Defending Against Damages in Employment Discrimination Cases
Calculating Front Pay Awards, Mitigating Emotional Distress and Punitive Damages

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1pm Eastern  |  12pm Central  |  11am Mountain  |  10am Pacific

Today’s faculty features:

Joshua M. Davis, Director, Goulston & Storrs, Boston
Ellen J. Zucker, Partner, Burns & Levinson, Boston
Timothy R. Newton, Partner, Constangy Brooks & Smith, Atlanta

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Litigating Damages in Discrimination and Retaliation Cases

Calculating Front Pay Awards

Joshua M. Davis, Director
Goulston & Storrs, Boston
jdavis@goulstonstorrs.com
(617) 574-4110
Introductory Remarks

Overview of presentations

Encourage questions and dialogue

Bottom line – lawyers on both sides of the equation need a realistic understanding of damages in order to determine how best to approach any employment case.
Tyler v. Union Oil Co. of California, 304 F.3d 379 (5th Cir. 2002)

Front pay is an equitable remedy applied when preferred remedy of reinstatement is impracticable.

Intended to compensate plaintiff for wages and benefits he would have received if not for the discrimination.

Plaintiffs not entitled to front pay and would not have received wages absent discrimination where, after their termination, the employer sold assets and terminated its employees to create a new company.
To qualify for front pay, a plaintiff may only reject offer of reinstatement if rejection is reasonable.

Plaintiff was unreasonable to reject offer that was made in good faith, fewer than 2 months after his termination, prior to the EEOC Charge, and after those responsible for firing the him were no longer at the company.

Defendant’s liability for front pay ended when the plaintiff refused the offer of reinstatement.

Front pay award of $105,000 upheld where plaintiff was unlawfully terminated on the basis of his service with the National Guard.

Plaintiff was 43 and relatively young in his work life.

The fact that the plaintiff did not find work after a diligent and reasonable search showed he would be unlikely to find other opportunities in the near future.
Observations

Not subject to the damages cap – equitable equivalent of reinstatement

Large awards are assumption-dependent

Defense goal is to make assumptions unreasonable – “unconditional offer of reinstatement”

Evidentiary equivalent of the “unconditional offer” or its opposite
I. Introduction

• When an employee lodges a complaint of discrimination, an employer naturally and appropriately focuses on issues relating to liability.

• Did the events described by the employee actually occur? What do his supervisor and others involved say about why events occurred? What is the performance record of the complaining employee? Are there any current problems management is pressing the employee to address? Has the employee treated in ways that are similar to the approach used for other employees? What explanations for actions were given to the employee at the time? What is the workplace atmosphere? Have you heard the same sort of complaints about this supervisor, this leadership team or this workplace atmosphere before?
• While a focus on issues relating to liability is critical to understanding and defending against a claim, equally critical is the assessment of an employer’s exposure to damages.

• An early and probing assessment of possible damages awards permits an employer to engage in productive discussions about resolving claims, in framing discovery and, ultimately, in defending against substantial awards at trial.

• In this presentation, I will discuss how to assess and limit emotional distress and punitive damages awards in employment discrimination actions.
II. Emotional Distress Damages In Employment Discrimination Cases

Federal Law

• Title VII permits the award of reasonable damages for emotional distress, defined to include mental pain, discomfort, indignity, depression, fear, anxiety, or humiliation by loss of reputation suffered as a result of the discrimination and/or retaliation. The award of such damages under Title VII is capped by statute (see below).

• Emotional distress is not presumed in every case and the plaintiff bears the burden of proof. While federal courts have not required in each instance that emotional distress damages be supported by evidence that a plaintiff sought therapy or was under psychiatric care, the case law makes clear that such treatment is useful to a plaintiff in proving up and sustaining substantial emotional distress awards.
See, e.g., Landgraf v. USI Film Products, 511 U.S. 244, 253 (1994) (“a Title VII plaintiff who wins a back pay award may also seek compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses”);

Aponte-Rivera v. DHL (USA) Solutions, Inc., __ F.3d __; 2011 WL 2027977 (1st Cir., May 25, 2011) (collecting cases and upholding $200,000 award where a hostile work environment claim was found but where the source of the plaintiff’s emotional distress was deemed “at best, mixed” because the plaintiff “experienced distress due to mental health issues, physical ailments, and general work stress” and where the plaintiff did not present evidence of “outward manifestations of emotional distress” or “long term distress or treatment”).
II. Emotional Distress Damages In Employment Discrimination Cases (cont.)

State Law

- The standards for proof of emotional distress damages may vary slightly from state to state and may not be subject to statutory caps. You need to make sure that you are aware of state law requirements as they reflect:
  - whether or not there are caps on emotional distress damages under state discrimination laws;
  - whether state law allows a practical presumption of emotional distress absent evidence of medical care for mental anguish or injury; and
  - how state law contends with the issue of mitigation in the area of emotional distress.
II. Emotional Distress Damages In Employment Discrimination Cases (cont.)

How To Assess The Possibility of A Substantial Emotional Distress Award

• When a claim is made, an employer’s reaction to that claim should include a tough-minded assessment of the risks that a jury could award significant emotional distress damages to compensate the plaintiff. It is helpful to remember the following:

  – Sticks and stones ... but words can hurt you.

Where the claim made is that a plaintiff has had to endure a work environment made hostile by sexually or racially charged conduct, an employer faces the possibility of significant emotional distress awards, depending in part on the severity of the conduct, the targeting of the employee particularly, and the duration of difficulties. If a plaintiff has attempted internal remediation without success, an employer can brace for a significant emotional distress award, even if no therapy was undertaken. On the other hand, if the hostile environment claim is slim and there is some evidence that a plaintiff contributed or at least did not seem terribly offended as events unfolded, a plaintiff will find a significant emotional distress award harder to prove or to sustain.
II. Emotional Distress Damages In Employment Discrimination Cases (cont.)

— **Beware the diligent and loyal worker.**

The narrative of a long-time employee pushed out of a job – particularly where that employee carries family responsibilities – is the stuff of high jury awards of emotional distress; it also makes for an award that is unlikely to be disturbed on appeal. *E.g.*, *McInerney v. United Airlines, Inc.*, __ F.3d __; 2011 WL 1350453 (10th Cir. April 11, 2011) (focusing on the particulars of a plaintiff’s experience, the court considered the nature of the harm suffered by the plaintiff and the context of the discriminatory behavior, noting that the plaintiff testified about being “devastated” and “humiliated” by her termination, that she “couldn't stop crying, and for weeks on end, [and] didn't really sleep, and it just, it was devastating and humiliating” and that the termination was the end of an eleven-year career with United was that was “part of her identity” and that she felt stigmatized by having to report to potential employers that she had been fired from her job.” Importantly, the court also found support for a substantial award in the testimony that the termination “put [the plaintiff] over the edge” regarding the stress she already was experiencing because she had a very sick child at home).
Take a realistic look at a supervisor’s punishing conduct.

Retaliation claims are powerful claims not only in terms of liability but damages. Where conduct can be viewed as intentionally punishing, a jury may respond powerfully – and a court will not be quick to solve the problem for an employer. See, e.g., McInerney, 2011 WL 1350453 (observing that the “context of retaliatory behavior is ... relevant” to the award of emotional distress damages, the court determined that a plaintiff’s persistent requests for unpaid leave denied by supervisors who were aware of her severe family circumstances and who managed a department that could have functioned in the plaintiff’s absence all supported a significant emotional distress award).
II. Emotional Distress Damages In Employment Discrimination Cases (cont.)

• Do not reject the possibility of emotional distress awards because there is evidence that the plaintiff continues to function reasonably in certain settings.

• How To Defend Against Substantial Awards By Marshaling Facts In Discovery
  • Use informal discovery. Talk to coworkers. Find out what else was going on in a plaintiff’s life. Reaction to events as they unfolded.
  • Fully explore medical history regarding therapy and other sources of emotional distress; depose treatment providers and subpoena their records directly.
- **New frontiers?** In certain circumstances, you may be able to explore questions about a plaintiff’s immigration status relevant to questions about the source of an employee’s emotional distress separate and apart from the conduct of his or her employer. See, e.g., E.E.O.C. v. Evans Fruit Co., Inc., __ F.Supp.2d __; 2011 WL 2471749 (E.D.Wash., June 21, 2011).

- **Get to the garden, if you can.** In evaluating the reasonableness of an emotional distress damages award in discrimination cases, courts often examine the duration, extent and consequences of mental anguish suffered by the plaintiff to determine whether the case is a “garden variety” mental-anguish claim, in which awards, on the low end, “hover in the range of $5,000 to $30,000.” Kinneary v. City of New York, 536 F.Supp.2d 326, 331 (S.D.N.Y. 2008); see also Price v. City of Charlotte, N.C., 93 F.3d 1241, 1251 (4th Cir. 1996).
II. Emotional Distress Damages In Employment Discrimination Cases (cont.)

At Trial

– **Raise questions about the sources of emotional distress in a plaintiff’s life** and suggest that whatever happened at work, the distress she or he says was *caused* by the workplace conduct was instead caused by other forces. Be careful here. A good plaintiff’s attorney will craft the situation as the plaintiff’s attorney in *McInterney* apparently did and will seek to achieve a *higher* award because the plaintiff was uniquely vulnerable given her circumstances.

– **Suggest that the plaintiff has done nothing to try to lessen the emotional damages** he or she purportedly has suffered. This line of questioning is dangerous with certain plaintiffs and without a specific instruction on the plaintiff’s burden to mitigate her emotional damage. Tread carefully but hit this theme if the plaintiff is overly dramatic and appears to have languished in self-pity.

– **Read the jury and the plaintiff carefully.** Don’t try to crush a sympathetic plaintiff. It will backfire.
Remember that you are playing to the jury and the trial court: Appeals Courts are loathe to get involved in damages assessments.

– The First Circuit’s decision in Tobin v. Liberty Mutual Ins. Co., 553 F.3d 121, 141 (2009), offers a good reminder that emotional distress damages, once determined by a jury, will not be disturbed unless they are deemed “grossly excessive.”

– The case reaffirmed that appellate courts “will not disturb an award of damages because it is extremely generous or because we think the damages are considerably less,” but will adhere to the jury's judgment unless the damages awarded are “so grossly disproportionate to any injury established by the evidence as to be unconscionable as a matter of law.” Id.

– Even where a jury’s award is “certainly generous and at the outer reaches of a reasonable jury verdict,” it will not be disturbed if the facts before the jury permitted the determination. Id. In affirming the award, the First Circuit noted the “esoteric nature of damages for emotional distress.” Id.
III. Punitive Damages

Title VII: Federal Law


- Punitive damages are available where an employer has engaged in discriminatory practices “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”
State Law

– Several states have cognate anti-discrimination laws that do not cap damages or that offer different caps.

– Where a party litigates in federal court under both state and federal theories, generally the plaintiff will seek damages under the more generous state law, if possible.

– Where state and federal law both have caps on damages, the caps are treated as co-extensive and not cumulative. Giles v. Gen. Elec. Co., 245 F.3d 474, 492 (5th Cir. 2001).

– The federal cap has been held by circuit after circuit to apply not per claim but per action, limiting the total recovery of damages for a plaintiff. E.g., Black v. Pan American Laboratories, L.L.C., __ F.3d __, 2011 WL 2673096 (5th Cir., July 11, 2011) (collecting cases).
III. Punitive Damages (cont.)

Some Standards and Cautions

• Punitive damages are available in Title VII claims where “the employer has engaged in intentional discrimination and has done so with ‘malice or with reckless indifference to the federally protected rights of an aggrieved individual.’”


  – The plaintiff must show that the employer “discriminate[d] in the face of a perceived risk that its actions will violate federal law.” Id. at 536.

  – Outrageousness or egregiousness of an employer’s behavior may provide evidence of the defendant's bad motive, but it is bad intent that is required to award punitive damages.

  – It is axiomatic that the purpose of punitive damages is to punish and deter defendants. “Most often ... eligibility for punitive awards is characterized in terms of a defendant's motive or intent.” Id., at 538 (emphasis added).
III. Punitive Damages (cont.)

Policies are not necessarily a protection

– If an employer knows what the law requires, has policies in place, but fails to comply in good faith, a punitive damages award may issue. Swinton is immune from punitive damages because a reasonable juror could certainly have determined that it had not acted in good faith to comply with Title VII. Swinton v. Potomac Corp., 270 F.3d 794, 809-11 (9th Cir. 2001).
III. Punitive Damages (cont.)

Closing Your Eyes To Problems Can Create More

– Where an employer allows a senior employee to participate in the decision to terminate an employee when senior officials knew that there were problems between the two, a jury question existed as to whether the employer was reckless and thus susceptible to a finding that a punitive damages award was appropriate in the former employee's Title VII race discrimination and retaliation action. Thomas v. iStar Financial, Inc., 629 F.3d 276, 281 (2nd Cir. 2010).
III. Punitive Damages (cont.)

• Are punitive damages now limited to a 1:1 ratio?

• The implications of the Supreme Court’s Exxon Valdes decision

  • In the final days of its 2007 – 2008 term, the United States Supreme Court announced its decision in Exxon Shipping Co. et al. v. Baker et al., 128 S.Ct. 2605 (2008). Exxon was most certainly not an employment case: the question before the Court was the appropriateness of a punitive damage award of $4.5 billion in a suit arising out of the grounding of an oil supertanker The Exxon Valdes on the Bligh Reef off the Alaskan coast, and the massive oil spill that followed.

  • In the civil suit, the jury had awarded $507.5 million in compensatory damages. Before the jury got the case, the Defendants had settled for payments in excess of $1 billion on state and federal claims for environmental damages and, in the aftermath of the spill, Exxon had spent around $2.1 billion in cleanup efforts. The Supreme Court slashed the punitive damages award and required that it not exceed the amount of the award for compensatory damages.
III. Punitive Damages (cont.)

- In the employment law context, many asked whether this decision would herald a day where a 1:1 ratio would be required for a punitive damages award in the discrimination law context to withstand constitutional scrutiny.

- The answer appears to be that no such ratio is required.

- Rather, Exxon has been noted for its reaffirming of the constitutional standards offered previously by the Court. See Exxon, 128 S.Ct. at 2626, citing with approval, State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003), and BMW of North America, Inc. v. Gore, 517 U.S. 559, 582 (1996) (stating that “[a]lthough we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, we have determined that ‘few awards exceeding a single-digit ratio between punitive and compensatory damages to a significant degree, will satisfy due process’

- Moreover, Exxon actually clarified that significant punitive damages awards may be particularly appropriate as a deterrent in cases that otherwise might be approached as simply a cost of doing business – not a basis to rethink conduct in the workplace.
III. Punitive Damages (cont.)

• The Court stressed that statutory schemes providing for punitive damages in recovery do so in recognition that the possibility of such punitive awards is necessary to “induce private litigation to supplement official enforcement that might fall short if unaided.” Exxon, 128 S.Ct. at 2622.

• In those circumstances, the Court held that “heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect .... or when the value of injury and the corresponding compensatory award are small (providing low incentives to sue).” Id. at 2622.

• Consistent with Exxon courts have largely rejected application of the 1:1 ratio in the civil rights context. Mendez-Matos v. Municipality of Guaynabo, 557 F.3d 36, 54 n. 14 (1st Cir. 2009).
Other considerations regarding punitive damages

– Remember what your mother told you: Lying just gets you in more trouble.

In cases where an employer offers shifting, inconsistent and sometimes implausible reasons for its conduct, it is more likely that a large punitive damages award will issue.
– Be mindful of the possibilities of punitive damages in retaliation cases particularly.

Commenting on the need to send the question of punitive damages to the jury, a court observed: “the employer’s actions and the effect of those actions [in terms of a punitive damages analysis] are closely connected in a way not necessarily present in other types of cases.” Che v. Massachusetts Bay Transit Authority, 342 F.3d 31, 41 (1st Cir. 2003)(requiring a retrial on the issue of punitive damages where the trial court had declined to give a punitive damage award instruction or put the issue before the jury).
LITIGATING DAMAGES IN DISCRIMINATION AND RETALIATION CASES

Litigation Strategies

Timothy R. Newton, Esq., Partner
Constangy, Brooks & Smith, LLP

Direct: 404.230.6764 • E-mail: TNewton@constangy.com

The Employers’ Law Firm, Since 1946
Remember Two Things:

• Damages issues always involve money, but do not always involve numbers!

• As with liability issues, you want to be able to tell a story when you are addressing the issue of damages
Two Stages

• Discovery

• Trial
Discovery Phase

• In your zeal to address liability, do not ignore the issue of damages

• Get on it early

• Finish written discovery on damages before Plaintiff’s deposition.

• Spend time strategizing about ways to address the issue of damages during Plaintiff’s deposition
Discovery Sources

- Work Records from Subsequent Employers
- Not just pay records, but complete personnel file
- Identity of companies/entities to which Plaintiff applied for employment and records related thereto
- Bankruptcy records, if any
- Sources of income other than as an employee (ownership of or investment in business, independent contractor income, etc.)
Discovery Sources

- Identity of Medical Providers;
- Medical Records
- LTD applications and documentation
- Social Security Disability Applications and documentation
- Expert Witnesses
Where Would He/She Be If. . .

- Would the plaintiff have been terminated pursuant to a lay-off, restructuring, or other reorganization?
- Would the plaintiff still be in the same position had he/she remained employed (demotion, transfer, etc.)
DEPOSITION STRATEGIES

• Address Damages First
• Find out as much as you can about Plaintiff’s life and how it has changed since employment action(s) at issue
• Ask questions that will allow you to compare life before vs life after
• Find out what “stuff” Plaintiff has; ask about real estate, cars, personal property, etc.
DEPOSITION STRATEGIES

• Flesh out what Plaintiff has bought or spent money on after the employment actions (and possibly before, too)
• Unusual medical expenses not covered by insurance
• Vacations, hobbies, participation in community activities
TO ARGUE OR NOT TO ARGUE, THAT IS THE QUESTION!
Reasons Why Defense Attorneys Choose NOT to Argue Damages

• “If I start talking to the jury about money, they’ll think I’ve ceded liability!”

• “Won’t I be ‘devaluing’ the plaintiff’s injury if I argue money? What will the jury think of me? If they think I’m heartless, won’t they attribute that to my client as well?”

• “It’s too dangerous. Once I talk about damages, that’s all the jury will think about and it will take away my credibility on liability.”

• “I don’t want to suggest what a ‘reasonable amount of damages’ is when I think we have a strong case on liability and I don’t think the jury should get to damages at all.”

-- Jeri Kagel, Damages: The Defense Attorney’s Dilemma
Reasons Why Defense Attorneys Should Argue Damages

• If you don’t the only story that will be presented will be Plaintiff’s

• Can mitigate a finding of liability by limiting the actual award to Plaintiff
Trial Strategies

• Start in Voir Dire

• Address in all phases of trial (opening, witness testimony, closing)

• In Opening Statements and Closing Arguments, follow pattern of: “Liability, Damages, Liability”

• If applicable, attack credibility of Plaintiff’s case on liability by pointing out weaknesses in the case for damages