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Direct Employer Liability for Punitive Damages

*Sandra F. Sperino**

In *Punitive Damages, Due Process, and Employment Discrimination*, Joseph Seiner tackles the growing complexity of employment discrimination punitive damages claims and provides a workable solution to a difficult problem. Given the importance of punitive damages in shaping incentives to bring discrimination suits, his contribution is valuable, especially in trying to align recent constitutional punitive damages cases with the underlying discrimination law.

This Essay begins by emphasizing the fundamental idea on which Professor Seiner and I agree—that there should be little room for courts to reduce punitive damages in federal employment discrimination cases based on constitutional concerns about excessiveness. Title VII contains express damages limitations that alleviate such concerns.¹

The Essay continues by discussing whether the Supreme Court's decision in *Exxon Shipping Co. v. Baker*² applies to federal discrimination claims. In arguing that there is little need for courts to use due process limits on punitive damages in federal discrimination cases, Professor Seiner draws on the underlying rationales of *Exxon*. Part II demonstrates how invoking *Exxon* is problematic because courts might use its reasoning to impose unnecessary and inappropriate limits on punitive damages, even those that fall within Title VII's modest damages cap.

Finally, this Essay supplements the multi-part test suggested by Professor Seiner. Professor Seiner's model involves situations in which the employer is being held vicariously liable for punitive damages. Part III argues that employers also should face direct liability for punitive damages and provides the contours for such analysis. Any punitive damages test that is centered on expressed Supreme Court norms related to agency principles will necessarily

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1. This Essay does not address claims brought pursuant to 42 U.S.C. § 1981 or state law. Although the Essay focuses on claims under Title VII, the Americans with Disabilities Act contains similar damages limitations. 42 U.S.C. § 1981a(a)(1)–(2), (b)(1), (3) (2006). The Age Discrimination in Employment Act does not provide for punitive damages for discrimination claims. 29 U.S.C. § 626(b) (2006).

2. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499 (2008).

be underinclusive as to possible punitive damages awards against employers. To date, the Supreme Court has failed to fully explore how employers are liable for their own intentional conduct rather than just derivatively liable for the acts of their agents.

I. A REALISTIC VIEW OF PUNITIVE DAMAGES

Many people and employers mistakenly believe that federal discrimination cases produce massive punitive damages awards. While these cases can create large expenses for employers, those costs are not primarily related to punitive damages. Any call for limits on punitive damages in federal cases must start by recognizing that juries award such damages in a small percentage of cases and that the awards are typically modest.

Both Title VII and the Americans with Disabilities Act (“ADA”) contain a statutory cap on punitive damages. This cap not only applies to punitive damages but also limits the combined amount of punitive and statutorily defined compensatory damages that a plaintiff may recover.³ This limit varies by the employer’s size, and only the largest employers are potentially liable for the maximum award of \$300,000 in combined damages.⁴ This number has not increased since 1991. Further, the trial judge is not allowed to instruct the jury regarding the damages cap.⁵ Therefore, in some federal discrimination cases employers are held liable for less damages than a jury found was warranted given the underlying conduct.⁶

A large body of research, including Professor Seiner’s own, shows that it is difficult for employment discrimination plaintiffs to prevail on summary judgment motions, let alone at trial, and that the underlying awards only include punitive damages in limited instances.⁷ Even in those rare cases

3. 42 U.S.C. § 1981a(a)(1)–(2), (b)(1), (3). These statutes exclude back pay and other defined kinds of relief from the definition of compensatory damages. *Id.* § 1981a(b)(2). Thus, “compensatory damages” under these statutes largely reflect awards for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” *Id.* § 1981a(b)(3).

4. *See id.* § 1981a(b)(3).

5. *See id.* § 1981a(c)(2).

6. 29 U.S.C. § 626(b).

7. *E.g.*, Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 451–56 (2004); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999) (reporting that either through dismissal or verdicts in ADA cases “[d]efendants prevailed in 448 of 475 cases (94%) at the trial court level and in 376 of 448 instances (84%) in which plaintiffs appealed these adverse judgments”); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 692; Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 741 (2008) (finding that punitive damages were awarded in only 18% of Title VII cases that resulted in a federal jury trial); Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV.

when an employer faces the maximum possible award under the federal discrimination statutes, the statute explicitly notifies the employer of the potential liability it faces. There is little concern about the “stark unpredictability of punitive awards”⁸ or the defendant’s lack of knowledge of the potential award. The substantive standard for permitting punitive damages,⁹ the availability of a defense for the employer to avoid liability,¹⁰ and the strong public policy against workplace discrimination assure the appropriateness of punitive damages. Given these realities, constitutional concerns about notice and fairness regarding punitive damages should rarely arise in the federal context.¹¹

Professor Seiner and I agree on this fundamental point. Court limits on punitive damages in federal employment discrimination cases should revolve more around the underlying substantive doctrine than around constitutional concerns about excessiveness. This point deserves reiterating because the courts have had a difficult time applying the Supreme Court’s due process jurisprudence to employment cases, making numerous errors as they try to navigate the statutes’ complex remedies regimes and the constitutional tests.¹²

Additionally, it is important that courts view federal employment discrimination liability realistically. If courts believe that such remedies are typically modest, it is unlikely that they will feel the need to intervene in jury decisions regarding punitive damages. Given the malleability of the three-prong test the Supreme Court developed to evaluate constitutional due process, it appears that in some cases the courts are not policing constitutional bounds, but rather imposing the judge’s own personal viewpoint about appropriate liability. Such meddling is especially inappropriate in employment discrimination cases.¹³

555, 556 (2001); Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEGAL STUD. 1, 2–3 (2006).

8. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499 (2008).

9. 42 U.S.C. § 1981a(b)(1) (2006) (providing that a party may prevail on punitive damages only if it establishes that the defendant engaged in discriminatory practices with “malice or with reckless indifference to the federally protected rights of an aggrieved individual”).

10. *See Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 544 (1999).

11. Some federal employment discrimination cases may result in a high ratio of punitive damages to other kinds of damages. Part II addresses why these claims should not typically draw constitutional scrutiny. *See infra* Part II. The author is not arguing that constitutional concerns would be inappropriate in claims brought under state law or pursuant to 42 U.S.C. § 1981. Section 1981 does not contain a damages cap; nor do many state law claims.

12. Sandra Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 OKLA. L. REV. 701 (2010) (describing mistakes).

13. *See generally* Sandra Sperino, *Judicial Preemption of Punitive Damages*, 78 U. CIN. L. REV. 227 (2009).

II. THE SUPREME COURT'S HOLDING IN *EXXON* SHOULD NOT BE EXTENDED TO FEDERAL EMPLOYMENT DISCRIMINATION LAW

In creating a structure for federal punitive damages inquiries, Professor Seiner argues that no constitutional excessiveness test is needed because the federal discrimination statutes already address such concerns. He relies on the Supreme Court's decision in *Exxon* for this general proposition. This Part highlights the subtlety of this argument, so that future readers do not misunderstand it as an embrace of *Exxon*, which is otherwise problematic.

In *Exxon*, the Supreme Court held that under the particular facts of the case, the Court had the authority to impose a one-to-one ratio of compensatory to punitive damages.¹⁴ The Court decided the issue under maritime law, which it characterized as falling "within a federal court's jurisdiction to decide in the manner of a common law court."¹⁵ Indeed, in *Exxon*, the Court rejected an argument that the Clean Water Act applied to preempt maritime damages.¹⁶ Thus, in *Exxon*, the Court was considering whether it had the power to substantively limit punitive damages claims prior to applying a constitutional analysis.¹⁷

When courts are considering punitive damages under federal employment discrimination law, they are not acting within common law authority. Rather, their appropriate role, at least where an explicit statutory provision is present, is to interpret the applicable provision and not to create law based on their own preferences. This is different than maritime law, where the courts play a large role in constructing remedies. In federal employment discrimination cases, the availability of remedies is established by statute. To the extent *Exxon* provides that courts can impose a one-to-one ratio on damages, this holding is not precedent with respect to federal employment discrimination law.

While *Exxon* is not precedent, the danger of associating the case with employment discrimination law is that courts might generally rely on it for persuasive reasoning. *Exxon* is generally skeptical of cases where the compensatory to punitive damages exceed a one-to-one ratio. It is plausible that courts will rely on this general skepticism when they consider the range of permissible liability under statutes.

In *BMW of North America, Inc. v. Gore*, the Supreme Court set forward a three-part test for determining whether punitive damages are excessive.¹⁸

14. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008).

15. *Id.* at 489–90.

16. *Id.* at 489.

17. *Id.* at 502 ("Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute.").

18. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996) (holding that courts should consider the degree of reprehensibility of the defendant's misconduct, the disparity

The Court also has repeatedly reiterated that “few awards exceeding a single-digit ratio between punitive and compensatory damages, . . . will satisfy due process.”¹⁹ The Court also has suggested that an award of more than four times the amount of compensatory damages would be close to the line of impropriety in many cases.²⁰ It is not clear from these standards whether judges should view the excessiveness inquiry as policing the outward limits of potential liability or whether it requires judges to place each case within a spectrum of liability based on the case’s own individual facts.²¹

The following example illustrates the tension. Assume a plaintiff prevails on a sexual harassment case under Title VII, and the jury awards punitive damages of \$300,000 against the large employer. A judge who views the constitutional inquiry as policing the outward bounds of liability would likely uphold the verdict. However, a judge that views the inquiry as requiring her to place punitive damages within a spectrum may examine other sexual harassment verdicts to determine whether the verdict is in line with comparable cases. The judge may decide to reduce punitive damages if other juries have awarded fewer punitive damages in similar factual contexts.

It is in these latter cases where *Exxon*’s reasoning may encourage courts to reduce damages to reflect the Supreme Court’s preferred 1:1 ratio of compensatory to punitive damages. However, employment discrimination cases present radically different factual scenarios than the Court considered in *Exxon*. It is important to highlight that *Exxon* did not apply a blanket 1:1 ratio in all maritime cases. Rather, it imposed the limit on cases of “this type,” meaning the kind of facts underlying *Exxon*.²²

In *Exxon*, the Court noted that the underlying conduct did not demonstrate “exceptional blameworthiness” in that there was no intentional

between the actual or potential harm suffered by the plaintiff, and the difference between the punitive damages awarded by the jury and civil penalties authorized or imposed in comparable cases). Federal courts have applied these factors to federal cases under the Fifth Amendment. *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004) (“The *Gore* guideposts may apply to punitive damages awards under federal statutes.”) (citing *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 430 n.3 (2001)); *Deters v. Equifax Credit Info. Servs., Inc.*, 981 F. Supp. 1381, 1389 (D. Kan. 1997) (“The only action at issue in this case is action by the *federal* system. Therefore, defendant asks this court to consider a *Fifth Amendment* substantive due process challenge.”). In discussing due process concerns, this Article does not discuss whether there should be a difference between the excessiveness inquiry under the Fourteenth and Fifth Amendments.

19. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (citing *BMW of N. Am., Inc.*, 517 U.S. at 581).

20. *Id.*

21. Some of the reasoning in *Exxon* supports this latter view. *Exxon Shipping Co.*, 554 U.S. at 502 (“And when the bad man’s counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they weak like damage.”).

22. *Id.* at 514.

or malicious conduct.²³ The Court further indicated that it was not a case of modest economic harm or low odds of detection of the underlying bad behavior.²⁴ Cases involving any of these elements do not fit well within a ratio analysis that relies on a comparison of compensatory to punitive damages. A strict one-to-one ratio fails in these instances because more egregious conduct might warrant more punishment, the level of appropriate punishment sometimes does not correspond to the plaintiff's other damages, and because a defendant may escape full punishment if the harm it causes often escapes detection.

Many federal employment discrimination cases in which punitive damages exceed other damages are likely to have one or more of these characteristics. First, given the substantive standard for proving intentional discrimination, the employer or its agent has engaged in conduct that violates strongly held beliefs about appropriate conduct. Under Title VII and the ADA, only intentional conduct will result in punitive damages.

Second, the measure of damages in these cases is often back pay, and it is difficult to argue that a company should be punished less because it discriminated against a low-wage worker than a higher paid one. It is even arguable that discriminating against a more economically vulnerable individual is more reprehensible. In many harassment cases, the plaintiff has not lost any pay, and a strict ratio between emotional distress damages and punitive damages may not fully punish the defendant. Finally, discrimination cases do involve low odds of detection regarding the underlying behavior, especially given that many employees fear retaliation and do not complain about discrimination. Overall, discrimination cases are not generally analogous to the underlying claim in *Exxon*.

More importantly, *Exxon's* reasoning is seriously flawed and should be limited to maritime law, rather than expanded. The Court decided on a one-to-one ratio because several studies showed that the median ratio of punitive to compensatory damages awarded by juries was one-to-one.²⁵ However, this observation does not account for the possibility that certain kinds of action might be considered more reprehensible than others or that community beliefs about reprehensibility might change over time. For example, it is reasonable that jurors might consider discrimination to be more reprehensible than a violation of patent law. It also is reasonable to believe that jurors might believe continued discrimination is more reprehensible now or in the future, given the clear societal policy against it. Further, just because juries generally apply a one-to-one ratio does not mean this ratio should direct the outcome in all cases.

23. *Id.* at 513.

24. *Id.*

25. *Id.* at 512.

More importantly, a court policy to generally apply a one-to-one ratio under the guise of constitutional due process would seriously undermine the role of the jury. In general, the jury is better equipped to handle questions of reprehensibility than a single judge. The jury is likely to be diverse as to gender and perhaps as to race and age. Further the relative social power and wealth of judges may make them less able to view conduct through the lens of an employee who is relatively less powerful than the judge and more economically vulnerable. Moreover, in many employment discrimination cases, the jury has already rejected defenses or affirmative defenses that would allow the employer to escape liability or to limit it.²⁶

While it is clear that *Exxon* does not apply as precedent in federal employment discrimination cases, courts must use care in invoking it for other reasons. While the case does stand for the proposition that constitutional analysis is not required where the underlying regime alleviates excessiveness concerns, the case's problematic reasoning about the appropriate level of punitive damages should not be imported into discrimination law.

III. EMPLOYERS SHOULD FACE DIRECT LIABILITY FOR PUNITIVE DAMAGES

Professor Seiner's Article provides an analysis for courts to use in the most common kinds of punitive damages cases they will face. In these cases, the plaintiff establishes the underlying violation of federal law by showing that an employee engaged in intentionally discriminatory behavior.²⁷ Then, the plaintiff establishes that punitive damages are warranted because the employee has the requisite malice or reckless indifference to justify punitive damages. Both of these steps focus on the employee. The final step requires a showing that it is appropriate to impute liability to the employer.

There are at least two other situations in which the employer should be liable for punitive damages. In the first, the underlying substantive liability is created by the employer's own intent. These cases thus involve the employer's direct liability for both the underlying discrimination and for punitive damages. In the second scenario, the plaintiff establishes that an employee engaged in intentionally discriminatory behavior, but bases the punitive damages liability on the employer's own intent or reckless indifference. This Part further explains these two possibilities.

Under the first proposal, a jury could award punitive damages against an employer for its own intentional conduct. The easiest cases involving the

26. See, e.g., 42 U.S.C. § 1981a(a)(3) (2006) (indicating that a plaintiff may not receive punitive damages if the employer made good faith efforts at accommodation under the ADA); *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) (providing affirmative defense for employers when it did not take a tangible employment action).

27. The author is not claiming that intent is required to establish discrimination outside of the disparate impact context. However, punitive damages will only lie in cases involving intent.

employer's own intentional conduct are those where the alleged discriminator is an alter ego of the employer, such as a sole proprietor of a business or a partner in a traditional partnership. In these instances, through a legal fiction, the discriminator is said to be acting as the company. In these cases, punitive damages can be proven without considering the employer's culpability separate from that of the individual, as long as the individual's actions constitute intentional discrimination and meet the required standard for punitive damages.

Pattern or practice cases also often involve the employer's intent. In these cases, the plaintiff has established that discrimination is an employer's standard operating procedure.²⁸ Cases in which the employer had an explicit or implicit policy of discrimination also could lead to direct liability for punitive damages.

Outside of these clear cut cases, a court must consider whether corporate intent exists, even in cases involving individual disparate treatment. It is crucial that courts not view intent as only stemming from individual actors, because doing so creates a stunted view of the workplace. The search for a "rogue" actor diverts courts and litigants from considering the way that formal and informal processes and policies shape the actions of individuals within the workplace.²⁹ Further, courts that view liability as deriving solely from individual actors tend to view the workplace as operating through discrete and identifiable employment decisions. In many instances, structural discrimination or group decision-making dynamics contribute to discrimination.

To be sure, some discrimination cases do stem from rogue actors and individualized decision making. However, courts considering whether punitive damages are appropriate should also consider whether the employer should be penalized for its own acts, and not just derivatively for the acts of its agents.

Courts can determine corporate intent not only by looking at the employer's official policies, but whether it engaged in other conduct, such as rewarding or failing to discipline employees who engaged in past discriminatory conduct, providing inadequate education about expected conduct, repeatedly allowing discrimination to continue, ignoring indications that systemic discrimination exists, and relying on subjective decisionmaking in light of evidence suggesting it is being used in a discriminatory manner.

Under a corporate-intent standard, it would be appropriate to amalgamate the actions of numerous actors, including non-supervisory co-

28. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

29. Michael B. Metzger & Dan R. Dalton, *Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency*, 33 AM. BUS. L.J. 489, 555 (1996) ("[O]rganizations would not exist without individuals, but it is also equally true that phenomena such as groupthink would not exist without organizations.").

workers. Thus, there are cases when the employer should be held liable for punitive damages, even when the primary actors are the plaintiff's co-workers.

In these direct-liability cases, the plaintiff would first be required to establish intentional discrimination by the employer. The plaintiff would then be required to demonstrate that the intentional discrimination was committed with malice or with reckless indifference to the employee's federally protected rights.³⁰ *Kolstad* suggests that reckless indifference would be found where the employer acted with subjective consciousness of a risk of injury with indifference to its obligations.³¹

In *Kolstad*, the Court created a defense when the employer engages in good faith efforts to comply with Title VII.³² The affirmative defense created in *Kolstad* does not apply in direct liability cases because for the defense to make sense, it only applies in instances where the plaintiff is seeking to hold the employer indirectly liable for the acts of its agents.

Employers would also potentially be liable for punitive damages when the underlying substantive liability is based on employee intent, but where punitive damages are appropriate because of the employer's malice or recklessness. The possibility of direct liability for punitive damages in these instances is specifically recognized by the Restatement (Third) of Agency. In discussing punitive damages, it notes:

To limit the availability of punitive damages to an individual employee or agent disregards the possibility that a principal, especially an organization, may systematically influence the actions of its employees or other agents but do so in ways that do not amount to instances of legal fault that a plaintiff could prove. The availability of punitive damages provides a mechanism to focus attention at an organizational level on how best to exercise control over employees and other agents to reduce the risk of harm that their activities pose to third parties.³³

In these cases, the employer is being held liable for punitive damages based on the employer's own failure to control the agent or other fault. The factfinder is tasked with assessing whether the employer's "mechanisms of control have fallen short and the degree to which an agent's tortious conduct fairly implicates the organization itself."³⁴ This distinction is important because it allows employers to be liable for punitive damages even when a managerial employee is acting outside the scope of employment and in instances when co-workers engage in discriminatory conduct.

30. 42 U.S.C. § 1981a(b)(1) (2006).

31. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999).

32. *Id.* at 544.

33. RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. e.

34. *Id.*

Take for example, a case in which a plaintiff proves that she was sexually harassed by a co-worker. The plaintiff also proves that this co-worker harassed two other co-workers and despite repeated complaints, the employer failed to stop the harassment. Under the substantive law, an employer could be held substantively liable for the co-worker harassment if it “knew or should have known of the harassment and failed to take remedial action.”³⁵ After establishing liability, the plaintiff could still try to hold the employer liable for punitive damages, if it could establish that the employer acted with malice or reckless indifference to the plaintiff’s protected rights. Allowing repeated harassment by the same supervisor meets this standard.

It also is necessary to keep in mind an essential problem that occurs when courts import evolving common law standards into statutory regimes. In *Kolstad*, the Supreme Court claimed that it was modifying common law concepts of agency for the employment discrimination context.³⁶ In doing so, it borrowed ideas from the 1957 Restatement (Second) of Agency.³⁷ Since *Kolstad*, the Restatement (Third) of Agency has been issued.³⁸ As agency law develops, both employees and employers should be able to argue that courts should modify *Kolstad*’s underlying premises to reflect modern understandings of agency.

Professor Seiner’s model brings much needed clarity regarding how courts should analyze vicarious liability for punitive damages, given the constraints of *Kolstad* and the Supreme Court’s recent discussions regarding due process. Professor Seiner asserts that constitutional limits are unnecessary in federal discrimination claims, and this statement is an important contribution. This recognition can save courts from the myriad conceptual and mathematical mistakes they make when trying to integrate the complex employment discrimination remedies regime with constitutional due process tests. By emphasizing the dangers of *Exxon* and by providing a way for plaintiffs to hold employers directly liable for punitive damages, this Essay seeks to strengthen Professor Seiner’s worthy project.

35. *Malone v. Ameren UE*, 646 F.3d 512, 517 (8th Cir. 2011) (quoting *Tatum v. City of Berkeley*, 408 F.3d 543, 550 (8th Cir. 2005) (internal quotation marks omitted)).

36. *Kolstad*, 527 U.S. at 541–42.

37. *Id.* at 542.

38. RESTATEMENT (THIRD) OF AGENCY (2006).