

THE HONORABLE TANA LIN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
SEATTLE DIVISION

PAUL BERNAL and JACK COE, individuals,

Case No. 2:22-cv-00533-TL

Plaintiffs,

**BOEING’S BRIEF REGARDING  
GARDEN-VARIETY EMOTIONAL  
DISTRESS**

vs.

THE BOEING COMPANY,

Defendant.

**I. INTRODUCTION AND STATEMENT OF FACTS**

Throughout the duration of this case, Plaintiff Paul Bernal maintained that he would be seeking only “garden-variety” emotional distress damages from Defendant The Boeing Company.

In response to Boeing’s interrogatory on this subject, Plaintiff stated the following:

**INTERROGATORY NO. 5:** Identify each health care professional, including, without limitation, all medical personnel, hospitals, clinics, psychologists, physicians, counselors, social workers, or mental health care providers you have consulted with and/or been treated by for any reason from April 8, 2017, to the present. Include in your answer the name, institution, and business address and phone number of each such health care provider and the dates of, and reasons for, each such consultation and treatment.

**ANSWER:** Objection. This question seeks privileged health care information (see, RCW 49.60.510). *Bernal is not asserting that defendant’s conduct resulted in a diagnosed physical or psychiatric injury, nor will he introduce or rely upon records or testimony of any health care provider or expert witness to support his claim for emotional distress damages.*

(Emphasis added.)



1 Wn.2d 795, 798, 466 P.3d 1077 (2020) (Gordon McCloud, J., dissenting in part and concurring in  
2 part) (recognizing RCW 49.60.510 abrogated prior case law that provided for mandatory waiver  
3 when plaintiffs claim emotional distress damages under WLAD). Substantive analysis of this  
4 change of Washington law is sparse.

5 Federal courts have a similar psychotherapist-patient privilege framework to evaluate  
6 emotional distress claims. When a plaintiff seeks certain emotional distress damages, the  
7 psychotherapist-patient privilege may be waived. *Dawson v. S. Corr. Entity*, No. C19-1987RSM,  
8 2021 WL 2012310, \*3 (W.D. Wash. May 20, 2021) (citing *Santelli v. Electro-Motive*, 188 F.R.D.  
9 306, 308 (N.D. Ill. 1999)). This is because “[f]or each item of damages, whether economic or  
10 non-economic, the plaintiff must show that the damage was proximately caused by the defendant’s  
11 unlawful conduct.” *Id.* (quoting *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568 (S.D. Cal.1999)).  
12 Further, “[i]f there is evidence to show that a plaintiff’s emotional distress may have been caused  
13 by something besides the injury, fairness dictates that the defendant should be permitted access to  
14 that evidence.” *Id.*

15 Washington federal courts have described garden-variety emotional distress as “ordinary  
16 or commonplace emotional distress” that is “simple or usual.” *Equal Emp’t Opportunity Comm’n*  
17 *v. Big Five Corp.*, No. C17-1098RSM, 2018 WL 2317613, at \*4 (W.D. Wash. May 22, 2018). In  
18 contrast, emotional distress that is not garden-variety “may be complex, such as that resulting in a  
19 specific psychiatric disorder.” *Id.* “When making allegations of ‘garden-variety’ emotional  
20 distress, a plaintiff does not rely on medical records or medical expert testimony for proof at trial.”  
21 *Uhler v. Van Cleave*, No. C16-1278RSM, 2017 WL 553276, \*11-12 (W.D. Wash. Feb. 10, 2017).

22 For example, in *Robertson*, the plaintiff brought discrimination and retaliation claims as  
23 well as negligent infliction of emotional distress against his employer. *Robertson v. Catholic*  
24 *Cmty. Servs. of W. Wash.*, No. C19-1618 RSM, 2020 WL 1819842 at \*2 (W.D. Wash. Apr. 10,  
25 2020). The plaintiff claimed the stress caused by the employer’s alleged discrimination and  
26 retaliation was extreme, causing him to pursue professional treatment, take days off from work,

1 spiral into “depression, anxiety, and alcohol abuse” such that he had to undergo treatment for  
2 several weeks and work no more than four hours a day. *Id.* at \*7. The court found that the plaintiff  
3 was not advancing “garden-variety” emotional distress claims. *Id.*

4 In cases in which the court has found that plaintiffs asserted “garden-variety” emotional  
5 distress damages, they sought relief only for non-medical emotional harms. For example, in  
6 *Dawson*, the court found that garden-variety emotional distress of plaintiffs included damages  
7 related to stress, loss of enjoyment of life, humiliation, embarrassment, fear, anxiety, and  
8 anguish/grief. *Dawson*, 2021 WL 2012310, at \*6. The court noted that these damages were not  
9 medical diagnoses, but lay observations of harm that plaintiffs claimed they experienced because  
10 of the defendants’ conduct. *Id.* The court further explained that these diagnoses did not strike the  
11 court as “severe” given the circumstances, and that the plaintiffs stated they would not seek to use  
12 medical testimony or records at trial and would not seek medical expenses as damages. *Id.*

13 In another matter here in the Western District of Washington, the plaintiff sought non-  
14 medical emotional harm damages related to stress, loss of enjoyment of life, humiliation,  
15 embarrassment, fear, anxiety and anguish/grief as a result of plaintiff’s conduct. *Karrani v.*  
16 *JetBlue Airways Corp.*, No. C18-01510-RSM, 2019 WL 2269818, at \*6 (W.D. Wash. May 28,  
17 2019). Although the court found that these damages were garden-variety emotional distress, the  
18 court acknowledged that in certain cases, “anxiety” constitutes a psychological condition more  
19 severe than “garden-variety” emotional distress. *Id.* (citing *Ginter v. BNSF Ry. Co.*, No. C13-  
20 00224-RSM, 2014 WL 294499, at \*3 (W.D. Wash. Jan. 24, 2014)). It recognized that in certain  
21 instances, plaintiffs allege anxiety in a manner that suggests a clinical condition of anxiety. *Id.*  
22 However, it felt that in that case, the plaintiff alleged anxiety in a generalized way, relying on the  
23 dictionary definition of the term: “fear or nervousness about what might happen.” *Id.* (citations  
24 omitted). It determined this claim of “anxiety” was a lay observation of the plaintiff’s emotions  
25 and therefore “garden-variety” emotional distress. *Id.* at \*7. The court accordingly denied the  
26 defendant’s motion to compel medical records. *Id.*

1           **B. Damage Calculation**

2           The next question is how this court should calculate garden-variety emotional distress  
3 damages if, in fact, Plaintiff is entitled to any such damages. Washington’s Pattern Jury Instruction  
4 on employment discrimination damages instructs fact finders, “The law has not furnished us with  
5 any fixed standards by which to measure [emotional distress].” Washington Pattern Jury  
6 Instructions—Civil (“WPI”) 330.81 (7th ed. 2022). The Ninth Circuit Pattern Instruction does not  
7 provide additional guidance beyond admonishing against speculation and guesswork. Manual of  
8 Model Civil Jury Instructions for District Courts of the Ninth Circuit 5.1; 5.2 (2017)  
9 <https://www.ce9.uscourts.gov/jury-instructions/node/106> (“Your award must be based upon  
10 evidence and not upon speculation, guesswork or conjecture.”).

11           To the extent the court wishes to look outside Washington for damage calculation guidance  
12 involving retaliation claims for transfers keeping the same salary, New York provides helpful  
13 instruction on garden-variety distress damage awards in those instances. Much like Washington,  
14 New York allows plaintiffs to maintain psychotherapist-patient privilege in employment cases  
15 unless the party asserts a claim for specific mental or physical injuries resulting from the alleged  
16 discrimination. *See Jarrar v Harris*, 2008 WL 2946000, at \*3-4 (E.D.N.Y. July 25, 2008). For  
17 example, a New York court considered claims by a plaintiff who brought a discrimination action  
18 against his employer for retaliation when he was transferred to a job in a less desirable department  
19 but retained the same salary. *Reiter v. Metropolitan Transp. Authority of New York*, 01 Civ. 2762  
20 (JGK) \*25 (S.D.N.Y. Sep. 30, 2003) (internal quotations omitted). In that case, the plaintiff sought  
21 emotional distress damages supported by his own lay testimony at trial. *Id.* at \*25. The jury found  
22 for the plaintiff, awarding him \$140,000. *Id.* at \*38. The court found the award excessive and  
23 reduced it to \$10,000, providing, “In evaluating the reasonability of a jury award in a retaliation  
24 or discrimination suit, it is useful to look at the duration, extent and consequences of the mental  
25 anguish suffered by plaintiff and to see whether the case fits into a class of so-called garden-variety  
26 mental-anguish claims, in which the awards hover in the range of \$5,000 to \$30,000.” *Id.*

1 Although not a fixed standard, Washington courts routinely reduce excessive emotional  
 2 distress awards under WLAD in light of “meager evidence” in the form of lay testimony. *See e.g.*  
 3 *Johnson v. Albertsons LLC*, No. 2:18-01678-RAJ, 2020 WL 3604107 (W.D. Wash. July 2, 2020)  
 4 (ordering six figure award be substantially reduced by more than half for emotional distress claims  
 5 under WLAD); *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 140, 856 P.2d 746 (1993)  
 6 (reducing excessive emotional distress damages award in light of “meager evidence”).

7 In Plaintiff’s case, like in *Reiter*, Plaintiff’s employment **was not terminated**; he received  
 8 a demotion and transferred teams at Boeing, and received the same senior manager salary that has  
 9 been increased every year since. Plaintiff actually received a raise every year in which he claims  
 10 he was being retaliated against. If the Court were to find in Plaintiff’s favor, it should award only  
 11 a very meager sum to reflect the alleged “garden-variety” emotional distress damages.

### 12 III. CONCLUSION

13 Boeing has asked the Court in Closing Argument to enter judgment in favor of Boeing on  
 14 both of Plaintiff’s claims, and this request will be amplified in its soon-to-be-filed Proposed  
 15 Findings of Fact and Conclusions of Law.

16 However, if the Court finds that Plaintiff is entitled to some form of relief in this matter,  
 17 Boeing respectfully asks the Court to consider the meager emotional distress testimony in this  
 18 matter based on the guidance set forth above. Such guidance informs us that “garden variety”  
 19 emotional distress damages are limited to simple, non-medical harms. Because Bernal failed to  
 20 allow pre-trial discovery and failed to produce medical and/or mental health records or expert  
 21 testimony to seek compensation for his medical and psychiatric claims, the Court should disregard  
 22 any testimony regarding the same. Moreover, any award of monetary damages should reflect the  
 23 simple, non-medical nature of any such purported harm.

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1 Respectfully submitted this 17th day of November, 2023.

2  
3 OGLETREE, DEAKINS, NASH, SMOAK &  
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14  
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 17, 2023, I served the foregoing BOEING’S BRIEF REGARDING GARDEN-VARIETY EMOTIONAL DISTRESS via the method(s) below on the following parties:

Margaret M. Boyle, WSBA #17089  
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- by **electronic** means through the Court’s Case Management/Electronic Case File system, which will send automatic notification of filing to each person listed above.
- by **mailing** a true and correct copy to the last known address of each person listed above. It was contained in a sealed envelope, with postage paid, addressed as stated above, and deposited with the U.S. Postal Service in Seattle, Washington.
- by **e-mailing** a true and correct copy to the last known email address of each person listed above.

SIGNED THIS 17th day of November, 2023 at Seattle, Washington.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: /s/ Jordan E. Sheets  
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