Punitive damages in the employment discrimination context: *"A general overview and analysis of whether they effectively deter from discriminating in the workplace"*

Manuel Martínez-Herrera
LL.M. Harvard Law School

I. Introduction

Black's Law Dictionary defines punitive damages as *"damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit"* and as *"damages assessed by way of penalizing the wrongdoer or making an example to others*[1]*"*.

Based on both this definition as well as the constant reinterpretation of this legal figure made by the United States Supreme Court (SC) and by the most reputed scholars, it is easy to see that the two main purposes of punitive damages are *"to punish the defendant for his wrongdoing and to deter him and others from similar misconduct*[2][3]*"*.

This type of damages, unknown in Civil Law countries, is available in many private actions brought before US Common Law courts in the most varied areas of law[4], and Employment Law is no exception. In fact, punitive damages can be awarded in causes of action related to the following Employment Law areas:

(i) Workers' Compensation
(ii) Wrongful Discharge
(iii) Employment Discrimination

The aim of this paper is to describe the current regulations and case law standards with regard to punitive damages in the Employment Discrimination context[5]. But first, we will study the historical legislative and case law evolution in order to understand the rationale behind the current norms. Finally, as a conclusion, this essay will also try to analyze the effectiveness of this measure as a deterrent for employers and the possible future litigation challenges that US courts will have to face in this context.

II. Legal regulation and relevant case law

1. The situation before the enactment of the Civil Rights Act of 1991

Title VII of the Civil Rights Act of 1964[6] provided only for the award of equitable relief: injunctions, back pay, and the award of attorney's fees. The main reason for the absence of damages was to constitutionally permit that these cases only be tried before a judge, avoiding

[1] Black's Law Dictionary, 418 (Bryan A. Garner ed., 2004).
[2] Linda L. Schlueter, *Punitive Damages*, 29 (5th ed. 2005).
[3] Other purposes that have also been mentioned are relationship to litigation expenses and redress for petty injury.
[4] Contracts, Property, Torts, Admiralty, Family Law, Environmental Law etc.
[5] Including Title VII, ADEA (Age Discrimination Employment Act) and ADA (Americans with Disabilities Act)..
[6] Title VII covers employment discrimination with regard to an individual's race, sex, color, religion or national origin; ADEA covers employment discrimination regarding age, and individuals with disabilities are protected by the ADA.

the intervention of juries[7] whose impartiality in racial discrimination cases, above all in the southern states, was far from clear at that time.

As a result, a majority of the federal courts established that Title VII neither expressly nor implicitly allowed punitive damages. However, in the 1980's, a minority of the federal circuits, more precisely the 8th and the 10th[8], started to award punitive damages in employment discrimination cases brought under Title VII[9].

Furthermore, it was also possible to obtain damages only for racial discrimination under two statutes enacted during Reconstruction, 42 U.S.C. §§ 1981, 1983. Under section 1981 plaintiffs could sue private employers for racial discrimination in contracting, and state and local officials could be sued under section 1983 for racial discrimination in violation of the Constitution[10][11]. Although these statutes were designed to avoid racial discrimination in any contracting sphere, claims under these sections in the employment discrimination context became more and more popular due to the possibility of obtaining damages, otherwise unavailable under Title VII. As a result, the victims of other types of employment discrimination, and the plaintiff's bars representing them, started lobbying to acquire the same array of remedies.

As a result of both of these factors (the minority trend in some federal circuits and the demands by the victims of other types of discrimination) as well as the acknowledgement by Congress that the population had attained sufficient maturity to serve as juries in discrimination cases, Congress included the possibility of awarding damages in the Civil Rihts Act of 1991.

2. The Civil Rights Act of 1991

Legislation

The Civil Rights Act of 1991 (CRA of 1991) establishes the possibility of recovering compensatory and punitive damages in employment discrimination cases brought under Title VII. Specifically, the Act states that punitive damages may be recovered from a defendant if the plaintiff proves that the defendant engaged in an unlawful employment practice *"with malice or with reckless indifference to the federally protected rights[12]"*. Thus, damages are

---

[7] The US SC long ago interpreted the 7th Amendment of the Constitution, *"Trial by jury in civil cases"*, as embracing *"all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights"* (Parsons v Bedford, 3 Pet. 433, 447 1830). Consequently, employment discrimination cases held before the enactment of the 1991 CRA were only tried by judges, as they were limited to equity relief.
Amendment 7 - Trial by jury in civil cases:
"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[8] See Goodwin v. Circuit Court of St. Louis City., 729 F.2d 541 (8th Cir. 1984); EEOC v. Gaddis, 733 F.2d 1373 (10th Cir. 1984).

[9] Schlueter, *supra* note 2, at 905.

[10] George A. Rutherglen & John J. Donohue III, *Employment Discrimination, Law and Theory*, 522, 523 (2005).

[11] Please note that these statutes were only limited to racial discrimination and did not cover any other type of employment discrimination.

[12] Robert Belton, Dianne Avery, Maria L. Ontiveros & Roberto L. Corrada, *Employment Discrimination Law, Cases and Materials on Equality in the Workplace*, 867 (7th ed. 2004).

only recoverable in cases of disparate treatment[13]. The Act also recognizes that any award of damages has to be accompanied by the right to a jury trial.

Although the Congress positioned itself with the victims when allowing the award of damages, it also made a very important concession to *"Corporate America"* by including *"an adjustable scale of upper limits on the combined amounts of compensatory and punitive damages recoverable by a successful litigant[14]"*. The caps are the following[15][16]:

(i) $50,000 for employers with more than 14 but fewer than 101 employees
(ii) $100,000 for employers with more than 100 but fewer than 201 employees
(iii) $200,000 for employers with more than 200 but fewer than 501 employees
(iv) $300,000 for employers with 501 or more employees

Moreover, no punitive damages can be awarded against a government agency or political subdivision.

Case law standards

a) Malice or Recklessness

Once the legislation was enacted, it was time for the courts to interpret it. During a certain period, the circuits could not come to an agreement regarding how a plaintiff should prove the existence of malice or recklessness. However, the landmark SC decision, Kolstad v. American Dental Association[17], solved this question and established the definitive standards involved in the award of punitive damages in an employment discrimination case brought under Title VII.

This decision established a two-tier structure in order to award damages:

(i) Compensatory damages are awarded for intentional discrimination (disparate treatment).
(ii) A claimant may recover punitive damages if he proves that the defendant engaged in intentional discrimination (disparate treatment) with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

The SC stated that the terms "malice" and "recklessness" focus on the actor's state of mind. While egregious misconduct is evidence of this state of mind, it is not the only evidence and it is not necessary to show such state of mind. Rather, what the statutory standard requires is proof that the employer was aware that it was *"engaging in unlawful discrimination"*. An

[13] There are two basic theories in the US for filing an employment discrimination claim: disparate treatment and disparate impact. Disparate treatment is the practice of intentionally dealing with persons differently because of their race, sex, national origin, religion, age or disability. To succeed in a disparate treatment claim, the plaintiff must prove that the defendant acted with discriminatory intent or motive. Disparate impact is the adverse effect of a facially neutral practice that nonetheless discriminates against persons because of their race, sex, national origin, religion, age or disability. Discriminatory intent is irrelevant in these claims.

[14] Raymond F. Gregory, *Unwelcome and Unlawful, Sexual Harassment in the American Workplace*, 217 (2004).

[15] The cap can be partially or completely avoided if the circumstances of the case permit a plaintiff to plead violation of a state civil rights statute in addition to a violation of Title VII. In such event, the court may allocate the part of damages that surpasses the cap to the state statute.

[16] Title VII only covers employers, independently of whether they are public or private, with more than 14 employees.

[17] Kolstad v. American Dental Association 527 U.S. 526 (1999). This case involved a woman, Carole Kolstad, who claimed that the American Dental Association had promoted a man over her in contradiction with Title VII. She alleged that the whole selection process was a sham, and that the decision was taken before the process had even started.

employer must know that he is violating federal law (or that he is in risk of violating federal law), not just that he is engaging in discrimination.

The decision pointed out that there are some situations (described below) in which the plaintiff may prove intentional discrimination but the requisites of malice or reckless indifference may not be present, in which case the plaintiff can only be awarded compensatory damages:

(i) The employer is unaware of federal law
(ii) The employer thinks that the discrimination is lawful
(iii) The employer may believe that the discrimination is a BFOQ[18]
(iv) The theory of discrimination is new or not widespread

b) Vicarious Liability

Discrimination in the workplace is suffered by employees, but is also inflicted by employees. However, if the plaintiffs want to recover the bulk of their damages, they need to be able to sue the employer, which has many more economic resources than any of its employees. Kolstad also established the standard for imputing vicarious liability to the employer due to the discriminatory actions of its employees with regard to punitive damages.

In this respect, the Restatement (Second) of Agency contemplates the employer's liability for punitive damages where an employee is serving in a *"managerial capacity"* and is *"acting in the scope of employment"*. The SC rejected a straightforward application of the *"scope of employment rule"* as it would have been extremely broad and it would have made the employer liable in almost all situations. As a result, the SC held that *"an employer may not be vicariously liable for the discriminatory decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII"*. This can be called the *"good-faith effort"* standard.

3. ADA

The Americans with Disabilities Act does not itself provide punitive damages. However, damages for intentional discrimination in this field are also governed by the Civil Rights Act of 1991.

4. ADEA

The Age Discrimination in Employment Act is the only federal employment discrimination statute that provides for liquidated damages. Liquidated damages are the doubling of *"amounts owing"* to a prevailing plaintiff in cases of *"willful violations"*. The amounts owing are unpaid wages and overtime compensation. It does not include front pay[19].

[18] Bona Fide Occupational Qualification: An employer can defend a classification based on sex, national origin, religion or age (but not race) by establishing that the classification is a BFOQ. It allows the employer to show that the classification is necessary for the efficient operation of the business so that the discriminated minority would be unable to perform the job properly (i.e. women not allowed to work in maximum security jails; pilots forced to retire at a certain age, etc.) The Supreme Court uses an extremely narrow interpretation of this defense.
[19] Barbara T. Lindemann & David D. Kadue, *Age Discrimination in Employment Law*, 894-895 (2003).

The SC established the standard for *"willful violations"* in Trans World Airlines v. Thurston[20] and affirmed the punitive nature of the liquidated damages[21]. This standard required showing that the employer *"knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA"*.

However, despite this definition, the circuit courts held different interpretations. Consequently, the SC once again attempted to clarify the standard in Hazen Paper Co. v. Biggins[22]. The SC established this time that the award of liquidated damages depends on whether the employer *"incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision"*. Therefore, the employer has a defense based on the existing exceptions set forth in the ADEA. As we can see, there is an extreme similarity between the standard and the exceptions established by the SC for Title VII and the ones established for the ADEA.

Willfulness is a question of fact for the jury, with the plaintiff bearing the burden of proof. Liquidated damages are mandatory if the jury determines its existence[23].

5. Class Actions

The circuit courts are split on whether compensatory and punitive damages can be recovered in class actions brought under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The 5th circuit ruled against it in Allison v. Citgo Petroleum Corp[24]. The 2nd circuit reached the opposite conclusion in Robinson v. Metro-North Commuter Railroad Co[2526].

III. CONCLUSIONS

As we mentioned at the beginning of this paper, the two main aims of punitive damages in any area of the law are deterrence together with the punishment of the discriminatory employer. It is clear that after the enactment of the CRA of 1991 with its consequent introduction of damages' awards, employers are now punished for their illegal actions. However, are they really deterred from carrying them out again? And, moreover, do these punitive damages awards set an example to other employers to eliminate these conducts from the workplace?

In my opinion, two main factors reduce the deterrence effect of punitive damages. On the one hand, as we previously saw, the combined award of compensatory and punitive damages is capped[27]. Therefore, regardless of how widespread the discriminatory conduct is, the maximum liability faced by the employer is always the same and only depends on the size of its workforce. As a result, we are offering an economic price to the employer in exchange for not implementing effective anti-discriminatory policies and not educating its employees.

---

[20] Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

[21] As a result, punitive damages are not recoverable under ADEA, as their punitive and deterrent functions are accomplished by the liquidated damages. However, punitive damages may be recoverable pursuant to a pendant state claim, where the state law so provides.

[22] Hazen Paper Co. v. Biggins, 507 U.S. 604, 617 (1993).

[23] Lindemann & Kadue, *supra* note 18, at 896.

[24] Allison v. Citgo Petroleum Corp, 151 F.3d 402 (5th Cir. 1998).

[25] Robinson v. Metro-North Commuter Railroad Co, 267 F.3d 147 (2nd Cir. 2001).

[26] Belton, Avery, Ontiveros & Corrada, *supra* note 12, at 874.

[27] In fact, juries must not be informed of the caps on damages, but the court must reduce the award to the statutory cap if the jury's award exceeds it.

Thus, in purely economic terms[28], for certain companies it would be more profitable to discriminate than to police these conducts.

Moreover, these caps were established in 1991 and they have not been adjusted since then. As a result, although these figures may have seemed harsh when they were first implemented, they now seem very limited if we compare them with punitive damages awards in other areas such as *"smoking liability"*, product liability, medical malpractice or environmental damages claims[29], especially if we take into account that there have been sixty-four punitive damages awards of at least $100 million (more than 300 times more than the maximum cap under the CRA of 1991) in the last twenty years (with the majority of them taking place since 1998)[30].

Furthermore, many reputed Law & Economics professors such as A. Mitchell Savinsky[31] and Steven Shavell[32], consider that imposing caps on punitive damages is *"inconsistent with deterrence theory[33]"* as *"it should be apparent that such caps cannot be justified on deterrence grounds – they might preclude the proper award of punitive damages[34]"*. These authors consider that punitive damages should be awarded following a ratio depending on the probability that the harmer may be found liable[35]. By imposing caps, there might be times in which the ratio cannot be applied, and the optimal deterrence level of punitive damages may not be reached.

In addition, since the enactment of the Civil Right Act of 1991 and due to the increased liability inherent in a possible award of punitive damages, employers now seek insurance to cover their employment discrimination liability. Allowing the insurance of these damages surely reduces the deterrence effect, as the employer counts on his insurance policy to cover any possible liability.

State law determines their insurability. A large number of states allow the insurance of punitive damages, but some do not. In general, however, an insured party cannot be indemnified against punitive damages awarded for intentional misconduct. Nevertheless, *"many claims against employers do not involve any policies on their part explicitly allowing or encouraging discrimination[36]"* as the intentional discriminatory conduct is merely performed by a fellow employee.

This possible intentional attitude on the part of the employer brings us back to the aforementioned *"good-faith effort"* standard set by the SC in Kolstad. Such standard is likely to be one of the most litigated issues in the future punitive damages related employment discrimination cases due to the imprecise definition and lack of guidance provided by the SC. As a result, this issue has been left to be contested and clarified in the lower federal courts[37].

---

[28] We have to take into account that many companies, especially those whose products are directly bought by the final consumers, are also very concerned about the negative reputation and publicity that comes along with an employment discrimination claim.
[29] See W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 Emory L.J., 1405, 1410-1411 (2004).
[30] *Id.* at 1405.
[31] Professor of Law and Economics, Stanford Law School.
[32] Professor of Law and Economics, Harvard Law School.
[33] A. Mitchell Savinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 212 Discussion Paper Series (John M. Olin Center for Law, Economics, and Business), 36 (1997).
[34] *Id.*
[35] I.e. if the harm is $100 and the possibility of being found liable is 20%, then the punitive damages award should be $800.
[36] Rutherglen & Donohue III, *supra* note 10, at 642.
[37] See EEOC v Wal-Mart Stores, Inc., 187 F.3d 1241 (10th Cir. 1999).

© Manuel Martínez-Herrera
© IUSLabor 3/2006
ISSN: 1699-2938