., Inc., 11 CV 5174, 2013 U.S. Dist. LEXIS 49374, at *22 (E.D.N.Y. March 7, 2013) ("In recent years, courts in this district have offered conflicting guidance on the appropriate range of damages for 'garden variety' claims of emotional distress.") (citations omitted); *accord* Francis v. Ideal Masonry, Inc., 16-CV-2839, 2018 U.S. Dist. LEXIS 132003, at *28 (E.D.N.Y. Aug. 3, 2018).

37. 17 F. Supp. 2d 211 (S.D.N.Y. 1997).

38. *Id.* at 226.

$114,000 (over $182,000 in today's dollars[39]) to each plaintiff for emotional damages, notwithstanding the absence of medical testimony,[40] the court noted that "large awards have been upheld without signs of tangible harm or medical testimony,"[41] and that "courts have recognized that even a single instance of discrimination can warrant significant emotional distress damage awards."[42]

After "reviewing the awards given for emotional distress in comparable cases and the evidence adduced at trial," the court determined that the jury's award was "not excessive."[43] In so doing, Judge Carter rejected the defendant's argument that "comparing [emotional distress] award damages between employment and housing discrimination cases is improper."[44] The defendants had argued that employment discrimination cases typically occur over months and years, longer than housing discrimination cases. Judge Carter found "no proof supporting this contention,"[45] and noted that the plaintiffs in *Broome* "testified to a recurrent pain," lasting well after the incident in question.[46]

Judge Carter might have added that this is an entirely specious argument: not only does employment discrimination range from protracted mistreatment to short-lived misconduct (e.g., wrongful termination, refusal to hire, etc.), but emotional distress jurisprudence already considers the duration of the emotional harm in its calculus. The duration of the distress – both during and after the misconduct in question – is one of several relevant factors in calculating the amount emotional distress damages, relating as it does to both the "severity" and "consequences" of the injury.[47] Comparing analogous employment – or other – discrimination

39. CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpi-calc.pl?cost1=114%2C000&year1=199711&year2=201808. All updated dollar amounts in this article were calculated using this helpful tool from the United States Department of Labor. Note that the award at issue in *Broome* was rendered in April of 1997. *See* Broome, 17 F. Supp. 2d at 215.

40. *See Broome*, 17 F. Supp. 2d 211. *See*, *e.g.*, Fink v. City of New York, 129 F. Supp. 2d 511, 536 (E.D.N.Y. 2001) (in *Broome*, "there was no tangible injury and no medical evidence").

41. *Id.* at 225.

42. *Id. See*, *e.g.*, Graham v. City of New York, 128 F. Supp. 3d 681, 714-17 (E.D.N.Y. 2015) (upholding award of $150,000 largely for emotional distress damages flowing from one-hour false arrest; plaintiff's physical injuries were minor, including "wrist pain during the incident, a headache following the incident, and sustained marks on his wrists").

43. *Broome*, 17 F. Supp. 2d at 226.

44. *Id.* at 225.

45. *Id.*

46. *Id.*

47. *See*, *e.g.*, Munson v. Diamond, 15-CV-00425, 2017 U.S. Dist. LEXIS 85143, at *20 (S.D.N.Y. June 1, 2017) ("Important factors in assessing an appropriate amount to award for

cases in housing cases is thus wholly appropriate.[48] In fact, the Second Circuit would do precisely this eleven years later, citing an age discrimination case in support of six-figure award (adjusted for inflation) for Tier One emotional distress in a housing discrimination case.[49]

Two years after *Broome*, an article in the Brooklyn Law Review[50] [hereinafter, the "1999 Article"] purported to evaluate emotional distress damages in the Second Circuit, providing a "continuum" or "spectrum" of damage awards for the various tiers of emotional distress claims.[51] "At the low end of the continuum are what have become known as 'garden-variety' distress claims," the 1999 Article concluded, "in which district courts have awarded damages for emotional distress ranging from $ 5,000 to $ 35,000."[52]

The author's review was avowedly quite limited in scope: as the title suggests, the author focused only on employment cases. More specifically, the author focused "only on the federal cases,"[53] and only those

emotional suffering include the amount, duration, and consequences of the claimant's emotional distress.") (citations and internal quotations omitted); Kinneary v. City of New York, 536 F. Supp. 2d 326, 331 (S.D.N.Y. 2008) ("In evaluating the reasonableness of a non-economic damages award in discrimination suits, courts often examine the duration, extent and consequences of mental anguish suffered by [the] plaintiff to determine whether the case is a so-called 'garden variety' mental-anguish claim . . . .") (citation and internal quotations omitted), *rev'd on other grounds* 601 F.3d 151 (2d Cir. 2010); Sanderson v. City of New York, 96 Civ. 3368, 1998 U.S. Dist. LEXIS 5737, at *26–27 (S.D.N.Y. 1998) ("The amount that is reasonable for each plaintiff depends on the evidence of his mental harm, including the duration and severity.").

48. *See* Anderson v. Metro-North Commuter R.R., 493 Fed. Appx. 149, 152 (2d Cir. 2012) ("We have compared the first jury's award for pain and suffering to the awards for pain and suffering in other cases with similar *injuries*.") (emphasis added); Ismail v. Cohen, 899 F.2d 183, 186 (2d Cir. 1990) ("Reference to other awards in similar [damages] cases is proper.") (citation omitted); Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978) ("[T]here is no logical reason why general principles of damages should not apply to a civil rights action."); Byrnes v. Angevine, 3:12-cv-1598, 2015 U.S. Dist. LEXIS 78261, at *6 (N.D.N.Y. June 15, 2017) ("[T]he law does not provide a precise formula by which pain and suffering and emotional distress may be properly measured and reduced to monetary value. However, guidance may be found by referring to analogous cases involving similar injuries.") (citations and internal quotations omitted); Zakre v. Norddeutsche Landesbank Girozentrale, 541 F. Supp. 2d 555, 568 (S.D.N.Y. 2008) ("Reference to other awards in similar cases is appropriate, but courts must take care not to limit their review too narrowly.") (citations and internal quotations omitted), *aff'd*, 344 Fed. Appx. 628 (2d Cir. 2009).

49. *See infra* note 145 and accompanying text.

50. Michelle Cucuzza, *Evaluating Emotional Distress Damage Awards to Promote Settlement of Employment Discrimination Claims in the Second Circuit*, 65 BROOK. L. REV. 393 (1999).

51. *Id.* at 427.

52. *Id.* at 428. The author divided Tier One claims into two categories: low-end Tier One and high-end Tier One claims. *Id.* at 428–29.

53. *Id.* at 429–30.

involving "post-trial remittitur."[54] The author further limited her inquiry to "cases repeatedly relied upon by federal courts in the Second Circuit to resolve these motions."[55] Given that the 1999 Article examined "recent case law,"[56] this was a significant limitation, since *perforce* the most recent cases could not have been "repeatedly relied upon." As a result, for Tier One damages, the 1999 Article examined merely ten cases from the late 1980s to the late 1990s.[57]

The 1999 Article omitted not only *Broome*, a Tier One case awarding $114,000 just a few years before publication of the article, but numerous other Tier One cases, employment and otherwise, greatly in excess of the "spectrum" set forth by the author. This included, for example, *Petramale v. Local No. 17 of Laborers' International Union*,[58] a Tier One civil rights case involving a remittitur by the Second Circuit in which the plaintiff proffered "no medical testimony" and did not seek medical help.[59] In *Petramale*, issued eleven years before the 1999 Article, the plaintiff testified that he suffered from "nerves and sleeplessness," but "there was no testimony as to the extent of those physical manifestations."[60] In fact, the court noted that it was "unclear how much of his injuries were caused by the *illegal punishment* as opposed to general problems with the union."[61] In these circumstances, the Second Circuit reduced the jury's award from $200,000 to $100,000 – the equivalent of $141,000 at the time of the 1999 Article, and over $217,000 today.[62]

In truth, a number of earlier, analogous cases not addressed in the 1999 Article awarded Tier One damages well in excess of the supposed $35,000 upper limit. Examining only the six-figure awards, for example, in *Ginsberg v. Valhalla Anesthesia Associates, P.C.*,[63] "plaintiff presented little evidence regarding her emotional distress."[64] Nonetheless, the court awarded the plaintiff $100,000 (over $158,000 today) for Tier One damages, reducing a jury award of $400,000.[65] In *Mihalick v.*

54. *Id.* at 396.
55. *Id.* at 428.
56. *Id.* at 427.
57. *Id.* at 430–41.
58. 847 F.2d 1009 (2d Cir. 1988).
59. *Id.* at 1013.
60. *Id.*
61. *Id.*
62. *Id.*
63. 99 Civ. 6462, 1997 U.S. Dist. LEXIS 16681 (S.D.N.Y. 1997).
64. *Id.* at *14.
65. *Id.* The plaintiff testified that she saw a psychiatrist and received anti-depressant medication, but she did not present any corroborating medical or expert testimony. *See id.* As the

*Cavanaugh*,[66] the court awarded the plaintiff $150,000 (over $233,000 today) on remittitur for Tier One emotional distress damages in an analogous civil rights case.[67] The plaintiff, alleging false arrest, "described on the stand his embarrassment and humiliation regarding the arrest, the effect it had on his relationship with his family, and that he has suffered from insomnia since the arrest."[68] On the basis of this testimony, the court concluded that "plaintiff proffered sufficient evidence to support his emotional distress claim."[69]

*Courtney v. City of New York*,[70] yet another employment discrimination case involving a remittitur – the very purview of the 1999 Article – awarded Tier One damages in the six figures. "There was a paucity of evidence at trial regarding the extent and magnitude of damages that plaintiff Fernandez sustained . . . ."[71] Indeed, "there was virtually no evidence elicited at trial regarding the severity, duration, and consequences of the emotional harm that Fernandez suffered," and "no evidence of any visits to doctors or medical treatment."[72] Nonetheless, the court awarded plaintiff emotional distress damages of $100,000 (over $156,000 today), reducing the jury award of $139,000.[73]

Finally, in *Sanderson v. City of New York*,[74] an age discrimination case, one plaintiff testified to the stress that he endured and the strain placed on his relationship, but offered no corroborating or medical testimony.[75] On remittitur, the court awarded the plaintiff $100,000 (over $157,000 today) in Tier One damages. Another plaintiff in *Sanderson* testified that the conditions to which he was subjected were "detrimental."[76] "Other than that description, [the plaintiff] did not testify as to any other emotional harm he suffered."[77] The court awarded him $50,000 (or over $78,000 today).[78]

court concluded, "Plaintiff's case was indisputably thin with respect to her non-economic damages." *Id.* at *7.

66. 26 F. Supp. 2d 391 (D. Conn. 1998).

67. *Id.* at 397. "The court arrived at this amount by reviewing comparable cases involving damage awards for emotional distress." *Id.* at 397.

68. *Id.* at 396.

69. *Id.*

70. 20 F. Supp. 2d 655 (S.D.N.Y. 1998).

71. *Id.* at 661.

72. *Id.*

73. *Id.*

74. 96 Civ. 3368, 1998 U.S. Dist. LEXIS 5737 (S.D.N.Y. April 21, 1998).

75. *Id.* at *27.

76. *Id.* at *29.

77. *Id.*

78. *Id.*

Even as of the date of the 1999 Article, then, several Tier One emotional distress awards extended into the six figures, including a 1988 award of $100,000 ($141,000 at the time of the 1999 Article) by the Second Circuit itself. Unfortunately, as we will see, some courts began to cite the low, inaccurate, and soon further-outdated "spectrum" set forth in the 1999 Article as persuasive authority, with other courts in turn citing those decisions as authoritative while entirely ignoring repeated Second Circuit (and other relevant) precedents to the contrary. This practice continues to this day, resulting in profoundly inaccurate and undervalued emotional distress awards.[79]

*Fink v. City of New York*,[80] issued two years after the 1999 Article, further demonstrated the inaccuracy of the $5,000 to $35,000 range. In *Fink*, the plaintiff "did not seek medical help for his problems and presented no medical evidence."[81] In addition, the court found that "although [plaintiff's] case involved physical symptoms (sleeplessness, headaches and short-temperedness) that resulted in marital problems, his symptoms were not as horrifying as some of those in the highest range of awards."[82] Reviewing numerous analogous cases, including, notably, both *Broome*[83] and the Second Circuit's decision in *Petramale*,[84] the court determined that a remittitur to $125,000 (over $181,000 today) for Tier One damages "would compensate [plaintiff] for his injuries without shocking the judicial conscience."[85]

In 2004, the Second Circuit again found a six-figure award for Tier One damages appropriate. In *Meacham v. Knolls Atomic Power Laboratory*,[86] the Second Circuit affirmed an award of $125,000 (over $179,000 in today's dollars),[87] *expressly* rejecting the defendant's contention that six-figure awards for Tier One emotional distress claims "should have been reduced to between $5,000 and $30,000."[88] Defendants asserted that "plaintiffs' claims do not rise above garden variety emotional distress

79. *See* Section III.A., *infra*.

80. 129 F. Supp. 2d 511, 537-38 (E.D.N.Y. 2001).

81. *Id.* at 537.

82. *Id.*

83. *Id.* at 536 (analyzing *Broome*).

84. *Id.* at 533 (analyzing *Petramale*).

85. *Id.* at 538.

86. 381 F.3d 56 (2d Cir. 2004), *vacated and remanded for further consideration on other grounds sub nom.*, KAPL, Inc. v. Meacham, 544 U.S. 957 (2005).

87. *Id.* at 77–78. Note that the court was affirming the lower court's award of $125,000, made in February 2002. *See* Meacham v. Knolls Atomic Power Lab., 185 F. Supp. 2d 193 (N.D.N.Y. 2002), *aff'd*, 381 F.3d 56 (2d Cir. 2004), *vacated and remanded for further consideration on other grounds sub nom.*, KAPL, Inc. v. Meacham, 544 U.S. 957 (2005).

88. *Id.* at 77.

claims for which New York courts traditionally uphold awards of no more than $ 30,000."[89] Rejecting this argument, the court noted that while some cases reduce six-figure jury awards, "other cases uphold awards of more than $100,000 without discussion of protracted suffering, truly egregious conduct, or medical treatment."[90] "When confronted with the range of mental anguish verdicts approved under New York law," the court concluded, "we do not find the verdicts in this case to deviate substantially from verdicts awarded under similar circumstances."[91] Dismissing comparisons to cases with lower awards, the Second Circuit added that "the passage of time since the cited cases were decided could reasonably support higher verdicts."[92]

In 2005, in *Cross v. New York City Transit Authority*, the Second Circuit again confirmed the appropriateness of six-figure awards in Tier One cases:

> Defendants contend that, where emotional distress claims are unaccompanied by any evidence of medical treatment or other concrete proof of duration, extent, and consequences, an award of $ 50,000 deviates materially from reasonable compensation. As this court recently observed, however, New York cases vary widely in the amount of damages awarded for mental anguish. Meacham v. Knolls Atomic Power Lab., 381 F.3d at 78. Thus, we reiterate that while many cases applying [New York's remittitur law] reduce awards to $ 30,000 or below, others uphold awards of more than $ 100,000 without discussion of protracted suffering, truly egregious conduct, or medical treatment.[93]

One month later, in *Watson v. E.S. Sutton, Inc.*,[94] the court addressed the defendant's claim that a jury award of $500,000 for Tier One damages was excessive. While agreeing that "$500,000 is well outside the acceptable range of damages under the law,"[95] the court ruled that defendant's "contention that 'garden variety' emotional damage awards are in the range of $ 5,000 to $ 30,000 is also not persuasive, because those numbers appear to be at the low end of the range of damages generally awarded under New York law."[96] The court noted that "[t]he Second Circuit in *Meacham* rejected a defendant's challenge to an order

89. *Id.*
90. *Id.* at 78 (citations omitted).
91. *Id.*
92. *Id.*
93. 417 F.3d 241 (2d Cir. 2005) (citations and internal quotations omitted).
94. 02 Civ. 2739, 2005 U.S. Dist. LEXIS 31578 (S.D.N.Y. Sept. 6, 2005), *aff'd*, 225 Fed. Appx. 3 (2d Cir. 2006).
95. *Id.* at *46.
96. *Id.* at *45.

remitting an award for emotional damages to $ 125,000 in a case in which plaintiffs had not offered evidence of treatment or physical sequelae, because that award did not deviate substantially from verdicts awarded under similar circumstances."[97] Based upon its own research, the court concluded that "[t]he range of acceptable damages for emotional distress in adverse employment action cases lacking extraordinary circumstances seems to be from around $ 30,000 to $ 125,000."[98] (That translates to between $39,000 and $160,000 today.) The court then remitted the jury award to $120,000, or over $154,000 today.[99]

In two separate cases in 2006, the Second Circuit again affirmed six-figure awards for Tier One damages. In *Patterson v. Balsamico*,[100] Defendant argued for an award "below $ 30,000"[101] for plaintiff's "garden variety" injuries, since "the evidence of the harms suffered was limited to Patterson's testimony alone, and there was no evidence that any medical treatment was required."[102] Affirming the lower court's refusal to grant a remittitur of the jury's $100,000 award (over $134,000 today),[103] the court explained:

> This Court, however, has recently sustained an award of $ 125,000 for "subjective distress" not accompanied by medical treatment. . . . This Court reaffirmed *Meacham*'s holding on remittitur of damages in *Cross*, 417 F.3d at 258-59 & n.4. . . . [O]n the basis of our finding in *Meacham* that New York courts have upheld awards of over $ 100,000 in comparable cases, we conclude that the district court did not abuse its discretion in declining to grant a remittitur.[104]

Nine months later, the Second Circuit affirmed the lower court's $120,000 award (over $154,000 today) in *Watson*, finding that "the award was not so large that it shocks the judicial conscience or deviates materially from awards in other comparable cases."[105] This was the *fourth* time in just seven years following the 1999 Article that the Second Circuit confirmed the propriety of a six-figure award for Tier One damages.[106]

97. *Id.* at *48 (citation and internal quotations omitted).
98. *Id.* at *46–47.
99. *Id.* at *47.
100. 440 F.3d 104 (2d Cir. 2006)
101. *Id.* at 120.
102. *Id.*
103. Note that a judgment based upon the jury verdict of $100,000 was entered on January 21, 2005. *Id.* at 109.
104. *Id.* (citations omitted).
105. Watson v. E.S. Sutton, Inc., 225 Fed. Appx. 3, 5 (2d Cir. 2006).
106. *See supra* notes 86–93, 100–105 and accompanying text.

If, as has been shown, the 1999 Article was inaccurate as of 1999, it was quite conclusively so by 2006.

In 2012, the Second Circuit did it again. In *Lore v. City of Syracuse*,[107] the court again expressly rejected the $5,000 to $30,000 range for Tier One claims: "In *Meacham*, . . . we rejected the defendant's contention that those damage awards, for 'garden variety emotional distress claims,' should have been reduced to between $5,000 and $30,000."[108] Instead, the court affirmed a six-figure ($150,000, or over $177,000 today)[109] award for Tier One emotional distress, observing that it had "affirmed awards of $125,000 each to plaintiffs for emotional distress resulting from age discrimination where the evidence of emotional distress consisted only of testimony establishing shock, nightmares, sleeplessness, humiliation, and other subjective distress . . . ."[110]

Not surprisingly, numerous district courts in the Second Circuit have similarly affirmed six-figure awards for Tier One emotional distress.[111] When setting forth the appropriate range for Tier One emotional

107. 670 F.3d 127 (2d Cir. 2012).

108. *Id.* at 177 (citation and internal quotations omitted).

109. Note that the jury award for compensatory damages, including emotional distress damages, was entered as a judgment on September 11, 2009. *See* Lore v. City of Syracuse, 5:00-CV-1833, 2009 U.S. Dist. LEXIS 82932, at *6 (N.D.N.Y. Sept. 11, 2009).

110. *Id.* at 177 (citing *Meacham*, 381 F.3d 56). The plaintiff in *Lore* submitted medical records indicating treatment for depression but did not proffer corroborating medical testimony. *Id.* at 178.

111. *See*, *e.g.*, Duarte v. St. Barnabas Hosp., 15 Civ. 6824, 2018 U.S. Dist. LEXIS 158052 (S.D.N.Y. Sept. 17, 2018) (awarding $125,000 for Tier One emotional distress); Lewis v. Am. Sugar Ref., 14-civ-02302, 2018 U.S. Dist. LEXIS 153272, at *78–85 (S.D.N.Y. Aug. 17, 2018) (awarding $115,000 for "garden-variety" emotional distress); Saber v. N.Y. State Dep't of Fin. Servs., 15 Civ. 5944, 2018 U.S. Dist. LEXIS 121811, at *36–39 (S.D.N.Y. July 20, 2018) (granting $125,000 for "garden variety" emotional distress, even where plaintiff did not seek medical attention, "testified only to feeling 'very uncomfortable' and 'very angry,'" and where "[n]one of Plaintiff's coworkers took the stand to testify as to Plaintiff's alleged change in behavior or deterioration in lifestyle"); Barham v. Wal-Mart Stores, Inc., 3:12-CV-01361, 2017 U.S. Dist. LEXIS 139565, at *7–9 (D. Conn. Aug. 30, 2017) (awarding $125,000 for "'garden-variety' emotional distress; although claimed consequences were grave, testimony of emotional distress "came exclusively from [plaintiff] – no other witnesses testified to confirm the claimed emotional harm, and neither [plaintiff] nor any other witness presented any medical evidence suggesting that [plaintiff's] emotional harm had physical or medical ramifications"); MacCluskey v. Univ. of Conn. Health Ctr., No 3:13-cv-1408, 2017 U.S. Dist. LEXIS 23520, at *52 (D. Conn. Feb. 21, 2017) (remitting damages for "garden variety" emotional distress to $125,000), *aff'd*, 707 Fed. Appx. 44 (2d Cir. 2017); Bouveng v. Nyg Capital LLC, 175 F. Supp. 3d 280, 329-30 (S.D.N.Y. 2016) (awarding $150,000 – over $160,000 today – on remittitur where defendant's behavior was "outrageous," but where "Plaintiff suffered no long-term emotional distress as a result of Defendant's conduct"; there was no medical corroboration; and "no evidence of continued shock, nightmares, sleeplessness, weight loss, or humiliation, or of an inability to apply for a new position or to enjoy life in general"); Vera v. Alstom Power, Inc., 189 F. Supp. 3d 360, 377 (D. Conn. 2016) (awarding $125,000 – over $132,000 today – upon remittitur despite finding that plaintiff's "emotional distress is

distress damages in the Second Circuit, all of these cases, including no fewer than seven Second Circuit cases affirming six-figure awards, must be considered. As the discussion in Section III.B., *infra*, makes clear, these cases must also be adjusted for inflation, yielding a fair and accurate range for Tier One damages markedly different from the demonstrably low and erroneous ranges currently propagated in the district courts.

## III. ERROR BEGETS ERROR IN THE SECOND CIRCUIT

Two main phenomena have contributed to a mountain of inaccurate and outdated Tier One decisions rendered by district courts in the Second Circuit: (1) flawed research and (2) failure to adjust older precedents for inflation. Each of these will be addressed in turn.

### *A. Flawed Research*

Finding the relevant precedents for Tier One damages claims takes time. Overburdened and understaffed courts[112] understandably find it difficult or impossible to conduct independent research on the most

'garden variety' because the evidence was limited to her own testimony, describing her emotional distress in general and conclusory terms, offering no proof of permanent injury or physical impact, and without corroborating testimony, medical or otherwise"); Stevens v. Rite Aid Corp., 6:13-CV-783, 2015 U.S. Dist. LEXIS 127312, at *57 (N.D.N.Y. Sept. 23, 2015) (awarding $125,000 on remittitur for "garden variety" emotional distress, where "there was no medical testimony or evidence corroborating the emotional distress"), *aff'd in part and rev'd in part on other grounds* 851 F.3d 224 (2d Cir. 2017); Vangas v. Montefiore Med. Ctr., 11 Civ. 6722, 2015 U.S. Dist. LEXIS 44300, at *62 (S.D.N.Y. April 3, 2015) (awarding $125,000 – over $135,000 today – in "garden variety" emotional distress case, where plaintiff did not support his testimony with "any medical corroboration" and "offered relatively little evidence of emotional distress at trial"), *aff'd in part and rev'd in part on other grounds*, 823 F.3d 174 (2d Cir. 2016); Monette v. Cty. of Nassau, No. 11-CV-539, 2015 U.S. Dist. LEXIS 42523, at *63–64 (E.D.N.Y. March 31, 2015) (although "there was no medical evidence and the damages were supported solely by the plaintiff's testimony," court found that the "$150,000 award here [over $163,000 today] does not shock the Court's conscience"); Abel v. Town Sports Int'l, LLC, 09 Civ. 10388, 2012 U.S. Dist. LEXIS 183444, at *50 (S.D.N.Y. Dec. 19, 2012) (awarding $100,000 – over $113,000 today – for Tier One damages where plaintiff did not "seriously contest that his emotional injury rose above the 'garden variety' level"); Campbell v. Celico P'ship, 10 Civ. 9168, 2012 U.S. Dist. LEXIS 110346, at *20 (S.D.N.Y. Aug. 6, 2012) (setting emotional distress damages at $125,000 – over $138,000 today); Bayon v. State Univ. of N.Y., 98-CV-0578E, 2006 U.S. Dist. LEXIS 18980 (W.D.N.Y. April 13, 2006) (awarding $100,000 (over $126,000 today) for Tier One emotional distress damages on remititur); *see also supra* notes 37–-46, 63–78, and 80-85 and accompanying text.

112. *See*, *e.g.*, Steven Bieszczat, *First Amendment Protection for Unfair Labor Practices?: Reexamining the Noerr-Pennington Doctrine*, 2017 U. ILL. L. REV. 1579, 1613 (2017) ("[I]t is well-reported that federal courts are overburdened and underfunded."); Jennifer Bendery, "Federal Judges Are Burned Out, Overworked and Wondering Where Congress Is," HuffPost, Sept. 30, 2015, https://www.huffpost.com/entry/judge-federal-courts-vacancies_n_55d77721e4b0a40aa3aaf14b ("Judges are struggling with burnout. And many courts are relying on semi-retired judges just to stay afloat. . . .They're just spread way too thin.").

accurate, contemporary price range for Tier One awards. With daunting caseloads, and in the absence of accurate briefing by the parties, courts are faced with two choices: conduct their own exhaustive survey to arrive at an accurate formulation, or cite to another court that has ostensibly done so. As the following discussion demonstrates, all too many choose the latter option. Once one court provides its own seemingly authoritative formulation, moreover, other courts perfunctorily adopt that formulation without investigating its validity – without tracing it back to its origin and questioning whether, in the ensuing years, that formulation has been rendered outdated or invalid. This practice can continue year after year, and decade after decade, ultimately yielding decisions that are wildly inaccurate – decisions seemingly based upon the most recent jurisprudence but in truth stemming from outdated research that was flawed from the inception.[113]

*Rainone v. Potter*,[114] issued a mere eleven days after *Watson*,[115] exemplifies this phenomenon. Recall that in *Watson*, the court rejected defendant's contention that Tier One awards should range from $5,000 to $30,000; noted that the Second Circuit in *Meacham* rejected a challenge to an award of $125,000 for Tier One damages; and, based on its own research, concluded that Tier One damages range from $30,000 to $125,000, ultimately awarding $120,000 to the plaintiff.[116] In stark contrast, in *Rainone*, the court entirely missed *Meacham*, along with *Cross* – issued one month before the decision in *Rainone* – and other relevant precedents (including *Petramale*). Instead, the court adopted the range set forth in the 1999 Article, echoing that article's observation that "there appears to be a 'spectrum' or 'continuum' of damage awards for emotional distress," and positing a range of $5,000 to $35,000 for such claims.[117] Not only was this decision largely based upon the flawed 1999 Article,[118] but it was plainly erroneous pursuant to Second Circuit precedent expressly rejecting this spectrum, as *Watson* had just made clear.

113. For an analysis of the dangers of relying upon precedents without scrutinizing the validity, or provenance, of their holdings, see Armen H. Merjian, *Bad Decisions Make Bad Decisions: Davis, Arline, and Improper Application of the Undue Financial Burden Defense Under the Rehabilitation Act and the Americans with Disabilities Act*, 65 BROOK. L. REV. 105 (1999).

114. 388 F. Supp. 2d 120 (E.D.N.Y. 2005).

115. *See supra* notes 94–99 and accompanying text.

116. *See id.*

117. *Id.* at 122.

118. In addition to the 1999 Article, and a 1996 decision cited in that article, the court cited merely two Tier One cases, entirely ignoring the numerous Second Circuit and other precedents reviewed earlier. *See id.* at 122–23.

To make matters worse, the court concluded that this was not a Tier One case, but a case "squarely in the low end of the 'significant' range."[119] The plaintiff, the court observed, "suffered from a level of emotional distress . . . that was more than mere 'garden variety.'" Indeed, the evidence of emotional distress was corroborated by not only the plaintiff's wife, but by his psychologist, who treated him for four years and diagnosed him with major depression.[120] Nonetheless, the court found that the jury's award of $175,000 for Tier Two emotional distress "shocks the conscience of the Court,"[121] and reduced the Tier Two award to $50,000.[122] Note that in 1988, the Second Circuit awarded *Tier One* distress damages of $100,000,[123] or over $169,000 as of the time of the decision in *Rainone*. One year before the *Rainone* decision, moreover, the Second Circuit affirmed a Tier One award of $125,000,[124] and just a month before *Rainone*, the Second Circuit reaffirmed the six-figure range for Tier One cases.[125] Yet, in *Rainone*, the court found that an award of $175,000 for *Tier Two* emotional distress "shocks the conscience of the Court."[126]

Ironically, in affirming *Watson* two years later, the Second Circuit would opine that the award of $120,000 for Tier One emotional distress was "not so large that it shocks the judicial conscience or deviates materially from awards in other comparable cases."[127] Sadly for the plaintiff in *Rainone*, the court simply missed the relevant authorities, placing undue faith in the 1999 Article and accordingly finding that a perfectly justifiable Tier Two award "shocks the conscience."[128]

The errors of *Rainone* did not go unnoticed. Over a decade ago, the court in *Olsen v. County of Nassau*[129] rejected the *Rainone* range of $5,000 to $35,000 as both outdated and unpersuasive:

> Defendants argue that emotional distress damage awards for "garden variety" claims range from $ 5,000 to $ 35,000. However, defendants rely on a 2005 case, Rainone v. Potter, 388 F. Supp. 2d 120 (E.D.N.Y. 2005), as support for this statement. More recent cases find this range

119. *Id.* at 126.
120. *Id.*
121. *Id.*
122. *Id.*
123. *See supra* notes 58–62 and accompanying text.
124. *See supra* notes 86–92 and accompanying text.
125. *See supra* note 93 and accompanying text.
126. 388 F. Supp. 2d at 126.
127. Watson v. E.S. Sutton, Inc., 225 Fed. Appx. 3, 5 (2d Cir. 2006).
128. 388 F. Supp. 2d at 126.
129. 615 F. Supp. 2d 35, 46 (E.D.N.Y. 2009).

> to be significantly higher . . . . As one court pointed out when faced with a similar argument, "[defendant's] contention that 'garden variety' emotional damage awards are in the range of $ 5000 to $ 30,000 is . . . not persuasive, because those numbers appear to be at the low end of the range of damages . . . ."[130]

To this day, however, courts continue to rely upon *Rainone* and its progeny for the appropriate range of Tier One damages.[131] A single, relatively recent case illustrates the problem. In *Styka v. My Merchants Services LLC*,[132] the court, ignoring – or simply missing – all of the Second Circuit and lower court precedents discussed above, opined that in Tier One claims, "appropriate damages range from $5,000 to $35,000."[133] For this proposition, the court cited *Rodriguez v. Express World Wide, LLC*,[134] a 2014 decision that similarly missed all of the Second Circuit precedents, instead relying upon the 2008 decision of *Khan v. HIP Centralized Laboratory Services*[135] for the $5,000 to $35,000 range.[136] *Khan*, in turn, relied upon *Rainone* for this erroneous range,[137] additionally citing several district court cases and distinguishing *Petramale*[138] on the ground that "a union's violation of free speech under the Labor Management Reporting and Disclosure Act is difficult to compare to a retaliation action under Title VII."[139] Given that both cases involved awards for emotional distress, the court's hyper-technical reliance upon the varying causes of action amounted to a distinction without a difference. Indeed, the court offered no justification for the untenable supposition that the emotional distress (e.g., shock, humiliation, sleeplessness, loss of appetite, loss of self-esteem, and other psychological injuries) caused by one is "entirely distinguishable"[140] from the other.

It is reasonable to distinguish Tier One emotional distress damages based upon the (universal) criteria utilized by the courts, such as the severity/duration and consequences of the injury,[141] erring on the side of liberality consonant with the broad and remedial purposes of the civil and

130. *Id.* at *46 n.4 (quoting *Watson*, 2005 U.S. Dist. LEXIS 31578, at *45).

131. *See infra* note 150 and accompanying text.

132. 14 Civ. 6198, 2016 U.S. Dist. LEXIS 34238 (E.D.N.Y. March 15, 2016).

133. *Id.* at *14.

134. 12 CV 4572, 2014 U.S. Dist. LEXIS 47978 (E.D.N.Y. Jan. 16, 2014).

135. CV-03-2411, 2008 U.S. Dist. LEXIS 76721 (E.D.N.Y. Sept. 17, 2008).

136. *See Rodriguez*, 2014 U.S. Dist. LEXIS 47978, at *19 (citing *Khan*, 2008 U.S. Dist. LEXIS 76721, at *11).

137. *See Khan*, 2008 U.S. Dist. LEXIS 76721, at *30.

138. *See supra* notes 58–62 and accompanying text.

139. *Khan*, 2008 U.S. Dist. LEXIS 76721, at *39.

140. *Id.*

141. *See supra* note 13 and accompanying text.

human rights laws at issue.[142] It is unprincipled, however, to do so based upon the technical statute or law upon which the claim is based.[143] Meanwhile, the court did not mention, much less distinguish, the wholly relevant and contradictory Second Circuit decisions in *Meacham*, *Cross*, *Patterson,* and *Watson*, despite purporting to offer "a closer look at the case law."[144] (Ironically, moreover, just three months after *Khan*, the Second Circuit approved an award of $90,000 (over $109,000 today) on remittitur for *housing discrimination*, citing *Meacham* (an analogous *age discrimination* case) for the proposition that "the District Court's award was not excessive."[145]

142. *See*, *e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, (1982) (noting "the broad remedial intent of Congress embodied in the [Fair Housing] Act"); Am. Tobacco Co. v. Patterson, 456 U.S. 63, 80 (1982) ("Through Title VII Congress sought in the broadest terms to prohibit and remedy discrimination."); N.Y. City Admin. Code § 8-130(a) ("The [HRL] shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof . . . ."); Scheiber v. St. John's Univ., 84 N.Y.2d 120, 126 (1994) ("We are mandated to read the Human Rights Law in a manner that will accomplish its strong antidiscriminatory purpose.").

143. *See supra* notes 47–49 and accompanying text. The court also labelled *Broome* "entirely distinguishable" on the ground that "the sizable compensatory damages in *Broome* were awarded due to willful and malicious conduct that also warranted a punitive damages award of $ 410,000 to these plaintiffs." *Id.* at 38–39 (citing *Broome*, 17 F. Supp. 2d at 229. Putting aside that the jury in *Khan* also imposed punitive damages, which the court struck from the verdict, *Khan*, 2008 U.S. Dist. LEXIS 76721, at *17, the court's attempt to distinguish *Broome* was in error. Even if *Broome* arguably involved more offensive conduct, there was "no tangible injury and no medical evidence" supporting the plaintiffs' emotional distress claim. Fink v. City of New York, 129 F. Supp. 2d 511, 536 (E.D.N.Y. 2001) (analyzing *Broome*). This, according to precedent, rendered *Broome* a Tier One case. *See*, *e.g.*, *supra* notes 13–26 and accompanying text. By contrast, in *Khan*, the plaintiff "provided evidence of emotional distress that elevates his case above the 'garden-variety' category. In particular, [the plaintiff] has provided concrete medical testimony to illustrate his job-related emotional distress." *Khan*, 2008 U.S. Dist. LEXIS 76721, at *32. The court therefore properly categorized the plaintiff's claim as a Tier Two or "significant" claim. *Id.* Hence, if *Khan* was distinguishable from *Broome*, it was the opposite distinction to that drawn by the court; unlike *Broome*, the evidence in *Khan* warranted Tier Two damages. In addition, compensatory damages focus on the harm suffered by the plaintiff rather than the degree of willfulness of the defendant. *See*, *e.g.*, Virgilio v. City of New York, 407 F.3d 105, 116 (2d Cir. 2005) ("While compensatory damages recompense for one's injuries . . . [p]unitive damages are invoked to punish egregious, reprehensible behavior."). The plaintiff in *Khan* unequivocally proffered greater evidence of harm than the plaintiffs in *Broome*, thus warranting a higher award. *See* Kate Sablosky Elengold, *Clustered Bias*, 96 N.C.L. REV. 457, 505 (2018) ("The greater the distress, the greater the damages. The individual experiences of humiliation, shame, or degradation should be directly proportional to the award of compensatory, or emotional distress, damages."). The court's rejection of *Broome* as distinguishably excessive was therefore improper, as was the court's citation to both *Rainone* and the 1999 Article for a Tier Two range of $50,000 to $100,000. *See Khan*, 2008 U.S. Dist. LEXIS 76721, at *32–33.

144. *Id.* at *29.

145. Brown v. Junction Pool Commons, Inc., 301 Fed. Appx. 24 (2d Cir. 2008); *see id.* at 26 ("It is undisputed that [plaintiff] is seeking damages only for emotional distress caused by

Finally, *Rainone*, the ultimate source for *Styka*, relied upon the 1999 Article,[146] which propounded the Tier One range after a limited review of older cases, including a case from the 1980s.[147] Hence, in 2016, the court in *Styka* cited as authoritative a range for Tier One damages stemming from research conducted in the 1990s, which included authority from the 1980s, *nearly three decades old* at the time of the *Styka* decision. Not only was the 1999 Article inaccurate at the time of publication, moreover, but since that time, the Second Circuit had affirmed the propriety of six-figure awards in Tier One cases on no fewer than *seven occasions*, to say nothing of the many other six-figure Tier One decisions within the Second Circuit.

In fact, twelve years before *Styka*, the Second Circuit expressly rejected the $5,000 to $30,000 range and affirmed a $125,000 Tier One award.[148] Four years before *Styka*, the Second Circuit, affirming a $150,000 Tier One award, again expressly "rejected the defendant's contention that [Tier One] damage awards, for 'garden variety emotional distress claims,' should have been reduced to between $5,000 and $30,000."[149] For a court in 2016 to cite the $5,000 to $35,000 "spectrum" was simply flabbergasting, and of course hugely deleterious to the victims of discrimination.

*Styka* is not unusual. A multitude of courts in the Second Circuit *continue* to repeat these errors, and thus grossly to undervalue Tier One

her experience of discrimination; it is also undisputed that she does not have any medical documentation of specific distress.").

146. *See Rainone*, 388 F. Supp. 2d at 122 (citing Cucuzza, *supra* note 50, at 427–28).

147. *See* Cucuzza, *supra* note 50, at 432–33.

148. *See supra* notes 86–92 and accompanying text.

149. *Lore*, 670 F.3d at 177 (citation and internal quotations omitted). *See* Abel v. Town Sports Int'l, LLC, 09 Civ. 10388, 2012 U.S. Dist. LEXIS 183444, at *53–54 (S.D.N.Y. Dec. 19, 2012) (rejecting defendant's argument for paltry Tier One awards, noting that "nearly all of the cases on which Defendant seeks to rely were decided in the 1990s," and explaining that "the Second Circuit has explicitly 'rejected' the argument, sometimes advanced by losing defendants, that awards in garden variety emotional-distress cases should be presumptively limited to $30,000").

emotional distress claims.[150] In *Joseph v. HDMJ Restaurant, Inc.*,[151] for example, the court explained that "[w]ithout any medical documentation, a damages award of $50,000 is difficult to support."[152] As authority for this proposition, the court cited only select district court cases, as if the Second Circuit had never ruled on this issue, repeatedly. This includes a 2005 decision in which the Second Circuit expressly rejected this *precise* argument, right down to the dollar amount, i.e., that "where emotional distress claims are unaccompanied by any evidence of medical treatment or other concrete proof of duration, extent, and consequences, an award of $ 50,000 deviates materially from reasonable compensation."[153]

150. *See*, *e.g.*, Vargas v. Permiere Staff Agency, 17 Civ. 4280, 2019 U.S. Dist. LEXIS 133851, at *12–19 (S.D.N.Y. July 18, 2019) (propounding the $5,000 to $35,000 range and awarding $30,000 despite finding that "plaintiff is entitled to the higher end of the range of damages commonly awarded under garden variety emotional distress claims"); Setty v. Synergy Fitness, 17-CV-6504, 2019 U.S. Dist. LEXIS 47236, at *14 47236 (E.D.N.Y. March 21, 2019) ("Garden variety emotional distress claims lacking extraordinary circumstances and without medical corroboration generally merit $5,000 to $35,000 awards.") (citations and internal quotations omitted); Burns v. Nurnberger Corp., 16-CV-6251, 2018 U.S. Dist. LEXIS 159421, at *25–26 (E.D.N.Y. Sept. 17, 2018) (citing a range of $5,000 to $30,000); Francis v. Ideal Masonry, Inc., 16-CV-2839, 2018 U.S. Dist. LEXIS 132003, at *28 (E.D.N.Y. Aug. 3, 2018) ("Courts in this Circuit have typically awarded damages ranging from $5,000 to $35,000 for garden-variety claims.") (citations omitted); Cavalotti v. Daddyo's BBQ, Inc., 15 Civ. 6469, 2018 U.S. Dist. LEXIS 154918, at *73 (E.D.N.Y. Sept. 8, 2018) ("'Garden variety' emotional distress claims lacking extraordinary circumstances and without medical corroboration generally merit $5,000 to $35,000 awards.") (citations and internal quotations omitted); Miller-Rivera v. Eddie Jr.'s Sports Lounge, Inc., 17-CV-0603, 2018 U.S. Dist. LEXIS 1151, at *8 (E.D.N.Y. Jan. 2, 2018) ("Courts have awarded damages ranging from $5,000 to $35,000 for typical or garden-variety emotional distress claims based upon the plaintiff's vague or conclusory testimony of distress.") (citations and internal quotations omitted); Munson v. Diamond, 15-CV-00425, 2017 U.S. Dist. LEXIS 85143, at *20 (S.D.N.Y. June 1, 2017) (same); Drice v. My Merch. Servs., LLC, CV2015-0395, 2016 U.S. Dist. LEXIS 29006, at *17 (E.D.N.Y. March 4, 2016) ("For garden variety emotional distress claims, courts have awarded damages ranging from $5,000 to $35,000.") (citations omitted); Joseph v. HDMJ Rest., Inc., 970 F. Supp. 2d 131, 153 (E.D.N.Y. 2013) ("For typical or garden-variety emotional distress claims, district courts have awarded damages ranging from $5,000 to $35,000, based upon plaintiff's vague or conclusory testimony of distress."); Levitant v. City of New York Human Res. Admin., 914 F. Supp. 2d 281, 309 (E.D.N.Y. 2012) (citing *Rainone* and the 1999 Article for the $5,000 to $35,000 range), *aff'd*, 558 Fed. Appx. 26 (2d Cir. 2014); Moore v. Houlihan's Rest., Inc. 07-CV-03129, 2011 U.S. Dists. LEXIS 64452, at *22 (E.D.N.Y. May 10, 2011) (citing *Rainone* for the $5,000 to $35,000 range). *See also* Gutierrez v. Taxi Club Mgmt., 17 Civ. 532, 2018 U.S. Dist. LEXIS 106808, at *24 (E.D.N.Y. June 25, 2018) (relying *inter alia* upon *Rainone* and finding that "$130,000 in emotional distress damages . . . falls at the upper end of the 'significant' range, considering inflation") (citations omitted).

151. 970 F. Supp. 2d 131 (E.D.N.Y. 2013).

152. *Id.* at 153–54.

153. *Cross*, 417 F.3d 241, (2d Cir. 2005) (citations and internal quotations omitted).

In the 2019 case of *Setty v. Synergy Fitness*,[154] to take another example, the court announced that "there appears to be a 'spectrum' or 'continuum' of damage awards for emotional distress,"[155] with a range "from $5,000 to more than $100,000" for *all* tiers of emotional distress.[156] Quoting *Rainone*, the court thus propounded a range for all tiers of emotional distress that was erroneously low – at both ends – even for Tier One claims. The court then proceeded to adopt the $5,000 to $35,000 Tier One range as authoritative, despite the Second Circuit's express rejection of this range fifteen years earlier.[157] The court even opined that the Magistrate Judge's recommendation of $35,000 in Tier One damages was "toward the high end of awards in garden-variety cases."[158] By contrast, four years earlier, in *Monette v. County of Nassau*,[159] the court noted that "[e]ven defendants concede that the general range of awards in similar [Tier One] cases extends at least to $125,000 . . . and $125,000 is not a hard cap in cases of this type."[160]

In addition, the court in *Setty* observed that "a significant emotional distress claim," ordinarily consisting of more substantial harm and "usually evidenced through medical testimony or documentation," would support damages of $50,000 to $100,000.[161] After decades of six-figure Tier One awards, and what is now *seven* Second Circuit decisions establishing a ceiling well over $100,000 for Tier One damages,[162] the court announced a ceiling for *Tier Two* damages in 2019 of $100,000.

One year earlier, in *Miller-Rivera v. Eddie Jr.'s Sports Lounge, Inc.*,[163] the court – citing *Rainone* – opined that emotional distress "damages have been awarded in excess of $100,000, *but only where the discriminatory conduct was outrageous and shocking or where the physical*

154. 17-CV-6504, 2019 U.S. Dist. LEXIS 47236 (E.D.N.Y. March 21, 2019).

155. *Id.* at *11 (citing *Rainone*, 388 F. Supp. 2d at 121).

156. *Id.*

157. *See supra* notes 86–92 and accompanying text; *accord* Abel v. Town Sports Int'l, LLC, 09 Civ. 10388, 2012 U.S. Dist. LEXIS 183444, at *54 (S.D.N.Y. Dec. 19, 2012) ("Indeed, the Second Circuit has explicitly 'rejected' the argument, sometimes advanced by losing defendants, that awards in garden-variety emotional-distress cases should be presumptively limited to $30,000.") (citations omitted).

158. *Id.* at *14 (citation omitted).

159. No. 11-CV-539, 2015 U.S. Dist. LEXIS 42523 (E.D.N.Y. March 31, 2015).

160. *Id.* at 63–64. Note, moreover that the $125,000 upper limit was first announced at least 17 years earlier, in *Meacham*. *See Meacham*, 185 F. Supp. 2d at 220.

161. *Id.* at *12 (citations and internal quotations omitted).

162. This includes *Brown v. Junction Pool Commons, Inc.*, 301 Fed. Appx. 24 (2d Cir. 2008), which, adjusted for inflation, approved a Tier One award of $108,000. *See supra* note 145 and accompanying text.

163. 17-CV-0603, 2018 U.S. Dist. LEXIS 1151, at *8 (E.D.N.Y. Jan. 2, 2018).

*health of plaintiff was significantly affected*."[164] To add insult to injury, some courts even knock $5,000 off of the top of the deflated and long-rejected 1999 formulation, announcing that Tier One "awards hover in the range of $ 5,000 to $ 30,000."[165] It is a deeply regrettable and unjust state of affairs, and one that must be corrected immediately to ensure justice for victims of discrimination.

### *B. Failure to Adjust for Inflation*

Over a decade and a half ago, the Second Circuit, awarding $125,000 in Tier One damages and discussing the relevant cases, observed that "the passage of time since the cited cases were decided could reasonably support higher verdicts."[166] Courts in the Second Circuit have failed to heed this admonition. Not only are courts failing to conduct the independent research that would reveal numerous Tier One cases in excess of the alleged range, but courts are perfunctorily recapitulating the same Tier One range without adjusting for inflation. This, too, is an injustice. As one court has pointed out, "an amount that may have been excessive five to ten years ago, may be reasonable today simply by virtue of inflation."[167]

A small number of courts have gotten this right. In *Abel v. Town Sports Int'l, LLC*,[168] for instance, the court rejected the defendant's argument for a paltry Tier One award, explaining that "nearly all of the cases on which Defendant seeks to rely were decided in the 1990s."[169] In *Wallace v. Suffolk Cty. Police Department*,[170] the court acknowledged the Second Circuit's instruction that "the passage of time since that award (made in 2002) would support higher awards in future cases,"[171] and observed that "$125,000 in 2002 dollars converted into $150,000 in 2009

164. *Id.* at *9 (citing *Rainone*, 388 F. Supp.2d at 123) (internal quotations omitted).

165. Kinneary v. City of New York, 536 F. Supp. 2d 326, 331 (S.D.N.Y. 2008), *rev'd on other grounds.* 601 F.3d 151 (2d Cir. 2010) (citation and internal quotations omitted); *accord* Perez v. Jasper Trading, Inc., CV-05-1725, 2007 U.S. Dist. LEXIS 103814, at *23 (E.D.N.Y. Nov. 27, 2007); Greathouse v. JHS Sec., Inc., 11 Civ. 7845, 2015 U.S. Dist. LEXIS 154388, at *10 (S.D.N.Y. Nov. 13, 2015), *aff'd*, 735 Fed. Appx. 25 (2d Cir. 2018).

166. *Meacham*, 381 F.3d at 78.

167. Luciano v. Olsten Corp., 912 F. Supp. 663, 673 (E.D.N.Y. 1996).

168. 09 Civ. 10388, 2012 U.S. Dist. LEXIS 183444 (S.D.N.Y. Dec. 19, 2012).

169. *Id.* at *50.

170. 04-CV-2599, 2010 U.S. Dist. LEXIS 100796 (E.D.N.Y. Sept. 24, 2010).

171. *Id.* at *30 (citations omitted).

dollars."[172] In *Setty*,[173] the court got it partially right: it adopted the erroneous *Rainone* range of $5,000 to $35,000, as we have seen,[174] but at least found that "applying the Consumer Price Index inflation calculation, these amounts should have been adjusted to $6,500 and $45,000, respectively."[175] (Alas, even this was only half right: the court determined that this scale "was first articulated in a 2005 case."[176] In fact, at least seven years earlier, another district court announced that in Tier One cases, "the awards hover in the range of $ 5,000 to $ 30,000."[177] Adjusting for inflation, those amounts would have been $7,800 to $46,900 at the time of the *Setty* decision.)

All too many courts in the Second Circuit, however, even while eschewing *Rainone*, continue to rehearse the figures announced in *Watson* in 2005: "Garden variety emotional distress claims generally merit $30,000 to $125,000 awards."[178] Perfectly illustrating the self-replicating phenomenon examined earlier,[179] a 2019 court even opined: "*Recent*

172. *Id.*; *see also* Nipon v. Yale Club of N.Y. City, 13 Civ. 1414, 2016 U.S. Dist. LEXIS 34934, at *11–12 (S.D.N.Y. March 17, 2016) (analyzing award amounts for inflation or "buying power"); Graham v. City of New York, 128 F. Supp. 3d 681, 715–16 (E.D.N.Y. 2015) (adjusting award amounts for inflation)

173. 17-CV-6504, 2019 U.S. Dist. LEXIS 47236 (E.D.N.Y. March 21, 2019).

174. *See supra* note 157 and accompanying text.

175. *Id.* at *15 n.5.

176. *Id.*

177. Bick v. City of New York, 95 Civ. 8781, 1998 U.S. Dist. LEXIS 5543, at *72 (S.D.N.Y. April 21, 1998).

178. Small v. N.Y. State Dep't of Corr. & Cmty. Supervision, 12-CV-12365, 2019 U.S. Dist. LEXIS 64132, at *31 (W.D.N.Y. April 15, 2019) (citations and internal quotations omitted). *See*, *e.g.*, Abafita v. Aldukhan, 1:16-cv-06072, 2019 U.S. Dist. LEXIS 59316, at *15 n.11 (S.D.N.Y. April 4, 2019) ("'Garden variety' emotional distress claims, where the evidence of mental suffering typically is limited to testimony of the plaintiff, generally merit $30,000 to $125,000 awards.") (citation and internal quotations omitted); Presumey v. Town of Greenwich Bd. of Educ., No. 3:15c278, 2018 U.S. Dist. LEXIS 94167, at *14 (D. Conn. June 5, 2018) ("In the Second Circuit, garden variety emotional distress claims generally merit $30,000 to $125,000 awards.") (citation and internal quotations omitted); MacCluskey v. Univ. of Conn. Health Ctr., No 3:13-cv-1408, 2017 U.S. Dist. LEXIS 23520, at *50 (D. Conn. Feb. 21, 2017) ("In the Second Circuit, garden variety emotional distress claims generally merit $30,000 to $125,000 awards.") (citations and internal quotations omitted); Andrade v. Kwon, 3:08cv479, 2012 U.S. Dist. LEXIS 106571, at *27 (D. Conn. March 26, 2012) ("Recent cases have calculated the range of awards to be between $30,000 and $125,000.") (citations omitted); MacMillan v. Millennium Broadway Hotel, 873 F. Supp. 2d 546, 561 (S.D.N.Y. 2012) ("In the Second Circuit, garden variety emotional distress claims generally merit $30,000 to $125,000 awards.") (citation and internal quotations omitted); DeCurtis v. Upward Bound Int'l, Inc., No. 09 Civ. 5378, 2011 U.S. Dist. LEXIS 114001, at *4 (S.D.N.Y. Sept. 27, 2011) ("A review of the relevant case law in this jurisdiction reveals that plaintiffs with garden-variety claims generally receive between $30,000 and $125,000."), *aff'd*, 529 Fed. Appx. 85 (2d Cir. 2013).

179. *See supra* notes 132-165 and accompanying text.

*decisions* describe such claims as generally meriting $30,000 to $125,000 awards."[180] The court cited cases from 2017-18, but unbeknownst to the court, this range was anything but "recent": those cases, in turn, cited others leading inevitably back to the 2005 pronouncement in *Watson*, which was of course based upon a review of even earlier cases.[181] Another court recently announced that "plaintiffs with garden-variety claims generally receive between $30,000 and $125,000,"[182] and then proceeded to award the plaintiff $150,000 in Tier One damages, finding that figure "not excessive" under the relevant case law.[183] In so doing, the court added yet another nail in the coffin of the $125,000 ceiling that it had just announced.

Correcting the research, and adjusting for inflation, then, the upper end of the range for Tier One cases in the Second Circuit in today's dollars is $233,000 (*Mihalick*),[184] with numerous other cases supporting a range far in excess of $125,000, including *Petramale* ($217,000),[185] *Broome* ($182,000),[186] *Fink* ($181,000),[187] *Meacham* ($179,000),[188] *Lore* ($177,000),[189] *Bouveng* ($171,000),[190] *Monette* ($163,000),[191] *Ginsberg*

180. Ravina v. Columbia Univ., 16 -CV-2137, 2019 U.S. Dist. LEXIS 56556, at *36 (S.D.N.Y. March 31, 2019) (citations and internal quotations omitted) (emphasis added).

181. For example, *Ravina* cited *Emamian v. Rockefeller Univ.*, 07 Civ. 3919, 2018 U.S. Dist. LEXIS 97674, at *44–45 (S.D.N.Y. June 8, 2018), which cited *Quinby v. WestLB AG*, 04 Civ. 7406, 2008 U.S. Dist. LEXIS 62366, at *8 (S.D.N.Y. Aug. 15, 2008), which cited *Lynch v. Town of Southampton*, 492 F. Supp. 2d 197, 207 (E.D.N.Y. 2007), *aff'd*, No. 07-3478-cv, 2008 U.S. App. LEXIS 24426 (2d Cir. Dec. 2, 2008), which cited *Watson*, labelling it, decided twelve years before *Ravina*, a "recent case." *Id.* at 207. (The author has corrected the courts' pincites in *Ravina* and *Emamian*.)

182. Figueroa v. KK Sub II, LLC, 15-CV-6526, 2019 U.S. Dist. LEXIS 38451, at *15 (W.D.N.Y. March 11, 2019) (citations and internal quotations omitted).

183. *Id.* at *17.

184. *See supra* notes 66–69 and accompanying text. In fact, one might fairly argue that the upper end of Tier One damages is over $360,000. In *Quinby v. WestLB AG*, 04 Civ. 7406, 2008 U.S. Dist. LEXIS 62366 (S.D.N.Y. Aug. 15, 2008), plaintiff's evidence of emotional distress flowing from two wrongful terminations was limited to her testimony. *Id.* at *9. The court found that "Plaintiff's distress largely resembles the 'garden variety' emotional distress claims that courts have found to merit reduction." *Id.* Awarding $300,000 ($363,200 today) upon remittitur, the court observed that it was "mindful that Plaintiff was unlawfully terminated not once but twice, and that the great cost of pursuing this action has been extremely stressful." *Id.* at *10.

185. *See supra* notes 58–62 and accompanying text.

186. *See supra* notes 37–46 and accompanying text.

187. *See supra* notes 80–85 and accompanying text.

188. *See supra* notes 86–92 and accompanying text.

189. *See supra* notes 107–110 and accompanying text.

190. *See supra* note 111.

191. *See supra* note 111. Note that the court in *Monette* refused to remit a jury award rendered in January 2014. *Monette*, 2015 U.S. Dist. LEXIS 42523, at *2.

($158,000),[192] *Sanderson* ($157,000),[193] *Courtney* ($156,000),[194] *Watson* ($154,000),[195] *Figueroa* ($150,000),[196] *Campbell* ($138,000),[197] and *Patterson* ($134,000).[198] Even simply adjusting the 2005 formulation in *Watson*, the range of Tier One awards in the Second Circuit would be approximately $39,000 to $160,000. (Naturally, the appropriate range for Tier Two and Tier Three claims must also be adjusted significantly upward, although an examination of the proper range for such claims is beyond the scope of this article.)

## IV. THE NEW YORK CITY HUMAN RIGHTS COMMISSION: AWARDS THAT SHOCK THE CONSCIENCE

At the New York City Human Rights Commission ("HRC"), the problem is far more pronounced. As we will see, the HRC is repeating the errors examined above: missing all of the relevant Second Circuit precedents, and citing erroneous lower court and Commission precedents without updating the research and adjusting for inflation. Even worse, it is doing so in violation of an express directive by the legislature that analogous federal decisions should serve as a floor beneath which decisions under the New York City Human Rights Law ("HRL") should not fall. The result is that, over and over, the HRC is issuing awards so low as to "shock the conscience,"[199] in direct contravention of the law.

### *A. The Civil Rights Restoration Act of 2005*

In assessing damages under the HRL, the HRC must be guided by the Local Civil Rights Restoration Act of 2005.[200] In the face of what it perceived as a judicial erosion of civil and human rights protections, the New York City Council ("City Council") passed the Restoration Act to

192. *See supra* notes 63–65 and accompanying text.

193. *See supra* notes 74–78 and accompanying text.

194. *See supra* notes 70–73 and accompanying text.

195. *See supra* notes 94–99, 105 and accompanying text.

196. *See supra* notes 182–83 and accompanying text.

197. *See supra* note 111.

198. *See supra* notes 100–104 and accompanying text.

199. This is the federal standard for determining whether a damages award is excessive, based upon awards in similar cases. *See*, *e.g.*, Patrolmen's Benevolent Ass'n of N.Y. v. City of New York, 310 F.3d 43, 56 (2d Cir. 2002) ("Having concluded that emotional distress damages were properly awarded, we may only reduce the award if the amount 'shocks the conscience.' In making this determination, we look to amounts awarded in similar cases.") (citations and internal quotations omitted).

200. Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85, § 1 (2005) ("It is the sense of the Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law.").

require an independent construction of that law, and indeed the most liberal interpretation available:

> The provisions of this title *shall* be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.[201]

Accordingly, City Council expressly provided that "similarly worded provisions of federal and state civil rights laws [are] a floor below which the City Human Rights Law cannot fall, rather than a ceiling above which the local law cannot rise."[202] As the Second Circuit has explained, the HRL imposes a "one-way ratchet," by which interpretations of similar federal statutes "'may be used . . . as a *floor* below which the City's Human Rights law cannot fall.'"[203] As such, "courts must analyze [HRL] claims separately and independently from any federal and state law claims, construing the [HRL]'s provisions broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible."[204]

Recognizing the "uniquely broad and remedial purposes"[205] of the NYCHRL, federal or state emotional distress damage awards in comparable discrimination cases must be viewed as a floor below which awards under the NYCHRL cannot fall, "rather than a ceiling above which the local law cannot rise."[206] Indeed, in its pre-enactment report, the New York City Council explained that under the Restoration Act, "a number of principles should guide decision makers when they analyze claims asserting violations of rights protected under the City's human rights law," including recognition of the fact that "victims of discrimination suffer

201. N.Y.C. Admin. Code § 8-130 (emphasis added); *see also* Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 31 (1st Dep't 2009) ("[T]he City HRL now explicitly requires an independent liberal construction in all circumstances, even where state and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart State or federal civil rights laws."); Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 278 (2d Cir. 2009).

202. Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85 (2005).

203. Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 278 (2d Cir. 2009) (quoting The Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85 § 1 (2005)).

204. Mihalik v. Credit Agricole Cheuvreux N. Am., 715 F.3d 102, 109 (2d Cir. 2013) (citations and internal quotations omitted); Albunio v. City of New York, 16 N.Y.3d 472, 477–78 (2011).

205. N.Y.C. Admin. Code § 8-130.

206. Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85, at § 1 (2005).

serious injuries, for which they ought to receive full compensation."[207] Lest there be any doubt, the principal drafter of the Restoration Act, Professor Craig Gurian, has explained that the Restoration Act was intended to follow the example of *Broome v. Biondi*, which awarded six-figure Tier One damages:

> The Restoration Act echoes Broome's message that the genuine pain associated with discrimination claims should not be undervalued. The City Human Rights Law's purposes are said to be not only uniquely broad, they are "uniquely broad and remedial." One of the core principles intended by the Council to guide decision makers is that "victims of discrimination suffer serious injuries, for which they ought to receive full compensation."[208]

### *B. Clear Error and Profound Undervaluing at the HRC*

In violation of the Restoration Act, the HRC is consistently awarding discrimination victims emotional distress damages markedly below the appropriate range. In so doing, the HRC is ignoring both the ceiling and floor established in analogous federal decisions; repeatedly citing the lowest, randomly selected district court cases; and miscalculating claims, awarding low Tier One damages in what are clearly Tier Two – or even Tier Three – cases. Indeed, tellingly, not one of the many post-Restoration Act HRC cases examined cited *Broome*, even in housing discrimination cases. None cited *any* of the Second Circuit decisions affirming six-figure Tier One damages, moreover, or any of the myriad district court cases doing the same.

In *Howe v. Best Apartments, Inc.*,[209] the petitioner (Mr. Howe) moved from Massachusetts to New York and sought to secure an apartment utilizing a Section 8 voucher as payment. Two years before the move, in 2008, New York City prohibited discrimination in housing based upon lawful source of income, such as a Section 8 voucher.[210] Respondents, a real estate agent and agency, nonetheless blatantly and

207. NEW YORK CITY COUNCIL, COUNCIL REPORT OF THE GOVERNMENTAL AFFAIRS, DIVISION COMMITTEE ON GENERAL WELFARE 5 (Aug. 17, 2005), available at http://www.antibiaslaw.com/sites/default/files/all/CommitteeReport081705.pdf.

208. Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 FORDHAM URB. L.J. 255, 309 (2006) (citations omitted).

209. OATH Index No. 2602/14, Dec. & Ord. (N.Y.C. Human Rights Comm'n March 14, 2016) [hereinafter, "Howe"].

210. N.Y. City Admin. Code § 8-107(5)(a). *See* Florentino v. Nokit Realty Corp., 906 N.Y.S.2d 689, 694 (Sup. Ct. N.Y. Cty. 2010) ("On March 26, 2008, the New York City Council passed Local Law 10, an amendment to the Human Rights Law, designed to ban discrimination by landlords against tenants based on their lawful source of income, including Section 8 vouchers.").

egregiously discriminated against Mr. Howe on the basis of his voucher, informing him that that they would not show him any apartments, that he was "wasting his time," and that no landlords with whom respondents worked would take his Section 8 voucher.[211] Respondents' conduct was precisely equivalent to stating, categorically, that they would not show apartments to African Americans, or that none of their landlords would accept Jews, as the Commission acknowledged.[212] At the time of the discrimination, moreover, respondents' website announced over 5,000 apartments available for rent.[213]

With respondents refusing to assist him, Mr. Howe was compelled to continue his search for another three months, facing further "difficulties finding a landlord who would accept his Section 8 voucher."[214] With that voucher about to expire,[215] Mr. Howe was compelled to take whatever was available, and the apartment he secured "was riddled with problems, including water leaks, a lack of heat and hot water, and vermin."[216] This is an all-too-familiar story, as landlords and real estate agents routinely steer those with subsidies or vouchers to the least desirable apartments.[217] As one commentator explains, "[i]ndividuals facing such discriminatory barriers must engage in a prolonged housing search, and often end up relying on substandard housing, which tends to be located in chronically poor communities and communities of color."[218]

Because Mr. Howe's evidence was "limited to [his] own testimony without other evidence of actual injury, such as medical treatment or

211. Howe, *supra* note 209, at 6.

212. *See id.* at 17 ("Discrimination based on a person's source of income is no less reprehensible [than] discrimination based on another category of protection under the NYCHRL.").

213. *Id.* at 7.

214. *Id.* at 6.

215. *See id.* at 5 ("If Mr. Howe was unable to secure an apartment by the end of July, the voucher would expire and he would have to reapply to the program.").

216. *Id.* at 7.

217. *See*, *e.g.*, Short v. Manhattan Apartments, 916 F. Supp. 2d 375, 384 (S.D.N.Y. 2012) (defendant informed plaintiff that the desirable apartments displayed in the agency's window were "only for people who are working"); Tracy Jan, *Housing vouchers mostly move families into impoverished neighborhoods, even when better apartments exist elsewhere*, WASH. POST, Jan. 3, 2019, https://www.washingtonpost.com/business/2019/01/03/housing-vouchers-mostly-move-families-into-impoverished-neighborhoods-even-when-better-apartments-exist-elsewhere/?noredirect=on&utm_term=.4b92cdc0d5b2 ("In New York, the region with the most families using housing vouchers, only 7 percent live in neighborhoods considered to be high opportunity, even though 28 percent of affordable units are located in those communities.").

218. Jorge Andres Soto, NYU Furman Center, *Persistent Acts of Housing Discrimination Perpetuate Segregation* (December 2016), http://furmancenter.org/research/iri/essay/persistent-acts-of-housing-discrimination-perpetuate-segregation.

physical manifestation,"[219] the Commission deemed this a Tier One claim. The Commission's analysis started out decently enough: for these claims, the Commission noted, "tribunals generally award between $30,000 and $125,000 in emotional distress damages."[220] As we have seen, these figures are erroneously low at both ends, even simply adjusting for inflation, but they are at least more accurate than many. Anomalously, however, the Commission then announced an entirely different range for Tier One cases: "In the employment context, where aggrieved parties have presented courts with bare evidence of emotional distress, courts have commonly approved awards in the range of $2,500 to $30,000."[221]

It is difficult to overstate the enormity of this error: the Second Circuit has repeatedly rejected the range of $5,000 to $30,000 as erroneously low,[222] establishing a Tier One ceiling in the six figures no fewer than seven times before *Howe* was decided. The $30,000 to $125,000 range that the Commission initially announced, moreover, was for the same sorts of cases for which the Commission proceeded to suggest the lower range, i.e., "bare evidence" cases in which "the evidence of mental suffering is generally limited to the testimony of the plaintiff, who describes his or her injury in vague or conclusory terms, without relating either the severity or consequences of the injury . . . typically lack[ing] extraordinary circumstances and . . . not supported by any medical corroboration."[223]

For the low range, the Commission cited three erroneous district court cases. The first and third of these, *Perez v. Jasper Trading, Inc.*[224] and *Fowler v. New York Transit Authority*,[225] relied upon a case decided in 1998, thus *ipso facto* missing all of the starkly divergent Second Circuit and lower court decisions that followed.[226] The second, *Holness v.*

219. Howe, *supra* note 209, at 12.

220. *Id.* at 12–13 (citation omitted).

221. *Id.* at 13 (citations omitted).

222. *See*, *e.g.*, *Lore*, 670 F.3d at 177 ("In *Meacham*, . . . we rejected the defendant's contention that those damage awards, for 'garden variety emotional distress claims,' should have been reduced to between $5,000 and $30,000."); *supra* Section II.

223. Olsen v. County of Nassau, 615 F. Supp. 2d 35, 46 (E.D.N.Y. 2009) (citations and internal quotations omitted). *Accord* Barham v. Wal-Mart Stores, Inc., 3:12-CV-01361, 2017 U.S. Dist. LEXIS 139565, at *6–7 (D. Conn. Aug. 30, 2017).

224. CV-05-1725, 2007 U.S. Dist. LEXIS 103814 (E.D.N.Y. Nov. 27, 2007).

225. 96 Civ. 6796, 2001 U.S. Dist. LEXIS 762 (S.D.N.Y. Jan. 31, 2001).

226. *See Perez*, 2007 U.S. Dist. LEXIS 103814. at *23 (citing Bick v. City of New York, 95 Civ. 8781, 1998 U.S. Dist. LEXIS 5543, at *25 (S.D.N.Y. April 21, 1998)); *Fowler*, 2001 U.S. Dist. LEXIS 762, at *41 (same).

*National Mobile TV, Inc.*,[227] relied upon *Khan*, analyzed *supra*,[228] also citing *Rainone* for a Tier Two range of $50,000 to $100,000.[229] Note, moreover, that all three of these cases announced a range starting at $5,000, and not the $2,500 that the Commission propounded (and ultimately selected). The Commission, meanwhile, failed to cite any of the seven Second Circuit Tier One decisions affirming an upper range in the six figures. This includes *Brown*,[230] in which the Second Circuit affirmed Tier One damages of $90,000 (approximately $102,000 at the time of the *Howe* decision) for housing discrimination no more compelling than the discrimination in *Howe*.[231] The Commission also failed to cite myriad analogous, six-figure lower court decisions, including, notably, *Broome*, the decision that the Restoration Act sought to emulate.[232]

Given that the discriminatory conduct in *Howe* was egregious, and given the grave consequences of that discrimination, there was still hope for an award at the highest end of the initial range announced by the Commission: respondents not only inflicted emotional distress and humiliation upon Mr. Howe, but they forced him to expend months of effort searching for an apartment; to suffer further acts of discrimination in the process; to suffer the stress of an imminently expiring Section 8 voucher; and, in desperation, to live with water leaks, a lack of heat and hot water, and with vermin.

The Commission awarded Mr. Howe $2,500, reducing the recommended award of $7,500 by two-thirds.[233] In doing so, the Commission made no mention of Mr. Howe's loss of housing opportunity,[234] and undertook no analysis of the crushing burden of ongoing housing discrimination.[235] The Commission's chief rationale for this miniscule award was

227. 09 CV 2601, 2012 U.S. Dist. LEXIS 67890 (E.D.N.Y. Feb. 14, 2012).

228. *See supra* notes 135–45 and accompanying text.

229. *Id.* at *14.

230. 301 Fed. Appx. 24.

231. In *Brown*, the defendant discriminatorily "initiated eviction proceedings against [the plaintiff] when she was not as far behind (or was in fact current) in her rent payments as Caucasian tenants." *Brown*, 301 Fed. Appx. at 25.

232. *See supra* note 208 and accompanying text.

233. Howe, *supra* note 209, at 12, 14.

234. A plaintiff suffering housing discrimination can claim damages for loss of housing opportunity, i.e., damages flowing from being forced to endure substandard housing and/or living conditions as a result of the housing discrimination in question. *See*, *e.g.*, United States v. Hylton, 944 F. Supp. 2d 176, 197 (D. Conn. 2013), *aff'd*, 590 Fed. Appx. 13 (2d Cir. 2014).

235. The Commission quadrupled the civil penalties to be paid to the City of New York, but inexplicably cut the award to Mr. Howe – who actually suffered from Respondents' discriminatory conduct, and from the deleterious consequences that flowed directly from that conduct – by two-thirds. Howe, *supra* note 209, at 12, 14, 18.

that Mr. Howe only testified to feeling "pretty upset."[236] The decision avows, however, that "the Bureau did not solicit any testimony, regarding the severity or physical manifestations of his being 'pretty upset'; the impact on Mr. Howe of the apartment search or living in substandard conditions; or any feelings of humiliation, shame, or stress."[237] In other words, representatives of the Commission never solicited the testimony that would have merited a far higher award.

The Commission has repeatedly explained, moreover, that petitioners face a lighter burden of proof of damages under the HRL:

> In light of the strong anti-discrimination policy spelled out in the NYCHRL and because the rights afforded therein are statutory and involve[] a vindication of a public policy as well as a vindication of a particular individual's rights, an aggrieved individual need not produce the quantum and quality of evidence to prove compensatory damages under the NYCHRL that would be required, for example, under traditional common law tort principles.[238]

Courts have recognized, finally, that "humiliation can be inferred from the circumstances as well as established by the testimony."[239] The circumstances themselves in *Howe* suggested profound humiliation, stress, frustration, and emotional harm.

Even by federal standards, the award in *Howe* shocks the conscience: it amounts to roughly an hour and a half of billable work for a New York City corporate partner.[240] It is difficult to disagree with commentators who posit that the effects of discrimination such as at issue in *Howe* are "likely much more severe than judges, especially those from privileged backgrounds, usually imagine."[241] And it is difficult not to view this as precisely the sort of devaluation of discrimination "by unreasonably low compensatory damage awards"[242] that the court in *Broome*

236. *Id.* at 13–14.

237. *Id.* at 14. The "Bureau" refers to the Law Enforcement Bureau of the HRC. *Id.* at 1.

238. Agosto v. Am. Construction Assoc., LLC, OATH Index No. 1964/15, at 15, Amended Dec. & Ord. April 5, 2017 (citations and internal quotations omitted).

239. Seaton v. Sky Realty Co., 491 F.2d 634, 636 (7th Cir. 1974). *Accord* Nieves v. Rojas, OATH Index No. 2153/17 Dec. & Ord. (N.Y.C. Human Rights Comm'n May 16, 2019) [hereinafter, "Nieves Decision"] ("While Complainant's testimony about his experiences of emotional distress is somewhat limited, the Commission is also informed by evidence of the objective circumstances of his experience.").

240. *See*, *e.g.*, Sara Randazzo and Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 an Hour Billing rates for partners at elite corporate law firms keep rising, despite low inflation, weak demand*, Wall Street Journal, Feb. 9, 2016, https://www.wsj.com/articles/legal-fees-reach-new-pinnacle-1-500-an-hour-1454960708.

241. *Anderson*, *supra* note 6, at 140.

242. *Broome*, 17 F. Supp. 2d at 226.

cautioned against, and that the drafters of the Restoration Act endeavored to avoid. By adopting an award at least twelve times lower than the lowest end of comparable federal Tier One damages, and well below the "floor" repeatedly rejected by the Second Circuit as unduly low, the Commission plainly violated the Restoration Act's mandate to use analogous cases as a floor "rather than a ceiling,"[243] to construe the law "broadly in favor of discrimination plaintiffs,"[244] and to comply with the legislature's "aim of making [the HRL] the most progressive in the nation."[245]

*Howe* is by no means an outlier: it is typical of the awards granted by the Commission. Indeed, all of the Commission's awards are woefully below comparable federal awards, notwithstanding the Commission's unique mandate. In *Agosto v. American Construction Associates, LLC*,[246] for example, respondents' discrimination rendered petitioner homeless for two months,[247] "unable to engage in even the most basic activities of daily life, including regular sleep and personal hygiene."[248] In light of the awful consequences of this discrimination, the Commission found that "significant compensatory damages are warranted in this case."[249]

Indeed, if, as we have seen, a Tier Two or "significant" case is typically "based on more substantial harm or more offensive conduct,"[250] this was such a case, for there was greater harm *and* more offensive conduct: respondents' actions led to palpable physical suffering (months of homelessness), and "Respondents acted intentionally and with reckless disregard both for Ms. Agosto's rights and for the harm that their conduct was likely to cause her."[251]

243. *Id.*

244. *Mihalik*, 715 F.3d at 109.

245. *See* Section I, *supra*; *Bumpus v. N.Y.C. Transit Auth.*, 859 N.Y.S.2d 893 (Sup. Ct., Kings Cty. 2008), *aff'd*, 883 N.Y.S.2d 99 (2d Dep't 2009) ("The New York City Human Rights Law sets forth a broad purpose. The legislative history contemplates that the Law be independently construed with the aim of making it the most progressive in the nation.") (citations omitted); *Jordan v. Bates Advertising Holdings, Inc.*, 816 N.Y.S.2d 310, 317 (Sup. Ct., N.Y. Cty. 2006) ("The Administrative Code's legislative history clearly contemplates that the New York City Human Rights Law be liberally and independently construed with the aim of making it the most progressive in the nation.").

246. *Agosto*, *supra* note 238.

247. *Id.* at 7 ("Ms. Agosto secured housing approximately two months later").

248. *Id.* at 17.

249. *Id.*

250. Olsen v. Cty. of Nassau, 615 F. Supp. 2d 35, 46 (E.D.N.Y. 2009) (citations and internal quotations omitted); *accord* Barham v. Wal-Mart Stores, Inc., 3:12-CV-01361, 2017 U.S. Dist. LEXIS 139565, at *6–7 (D. Conn. Aug. 30, 2017).

251. *Id.* at 22; *see also id.* at 21 ("Respondents expressly and unapologetically admitted in their Cross Motion that it is their 'choice of practice' to refuse to accept security vouchers.") (citation omitted).

The Commission awarded petitioner $13,000.[252] Astoundingly, the Administrative Law Judge had concluded that "mental anguish damages for a single denial of an accommodation based upon a discriminatory motive generally range from $1,000 to $7,500."[253] *Broome*, it will be recalled, awarded the plaintiffs $114,000 ($172,000 at the time of the *Agosto* decision) for a single instance of housing discrimination, arguably of far less significant consequence, noting that "courts have recognized that even a single instance of discrimination can warrant significant emotional distress damage awards."[254]

In rejecting the Bureau's argument that $30,000 represents "a minimum award for 'garden variety' damages,[255] the Commission observed that it was wary of arguments that "appear to place undue emphasis on broad categorical limits for damages, without adequate regard for the evidence of specific harm."[256] This was, however, to miss the point. Because emotional distress damages cannot be reduced to mathematical formulas, tribunals must look to analogous cases in order to determine the appropriate award. The ranges in question, moreover, are in fact based upon the "the evidence of specific harm." The Tier One category already reflects the very weakest evidentiary cases, i.e., those that are "generally limited to the testimony of the plaintiff," who "describes his or her injury in vague or conclusory terms," failing to relate the severity or the consequences of the injury.[257]

The injury in *Agosto* compares favorably to virtually all of the six-figure Tier One cases discussed above, particularly given the strong Tier Two elements present. The damages awarded were not only significantly lower than those in comparable cases, but even those with far weaker evidence. In *Sanderson*, to take but one example, one plaintiff testified

252. *Id.* at 20. The Commission based its award on *Howe* and *Short v. Manhattan Apts.*, 916 F. Supp.2d 375 (S.D.N.Y. 2012). The former has been discussed. *See supra* notes 209–45 and accompanying text. In the latter, the court provided no authority for its award of $20,000 in emotional distress damages to the plaintiff ($10,000 from each of two defendants) for source of income discrimination that perpetuated his homelessness for months. *See id.* at 402. Judge Conti, visiting from the Northern District of California, provided no analysis of, and apparently did not consult, the relevant and comparable emotional distress awards in the Second Circuit, which helps to explain this palpably low award, an award that was, as the preceding discussion demonstrates, inconsonant with those authorities. *See id.*

253. *Id.* at 17 (citation and internal quotations omitted).

254. *Id. See*, *e.g.*, Graham v. City of New York, 128 F. Supp. 3d 681, 714–17 (E.D.N.Y. 2015) (upholding award of $150,000 largely for emotional distress damages flowing from one-hour false arrest; plaintiff's physical injuries were minor, including "wrist pain during the incident, a headache following the incident, and sustained marks on his wrists").

255. *Id.* at 17.

256. *Id.*

257. *See supra* note 13 and accompanying text.

that the conditions to which he was subjected were "detrimental," with no other testimony of emotional harm.[258] The court awarded him $50,000 (or over $75,000 at the time of the *Agosto* decision), nearly six times the award in *Agosto*.

In *Blue v. Jovic*,[259] the Commission examined what can only be described as a Tier Three case, both in terms of injury and egregiousness. Ms. Blue and her minor daughter, B.T., asked respondents (their landlords) for a new, accessible bathtub or walk-in shower as a reasonable accommodation of B.T.'s disabilities.[260] B.T. lived with several disabilities, including "a seizure disorder, a thyroid disorder, a submucous cleft palate, a missing patella in her left leg, and lack of any cartilage in her knee."[261] As a result, she required assistance "with virtually every activity of daily life," including bathing.[262] Unfortunately, the bathtub was nearly two feet off of the ground, making it extremely difficult, painful, and dangerous for Ms. Blue to bathe her daughter, who was 5'5" tall and 135 pounds[263]:

> Ms. Blue testified that she or a home health aide must hold her under one arm, assist her through the narrow space to the tub, and help her in, one leg at a time, in a process that can take anywhere from 15 to 45 minutes . . . . To exit the tub, the person assisting B.T. must help her from a seated position to her knees, which is painful for her, and then assist her in stepping out of the tub, with additional assistance from a handrail. . . . Ms. Blue explained that bathing her daughter becomes more difficult as B.T. continues growing. In addition, Ms. Blue suffers from arthritis and degenerative bone disease that make it difficult for her to physically assist her daughter.[264]

This caused profound physical and emotional pain. Ms. Blue testified that it was a "physical battle" every time. "She's swinging at me and very angry because of the situation. We're both frustrated because it's dangerous constantly."[265] Indeed, B.T. accidentally bumped her head on the wall and injured herself getting in and out of the tub "several times each week," and on one occasion, she suffered a bad fall.[266] B.T. also

258. 1998 U.S. Dist. LEXIS 5737, at *29.

259. OATH Index No. 1624/16 (N.Y. City Comm'n on Human Rights Dec. & Ord. May 26, 2017).

260. *Id.* at 1–2, 6–7.

261. *Id.* at 8.

262. *Id.*

263. *Id.* at 6.

264. *Id.* at 9.

265. *Id.*

266. *Id.*

suffered "visible pain when transitioning from a seated position to a kneeling position in the tub, due to the lack of cartilage in her knee."[267] To cope with the pain, B.T. took medication every day, and in 2016, two years after the accommodation request, "B.T. also began having seizures," leaving her "too scared to bathe."[268] Not surprisingly, this ordeal "strained Ms. Blue's relationship with her daughter, exacerbated the pain from her arthritis and degenerative bone disease, and caused her anxiety about potential injury to her daughter."[269]

Respondents not only refused to provide the requested accommodation, leaving the petitioners to suffer over three years of pain, humiliation, injury, and stress,[270] but respondents engaged in "an ongoing campaign of intentional discrimination"[271] that can only be described as abhorrent. After receiving the accommodation request, one of the respondents (Ms. Jovic) began to interrogate and intimidate the petitioners' guests, at least twice denying their guests entry to the building.[272] The harassment was so great that "guests stopped visiting,"[273] upon which "B.T.'s quality of life deteriorated rapidly," with no one but her mother for human contact.[274] In addition, Ms. Jovic regularly made false allegations to the police of drug use in petitioners' apartment, along with false noise complaints.[275] She even attempted to evict Ms. Blue and B.T. "based on the false allegations of drug use and noise."[276]

Recall that Tier Three or "egregious" emotional distress claims "generally involve either outrageous or shocking discriminatory conduct *or* a significant impact on the physical health of the plaintiff."[277] Both of these were clearly present in *Blue*: respondents' conduct was shocking and outrageous, and it had a significant impact on the physical and emotional health of B.T. and Ms. Blue. This included, for B.T., head injuries several times a week for years, daily pain, seizures, and isolation, and for

267. *Id.* at 23.

268. *Id.* at 10.

269. *Id.* at 19–20.

270. Petitioners requested the accommodation in March 2014, *id.* at 6, and the Commission issued its decision, requiring respondents to provide the accommodation within three months, in May 2017. *Id.* at 31, 33.

271. *Id.* at 24.

272. *Id.* at 7.

273. *Id.* at 22.

274. *Id.* at 22 (citation and internal quotations omitted).

275. *Id.* at 7.

276. *Id.*

277. Olsen v. Cty. of Nassau, 615 F. Supp. 2d 35, 46 (E.D.N.Y. 2009) (citations and internal quotations omitted). *Accord* Barham v. Wal-Mart Stores, Inc., 3:12-CV-01361, 2017 U.S. Dist. LEXIS 139565, at *6–7 (D. Conn. Aug. 30, 2017).

Ms. Blue, an exacerbation of the pain from her arthritis and degenerative bone disease.[278] The Commission awarded B.T. $45,000, and Ms. Blue $50,000.[279] Given that the *floor* for *Tier One* damages hovers very close to these amounts, and that the court in *Broome* affirmed a Tier One award of $114,000 to each of the plaintiffs ($172,000 at the time of the *Blue* decision) under incontrovertibly less compelling circumstances, this was a grave miscarriage of justice.

Finally, in *Nieves v. Rojas*,[280] the respondent blatantly discriminated against Mr. Nieves and his family based upon source of income, repeatedly informing him that "the apartment's landlord does not take any programs,"[281] and that scheduling a viewing "would be a 'waste' of everyone's time."[282] At the time, Mr. Nieves was homeless, living with his wife and four-year-old son in a homeless shelter.[283] Conditions in the shelter were deplorable. "[T]he shelter had mice infestations," and Mr. Nieves' son "had screamed that there were mice running on his bed."[284] As a result, Mr. Nieves' son was afraid to sleep in his bed, and was "developing nosebleeds."[285] In addition, "water from the upstairs apartment at the shelter had leaked into his bathroom, causing the floor to crumble and mold to grow."[286] Eventually, Mr. Nieves moved his family out of the shelter and into an apartment that did not accept his voucher, "in effect, paying approximately $120.00 more per month than the maximum he might have paid with his voucher."[287]

In her Report and Recommendation, the Administrative Law Judge found that "[p]lainly the situation distressed [Mr. Nieves] and had a significant impact on his family, particularly his young child."[288] In addition, "Respondent's discriminatory actions in this case left Complainant and his family in substandard conditions at a homeless shelter for approximately ten months, where they were exposed to a rodent infestation and mold."[289] This was a source of great anguish and stress for the Respondent, among other things, "making him feel that he could not provide

278. *See supra* notes 265–67 and accompanying text.

279. *Id.* at 24, 26.

280. Nieves Decision, *supra* note 239.

281. *Id.* at 5–3 (citation and internal quotations omitted).

282. Nieves v. Rojas, OATH Index No. 2153/17 (N.Y. City Comm'n on Human Rights Report and Rec. Oct. 24, 2017), at 5 [hereinafter, "Nieves Report"].

283. *Id.* at 4. *Accord* Nieves Decision, *supra* note 239, at 5.

284. *Id.*

285. *Id.*

286. *Id.*

287. Nieves Decision, *supra* note 239, at 6.

288. Nieves Report, *supra* note 282, at 9.

289. Nieves Decision, *supra* note 239, at 12.

for his family's needs."[290] Yet, the ALJ found Mr. Nieves' request for $50,000 to be "excessive" and instead recommended an award of "$10,000 in mental anguish damages,"[291] which the Commission ultimately adopted.[292]

This was a shockingly low award – one-quarter the floor for Tier One Damages[293] – and *Nieves* had the hallmarks of a Tier Two claim, for there was greater harm *and* more offensive conduct than in comparable Tier One cases. Respondent's discriminatory conduct prolonged homelessness for Mr. Nieves and his family in awful conditions for ten months, with "mice infestations," water leaks, a crumbling floor, and growing mold.[294] This left Mr. Nieves' young son stressed "to the point of having frequent nose bleeds."[295] Desperate to free his family from the "substandard" conditions in the shelter, Mr. Nieves forfeited his valuable housing voucher, a massive loss for a low-income New Yorker.[296] Indeed, as a result, he was forced to pay "approximately $120.00 more per month than the maximum he might have paid with his voucher,"[297] and was forced to "change his job twice in order to afford the rent."[298] (There was no award for this clear loss of housing opportunity.[299]) Here again, we are talking about damages that are far more significant than a typical Tier One case.[300]

*Nieves* also involved "more offensive conduct"[301] than a typical Tier One case. Respondent blatantly informed Mr. Nieves that the building did not accept his kind, and he even placed a public advertisement for an apartment in the same building that stated, "No Programs,"[302] dissuading untold numbers of applicants with vouchers or subsidies from finding a home in the building. This brazen discrimination harkens back to the

290. Nieves Report, *supra* note 282, at 6.

291. *Id.* at 6.

292. Nieves Decision, *supra* note 239, at 13.

293. *See supra* Section III.B.

294. Nieves Report, *supra* note 282, at 4.

295. Nieves Decision, *supra* note 239, at 5.

296. *Id.* at 5. Without the voucher, Mr. Nieves explained that he had "to 'push' to afford the rent and that his family at times lives 'check by check.'" *Id.* at 6.

297. Nieves Decision, *supra* note 239, at 6.

298. *Id.* at 6.

299. The Decision notes that Bureau did not "introduce a claim of lost housing opportunity at any point." *Id.* at 11.

300. It appears, moreover, that the damages were even more significant than the Decision reflects: the Bureau's request to reopen the record "to admit additional evidence related to compensatory damages" was denied. *Id.* at 2.

301. *Vangas*, 2015 U.S. Dist. LEXIS 44300, at *60.

302. Nieves Report, *supra* note 282, at 3.

ugliest days of overt discrimination in this country, and it is no less viscerally offensive and consequential because it is based upon a newer protected class. *Nieves* merited a Tier Two award or, at the very least, an award at the highest end of the Tier One range. Instead, Mr. Nieves received an award four times lower than the bottom range of Tier One damages.

Courts and tribunals can always cherry-pick erroneous and/or unduly low awards. For the Commission to repeatedly do so, missing all of the comparable Second Circuit decisions, and eschewing the already-deflated $30,000 to $125,000 range that the federal courts recognize for comparable cases – without even adjusting for inflation and more recent developments – is a violation of both the letter, spirit, and purpose of the Restoration Act.[303] It is a glaring injustice for the largely unrepresented petitioners who seek redress from the Commission.

## CONCLUSION

Over two decades after Judge Carter's dissuasion in *Broome*, courts and tribunals must make every effort not to devalue the genuine emotional pain associated with discrimination through unreasonably low compensatory damage awards. In particular, any formulation of the appropriate range of Tier One emotional distress damages must (1) incorporate and reflect all of the relevant authorities, including no fewer than seven Second Circuit decisions affirming six-figure damage awards for precisely such claims, and (2) account for inflation, adjusting earlier awards for accuracy and fairness (as the Second Circuit has advised). That is not happening at present. Instead, courts are conducting extremely

303. The Commission is doing so over and over again. *See*, *e.g.*, Joo v. UBM Bldg. Maint. Inc., OATH Index No. 384/16, Dec. & Ord. 17 (N.Y. City Human Rights Comm'n Dec. 20, 2018) (awarding $15,000 where "Respondents' conduct was egregious, leaving Complainant financially insecure . . . and involving threatening him with further harm in retaliation for pursuing help through the Bureau"); Gibson v. N.Y. City Fried Chicken Corp., OATH Index No. 279/17, Dec. & Ord. 11 (N.Y. City Human Rights Comm'n Sept. 25, 2018) (awarding $13,000 where disability discrimination "ripped [petitioner] to the core"; rendered petitioner depressed "for a period of at least six months," unable to sleep without relying on medication for about six to eight months," and experiencing "recurrent nightmares"); Carol T. v. Mutual Apts., Inc., OATH Index No. 2399/14, Dec. & Ord. 18 (N.Y. City Human Rights Comm'n April 12, 2018) (awarding $40,000, the floor for Tier One damages, in Tier Two case in which "Respondents' discriminatory conduct directly caused a worsening of Carol's preexisting mental health conditions," as her psychiatrist explained); Martinez v. Joseph "J.P." Musso Home Improvement, OATH Index No. 2167/14, Dec. & Ord. 17 (N.Y. City Human Rights Comm'n Sept. 29, 2017) (awarding $12,000 where, as a result of discriminatory firing, petitioner "worried constantly about being able to afford diapers for her baby and to provide for her family," and where "these financial stresses strained her relationship with her children's father and caused her to lose weight.").

limited independent research, habitually citing flawed district court decisions without determining their accuracy, without ascertaining whether the circuit court has weighed in, and without adjusting cases for inflation.

This is plainly unfair to the claimants, and a serious impediment in combating discrimination. Civil and human rights laws empower private citizens to challenge discriminatory practices, acting as "private attorneys general" to enforce those laws.[304] As one court has observed, "adequate compensation from these suits is necessary to incentivize civil rights plaintiffs to continue to play the role of private attorney general."[305] Additionally, "the damages the plaintiff recovers deter future civil rights violations."[306] Awarding unduly low emotional distress damages disincentivizes citizens from bringing suit, and emboldens the perpetrators.

With respect to the HRC, these low awards are also a betrayal of the letter, spirit, and purpose of the Restoration Act, and the Human Rights Law. Pursuant to the Restoration Act, the Commission must construe relevant authority as broadly as possible, and in favor of discrimination plaintiffs as far as "reasonably possible."[307] There can be no question that six-figure Tier One awards are not only "reasonably possible," but in fact repeatedly sanctioned in the federal courts. Yet, rather than looking for the highest awards "reasonably possible," the Commission is cherry-picking anomalously low federal and HRC cases in granting the *lowest conceivable* awards. Nearly a decade and a half after passage of the Restoration Act, this, too, must change.

304. Grosvenor v. Brienen, 801 F.2d 944, 946 (2d Cir. 1986) ("A plaintiff who obtains relief in a civil rights suit does so not for himself alone but as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority.") (citations and internal quotations omitted).

305. Cannata v. Wyndham Worldwide Corp., 798 F. Supp. 2d 1165, 1174 (D. Nev. 2011). *Accord* Bell v. Helmsley, Index No. 111085/01, 2003 N.Y. Misc. LEXIS 537, at *16 (Sup. Ct. N.Y. Cty. 2003) ("[I]n civil rights cases there is an overriding transcending principle that plaintiffs in civil rights actions seek to vindicate the important civil and constitutional rights that cannot be valued in monetary terms. In short, each litigant is viewed as a private attorney general to encourage private enforcement for the public benefit . . . .").

306. Grosvenor v. Brienen, 801 F.2d 944, 947 n.5 (2d Cir. 1986). *See*, *e.g.*, Baker v. John Morrell & Co., 249 F. Supp. 2d 1138, 1191 (N.D. Iowa 2003) ("It is widely recognized that Congress enacted the 1991 Civil Rights Act [allowing for compensatory damages, including emotional distress damages, In Title VII actions], in part, because the damages available to successful civil rights plaintiffs were an insufficient deterrent to employers and did not function as an adequate compensatory mechanism.").

307. Mihalik v. Credit Agricole Cheuvreux North America, 715 F.3d 102, 109 (2d Cir. 2013) (citations and internal quotations omitted); Albunio v. City of New York, 16 N.Y.3d 472, 477–78 (2011).