Punitive Damages and Disability Discrimination
A Little Knowledge Can Be Dangerous

By Karen Sutherland

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Legal Background

The media is fairly good at publicizing recent court decisions relating to harassment and discrimination. However, the brief summaries presented by newspapers, television and radio can be misleading because they do not tell the whole story. For example, media reports of recent federal court decisions could give employers the misimpression that there is a cap on punitive damages in all harassment and discrimination cases, and that the definition of "disability" has been substantially narrowed. While these impressions are partly true, there are exceptions that you need to be aware of in order to avoid liability.

A. There is No Cap on Punitive Damages for Many Harassment Claims.

The media has done a good job of publicizing the fact that there is a cap on punitive damages cases that are filed under Title VII of the Civil Rights Act. Generally, the cases that are covered by this cap relate to sexual harassment and retaliation for reporting sexual harassment. This cap does *not* apply to discrimination or harassment cases filed under other laws that allow for punitive damages such as 28 USC § 1981 or 28 USC § 1983.

28 USC § 1981 is the law that prohibits discrimination or harassment based on race. By way of example, in a Ninth Circuit Court of Appeals decision issued in October 2001 (which covers much of the Western United States) called *Swinton v. Potomac Corporation*, the court upheld a punitive damages award of $1 million against the employer of a black man who had been subjected to racially offensive jokes and comments at work. The illegal conduct included comments about watermelons and 40-ouncers, carjacking, racial slurs, etc. The employer argued that there were jokes made about a wide variety of other ethnic groups, including whites, Asians, Polish people, gays, Jews and Hispanics, but the court ruled that "equal opportunity" harassment was no defense.

With respect to the $1 million punitive damages award, the court held that the Title VII cap did not apply, and described the criteria for upholding punitive damages in a race-based federal case as follows:

- The reprehensibility of the conduct, which includes not only the actual harassment or discrimination but the employer's response or lack thereof. The court outlined a

"hierarchy of reprehensibility" with acts of violence at the top, followed by acts taken in reckless disregard of others' health and safety, affirmative acts of trickery and deceit, and acts of omission and mere negligence.

- The ratio of punitive damages to the amount of compensatory damages. In the Swinton case, the amount of compensatory damages was $35,600, so the ration was 28:1. There is no mathematical scale used by the courts to determine an appropriate ratio. However, a 500:1 ratio would "raise a suspicious judicial eyebrow," according to the court. Additionally, the defendant's wealth can be a factor in assessing the ratio.

- The reasonable relationship between the punitive damages and the harm likely to result from the defendant's conduct, as well as the harm that actually has occurred.

- The difference between punitive damages and the civil penalties authorized or imposed in comparable civil cases. Under this criteria, the courts occasionally analogize to the punitive damages cap in sexual harassment cases, but they will not actually apply the cap since Congress has not mandated it for race-based cases.

Taking those factors into account, the court upheld the $1 million punitive damages award.

B. Disability Discrimination.

A recent U.S. Supreme Court decision, *Toyota Motor Manufacturing v. Williams*, which was issued January 8, 2002, has received a lot of press indicating that it is now much harder for an employee to prove that he or she is disabled. This is true, as it relates to federal law, primarily the Americans with Disabilities Act (ADA). In short, the *Williams* decision says that, in order for an employee to be disabled, the employee must have a condition that interferes with a major life activity. This part of the decision is not newsworthy. The newsworthy part of the decision is that if the "major life activity" being considered is the ability to perform manual tasks, then the manual tasks that must be considered are not the manual tasks necessary to do the employee's job, but the variety of manual tasks that are central to most people's daily lives. Thus, Ms. Williams' ability to do household chores, brush her teeth, and bathe were what counted, not her inability to hold her hands and arms at shoulder height for several hours at a time, which is what her job required. As a result, the court found that Ms. Williams was not disabled and that the ADA did not apply to her.

State law, however, is not necessarily identical to federal law. Washington state law, for example, defines "disability" broader than federal law, which means that an employee may not have a claim under the federal ADA, but would still have a discrimination or harassment claim under state or local law, such as RCW Ch. 49.60.

The definition of "disability" in the employment discrimination context under state law is as follows: (1) the employee has/had a sensory, mental or physical abnormality and (2) such abnormality has/had a substantially limiting effect upon the individual's ability to perform his or her job. This definition has been applied by the Washington Court of Appeals as recently as September 2001 in *GM Nameplate v. Guech-Ghong Tang*, and the definition will continue to

govern in state law cases unless it is modified or reversed by the state courts, regardless of what the U.S. Supreme Court has done to modify the definition of "disability" under federal law.

Under the state law definition, temporary conditions as well as permanent conditions are covered, and the focus is on the individual's ability to perform his or her job, not the individual's ability to perform major life functions outside of the workplace. As a result, it is generally easier for an employee to prove that he or she is disabled under state law than under federal law, at least in Washington State.

Practical Guidelines

- Take what you read or hear from the media regarding employment law with a grain of salt. The media is focusing on the highlights of a new law or ruling, not the fine points, and they are reporting for a wide audience with varying degrees of sophistication.

- When you hear or read about a new law or court ruling that may affect your workplace, contact an employment law attorney for advice as to whether it is something that you need to be concerned about.

- A quick telephone call to an employment lawyer is far more cost effective than relying on a magazine or newspaper article for legal advice, especially in an area as complex as employment law.

- Many news sources are not state-specific. Thus, the changes in the law that you are hearing about may not apply to employers in your state.

- In addition to federal and state law, your employment practices may be covered by a city or county ordinance that is more stringent. For example, in Seattle, Washington, employers cannot discriminate based on sexual orientation, even though state and federal laws do not prohibit such discrimination.

- Have your policies and procedures for dealing with discrimination, harassment and disabled employees or applicants reviewed by an employment law attorney every your or two, as this is an area of the law that is constantly changing.
