



Proving punitive damages in employment cases

Punitives should be at the forefront of your litigation strategy at every stage of your employment case

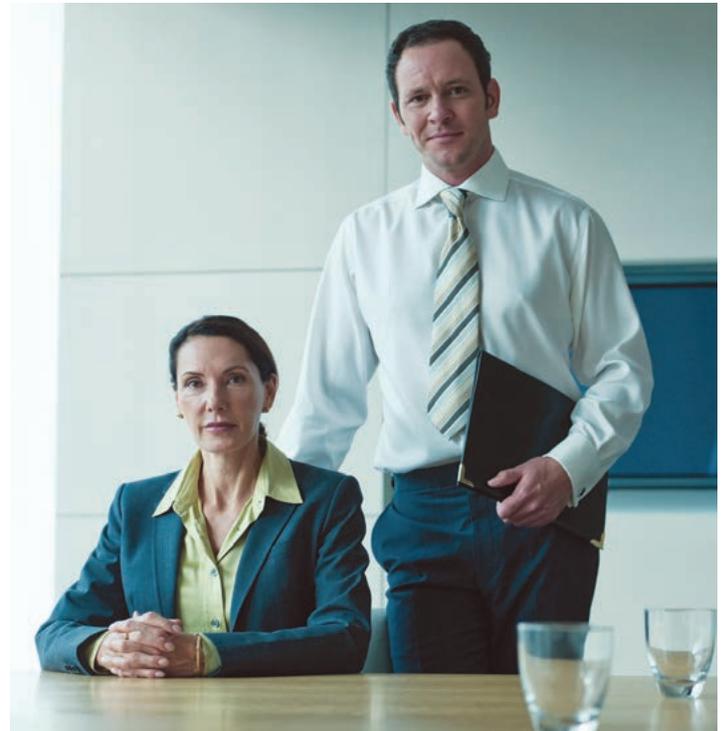
By JOSHUA COHEN SLATKIN

Punitive damages are often an essential part of maximizing the value of employment cases. Punitive damages however, are not always available against the employer in employment cases. Your litigation strategy, from the filing of the complaint through discovery, should be directed toward ensuring that punitive-damages claim against the employer will survive the defendant's inevitable motion for summary judgement and legal attacks at trial. Punitive damages often lead to larger jury verdicts, arbitration awards and higher settlements in employment cases.

Civil Code section 3294 codifies section 909 of the Restatement of Torts and authorizes the award of punitive damages in any "action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (a).) Punitive damages may be awarded upon a showing that the defendant acted with oppression, fraud or malice. (*Ibid.*) Under Civil Code section 3294, subdivision (b), which governs awards of punitive damages against employers, punitive damages can be awarded against the employer based on the conduct of its officers, directors, or managing agents without an additional finding that the employer itself also acted with oppression, fraud or malice. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1137.)

The plaintiff in employment cases can establish punitive liability against the entity employer when the conduct constituting malice, oppression or fraud occurs in three situations:

- 1) When an employee was guilty of oppression, fraud or malice, and the employer's officers, directors or managing agents knew of the conduct and adopted or approved it; or
- 2) The conduct constituting oppression, fraud or malice was authorized or ratified by one or more officers, directors or managing agents of defendant; or
- 3) The wrongful act giving rise to the exemplary damages was committed by an "officer, director, or managing agent" of the employer who acted on behalf of the defendant. (Civ. Code, § 3294 (b); see also California Civil Jury Instructions ("CACI") 3945 (Punitive damages against entity defendants); *Weeks* 63 Cal.App.4th at 1151.)



A plaintiff cannot, however, recover punitive damages against a public entity. (*McAllister v. South Coast Air Quality etc. Dist.* (1986) 183 Cal.App.3d 653.) Although the Fair Employment and Housing Act ("FEHA") does not itself authorize punitive damages, Civil Code section 3294 applies to actions brought under FEHA. (*Weeks* 63 Cal.App.4th at 1131.)

Large corporate employers

Employment cases against larger employers, with multiple hierarchical levels, multiple store locations and/or corporate headquarters in a different state, create challenges for the employment lawyer to establish the legal elements necessary for punitive damages against corporate employers. These challenges become apparent in typical employment cases where the plaintiff



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is a lower-level employee and the person in charge of termination or engaging in misconduct was not the CEO of the company but rather a supervisor or member of human resources. Experienced employment lawyers typically advise against initiating lawsuits against small employers who often lack insurance coverage or the necessary financial resources to fairly compensate plaintiffs by way of a settlement or judgment.

A litigation strategy geared toward obtaining evidence of punitive damages against the employer in the discovery phase and ultimately proving the elements for punitive damages against the employer is essential for maximizing the value of your employment-law cases and ensuring that your client receives fair compensation. Litigation strategy should not be directed solely towards establishing liability against the individual defendant who almost always lacks sufficient financial resources to satisfy a settlement or judgment.

This article will address the following: 1) The legal requirements necessary to establish punitive damages against employers in employment cases, including strategies to help obtain evidence needed for punitive damages during discovery with sample discovery requests and deposition questions, and 2) pertinent issues for the assessment of the potential value of punitive damages in employment cases.

The legal requirements

What are the legal requirements to establish punitive damages against employers in employment cases? In the beginning, you want to establish that a managing agent was responsible for the wrongful conduct alleged in your employment case. You should always allege punitive damages in your complaint as to each cause of action where such damages are available and include punitive damages in the prayer for relief.

The “Managing Agent” – identification, discovery requests and deposition questions

An act of oppression, fraud or malice, by an officer, director or managing agent,

acting on behalf of the employer is sufficient to impose liability on a corporate employer for punitive damages, without any additional showing of ratification by the employer. (Civ. Code § 3294, subd. (b); see also CACI 3945.) “Malice” is defined as intentional injury or “despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.” (Civ. Code, § 3294, subd. (c) (1).) “Oppression” is defined as “despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.” (Civ. Code, §3294, subd. (c)(2).)

In motions for summary judgment and at trial, the defense will argue that the corporate employee involved in the alleged misconduct or responsible in the termination decision was not a managing agent and therefore punitive damages against the corporate employer should be dismissed or not awarded. In *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573 the Supreme Court defined the statutory term “managing agent” for determining punitive damages liability against the employer under section 3294, subdivision (b). The term “managing agent” includes only “those corporate employees who exercise substantial independent authority and judgment in their corporate decision making so that their decisions ultimately determine corporate policy.” (*Ibid.*)

The scope of a corporate employee’s discretion and authority under this test is therefore a question of fact for decision on a case-by-case basis. (*Id.* at 567; see also *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822-823 [holding that whether employee acted in a managerial capacity depends on the discretion the employees possess in making decisions that will ultimately determine corporate policy].) When describing “discretionary authority” in *White*, the Court was referring to formal policies that affect a substantial portion of the company and that are the type likely to come to the attention of corporate

leadership because it is that “sort of broad authority that justifies punishing an entire company for an otherwise isolated act of oppression, fraud, or malice.” (*Roby v. McKesson Corp.* (2010) 47 Cal.4th 686, 715.)

Job titles do not determine whether an individual can be classified as a “managing agent.” (*Egan* 24 Cal.3d at 823.) The Ninth Circuit Court has adopted the interpretation in *White*. (See e.g., *Glovatorium, Inc. v. NCR Corp.* (9th Cir. 1982) 684 F. 2d 658, 661 [Holding that “the key inquiry in the determination of whether an employee is a managing agent is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.”].)

Therefore, to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee who engaged in or ratified the misconduct exercised substantial discretionary authority over significant aspects of a corporation’s business. (*White* 21 Cal.4th at p. 577; see also *Roby* 47 Cal.4th at p. 715.)

Examining the job functions of the supervisor

It is essential to thoroughly examine the job functions of the supervisor who made the termination decision, who engaged in the wrongful conduct and/or was involved in the process of terminating the employee throughout the discovery process. In *White*, the managing agent terminated a lower-level employee for testifying on behalf of a former employer at an unemployment hearing. (*White* 21 Cal.4th at 567.) Liability turns not on the employee’s managerial classification or title, but on the extent of his or her decision-making discretion. (*Id.* at 577.) In some cases, a supervisory employee with hiring and firing power will qualify as a “managing agent.” (*Ibid.*)

But not all supervisors or all personnel with the power to hire and fire, are “managing agents.” (*Ibid.*) Furthermore, not all policy makers are necessarily



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“managing agents.” (*Id.*) Each case must be decided on its specific facts. (*Ibid.*)

The managing agent in *White* was similar to the managing agents in the majority of employment cases. She was a local supervisor who lacked the authority to terminate plaintiff without the approval of defendant’s human resources manager and division manager. (*Id.* at 580.) She did not set any firm-wide or official policy concerning termination of employees for testifying at unemployment hearings. (*Ibid.*) She did, however, exercise authority that “necessarily result[ed] in the ad hoc formulation of policy” that adversely affected plaintiff. (*Id.* at 571.; see also *Egan, supra*, 24 Cal.3d at p. 823.) Specifically, she engaged in a local practice of retaliation by firing an employee who testified at the unemployment hearing of another employee. (*White* 21 Cal.4th at 567.) It was held that a “corporate manager” with such authority may fairly be deemed a managing agent under section 3294, subdivision (b). (*Ibid.*)

Therefore, like the supervisor in *White*, when the supervisor in your case makes the decision to terminate or harass the employee based on a protected characteristic or protected activity, you can argue that such actions reflect an “ad hoc formation of policy.” A supervisor can still be a managing agent for punitive damages purposes even in the likely event they lack the authority to create actual company policies and even when approval is required to terminate the plaintiff. You can establish that a managing agent, by making the decision or recommendation to terminate based on a protected characteristic or protected activity, created an “ad hoc formulation of policy.”

Sample written discovery requests to establish managing agent status

- The Complete job descriptions of any and all individuals involved in the decision to terminate or [INSERT OTHER WRONGFUL CONDUCT] Plaintiff’s employment with Defendant.

- The organizational hierarchy for Defendant, which includes the positions of those involved in the decision to terminate Plaintiff’s employment.
- Identification of each person who participated in making the decision to terminate plaintiff’s employment. Deposition questions should track the jury instructions and case law to establish the supervisor or harasser was a managing agent.

Sample deposition questions

- You are the main decision maker at [Insert Employer]?
- You exercise substantial judgment/discretion in your decisions at [Insert Employer] such that your decisions create/impact/shape corporate policy?
- You have the authority to hire and/or fire employees?
- You can make termination recommendations to your superiors or the human resources department that will be approved?

Employer’s advance knowledge of employee misconduct

The employer’s advance knowledge of employee misconduct is necessary to impose employer punitive damage liability. Section 3294, subdivision (b) states that “An employer shall not be liable for [punitive] damages...based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct...With respect to a corporate employer, the advance knowledge and conscious disregard, authorization [or ratification...must be on the part of an officer, director, or managing agent of the corporation.” (*Roby*, 47 Cal.4th at p. 711.)

In *Weeks v. Baker & McKenzie*, 63 Cal.App.4th 1128, a partner of the

defendant law firm engaged in sexual harassment and the defendant law firm was aware of numerous prior incidents of severe sexual harassment against other women prior to plaintiff’s allegation involving the same partner. The result was a punitive damages verdict against the employer, Baker & McKenzie, for \$3.5 million, reduced by the trial court from \$6.9 million. Knowledge and ratification are often shown by demonstrating that the plaintiff complained to his or her superiors of the misconduct and the employer did nothing, which reflects a conscious disregard for the rights and safety of others. Further, knowledge and ratification can be proven by demonstrating that the employer was aware of prior misconduct by an employee – such as sexual harassment by a supervisor or other discriminatory or harassing conduct – and the corporate employer took no concrete steps to remedy the situation, such as disciplining the harasser and/or altering the conditions of the work environment somehow, such as through transfers to different departments.

You want to establish that the defendant engaged in conduct that they knew or should have known created a situation where someone was likely to get hurt. This could include advance knowledge that a supervisor/employee was a harasser through prior complaints. If it is apparent that the supervisor who terminated the plaintiff was not a managing agent, you want to ask questions and drill into the specifics of who at the company ultimately authorized the termination and that decision maker’s role in the company. Lower-level human resource employees and supervisors almost always require authorization from those higher up in the organizational hierarchy before terminations occur. Then, that information can be used to show that a managing agent had knowledge and/or authorized the wrongful conduct such as the wrongful termination.



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Using policies and procedures to strengthen the case for punitive damages

Departures from employer's internal policies and procedures can be used as evidence of discriminatory conduct and can help establish oppression, fraud or malice. (*Village of Arlington Heights v. Met. Hous. Dev. Corp.* (1977) 429 U.S. 252, 267 ["Departures from the normal procedural sequence also might afford evidence that improper procedures are playing a role"].) Corporate employers often have internal policies and procedures that mirror state and federal anti-discrimination, harassment and retaliation laws.

These policies will usually indicate that the employer cannot retaliate against employees for exercising their rights and that discrimination/harassment will not be tolerated in the workplace. Defendants in employment cases nearly always violate their own policies and procedures. If your client was wrongfully terminated or subjected to harassment, obtaining policy and procedure documents in the form of employee handbooks and other policies/procedures and showing how the corporate employer failed to follow their own internal policies/procedures can be used to help establish fraud, malice or oppression. Evidence of prior complaints builds the case against the employer for punitive damages as it establishes knowledge and ratification on behalf of the employer.

Sample document requests

- Any and all documents that relate to your policies and/or procedures regarding discrimination, harassment, and/or retaliation in the workplace in effect from [insert date] through the time of plaintiff's termination.
- All documents that relate to any training defendant's employees receive relating to discrimination, harassment and/or retaliation (this includes PowerPoint presentations and/or other written materials and/or other online training modules that your employees receive).

In *Weeks*, there was significant evidence that the employer's managing agents had knowledge that the harasser posed a danger to other employees but, in conscious disregard for plaintiff's safety, failed to take any reasonable action to prevent harassment." (*Weeks* 63 Cal.App.4th at 1161.) You can ask questions designed to elicit that the defendant employer/supervisor was aware of the probable dangerous/negative consequences of their conduct toward the employee and he or she willfully failed to avoid such consequences and therefore violated the defendant employer's stated policies. This is especially relevant when an individual employee has a prior history of disciplinary action and/or complaints against him or her for discrimination and/or harassment.

Here, it is crucial to establish that your client complained to his or her superiors or that the supervisors who were managing agents were aware of the unlawful conduct that constitutes the civil rights violations you are alleging in your complaint. In *Roby*, 47 Cal.4th at p. 715, the Court held that because there was evidence that the plaintiff complained of her supervisor's harassment based on her disability to two mid-level managers (who were managing agents) and no corrective measures were taken against the supervisor, that indicated a conscious disregard of the rights and safety of others, warranting punitive damages under section 3294, subdivision (b).

Further, prior complaints against similar supervisors, even in other cases, can establish knowledge and ratification, particularly if the defendant employer took no disciplinary action against the employee who engaged in wrongful conduct. The purpose of section 3294, subdivision (b) is to impose a "duty on the employer to take reasonable measures to prevent a known harasser from committing future acts of harassment." (*Weeks* 63 Cal.App.4th at 1157.)

Within your written discovery requests, you want to obtain prior complaints made against the supervisor

who was the harasser or in charge of terminating the employee. This can often be found through the supervisor's personnel file and/or from other employees who were terminated and have similar characteristics as your client. Evidence from the interviews and depositions of other employees who believe they were discriminated against and/or harassed by the same supervisory employee is important for punitive damages against the employer.

Sample written discovery devices to prove prior complaints

- Employment Form Interrogatory no. (209.2) specifically asks about other civil actions in the past 10 years that other Employees filed against the Employer regarding the Employee's employment. (You want to ensure you obtain that information but note that confidentiality in settlement provisions may limit informal interviews with past plaintiffs and deposition subpoenas may be required.)
- Any and all documents that comprise the complete and entire Personnel File of [Insert name of supervisor/harasser]
- All prior complaints/disciplinary actions taken against [Insert name of supervisor]
- All documents relating to complaints that the Plaintiff made to Defendants relating to conduct alleged in the complaint [insert harassment, discrimination, retaliation] which forms the basis of this lawsuit

Sample deposition questions

- Were you aware that [insert name of Plaintiff] complained about [insert misconduct]?
- What action steps were taken by [insert name of Defendant] to address Plaintiff's complaints? (i.e., there was no investigation, no efforts to transfer plaintiff to a different department/division with a



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different employee or supervisor who is engaging in the misconduct, no disciplinary actions taken against the supervisor, etc.)

- Were you aware there were prior complaints against [insert name of supervisor or employee] by other employees relating to prior acts of discrimination/harassment?
- Despite these prior complaints, [insert name of supervisor/employee], Defendant still employed him or her? In fact, defendant continued to promote him or her and/or increase salary, benefits, etc.? Were you aware that keeping an employee employed who has a history of harassment/misconduct would likely lead to other instances of harassment toward other employees in the future?

Assessing the value of punitive damages in your employment case

In *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418, the U.S. Supreme Court described “three guideposts” for courts reviewing punitive damages under the due process clause of the Constitution: “1) the degree of reprehensibility of the defendant’s conduct; 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” Of the

three guideposts that the Supreme Court outlined in *State Farm*, the most important is the degree of reprehensibility of the defendant’s conduct. (*Roby* 47 Cal.4th at 713.)

In *Roby*, a disability discrimination, harassment, wrongful termination case, the California Supreme Court held that, in light of the facts in that case, punitive damages in a one-to-one ratio, an amount equal to compensatory damages, marked the constitutional limit. (*Id.* at p. 719.) However, in *Roby*, the Court noted that that conclusion was based “on the specific facts” of that case and the “relatively low degree of reprehensibility on the part of employer.” (*Id.* at p. 718.) As a matter of California law, punitive damages are not generally permitted to exceed 10 percent of the defendant’s net worth. (*Weeks* 63 Cal.App.4th at 1133.) This rule is not absolute, however, because net worth can be manipulated.

A common-sense way to look at the value of potential punitive damages that may be awarded for trial and settlement purposes is to determine if the specific facts of the case, assuming that other legal requirements are met, evoke a visceral, sympathetic response from you and others. Therefore, harassment and retaliation cases typically result in larger punitive damages awards than an employment-discrimination case. If there is an arbitration agreement involved, the arbitrator will likely not award significant punitive damages.

If the employee is not sympathetic and/or engaged in conduct that may have, in and of itself, justified termination, that will likely result in lower punitive damages awards or punitive damages being dismissed at the motion for summary judgment stage.

Conclusion

Punitive damages should be included within your complaint and be at the forefront of your litigation strategy at every stage of your employment case, from discovery through trial or arbitration, to ensure that the necessary evidence is collected to hold the employer accountable, successfully oppose motions for summary judgment and maximize the value of your case for settlement or trial purposes. Employment-case values are specific to each case and are often determined by the combination of the specific facts of the case, the likeability of clients and the financial resources of the employer. It is our job to identify and communicate those facts which justify the punitive damages in a clear and compelling way to obtain the best possible case results.

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