

# Punitive Damages in Employment Discrimination Cases: Myth or Reality?

By Vivian Berger

## I. Introduction

As a mediator specializing in employment disputes, most of which involve discrimination charges, I fairly often receive assurances from plaintiffs' lawyers that their clients are very likely to receive substantial punitive damages if the matter goes to trial. A number routinely include in their pre-mediation submissions a laundry list of employee-dream, employer-nightmare punitive awards. Rarely is any attempt made to compare the facts of the case at hand with those of the cases yielding a jackpot. I do not usually attempt to argue; I simply admonish that one cannot bargain with respect to punitive damages—their incidence and size are just too random. At most, I advise, the potential for a verdict including punitives should operate as a thumb on the scale, a consideration that might influence parties to settle at the higher end of an otherwise determined reasonable range.

But even attorneys disinclined to heed my counsel, in mediations or in unfacilitated talks, would probably agree that the more they know (not guess or intuit) about the subject, the better they can serve their clients in negotiation. This article constitutes a modest effort to substitute facts for emotions and “hype” in discussions generally evincing much more heat than light. The results should dampen the expectations of plaintiffs' counsel who imagines that a sizable punitive verdict will surely reward her efforts at trial while cautioning her dismissive opponent that sometimes the vision is not a mirage.

## II. A Primer on the Legal Landscape<sup>1</sup>

The last two decades have seen the emergence of a Supreme Court jurisprudence setting due process limitations on the size of punitive damages awards. Its overarching principle is that the Fourteenth Amendment forbids the states to impose on a tortfeasor “grossly excessive or arbitrary punishments.”<sup>2</sup>

The seminal decision of *BMW of North America, Inc. v. Gore*<sup>3</sup> announced three factors (the “*Gore* guideposts”) to use in determining whether a particular punitive award had crossed the constitutional line: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the award and the civil penalties authorized or handed down in comparable cases.<sup>4</sup> The Court has emphasized the second guidepost, opining in 2003 that a single-digit ratio between punitive and compensatory damages is “more likely to comport with due process”<sup>5</sup> In 2008, in *Exxon Shipping Co. v. Baker*,<sup>6</sup> the justices established a 1:1 ratio as “a fair upper limit” in maritime matters. Although

federal common law and the Clean Water Act governed this case, they bolstered their conclusion by reference to the one-digit maximum presumptively appropriate under their prior due process precedents.<sup>7</sup>

Notably, neither *Gore* nor any of the subsequent decisions in this vein arose in an employment discrimination context. The Civil Rights Act of 1991<sup>8</sup> for the first time provided for punitive damages under Title VII if the complainant demonstrates that the “respondent (other than a government, government agency or political subdivision)... engaged in a discriminatory practice...with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”<sup>9</sup> In *Kolstad v. American Dental Association*,<sup>10</sup> which involved alleged sex discrimination, the Court fleshed out the requirements of the amended law in certain respects.

Justice O'Connor's majority opinion held that to satisfy the statute's “mens rea” element so as to support liability for punitives, the perpetrator “must at least discriminate in the face of a perceived risk that its actions will violate federal law”; the Court rejected the view of the en banc D.C. Circuit that the actor's conduct must have been “egregious.”<sup>11</sup> The opinion also stated that “[t]he inquiry does not end with a showing of the requisite ‘malice or reckless indifference’ on the part of certain individuals.... The plaintiff must impute liability for punitive damages to respondent”—that is, the employer. Agency law permits such vicarious liability when the principal either authorizes or ratifies the tortious act or “the agent was employed in a managerial capacity and was acting in the scope of employment.” The Justice, however, departed from strict agency precepts by framing a defense for the employer whose agent's “discriminatory employment decisions are contrary to [its] ‘good-faith efforts to comply with Title VII.’”<sup>12</sup>

None of the key terms in the opinion is self-defining. Thus, the lower courts have struggled over how to apply such concepts as “malice or reckless indifference,” “managerial capacity,” and “good-faith efforts.”<sup>13</sup>

Significantly, unlike the cases discussed earlier, *Kolstad* did not deal with the issue of excessiveness. More on point in this regard in the setting of punitive damage awards in employment lawsuits is the statute itself: it calls for caps ranging from \$50,000 to \$300,000, depending on the number of workers employed by the defendant.<sup>14</sup> These maximums' existence reduces, although it does not eliminate, the likelihood that a punitive award under Title VII or the ADA will run afoul of the *Gore* guideposts, especially the second. Presumably, in the wake of *Exxon*, these criteria

would inform rather than control the inquiry in the federal context.<sup>15</sup> Due-process analysis does, however, apply to punitive damages assessed pursuant to the New York City Administrative Code. (Notably, it contains no caps.<sup>16</sup>) But within the Second Circuit, courts may invoke a “shock the judicial conscience” test (which also refers to the *Gore* factors) to find a punitive award excessive even if it is not so large as to offend the Constitution.<sup>17</sup>

What lessons can practitioners usefully draw from this brief review? In a nutshell: pertinent law considerably constrains the jury’s power to redress employment discrimination through an assessment of punitive damages. Furthermore, judges have not been reluctant to police such awards quite vigorously.<sup>18</sup> Even the plaintiff who gains the proverbial pot of gold in the first instance will often see it substantially—if not wholly—drained by the end of post-trial motions and appeals.

### III. A Sampling of Punitive Awards in the New York City Metropolitan Area

One can analogize the universe of civil cases to an iceberg. Matters that culminate in a trial comprise the portion above the water; pre-trial dispositions and settlements lurk, invisibly, below the surface. Of the visible part—the top one-third, let us estimate<sup>19</sup>—consists of those lawsuits that plaintiffs have won. In terms of our metaphor, only the very tip of the top represents cases in which the verdict has included punitive damages. These observations hold as true for employment litigation as for other disputes.<sup>20</sup>

In my earlier article on employment discrimination trials in the Southern and Eastern Districts of New York, I remarked that the necessarily small number of verdicts that could be surveyed precluded the type of rigorous analysis that, one hopes, may lead to statistically significant results.<sup>21</sup> The same is true in spades of a study of punitive damages limited to a particular geographic and subject area. Nonetheless, having dealt with the topic in my previous piece in only a paragraph, I thought it worthwhile to expand the inquiry. Even an impressionistic picture might serve as a reality check for attorneys and clients who fixate, either in hope or in fear, on a few humongous punitive awards—“litigation legends” bearing no more relationship to litigation reality than a pro basketball player’s height bears to the average adult male’s.

The database used in the trial study (relevant filings in 2004 and 2005)<sup>22</sup> yielded 33 winning plaintiffs eligible for punitive damages; of these, six (18.2%) actually received them. The median figure (after taking into account post-trial reductions, which one-half suffered) lay between \$50,000 and \$190,000 (average \$120,000).<sup>23</sup> Respecting the key parameter of amount, this handful of cases tells us little, though it does provide anecdotal support for the conclusion suggested by pertinent legal doctrine as well as experience: a plaintiff with a punitive verdict should celebrate only, or to the extent, that it survives post-trial defense attacks upon it.<sup>24</sup>

### A. The Present Study: How Much Punitive Damages Do Plaintiffs Get, in What Kinds of Cases?

In an attempt to expand the data, I searched for punitive damages verdicts using a variety of sources covering trials<sup>25</sup> occurring between 2000 and 2011. From PACER, the online system for tracking federal litigation, I took closed employment cases whose last docket entries were in 2010-2011; the trials resulting in a punitive award occurred between 2003 and 2011. The rest of the data came from West-law databases: (1) CTA2-ALL—2008 (published federal and state cases in the Second Circuit<sup>26</sup>); (2) NY-CS-2000-11 (published state cases<sup>27</sup>); and (3) JV-2nd—2000-11 (synopses of federal and state cases).<sup>28</sup> I excluded class actions and suits against governments and related entities, as to which punitive damages are barred.<sup>29</sup>

My review of these sources yielded a total of 34 cases (26 federal and eight state) with punitive awards; the number of plaintiffs was 41. Interestingly, nearly a quarter of these—representing almost one-third of the cases—were made in actions culminating in default judgments; hence, no jury was involved.

Although this study was not designed to permit testing for statistical significance, it did produce a seemingly robust correlation between the type of claim and punitive damages. Twenty plaintiffs whose verdict included punitive damages (48.8% of the 41) in nineteen cases (55.9% of the 34) had prevailed on a charge of retaliation. Furthermore, fourteen plaintiffs (34.1%) in eleven cases (32.4%) won on the ground of sexual harassment. (Some of the latter also bore features of other kinds of sex discrimination.) Several received punitive awards on both these claims.<sup>30</sup> Notably, of the six impositions of punitive damages identified in my previous article, five represented victories on retaliation; the remaining one arose from a charge of sexual harassment.<sup>31</sup>

With regard to amount, averages tend to be misleading on account of their sensitivity to outliers—especially large ones; more informative for one who wishes to calculate the probability of an award’s falling within a certain range is the median, the middle value or values in a distribution.<sup>32</sup> The median amount of punitives found by the trial finder (calculated by number of cases) came to \$500,000.<sup>33</sup> The calculation by plaintiff was harder because of an undifferentiated verdict for three people; on the reasonable assumption that they split the amount roughly evenly, the median would be around \$326,667.

But apart from its potential utility as leverage in post-verdict bargaining, which may be substantial at times,<sup>34</sup> a trial award of punitive damages presents a picture that is often deceptively favorable to the plaintiff. To re-invoke my earlier metaphor, cases (or plaintiffs) with punitive verdicts that survived, let alone survived intact, through the close of litigation embrace only the tip of the tip of the top of the iceberg.

Simply put, of the 41 plaintiffs who initially received punitive damages, two suffered a later court ruling that they were not entitled to punitives; eight were subjected to reversal of their victory for lack of liability or trial error;<sup>35</sup> and thirteen saw their damages reduced when defendants prevailed on a motion for remittitur. Three of the latter reductions were due to statutory caps. Thus, a mere 31 out of 41 plaintiffs (about three-quarters) ended up with punitive damages in some amount; and only 18 (43.9%) retained the full original award. When one calculates by case, not plaintiff, the result is that only in 27 of the 34 actions yielding punitives (79.4%) did the prevailing party or parties hold onto at least part of the award; the figure was 14 out of 34 (41.2%) for awards that survived unchanged. Given these setbacks, predictably the plaintiffs' median award fell considerably: to \$200,000 (by case) and \$75,000 (by plaintiff).<sup>36</sup>

## B. The Present Study: How Often Do Plaintiffs Get Punitive Damages?

Logically, this question precedes the questions of who receives them and how much. But because my inquiry was mainly geared toward finding cases where plaintiffs had received punitive damages, I gave the topic secondary, and summary, treatment. The only information I had that could yield the ratio of number of punitive awards to number of prevailing employment plaintiffs came from my PACER database, cases with final docket entries in 2010-2011; therefore, they are all federal.

Of 20 plaintiffs who won, twelve, or 60%, received a punitive verdict from the trier of fact; eleven, or 55%, retained their awards in whole or in part. In my estimation, this number is high given the relative paucity of cases; it may well be an artifact of sampling error. Significantly, an exhaustive study by Professor Marc Galanter of punitive damages awards in 1992 in the nation's largest 75 counties found that only 26.8% of victorious employment plaintiffs obtained such an award from the factfinder.<sup>37</sup> In a review of all published federal decisions in 2004 and 2005, focusing on awards of punitives in cases arising under Title VII, Professor Joseph A. Seiner found that about 29% of juries who returned a plaintiff's verdict also gave out punitive damages.<sup>38</sup> Recall that the 33 relevant suits in my prior article, which dealt with cases from the Southern and Eastern Districts of New York, produced the lowest rate of all, 18.2%.

## IV. Conclusion

At the end of the day, there is mixed news for plaintiffs and defendants on the subject of punitive damages in employment discrimination cases. Their incidence is likely rarer than suggested by the small numbers in this study; their amount, after post-trial depletions, is quite moderate. Still, employers can hardly discount this civil form of "capital punishment" as a prospect comparably "freakish" to being hit by a bolt of lightning.<sup>39</sup> Other than egregious facts,<sup>40</sup> an obvious predictor, a strong claim of retaliation or sexual harassment should alert counsel to the realistic pos-

sibility of such an award—especially in cases that involve a notorious defendant.

Seasoned practitioners will scarcely find these conclusions surprising, though a fair number of plaintiffs' attorneys seem to ignore the lessons of experience (or posture in a way suggesting they do so). Perhaps this article will at least help both sides' counsel to educate clients misled by media exaggeration of supposedly rampant large recoveries to base their litigation decisions on a cool-headed view of the actual facts. If so, it will have served its purpose.

## Endnotes

1. See generally Joseph A. Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 IOWA L. REV. 473 (2012); Sandra Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 OKLA. L. REV. 701 (2010) ("The New Calculus"); Sandra Sperino, *Judicial Preemption of Punitive Damages ("Judicial Preemption")*, 70 U. CIN. L. REV. 227 (2009).
2. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).
3. 517 U.S. 559 (1996).
4. *Id.* at 574-74.
5. *State Farm*, 538 U.S. at 425. Justice Kennedy's opinion for the Court stated that in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1(1991), "in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.... We cited that 4 to 1 ratio again in *Gore*." *State Farm*, 538 U.S. at 425.
6. 554 U.S. 471 (2008).
7. *Id.* at 514-15.
8. Pub. L. No. 102-166, 105 Stat. 1071.
9. 42 U.S.C. § 1981a(b)(1). The Act also authorized punitive damages under the ADA. See 42 U.S.C. § 1981a(b)(2).
10. 527 U.S. 526 (1999).
11. *Id.* at 533.
12. *Id.* at 543-46.
13. See Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 754 (2008). The *Kolstad* Court itself noted the lack of any good definition of what constitutes "managerial capacity." See 527 U.S. at 543. It wrote that examples in the Restatement of Torts suggested that to come under this definition "an employee must be 'important,' but perhaps need not be the employer's 'top management, officers or directors.'" *Id.* (citations omitted). The opinion also implied that a written policy can go far toward negating malice or recklessness. *Id.* at 545 (citation omitted). Relevant trainings can likely perform a similar function. The employer (on whom the burden of proof of good faith probably rests) must also be able to demonstrate that the policy is effectively enforced. See Seiner, *supra* note 1, at 475, 511-12.
14. 42 U.S.C. § 1981a(b)(3). The maximums apply to the total of punitive and compensatory damages. The latter encompass "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." Cf. Michael C. Harper, *Eliminating the Need for Caps on Title VII Damage Awards: The Shield of Kolstad v. American Dental Association*, 14 LEGIS. & PUB. POL'Y 477 (2011) (*Kolstad*'s good-faith defense should obviate the need for caps).
15. See Seiner, *supra* note 1, at 491-93. The same would be true for cases arising under Section 1981, which permits punitive awards in appropriate cases, see *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975), and has no caps.
16. See N.Y.C. ADMIN. CODE § 8-502(a). But cf. *Thomas v. iStar Fin., Inc.*, 508 F. Supp. 2d 252, 263 (S.D.N.Y. 2007) (noting that, despite absence of caps on punitive damages in NYC law, "the federal cap nonetheless provides guidance on what is considered an

- appropriate civil penalty for comparable misconduct”), *aff’d*, 629 F.3d 276 (2d Cir. 2010), quoted in *Tse v. UBS Fin. Servs., Inc.*, 568 F. Supp. 2d 274, 317-18 (S.D.N.Y. 2008). It also does not incorporate *Kolstad’s* good-faith defense. Instead, various good-faith measures may serve only to mitigate punitives. See N.Y.C. ADMIN. CODE § 8-107(13)(e). The New York State Executive Law does not provide for punitives at all in the context of employment discrimination. See N.Y. Exec. L. § 297(9).
17. See, e.g., *Norris v. NYC College of Technology*, No. 07-CV-853, 2009 WL 82556, at \*6 (E.D.N.Y. Jan. 14, 2009) (citations omitted); *Zakre v. Norddeutsche Landesbank Girozentrale*, 541 F. Supp. 2d 555, 563-64 (S.D.N.Y. 2008), *aff’d*, 344 F.App’x 628 (2d Cir. 2009).
  18. Professor Sandra Sperino has exhaustively analyzed the ways in which judges in her view err to plaintiffs’ disadvantage, mathematically and conceptually, in applying excessiveness review in employment discrimination cases. See generally Sperino, *The New Calculus*, *supra* note 1; Sperino, *Judicial Preemption*, *supra* note 1.
  19. See Vivian Berger, *Winners and Losers: Employment Discrimination Trials in the Southern and Eastern Districts of New York*, 37 NYSBA LABOR & EMP. L.J. 42, 42 (2012).
  20. E.g., in 2006 only 3.2% of employment discrimination cases concluded by trial. See *id.* at 43 (citing statistics from the Administrative Office of the U.S. Courts).
  21. See *id.* at 42.
  22. *Id.*
  23. *Id.* at 44.
  24. While any verdict is potentially subject to the vagaries of post-trial motions and appeals, punitive awards, especially large ones, predictably attract such defense maneuvers disproportionately often. Even an “unstable” award, however, may advantage the plaintiff in that it provides leverage for settlement. See, e.g., *Velez v. Novartis Pharmaceuticals Corp.*, No. 04 CIV 09194 CM, 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010) (after sex discrimination class action trial resulted in a verdict for, inter alia, \$250 million in punitive damages, parties settled for relief valued at up to \$175 million). In one of the cases in my database, *Chisholm v. Memorial Sloan-Kettering Cancer Center*, 824 F. Supp. 2d 573 (S.D.N.Y. 2011), a plaintiff who obtained \$1 million in punitive damages refused to accept a remittitur to \$50,000. Both sides appealed. Later they withdrew their appeals, settled the matter—which also involved \$233,290 in back pay, \$102,546 in front pay, \$13,665 in pre-judgment interest, and an unknown amount of attorneys’ fees—for \$690,000.
  25. Under “trials” I include inquests leading to default judgments.
  26. I found only federal cases. The trials in this sample had taken place in 2007-2008. Given that the median time to get to trial was about a year-and-a-half in the prior study, the cases reviewed there would probably have clustered in 2006-2008. See text accompanying note 22; Berger, *supra* note 19, at 44. When compiling the results of all my searches for this study, I eliminated duplicate cases.
  27. This search yielded punitive verdicts from 2000-2007. In the 2000 case, the amount was not given.
  28. Trials in the state cases occurred from 2003-2008. In one tried in 2005 the jury said that the plaintiff was entitled to punitive damages but did not indicate any amount. (The court in dictum stated that punitives were not warranted.) In the federal cases trials took place between 2004 and 2010.
  29. Title VII’s authorization of punitive awards in terms excludes a “government, government agency or political subdivision.” 42 U.S.C. § 1981a(b)(1). See *Terry v. Ashcroft*, 336 F.3d 128, 153 (2d Cir. 2003). Nor are such damages available against New York City; see *Krohn v. N.Y.C. Police Dep’t*, 2 N.Y.3d 329, 778 N.Y.S.2d 746 (2004), or a public corporation like CUNY. See *Norris v. N.Y.C. Institute of Technology*, No. 07-CV-853, 2009 WL 82556, at \*8 (E.D.N.Y. Jan. 14, 2009). Because City law does permit aiding and abetting liability, see *id.* at \*8-9; N.Y.C. ADMIN. CODE § 8-107(6), it is conceivable that I may have missed one or more cases involving this type of situation.
  30. In one instance, each of two plaintiffs was given punitives for sexual harassment “or” retaliation.
  31. See Berger, *supra* note 19, at 44. Several of the defendants held liable for punitive damages were well-known figures: e.g., real estate mogul Sheldon Solow, see *Lamberson v. Six West Retail Acquisition, Inc.*, No. 98 CIV 8053, 2002 WL 59424 (S.D.N.Y. Jan. 16, 2002); basketball player Isiah Thomas, see *Verdict and Settlement Summary, Browne Sanders v. Madison Square Garden L.P.*, 2007 WL 3144545 (S.D.N.Y. Oct. 4, 2007); Governor Eliot Spitzer’s father, see *Boyce v. Spitzer*, 29 Misc.3d 1207(A), 2010 WL 3959616 (Sup. Ct. Bx. Co. 2010), *aff’d in part, rev’d in part*, 82 A.D.3d 491, 918 N.Y.S.2d 111 (1st Dep’t 2011); and “The Queen of Mean,” Leona Helmsley. See *Bell v. Helmsley*, 2003 WL 1453108 (Sup. Ct., N.Y. Co. Mar. 4, 2003). Notably, even Ms. Helmsley attracted a modicum of sympathy from the judge if not the jury. In reducing the punitive award in *Bell* from \$10 million to \$500,000, he wrote: “...Mrs. Helmsley is not a 4 Billion Dollar pinata for every John, Patrick or Charlie to poke a stick at in the hopes of hitting the jackpot.” *Id.* at \*3.
  32. Berger, *supra* note 19, at 34.
  33. Where the damages figure was not given, the case and/or plaintiff was excluded.
  34. See *supra* note 24.
  35. In two cases an appellate court disapproved in dicta the trial court’s actions with respect to punitive damages. In one instance, the New York Appellate Division, First Department, stated that it would have annulled in any event the “grossly excessive compensatory and punitive damages.” (The latter exceeded \$10 million.) See *Minichiello v. Supper Club*, 296 A.D.2d 350, 350, 353, 745 N.Y.S.2d 24, 26 (1st Dep’t 2002). In another, the Appellate Term, First Department, opined that if it were not reversing, it would have found that the evidence failed to warrant a punitive damages award. See *Taylor v. N.Y.U. Med. Ctr.*, 21 Misc. 3d 23, 28, 871 N.Y.S.2d 568, 573 (N.Y. Sup. Ct. App. Term 2008).
  36. The latter calculation included one verdict of \$0, where the court set aside a \$5,000 punitive award as a matter of law. Because it would have been misleading to record in this manner verdicts lost pursuant to reversal for trial error, unrelated to punitive damages, I omitted such cases entirely.
  37. See Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. Rev. 1093, 1134-35 (Table 4) (1996).
  38. See Seiner, *supra* note 13, at 741-742, 758-59. As the author admits, a database limited to published decisions cannot capture those cases that yielded no opinion. See also Berger, *supra* note 19, at 45 (discussing publication bias). I suspect that a survey limited in this way may well exaggerate the ratio of punitive damages awards to plaintiffs’ verdicts. An imposition of punitive damages, especially when it is large or contested by the defense, should be one of the factors making a case important enough for a judge to submit for publication.
  39. Cf. *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”).
  40. See, e.g., *Gallegos v. Elite Model Mgt. Corp.*, 28 A.D.3d 52, 807 N.Y.S.2d 44, 46 (1st Dep’t 2005) (defendant and its agents failed to accommodate asthmatic plaintiff in a heavy smoking environment, proposing that she bring a gas mask to work). Plaintiff received a punitive verdict of \$2.6 million, but because of error a new trial on damages was ordered. See 28 A.D.3d at 51, 53, 807 N.Y.S.2d at 45, 47.

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