Mitigating Punitive Damages in Employment Retaliation and Discrimination Cases: Leveraging Recent Court Decisions

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Today’s faculty features:

Francis V. Cook, Partner, Fox Rothschild, Lawrenceville, N.J.

Professor Rachel Janutis, Interim Dean and Professor, Capital University Law School, Columbus, Ohio

Sarah N. Turner, Partner, Gordon & Rees, Seattle

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Punitive Damages in Retaliation Cases

Dean Rachel M. Janutis
rjanutis@law.capital.edu
Federal Overview

- **Title VII**
  - Civil Rights Act of 1991 added punitive damages for intentional discrimination
  - Includes claims for retaliation

- **Americans with Disabilities Act**
  - Civil Rights Act of 1991 applies to ADA
  - Available in discrimination and reasonable accommodation claims
  - Split amongst federal courts about availability in retaliation claims

- **Age Discrimination in Employment Act**
  - Not recoverable in discrimination claims
  - Limited authority recognizing in retaliation claims

- **FMLA**
  - No punitive damages
  - Liquidated damages may be available
ADA Retaliation Claims

No Punitive Damages

- 42 U.S.C. §1981a references:
  - Discrimination & reasonable accommodation provisions (§12112 & §12112(b)(5))
  - But not retaliation provisions (§12203)
- Plain language does not authorize punitive damages in retaliation claims

Alvarado v. Cajun Operating Co., 588 F.3d 1261 (9th Cir. 2009);
Kramer v. Banc of Am. Sec., 355 F.3d 961 (7th Cir 2004)

Punitive Damages Allowed

- §12203 does not contain its own remedial clause
- References Title I—same remedial provision for all sections

Rumler v. Dep’t of Corrections, 546 F.Supp.2d (M.D. Fla. 2008)
ADEA Retaliation Claims

No Punitive Damages

• §626(b) limits remedies to unpaid wages & overtime plus liquidated damages & judicial relief

• Punitive damages not recoverable


Punitive Damages Allowed

• Enforcement according to FLSA §216

• FLSA §216 permits legal & equitable relief “as appropriate” in retaliation claims only

• Punitive damages = legal relief

Moskowitz v. Trustees of Purdue Univ., 5 F.3d 279 (7th Cir. 1993)
• Malice or Reckless Indifference to a Federally Protected Rights
• Impute Liability to Employer
• Defense of Good Faith Efforts to Comply

Standard--Malice

Malice or Reckless Indifference to a Federally Protected Right

– “Perceived risk” that actions would violate law
– Relevant actors knew of or familiar with employment discrimination laws; or
  • Receipt of manuals or written policies
  • Training
– Misrepresentations or efforts to cover up actions
  • Inference of awareness
Impute Liability Under Agency Principles

- Managerial Capacity in the Scope of Employment
  - Managerial Capacity
    - Substantial Independent Authority
    - Determines Corporate Policy
  - Scope of Employment
    - Can include intentional torts if
      » Conduct is the type of conduct win/scope
      » Win/authorized time & space
      » At least, in part, to serve employer

*See, e.g., E.E.O.C. v. New Breed Logistics, 783 F.3d 1057 (6th Cir. 2015)*

- Authorized or Ratified Misconduct
- Recklessly Employ Unfit Agent
Standard—Good Faith Efforts Defense

• Good Faith Efforts to Comply
  – Employer Bears the Burden
  – Evidence of Good Faith:
    • Written Policy
      – Relevant but not sufficient
        See e.g., May v. Chrysler Group, LLC, 716 F.3d 963 (7th Cir. 2013)
    • Dissemination of Written Policy
      See, e.g., E.E.O.C. v. New Breed Logistics, 783 F.3d 1057 (6th Cir. 2015)
    • Regular Training
      See e.g., Ash v. Tyson Foods, Inc., 664 F.3d 883 (11th Cir. 2011)
    • Complaint Procedure
    • Adherence to Policy
      See e.g., Lowery v. Circuit City Stores, 206 F.3d 431 (4th Cir. 2000)
Excessiveness

Grossly excessive in relation to State’s legitimate interest in punishment & deterrence

– Reprehensibility
– Ratio
– Sanctions for Comparable Conduct

Constitutional Limits--Guideposts

Reprehensibility

– Violence
– Intentional v. conscious disregard
– Bodily injury v. economic
– Vulnerable victims
– Recidivism
Constitutional Limits--Guideposts

Ratio

– Greater than 9:1 presumed unconstitutional
  • Size of compensatory award
  • Whether award provided full compensation
  • Portion of non-economic losses
Comparable Sanctions

• Award win/statutory cap under §1981a may be evidence of constitutionality
  
Punitive Damages

Francis V. Cook, Esq.
Plaintiff is required to prove...

• BOTH of the following factors are present:
  1. Retaliatory conduct was "especially egregious"
  2. A member of employer’s "upper management" actually participated in, or was willfully indifferent to, the wrongful conduct.
What is EERC?

• Especially Egregious Retaliatory Conduct ("EERC"):
  – Actual Malice
    • Intentional wrongdoing
    • Evil-minded act
    • Done specifically to injure the plaintiff
What is EERC

– **Wanton or Willful Conduct**
  - Deliberate act or omission with
  - High degree of probability of harm to another
  - Who foreseeably might be harmed by that act or omission and
  - Reckless indifference to the consequence of the act or omission
Standard of Proof

• Plaintiff must prove this by “clear and convincing evidence” which is:
  – Evidence which leaves NO serious doubt about the correctness of the conclusions drawn from the evidence.
  – VERY HIGH STANDARD
Standard of Proof

• Negligence is not enough
• The fact that retaliation occurred is not enough
• Only in exceptional cases where the conduct is
  EERC
Upper Management

- At least one employee involved in EERC must be “upper management”
  - Must have sufficient authority to make imposing punitive damages fair and reasonable
  - Responsible for policy formation
  - Control day-to-day operations
Upper Management

• Factors for upper management are:
  – Broad supervisory powers
  – Ability to hire, fire, promote, and discipline
  – Delegated responsibility to execute policies
Upper Management

• “Actual Participation”
  – Knew about conduct AND
  – Engaged in affirmative acts to accomplish conduct
  – Assisted in or participated directly in retaliation
Upper Management

• “Willful Indifference”
  – Knew about wrongful conduct but ignored it rather than stop it

This DOES NOT mean that they were negligent in failing to learn of the conduct.
Punitive Damages

• Designed as a punishment for:
  – Evil minded
  – Malicious
  – Egregious
  – Outrageous behavior by Upper Management

And can be awarded only where there is clear and convincing evidence
Relevant Evidence

• Relevant evidence may include:
  – Likelihood of harm
  – Defendant’s awareness or disregard of harm
  – Conduct after learning of harm
  – Duration
Amount of Punitive Damages

• Factors to consider:
  – The nature of the conduct
  – The extent of the harm
  – The intent of the defendant
  – Whether there were adequate policies in place
  – Whether there was an effort to address the conduct
  – Financial condition and ability to pay
STRATEGIES AND PREVENTATIVE MEASURES FOR EMPLOYERS TO AVOID PUNITIVE DAMAGES

Sarah N. Turner
Gordon & Rees LLP
DEFENSES TO PUNITIVE DAMAGES

1. Mixed-Motive/Same Decision Defense
2. Good Faith Defense
3. Due Process
If the employee establishes discrimination, the employer can raise the Mixed-Motive Defense by demonstrating:

- Non-discriminatory factors that motivated the decision at the time it was made; and

- Those factors caused the decision and thus the decision would have been made even without the discriminatory motivating factor.

PRICE WATERHOUSE V. HOPKINS
490 U.S. 228 (1989)
“Once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by providing that it would have made the same decision even if it had not allowed gender to play a such role.”
If the Same Decision Defense is successful, the employee’s available remedies are limited to:
- Declaratory Relief
- Injunctive Relief, and
- Attorneys’ Fees and Costs

The employee cannot receive:
- Monetary Damages (Including Punitive Damages)
- Admission
- Reinstatement
- Promotion, or
- Rehiring.

Consider making an Offer of Judgment to cut off risk of a high award of attorneys’ fees.

An employer's good-faith effort to enforce an anti-discrimination policy in the workplace effectively shields the employer from punitive damages in employment discrimination suits.
Agency principles limit vicarious liability for punitive damage awards. The employer may be liable for punitive damages if:

- It authorizes/ratifies its agent’s bad acts, or
- It is reckless in employing the agent.
Punitive damages are available if the employee was acting in a “managerial capacity” while “acting in the scope of employment.”

Determining “managerial capacity” is a fact-intensive inquiry, i.e., the court will consider the employee’s authority and ability to act on their own discretion.

The employee must be “important,” but not necessarily top management, officers or directors.
In *Kolstad*, the U.S. Supreme Court considered under what circumstances punitive damages may be awarded.

The Supreme Court examined:

- Intent
- Whose Acts Count or Imputed Liability
- Good Faith Defense
In order to receive punitive damages, an employee does *not* have to show that the employer’s misconduct was “egregious.”

The employee must show that the employer’s agent acted with malice or reckless indifference that their acts violated federal law.

Whether punitive damages will be awarded depends upon the bad motive of the wrongdoer *as exhibited by his acts.*
“In the punitive damages context, an ER may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer’s ‘good faith efforts to comply with Title VII.’”

- Kolstad v. American Dental Association
  527 U.S. at 545.
Where an employer has undertaken good faith efforts to comply with Title VII, it shows that it never acted with reckless disregard of federally protected rights.

In some cases, the existence of a written policy instituted in good faith has been a total bar to employer liability for punitive damages.

Employers should be encouraged to adopt Anti-Discrimination Policies and to educate employees on Title VII prohibitions.
TIP #1
ADOPT AN
ANTI-DISCRIMINATION POLICY

- Adopt and update a meaningful and well designed Anti-Discrimination Policy.
- Police the Policy.
- Have thorough and accurate documentation of all actions taken pursuant to the Policy.
**Effective Anti-Discrimination Policy**

- Have the Policy be issued by the head or highest level of the company.
- Define what acts are considered workplace discrimination.
- Describe behavior that constitutes harassment.
- Highlight the employer's commitment to preventing and dealing with discrimination in the workplace.
- Establish a clear reporting procedure.
- Establish an investigation procedure.
- Make sure employees know that complaints of discrimination will be kept confidential, to the extent possible, and that retaliation is not tolerated against those who inform or complain of discriminatory conduct.
- Explain the consequences of engaging in discriminatory conduct.
- Require prompt and effective remedial action to stop the discrimination.
Include the Policy in the employment Handbook and require the employees signature acknowledging receipt.

Post the Policy in break rooms, over the water fountain, above a sink, and other high-traffic, noticeable areas.

Reissue the Policy to employees annually.

Begin each staff meeting with a review of the Policy.

Include a copy of the Policy with each pay stub.
Conduct ongoing training annually for employees.
Conduct training for managers and supervisors who could be considered to act in a “managerial capacity” on behalf of the company and trigger punitive damages.
Ensure individuals assigned to conduct investigations have received proper training.
Ensure management is aware of what actions might arguably be retaliatory, especially after an employee has raised a complaint or filed a charge for discrimination, i.e.:

- Lowered Performance Reviews
- Decreased Job Responsibilities
- Diminished Portfolio
- Exclusion From Meetings
- Demotion
- Transferred to a Different Position
- Subsequent Discipline
- Failure to Promote
- Termination
TIP #4

REVIEW EMPLOYMENT DECISIONS

- If an employee has made a complaint of discrimination and later receives a low performance evaluation, have a supervisor or other higher authority review the evaluation to ensure accuracy of evaluation.

- Do not have one member of management have absolute authority for employment decisions.
Is the proposed action consistent with the employer’s actual practice when presented with similar performance deficiencies or misconduct?

Is the proposed action supported by appropriate documentation?

Is the claimant now being criticized or disciplined for performance or conduct that the employer deemed acceptable or tolerated prior to the claim?

Would an unbiased observer think the action was reasonable?

Would the employer’s “best employee” be treated the same way?
Employees must know how to report a complaint.
Tell employee the complaint will be kept confidential to the extent possible.
Conduct prompt and thorough investigations.
Promptly investigate all allegations of discrimination within a few days of receiving any information regarding discriminatory conduct.

Conduct thorough investigations - even if the alleged victim or the person providing the information requests that nothing be done.

Do not require formal written allegations. Complaints of discriminatory conduct can take many forms and may be oral or written.

Identify for employees the individual who they should report their complaints.

Ensure supervisor/managers know how to respond to a complaint.

Open an investigation file for all investigations.

Take care to keep the investigation confidential and store investigation files in a secure location.

Tell the employee the result of the investigation.
Interview witnesses for any relevant information.

Interview the individual that allegedly engaged in discriminatory conduct.

Consider taking intermediate corrective action during the investigation.

Take thorough notes of all interviews.
Identify an individual to investigate complaints.

Investigator must be someone the employee trusts and finds credible.

Investigator must be someone who is not vested in the investigation, neutral and objective.

Knowledgeable in conducting investigations.
Make employee feel comfortable.

Ensure the employee that the organization will conduct an investigation, and that it will take appropriate action.

Retaliation will not be tolerated.

Report any alleged retaliation so that it can be investigated and corrected.

The information will be kept confidential to all extent possible. However, the information will likely need to be shared with the accused party, others involved in the investigation and during any potential legal proceedings.

Don't make any specific promises or make any judgments.

Take detailed written notes.

After the investigation and any remedial action, put the complaint in writing, make sure the employee agrees to the written statement and sign off on it.
TIP #6
DOCUMENT, DOCUMENT, DOCUMENT!

Documents will aid in investigations and any potential litigation, and can help establish an employer’s good faith defense to punitive damages.

- Maintain personnel files.

- Keep records of efforts to maintain the Policy: trainings, interviews, exit interviews, and screenings of employment decisions.
Due process prohibits the imposition of grossly excessive or arbitrary punishment of a tortfeasor.

The purpose for punitive damages is for retribution and to deter conduct.

An employer can challenge punitive awards where there is higher than a single-digit ratio between compensatory damages and punitive damages on due process grounds.

Sanctions of double, treble or quadruple damages have been accepted by courts as reasonable.
QUESTIONS?

Sarah Turner
206-695-5100
sturner@gordonrees.com