PUNITIVE DAMAGES:
GETTING THEM FROM JURIES AND KEEPING THEM FROM COURTS

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Believe in the Lord and you will be saved. – Acts 16:31;
And the destruction of transgressors and of the sinners shall be together and they that forsake the LORD shall be consumed – Isaiah 1:28

Translation to Legaleeze: Do not offend the Diety for He can take back that which the common man giveth.

Introduction

Punitive damages are by far the most difficult to obtain in employment discrimination cases, but they are also often the most lucrative. Like compensatory damages, the Plaintiff's employment lawyer faces two hurdles: jury and judge. Before even considering punitive damages as a proposition, it is important to understand the very distinct differences between juries and judges.

Judges and Jurors see cases through a very different lense. Judges look at cases through the lense of case law and precedent while Jurors view them through the lense of simple logic and the evidence put forth before them in a very short period of time.

A. Judges: Legal Fiction (e.g. *McDonnell Douglas* Burden Shifting)

Like mathematicians and scientists, lawyers and judges are inexorably driven to the structure of formulas. The world of a chemist relies upon the Periodic Table of *Elements*. Without that a chemist is lost and cannot recognize the world. In the same way lawyers and judges would be in danger of the terrible chaos of uncertainty were it not for their grounding in the *elements* of law. Whether found in a statute, a restatement, or in the case law itself, we tear every claim, every tort, every crime, and yes even every employment case down to its elements and are then forced to rebuild them.

McDonnell Douglas v. Green, 411 U.S. 792 (1973) is probably the case that rests foremost in the minds of employment lawyers. Even if one has never read this masterpiece, every employment attorney is familiar with its tenets. Though intended in its original as a blessing, it has often become the bane of the plaintiff employment lawyer's existence as he frantically prepares the record and later searches it with a fine toothed comb to meet *prima facie* cases and to disprove allegedly legitimate reasons. And then, disproving the allegation that the plaintiff did something wrong is not enough as the lawyer must now prove that the bad actor *knew* that the plaintiff did not do what he accuses the plaintiff of having done because the key is the actors' mental state, not the actual facts.

The First Commandment of the highly structured religion known as "Plaintiff's Employment Law" states: "Thou shalt propound the interrogatory 'Identify all allegedly legitimate non-discriminatory reasons for [adverse act].'" And it has been said that he who defies this law risks the damnation of summary judgment; for without the answer to this eternal question he shall fail to provide evidence to disprove such alleged reason regardless of how preposterous it may in the end appear to be.

Most of the lawyer's efforts after receiving the answer to that question – sometimes years later – will relate to disproving those legitimate reasons. And yet, a jury rarely cares. Take for example the following [true case] scenario:

> In a race discrimination case, a secretary was denied an interview for a position that would for her have been a promotion by someone for whom she had worked as a secretary. One of three reasons provided was that the plaintiff was a poor secretary. Motions to compel more specific answers to interrogatories and pages of deposition testimony over the course of two depositions, the second of which was obtained only after a motion to compel was granted by the Court, culminated in, among other things "she took bad phone messages". Further deposition testimony revealed the existence of telephone memo pads from someone identified as "her best secretary ever." Document requests and more motions to compel eventually resulted in production of the message pads, 100 pages of which were attached in response to the summary judgment motion. The result of all this effort was that the Court concluded after looking at the messages from "the best secretary ever" which lacked a date, a time, and often the name of an individual instead showing just a business name, and comparing them to the complete messages created by the Plaintiff, that Plaintiff presented competent evidence which if believed by a jury would disprove that she was a poor secretary or that the decision maker could reasonable be believed to have thought she was a poor secretary on the basis that she took poor messages.

No matter how much logic was presented to support discrimination, without having rebutted this subset of a legitimate reason, the Court may well have entered summary judgment in favor of

the Defendant. When analyzing these claims, lawyers and courts count every tree and generally do not view the forest as a whole.

B. Jurors: Reality, Logic and a Sense of Justice

Unlike the monks worshiping at the monasteries we call courts, Jurors tend to be secularists of little faith who trust what they can see, hear, and reasonably deduce. Most when given 2+2 will see 4. They live by the old adage "if it looks like a duck, and it walks like a duck, and it quacks like a duck – the blinkin thing is a duck!"[1]

As a result, the good trial lawyer drops the pretenses of summary judgment argument and elements, and case law, and presents a story to the jury. There are no "*See e.g.*", "*id.*", "*But see*", or "*Contra.*"'s. Most jurors speak the secular language, known in these parts as English though it has many dialects. Worship which is often done in Latin i.e. *res ipsa loquitur, quid pro quo, subpoena duces tecum, in limine, en banc, per curium*, etc., is beyond the common man and better left for theologians (i.e. legal scholars).

Although the common man is content to leave his after life in the hands of his prophet or other person who in his mind communes with the Deity, there is also a certain mistrust. How doth I insult the barrister, oh let me count the ways: "a good start",[2] "professional courtesy", "you can negotiate with a terrorist", "a vampire only sucks blood at night" ..."[3]

But when asked to do the job themselves, reasonable people use reasonable means. They cannot do otherwise. Tell a juror that a man has killed 47 times before and he will not intone "Hear O Israel the Lord our G-d – grants us the covenant of 404(b)". Rather, as common logic would dictate he considers the possibility that the man has killed again. Similarly, he will not chant *Kyrie eleison* he who possesses only 9 grams of cannabis (a misdemeanor), yet devout in the teachings of 609(a)(1), charge as a fork-tongued heathen he who possesses 11 grams of the same cannabis (a felony). Nay, be it 9 grams or 11, it matters not for the man either speaketh the truth or he does not.

Thus it is no surprise that given the aforementioned scenario of the secretary applying for a promotion, at a trial, the focus was on the question of whether she was qualified. If given the evidence presented to it, the jurors concluded that she was qualified for the position, the jury would rule for the Plaintiff. If not, then for the Defendant. As a result, what a plaintiff's attorney presents to the jury and what she presents to the courts are two entirely separate animals.

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[1]Modified by author with poetic license.

[2]Though if one reads the original Shakespear in context it is actually a fool who comes to this conclusion.

[3]If really necessary see Appendix A for the lead ins.

Presentations to the Secularists – Getting Punitive Damages From the Jury

Getting a jury to award punitive damages is more a matter of placing the Defendant in a bad light and angering the jury at it. Meeting the elements is only a very minor part of this endeavor. The jury will do what it wants to do so long as we as attorneys give it the ability to do so.

To the secularist, the heart is guided by real life values. What does this person believe to be right or wrong? Values are subject to our control. He who writes the book, defines good and evil. For example, the winner of a war writes history. The war of 1776, won by the colonists was "the Revolutionary War" or "the War of Independence." Would it have had that title if the British had prevailed? The war of 1861 was "the Civil War". Would it have had that appellation had the Confederacy won? The same is true for movies and books. The reader believes that which the writer wishes him to. Take for example *Beowulf*. In the original epic Beowulf is a hero, he represents good, while Grendel is the monster representing evil. But when John Gardner wrote Grendel in 1989, the roles were reversed.

As attorney's, our job is to be the author of the story so that we can write it our way. In so doing, we paint the plaintiff as good and the defendant as evil. This is theater. It is entertainment. It is not ceremony. We paint our characters with opening statements, with testimony and with closing arguments.

Take for example the following introduction in the opening statement in the case of *Anderson v. Dimazzi's Pizzeria*.[4]

> You are fat! You are stupid! Kimberly, you are going to end up working at that Burger King for the rest of your life. You are lucky I let you have this job. You should wear your clothes tighter. MAMA*CI*TA! NICE CHI-CHI'S! Ever give a blow job before? I can go all night with my girlfriend. You have got to see Jose's penis. Its HUGE. Fuck me for $5,000?
>
> This is *NOT* appropriate language or conduct for a pizzeria. It is *NOT* what any 16 year old girl should have to face in her first job. And it is *CERTAINLY NOT* what Kimberly Anderson expected when at 16 she took her first job at Dimazzi's Pizzeria. — Then again this is her first job... She doesn't know *WHAT* to expect.
>
> Let me start by apologizing for the language. These are not my words, I didn't do these things — **THEY DID.** And unfortunately, this is just the beginning.
>
> The case that you are about to hear is simply not rated G or even PG. But I hope that the testimony that you will hear over the next few days will give you some

[4]The names have been changed to protect the parties, including a 16 year old plaintiff.

picture of what a traumatic experience this was for 16 year old Kimberly Anderson who had never seen an R rated film.

Ladies and gentlemen, my name is Aaron Maduff and, along with Ms. Janice Pintar, I represent Kimberly Anderson, in her Complaint of sexual harassment, and assault and battery, against Dimazzi's Pizzeria and intentional and reckless infliction of emotion distress against the owner's son, Billy Terrantino, who supervised the pizzeria, and Guy Rokoviecz, the Pizzeria's manager.

Certainly, the defense had something different to say. But it is our job to persuade the jury on our version of the facts. And because the plaintiff gets the first opportunity to make an opening statement, this is the first moment to paint the defendant as evil; and evil does not mean the snake in the Garden of Eden, evil means contrary to the values of the common man.

The next opportunity is through the plaintiff's own testimony. This is an opportunity to not only paint the defendant as evil, but the plaintiff as good. Take for example the testimony of Jerry Lampley:

Q. Can you tell me what happened in that meeting?
A. I came in. He was sitting at his desk and Joe Long was standing next to him, standing up. He wasn't saying

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anything. He didn't even greet me when I came in. And I sat down.
Q. All right. And who said the first thing?
A. Mike Strater.
Q. What did he say?
A. He said "Jerry, I didn't know what I was going to do with you. With your numbers and the fact that you went to the EEOC, I'm going to ask for your resignation." I said "What?" He said "We can't have anybody working here who complains and files complaints to the EEOC. I want your resignation."
I said "Mike, I never quit on my team, I never quit on Onyx, and I don't want to quit now." He said "Well, then you're terminated, you're fired, get your things and leave."

Lampley v. Onyx Acceptance Corp., Testimony of Gerald Lampley. April 25, 2002, page 324-5.

And never miss the opportunity to do the same in closing arguments. In the case of *Carmen DeLeon v. Atiyeh Salem*, the plaintiff was the victim of an attempted rape.

> You saw Carmen cry on the stand. Why? It's not because she was physically injured. As defense counsel noted, she had not one scratch on her body. But when this 5'2" 100 pound 23 year old girl found her hands pinned down by a 6'3" 200 pound 47 year old man grinding his crotch against her and then pulling at her pants, she was terrified. Now I am not telling you that Atiyeh Salem is a bad guy because he is Palestinian. I am telling you that he is a bad guy because he decided that his newly hired secretary was a piece of property available for his pleasure.
>
> Now he protests that he is from a different culture. But if he wishes to practice podiatry in this country; if he is going to be in the United States, he has to respect *our culture*. And in *our culture* we do not permit people to act this way. THAT is why he is a bad man. And if you fail to tell him he is a bad man, if you fail to include significant punitive damages in your verdict, you allow him to apply his *values* (said with derision) to *our* culture. That we CANNOT allow. So when you retire to the jury room to consider the question of punitive damages consider this: You need not award ten million dollars. It's not as though Carmen DeLeon spilled coffee in her lap. But it must be enough to make THIS MAN [pointing at him] take notice that he is now in the United States of America, and in the United States of America we will not abide this behavior.[5]

As attorneys, we are not on trial. We are the theologians for whom the jury cares little. What we have to say has little relevance except insofar as we paint the picture of our clients and of the defendants. The attorney's credibility depends not on her statement of the facts, but on whether it is consistent with the testimony of the witnesses. The theologian is expected to tell the truth.

Presentations to the Monks – Keeping the Punitive Damages Verdict

In post trial motions and appeals, there are two primary attacks defendants can make on punitive damages awards: 1) the blasphemy of punitive damages themselves (i.e. are they appropriate in this case at all); and 2) preserving the sanctity of the punitive damages award (i.e. keeping the amount of punitive damages awarded "reasonable"). Therefore, though it may be of little relevance to the jury, there is testimony that we as attorneys need to elicit during a trial.

A. <u>Availability of Punitive Damages As a Matter of Law – The Devil's Misdirection</u>

[5]Some of the italics and capitalization is intended to express intonation, and as noted below intonation is paramount.

On the question of the availability of punitive damages, there is a three step process which starts with *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 119 S.Ct. 2118 (1999). More recently, the Seventh Circuit clarified this standard in *Bruso v. United Airlines*, 239 F.3d 848, 857-8 (7th Cir. 2001). The plaintiff has the burden of showing that the employer "acted with knowledge that its actions may have violated federal law" and that "the employees who discriminated against him [or sexually harassed her] are managerial agents acting within the scope of their employment. *Id.* at 857-8. Once the plaintiff has proven these two elements, the burden shifts to the employer to provide an affirmative defense. More specifically, "the employer may avoid liability for punitive damages if it can show that it engaged in good faith efforts to implement an anti-discrimination [anti-sexual harassment] policy." *Id.* Surprisingly, it is not the plaintiff's burden which most often causes courts to reverse punitive damages awards, rather, it is the failure of plaintiffs to adequately challenge the affirmative defense. In other words, it is important to say the right prayers at the right time.

In sexual harassment cases, and *quid pro quo* cases in particular, there is no question that a managerial agent is acting within the scope of employment. The minute employment is affected at all (e.g., someone's desk is moved, someone is yelled at by a manager, someone receives a poor evaluation) as a result of a refusal to engage in sexual activity, there is a managerial agent acting within the scope of employment. Similarly, in hostile environment cases if you have obtained liability, we assume that the actor is a managerial agent, because the harassment creates a tangible job detriment such as a constructive discharge. See *Pennsylvania State Police v. Suders* 124 S.Ct. 2342, (2004) (sexual harassment victim shows that environment so severe as to cause a constructive discharge).

With regard to the second prong, knowledge upon the part of the actor that his actions may have violated federal law, the fact that the plaintiff has prevailed on liability makes a strong case for that knowledge. The easiest way to meet this prong is to simply ask the question. Ego alone will almost always result in a deponent insisting that he is aware of the law. In other cases, an individual simply cannot deny that he or she is aware of the law. Take for example the cross examination of Rosie Hokenson, HR Manager at Onyx Acceptance Corporation:

Q. [By Mr. Maduff] Let me start from the bottom. Mr. Cybak asked you about an at-will employee. All of your employees are at-will employees?
A. Correct.
Q. And that means that under ordinary circumstances Onyx can terminate an employee at any time?
A. Correct.
Q. There is an exception to that, however, that it does not apply where you would be terminating them for any illegal reason, right?
A. That is correct.
Q. You have been in Human Resources for the eight years of your career?

22 A. Yes.
23 Q. So you're pretty knowledgeable about this stuff?
24 A. I think so.
25 Q. And the at-will contract or agreement, whatever we

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1 want to call it, really has no bearing at all on a civil
2 rights claim, does it?
3 A. I would say not.

Testimony of Rosie Hokenson in Lampley v. Onyx Acceptance Corporation, pg. 611-612, April 26, 2002.

In *quid pro quo* cases, like most other discrimination and retaliation cases, the defendant is likely to present some allegedly legitimate reason for taking the adverse act against the plaintiff. *Reeves v. Sanderson Plumbing Products Inc.,* 530 U.S. 133, 120 S.Ct. 2097 (2000) hands this factor to the plaintiff on a golden platter. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Id.* at 2101-2.

If you have liability, you have likely met the first two prongs. Thus, as ministers we are not likely to lose punitive damages claims because we failed to intone "Peace be with you" at the beginning of our service. Rather, where plaintiffs lose their punitive damages awards is in failing to place the burden of the affirmative defense on the defendant. In other words, we fail to remind the Pope that it is the Devil himself who acts by misleading and it is therefore the Devil himself who cannot show his lies to be truth.

The biggest mistake in this sense is to presume that the good faith defense is something that the plaintiff must disprove. But the point of an affirmative defense is that the burden is on the defendant. To do so, the defendant is going to have to show two items: 1) that it has a policy against discrimination/harassment, and 2) that it is making an effort to implement it. Showing the first without the second is not enough, and typically that is what the Devil does; his *modus operandi* is to hide his deeds in the shadows.

Defendants will make a show of having a policy against discrimination and harassment. In most cases they do – if they have a personnel manual it doubtless includes these policies. Defendants may even try to introduce it by simply stating that it exists. But this is not enough for the defendant to meet *its* burden.

> Onyx allegedly had a formal anti-discrimination policy, although it is difficult to ascertain the contours of this policy without physical evidence of its existence. But even assuming that the policy included appropriate procedures, we explained in *Bruso* that "although the implementation of a written or formal anti-discrimination policy is relevant to evaluating an employer's good faith efforts at Title VII compliance, it is not sufficient in and of itself to insulate an employer from a punitive damages award." *Id.* at 858. Here, there was sufficient evidence for a jury to believe

> that Onyx failed to engage in good faith efforts at Title VII compliance after it became aware of Lampley's retaliatory discharge claim. *Lampley v. Onyx Acceptance Corp.*, 340 F.3d 478, 482-3 (7th Cir. 2003).

In short, the defendant must also enact that policy. It must give meaning to its words and not attempt to lead a plaintiff down the garden path only to leave her without remedy.

B. Amount of Punitive Damages As a Matter of Law – The Devil's Protestations

Admitting its evil nature – or having been forced to face the reality of it – the defendant now protests that there are degrees of evil and this defendant is only a minor demon and not the Devil himself. It argues relativity; it argues that "there are others more evil than I". Defendants demand a consistency of damages verdicts (including punitive damages). This strategy is to try to differentiate itself from other Defendants who were subjected to smaller punitive damage awards, often in cases where the caps restrict the amount of the award.

But the caps were not put in place for the purpose of identifying what is necessary to punish an evil doer. They were put in place to protect a smaller company from being bankrupted. It may be that the Deity has the responsibility for passing judgment in the afterlife. In this life however, man is required to police himself. And the courts recognize this proposition, noting that Title VII cases are fact specific and the court therefore will "not normally disturb an award of damages in a Title VII case at or under the statutory caps, as this decision is largely within the province of the jury." *Fine* at 755. Or as stated by the Ninth Circuit "We have never required the district court to adjust a jury's punitive damages verdict so that it is proportional, in the court's view, to the defendant's wickedness. Such proportional adjustments are left to the jury itself." *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1028 (9th Cir. 2000).

Conclusion

For the atheist, the idea that good and evil is decided by some higher power is anathema. There is no place for theologians. Most of the world would be happy to adopt that view when it comes to the barrister. Arguing for punitive damages as if the secularist juror understands, appreciates, or respects the rule of the Bible known as case law, is akin to arguing the appropriateness of religious damnation to the atheist. Jurors speak English and are swayed by emotion, and efforts to persuade them must be made in their secular language. Nonetheless, that which man giveth, G-d may taketh away. Thus, Latin and logic must be included to appease the Deity as well.

APPENDIX A

Q. What do you call a thousand lawyers at the bottom of the sea?
A. A good start.

Q. Why didn't the shark eat the lawyer?
A. Professional courtesy.

Q. What is the difference between a lawyer and a terrorist?
A. You can negotiate with a terrorist.

Q. What is the difference between a lawyer and a vampire?
A. A vampire only sucks blood at night.