Proskauer

Latest 'Nuclear Verdict' Underscores Jury-Trial Employer Risk

Law360 on **August 8, 2024**

Last month, in Jane Doe v. Alkiviades David, a Los Angeles Superior Court jury returned a verdict in a sexual assault and harassment case in the amount of $900 million.[1] This verdict is one of the largest ever for a single-plaintiff employment case.

Jane Doe is a former employee who sued David and various entities he owns in Los Angeles Superior Court in September 2020 for sexual assault and battery, false imprisonment, civil rights violations, sexual harassment, sex and gender discrimination, retaliation, failure to prevent, wrongful termination and constructive discharge, and intentional infliction of emotional distress.

Doe's complaint alleges that, among other things, David sexually harassed, assaulted and raped her while she worked as a business developer and brand ambassador at two of David's companies, Hologram USA Inc. and Swissx Labs AG Inc.

During the short trial, in which it appears no case was put on by the defense, Doe moved for a directed verdict as to her causes of action for sexual assault and battery and intentional infliction of emotional distress, which the court granted as to liability.[2]

She also moved to dismiss her other causes of action without prejudice, which was granted.

After deliberating for less than a day, the jury awarded Doe $100 million in compensatory damages and $800 million in punitive damages. Although possibly unsustainable on appeal, the amount is seen as a possible record.

In the past decade and in California alone, there have been at least 24 of what are known as nuclear verdicts, or verdicts in excess of $10 million.

Constitutional Limits on Punitive Damages Awards

Punitive damages exist to punish wrongful conduct and to deter future wrongful conduct. While punitive damages these days are sky-high and growing, they're not limitless — the 14th Amendment's due process clause prohibits imposing excessive or arbitrary punishments.

A set of guideposts articulated by the U.S. Supreme Court in its 1996 decision in BMW of North America v. Gore and its 2003 decision in State Farm Mutual Automobile Insurance Co. v. Campbell established a framework for analyzing whether a punitive damages award violates constitutional due process.

The court must consider:

- The degree of reprehensibility of the defendant's conduct;
- The disparity between the punitive damages award and the actual or potential harm suffered by the plaintiff, often described in terms of the numerical ratio of the punitive damages award to the compensatory damages award; and
- The civil penalties allowed in comparable [3]

Under federal and state law, a punitive damages award that is more than a single-digit multiplier of the compensatory damages award generally violates due process.

In reviewing damages awards, the California Court of Appeal has concluded that a 6-1 punitive to compensatory damages ratio approaches the highest permissible limit, while more frequently greenlighting much lower ratios such as 1-1, 1.5-1, 2-1 and 3.5-1.[4]

The ratio determined, or affirmed, in each case follows a fact-specific analysis based on the three guideposts, with the degree-of-reprehensibility factor usually carrying the most weight. California courts also look at the amount of the compensatory damages award — where the compensatory damages award is substantial, that may lead a court to conclude a lower punitive damages ratio is appropriate.

The guideposts allow for flexibility in a court's analysis depending on the specific facts of each case, but do little to offer tangible guidance to a jury faced with filling out a verdict form. Despite the well-established principle that punitive damages awards should be no more than a single-digit multiplier of the compensatory damages award, this information is not typically disclosed to juries.

One of the great ironies is that everyone in the courtroom, including the judge and the attorneys trying the case, are keenly aware of these constitutional limits — everyone other than perhaps the most important people present: the jury itself.

A judge generally does not instruct the jury about these constitutional limits, and counsel for the plaintiff and the defendant have their own reasons not to mention them, usually having to do with not wishing to suggest either a ceiling or a floor that might attract the jury's attention and affect its judgment.

In California trial courts, juries are guided by the Judicial Council of California Civil Jury Instructions.

The guidance, however, is relatively minimal: The California jury instructions and corresponding sample verdict forms for punitive damages in employment cases merely tell a jury that — after finding evidence of malice, fraud or oppression — "[t]here is no fixed formula for determining the amount of punitive damages," and to "consider all of the following factors in determining the amount," before proceeding to list out a series of factors that track the three-pronged guideposts articulated by courts.[5]

Occasionally, juries find themselves seeking more guidance when faced with calculating a damages award. In fact, the jury in Doe v. David submitted a question form to the court, asking, "Is the 'ten times' amount for punitive statutorily based or just a suggestion?"[6]

Recent Punitive Damages Awards in California Courts

The ratio of punitive to compensatory damages awarded in Doe v. David was 8-1 — very high, but not necessarily unconstitutional. Despite being a single-digit ratio, and the particularly reprehensible conduct, the punitive damages award could still be considered impermissibly excessive given the very high award of compensatory damages in the case ($100 million).

In addition to the nearly $1 billion damage award in Doe v. David, below is a sampling of some other recent high damages amounts awarded by California juries in employment cases over the past five years.

Case name and number	Court	Verdict date	Compensatory damages	Punitive damages	Ratio (approximate

Buron v. Occupational Health Centers of California (37-2021-00026852)	San Diego Superior Court	Dec. 20, 2023	$1.56M	$7.81M	5:1
Armstrong v. Life Care Centers of America, Inc. (RIC1902845)	Riverside Superior Court	Dec. 15, 2023	$1.18M	$10M	8.5:1
Gatchalian v. Kaiser Foundation Hospitals (21STCV15300)	Los Angeles Superior Court	Dec. 11, 2023	$11.49M	$30M	2.6:1
Callahan v. Marriot Marquis Hotel (CGC20584599)	San Francisco Superior Court	Sept. 21, 2023	$5M	$15M	3:1
McCray v. WestRock Services LLC (2:21-cv-09853)	Central District of California	Aug. 24, 2023	$4.01M	$5.45M	1.3:1
Cunning v. Skye Bioscience (8:21-cv-00710)	Central District of California	Jan. 18, 2023	$1.35M	$3.5M	2.6:1
Martinez v. SoCal Edison (BC670461)	Los Angeles Superior Court	June 2, 2022	$24.5M	$440M	18:1
Rudnicki v. Farmers Insurance Exchange (BC630158)	Los Angeles Superior Court	Dec. 16, 2021	$5.41M	$150M	27.8:1
Zirpel v. Alki David Productions (BC684618)	Los Angeles Superior Court	Oct. 6, 2021	$1.07M	$6M	5.6:1
Garcia v. Greshman Apartments Investors (BC699421)	Los Angeles Superior Court	Aug. 5, 2021	$2.38M	$5.25M	2.2:1
Khan v. Alki David Productions (BC654017)	Los Angeles Superior Court	Dec. 2, 2019	$8.26M	$50M	6.1:1

Takeaways

Employers wondering what can be done to avoid the possibility of an astronomical jury verdict should strongly consider using arbitration agreements with their employees. Arbitration agreements, which are still valid and enforceable for most claims in California despite numerous legislative efforts to outlaw them, offer time- and cost-saving benefits to employers and employees alike.

While it may not have been possible to compel the plaintiff in Doe v. David to arbitrate her claims for sexual harassment and assault following the effective date of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 even if she had signed such an agreement, the existence of a valid arbitration agreement may have spared other employers mentioned above.[7]

Another potential solution is to reform the standard jury instructions so that jurors are informed of constitutional limits on punitive damages awards before they deliberate.

This might promote judicial efficiency and conservation of the parties' resources by reducing the need for post-verdict motion and appellate practice.

In short, judges could let juries know that if they do decide to award punitive damages, the amount should generally not exceed, say, two or three times the amount of compensatory damages awarded in the case.

On the other hand, the defense bar is likely to worry that a jury, armed both with knowledge of the constitutional limitations and with a strong desire to punish a defendant for its misconduct, will simply increase the amount of compensatory damages it awards so that a lower single-digit multiplier will result in the jury's intended punitive damages award.[8]

Conclusion

Ever-larger jury verdicts in employment cases seem to have become rather commonplace in California and other large jurisdictions in recent years.

Juries tend to identify with an employee who may have lost a job or been the victim of harassment, discrimination or retaliation; the jury may seek not only to make that employee whole, but also to punish, sometimes severely, wrongful conduct for which it perceives the employer to be responsible.

Employers should think twice before trusting their fate to a jury in cases like these. The best and really only antidote to such a problem remains arbitration — it is the surest and most reliable way of resolving employment-related disputes in a business-like manner.

[1] Jane Doe Alkiviades David et al., Los Angeles Superior Court Case No. 20STCV37498.

[2] Minute at 2, Doe v. David, No. 20STCV37498 (Cal. Sup. Ct. June 14, 2024).

[3] BMW of Am., Inc. v. Gore, 517 U.S. 559, 568 (1996); State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408 (2003); see also Roby v. McKesson Corp., 47 Cal. 4th 686 (2009).

[4] See Zirpel v. Alki David Prods., Inc., 93 Cal. App. 5th 563 (2023) (6:1 ratio); Gober v. Ralphs Grocery , 137 Cal. App. 4th 204 (2006) (6:1 ratio); Roby v. McKesson Corp., 47 Cal. 4th 686, 718-19 (2009) (1:1 ratio); King v. U.S. Bank Nat'l Ass'n, 53 Cal. App. 5th 675, 731 (2020) (1:1 ratio); Colucci v. T-Mobile USA, Inc., 48 Cal. App. 5th 442, 459-60 (2020) (1.5:1 ratio); Tilkey v. Allstate Ins. Co., 56 Cal. App. 5th 521, 562-63 (2020) (finding a 6:1 ratio was excessive in the case and opting instead for a 1.5:1 ratio); Contreras-Velazquez v. Family Health Ctrs. of San Diego, Inc., 62 Cal. App. 5th 88, 110-11 (2021) (2:1 ratio); Rubio v. CIA Wheel Grp., 63 Cal. App. 5th 82, 100-01 (2021) (3.5:1 ratio).

[5] See, g., CACI Nos. 3943, 3945, 3947, 3949, and the corresponding Verdict Forms.

[6] Jury Request or Question / Response Form at 1, 20STCV37498 (Cal. Sup. Ct. June 17, 2024). The court responded "Arguments of counsel are not evidence of damages. Instruction no. 3940 provides you with the instruction on how to decide whether to award punitive damages, and if so, how to determine the amount." Id. at 2.

[7] A "dispute" arises within the meaning of the Act (9 S.C. §§ 401 & 402) when a party first asserts "a right, claim, or demand" on or after the date of enactment of the statute (Mar. 3, 2022). See, e.g., Kader v. Southern Cal. Med. Ctr., Inc., 99 Cal. App. 5th 214 (2024).

[8] Under California law, defendants may seek bifurcation of the compensatory and punitive damages phases of a trial. Civ. Code § 3295.

Reproduced with permission. Originally published August 7, 2024, "Latest 'Nuclear Verdict' Underscores Jury-Trial Employer Risk,*" Law360.*

- **Anthony J. Oncidi**
  Partner
- **Morgan J. Peterson**
  Associate