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Punitive damages in employment: How to get them and keep them

"This is just not a punitive damages case. And even if you somehow convinced a jury otherwise, punitive damages are limited to a 1:1 ratio to compensatories in employment cases." Sound familiar? Defense counsel and mediators have repeated some version of this statement to me in just about every case I have litigated. So, are they right? Are punitive damages incredibly difficult to prove and even harder to hold on to?

Is your case a punitive damages case?

If you are litigating against a public entity, punitive damages are not available. However private employers in California are liable for punitive damages in discrimination, harassment, and retaliation cases if a plaintiff proves by clear and convincing evidence that "an officer, director, or managing agent" of a corporation personally engaged in oppressive, fraudulent, or malicious conduct, or "authorized or ratified" that conduct. (Civ.Code 3294, subd. (b).)

Certainly some of our cases may involve a board member personally engaging in sexual harassment. Or perhaps you have smoking gun evidence that the head of human resources targeted your client for termination because she was a "troublemaker" who complained about illegal conduct. In these cases, proving liability under Civil Code section 3294 may simply be a matter of lining up the evidence for the jury so they can see the elements are met.

But many of our cases simply don't reveal direct evidence of corporate heads personally engaging in misconduct. Companies intentionally use low-level managers to deliver termination decisions in an attempt to shield themselves from this very type of liability. When this

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situation presents itself, focusing on who "authorized or ratified" the discriminatory conduct is key.

Depose all players

In response to Employment Form Interrogatory number 201.1, an employer must disclose the name of "each person who participated in the termination decision." Look carefully at this response and depose each of the people listed. If these deponents deny having the authority to fire your client on their own, don't be frustrated: you may have just been handed proof of authorization or ratification by a higher-up in the company. Confirm that the supervisors and managers that interacted directly with your plaintiff shared all important information about your client with that decision maker when they recommended termination. Specifically request all emails and text messages between the corporate decision maker and subordinate manager, so that you can build a record of the company being on notice about the events that form the basis of your lawsuit.

Once you have proof that a corporate agent had to be briefed about events in order to approve the termination, you are on your way to showing liability for punitive damages. "Ratification . . . may be established by any circumstantial or direct evidence demonstrating *adoption* or *approval* of the employee's actions by the corporate agent." (*Ibid.*, emphasis added.) Ratification may be "inferred" if the employer is "*informed* of the employee's actions" but "does not fully investigate and fails to repudiate the employee's conduct." (*Fisher v. San Pedro Hospital* (1989) 214 Cal.App.3d 590, 621, emphasis added.)

Also, keep in mind that the employer's proffered reason for termination may help you in proving more than simple "pretext" to establish underlying liability for discrimination or retaliation. The same evidence the defendant relies on to attempt to cover-up their unlawful actions can be further proof of fraudulent and malicious conduct. When an employer "attempt[s] to hide the illegal reason for their decision with a false explanation," that very conduct is "base, contemptible or vile" and will support a jury's determination that the employer acted willfully and in conscious disregard of your employee's rights. (*Cloud v. Casey* (1999) 76 Cal.App.4th 895, 912.)

Because there are various ways to meet the requirements for punitive damages under Civil Code 3294, be sure to take the time in closing to review each element of CACI Jury Instruction 3946 (Punitive Damages – Entity Defendant) with your panel. Explain to them piece by piece that there are multiple ways that liability can attach, and show them the specific documents and testimony that support each separate type of finding.

Who is a managing agent?

The defendant in your case will certainly not concede "managing agent" status if there is any chance for avoidance of punitive damages. Because you know the challenge is coming (perhaps via summary adjudication motion and then again at trial), knowing the types of employees who have been found by California courts to constitute managing agents is key, and will help you create a roadmap of the evidence you need to obtain during depositions to get ahead of this anticipated defense.

The seminal case regarding the determination of managing agent status is *White v. Ultramar, Inc*. (1999) 21 Cal.4th 563. In *White,* the California Supreme Court held that "the mere ability to hire and fire employees" was not enough to render a supervisory employee a managing agent under Civil Code 3294. Instead, managing agents were "only those corporate employees who exercise substantial independent authority and judgment in their corporate decision-making so that their decisions ultimately determine corporate policy." (*White* at 566-67.)

Defense counsel in your cases will likely argue that this definition effectively limits managing agents to board members and the highest ranking executives in a company. It does not.

An employee's status must be determined on a "case-by-case basis." (*White* at 567.) In *White,* the court found that a "zone manager" responsible for "managing eight stores" and "at least 65 employees" was a managing agent. (*Ibid.*) The Court explained that "the supervision of eight retail stores and sixty-five employees is a significant aspect of Ultramar's business" and the fact that the manager reported to and consulted someone in another department before taking action did not detract from the employee's independent authority. (*Ibid.*). A few key opinions which have made managing agent determinations are:

- *Wysinger v. Automobile Club of Southern Calif*. (2007) 157 Cal.App.4th 413, 428-429: a vice president of district office operations was found to be a managing agent. Five regional managers reported to him, he managed day-to-day operations of all of the facilities in his district, and had authority to move managers to different offices.
- *Major v. Western Home* (2009) 169 Cal.App.4th 1197, 1220-1221: a regional insurance claims manager who supervised 35 employees and exercised authority to pay or deny claims was determined a managing agent.
- *Hobbs v. Bateman Eichler, Hill Richards* (1985) 164 Cal.App.3d 174, 193: the manager of single branch office of a brokerage firm was a managing agent because he was responsible for supervision of office's 8,000 accounts.
- *Gober v. Ralphs Grocery* (2006) 137 Cal.App.4th 204: a district manager who was "in charge of several stores" and "acts as a liaison to upper management for the operation of the stores" was a managing agent.
- *Roby v. McKesson* (2009) 47 Cal.4th 686, 715: the plaintiff's complaint to two midlevel managers (the head of a distribution center and the regional human resources director) was sufficient to support the jury's inference that employer was aware of and ratified unlawful conduct.

Are there limits on punitive damages in employment cases?

For most employment cases asserting discrimination, harassment, or retaliation

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in violation of California law – including the Fair Employment and Housing Act, Labor Code 1102.5, and Wrongful Termination in Violation of Public Policy claims – punitive damages are available without any statutory limit on amount.

Be aware that in contrast, Title VII and the ADA have "caps" on the amount of punitive damages that can be recovered; the cap changes depending on the size of the employer. Therefore if you are considering alleging such federal causes of actions for some strategic purpose, be thorough with your damages research before filing, and consider including corresponding California "non-capped" claims as well.

Assuming you have asserted California claims with no damage caps, then why is defense counsel still talking about limits on punitive damages? Civil Code section 3294 does not place any monetary limit on recovery of exemplary damages. In fact, no statute does so with regard to these California employment cases. So where are these limits coming from?

Look to the Constitution

The answer, purportedly, is the Constitution. In a series of U.S. Supreme Court decisions published in the mid 1990's, including *TXO Prod. Corp. v. All. Res. Corp*. (1993) 509 U.S. 443 and *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, the Court opined that the Due Process Clause of the Fourteenth Amendment prohibits the imposition of "grossly excessive" punishments and therefore imposed "substantive limits" on punitive damage awards. (*TXO* at 454, *Gore* at 562.) The reasoning behind these limits is that the "notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." (*Gore* at 574.)

Whether or not these "limits" are in fact required by the Constitution is certainly an important question, especially given the societal importance of using exemplary damages to punish and deter egregious conduct. The dissenting opinions in the *Gore* case address this concern head on, arguing that the Constitution does not make the size of punitive damage awards "any of our business," and that by permitting such judicial review and reductions, the courts were in effect engaged in legislative policymaking by declaring a punitive award unconstitutional simply because it was "too big." (*Gore* at 600-614, dis. opns. of Scalia, A., Thomas, C., and Ginsburg, R.)

Regardless of whether or not punitive damage limits are in fact required under the Constitution, it is absolutely clear at this juncture that this is the way that binding case law has developed. Federal and California courts are required to review punitive damage awards to ensure that they are not "grossly excessive."

The *Gore* court developed three "guideposts" by which punitive damage awards should be reviewed to ensure constitutional due process: (1) the reprehensibility of defendant's conduct, (2) the disparity between the harm to plaintiff and the punitive award; and (3) comparable civil penalties. (*Gore* at 574-575.) These "guideposts" have since been widely adopted.

The second of these *Gore* guideposts, i.e., the disparity between the harm to plaintiff and the punitive award, essentially examines the numerical "ratio" of the compensatory award and punitive award in a case. For example, if an employee was awarded $10,000 in wage loss, $40,000 in general damages, and $250,000 in punitive damages, the "ratio" would be 5:1, as the punitive damage award would equate to five times the amount of the total compensatory award. It is this numerical ratio which defendants will argue should serve as a "limit" or "cap" on an employee's ability to keep a punitive damage award.

Is there a 9:1 ratio or 1:1 ratio limit in employment cases?

Many of you may have heard reference to a 9:1 or single-digit ratio or limit on punitive damages in all cases, or even a 1:1 ratio in employment cases. Where did these seemingly arbitrary numbers come from? Do they in fact serve as strict caps on punitive damages?

The 9:1 or single-digit ratio language is related to the U.S. Supreme Court case *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408. *State Farm* was a bad-faith insurance case following a car collision. State Farm, the defendant driver's insurer, refused to settle for the limits of their insurance policy ($50,000), and instead took the case to trial and lost; the judgement was for $185,849. State Farm refused to cover the $135,849 in excess liability, and a bad-faith action ensued. At trial on the bad-faith action, the insureds "introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company-wide." (*State Farm* at 414-415.) The jury awarded $2.6 million in compensatory damages (which the trial court reduced to $1 million) and $145 million in punitive damages. (*Ibid.*) On appeal, the Supreme Court examined whether this 145:1 ratio was "excessive."

The Supreme Court in *State Farm* examined the punitive award and found it to be "irrational" and "unreasonable" and therefore in violation of due process protections. The Supreme Court did not reduce the award itself, instead remanding the matter for the Utah state court – but in doing so, the Supreme Court noted that "*few awards* exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. [Citation omitted.] Single-digit multipliers are *more likely to* comport with due process…." (*Id.* at 418, emphasis added.) It is this language from the *State Farm* case which has been widely cited by defendants to purportedly limit punitive damages to a 9:1 or single-digit ratio. Notably, however, the *State Farm* opinion specifically *refused* to set such a bright line ratio by expressly using the qualifiers "few" and "more likely."

The fake 1:1 ratio

The 1:1 ratio that employment defense counsel attempt to claim "caps"

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punitive damages in our cases arose out of the California Supreme Court case of *Roby v. McKesson* (2009) 47 Cal.4th 686. In *Roby,* a disabled employee challenged an attendance policy which required 24-hour notice for absences. (*Ibid.*) *Roby* did reduce punitive damages to a 1:1 ratio to compensatory damages on appeal, but *at no point* did the court state that such a ratio would be required, nor even appropriate in every employment case.

Instead, the *Roby* opinion emphasized the ratio it selected was based "on the specific facts of this case," where there was "no indication of repeated wrongdoing by employer McKesson." (*Id.* at 766-767.) The *Roby* court went so far as to note that the employer's conduct "was at the low end of the range of wrongdoing *that can support an award of punitive damages*" and expressly noted that the 1:1 ratio was only appropriate given "the relatively low degree of reprehensibility on the part of employer McKesson." (*Id.* at 719, emphasis added.)

In sum, *Roby* simply does *not* stand for the proposition that punitive damages are limited to a 1:1 ratio. In fact, courts looking at cases since *Roby* with evidence of a high level of reprehensibility by defendants have refused to apply such limits. (See, for example *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 38, rejecting application of 1:1 ratio applied in *Roby*, concluding "This is not such a case.")

How do we respond if our punitive award is challenged as unconstitutional?

A defendant's challenge to your punitive damage award will begin before your trial judge, through a motion for judgment notwithstanding the verdict ("JNOV") or new trial motion. When you are opposing this post trial request, it is important to educate the court about its procedural role and substantive limitations in reviewing your award.

From a procedural standpoint, be sure to advise the court that a constitutionally reduced verdict is *not* the same thing as a remitter. A remittitur is *discretionary* and is used when the court believes the jury's award is unreasonable on the facts. A constitutional reduction, on the other hand, is a *mandatory* correction to ensure a verdict conforms with the law, i.e., the due process clause. (*Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal.4th 1159, 1188.) As such, "should a reviewing court conclude that the jury's punitive damages award is excessive, the remedy is *not* to set the award aside … but to reduce the award to constitutional limits. (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 375, emphasis added.) "The appropriate order is for an absolute reduction, rather than a conditional reduction with the alternative of a new trial, i.e., a remittitur." (*Simon, supra* at 1188.)

From a substantive standpoint, it is key to remind the court that its role in reviewing the jury's punitive damage award is expressly restricted. "Although the *Gore* inquiry, too, serves to prevent arbitrary punitive damages awards, it does *not* perform this function by regulating the jury's decision making process." (*Nickerson* at 374-75, emphasis added.) The "constitutional mission is *only to find a level higher than which an award may not go*; it is not to find the "right" level in the court's own view." (*Simon, supra* at 1188.) "Thus, in deciding the constitutional maximum, a court does not decide whether the verdict is unreasonable based on the facts; rather, it examines the punitive damages award to determine whether it is constitutionally excessive and, if so, may adjust it to the maximum amount permitted by the Constitution." (*Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 214.)

Bright line is actually quite blurred

The defense will likely try to convince the trial judge that there is a numerical ratio that simply cannot be surpassed. You must dispel this falsehood. The United States Supreme Court has *repeatedly* confirmed that there is no bright line ratio that applies to the determination as to whether a particular punitive damage award is constitutional. (See *State Farm v. Campbell* (2003) 538 U.S. 408, 416-418, "there are no rigid benchmarks that a punitive damages award may not surpass"; see also *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568, "of course, we have consistently rejected the notion that the constitutional like is marked by a simple mathematical formula.)

Instead, "California published opinions on this issue have adopted a broad range of permissible ratios — from as low as one to one to as high as 16 to one depending on the specific facts of each case." (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 88.) For example, in *Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal.4th 1159, 1188, the California Supreme Court explained that when the ratio of punitive damages to compensatory damages is "*significantly* greater" than 9 or 10 to 1, the punitive damages award is suspect under federal due process. (*Id.* at 1182, emphasis added.) Notably, in *Simon,* the Court upheld a 10 to 1 ratio. (*Id.* at 1188-89.)

Focus on defendant's reprehensible conduct

As set forth above, your defendant will focus on the ratio of your punitive damage award to your compensatory award, i.e., the second *Gore* factor used for review of punitive damages. However, this factor is *not* the most important consideration for the court.

"The *most important* indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." (*Gore, supra* at 575). With regard to reprehensibility, this court should consider, (a) if the harm caused was physical as opposed to economic; (b) if the conduct evinced an indifference to or a reckless disregard of the health or safety of others; (c) if the target of the conduct had financial vulnerability; (d) if the conduct involved repeated actions or was an isolated incident; and (d) if the harm was the result of intentional malice, trickery, or deceit, or mere accident. (*State Farm, supra* at 419.)

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Be sure to detail for the court, with citations to your trial record, all of the evidence that supports each of these reprehensibility factors. This is not the time for a general summary of the case. Remind your trial judge why the jury reached the award they did, using specific quotations from testimony and key documents. And: if you presented "me-too" evidence at trial, be sure to highlight it in this context. Educate your judge that "A court properly may consider the defendant's similar wrongful conduct toward others in determining the degree of reprehensibility of the defendant's conduct toward the plaintiff." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 559.)

Defendant's wealth absolutely matters and you must be prepared to prove it

The California Supreme Court has repeatedly confirmed that "the defendant's financial condition is an *essential factor* in fixing an amount [of punitive damages] that is sufficient." (*Simon, supra*, at 1184-85.) "Obviously, the function of deterrence ... will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) "The wealthier the wrongdoing defendant, the larger the award of exemplary damages need be." (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 65.)

Because punitive damages are inherently linked to a defendant's wealth, it is crucial that you actually present evidence of financial condition to the jury in the punitive phase of trial. You must consider in advance how you are going to obtain and present this evidence. Keep in mind that your trial judge may require you to put on your punitive damages case *immediately* after the jury returns a finding of malice. Sometimes the court will even require that evidence to be presented the same day as your liability verdict.

Because of the time crunch that you will likely face, take steps in advance. Consider filing a motion prior to trial (perhaps to be heard concurrently with defendant's summary judgment motion) or along with motions *in limine* requesting an order permitting discovery of defendant's financial condition. Be sure to personally serve subpoenas on defendant during trial for documentation of its wealth. Remind your trial judge during trial that you have requested and subpoenaed this information and request an order from the court requiring defendant to timely comply.

Further, you must consider *how* you are going to present proof of financial condition to the jury: you will either need a stipulation as to net worth, or a live witness to explain to the jury what the company's value is. Does defendant have a financial representative in California who you can subpoena for this purpose? One way to get this information early in a case is to simply ask for it through a special interrogatory, i.e., "identify the name and contact information of the person most knowledgeable about defendant's financial condition." Do not permit an objection to lie regarding this inquiry. Under Civil Code section 3295, you have a *right* to pretrial discovery of "the witnesses employed by or related to the defendant who would be most competent to testify" regarding financial condition.

When you are presenting evidence of wealth to the jury, don't forget to explain to them *why* that evidence is key to their analysis. Review CACI Jury Instruction 3949 (Punitive Damages – Individual and Corporate Defendants) with your panel and highlight that the judge has posed the following question to them: "In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct?"

When requesting a dollar amount linked to your defendant's wealth, keep in mind that California courts have generally found punitive damages greater than 10-15 percent of a defendant's net worth to be excessive. (*Bankhead v. ArvinMeritor* (2012) 205 Cal.App.4th 68, 83.) Keeping these numbers and the generally acceptable compensatory vs. punitive ratios in mind during your punitive damages closing argument will help you hold onto your award.

Finally, empower your jury to make a statement with their punitive damage award. They must understand that punitive damage awards "should not be a routine cost of doing business." (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 427.)

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