

Court upholds \$2 million punitive award against Chicago State University

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The due process review of a punitive damages award for excessiveness has a number of interconnected parts. A series of relatively small errors can quickly add up and dramatically skew the outcome of a review process that is intended to impose predictability and consistency on the largely black-box process juries use when setting the amount of punitive damages. The Illinois Appellate Court's decision in *Crowley v Watson* illustrates this point.

Decision

Crowley involved a retaliatory discharge claim by an administrator and Freedom of Information Act attorney at a public university. The plaintiff claimed that he was terminated in retaliation for responding to a Freedom of Information Act request that required disclosure of documents that were embarrassing to the incoming president of the university. The jury agreed, awarding him \$480,000 in back pay and \$2 million in punitive damages. Under the state ethics act for public employees, the award of back pay was doubled and the plaintiff was awarded \$60,000 in pre-judgment interest and \$318,173 for attorneys' fees. In addition, the trial court awarded front pay in an amount to be determined after the appellate proceedings conclude.

On appeal, the defendants argued, among other things, that the punitive award was excessive under the Supreme Court's due process guideposts. The appellate court rejected this argument, concluding that the conduct was highly reprehensible and that the ratio – which the court calculated to be either 1.5:1 or 2.4:1 – was well within constitutional limits. However, proper application of the Supreme Court's reprehensibility and ratio guideposts points to the conclusion that the punitive damages should have been quartered or eliminated entirely.

Reprehensibility

With respect to reprehensibility, the court focused almost exclusively on the implied finding that the plan to terminate the plaintiff was intentional and deceitful. In so doing, the court repeated a mistake that is all too common in punitive damages excessiveness review: equating the presence of facts sufficient to give rise to any punitive liability with the high degree of reprehensibility necessary to justify a multi-million dollar punitive award. Although the intentional and deceitful nature of conduct is one factor that the Supreme Court has held to be indicative of increased reprehensibility, had the defendant in *Crowley* not acted intentionally and deceitfully there would presumably have been no basis to find it liable for punitive damages in the first place. Consequently, the fact that it engaged in punishable conduct sets the stage for the inquiry but does not by itself push the reprehensibility needle to the high end of the scale.

Moreover, the presence of intentional and deceitful conduct is only one of the five reprehensibility factors that the Supreme Court has instructed lower courts to consider. In this case, those other

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factors do not point to high reprehensibility. The other four factors are as follows:

- Physical injury – although the *Crowley* court indicated that the defendants' conduct caused both economic and psychological injury, there was no finding that the plaintiff suffered compensable emotional distress. More important, the physical injury reprehensibility factor is intended to single out conduct that causes bodily harm. It is not satisfied by economic torts that, as a side effect, may cause the plaintiff emotional distress.
- Disregard for safety – the court simply ignored that the defendants' conduct did not demonstrate a disregard for anyone's health or safety.
- Vulnerable victim – the court implied that the plaintiff was economically vulnerable because the defendants' conduct was designed to harm the plaintiff economically. But the economic-vulnerability factor is intended to identify conduct as more reprehensible when it targets and attempts to exploit those who are vulnerable due to their limited socio-economic status or lack of sophistication in money matters. If it were satisfied whenever someone suffers economic injury, it would not serve that function but would simply cause the reprehensibility factors to produce enhanced reprehensibility automatically for both physical and economic injury. In *Crowley* the plaintiff's professional position at the university and the amount of back pay awarded strongly suggest that the plaintiff was not economically vulnerable, let alone targeted by the defendants because of such vulnerability.
- Recidivism – the court stated that there was evidence that "other employee dissenters" were eventually demoted or fired, but did not point to evidence that those employment decisions were part of a pattern of retaliatory terminations at this school. It appeared that the plaintiff's termination was an isolated incident in that respect.

In sum, the conduct at issue involved at most one or two of the reprehensibility factors identified by the Supreme Court and should have been treated as falling relatively low on the spectrum of conduct that warrants an award of punitive damages.

Ratio

When calculating the ratio of compensatory to punitive damages, the appellate court included in the compensatory damages not only the award of back pay, but also the statutory award of attorneys' fees. It also included the statutory award of doubled back pay, although it offered an alternative calculation that excluded this amount from the compensatory damages figure. The court concluded that the ratio was either 1.5:1 or 2.4:1, both of which, it concluded, were constitutionally permissible ratios.

This analysis suffers from several flaws. As an initial matter, the modern trend, sparked by recurring language in recent Supreme Court decisions, is to limit punitive damages to the amount of compensatory damages when the compensatory damages are "substantial" and the conduct does not rise high on the spectrum of reprehensibility. Courts have generally considered any award over around \$50,000 to be substantial, strongly suggesting that the highest permissible ratio in *Crowley* should have been 1:1.

Moreover, the appellate court committed a number of errors when calculating the ratio. Most significantly, the court should not merely have excluded the statutorily doubled award of back pay from the compensatory damages; it should have added those damages to the punitive side of the ledger. The court speculated that doubled damages may serve a compensatory function by making the plaintiff whole for the "collateral consequences" of lost income. However, those are items of damages that a wrongfully terminated employee can prove and recover. The purpose of doubling the plaintiff's back pay is not to provide rough justice for unproved losses, but rather to punish the defendant and deter future misconduct. Indeed, the ethics act specifically mentions deterrence as a goal of damages under the act. Because the doubled award of back pay already serves a punitive function, the pertinent question under *State Farm v Campbell* is whether additional damages are necessary to accomplish the state's legitimate interest in punishment and deterrence.

The court also erred by including the award of attorneys' fees in the compensatory award. While the plaintiff's attorneys' fees do represent a cost imposed on the plaintiff by the defendant's punishable conduct, the fact that they are chargeable to the defendant in only a limited range of cases gives them a punitive aspect as well, making it arbitrary to include them in the denominator and thereby use

them as a justification for higher punitive awards in those cases.

In sum, the doctrinally correct ratio of compensatory to punitive damages in *Crowley* was more than 4:1, not 1.5:1. There is a strong argument that due to the deterrent and punitive effect of the double damages, front pay award, attorneys' fees and pre-judgment interest, any award of punitive damages was unnecessary and therefore unconstitutionally excessive. Certainly, under *State Farm v Campbell*, any additional punitive award should not have been allowed to exceed a 1:1 ratio with the actual compensatory damages.

Penalties for comparable conduct

The appellate court held that the punitive damages were not out of line with punitive awards in other retaliatory discharge cases, but it failed to note the most directly analogous penalty – the provision in the ethics act that authorised an award of double damages. That is a legislative endorsement of a punishment in the amount of the compensatory damages. Therefore, even if the award of double damages is not treated as preclusive of additional punitive damages, the third guidepost would suggest that a punitive award of more than the amount of the pre-doubling compensatory damages is excessive.

Punitive damages against public entity

Finally, there is a strong argument that it is never proper to impose punitive damages against a public entity such as Chicago State University. In *City of Newport News v Fact Concerts, Inc* the Supreme Court recognised that such awards do not serve the traditional function of punitive damages because the money is paid by taxpayers, not the individuals who are guilty of wrongdoing. The result of a punitive award against a public entity is "a windfall to a fully compensated plaintiff... accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill". While the appellate court specifically rejected that argument in *Crowley*, those concerns are yet another reason to allow only a modest punitive award in a case like this.

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