Early punitive damages discovery – let's give it a try!

Make the case for punitive damages early on and bring your motion to secure defendant's financial records

By Karine Bohbot and Elizabeth Riles

One aspect of a plaintiff's employment case that often does not get the attention or work it needs is punitive damages. The law provides for punitive damages in most intentional tort actions, such as personal injury cases for assault and battery, and for employment discrimination actions brought under the Fair Employment and Housing Act and similar federal statutes, when the plaintiff establishes that the conduct of a defendant was malicious or in total disregard of the plaintiff's rights. (See *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 220-222; *Stirlen v. Supercuts, Inc*. (1997) 51 Cal.App.4th 1519, 1540; *Monge v. Superior Court* (1986) 176 Cal.App.3d 503, 509; *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1212.) Once the jury has found that the plaintiff has met his or her burden on this point, which occurs in the first phase of the trial, the plaintiff is then permitted to move on to the second phase of the trial – the punitive phase. It is in this phase that the plaintiff has the opportunity, and burden, to set forth evidence of the defendant's financial condition and net worth in support of the amount of punitive damages being sought by the plaintiff.

Plaintiffs' attorneys understand that the standard to prove punitive damages, clear and convincing evidence, is a high one. Moreover, many plaintiffs' attorneys have either heard from the court or the defendant that they are not permitted discovery into the financial status or condition of the defendant to meet this burden until after liability and malice have been proven to a jury. Unfortunately, this timing often leaves little time for a plaintiff's attorney to analyze the financial information received and prepare for the common arguments used to lower a punitive damage award, *i.e.*, poverty, large payables, etc. As plaintiffs' attorneys, the most important thing that we can do is place our client in the best position possible for settlement, trial or anything else. This timing prevents us from accomplishing that goal.

Bringing a motion to secure discovery

Bringing a motion to secure this discovery prior to trial, is the most important step a plaintiff's attorney can take in order to ensure she has placed herself and her client in the best position to secure a punitive damages award at trial. The burden warranting permission from the court to obtain the defendant's financial records and information is a high one, but it is not an insurmountable one. Bringing a motion for discovery of financial records *during* the discovery stage is by far the best way to ensure, or at least greatly increase the chances, that you will be permitted to obtain these records in time.

So, what should you do?

California Civil Code section 3294 provides the vehicle for plaintiffs to bring a motion seeking the court's permission to conduct discovery into financial records of the defendants that might otherwise be prohibited by law. If the plaintiff is able to establish, through affidavits and other evidence, that he or she "has established that there is a substantial probability that [he or she] will prevail on the claim for punitive damages," the Court is within its right to grant the discovery. (See Civ. Code, § 3295(c); *Jabro v. Superior Court* (2002) 95 Cal.App.4th 754, 757.) The court's role in making this determination is to weigh the evidence presented by both sides and "simply . . . determine whether there is a "*strong likelihood*" or whether it is "*very likely*" that the plaintiff will prevail on [his or her] claim for punitive damages against the defendants." (*Id.* at 759; *Guardado v. Superior Court* (2008) 163 Cal.App.4th 91, 98.) This "weighing is not the traditional fact-finding process and shall not be considered to be a determination on the merits of the claim or any defense thereto." (*Id*., at 758; *Guardado*, 163 Cal.App.4th at 98.)

Therefore, your first step is to evaluate your claims and determine whether they provide for punitive damages. If they do, then your next step is to carefully evaluate your facts to determine whether a jury could well find that the defendant's conduct towards your client was malicious or in total disregard of his or her rights. Next, you will need to conduct the necessary discovery to secure the evidence to support these facts. This could involve getting declarations, taking depositions and fighting discovery battles related to other claims of discrimination made against the defendant. As is discussed more fully below, this evidence can be vital to this kind of motion. Once you have taken these steps, if you believe sufficient facts do or even *may* support a finding of malice, then bring your motion.

The motion is not a complicated one, but should include a detailed factual analysis, with special emphasis on those facts that support a finding of malice against the defendant. You should include deposition testimony, exhibits and declarations of witnesses that provide supporting facts for the intentional torts or discrimination that you are claiming.

"Me too" evidence

In employment cases, we are often faced with the classic "he said/she said" situation. We do not often have witnesses to the discriminatory or harassing behavior. It is well-recognized that "[d]efendants of even minimal sophistication will [typically] neither admit discriminatory animus nor leave a paper trail demonstrating it." (*Riordan v. Kempiners* (7th Cir. 1987) 831 F.2d 690, 697.) What this means in a discrimination, harassment or retaliation claim, is presenting as much "me too" evidence as you can. Any evidence of other individuals who suffered from discrimination, whether in same form, at the same time as your client, before or after your client, or even at the hands of different individuals than those who subjected your client to discrimination, can be crucial in supporting this type of motion. You will face objections to this evidence often based on hearsay, and most importantly, relevance. Be aware that there are many evidentiary reasons that will permit the admission of this evidence, including, but not limited to, proving discriminatory intent, failure to adequately prevent discrimination and harassment and rebutting arguments that the use of the defendant's valid and viable discrimination and harassment policies would have prevented the actions your client suffered. (See *Pantoja v Anton* (2011) 198 Cal.App.4th 87, 115; *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 760; *Bihun vs. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 989 (overruled on other grounds); *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 667-668; *Obrey v. Johnson* (9th Cir. 2005) 400 F.3d 691, 694-699; *Beachy v. Boise Cascade Corp.* (9th Cir. 1999) 191 F.3d 1010, 1013; *Larson v Harrington* (ED Cal 1998) 11 F Supp 2d 1198, 1201; *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1480; *EEOC v. Farmer Bros. Co.* (9th Cir, 1994) 31 F.3d 891, 898; *Teamsters v. U.S.* (1977) 431 U.S. 324, 339.) The goal is to set forth the strongest evidence in support of your motion. As the burden is on the plaintiff to establish to the court's satisfaction that punitive damages are "very likely" to be awarded by a jury, it is important to focus on that burden.

Timing is everything

The significance of bringing this motion well before trial is two-fold. The first reason, and the most obvious, is that you can actually succeed and obtain financial information in preparation for trial. The second reason, which is less obvious but just as significant, is that bringing this motion early places you in a better position once you *do* get to the punitive phase of your trial. As we have found time and again, just having brought the motion, even when it is denied, you have placed yourself and your client in the best possible position for seeking *and getting* a reasonable continuance at trial prior to the punitive phase to obtain the records you were denied by way of this motion. Judges will tend to be more willing to place a trial, and thus a jury, "on hold" for a reasonable amount of time to permit discovery of financial records upon knowing that an effort to obtain the records had been made during discovery and denied.

We experienced this firsthand in a trial a few years ago, where the fact that we had failed to make the motion during discovery was the reason given for the Court's refusal to provide a sufficient time to depose the Person Most Knowledgeable (PMK) regarding the financial records produced pursuant to our trial subpoena. Though we were still able to present the subpoenaed evidence during the punitive phase, we could have been better prepared and perhaps have received a greater punitive award had we done the motion during the discovery phase.

Finally, we are sure that many plaintiffs' attorneys have had the experience where the defendant produces a less than well-informed PMK at the punitive phase in response to the trial subpoena. A successful motion made during the discovery phase will keep this tactic on the part of the defense from being as effective. The financial records produced can be used to get the necessary information you need from the witness and make the defendant look ill-prepared, further angering the jury. This is much harder to do if you have failed to seek those records through discovery. We make it our practice to bring this kind of motion whenever we believe we have sufficient facts to lead a jury to find malice and thus award punitive damages. So far, we have been successful.

Thus, the lesson to take away here is . . . bring that motion! Even if you are not totally certain you will succeed, bring it! Even if you think the facts are not as strong as you would like them to be, bring

it! The positives in bringing this type of motion far outweigh the negatives. You will be better prepared and better equipped to ask for and likely obtain a much larger punitive damage award when the time comes. And don't we all want *that* kind of result!


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