THE CASE FOR LINKING NONECONOMIC DAMAGES IN EMPLOYMENT CLAIMS TO TITLE VII CAPS

By Timothy Rote

Under the laws enforced by EEOC, it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

The law forbids discrimination in every aspect of employment.

There is a range of relief available in a retaliation case:

Preliminary relief. The EEOC has the authority to sue for temporary or preliminary relief while completing its processing of a retaliation charge. This asks the court to stop retaliation before it occurs or continues.

Compensatory and punitive damages. Money damages are paid to compensate the victim and to punish the employer for retaliation. However, punitive damages are only available against private employers, not against the government.

Other Relief. Under all the statutes enforced by the EEOC, relief may also include equitable relief such as back pay, front pay, or reinstatement into a job. The Commission also seeks changes in employer policies and procedures, managerial training, reporting to the Commission, and other measures designed to prevent violations and promote future compliance with the law.

Remedies For Employment Discrimination

Whenever discrimination is found, the goal of the law is to put the victim of discrimination in the same position (or nearly the same) that he or she would have been if the discrimination had never occurred.

The types of relief will depend upon the discriminatory action and the effect it had on the victim. For example, if someone is not selected for a job or a promotion

because of discrimination, the remedy may include placement in the job and/or back pay and benefits the person would have received.

The employer also will be required to stop any discriminatory practices and take steps to prevent discrimination in the future.

A victim of discrimination also may be able to recover attorney's fees, expert witness fees, and court costs.

Remedies May Include Compensatory & Punitive Damages

Compensatory and punitive damages may be awarded in cases involving intentional discrimination based on a person's race, color, national origin, sex (including pregnancy, gender identity, and sexual orientation), religion, disability, or genetic information.

Compensatory damages pay victims for out-of-pocket expenses caused by the discrimination (such as costs associated with a job search or medical expenses) and compensate them for any emotional harm suffered (such as mental anguish, inconvenience, or loss of enjoyment of life).

Punitive damages may be awarded to punish an employer who has committed an especially malicious or reckless act of discrimination.

Limits On Compensatory & Punitive Damages

There are limits on the amount of compensatory and punitive damages a person can recover. These limits vary depending on the size of the employer:

- For employers with 15-100 employees, the limit is $50,000.
- For employers with 101-200 employees, the limit is $100,000.
- For employers with 201-500 employees, the limit is $200,000.
- For employers with more than 500 employees, the limit is $300,000.

The award of noneconomic damages is intended to compensate, while punitive damages are intended to punish, but not to destroy an employer.

OREGONS CAP ON NONECONMIC DAMAGES

Oregon's cap on noneconomic damages on employment claims is $500,000.

Multnomah County juries commonly award damages to employee litigants that are ten times higher than the Title VII caps and ten times higher than Oregon's Bureau of Labor and Industry (BOLI) awards.

Juries also find in favor of the employee 85% of the time and are reversed on appeal more than 75% of the time.

Unfortunately jurors all too often see this as a lottery opportunity and a form of punishment even when punitive damages are not allowed.

Like most states Oregon has a robust small business community, which represents disproportionately high percentage of overall employment. But unlike big businesses, very few small businesses have equity and capital anywhere near $500,000.

Title VII remedies addresses this very issue by caping damages based on employee size and while imperfect, it is a good place to start for Oregon.

LITIGATION IS AN IMPERFECT VEHICLE AND WE MUST BE EVER CAUTIOUS OF ITS ABUSE

This author can offer you a perspective of how imperfect and costly can be between two parties, over 15 years.

In 2003 an IT manager for one of my companies attempted to extort a raise and to support that extortion he withheld computer programming owned by his employer. By withheld programming I mean that the employee denied its existence and no trace of known prior programs and code, necessary to process and report daily 100,000 bits of data.

After he was fired he filed a complaint with the ODJ and me claiming his employer was over-billing clients. The ODJ requested evidence. No evidence was provided

and the ODJ shut down its investigation. The evidence offered by the employee was a spreadsheet showing adjustments to hours, no clients were identified, the source of the spreadsheet was identified by the employee as from an email the employee received, the email was never provided, the recipients of the email never identified and the employee's email account absent from the computer and hard drive he returned on his last day. The spreadsheet alleged $400 in adjustments by a company that generated $5 Million a year in revenue. And I found no one to corroborate the $400 in adjustments or the spreadsheet.

The employee remained committed to not providing the software needed to process daily reports and after his last day the employer had to shut down for ten days to recreate the programming. Later we would find the programming on a hard drive the former employee had returned on his day. That hard drive had been reformatted by the employee, that code destroyed.

There were a number of legal maneuvers by opposing counsel and the long and short of this is that it took seven years to get this case to arbitration at a cost of three years of profit.

Not long after the arbitration started I discovered the arbitrator and opposing counsel had been partners together for 14 years. Neither had disclosed the conflict. But upon raising the conflict, the arbitrator resigned. His former partner said he could not do so and so he agreed to return over our objections. Upon returning he refused to consider our evidence of more than 1,000 documents, the testimony of ten witnesses and the reports and testimony of three computer forensic experts.

This story has continued with the litigation. The litigants were exposed. A short time after the arbitrator ignored our evidence he became Chairman of the Disciplinary Board of the Oregon State Bar. Our complaints to the OSBar went to him and did not see the light of day thereafter.

The former IT manager lives in New Jersey and worked from there during his tenure as an employee for one of my companies. He believes Oregon is a much better place to litigate employee claims than New Jersey.

This experience would be hard on any small business. We can curb this abuse by linking noneconomic damage awards in employment cases to the Title VII caps on compensatory and punitive damages.

The reasoning behind the caps is to punish but not destroy the employer. Let's bring reason back into the equation and amend HB 2014 to cap damages in employment claims following the Title VII mandates.