PUNITIVE DAMAGES

This is the series of specific topics we will address. Panelists will take turns identifying the general points, then other panel members, then comments and questions from the audience will be solicited. Some suggestions are offered below. They are only suggestions and need not all be used—and you may have better or more applicable cases or arguments.

1. *What is required to show punitive damages generally under Kolstad?*

Begin by what *Kolstad* itself says, then to what the decisions construing it say.

- The decision tells us conduct need not be "egregious" and that the focus must be on the intentional discriminatory conduct found by the trier of fact, subject to a good faith affirmative defense.
- It is not enough to argue that the plaintiff received severance pay or progressive discipline or outplacement and thus punitive damages are inappropriate.
- Not sufficient are situations where there is a novel theory of liability or belief that a statutory exemption applies. These are rare cases.
- The fact that management's view of the facts posited an exculpatory theory (plaintiff was using a harassment claim to extort favorable treatment for a co-worker) is not sufficient if the evidence is such that the jury was entitled to disbelieve it. *EEOC v. Stocks* (5th Cir. 2001) 2007 WL 1119186
- But where the court found the case close on the evidence, the court was entitled to dismiss the punitive damage claim, *Praseuth v. Rubbermaid, Inc.,* 406 F.3d 1245 (10th Cir. 2005). Is this holding consistent with the court's role as trier of law but not fact?

2. *How is the critical element of discriminatory intent satisfied?*

- The employer admits knowing that discrimination is unlawful. *Brusco v. United Airlines,* 239 F.3d 848 (7th Cir. 2001). There is no reason for plaintiff's counsel not to explore this subject in detail in deposition and at trial.
- The company has a policy against discrimination. *Gagliardo v. Connaught Laboratories,* 311 F.3d 565 (3rd Cir. 2002). They call that irony—more on this subject below.

- One court has suggested that perhaps it is now safe to assume, without a specific showing, that *everyone* knows that discrimination is unlawful, *Zimmerman v. Associates First Capital Corp.,* 251 F.3d 376 (2nd Cir. 2001).
- One important factual element of such a showing was found where no one emerged as the decision-maker to defend the decision, and a key document was altered, all of which the court found suggested intent, *Chalfant v. Titan Distribution* (8th Cir. 2007) 2007 WL 136324

3. Discovery Opportunity For Plaintiffs: Other Discrimination Claims, Investigations

- The good faith defense is an affirmative defense, right? It has to be pleaded?
- Once the question is put into issue, the company's handling of other claims, even the existence of other claims if they have merit, is evidence of a lack of good faith.
- In *Chalfant,* above, the court relied on other discrimination complaints as evidence of the intentional character of the discrimination (from the company's point of view). Even without a good faith defense, the punitive damage claim alone may thus be sufficient to allow such discovery.
- Thus, perhaps it is no longer the case that discovery of other claims can be limited to those of the plaintiff or others in his or her work unit or business unit. This becomes, in effect, class discovery and can be used for that purpose by plaintiff's counsel.

4. Policies and Training—when it helps, when it does not

- What is the difference in focus between "management employees" (including those who make ultimate employment decisions) and "high officials?" How important is this distinction and what does it mean for the punitive damage decision?
- We have seen that the company policy can be evidence that discrimination that occurred was intentional. Is this catch-22 for the employer? If the decision-maker did not get training, does it show lack of a sufficient good faith defense. If the decision-maker did received training, does it call into question the sufficiency of management's policy/training/commitment to equal opportunity?

- *McDonough v. City of Quincy,* 452 F.3d 8 (1st Cir. 2006)said that the policy and training required submission of punitive damages to the jury. That case involved high-ranking police officials.
- *Harsco Corp. v. Renner,* 475 F.3d 1179 (10th Cir. 2007) approved vacating an award of punitive damages where they were based on the conduct of the managerial employees in this specific case, pointing out that a contrary rule would eliminate the good faith defense entirely.
- *Ridley v. Costco Wholesale Corp.,* (3rd Cir. 2007) 2007 WL 328852 approved summary judgment on punitive damages despite an inadequate investigation and instances of retaliation, relying heavily on the company policy, open door and widespread training. Query: how good was the training? Plaintiffs should try to get unaligned witnesses such as former employees to admit that they do not recall much about the training they received and that it did not tell them anything particularly important or new.
- *EEOC v. DuPont,* 480 F.3d 724 (5th Cir. 2007) refused to rule out punitive damages despite the company policy. The evidence on the policy was limited and the discrimination was egregious: disabled plaintiff given work to worsen her condition, decision made derisive "crippled" comment.
- *Dominic v. DeVilbliss Air Power, Inc.,* 493 F.3d 968 (2007) refused to allow punitive damages because management, in the instant case, conducted four investigations, using open-ended questions, including co-workers and bringing in outside investigators, even if they did not uncover evidence supporting plaintiff's claim.
- *Flitton v. Primary Residential Mortgage* (10th Cir. 2007) 2007 WL 2218886 allowed punitive damages where the CEO decision-maker admitted discriminatory intent.
- *Farias v. Instructional Systems,* 274 F.3d 1276 (9th Cir. 2001) recognized reliance on advice of counsel to support a good faith defense. NOTE: This waives the attorney client privilege and opens it up for discovery, and the defense is only good (under federal criminal tax cases, at least) when there was full disclosure of the material facts (this might include true intentions) to the lawyer

and reliance on the advice in good faith (rather than as an after-the-fact "insurance policy").

- *Beard v. Flying J, Inc.,* 266 F.3d 792 (8th Cir. 2001) was a case where the investigating employee testified that he believed the plaintiff's claims, but the company took no action. That "mere belief" was enough to justify punitive damages. Query: what if the investigator has nothing in the way of evidence to back up the belief and it turns out to be no more than suspicion? Moral of story: be selective about who you appoint to investigate, and consider yourself stuck with their determination.
- *Rowe v. Hussmann Corp.,* 381 F.3d 775 (8th Cir. 2004) allowed $1 million in punitive damages because plaintiff reasonably feared for her physical safety.
- *Winarto v. Toshiba America Electronics Components,* 274 F.3d 1276 (9th Cir. 2001) noted that proof that management had not, in other instances, enforced its anti-discrimination policy would likely allow the punitive damage claim to proceed to trial.
- *Madison v. IBP,* 257 F.3d 780 (8th Cir. 2001) is to the same effect—that a policy is not a good defense if it is not being enforced. In that case, multiple reports of harassment were not investigated, no records were made of employees counseled against harassment and an unsubstantiated assertion that a claimant had "joined in" the activity was sufficient to cause the company to find no harassment where there was physical conduct involved.
- *Green v. Administrators,* 284 F.3d 642 *5th Cir. 2002) found that where, in the instant case, there was a good faith attempt to stop sexual harassment that was not successful in doing so, punitive damages were not appropriate even if liability was.

5. Compensatory Damages or Back Pay Required?

- Back pay award not required, *e.g., EEOC v. DuPont,* 480 F.3d 724 (5th Cir. 2007)
- Compensatory damages not required, *Hennessey v. Penril Datacomm Networks,* 64 F.3d 1344 (7th Cir. 1995)

6. Net Worth—Admissible?

- *State Farm* (and Justice Breyer in *BMW*) criticizes reliance on size of company, but does not appear to mandate its exclusion.
- But Title VII is a federal statute, and Supreme Court has authority to decide federal common law of punitive damages.
- What, if anything, are the courts saying?

7. Punitive Damages in FLSA Retaliation Cases

- *Travis v. Gary Community Mental Health Center*, 921 F.2d 108, 111-12 (7th Cir. 1990)(Easterbrook, J.) . This is the case that interprets the 1977 amendment of the FLSA to include an unrestricted remedy for retaliation to allow compensatory (emotional distress) and punitive damages.
- *Soto v. Adams Elevator Equipment Co*., 941 F.2d 543, 551-52 (7th Cir. 1991)(Ripple, J.) reinstated a jury verdict of $43.000 in emotional distress damages that the district court JNOV'd (and which the district court referred to as punitive damages) in an FLSA retaliation case.
- *Moore v. Freeman*, 355 F.3d 558, 563-64 (6th Cir. 2004) adopts *Travis* and suggests that there is a consensus among the circuits that emotional distress damages are recoverable for FLSA retaliation, but that there is a split in the circuits on the question of punitive damages.
- *Eggleston v. South Bend Community School Corp*., 858 F.Supp. 841, 854-56 (N.D. Ind. 1994) allowed emotional distress damages for ADEA retaliation, relying in great part of comments by Judge Posner in *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279 (7th Cir. 1993). Citing specific language in the legistlative history of the 1978 amendment to ADEA renouncing punitive damages under that statute, *Eggleston* found that punitive damages were not available in ADEA retaliation cases.
- *Tomao v. Abbott Laboratories, Inc*., 2007 WL 2225905, at *16-20 (N.D. Ill. July 31, 2007)(Nolan, M.J.) contains a good exposition of the issue and the case law as it has developed on the issues of emotional distress and punitive damages for ADEA retaliation. The decision allowed both, although it reduced the recovery of emotional distress damages down by two orders of magnitude and ultimately allowed punitive

damages based on almost entirely on Travis and Soto and similarly reduced the award down from $3 million to $18,000. However, the total recovery was almost $1 million in that case.