

SELECTED ISSUES ON PUNITIVE DAMAGES IN DISCRIMINATION CASES

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By

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I. Availability of Punitive Damages Under Title VII of the Civil Rights Act of 1964¹

A. Punitive Damages Allowed Subject to a Statutory Cap

1. Title VII provides that punitive damages are available where the defendant “engaged in a discriminatory practice ... with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981(b)(1).
2. Punitive damages are subject to a **cap** on “the sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section.” 42 U.S.C. § 1981 a(b)(3)(B); Cush-Crawford v. Adchem Corp., 271 F.3d 352, 356-57 (2d Cir. 2001). The statutory cap is to be excluded from jury instructions. Once the jury returns its verdict, the trial court must ensure that the award complies with the statutory maximums and make any necessary reductions. Parrish v. Sollecito, 280 F.Supp.2d 145, 155, (S.D.N.Y. 2003), citing, Luciano v. The Olsten Corp., 110 F.3d 210, 221 (2d Cir. 1997).
3. Back pay awards are not included in the computation of the statutory cap. Kuper v. Empire Blue Cross & Blue Shield, 2003 WL 359462, * 10 (S.D.N.Y., February 18, 2003). Whether front pay is included in the cap is an unresolved issue. Id at * 11.
4. Statutory Cap Amounts (42 U.S.C. § 1981 a(b)(3)(A)-(D)):

Defendant with	14-100 employees-\$50,000
	101-200 employees-\$100,000
	201-500 employees-\$200,000
	501 or more employees-\$300,000
5. In the Second Circuit, actual or nominal damages are **not** a prerequisite for an award of punitive damages under Title VII. Cush-Crawford, 271 F.3d at 359. There is a split among the circuits on this point. Some circuits require an award of compensatory or nominal damages to sustain an award of punitive

¹ This Study focuses primarily on Title VII. For punitive damages purposes the Americans with Disabilities Act (ADA) and Title VII are virtually the same. The Age Discrimination in Employment Act (ADEA) does not allow for punitive damages.

damages, while others require, at a minimum, that the plaintiff submit proof of actual damages. Id at 357-58.

B. Requisite State of Mind: The Employer Discriminated in the “Face of Perceived Risk that Its Actions Will Violate Federal Law”

6. The U.S. Supreme Court in Kolstad v. American Dental Association, 527 U.S. 526, 529-30 (1999) has spoken with respect to the state of mind necessary for an award for punitive damages under Title VII: “[t]he employer has engaged in intentional discrimination and has done so ‘with malice or with reckless indifference to the federally protected right of an aggrieved individual.’” See also Zimmerman v. Associates First Capital Corp., 251 F.2d 376, 384 (2d Cir. 2001).
7. “Malice” or “recklessness” focuses on the actor’s state of mind. Kolstad, 527 U.S. at 535. Egregious misconduct, although evidence of the requisite mental state, is not a prerequisite for an award of punitive damages. Id. Specifically, a plaintiff must establish that the **“employer...at least discriminate[d] in the face of a perceived risk that its actions will violate federal law.”** Id at 536. By contrast, an employer would not have the requisite state of mind if it was unaware of the relevant federal prohibition or acted with the distinct belief that its discrimination is lawful. Kolstad, 527 U.S. at 537.
8. Punitive cannot be sustained where an employer is unaware of the federal prohibition against discrimination or where the discrimination claim is based on a novel theory of liability or the employer reasonably believes that its conduct fell within an exception to liability. Kolstad, 527 U.S. at 536-37.
9. Evidence that an employer gave a terminated false and misleading information about potential jobs supports a finding of malice or reckless indifference. Kuper v. Empire Blue Cross & Blue Shield, 2003 WL 359462 (S.D.N.Y., February 18, 2003).

C. An Employer May Be Assessed Punitive Damages for the Acts of Its Agents Acting Within the Scope of Their Employment

10. An employer may be liable for punitive damages for the acts of its agents, where an employee serving in a managerial capacity committed the wrong while acting within the scope of his employment, unless the agent’s discriminatory employment

decisions were contrary to the employer's good faith efforts to comply with Title VII. Kolstad, 527 U.S. at 545.

11. Notably, training in "equal opportunity" may now be fairly understood to convey some awareness of Title VII requirements and permits an inference of the requisite mental state. Zimmerman, 251 F.3d at 385. Furthermore, general knowledge of anti-discrimination law and policy is sufficient for a finding that federal law prohibits particular discriminatory acts. Parrish, 280 F.Supp.2d at 153.

D. Affirmative Defense: The Employer Has Made a Good Faith Effort to Enforce an Anti-discrimination Policy

12. Kolstad insulates an employer from punitive damages if the employer has made "good faith efforts to enforce an anti-discrimination policy." This requires an employer to establish both (a) that it has an anti-discrimination policy and (b) that it has made a good faith effort to enforce the policy. The jury may be instructed on this affirmative defense if there is evidence of both of these elements. Zimmerman, 251 F.3d at 385.
13. The existence of a written anti-discrimination policy does not automatically establish good faith enforcement. Kuper, 2003 WL 359462, * 5.
14. "A dearth of anti-discrimination training during the time period at issue in [the] lawsuit could actually lead the jury to infer that [the defendant] did not, in fact, make a good faith effort to enforce such policies." Kuper, 2003 WL 359462, * 5, citing, Greene v. Coach, Inc., 218 F.Supp.2d 404, 414 (S.D.N.Y. 2002).

E. State Law Issues

15. The New York State Human Rights Law does not provide for punitive damages, but the New York City Administrative Code § 8-502(a) provides for uncapped punitive damages awards. The federal standard enunciated in Kolstad applies to the imposition of punitive damages under the New York City Administrative Code. Farais v. Instructional Systems, Inc., 259 F.3d 91, 101-02 (2d Cir. 2001).
16. It is unresolved whether punitive damages under the New York City Administrative Code may be exempted from the federal statutory cap. Zimmerman, 251 F.3d at 384; Greenbaum v.

Handelsbanken, 67 F.Supp.2d 228, 262 (S.D.N.Y. 1999)(allowing \$1.25 million in punitive damages to stand under New York City Administrative Code in addition to amounts under federal cap).

17. Title VII does not preempt the New York City Administrative Code. Greenbaum, 67 F.Supp.2d at 265. Compare Chambers v. Capital Cities/ABC, 851 F.Supp. 543 (S.D.N.Y. 1994)(the Age Discrimination in Employment Act, which does not allow for punitive damages, preempts punitive damages for state law age discrimination claims).

F. Miscellaneous

18. A jury can properly consider the existence of an indemnity agreement in order to obviate the need to determine whether a defendant's limited financial resources justifies some reduction in the amount of punitive damages that would otherwise be awarded. Additionally, it is the defendant's burden to show that his financial circumstances warrant a limitation on a punitive damages award. Mathie v. Fries, 121 F.3d 808, 816 (2d Cir. 1997).

G. Due Process Propriety of Punitive Damages Awards

19. Due process requires an evaluation of punitive damages awards for excessiveness and whether the party being punished received fair notice of the conduct that will subject him to punishment. The U.S. Supreme Court in BMW of North America, Inc. v. Gore, 517 U.S. 559, 574-75 (1996) set forth three guideposts by which lower courts assess a punitive damages award: (1) the degree of reprehensibility of the conduct, (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases.
20. The Court in Gore held that the most important indicia of the reasonableness of the punitive damages award is the reprehensibility of the defendant's conduct. Id at 575.
21. The Supreme Court in State Farm v. Campbell, 123 S.Ct. 1513, 1524 (2003) refined the Gore analysis. Although the Court did not prescribe a fixed ratio between compensatory and punitive damages, it held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.... Single-digit multipliers are more likely to comport with due process, while still achieving the

State’s goals of deterrence and retribution....” Id. A higher ration might comport with due process where “a particularly egregious act has resulted in only a small amount of economic damages...and where the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.” Id.

22. Gore and State Farm indicate that the “following elements are to be weighed in assessments of the propriety and outer limits of punitive awards: (a) the reprehensibility of the underlying conduct determined by (i) the character of the acts, (ii) the type and extent of the pertinent injuries, actual and potential, and (iii) the nature of the parties and their relationships to each other and to the alleged unlawful conduct giving rise to the action; (b) the proportionality of the punitive award in relation to the relevant harms and the compensatory damages the verdict allocates to redress them; and (c) aggravating or mitigating circumstances or conduct, including those arising during the course of the underlying litigation or other related proceedings.” Parrish, 280 F.Supp.2d at 162.

Representative Examples of Judicial Review of Punitive Damages Awards

23. In Parrish, the Court reduced a punitive damages award of \$500,00 to \$50,000 in a sex discrimination case, where the jury awarded \$15,000 in compensatory damages. 280 F.Supp.2d at 164.
24. Punitive damages of \$200,000 upheld where actual damages of \$178,878 were awarded in a case under the ADA. Kuper, 2003 WL 359462, * 10-11.
25. In Fernandez v. North Shore Orthopedic Surgery & Sports Medicine, 79 F.Supp.2d 197, 208 (E.D.N.Y. 2000), the Court reduced the punitive damage award from \$100,000 to \$50,000 where no compensatory damages were awarded.
26. In Iannone v. Frederic R. Harris, Inc., 941 F.Supp. 403, 415 (S.D.N.Y.), the Court reduced the punitive damages award from \$250,000 to \$50,000 where there was a single incident of retaliation and the jury found no sexual harassment.
27. In Lamberson v. Six West Retail Acquisition, Inc., 2002 WL 59424, *7-8 (S.D.N.Y., Jan. 16, 2002), the Court reduced the

punitive damages award from \$400,000 to \$30,000 on a finding of retaliation.

28. In Greenbaum, the Court upheld a \$1.25 million punitive damages award under the New York City Administrative Code, where the jury awarded \$320,000 in back pay in a sex discrimination case. 67 F.Supp.2d at 262-273.
29. In McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., 682 N.Y.S.2d 167 (1st Dep't 1998), the Court reduced the punitive damages award in a sexual harassment case from \$3 million to \$1.5 million (after it had been reduced from \$5 million to \$3 million by the trial court) based on a \$650,000 compensatory damages award.
30. In Bell v. Helmsley, 2003 WL 1453108 (N.Y. Sup. Ct., March 4, 2003), the Court reduced a \$10 million punitive damages award to \$500,000, based on a \$54,000 compensatory damages award in a hostile work environment case.
31. The Court in Zimmerman upheld a \$300,000 punitive damages award (the maximum under the cap) in a sex discrimination case. The jury had returned a \$1 million punitive damages verdict (which was reduced the maximum allowed under the cap), as well as award, back pay damages of \$165,000 and compensatory damages of \$50,000. 251 F.3d at 386.
32. The Court in Cush-Crawford upheld a \$100,000 punitive damages verdict where the jury awarded zero dollars in actual damages in a hostile environment case. 271 F.3d at 359.