



SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

BY EDWARD M. SPIRO

Constitutional Limitations on Punitive Damages Awards

As punitive damages awards have soared into the stratosphere, the U.S. Supreme Court has acted more aggressively to fetter the discretion of juries imposing punitive damages and to make more robust the supervision of those awards by trial and appellate courts.

The Court has staked out “guideposts” by which an award of punitive damages should be measured,¹ and has sought to ensure that jurors, told that they can and should take into account the potential impact of the defendant’s conduct on others in measuring its reprehensibility, are also instructed that they may not punish a defendant for harm to nonparties,² nor for conduct unrelated to the claims in the lawsuit³ or that is lawful outside the state in which they sit.⁴

In contrast to a jury’s decision to impose compensatory damages which represents a determination of “historical or predictive fact” that cannot be re-examined consistent with the Seventh Amendment, trial courts are to review jury decisions on punitive damages for compliance with due process, and appellate courts in turn are to review those decisions de novo.⁵

While the Supreme Court’s recent decisions on punitive damages have focused primarily on state court awards, federal courts considering state law claims (whether through diversity or supplemental jurisdiction) or federal claims under which punitive damages are authorized, are also called upon to supervise, review and often reduce awards of punitive damages.

In the past several months, judges in three separate cases in the U.S. District Court for the Southern District of New York have confronted large punitive damages awards in employment discrimination cases, and have issued thoughtful and detailed decisions illustrating the practical application of the Supreme Court’s guidance on the constitutional limits on punitive damages.

Edward M. Spiro is a principal of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, concentrating in commercial litigation. Mr. Spiro is the coauthor of “Civil Practice in the Southern District of New York,” 2d Ed. (Thomson West 2007). **Judith L. Mogul** assisted in the preparation of this article.



The Supreme Court ‘Guideposts’

Focusing on the due process requirement that a defendant be on notice not simply of the conduct which will subject it to punishment, but of the severity of the penalty that may be imposed for that conduct, the Supreme Court in *BMW of North America, Inc. v. Gore*,⁶ put forward three guideposts for assessing whether an award of punitive damages comports with “[e]lementary notions of fairness enshrined in our constitutional jurisprudence.” The first and “most important indicium” of whether an award is reasonable is the degree of reprehensibility of the defendant’s conduct. The Court identified a number of aggravating factors that make some wrongs “more blameworthy than others,” including whether: the offense was marked by violence or the threat of violence; it evinced indifference or a reckless disregard for the safety of others; the target of the conduct was financially vulnerable; the act was undertaken with deceit or malice, as opposed to mere negligence; and the defendant’s conduct was part of a pattern rather than an isolated incident.

The second *Gore* guidepost is the ratio between the punitive damages award and the actual harm inflicted on the plaintiff. The Supreme Court has long resisted drawing a “mathematical bright line” or adopting a categorical approach,⁷ but has nonetheless made clear that the ratio between compensatory and punitive damages must not be extreme. It has said that “[s]ingle-digit multipliers are more likely to comport with due process,”⁸ and suggested that a smaller compensatory award might

support a higher ratio than a large compensatory award.⁹ Most recently, at oral argument on Feb. 27, 2008 in *Exxon Shipping Co. v. Baker*, a case in which Exxon has challenged a \$2.5 billion punitive damages award imposed on it in connection with the Exxon Valdez oil spill, Justice David Souter inquired why the Court should not “recognize the difficulty of trying to deal with indeterminate limits...proven in the constitutional context and...simply...come up with a number, because no other way is going to give us any kind of an administrable standard.”¹⁰

The third guidepost to guard against excessiveness requires that a punitive damages award be measured against the civil penalties authorized or imposed in comparable cases. The Supreme Court has framed this inquiry in terms of deference to legislative judgments concerning appropriate sanctions for the conduct at issue, but, as discussed below, some lower courts have looked beyond statutory and regulatory schemes, to damage awards in similar cases in gauging how a particular award stacks up against awards in other cases for like misconduct.

Application of the ‘Gore’ Guideposts

In the past several months, judges in three separate employment discrimination cases in the Southern District of New York have slashed punitive damages awards as excessive under the *Gore* guideposts. In *Zakre v. Norddeutsche Landesbank Girozentrale*,¹¹ Judge Robert W. Sweet reduced the amount of punitive damages awarded to the plaintiff by approximately 75 percent, from \$2.5 million to \$600,000, and Judge Gerard E. Lynch, in *Tse v. UBS Financial Services, Inc.*,¹² and Judge Victor Marrero, in *Thomas v. iStar Financial, Inc.*,¹³ reduced punitive damages by up to 90 percent, from \$3 million to \$300,000 in *Tse*, and from \$1.6 million to \$190,000 in *iStar*.

Reprehensibility

In *Tse*, the jury found that the defendant had placed the plaintiff on a “business development plan,” a kind of probationary, restrictive duty, because of her gender, but rejected other claims of racial and gender discrimination, including the claim that her termination was the result of discrimination. It awarded plaintiff compensatory damages of \$556,000 (consisting of economic damages¹⁴ and damages for emotional distress) and \$3 million in punitive damages. In evaluating the reprehensibility of the defendant’s conduct,

Judge Lynch concluded that although there was enough evidence that the defendant had acted in reckless disregard of the plaintiff's rights when it placed her on the business development plan to support the imposition of some amount of punitive damages, the defendant's conduct was not sufficiently reprehensible to warrant the \$3 million awarded in that case.

Specifically, he observed that there was no evidence of violence or threat of violence, and no evidence of deceit. He also found that there was little evidence of malice directed at plaintiff because the plaintiff's case was built on indirect evidence of discrimination, sufficient to sustain liability, but insufficient to show malicious intent.

Judge Lynch found most significant that the defendant's discrimination consisted of an "isolated, discrete event." In finding a low degree of reprehensibility, he was guided by the fact that there was no evidence of discrimination toward other female employees, and particularly by the fact this plaintiff's termination was not discriminatory. He concluded that the punitive damages awarded by the jury were not "reasonably tailored to the degree of reprehensibility exhibited" by the defendant and that the verdict went "beyond the need to punish and deter this particular discriminatory act" and was improperly influenced by passion against discrimination in general.

The discrimination in *iStar* was somewhat more extensive, inasmuch as the jury found that the plaintiff's discharge was both retaliatory and discriminatory, and in light of evidence that one of the defendant's employees had targeted other black employees who had complained of their treatment without appropriate response. Judge Marrero cautioned, however, that "the reprehensibility should not be overstated," stressing that there was no threat of violence and no finding of intentional discrimination against the plaintiff.

In *Zakre*, Judge Sweet's discussion of the *Gore* factors indicates a higher level of reprehensibility in that case. He noted that the plaintiff had suffered discrimination for as much as four years and that there was extensive evidence that the defendant discriminated against women generally and disregarded complaints about discrimination and suggestions concerning training under the equal employment opportunity laws. He also found evidence that the specific acts of mistreatment directed at plaintiff (including conflicting explanations provided for promotion of another employee to a position plaintiff had sought, limitations on her career prospects and job responsibilities, and directions to listen in on her phone calls) supported a finding that the defendant acted with malice rather than by accident.

Although Judge Sweet did not attempt to quantify the reprehensibility in *Zakre*, the fact that he permitted \$600,000 in punitive damages after remittitur, in contrast to the far lower awards of \$300,000 and \$190,000 permitted in *Tse* and *iStar*, suggests that the greater level of reprehensibility he identified supported a higher punitive damages award in that case.

Punitive Damages and Harm

In examining the ratio between the punitive and compensatory damages awards, Judge Lynch in *Tse* found the ratio of nearly 30:1 "clearly excessive." The ratios in both *iStar* and *Zakre* were considerably lower, but in both cases the courts found that the

substantial compensatory damages awarded by the juries supported still further reductions in the ratios. In *Zakre*, the jury awarded plaintiff \$2.5 million in punitive damages and \$1,448,971 in compensatory damages. Although Judge Sweet did not find the less than 2:1 ratio between those amounts to be excessive, he did note that in light of the substantial compensatory award, a reduction in the punitive damages award "would not be inappropriate" if warranted by other circumstances. In *iStar*, Judge Marrero specifically found that the ratio of between 3:1 and 4:1 between the punitive damages and compensatory damages awarded by the jury was excessive because of the substantial amount of compensatory damages awarded to plaintiff.¹⁵ (The jury awarded plaintiff \$190,000 in back pay, \$250,000 in front pay (which the court reduced to \$85,950) and \$3,500 in noneconomic compensatory damages). He concluded that a punitive award equal to the amount of the compensatory award would be more appropriate.

On plaintiff's motion for reconsideration, Judge Marrero expanded on this rationale, observing that the "vast disparity" of the punitive damages award was supported not simply by the overall ratio, but also in relation to the "minimal recovery" of \$3,500 awarded for the plaintiff's emotional injuries. Judge Marrero reasoned that this figure reflected the jury's ultimate judgment that "whatever the level of reprehensibility [defendant's] action embodied, it did not cause [plaintiff] significant injury."¹⁶ He went on to hold that \$1.6 million imposed for relatively slight injury is "exorbitantly disproportionate to the personal harm committed" and that the "award so grossly and inexplicably exceeds both the economic and emotional harm the jury found that the discrepancy raises serious concern that sheer passion, guesswork, or other impermissible motives imbued this aspect of the verdict."¹⁷

Comparable Conduct

All three of these cases were brought under Title VII, which contains a \$300,000 statutory cap on damages¹⁸ as well as under the New York City Human Rights Law, which contains no statutory cap. All three decisions recognized that the court was not bound by the Title VII statutory cap, but, to varying degrees, considered that cap relevant in assessing the comparability of the punitive damages award against the civil penalties deemed appropriate for the conduct at issue. As part of the comparability analysis, all three courts also relied on the fact that the damages awarded by the juries in the cases before them were not in line with awards in comparable employment discrimination cases (although the cases cited in comparison almost all involved large damage awards which had themselves been remitted by reviewing courts).

Conclusion

The *iStar*, *Zakre* and *Tse* decisions all employ the *Gore* guideposts to impose radical reductions on the punitive damages awarded to employment discrimination plaintiffs. Although these cases demonstrate that trial courts are willing to police aggressively awards that are disproportionate to the degree of reprehensible conduct, the harm suffered, and the amounts awarded in comparable cases, they do not signify that the courts are ready to substitute their own judgment for that of the

jury. Rather, as Judge Lynch observed in *Tse* in characterizing the reduced award in that case as "designedly generous," the reviewing court's role is "to remit the award to a figure that would not be excessive," but is "maximally sufficient to serve the retributive and deterrent purposes of civil penalties without violating due process principles."¹⁹



1. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).
2. *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007).
3. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).
4. *Gore*, 517 U.S. at 572-574.
5. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).
6. 517 U.S. 559.
7. See, e.g., *Gore*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (no "mathematical bright line" between constitutionally acceptable and unacceptable).
8. *State Farm*, 538 U.S. at 425.
9. *Gore*, 517 U.S. at 582.
10. Transcript of Oral Argument at 67-68, *Exxon v. Baker*, No. 07-219, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-219.pdf. The Court was not considering the constitutional dimensions of the punitive damages award, inquiring only into whether the award in that case could be sustained under federal maritime law, but Justice Souter's comments acknowledge a discomfort with the indeterminate nature of the constitutional ratio analysis, and may presage a shift toward more concrete standards in that context as well.
11. 2008 WL 351662 (S.D.N.Y. Feb. 8, 2008).
12. 2008 WL 463719 (S.D.N.Y. Feb. 19, 2008).
13. 508 F.Supp.2d 252 (S.D.N.Y. 2007), reconsideration denied, 520 F.Supp.2d 478 (S.D.N.Y. 2007), directing entry of final judgment, 520 F.Supp.2d 483 (S.D.N.Y. 2007).
14. The court ordered a remittitur of the economic damages award from \$500,000 to \$45,000.
15. See also *Osorio v. Source Enterprises, Inc.*, 2007 WL 683985 (S.D.N.Y. March 2, 2007) (Rakoff, J.) (declining to permit jury to award any amount of punitive damages, despite jury's finding that plaintiff was so entitled, in part because the multi-million-dollar compensatory damages were so comprehensive that they had the same deterrent effect that a punitive award would otherwise provide).
16. 520 F.Supp.2d at 481.
17. *Id.*
18. Title VII caps punitive damages (and certain compensatory damages) under a sliding scale, ranging from \$50,000 to \$300,000 based on the number of employees of the defendant. See 42 U.S.C. §1981a(b)(3).
19. 2008 WL 463719, at * 33 (quoting *TVT Records v. Island Def Jam Music Group*, 279 F.Supp.2d 413, 461 (S.D.N.Y. 2003) (Marrero, J.)).