

Reduction of Punitive Damages for Employment Discrimination: Are Courts Ignoring our Juries?

Stacy A. Hickox*

Employees who have been subjected to discrimination face numerous hurdles in recovering punitive damages under the federal acts adopted to protect them. After surviving motions for summary judgment and convincing juries that they have been injured, employees must convince juries that their employers acted with malice or reckless disregard of their statutory rights to recover punitive damages. Even then, these employees face yet another obstacle to actual recovery: the courts themselves. Despite the statutory right to a jury trial, trial and appellate courts are intent on reducing jury awards for punitive damages. Since § 1981a of the Civil Rights Act¹ was amended in 1991 to allow for the recovery of compensatory and punitive damages under a statutory cap, the courts have eviscerated this right in many instances to deny claimants the damages that juries determined were due.

This Article will examine the adoption of § 1981a of the Civil Rights Act of 1964 and its legislative purposes, the development of case law under which punitive damages were reviewed after the passage of § 1981a, and the impact of the Supreme Court's decision to allow punitive damages without requiring a showing of egregious conduct by an employer. The Article then challenges the appropriateness of applying to federal employment claims, the Supreme Court's model for reviewing excessive punitive damages in state fraud cases.² First, application of that model to discrimination claims may be inappropriate because such claims do not raise the same due process concerns that

* Visiting Professor, Michigan State University Detroit College of Law. Cornell University (B.S., 1985); University of Pennsylvania (J.D., 1988).

1. 42 U.S.C. § 1981a (1994).

2. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

justified the Supreme Court's model. Second, the courts that have applied the Supreme Court's model have done so without respect for the Court's emphasis on the reprehensibility of the defendant's actions, or without respect for juries' interpretations of the facts that justified the original punitive damage awards.

I. RIGHT TO PUNITIVE DAMAGES UNDER THE EMPLOYMENT DISCRIMINATION STATUTES

Punitive damages are recoverable under § 1981a "if the complaining party demonstrates that the [employer] engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual."³ Punitive damages are designed to punish and to deter discriminatory conduct by employers.⁴ The 1991 Act creates a cap on a plaintiff's combined compensatory and punitive damages based on the size of the employer.⁵ Courts have applied this cap to all compensatory and punitive damages available in one plaintiff's action, rather than to each claim.⁶ In determining whether to award punitive damages, the jury is not informed about the statutory cap on damages.⁷

Congress's primary concern when enacting the revision allowing punitive damages was to reconcile the differences in the law covering various types of discrimination. Because punitive damages had previously been available under § 1981, Congress expanded the availability of punitive damages to claims arising under Title VII⁸ of the Civil Rights Act of 1964 ("Title VII").⁹ Thus, courts have determined the propriety of punitive damage awards under §§ 1981 and 1981a using the same criteria.¹⁰

3. 42 U.S.C. § 1981a(b)(1).

4. *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 306 (4th Cir. 1998).

5. 42 U.S.C. § 1981a(b). Note that a claimant alleging race discrimination under 42 U.S.C. § 1981, or any covered discrimination under a state discrimination statute, may recover damages beyond the cap imposed by § 1981a. *See, e.g., Madison v. IBP, Inc.*, 257 F.3d 780, 792 (8th Cir. 2001), *vacated on other grounds by Madison v. IBP, Inc.*, 122 S. Ct. 2583 (2002).

6. *See, e.g., Hudson v. Reno*, 130 F.3d 1193, 1200 (6th Cir. 1997), *overruled on other grounds, Pollard v. E.I. DuPont de Nemours & Co.*, 532 U.S. 843 (2001); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1355 (7th Cir. 1995); *Hogan v. Bangor & Arrostook R.R.*, 61 F.3d 1034, 1037 (1st Cir. 1995).

7. 42 U.S.C. § 1981a(c)(2).

8. H.R. REP. NO. 102-40, pt. 1, at 24-29 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 717-23; H.R. REP. NO. 40 pt. 1, at 74 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 612.

9. 42 U.S.C. §§ 1981a-2000 (1994).

10. *E.g., Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 941 (5th Cir. 1996).

Some states' statutes prohibiting employment discrimination also allow for punitive damages against discriminating employers.¹¹ At least twenty-two states have statutes that either expressly provide or have been interpreted to provide punitive damages.¹² Some of these statutes have incorporated limits on punitive damages for employment discrimination similar to the caps included in § 1981a.¹³

A. Legislative History

In 1991 Congress provided for additional remedies, including punitive damages under the Civil Rights Act beyond the equitable relief that was available previously.¹⁴ The 1991 Act's requirements for punitive damages were based in large part on the Supreme Court's decision in *Smith v. Wade*,¹⁵ in which the Court allowed the award of punitive damages under 42 U.S.C. § 1983.¹⁶ The Court in *Smith* allowed for punitive damages when the defendant's conduct was shown to be "motivated by evil motive or intent, or when it involve[d] reckless or callous indifference to the federally protected rights of others."¹⁷ The Age Discrimination in Employment Act of 1967 ("ADEA")¹⁸ also provides for damages that are "punitive in nature"¹⁹ when the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."²⁰

In allowing punitive damages, Congress sought to expand the remedies available to victims of discrimination.²¹ Congress allowed punitive damages to punish employers for their unlawful conduct, to reinforce public policy against discrimination, and to deter future discrimination.²² This provision confirms that punitive damages are proper to punish defendants for improper and illegal behavior.²³

-
11. See Appendix for a compilation of state statutes that provide for punitive damages.
 12. See Appendix: AK, AR, CA, DC, FL, GA, HI, ID, KY, ME, MA, MN, MO, NV, NJ, OH, OR, RI, TX, VA, WA and WV.
 13. See Appendix: AR, FL, ID, ME, MN, and TX (these states have limits).
 14. See *Landgraf v. USI Film Prod.*, 511 U.S. 244, 252-53 (1994).
 15. 461 U.S. 30 (1983).
 16. *Id.* at 56. See H.R. REP. NO. 102-40, pt. 2, at 29 (1991); H.R. REP. NO. 102-40, pt. 2, at 74 (1991) (standard for punitive damages taken from civil rights case law).
 17. 461 U.S. at 56.
 18. 29 U.S.C. §§ 621-34 (1994).
 19. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985).
 20. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993).
 21. *Pollard*, 532 U.S. at 848.
 22. 137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards).
 23. Kelly Koenig Levi, *Allowing a Title VII Punitive Damages Award Without an Accompanying Compensatory or Nominal Award: Further Unifying the Federal Civil Rights Laws*, 89 KY. L. J. 581, 598 (2000/2001).

A cap was included on the punitive and compensatory damage awards to be implemented by the trial court. The Senate Report suggests that the cap was adopted, at least in part, to deter frivolous lawsuits and to protect employers from financial ruin, which could result from excessive damage awards.²⁴ Yet the House Report suggests that the requirement of showing malice or reckless disregard would prevent disproportionate jury awards.²⁵ Regardless of the specific intent, there is no indication that the cap was intended to act as an endpoint of a scale on which courts could recalibrate jury awards.²⁶ Rather, the House Report states that “juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct.”²⁷ That Report did note, however, that judges could act as an additional check by reducing punitive damage awards that are disproportionate to the defendant’s discriminatory conduct or the plaintiff’s resulting loss.²⁸

B. *Judicial Interpretation of Section 1981a*

After § 1981a was adopted in 1991, courts began to address whether punitive damages awarded under that section were excessive. The court in *EEOC v. AIC Security Investigations, Ltd.*²⁹ upheld a \$150,000 punitive damage award after recognizing that “the primary responsibility for deciding the appropriate amounts of such damages rests with the jury [The court] will set aside a jury’s award of punitive damages only if [the court is] certain that [the amount] exceeds what is necessary to serve the objectives of deterrence and punishment.”³⁰ After its decision in *AIC*, the Seventh Circuit revisited the punitive damages issue in *Hennessy v. Penril DataComm Networks, Inc.*³¹ while *BMW of North America, Inc. v. Gore* (“*BMW*”)³² was pending before the Supreme Court.³³ Although the evidence supported punitive damages against Penril, the Seventh Circuit Court of Appeals remanded the case to the

24. 137 Cong. Rec. S15472 (1991) (statement of Sen. Dole); *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. 1997).

25. H.R. No. 102-40, pt. 1, at 72 (1991), reprinted in 1991 U.S.C.C.A.N. 610.

26. *Luciano*, 110 F.3d at 221 (citing H.R. Rep. No. 40, pt. 1, at 72 (1991), reprinted in 1991 U.S.C.C.A.N. 610).

27. H.R. No. 102-40, pt. 1, at 72 (1991), reprinted in 1991 U.S.C.C.A.N. 610.

28. *Id.*

29. 55 F.3d 1276 (7th Cir. 1995).

30. *Id.* at 1287.

31. 69 F.3d 1344 (7th Cir. 1995).

32. 517 U.S. 559 (1996).

33. *Hennessy*, 69 F.3d at 1355.

trial court to determine the amount of damages because the conduct was not egregious enough to warrant the maximum award available under the statutory cap.³⁴

Since its adoption, courts have disputed whether the cap imposed by the 1991 Act was intended to give courts a free reign to reduce jury awards. Some courts use the statutory cap as a maximum award to be allowed only for the most reprehensible incidents of discrimination. The Seventh Circuit determined that the maximum award of \$100,000 in punitive damages for small employers should be reserved for egregious cases.³⁵ This court compared the allowance of punitive damages to the Federal Sentencing Guidelines, which provide a range of sentences for a crime, with the most stringent sentences reserved for the most egregious offenses.³⁶ Thus, the court in *Hennessey* ordered the trial court to reduce the punitive damage award, even though the evidence of discrimination was sufficient to support an award of punitive damages because plaintiff alleged sexual harassment based on her dismissal soon after maternity leave, rather than a “quid pro quo” type of harassment.³⁷

Prior to the Supreme Court’s decision in *BMW*, trial courts tended to adopt the same standard used to review punitive damage awards in other contexts. In *Dickerson v. HBO & Co.*,³⁸ the court looked at whether the award was “beyond all reason” or was “so great as to shock the conscience” and whether the verdict was “so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.”³⁹ With respect to punitive damages in particular, the court looked to the standard set by the District of Columbia Circuit Court in a § 1983 assault and false arrest claim, requiring that punitive damages not be “grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages.”⁴⁰ Similarly, the district court in *Sassaman v. Heart City Toyota*⁴¹ looked at whether the jury award in a sex

34. *Id.* at 1356.

35. *Id.*

36. *Id.*

37. *Id.*

38. 1995 U.S. Dist. LEXIS 19213 (D.D.C. Dec. 21, 1995).

39. *Id.* at *10 (quoting *Webb v. Hyman*, 861 F. Supp. 1094, 1113 (D.D.C. 1994)) (citations omitted).

40. *Id.* at *14 (quoting *Hutchinson v. Stuckey*, 952 F.2d 1418, 1422 (D.C. Cir. 1992)).

41. 879 F. Supp. 901 (N.D. Ind. 1994).

discrimination claim was “monstrously excessive, born of passion and prejudice, or not rationally connected to the evidence.”⁴²

In *AIC* the Seventh Circuit briefly compared the punitive damages awarded to past awards in breach of contract and libel claims.⁴³ Similarly, the court in *Sassaman* looked to punitive damage awards in similar cases to determine whether that award was “monstrously excessive.”⁴⁴ Because the \$20,000 award was less than two other awards approved by the Seventh Circuit for racial discrimination claims under § 1981, the court concluded that the award was not excessive.⁴⁵ Similarly, the court in *Dickerson* compared the \$300,000 award for the retaliation claim to the \$75,000 award in another race and sex discrimination claim in that district, and compared it to the back pay award of \$96,452 and \$100,000 in compensatory damages; the court then reduced the \$300,000 award to \$100,000.⁴⁶ Both the court in *Dickerson* and the court in *Shepherd v. American Broadcasting Co.*⁴⁷ noted that the punitive damage awards were within the statutory caps set by § 1981-a.⁴⁸

The court in *Sassaman* also briefly considered whether the punitive damage award was against the weight of the evidence.⁴⁹ Relying on the Seventh Circuit’s reasoning in a prisoner’s civil rights claim, the court upheld the claim, in part, because the value of victory for a civil rights plaintiff “cannot be gauged by the modest size of the damages awarded.”⁵⁰ Similarly, the court in *AIC* considered that the employer was a large company with gross revenue of several million dollars, justifying a “sizeable” punitive damage award.⁵¹ These decisions adhere to the traditional test for jury awards, including punitive damages for other types of claims, which allow a reduction of an award only where the award is monstrously excessive.

These decisions began the trend of judicial adjustment of punitive damages awards in employment discrimination cases after the 1991 Act

42. *Id.* at 911 (quoting *Dresser Indus., Inc., Waukesha Engine Div. v. Gradall Co.*, 965 F.2d 1442, 1446 (7th Cir. 1992) (reviewing punitive damages in breach of contract claim) (citations omitted)).

43. 55 F.3d at 1287.

44. 879 F. Supp. at 911.

45. *Id.*

46. 1995 U.S. Dist. LEXIS 19213, at *13-15.

47. 862 F. Supp. 486 (D.D.C. 1994), *vacated on other grounds*, 62 F.3d 1469 (D.C. Cir. 1995).

48. *Dickerson*, 1995 U.S. Dist. LEXIS 19213, at *13-15; *Shepherd*, 862 F. Supp. at 502.

49. 879 F. Supp. at 911.

50. *Id.* at 912 (quoting *Ustrak v. Fairman*, 851 F.2d 983, 989 (7th Cir. 1988)).

51. 55 F.3d at 1287.

provided plaintiffs with the right to such damages. To put these adjustments in context, a study conducted in 1993 found that motions challenging verdicts in favor of plaintiffs were filed in nearly half of the cases studied and that 10% of those motions were successful.⁵² However, the Supreme Court's determination of whether a plaintiff needed to establish the egregiousness of the employer's conduct to collect any punitive damages intervened in this development of standards of review for punitive damage awards.

C. *Setting the Standard for Damages in Kolstad*

The Supreme Court first interpreted the § 1981a requirements for recovering punitive damages in *Kolstad v. American Dental Ass'n.*⁵³ In *Kolstad* the Court rejected the employer's request to allow punitive damage awards only against those employers who engaged in discrimination of an "egregious" nature.⁵⁴ The Court instead relied on general tort principles to conclude that while egregious conduct could be evidence of malice or reckless indifference, the plaintiff need only show the employer's state of mind.⁵⁵ The Court made this distinction because conduct has been characterized as egregious due to the defendant's mental state.⁵⁶ Congress based punitive damages solely on the employer's mental state and did not leave room for employers to suggest that "any class of willful violations . . . are exempt from exposure to punitive damages."⁵⁷ Thus, a plaintiff need not prove that the label of "egregious" fits the employer's conduct to be awarded punitive damages.⁵⁸

The element of willfulness or reckless disregard of the law alone justifies such additional damages.⁵⁹ This is particularly true as employers become more aware of their obligations under the anti-discrimination statutes.⁶⁰ The Court in *Kolstad* recognized that if a "plaintiff proffers sufficient evidence from which a jury could conclude that an employer acted willfully, judges have no place making their own value judgments regarding whether the conduct was 'egregious' or

52. Brian Ostrom, Roger Hanson & Henry Daley, *So the Verdict's in? What Happens Next? The Continuing Story of Tort Awards in the State Courts*, 16 JUST. SYS. J. 97, 102 (1993).

53. 527 U.S. 526, 534-35 (1999).

54. *Id.* at 534-35.

55. *Id.* at 535 (citing PROSSER & KEETON, LAW OF TORTS 212-14 (5th ed. 1984)).

56. *Id.* at 538.

57. *Id.* at 550-51.

58. *Id.* at 551.

59. *Id.* at 550.

60. *Id.*

otherwise presents an inappropriate candidate for punitive damages; the issue must go to the jury.”⁶¹

The Court in *Kolstad* applied this interpretation of § 1981a to the denial of a promotion sought by Kolstad.⁶² The Court concluded that Kolstad presented sufficient evidence that the employer willfully took a tangible employment action against her by denying her request for a promotion.⁶³ Defendant’s decisionmakers, who promoted another less qualified candidate, told sexually offensive jokes and referred to professional women in derogatory terms.⁶⁴ Evidence also showed that the decisionmakers manipulated the job requirements and conducted a “sham” selection procedure to conceal their discriminatory conduct.⁶⁵ The Court ruled that such evidence would allow a jury to conclude that the employer acted with reckless indifference to plaintiff’s federally protected rights, thereby entitling her to submit the issue of punitive damages to a jury.⁶⁶

II. ADOPTING THE *BMW* MODEL

A plaintiff must first overcome the hurdle presented by § 1981a and the interpretation thereof in *Kolstad* before a jury may consider the issue of punitive damages. Once that hurdle is overcome, a plaintiff must present evidence to support the punitive damage award. Without such evidence, the trial or appellate court may vacate a punitive damage award. Traditionally, damages awarded by juries have been entitled to great deference, and courts have only reduced those awards if the award was “monstrously excessive,”⁶⁷ “shocked the conscience of the court,”⁶⁸ had “no rational connection [to] the evidence,”⁶⁹ or clearly appeared to be “born of passion and prejudice.”⁷⁰

Punitive damage awards for employment discrimination, even after passing the *Kolstad* test and fitting within the statutory cap, are being reduced by courts based on a model developed by the Supreme Court in a fraud claim arising under state law. The Supreme Court established

61. *Id.* at 551.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 552.

67. *E.g.*, *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 516 (7th Cir. 1993).

68. *Levka v. Chicago*, 748 F.2d 421, 424 (7th Cir. 1984).

69. *McNabola*, 10 F.3d at 516.

70. *See Sassaman v. Heart City Toyota*, 879 F. Supp. 901, 911 (N.D. Ind. 1994) (quoting *Dresser Indus., Inc., Waukesha Engine Div. v. Gradall Co.*, 965 F.2d 1442, 1446 (7th Cir. 1992)).

a model in *BMW of North America, Inc. v. Gore* (“BMW”)⁷¹ that factored in the reprehensibility of the conduct, the ratio of the award to compensatory damages, and a comparison to other awards to determine whether punitive damages awarded by a jury are excessive.⁷² The Court in *BMW* reviewed the amount awarded by the jury, which included \$4 million in punitive damages based on BMW’s repainting new cars that had been damaged before they sold them.⁷³ The Court was concerned with whether defendant’s right to due process was violated by the large sum of punitive damages awarded under state law.⁷⁴ This was the first time the Supreme Court defined a federal standard by which punitive damage awards under state law could be reviewed for constitutionality.⁷⁵ Moreover, this was the first time that the Court acknowledged a constitutional, substantive right protecting defendants against unreasonable punitive damage awards.⁷⁶

Courts have consistently applied the *BMW* model to reduce the punitive damage awards in various discrimination claims.⁷⁷ Some courts have recognized that the analysis in *BMW* dealt with constitutional limits while still finding the factors “instructive.”⁷⁸ Most courts simply follow the lead of other courts in applying the *BMW* factors to the

71. 517 U.S. 559 (1996).

72. *Id.* at 575.

73. *Id.* at 563, 566.

74. *Id.* at 568. Note that the Supreme Court generally has not recognized challenges to civil awards of punitive damages under the Eighth Amendment if the government has not prosecuted the action and has no right to receive a share of the damages awarded. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262-63 (1989).

75. *BMW*, 517 U.S. at 575. See Shawn Harpin & Marilyn Widman, Note, *BMW of North America, Inc. v. Gore & Life Insurance Co. of Georgia v. Johnson: Blazing the Judicial Trails in Punitive Damage Reform*, 28 U. TOL. L. REV. 401, 401 (1997).

76. *BMW*, 517 U.S. at 599 (Scalia, J., dissenting).

77. See, e.g., *Romano v. U-Haul Int’l*, 233 F.3d 655, 672-73 (1st Cir. 2000), *cert. denied*, 122 S. Ct. 41 (2001); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 597-98 (5th Cir. 1998), *aff’d after remand*, 188 F.3d 278, 286 (5th Cir. 1999); *Jonasson v. Lutheran Child & Family Serv.*, 115 F.3d 436, 441 (7th Cir. 1997); *Rubinstein v. Adm’r. of the Tulane Educ. Fund*, 218 F.3d 392, 407 (5th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1067-68 (8th Cir. 1997); *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 909-10 (9th Cir. 1999); *Deters v. Equifax Credit Info. Serv.*, 202 F.3d 1262, 1271-73 (10th Cir. 2000); *EEOC v. W & O, Inc.*, 213 F.3d 600, 614-15 (11th Cir. 2000); *Geuss v. Pfizer*, 971 F. Supp. 164, 177 n.21 (E.D. Pa. 1996); *Wagner v. Dillard Dep’t Stores, Inc.*, No. 1:98CV499, 2000 U.S. Dist. LEXIS 20414, at *29 n. 10 (M.D.N.C. July 20, 2000), *vacated in part on other grounds*, No. 00-2109, 2001 U.S. App. LEXIS 19278 (4th Cir. Aug. 27, 2001).

78. See, e.g., *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996) (reviewing damages award in nonjury trial); *but see Mathie v. Fries*, 121 F.3d 808, 817 (2d Cir. 1997) (suggesting that *BMW* review was based not only on constitutional restraints, but on “nonconstitutional standard of excessiveness.”).

employment discrimination context.⁷⁹ The court in *Clark v. Metro Health Foundation, Inc.*⁸⁰ explained that the *BMW* analysis “was directed to the issue of constitutionality rather than simply to excessiveness, and rarely will produce a complete inquiry.”⁸¹

The Supreme Court revisited this issue in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*⁸² In *Cooper* the Court vacated a punitive damage award in an unfair competition claim.⁸³ The Court adopted a de novo standard of review and suggested that the punitive damage award was grossly excessive and offended the Due Process Clause of the Constitution under the factors set forth in *BMW*.⁸⁴ The Court, however, retained the three factors set forth in the *BMW* model as the basis for reviewing the constitutionality of punitive damage awards.⁸⁵

Courts continue to adopt and apply to employment discrimination claims the factors set forth in *BMW*, and reiterated in *Cooper*, without considering whether such factors are appropriate to review punitive damage awards. The defendant-employer in *Jimenez v. Paw-Paw's Camper City, Inc.*⁸⁶ did not assert a constitutional claim to challenge the punitive damage award, yet the district court still reviewed that award under the *BMW* factors.⁸⁷ The district court in *EEOC v. Mid-Continent Security Agency, Inc.*⁸⁸ stated that a court is not limited to reviewing punitive damages based on constitutional provisions but could vacate jury awards that appear to be the result of passion or prejudice or are “monstrously excessive.”⁸⁹ Yet the court still applied the factors set forth in *BMW* and *Cooper* to reduce punitive damages awarded to an employment discrimination claimant.⁹⁰

The test established in *BMW* for evaluating the amount of punitive damage awarded in common law litigation does not transfer well to the employment discrimination arena. The Court in *BMW* limited the punitive damage award for a claim of failure to disclose against a car

79. See, e.g., *Golson v. Green Tree Fin. Servicing Corp.*, No. 00-2365, 2002 U.S. App. LEXIS 472, at *15 n.3 (4th Cir. Jan. 10, 2002) (“assum[ing] without deciding that *BMW*'s due process analysis applie[d]” because the parties did not object).

80. 90 F. Supp. 2d 976 (N.D. Ind. 2000).

81. *Id.* at 987.

82. 532 U.S. 424 (2001).

83. *Id.* at 443.

84. *Id.* at 434-41.

85. *Id.* at 440-41.

86. No. 00-1756, 2002 U.S. Dist. LEXIS 3248 (E.D. La. Feb. 22, 2002).

87. *Id.* at *34-36.

88. No. 99C5381, 2001 U.S. Dist. LEXIS 9726 (N.D. Ill. July 11, 2001).

89. *Id.* at *12-14.

90. *Id.* at *12-17.

dealership because the Court saw it as an attempt by one state to impose on other states its preferred rules regarding fraud and disclosure.⁹¹ The Court specifically stated that “one [s]tate’s power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other [s]tates”⁹² The Court concluded that punitive damages should not be awarded if based on an intent to change a tortfeasor’s conduct in other states.⁹³

Because Title VII, the ADEA, and the Americans with Disabilities Act (“ADA”)⁹⁴ apply equally to all national employers, there is no danger that a large punitive damage award is an attempt to dictate standards in another jurisdiction. Rather, the intent of those protective statutes is to dictate a national policy of prohibiting discrimination, regardless of the preferences of various employers in individual states to discriminate.⁹⁵ In reviewing punitive damages under states’ statutes prohibiting discrimination, it makes no sense to worry about the imposition of one state’s standards on other states because the anti-discrimination statute would impact only an employer who discriminates against its employees in that state. Thus, in *BMW*, the Court’s concern for states’ rights has no application to employment discrimination claims arising under federal or state anti-discrimination laws.

In *BMW* the Court’s concern with due process issues also fails to justify the application of its factors in the employment discrimination context. The Court provided the three factors to ensure, under the Due Process Clause, that the defendant receive fair notice of the conduct that will subject him to punishment and fair notice of the severity of the penalty that a state may impose.⁹⁶ The three factors used in *BMW* to determine whether the punitive damage award is constitutionally excessive should not be transferred to the employment discrimination context. These factors were developed by the Court to protect against a lack of fair notice that certain conduct would lead to a punitive damage award.⁹⁷ The Court relied heavily on the comparable awards factor, finding that the maximum civil penalty available under Alabama’s Deceptive Trade Practices Act⁹⁸ was \$2,000, while the *BMW* jury had

91. *BMW*, 517 U.S. at 571 (citations omitted).

92. *Id.*

93. *Id.* at 572.

94. 42 U.S.C. §§ 12101-12213 (1994).

95. H.R. No. 102-40, pt. 2, at 25 (1991), *reprinted in* 1991 U.S.C.C.A.N. 718.

96. 517 U.S. at 574.

97. *Id.*

98. ALA. CODE § 8-19-11(b) (1993).

awarded \$4 million in punitive damages.⁹⁹ The Court in *BMW* used the three factors to conclude that BMW “did not receive adequate notice of the magnitude of the sanction that Alabama might impose” for a violation of its common law rules of nondisclosure.¹⁰⁰

The federal employment discrimination statutes, in stark contrast to the liability reviewed in *BMW*, specifically provide notice to all employers of the possibility and amount of punitive damages available to a victim of employment discrimination.¹⁰¹ Similarly, state statutes providing for punitive damages against discriminating employers notify employers that such damages could be awarded.¹⁰² These statutes notify employers that juries are free to set punitive damages in any amount justified by the evidence, yet the trial court will adjust those awards to fit within the statutory caps depending on the size of the employer. So long as the employer knows his own size, the wording of the statute tells the employer exactly how much he can expect to pay in punitive damages for intentional discrimination. Deference to the notification provided by these caps is warranted by the reasoning of the Court in *BMW*, which states that a court reviewing a punitive damage award should “accord ‘substantial deference’ to legislative judgments concerning appropriate sanctions for the conduct at issue.”¹⁰³

Some appellate courts have recognized the notice provided by the 1991 Act. Before applying the *BMW* factors, the court in *Romano v. U-Haul International*¹⁰⁴ stated that “[a] congressionally-mandated, statutory scheme identifying the prohibited conduct as well as the potential range of financial penalties goes far in assuring that appellants’ due process rights have not been violated.”¹⁰⁵ The court then concluded that a punitive damage award’s compliance with a statutory cap provides “strong evidence” that the defendant-employer’s due process rights have not been violated.¹⁰⁶ Relying on this reasoning, the court upheld the jury’s award of \$285,000 in punitive damages due to the employer’s dismissal of the plaintiff based on her sex.¹⁰⁷

99. 517 U.S. at 584.

100. *Id.* at 574-75.

101. *See* 42 U.S.C. § 1981a(b) (1994).

102. *See* Appendix.

103. 517 U.S. at 583 (quoting *Browning-Ferris Indus. of VT, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O’Connor, J., concurring in part and dissenting in part)).

104. 233 F.3d 655 (1st Cir. 2000).

105. *Id.* at 673.

106. *Id.*; *see also* *Golson*, 2002 U.S. App. LEXIS 472 at *17 (stating that award well below the cap is “strong indicator” that award was not unconstitutional); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1249 (10th Cir. 1999).

107. *Romano*, 233 F.3d at 673-74.

The court in *EEOC v. Harbert-Yeargin, Inc.*¹⁰⁸ likewise recognized that a \$300,000 punitive damage award was acceptable under the *BMW* analysis, in part, because of the “notice provided by the statutory maximum.”¹⁰⁹ Similarly, the court in *EEOC v. Wal-Mart Stores, Inc.*¹¹⁰ upheld a punitive damage award of \$75,000 for a violation of the ADA because it fell “within the range that Congress has determined to be reasonable.”¹¹¹ Compliance with the cap undermined Wal-Mart’s argument that the punitive damage award should shock the judicial conscience.¹¹² In *Notter v. North Hand Protection*,¹¹³ the Fourth Circuit stated that the limitation of punitive damages to cases of malice or reckless indifference and the caps on damage awards prevent punitive damage awards from becoming “vehicles for unbridled retribution.”¹¹⁴ In *Notter* the court saw “no need to impose additional limits on punitive damages when Congress could have done so, but did not.”¹¹⁵ The language of Title VII arguably gives a defendant fair notice that he could be exposed to punitive damages.¹¹⁶ Yet many courts continue to apply the *BMW* factors based on some vague notion that employers have been denied due process when an award has already been reduced to fit the statutory cap.

The application of the *BMW* test to employment discrimination claims also ignores the fundamental differences between claims of discrimination and claims aimed toward economic recovery, as in *BMW*. As the court in *McKnight v. Circuit City Stores, Inc.*¹¹⁷ observed, “the seriousness and reprehensibility of intentional race discrimination in the workplace far outweighs a simple complaint that a new car was repainted before sale. In fact, there is no conceivable method for comparing the two situations.”¹¹⁸ The trial court in *McKnight* relied

108. 266 F.3d 498 (6th Cir. 2001).

109. *Id.* at 517; *see also Preferred Prop., Inc. v. Indian River Estates*, 276 F.3d 790, 799 (6th Cir. 2002) (citing *Harbert-Yeargin*, 266 F.3d at 498, to support jury award for fair housing punitive damages).

110. 187 F.3d 1241 (10th Cir. 1999).

111. *Id.* at 1249.

112. *Id.*

113. No. 95-1087, 1996 U.S. App. LEXIS 14954 (4th Cir. 1996).

114. *Id.* at *32.

115. *Id.* at *33.

116. *See Rahn v. Junction City Foundry, Inc.*, 161 F. Supp. 2d 1219, 1244 (D. Kan. 2001); *see also Roberts v. Ford Aerospace & Communications Corp.*, 274 Cal. Rptr. 139, 146 (Cal. Ct. App. 1990) (California anti-discrimination statute gave employer notice of potential for punitive damages for racial discrimination so as to provide due process).

117. 1997 U.S. Dist. LEXIS 5781 (E.D. Va. 1997), *vacated*, 527 U.S. 1031 (1999), *aff'd in relevant part*, 206 F.3d 431 (4th Cir. 2000).

118. *Id.* at *22.

on such reasoning in upholding awards of \$225,000 and \$47,000, respectively, in punitive damages for two African Americans who had been denied promotions.¹¹⁹

The unique qualities of discrimination claims have been recognized in related contexts. The Eighth Circuit has allowed punitive damages for race discrimination under the Fair Housing Act¹²⁰ after recognizing that punitive damages help promote the Act's goal of providing housing free of racial bias by ensuring that "citizens who engage in such contemptible behavior against other citizens receive society's full rebuke and condemnation."¹²¹ After noting that *BMW* did not involve racial discrimination, the California Court of Appeals refused to reduce a punitive damage award for racial discrimination despite the pending review of *BMW*.¹²² Given the federal goals expressed with the passage of § 1981a, to provide deterrence against employment discrimination, courts should give greater deference to a jury that has found a discriminating employer's conduct reprehensible enough to award punitive damages.

The use of the *BMW* test to reduce employment discrimination punitive damage awards also ignores the fundamental presumption traditionally recognized by the U.S. Supreme Court in favor of upholding jury awards. Section 1981a provides for the right of a plaintiff to a jury trial.¹²³ Even if large jury awards in employment discrimination claims raise some due process concerns, the right to a jury trial guaranteed by the Seventh Amendment presents a countervailing interest warranting greater respect for juries' punitive damage awards. Even before the Fourteenth Amendment was passed, the Supreme Court held in *Day v. Woodworth*¹²⁴ that the task of determining the amount of punitive damages to be assessed has always been "left to the discretion of the jury."¹²⁵ The court in *Day* explained that "the degree of punishment to be . . . inflicted must depend on the peculiar circumstances of each case."¹²⁶

Shortly after the passage of the Fourteenth Amendment in 1868, the Court held in *Barry v. Edmonds*¹²⁷ that, when no precise rule fixes the amount of damages, "nothing is better settled than that . . . it is the

119. *Id.* at *14-22.

120. 42 U.S.C. §§ 3601-3631 (1994).

121. *United States v. Big D. Enter., Inc.*, 184 F.3d 924, 934 (8th Cir. 1999).

122. *Roberts*, 274 Cal. Rptr. at 147.

123. 42 U.S.C. § 1981a(c)(1) (1994).

124. 54 U.S. 363 (1851).

125. *Id.* at 371.

126. *Id.*

127. 116 U.S. 550 (1886).

peculiar function of the jury to determine the amount by their verdict."¹²⁸ Shortly thereafter, the Supreme Court established in *Kennon v. Gilmer*¹²⁹ that the Seventh Amendment prohibits a court's re-examination of a jury's assessment of a plaintiff's injury.¹³⁰ Thus, a federal court may not "according to its own estimate of the amount of damages which the plaintiff ought to have recovered, . . . enter an absolute judgment for any other sum than that assessed by the jury."¹³¹ If a jury award is constitutionally excessive, the court may order a new trial to address the issue of damages if the plaintiff fails to agree to remit a portion of the jury's award.¹³² A court may also strike the unconstitutional excess from a jury's punitive damage award and enter judgment for the remaining amount.¹³³ Reduction to any smaller amount would still invade the province of the jury.¹³⁴

The abuse of discretion standard was approved for the review of a trial court's decision to deny a motion to set aside a punitive damage award in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*¹³⁵ The Court in *Browning-Ferris* recognized that appellate review of punitive damage awards should involve, at most, abuse of discretion review.¹³⁶ Under the restrictions of the Seventh Amendment, the Court was "reluctant to stray too far from traditional common-law standards, or to take steps [that] ultimately might interfere with the proper role of the jury."¹³⁷ Beyond due process considerations, the Court recognized that there is no federal common law standard or compelling federal policy that would permit the Supreme Court to do

128. *Id.* at 565.

129. 131 U.S. 22 (1889).

130. *Id.* at 28-29.

131. *Id.*

132. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433 (1996); *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). Note that neither district court's grant of a new trial nor an acceptance of remittitur generally is appealable. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977). The denial of a motion for a new trial or remittitur will only be reversed upon a manifest abuse of discretion or if the verdict is "so grossly excessive the result is monstrous or shocking." *Foster v. Time Warner Entm't Co.*, 250 F.3d 1189, 1194 (8th Cir. 2001); *Callantine v. Staff Builders, Inc.*, 271 F.3d 1124, 1133-34 (8th Cir. 2001) (reviewing punitive damages for a claim of wrongful termination after *Cooper*).

133. *Dimick*, 293 U.S. at 486; *New York, Lake Erie & Western Co. v. Estill*, 147 U.S. 591, 622 (1893); see also *Johansen v. Combustion Eng'r, Inc.*, 170 F.3d 1320, 1331 (11th Cir. 1999).

134. *Johansen*, 170 F.3d at 1331, 1331 n.16.

135. 492 U.S. 257, 279 (1989).

136. *Cooper*, 532 U.S. at 447 (Ginsburg, J., dissenting) (citing *Browning-Ferris*, 492 U.S. at 279-80).

137. *Kelco Disposal, Inc.*, 492 U.S. at 280 n.26.

more than "accord considerable deference to a district court's decision."¹³⁸

The Supreme Court recognized the importance of the jury's role in *Pacific Mutual Life Insurance v. Haslip*¹³⁹ when it upheld a punitive damage award on appeal from the Supreme Court of Alabama in a fraud claim.¹⁴⁰ While recognizing that unlimited jury discretion in awarding punitive damages could result in violations of defendants' due process rights, the Court in *Haslip* declined to impose a formula by which to review the constitutionality of a jury's punitive damage award.¹⁴¹ After tracing the evolution of the Due Process Clause in his concurrence in *Haslip*, Justice Scalia concluded that the Due Process Clause should not be used to alter the amount of punitive damages awarded in jury verdicts.¹⁴² Noting that a harsh or unwise procedure is not necessarily unconstitutional, Justice Scalia would rely on legislatures to limit the amount of punitive damages awarded.¹⁴³ Similarly, Justice Kennedy noted in his concurrence that the Court did not have the authority to alter state common law on punitive damages or to determine the roles of the judges and juries in determining the amount of those damages.¹⁴⁴

That is exactly what Congress has done in enacting the caps on punitive damages for all employment discrimination claims. As the Court noted in *Smith v. Wade*,¹⁴⁵ in holding that a jury may award punitive damages under § 1983 when the evidence shows evil motive or reckless indifference to the rights protected, punitive damages are awarded "in the jury's discretion 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.'"¹⁴⁶ Congress looked to this reasoning in crafting § 1981a of the Civil Rights Act of 1991.¹⁴⁷

In the Supreme Court's previous decision in *TXO Production Corp. v. Alliance Resources Corp.*,¹⁴⁸ the Court reasoned that when members of

138. *Id.* at 279-80.

139. 499 U.S. 1 (1991).

140. *Id.* at 24.

141. *Id.* at 18-20.

142. *Id.* at 24-40 (Scalia, J., concurring).

143. *Id.* at 39-40 (Scalia, J., concurring).

144. *Id.* at 42 (Kennedy, J., concurring).

145. 461 U.S. 30 (1983).

146. *Id.* at 53 (quoting RESTATEMENT (SECOND) OF TORTS § 908(1) (1979)); *see also* *Geuss v. Pfizer, Inc.*, 971 F. Supp. 164, 176 (E.D. Pa. 1996).

147. *See* H.R. REP. NO. 102-40, pt. 2, at 29 (1991) (quoting *Smith*, 461 U.S. at 56); H.R. Rep. No. 102-40, pt. 1, at 74 (1991) (citing *Smith* with approval).

148. 509 U.S. 443 (1993).

a jury are determined to be impartial prior to trial, and fair procedures are followed, the Court should assume that a verdict, “a product of that process[,] is entitled to a strong presumption of validity. Indeed there are persuasive reasons for suggesting that the presumption should be irrebuttable, or virtually so.”¹⁴⁹ Justice Kennedy recognized in his concurrence in *TXO* that the Constitution does not concern itself with the amounts of jury awards, but instead, only guarantees “that the individual citizen may rest secure against arbitrary or irrational deprivations of property.”¹⁵⁰

The important role of the jury in employment discrimination cases was reaffirmed by the Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*¹⁵¹ In limiting the amount of proof required of a plaintiff to survive a motion for summary judgment, the Court in *Reeves* adopted the general rule that “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.”¹⁵² Ignoring this precedent, the Eighth Circuit has commented directly on the role of the jury in setting punitive damages. In *Ross v. Kansas City Power & Light*,¹⁵³ the court recognized that *BMW* involved Fourteenth Amendment concerns. Yet that court still reduced a punitive damage award from \$750,000 to \$160,000 because a “court’s mandatory review of a punitive damages award does not implicate the Seventh Amendment.”¹⁵⁴

Because the federal employment discrimination statutes are so different in purpose and effect from state standards for commercial conduct, as addressed in *BMW*, courts should consider whether the factors set forth in *BMW* must be met for a punitive damage award under federal law. Moreover, courts should consider whether a heavy-handed role in applying those factors to awards for discrimination claims usurps the power of the jury to interpret the facts that support such awards. Even if courts continue to apply these factors in employment discrimination claims, they must apply the factors as intended by the Supreme Court and respect the role of the jury in interpreting the facts related to those factors.

149. *Id.* at 456-57 (citations omitted).

150. *Id.* at 467 (Kennedy, J., concurring).

151. 530 U.S. 133 (2000).

152. *Id.* at 150 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

153. 293 F.3d 1041 (8th Cir. 2002).

154. *Id.* at 1049.

III. APPLYING THE *BMW* FACTORS

Assuming that at least some employers do have due process rights at stake in the face of a large punitive damage award, courts should adhere carefully to the model set forth by the Supreme Court in *BMW of North America, Inc. v. Gore* (“*BMW*”).¹⁵⁵ The three factors to be considered under *BMW* and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,¹⁵⁶ as applied in the employment discrimination context, are the following: 1) the degree of reprehensibility of the employer’s conduct, 2) the ratio of the compensatory damages award to the punitive damages award, and 3) a comparison of the punitive damage award with civil or criminal penalties that could be imposed for comparable misconduct.¹⁵⁷ Reprehensibility is recognized as “perhaps the most important indicium” of the three factors.¹⁵⁸ Each of these factors requires some interpretation of the facts—a role typically reserved for the jury. Thus, courts should reconsider their role in applying the *BMW* factors with some respect for that role of the jury.

A. *Reprehensibility*

In *BMW* the emphasis on reprehensibility reflects the Court’s historical reasoning that exemplary damages should reflect the “enormity of [the] offense.”¹⁵⁹ This emphasis supports the legislative intent behind § 1981a to compensate the victim fully for his injuries and to ensure that the employer is deterred from engaging in future acts of discrimination.¹⁶⁰ The Court in *BMW* reiterated the statement in *TXO Production Corp. v. Alliance Resources Corp.* (“*TXO*”)¹⁶¹ that punitive damages may not be “grossly out of proportion to the severity of the offense.”¹⁶² In *TXO*, in fact, defendant’s intentional malice was the decisive element in approving the punitive damages award.¹⁶³ The Court in *Cooper* noted that the reprehensibility factor can be heavily

155. 517 U.S. 559 (1996).

156. 532 U.S. 424 (2001).

157. *BMW*, 517 U.S. at 574-75; *Cooper*, 532 U.S. at 440.

158. 517 U.S. at 575.

159. *Id.* at 575 (quoting *Day v. Woodworth*, 54 U.S. 363, 371 (1852)) (citation omitted).

160. H.R. REP. NO. 102-40, pt.1, at 73 (1991), reprinted in 1991 U.S.C.C.A.N. at 611.

161. 509 U.S. 443 (1993).

162. 517 U.S. at 576 (quoting *TXO*, 509 U.S. at 462); see also David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 387 (1994).

163. 509 U.S. at 468.

influenced by the demeanor and credibility of witnesses, factors that require substantial deference to the jury.¹⁶⁴

Courts reviewing punitive damages in discrimination claims have relied on the definition of this factor set forth in *BMW*, despite its overlap with the Court's emphasis on malice and reckless disregard in *Kolstad v. American Dental Ass'n.*¹⁶⁵ A consideration of these decisions in tandem could imply that a plaintiff would be entitled to punitive damages upon a showing of malice or reckless disregard because the Court in *Kolstad* held that egregiousness need not be established, but that the award could not exceed a nominal amount unless reprehensibility is established.¹⁶⁶

In *BMW* the Court's emphasis on reprehensibility stems from the simple reason that some wrongs are more blameworthy than others and that the punishment should fit the crime.¹⁶⁷ The court in *Rubinstein v. Administrator of the Tulane Educational Fund*¹⁶⁸ explained that while compensatory damages correct the wrong previously committed, punitive damages are "used to correct the retrospective harm."¹⁶⁹ Thus, a court should consider not only the harm suffered by the particular plaintiff, but also the potential harm to future victims of discrimination by that employer.

In *BMW* the Supreme Court established a hierarchy of conduct for interpreting the reprehensibility factor.¹⁷⁰ Acts of violence constitute the most reprehensible conduct, followed by acts taken with reckless disregard for others' health or safety, affirmative acts of trickery or deceit, and acts of omission or negligence.¹⁷¹ Repeated behavior, known or suspected to be unlawful, makes the conduct more reprehensible.¹⁷² The Court in *BMW* relied on these factors to conclude that the pure economic harm inflicted on the purchaser of a repainted, new car was not significant enough to support the punitive damages awarded to

164. 532 U.S. at 440-41.

165. 576 U.S. 526 (1999).

166. *Clark v. Metro Health Found., Inc.*, 90 F. Supp. 2d 976, 986 (N.D. Ind. 2000).

167. 517 U.S. at 575, 576 n.24; *see also* *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1027 (8th Cir. 2000), (approving of \$110,000 in punitive damages in fraud action based on egregiousness of actions and importance of reprehensibility under *BMW*), *cert. denied*, 531 U.S. 825 (2000).

168. 218 F.3d 392 (5th Cir. 2000).

169. *Id.* at 408.

170. 517 U.S. at 575.

171. *Id.* at 575-80.

172. *Id.* at 576-77.

him.¹⁷³ The Court considered, but did not find controlling, the fact that the nondisclosure of repairs to the cars was part of a nationwide pattern of tortious conduct by BMW.¹⁷⁴ The Court did rely on the absence of a state court determination that would have made it clear to BMW that they were not protected by the safe harbor provided under the states' disclosure statutes.¹⁷⁵ Because BMW chose to comply with the strictest state disclosure statute, the Court refused to find that its conduct was reprehensible enough to justify the \$4 million award.¹⁷⁶

Some courts have held that reprehensibility is the most important indicium of the reasonableness of a punitive damage award.¹⁷⁷ In *EEOC v. Premier Operator Services, Inc.*,¹⁷⁸ for example, the court looked only at the reprehensibility of the employer's conduct and held that punitive damages were warranted because the managing officers showed a reckless disregard for the law and for the federally protected rights of their employees.¹⁷⁹ Yet other courts have discounted the amount of punitive damages despite a finding of significant reprehensibility. For example, in *David v. Caterpillar, Inc.*,¹⁸⁰ the trial court reduced the punitive damages for failure to promote and for retaliation from \$750,000 to \$150,000 despite its recognition that "the goals of Title VII mandate that the right to engage in protected activity must be zealously guarded."¹⁸¹ This reduction ignored the jury's finding that the employer had purposefully retaliated against plaintiff and another female employee and that it tried to conceal its improper motive.¹⁸²

The reprehensibility factor involves factual determinations that should, under *Cooper*, receive at least some deference by the court to the trier of fact.¹⁸³ For example, the court in *Hurley v. Atlantic City Police Department*¹⁸⁴ respected the jury's \$700,000 punitive damage award to

173. *Id.* at 576; *see also In re Exxon Valdez*, 270 F.3d 1215, 1242 (9th Cir. 2001) (\$5 billion in punitive damages not supported by purely economic harm caused to fishermen by oil spill).

174. 517 U.S. at 576-77.

175. *Id.* at 577-78.

176. *Id.* at 578.

177. *See, e.g., Deffenbaugh-Williams v. Wal-Mart Stores*, 156 F.3d 581, 597 (5th Cir. 1998) (quoting *BMW*, 517 U.S. at 575); *Rubinstein v. Adm'r of the Tulane Educ. Fun.*, 218 F.3d 392, 408 (5th Cir. 2000).

178. 113 F. Supp. 2d 1066 (N.D. Tex. 2000).

179. *Id.* at 1076-77.

180. 185 F. Supp. 2d 918 (D. Ill. 2002).

181. *Id.* at 925-27.

182. *Id.* at 926-27.

183. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

184. 933 F. Supp. 396 (D.N.J. 1986), *rev'd*, 174 F.3d 95, 123 (3d Cir. 1999) (ordering new trial on punitive damages based on jury instruction that failed to require finding that

a victim of sexual harassment when the jury found that the conduct was sufficiently reprehensible to merit a large award.¹⁸⁵ Yet some courts refuse to give deference to the jury's determination that the proven discrimination was reprehensible enough to justify the punitive damages awarded. In *Dubin v. LaGrange Country Club*,¹⁸⁶ for example, the court reduced the punitive damages from \$90,000 to \$30,000 despite its recognition that the evidence supported the jury's finding of reckless indifference, and despite the jury's conclusion that defendant's conduct was "of a type deserving punishment."¹⁸⁷

Numerous factors have been applied to determine the degree of reprehensibility of a discriminatory act. Sexual harassment, which includes physical contact, stalking, and ill treatment by other coworkers, shows a high degree of reprehensibility.¹⁸⁸ In contrast, the court in *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*¹⁸⁹ considered the absence of verbal or physical abuse when reducing the punitive damage award from \$100,000 to \$75,000.¹⁹⁰ The jury had enough evidence to award punitive damages based on the employer's reckless indifference, and the court found that the injury was not simply economic as in *BMW*, but the termination had "wide-ranging adverse personal impact and consequences."¹⁹¹ Yet that court held that because the determination of reckless disregard was a "close call," the degree of reprehensibility was "not great enough alone to support" the \$100,000 award.¹⁹²

The employer's knowledge and response to discriminatory conduct helps establish the degree of reprehensibility. In reviewing an award for race discrimination, the court in *Pavon v. Swift Transportation Co.*¹⁹³ upheld a punitive damage award, in part, because management knew of but took no steps to stop the use of racial insults and slurs on its shop floor.¹⁹⁴ The "blame the victim" mentality of Swift, evidenced by the dismissal of plaintiff and the failure to investigate, helped to support the

upper management participated in egregious conduct), *cert. denied*, 528 U.S. 1074 (2000).

185. 933 F. Supp. at 426-31. The court stated that the atmosphere of intolerance and misogyny involving management and affecting all female employees, along with ratio of 4:1, justified the award. *Id.*

186. 1997 U.S. Dist. LEXIS 8548 (N.D. Ill. 1997).

187. *Id.* at *9-10.

188. *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 493, 515 (2001).

189. 156 F.3d 581 (5th Cir. 1998).

190. *Id.* at 597-98.

191. *Id.* at 598.

192. *Id.*

193. 192 F.3d 902 (9th Cir. 1999).

194. *Id.* at 909; *see also Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001).

punitive damage award.¹⁹⁵ Similarly, the court in *EEOC v. Moser Foods, Inc.*¹⁹⁶ upheld a punitive damage award for sexual harassment, which was within the statutory caps and was based on evidence of repeated sexual harassment of several employees.¹⁹⁷ In this case, the harassment was brought to the attention of defendant's manager and other supervisors, who then failed to take any action.¹⁹⁸

In applying the reprehensibility factor, the court in *Wagner v. Dillard Department Stores, Inc.*¹⁹⁹ considered the employer's knowledge that it had violated a pregnant applicant's rights by its refusal to hire her, its lack of a nondiscrimination policy, and its limited job training regarding discrimination.²⁰⁰ These findings supported the jury's award of \$150,000 in punitive damages based upon the jury's belief of the testimony of plaintiff as to the reason for the rejection of her application and the manager's knowledge of the employer's legal obligations.²⁰¹ The jury also had evidence on which it could base a conclusion that the employer had inadequate training and information for hiring managers.²⁰²

In contrast to the court's deference to the jury's interpretation of the evidence in *Wagner*, the court in *Patterson v. P.H.P. HealthCare Corp.*²⁰³ reduced punitive damages awarded in a bench trial for two reasons: (1) no employee was personally subjected to verbal or physical abuse, and (2) no evidence suggested that the discriminatory attitude of the employer's project manager reflected a prevailing discriminatory attitude on the part of the employer, even though the manager used racial epithets and took actions showing his "reprehensible views on race relations."²⁰⁴ Similarly, significant evidence that an employer's owner and top corporate officers sought to exclude women from upper management was found to justify a maximum punitive damage award.²⁰⁵

195. 192 F.3d at 902.

196. 1997 U.S. Dist. LEXIS 19798 (D. Ariz. 1997).

197. *Id.* at *5.

198. *Id.*

199. 2000 U.S. Dist. LEXIS 20414 (M.D.N.C. 2000), *aff'd in relevant part*, 2001 U.S. Dist. LEXIS 19278 (4th Cir. 2001).

200. *Id.* at *30-31; *see also* *EEOC v. W & O, Inc.*, 213 F.3d at 614 (practice of discriminating against pregnant employees).

201. 2000 U.S. Dist. LEXIS 20414, at *30.

202. *Id.* at *30-31.

203. 90 F.3d 927 (5th Cir. 1996).

204. *Id.* at 942-43.

205. *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 637-38 (7th Cir. 1996).

Admissions by the employer may also help establish the reprehensibility of the conduct. Based on the admissions of a university dean that a decision was based on an employee's exercise of protected rights, the court in *Rubinstein* held that the university exhibited a high degree of reprehensibility.²⁰⁶

Some courts have compared the "reprehensibility" of an employer's conduct in a particular situation to the conduct of other employers in applying this factor. In *Geuss v. Pfizer*,²⁰⁷ for example, the court compared the reprehensibility of the employer's exacerbation of plaintiff's asthma to other cases in which the jury awarded a similar amount in punitive damages.²⁰⁸ The reduction of the award in *Geuss* was based, in part, on the determination that in other cases supervisory personnel turned a blind eye to misconduct of subordinates, actively participated in discriminatory conduct, or exhibited a propensity to engage in future violations.²⁰⁹ In the absence of a history of discrimination, the court in *Geuss* held that a lesser award would serve the goal of motivating compliance.²¹⁰ The court reduced the \$150,000 punitive damages award to \$17,500 because defendant was "far less blameworthy than the conduct exhibited in other cases where large punitive damage verdicts were awarded."²¹¹

In line with the Supreme Court's emphasis on different degrees of reprehensibility in *BMW*, a work environment including physical sexual abuse on the job may warrant a relatively higher amount of punitive damages.²¹² In determining that a \$5 million punitive damage award for sexual harassment was excessive under Missouri law, the court in *Kimzey v. Wal-Mart Stores, Inc.*²¹³ relied on its previous holding that the harassment "was not the most egregious type of sexual harassment" because it did not involve serious sexual assault, physical touching, quid pro quo harassment, or retaliation.²¹⁴ Wal-Mart escaped some of its punitive damages awarded under the ADA based on a court's determination that an award of \$182,500 to an employee who was terminated for using disability leave would result in a "miscarriage of justice" in *Cline*

206. 218 F.3d at 408.

207. 971 F. Supp. 164 (E.D.P.A. 1996).

208. *Id.* at 177.

209. *Id.*

210. *Id.* at 178.

211. *Id.* at 178-79.

212. See *Anderson v. YARP Rest., Inc.*, 1997 U.S. Dist. LEXIS 560, at *26 (S.D.N.Y. 1997).

213. 107 F.3d 568 (8th Cir. 1997).

214. *Id.* at 577.

*v. Wal-Mart Stores, Inc.*²¹⁵ The court in *Cline* relied on “the harm suffered by Cline; the degree of Wal-Mart’s indifference towards Cline’s rights under the ADA; and the policy judgments inherent in any award of punitive damages” to reduce the award to \$50,000.²¹⁶

In some instances, an employer’s allowance of a pervasive and severe harassing work environment may support punitive damages equal to the statutory cap of \$300,000.²¹⁷ Failure of an employer to reprimand the harasser may also support a larger award.²¹⁸ Similarly, the dissent in *Kimzey* considered the store’s failure to enforce its anti-harassment policy and its offer to reduce plaintiff’s hours and benefits in response to her complaints to establish a high degree of reprehensible conduct.²¹⁹ The court in *Swinton v. Potomac Corp.*²²⁰ likewise upheld \$1 million in punitive damages because its manager knew about the use of racial epithets on the shop floor and did nothing to stop it.²²¹ The trial court in *Rahn v. Junction City Foundry, Inc.*²²² showed respect for the jury’s finding when it upheld the punitive damage award of \$130,000 for sexual harassment and retaliation, stating that “in holding defendant liable for sexual harassment, the jury necessarily rejected defendant’s argument that plaintiff welcomed the conduct of which she complained. The record contains ample evidence that defendant engaged in sexual harassment which was reprehensible in both its quality and duration.”²²³ In contrast, the court in *Hill v. Airborne Freight Corp.*,²²⁴ reduced punitive damages that were based on the malicious behavior and permissive environment fostered by just one manager.²²⁵

215. 144 F.3d 294, 306 (4th Cir. 1998).

216. *Id.*

217. *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1245 (10th Cir. 1999) (other *BMW* factors not considered).

218. *Anderson*, 1997 U.S. Dist. LEXIS 560, at *26.

219. 107 F.3d at 579 (Heany, J., dissenting).

220. 270 F.3d 794 (9th Cir. 2001).

221. *Id.* at 818; *see also* *Hampton v. Dillard Dep’t Stores, Inc.*, 247 F.3d 1091, 1116 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 1071 (2002) (store policy to code and exercise close surveillance of African American shoppers supported punitive damages of \$1.1 million under § 1981); *Storlie v. Rainbow Foods Group*, 2002 U.S. Dist. LEXIS 465, at *11-12 (D. Minn. Jan. 9, 2002) (punitive damages of \$60,000 for sexual harassment supported by employer’s toleration of harassing conduct over several years); *Muller v. Costello*, 997 F. Supp. 299, 303 (N.D.N.Y. 1998) (harassment for disability took place over several years, causing mental suffering and ending in dismissal), *aff’d*, 187 F.3d 298 (2d Cir. 1999).

222. 161 F. Supp. 2d 1219 (D. Kan. 2001).

223. *Id.* at 1244-45; *see also* *Carter v. Blakely*, 1999 U.S. Dist. LEXIS 14389, at *35-36 (M.D.N.C. Sept. 1, 1999) (upholding punitive damages of \$200,000 for sexual harassment of deputy which increased in severity over a period of four years).

224. 212 F. Supp. 2d 59 (E.D.N.Y. 2002).

225. *Id.* at 77.

Even without violent or long-term discriminatory behavior, larger punitive damages may be supported if the employer's conduct involved trickery and deceit, as in a claim of failure to promote based on race.²²⁶ The court in *Romano v. U-Haul International*²²⁷ approved punitive damages for a victim of sex discrimination based, in part, on her supervisor's statement that he would deny all of the comments that established that she was dismissed because of her sex.²²⁸ Similarly, the court in *EEOC v. Harbert-Yeargin, Inc.*²²⁹ approved the maximum punitive damage award because the employer's management had told an employee to be evasive during the EEOC's investigation.²³⁰ Yet other courts have interpreted the facts to discount the deceptiveness factor, as in *EEOC v. Mid-Continent Security Agency, Inc.*,²³¹ in which the trial court reduced the amount of punitive damages, in part, based on its interpretation of the facts that could show that the employer tried to cover up a supervisor's termination of plaintiff based on his use of an accommodation previously approved by another supervisor.²³²

Employers have argued that an employer's post-discrimination conduct may be considered in determining whether the discriminatory conduct was reprehensible. In assessing the reprehensibility of BMW's conduct, the Supreme Court referenced the fact that it had since taken steps to change its practices.²³³ The Court in *Cooper* also mentioned that defendant had taken remedial action after the filing of the action.²³⁴ Discriminating employers have used these references to argue in favor of a reduction in punitive damage awards against them. The Ninth Circuit has allowed trial courts to use their discretion to allow employers to introduce evidence of remedial conduct to mitigate punitive damages, which encourages such remedial action.²³⁵ Plaintiffs can still argue

226. *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1066-67 (8th Cir. 1997).

227. 233 F.3d 655 (1st Cir. 2000).

228. *Id.* at 673.

229. 266 F.3d 498 (6th Cir. 2001).

230. *Id.* at 515; *see also* *Menchaca v. Am. Med. Response of Ill., Inc.*, 2002 U.S. Dist. LEXIS 405, at *22 (N.D. Ill. Jan. 14, 2002) (punitive damages supported by employer's creation of a cover story and lying about it at trial); *Greenbaum v. Svenska Handelsbanken*, 67 F. Supp. 2d 228, 269-70 (S.D.N.Y. 1999) (punitive damages justified, in part, by employer's hiding of adverse actions and retaliation in a deceitful manner).

231. 2001 U.S. Dist. LEXIS 9726 (N.D. Ill. July 11, 2001).

232. *Id.* at *13-14.

233. *BMW*, 517 U.S. at 565-66, 579.

234. 532 U.S. 424, 427 (2001); *but see* *O'Gilvie v. Int'l Playtex, Inc.*, 821 F.2d 1438, 1440-41, 1449 (10th Cir. 1987) (stating that punitive damages for toxic shock syndrome should not be reduced based on defendant's promise to discontinue sales and modify warning).

235. *E.g.*, *Swinton v. Potomac Corp.*, 270 F.3d 794, 814-15 (9th Cir. 2001).

that the remedy was “too little too late” to warrant a reduction of the punitive damages.²³⁶ A jury is then free to either accept such evidence as proof of less reprehensibility or to discount it.²³⁷

In considering the reprehensibility of the defendant’s discriminatory acts, some courts have relied more heavily on the initial determination that the employer acted with malice or with recklessness. Even prior to the Supreme Court’s decision in *Kolstad*, the court in *Merriweather v. Family Dollar Stores*²³⁸ held that when plaintiff established the employer’s reckless indifference to its employee’s rights under Title VII, punitive damages of \$25,000 for retaliation were justified to punish defendant and to deter future similar misconduct.²³⁹ The court in *Merriweather* noted that this was “precisely the sort of judgment peculiarly within the province of the finder of fact.”²⁴⁰

After *Kolstad* some courts have continued to rely on the initial determination of discriminatory motive or reckless indifference to sustain the amount of punitive damages awarded by the jury. These courts recognize that if there was substantial evidence to support the punitive damage award under a *Kolstad* analysis, the plaintiff has shown that punitive damages would not shock the judicial conscience or constitute a denial of justice, and therefore, the conduct is reprehensible enough to warrant punitive damages.²⁴¹

In contrast, other courts have engaged in a substantive review of the facts supporting the award of punitive damages to support their reduction of those awards. For example, the trial court in *Lafate v. Chase Manhattan Bank (U.S.A.)*²⁴² reduced the jury’s punitive damage award of \$500,000 to \$100,000 based, in large part, on its interpretation of the facts, stating “all the evidence requires the factfinder to draw inferences regarding the Defendant’s knowledge of the retaliation.”²⁴³

Although the Supreme Court indicated in *BMW* that reprehensibility is the most important consideration, some courts do not even consider

236. *Id.* at 815.

237. *Id.*

238. 103 F.3d 576 (7th Cir. 1996).

239. *Id.* at 582 n.3.

240. *Id.*

241. See *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. 1996); *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 619 (8th Cir. 2000) (deliberate indifference to federal rights showed conduct was reprehensible enough to justify punitive damages); *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 984-85 (4th Cir. 1997) (egregious conduct justified punitive damages).

242. 123 F. Supp. 2d 773 (D. Del. 2000).

243. *Id.* at 789.

that factor in assessing the reasonableness of a punitive damage award.²⁴⁴ Instead, they look to the more easily computed ratio factor to determine whether the award is constitutional. This heavy reliance on the ratio factor has the effect of discounting the jury's determination that the defendant's discriminatory conduct was reprehensible and warranted punitive damages in the amount set by that jury.

B. Ability to Pay

Courts sometimes consider, as related to the reprehensibility of the discriminatory act, the defendant's ability to pay the punitive damage award. The Supreme Court has recognized that one purpose of punitive damages is to "punish what has occurred and to deter its repetition."²⁴⁵ The Seventh Circuit has held that a jury award for punitive damages should only be set aside if the court is certain that "it exceeds what is necessary to serve the objectives of deterrence and punishment."²⁴⁶ Similarly, the Eighth Circuit has reviewed punitive damage awards in light of the goals of punishment and deterrence.²⁴⁷

Larger awards are sometimes considered necessary to "punish" a relatively profitable defendant. As the House Report recognized when § 1981a was passed, a substantial award may be necessary to deter future discrimination, and in that case, juries should take the defendant's financial standing into account in setting punitive damage awards.²⁴⁸ The employer's limited worth may also support a reduction of the punitive damage award. The court in *Luciano v. Olsten Corp.*,²⁴⁹ for example, considered the defendant's financial ability to pay before approving \$300,000 in punitive damages against Olsten Corporation, which was financially "well-situated" such that the award would not

244. See, e.g., *Foster v. Time Warner Entm't Co.*, 250 F.3d 1187, 1197 (8th Cir. 2001) (only ratio and similar cases considered); *Jimenez v. Paw-Paw's Camper City, Inc.*, 2002 U.S. Dist. LEXIS 3248, at *39 (award reduced despite substantial evidence showing extended discriminatory harassment that employer did not attempt to prevent).

245. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991); see also *BMW*, 517 U.S. at 568 (punitive damages vindicate a state's legitimate interests in punishment and deterrence).

246. See *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1287 (7th Cir. 1995); *Stafford v. Puro*, 63 F.3d 1436, 1444 (7th Cir. 1995) (under compensation agreement between employee and employer).

247. See *EEOC v. HBE Corp.*, 135 F.3d 543, 556 (8th Cir. 1998) (applying Missouri law on damages); *Blackmon v. Pinkerton Sec. & Investigative Servs.*, 182 F.3d 629, 637 (8th Cir. 1999) (holding that award of \$100,000 for sexual harassment achieved the objectives of punishment and deterrence).

248. H.R. Rep. No. 102-40(I) (1991), reprinted in 1991 U.S.C.C.A.N., at 611.

249. 110 F.3d 210 (1997).

cause financial ruin.²⁵⁰ Similarly, the Eighth Circuit has compared the award to the employer's net worth and has approved an award of less than one one-thousandth of that worth.²⁵¹ In an analogous wage recovery and tortious interference claim, the Seventh Circuit noted that punitive damages in excess of one percent of the defendant's net worth could be excessive.²⁵²

The overall size of the corporate employer may also support a relatively large award to serve the goals of punishment and deterrence. Because the defendant in *Harbert-Yeargin* was part of a global corporation, an award of \$300,000 was justified as a punishment and deterrent.²⁵³ Similarly, the court in *McKnight* approved punitive damage awards of \$225,000 and \$47,000 for two victims of race discrimination because any lesser award would have a "very meager deterrent effect" on the defendant, the multi-million dollar corporation Circuit City.²⁵⁴ The court in *Wagner* also noted that for the award to constitute punishment or provide deterrence, the punitive damages must be considered in light of Dillard's assets of over \$8 billion and its substantial net income.²⁵⁵ Yet the trial court in *David* reduced the punitive damage award by \$600,000 despite its finding that defendant, Caterpillar, was a "large and prosperous company," and that a large award was necessary to both punish and to encourage future compliance because the employer continued to deny its culpability throughout the trial.²⁵⁶

250. *Id.* at 222; *see also AIC*, 55 F.3d at 1287 (gross revenues of several million dollars show need for sizeable award to punish and deter); *EEOC v. CEC Entm't, Inc.*, 2000 U.S. Dist. LEXIS 13934, at *56-57 (W.D. Wis. Mar. 14, 2000) (net profits of over \$33 million justified award of \$230,000); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1068 (8th Cir. 1997) (\$300,000 was an adequate sanction and enough to deter future discrimination); *EEOC v. W & O, Inc.*, 213 F.3d 600, 616-17 (11th Cir. 2000) (recognizing that employer did not argue that award was disproportionate to wealth of the company).

251. *Morse v. S. Union Co.*, 174 F.3d 917, 925 (8th Cir. 1999), *cert. dismissed*, 527 U.S. 1059 (1999).

252. *Stafford v. Puro*, 63 F.3d 1436, 1444 (7th Cir. 1995) (punitive damages reduced to \$250,000 on remittitur).

253. 266 F.3d at 516.

254. 1997 U.S. Dist. LEXIS 5781, at *22-23; *see also Rahn v. Junction City Foundry, Inc.*, 161 F. Supp. 2d 1219, 1245 (D. Kan. 2001) (goal of deterrence warranted jury's consideration of employer's wealth and size).

255. 2000 U.S. Dist. LEXIS 20414, at *34; *see also Kimzey v. Wal-Mart Stores*, 107 F.3d 568, 579 (8th Cir. 1997) (Heany, J., dissenting) (majority should have considered the extent of Wal-Mart's assets so that the damages would constitute more than a "slap on the hand" for a company of that size).

256. 185 F. Supp. 2d at 927.

C. *Comparison to Compensatory Damages*

Consideration of reprehensibility and the defendants' ability to pay often give way to a more mathematical approach relying on the ratio of punitive damages to compensatory damages. According to the Supreme Court, the reasonableness of punitive damages depends, at least in part, on the mathematical relationship between the punitive damages and the amount of compensatory damages awarded.²⁵⁷ The punitive damage award against BMW was reduced, in part, based on the "breathtaking" ratio of 500:1.²⁵⁸ Yet strict adherence to this ratio is inappropriate given the Court's pronouncement that in reviewing punitive damages, courts should consider not only the harm that has occurred but also "the harm likely to result from the defendant's conduct."²⁵⁹

The Court in *BMW* cautioned that courts should not apply a simple mathematical formula to determine if the punitive damage award is excessive.²⁶⁰ Some courts have adhered to this caution. For example, the court in *Jeffries v. Wal-Mart Stores, Inc.*²⁶¹ refused to overturn a punitive damage award of \$425,000 based solely on the 50:1 ratio of punitive to compensatory damages, reasoning that a high ratio alone was insufficient grounds for overturning the jury verdict.²⁶² The court in *AIC* approved an award, in part, based on a ratio of 3:1 but noted that "no fixed ratio is necessary or desirable."²⁶³

Ignoring the caution against over-reliance on the ratio, many courts have concentrated on the mathematical ratio between the amount of punitive damages and the amount of actual damages awarded. For example, the court in *Lambert v. Fulton Co.*²⁶⁴ held that the punitive damage award for racial harassment was not excessive based solely on its finding that the ratio of actual damages to punitive damages was

257. 517 U.S. at 580.

258. *Id.* at 583.

259. *Id.* at 581 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993)); see also *EEOC v. W & O, Inc.*, 213 F.3d 600, 616 n.7 (11th Cir. 2000) (damages supported in part on finding that employer's discriminatory policy would have continued absent plaintiffs' claims); *Swinton*, 270 F.3d at 819 (harassment may have forced plaintiff to quit if allowed to continue).

260. 517 U.S. at 582-83; see also *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000) (approving ratios of up to 99:1 in fraud action because ratios are instructive rather than dispositive under *BMW*), *cert. denied*, 531 U.S. 825 (2000).

261. 2001 U.S. App. LEXIS 16753 (6th Cir. July 20, 2001).

262. *Id.* at *35-36.

263. 55 F.3d at 1287; see also *U.S. v. Big D. Enter., Inc.*, 184 F.3d 924, 933 (8th Cir. 1999) (rejecting strict reliance on ratio in Fair Housing Act claim).

264. 253 F.3d 588 (11th Cir. 2001).

4.5:1.²⁶⁵ Similarly, the court in *David* reduced a punitive damage award for sex discrimination and retaliation from \$750,000 to \$150,000, despite the statutory cap allowance of \$250,000, based on the high ratio of punitive damages to compensatory damages.²⁶⁶

Because *BMW* involved a 500:1 ratio, that decision gave little guidance on the constitutionality of lower ratios. Consequently, in applying this factor from *BMW*, courts employ different standards on what constitutes an excessive ratio. Relying on dicta in *BMW*, the court in *Wagner* found that a ratio of 4:1 of punitive and compensatory damages was not excessive under the guidance of *BMW*.²⁶⁷ Other courts have approved ratios as high as 18:1 and 50:1.²⁶⁸

The same ratio can be considered either constitutional or unconstitutional depending on the court. The Eighth Circuit upheld a punitive damage award for sexual harassment with a ratio of 6.5:1 to compensatory damages.²⁶⁹ In contrast, the Fifth Circuit recognized, in support of a reduction of that award, that a ratio of 6.5:1 exceeded the factor of four found to be close to the line in *BMW*.²⁷⁰ The court in *Rubinstein* held that a ratio of 30:1 clearly was excessive and “raised a judicial eyebrow” under *TXO*; the court did not bother with consideration of the third *BMW* factor before reducing the jury-awarded punitive damages from \$75,000 to \$25,000.²⁷¹ Relying on similar reasoning, the First Circuit held that a punitive damage award should be vacated absent a compensatory damage award, or a timely request for nominal damages.²⁷² These courts worry that allowing punitive damage awards

265. *Id.* at 598.

266. 2002 U.S. Dist. LEXIS 2148, at *22-24; *see also Jimenez*, 2002 U.S. Dist. LEXIS 3248, at *40-42 (punitive damages reduced from \$161,000 to \$80,000 where only \$1 in nominal compensatory damages awarded in harassment claim).

267. 2000 U.S. Dist. LEXIS 20414, at *32; *see also Luciano*, 110 F.3d at 221-22 (punitive damages of less than twice the compensatory damages was not excessive); *Morse*, 174 F.3d at 925 (6:1 ratio not excessive).

268. *See McKnight v. Circuit City Stores, Inc.*, 1997 U.S. Dist. LEXIS 5781, at *22 (E.D. Va. Mar. 12, 1997); *Jeffries v. Wal-Mart Stores, Inc.*, 2001 U.S. App. LEXIS 16753, at *36 (6th Cir. July 20, 2001).

269. *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1011 (8th Cir. 2000).

270. *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996).

271. 218 F.3d at 408-09 (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)).

272. *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205, 1215 (1st Cir. 1995); *see also Louisiana ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 303 (5th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001); *People Helpers Found., Inc. v. City of Richmond*, 12 F.3d 1321, 1327 (4th Cir. 1993) (punitive damages unavailable under Fair Housing Act without compensatory damages).

without a showing of grounds for compensatory damages would allow for unreasonable verdicts by juries.²⁷³

While some courts rely heavily on this mathematical comparison between punitive and compensatory damage amounts, other courts discount this factor if the reprehensibility and comparison factors warrant a reduction of the award. For example, the court reduced the punitive damage award in *Deffenbaugh* despite a finding that a 5.26:1 ratio of punitive damages to compensatory damages would not warrant a remittitur.²⁷⁴ Similarly, the court in *Geuss* reduced the punitive damage award from \$150,000 to \$17,500, even though the jury had awarded him \$154,000 in actual damages and \$11,250 in compensatory damages.²⁷⁵ The court in *Geuss* relied on the low degree of reprehensibility, as evidenced by the lack of a propensity to engage in future discrimination or a pattern of past discrimination against the disabled.²⁷⁶

Some courts recognize that a higher ratio of punitive to compensatory damages may be appropriate when the discrimination is particularly egregious, the economic injury was hard to detect, or the monetary value of noneconomic harm was difficult to determine.²⁷⁷ The Court in *BMW* held that if the injury is hard to detect or the monetary value of noneconomic harm is difficult to determine, a higher ratio of punitive damages to compensatory damages may be allowed.²⁷⁸ This reasoning is reflected in a prisoner injury case decided in the same year as *BMW*, in which the Seventh Circuit observed that when compensatory damages may be low based on the difficulty in compensating for fright and pain, a low punitive damage award based on the ratio factor would “have a

273. See *King v. Macri*, 993 F.2d 294, 297-98 (2d Cir. 1993); see also *Griffis v. Emory Univ.*, 1998 U.S. Dist. LEXIS 7178 (N.D. Ga. Jan. 12, 1998) (punitive damages unavailable absent compensatory or nominal damages award).

274. 156 F.3d at 597-98.

275. 971 F. Supp. at 178-79; see also *Lafate v. Chase Manhattan Bank*, 123 F. Supp. 2d 773, 789 (D. Del. 2000) (damages reduced from \$500,000 to \$100,000 despite ratio of only 5:1).

276. 971 F. Supp. at 178.

277. See *Kimbrough v. Loma Linda Dev., Inc.*, 183 F.3d 782, 785 (8th Cir. 1999) (ratio of 10:1 approved given abusive and repeated harassment by supervisor); *Ogden v. Wax Works Inc.*, 214 F.3d 999, 1011 (8th Cir. 2000) (6.5:1 ratio not excessive given abusive and repeated harassment); *McKnight v. Circuit City Stores, Inc.*, 1997 U.S. Dist. LEXIS 5781, at *19-20 (E.D. Va. Mar. 12, 1997); but see *In re Exxon Valdez*, 270 F.3d 1215, 1243-44 (9th Cir. 2001) (ratio of 12:1 to 17:1 for oil spill unjustified, in part, because of the benefits of providing low cost fuel to the U.S.).

278. 517 U.S. at 582.

very meager deterrent effect, . . . and would not be commensurate with the moral gravity of the defendants' actions."²⁷⁹

Relying on this type of reasoning, several circuit courts have recognized that punitive damages may be available even when little or no compensatory damages have been approved by the jury.²⁸⁰ Based on particularly egregious discriminatory practices, the court in *EEOC v. W & O, Inc.*²⁸¹ approved a ratio of up to 26.3:1 for discriminatory practices against pregnant employees that did not stop until plaintiffs' claims were filed.²⁸² Similarly, the court in *Swinton* upheld punitive damages with a ratio of 28:1 based on the egregiousness of the discriminatory acts of racial harassment and the noneconomic harm that resulted from them.²⁸³ The statutory constraints on punitive damage awards under the 1991 Act also warrant a rule that does not require compensatory damages as a prerequisite to punitive damages. The court in *Cush-Crawford v. Adchem Corp.*²⁸⁴ explained that the statutory caps prevent

279. *Cooper v. Casey*, 97 F.3d 914, 920 (7th Cir. 1996) (cited by *McKnight*, 1997 U.S. Dist. LEXIS 5781, at *21); *see also* *Lee v. Edwards*, 101 F.3d 805, 811 (2d Cir. 1996) (ratio not the best factor in reviewing punitive damages for assault and battery by police officer); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1338 (11th Cir. 1999) (under *BMW*, strong state interest in deterrence justified a 100:1 ratio).

280. *Hennessy v. Penril Datacomm Networks*, 69 F.3d 1344, 1351-52 (7th Cir. 1995); *see also* *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 515 (6th Cir. 2001) (\$300,000 in punitive damages justified, despite compensatory damages of only \$1 to advance deterrence purposes of Title VII given egregiousness of employer's conduct); *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1116-17 (ratio of 20:1 justified in § 1981 claim for close surveillance of African Americans in department store when injury is primarily personal); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1009-10 (7th Cir. 1998) (\$15,000 in punitive damages allowed with no compensatory damages); *Beard v. Southern Flying J, Inc.*, 266 F.3d 792, 803-04 (8th Cir. 2001) (punitive damages allowed for battery claim despite no compensatory damages); *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 357-59 (2d Cir. 2001) (upholding \$100,000 in punitive damages for hostile work environment claim without any compensatory damages); *Searles v. Van Bebber*, 251 F.3d 869, 879-80 (10th Cir. 2001) (punitive damage award stricken in constitutional claim when jury was instructed to consider the amount of the compensatory damages in setting punitive damages), *petition for cert. filed* Oct. 31, 2001.

281. 213 F.3d 600 (11th Cir. 2000).

282. *Id.* at 616; *see also* *Cush-Crawford*, 271 F.3d at 357-59.

283. 270 F.3d at 818; *see also* *Rahn v. Junction City Foundry, Inc.*, 161 F. Supp. 1219, 1244-45 (D. Kan. 2001) (approving ratio of 30:1 when harm was primarily personal); *but see* *EEOC v. Mid-Continent Sec. Agency, Inc.*, 2001 U.S. Dist. LEXIS 9726, at *14-15 (N.D. Ill. July 11, 2001) (reducing an award of \$184,000 to \$50,000 based, in part, on high ratio, despite recognition that smaller compensatory damages may warrant higher punitive damages to have deterrent effect).

284. 271 F.3d 352 (2d Cir. 2001).

juries from awarding excessive punitive damage awards without evidence justifying compensatory damages.²⁸⁵

Strict reliance on a ratio of punitive to compensatory damages is particularly inappropriate in employment discrimination claims when the plaintiff may have suffered discrimination that did not result in emotional upset but did result in significant financial losses. Compensatory damage awards under § 1981a cannot include front or back pay.²⁸⁶ Yet some courts refuse to consider any loss other than compensatory damages in determining the appropriateness of the punitive damage award. In reducing the punitive damages in *Rubinstein*, the court refused to consider the 3.5% pay raise awarded to the plaintiff as a result of his claim that the refusal to grant a pay raise was the result of discrimination.²⁸⁷ Similarly, the court in *David* reduced a \$750,000 punitive damage award to \$150,000 after reducing the compensatory damages to \$50,000 and finding that a 3:1 ratio was appropriate.²⁸⁸ Yet the court failed to consider that plaintiff had been awarded \$35,606 backpay in addition to the compensatory damages,²⁸⁹ which even under its ratio reasoning, would have justified a punitive damage award of approximately \$257,000. A reviewing court may even ignore significant damages awarded under a different statute. For example, the court in *Kerr-Selgas v. American Airlines*²⁹⁰ vacated a punitive damage award of \$300,000 based only on the lack of compensatory damages awarded under Title VII, even though the court upheld \$1.2 million in compensatory damages under Puerto Rico's employment discrimination statute.²⁹¹

Some courts do recognize that other damages should be considered. For example, the court in *Romano* upheld a punitive damage award of \$285,000 despite compensatory damages of only \$15,000 because of the particularly egregious conduct that limited plaintiff's compensatory damages and because of the difficulty in measuring actual damages in

285. *Id.* at 359.

286. 42 U.S.C. § 1981a(b)(2) (1994); *see also* *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 500 (7th Cir. 2000) (front and back pay not included as compensatory damages); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545 (10th Cir. 1999) (front pay not included as compensatory damages); *Kramer v. Logan County Sch. Dist. No. R-1*, 157 F.3d 620, 625-26 (8th Cir. 1998) (front pay not included as compensatory damages).

287. 218 F.3d at 408.

288. 185 F. Supp. 2d at 927.

289. *Id.* at 920.

290. 69 F.3d 1205 (1st Cir. 1995).

291. *Id.* at 1214.

a case involving primarily personal injury.²⁹² Similarly, the Eighth Circuit upheld \$100,000 in punitive damages, based in large part on the \$445,516 front pay award awarded to the plaintiff.²⁹³ As the court in *Cush-Crawford* explained, a defendant should not escape punitive damages simply because either the plaintiff's unusual strength or good fortune prevented the accrual of compensatory damages.²⁹⁴

Just as the Court in *BMW* cautioned, courts reviewing punitive damage awards for employment discrimination should not rely too heavily on the ratio factor.²⁹⁵ The extreme reprehensibility of discrimination, particularly discrimination that has passed the *Kolstad* test for intent or reckless disregard, should warrant allowance of punitive damage awards beyond the 4:1 ratio some courts have tried to meet. Moreover, reviewing courts should consider the difficulty of proving entitlement to compensatory damages for some victims of employment discrimination, particularly those who are resourceful enough to limit the long-term effects of such discrimination. Additionally, courts should consider the compensatory damages awarded, other monetary relief, such as back pay, which is not included as compensatory damages, and injunctive relief in determining whether the punitive damage award is proportional to the other types of damage caused by the discrimination at issue.

D. Comparison to "Similar" Cases

The last factor to be applied under the *BMW* model compares the punitive damages to the civil or criminal penalties that could be imposed for comparable misconduct.²⁹⁶ The Court in *BMW* compared the punitive damage award of \$4 million to the civil fines available under Alabama law, which ranged from \$50 to \$10,000.²⁹⁷ The Court concluded that the award was substantially greater than the statutory fines available in the state where the claim originated or any other state.²⁹⁸ Relying on this factor to justify the reduction of that punitive

292. 233 F.3d at 671, 673; see also *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996) (court considered the back pay and benefits awarded in comparison to the punitive damage award).

293. *Salitros v. Chrysler Corp.*, 306 F. 562 (8th Cir. 2002).

294. 271 F.3d at 359.

295. 517 U.S. at 582-83.

296. 517 U.S. at 583.

297. *Id.* at 584.

298. *Id.* at 583 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (striking \$10 million award 100 times greater than maximum fine available); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (striking award 1,000 times greater than fine allowed by state criminal statute)).

damage award, the Court in *BMW* held that none of these state statutes provided defendant with “fair notice” that its conduct would subject it to a multimillion-dollar penalty.²⁹⁹

Courts have seen the caps set in § 1981a as one indication of the amount of civil penalties that could be imposed in employment discrimination claims. Some courts have used these caps to justify further reduction of punitive damage awards that have been adjusted by the trial court to adhere to the caps. In interpreting state anti-discrimination statutes, courts may also be tempted to consider states’ general limitations on punitive damage awards in determining whether an award is appropriate.³⁰⁰

The Seventh Circuit has given significant deference to the § 1981a statutory caps in reviewing punitive damage awards. The court in *Hennessy v. Penril Datacomm Networks, Inc.*³⁰¹ ordered the trial court to reduce the punitive damage award to an amount below the statutory cap because plaintiff alleged sexual harassment based on her dismissal soon after maternity leave, rather than a “quid pro quo” type of harassment.³⁰² In comparing a punitive damage award to other comparable awards, the court in *Wagner* compared the award of \$150,000 to the statutory cap of \$300,000 and found that it was not excessive.³⁰³ Yet the court in *EEOC v. CEC Entertainment*³⁰⁴ recognized that *Hennessy* may not be controlling authority in light of the Supreme Court’s decision in *Kolstad*, which held that a plaintiff need not show egregiousness to recover any amount of punitive damages.³⁰⁵

According to the Second Circuit, the punitive damage caps should not be seen as an endpoint of a scale for judges to use in recalibrating jury awards.³⁰⁶ A New York trial court followed this advice when it upheld a punitive damage award of \$1.25 million for sex discrimination and retaliation under the New York City anti-discrimination statute, even though § 1981a(b)(3) would have capped those damages under Title VII³⁰⁷ at \$300,000.³⁰⁸ In adopting the caps, Congress recognized the

299. *Id.* at 584.

300. See Appendix for list of states with statutory limits on punitive damages.

301. 69 F.3d 1344 (7th Cir. 1995).

302. *Id.*

303. 2000 U.S. Dist. LEXIS 20414, at *33 (M.D.N.C. July 20, 2000).

304. 2000 U.S. Dist. LEXIS 13934 (W.D. Wis. Mar. 14, 2000).

305. *Id.* at *54.

306. *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. 1997); *but see Swinton v. Potomac Corp.*, 270 F.3d 794, 819-20 (9th Cir. 2001) (stating that \$1 million justified, in part, based on Congress’s failure to impose cap on § 1981 claims).

307. 42 U.S.C. §§ 1981-2000 (1994).

308. *Greenbaum v. Svenska Handelsbanken*, 67 F. Supp. 2d 228, 271 (S.D.N.Y. 1999).

jury's role in determining how large an award of damages should be to compensate the plaintiff adequately and to deter further repetition of the prohibited conduct.³⁰⁹

Likewise, other circuit courts have given less deference to the caps. The Second Circuit recognized in *Luciano v. Olsten Corp.*³¹⁰ that "[n]othing in the language of the statute suggests that the cap on damages is intended to diminish the jury's role in assessing punitive damages or to alter the standard for judicial review of such awards."³¹¹ That court also stated that the cap was "not meant to exert upward or downward pressure on the size of jury awards."³¹² The court in *Luciano* relied on this reasoning to leave intact an award for \$300,000 in punitive damages based on the employer's failure to promote, and subsequent dismissal of, the female plaintiff.³¹³

Similarly, the Tenth Circuit has held that courts should avoid invading the province of the jury by treating the statutory cap as "the limit of a damages spectrum, within which the judge might recalibrate the award given by the jury."³¹⁴ This same reasoning was adopted by the Eleventh Circuit when the court upheld punitive damages of \$100,000 each awarded to each of three pregnant employees.³¹⁵ The court also held that an award should only be reduced below the cap if the award is unreasonable or otherwise shocks the judicial conscience and constitutes a denial of justice.³¹⁶

Some courts recognize that using the cap as a high point of a sliding scale would invade the province of the jury. The court in *CEC Entertainment, Inc.* reduced the punitive damage award in an ADA claim from \$13 million to \$230,000, which is under the statutory cap.³¹⁷ In considering a further reduction of that award, the court asked "[h]ow [it could] realistically discuss where this award should fit on the 0 to \$300,000 spectrum when \$12,770,000 of the award has already been

309. H.R. Rep. No. 40, pt. 1, at 72 (1991), *reprinted in* 1991 U.S.C.C.A.N. 610.

310. 110 F.3d 210 (2d Cir. 1997).

311. *Id.* at 221.

312. *Id.* (citing 137 Cong. Rec. S15484 (1991) (statement of Sen. Danforth)).

313. *Id.* at 216, 221-22. Note that the court in *Luciano* did not reference the decision in *BMW*, which was decided ten months earlier. See also *Oliver v. Cole Gift Ctrs., Inc.*, 85 F. Supp. 2d 109, 115 (D. Conn. 2000) (stating that an award capped under Title VII shows that it is in line with awards with similar cases or comparable penalties authorized by law).

314. *Deters v. Equifax Credit Info. Servs.*, 202 F.3d 1262, 1273 (10th Cir. 2000).

315. *EEOC v. W & O, Inc.*, 213 F.3d 600, 616-17 (11th Cir. 2000)

316. *Id.* at 616-17.

317. 2000 U.S. Dist. LEXIS 13934, at *49.

excised?”³¹⁸ Finding that the jurors were “attentive, intelligent, thoughtful, and rational,” the trial court refused to further reduce the punitive damage award.³¹⁹ The court in *CEC Entertainment* concluded that “[t]o argue over the fraction [of the award] that remains could be viewed as denigrating the jury’s very function in this trial.”³²⁰ In upholding the award of \$230,000, the court considered, in part, the fact that plaintiff was awarded \$70,000 in compensatory damages, and therefore, the employer was only charged with 77% of the total allowable under the statutory cap.³²¹ Recognizing that the jury holds the primary responsibility for assessing punitive damages, the court concluded that “if a trial court must recalibrate the jury’s award in every case by using the statutory cap as an endpoint, there would appear to be little point in allowing the jury to assess punitive damages.”³²²

Despite findings that the retaliation was quite severe and the ratio of punitive damages to other damages was only 10:1, the trial court in *Iannone v. Frederic R. Harris, Inc.*³²³ reduced the punitive damage award from \$250,000 to \$50,000 because the original award represented more than 80% of the damages available under the § 1981a cap.³²⁴ The cap has even been used in § 1981 actions not subject to the cap to reduce punitive damages under the *BMW* comparison factor.³²⁵

In addition to considering the statutory cap, courts have considered the awards in other discrimination claims of a similar type. The trial court in *Fall v. Indiana University Board of Trustees*³²⁶ concluded that the punitive damage award of \$800,000 should be reduced to \$50,000 based on a comparison to other sex discrimination claims.³²⁷ The claim was based on a sexual assault, which under the *BMW* factors would be severe enough to warrant a large award, but the attack only lasted 30

318. *Id.*

319. *Id.* at *49-50.

320. *Id.* at *50.

321. *Id.* at *55.

322. *Id.* at *57-58.

323. 941 F. Supp. 403 (S.D.N.Y. 1996).

324. *Id.* at 415; *see also Mid-Continent Sec. Agency, Inc.*, 2001 U.S. Dist. LEXIS 9726, at *15 (justifying a remittitur, noting that award of \$184,000 was near the maximum award allowed under the statutory cap).

325. *Copley v. Bax Global, Inc.*, 97 F. Supp. 2d 1164, 1173-74 (S.D. Fla. 2000) (stating that punitive damages of \$1 million for discrimination based on national origin remitted to \$350,000 because caps are indicative of Congressional intent on appropriate punishment for intentionally discriminating employers); *see also Bernstein v. Sephora*, 182 F. Supp. 2d 1214, 1228-29 (S.D. Fla. 2002) (citing *Copley*, 1991 Act cap considered in reducing compensatory damages on remittitur).

326. 33 F. Supp. 2d 729 (N.D. Ind. 1998).

327. *Id.* at 747.

seconds and plaintiff was not injured.³²⁸ The court in *Fall* concluded that this assault was less severe than the claims reviewed in *Mathie v. Fries*,³²⁹ which included awards of \$100,000 to \$500,000 for various sexual assaults found to be more “violent and reprehensible” than the assault against Fall.³³⁰ Similarly, the court in *Deffenbaugh* reduced the punitive damage award of \$100,000 to \$75,000 because the original award was excessive, even though it was well below the \$300,000 statutory cap.³³¹ The court based its holding only on the conclusion that \$100,000 was “on the high-end for cases of this type in our circuit.”³³² Apparently these courts did not trust the juries’ determinations that the sexual discrimination committed by the employers warranted significant punitive damages.

Some courts fail to even engage in a detailed comparison between the plaintiff’s claims and other claims with smaller awards before reducing the punitive damages. In justifying a holding that the punitive damage award was excessive, the court in *Patterson* found that the award of \$150,000 for each plaintiff exceeded the largest previous award in that circuit under § 1981, which was \$50,000.³³³ The court in *Rubinstein* reduced punitive damages for retaliation from \$75,000 to \$25,000 by refusing to grant plaintiff’s raise.³³⁴ That reduction was based solely on the 30:1 ratio between the punitive damages and the compensatory damages, even though the court recognized that the retaliation was significantly reprehensible.³³⁵ Then the court in *Jimenez v. Paw-Paw’s Camper City, Inc.*³³⁶ relied on the remittiturs in *Patterson* and *Rubinstein* to reduce the jury’s award from \$161,000 to \$80,000, despite a factual finding that the sexual harassment continued and was unchecked by the employer.³³⁷

Other courts have engaged in a similarly limited comparison. The court in *Lafate* reduced an award of \$500,000 for retaliation, despite other awards previously approved for other discrimination claims, based on that court’s factual finding that the employer “had very little active involvement in the retaliation.”³³⁸ Similarly, the trial court in *EEOC*

328. *Id.* at 742, 745 (plaintiff was grabbed, forcibly kissed, and had breasts fondled).

329. 121 F.3d 808 (2d Cir. 1997).

330. 33 F. Supp. 2d at 745 (citing *Mathie*, 121 F.3d at 817).

331. 156 F.3d at 598.

332. *Id.*

333. 90 F.3d at 943.

334. 218 F.3d at 408-09.

335. *Id.* at 408. Note that the court did not even consider the comparison factor.

336. 2002 U.S. Dist. LEXIS 3248, at *34 (E.D. La. Feb. 22, 2002).

337. *Id.* at *45-46.

338. *Lafate*, 123 F. Supp. 2d at 789-90.

*v. Mid-Continent Security Agency, Inc.*³³⁹ compared the damages awarded by that jury for a disabled employee, who was dismissed for exercising his right to use a pre-approved accommodation with just two other failure to accommodate claims, which did not involve dismissal of the employee for his use of a pre-approved accommodation.³⁴⁰

Courts also tend to compare an award to other jury awards in a variety of factual circumstances simply because those other cases involved discrimination claims.³⁴¹ Such a comparison fails to recognize the wide variety of evidence that could be presented in a discrimination claim to support different punitive damage awards. One court recognized that a comparison to other cases may be of “limited utility because a wide range of awards have been upheld.”³⁴² Despite this wide range, some decisions do not even bother to give the citations to other cases with which the award has been compared.³⁴³

The final *BMW* factor would compare a particular jury award of punitive damages with civil or criminal penalties that could be imposed for comparable misconduct.³⁴⁴ The application of this factor fails to recognize that some inconsistency of jury awards can be expected given differences in facts across different claims and given the flexibility allowed a jury to provide punishment in a particular context.³⁴⁵ As Justice Kennedy concluded in *Pacific Mutual Life Insurance v. Haslip*,³⁴⁶ “nonuniformity cannot be equated with constitutional infirmity” because “it is the jury’s function to make the difficult and uniquely human judgments that defy codification and that ‘build discretion, equity and flexibility into a legal system.’”³⁴⁷ Reliance on other awards in similar cases also ignores the pre-existing controlling effect of the statutory cap.³⁴⁸

339. 2001 U.S. Dist. LEXIS 9726 (N.D. Ill. July 12, 2001).

340. *Id.* at *15-16.

341. *See Morse v. S. Union Co.*, 174 F.3d 917, 925 (8th Cir. 1999) (comparing age discrimination award to awards for claims of race discrimination, sex discrimination, and sexual harassment); *but see Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 83-84 (1st Cir. 2001) (holding that sufficient notice provided for award of \$400,000 for retaliation under state nondiscrimination law even though past awards did not exceed \$300,000).

342. *Hill v. Airborne Freight Corp.*, 212 F. Supp. 2d 54, 76 (E.D.N.Y. 2002).

343. *See, e.g., Pavon v. Swift Transp. Co.*, 192 F.3d 902, 910 (9th Cir. 1999) (stating that “the award here was well within the range of other jury verdicts in similar cases”); *Worth v. Tyer*, 276 F.3d 249, 269 (7th Cir. 2001) (referencing other cases).

344. 517 U.S. at 574-75.

345. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 41 (1990) (Kennedy, J., concurring).

346. *Id.*

347. *Id.* (quoting *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987)).

348. *See SEC v. Lipson*, 278 F.3d 656, 664-65 (7th Cir. 2002) (stating that even after Supreme Court’s decision in *Cooper*, comparison to other awards in SEC claim unnecessary).

IV. APPLYING *BMW* IN EMPLOYMENT DISCRIMINATION CLAIMS

The Supreme Court called for de novo review of punitive damage awards in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*³⁴⁹ Yet a de novo review does not require any greater deference to a court's application of *BMW* to discrimination claims. The Court in *Cooper* reviewed a punitive damage award in an unfair competition claim filed under both the Trademark Act of 1946³⁵⁰ and common law standards for false advertising and unfair competition, but only awarded punitive damages of \$4.5 million for the common law claims.³⁵¹ Characterizing punitive damages as private fines intended to punish a defendant, the Court in *Cooper* held that reviewing courts should use a de novo standard in reviewing for constitutionality of such fines.³⁵²

The Court in *Cooper* left intact the Supreme Court's longstanding principle that legislatures enjoy broad discretion in authorizing and limiting permissible punitive damage awards, and courts reviewing such awards on nonconstitutional grounds should review such awards under an abuse of discretion standard.³⁵³ Relying on that distinction, the Eighth, Eleventh, and Second Circuits have continued to apply a clear abuse of discretion standard of review where the defendant did not claim that the punitive damage award violated his due process rights.³⁵⁴ The Court in *Cooper* also made it clear that a reviewing court, under the Seventh Amendment, cannot disregard jury findings on factual issues, even if related to the punitive damage award.³⁵⁵ Thus, if a punitive damage award rests on purely factual issues, the reviewing court should assume that those factual issues have been resolved adversely to the defendant, absent evidence to the contrary.³⁵⁶

given the statutory cap on damages).

349. 532 U.S. 424 (2001).

350. 15 U.S.C. § 1125(a) (1994).

351. 532 U.S. at 428.

352. *Id.* at 428, 435-36.

353. *Id.* at 432-33.

354. *Foster v. Time Warner Entm't Co., L.P.*, 250 F.3d 1189, 1194 n.3 (8th Cir. 2001) (punitive damages awarded under ADA); *Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1249 n.5 (11th Cir. 2001) (upholding punitive damages for violation of § 1981); *Northrup v. Hoffman of Simsbury, Inc.*, 2001 U.S. App. LEXIS 13728, at *51 (2d Cir. June 14, 2001) (upholding punitive damages for release of credit report); *but see Jimenez v. Paw-Paw's Camper City, Inc.*, 2002 U.S. Dist. LEXIS 3248, at *34-35 (E.D. La. Feb. 22, 2002) (employing *BMW* factors even though defendant did not argue that punitive damages were constitutionally excessive).

355. 532 U.S. at 438-40.

356. *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1347 (Fed. Cir. 2001).

Some courts reviewing punitive damage awards in discrimination claims have been cognizant of the role of the jury in awarding such damages. In *EEOC v. Moser Foods, Inc.*,³⁵⁷ for example, the court relied loosely on the *BMW* factors but noted that “the decision to award punitive damages is within the exclusive province of the jury.”³⁵⁸ Similarly, the Seventh Circuit has recognized that “the primary responsibility for deciding the appropriate amount[] of [punitive] damages rests with the jury.”³⁵⁹ The Seventh Circuit has recognized that a jury verdict for punitive damages should only be overturned given a complete absence of probative facts to support that award such that no reasonable juror could have granted those damages.³⁶⁰ In deciding that a plaintiff was not entitled to a new, separate trial on the issue of punitive damages, the Fifth Circuit explained that an award of compensatory and punitive damages “is a meld, a phenomenon providing essential anchors and focus to the open-ended character of punitive damages.”³⁶¹

Courts have upheld the constitutionality of the caps in § 1981a, in part, based on the statute’s preservation of the role of the jury. As the court held in *Madison v. IBP Inc.*,³⁶² the caps do not impinge on the jury’s fact-finding function in violation of the Seventh Amendment because “a court does not ‘re-examine’ the jury’s verdict or impose its own factual determination” by enforcing the cap.³⁶³ This reasoning suggests that if the courts do engage in such a re-examination, they may be infringing on the role of the jury as envisioned by Congress.

Trial courts considering a motion to reduce punitive damages or appellate courts engaging in a de novo review of a trial court’s denial of a new trial on punitive damages need to respect the role of the jury in making factual determinations that support or undermine a claim for punitive damages. As shown by lower courts’ application of the *BMW* model, claims for punitive damages often turn on the interpretation of the facts. Certainly, the most significant factor, reprehensibility, rests on the trier of fact’s impressions of the severity of the acts of discrimination. By relying too heavily on a ratio of punitive damages to compensatory damages or by only comparing the award to the statutory cap or

357. 1997 U.S. Dist. LEXIS 19798 (D. Ariz. Nov. 7, 1997).

358. *Id.* at *5 (citing *Kennedy v. Los Angeles Police Dep’t*, 901 F.2d 702, 707 (9th Cir. 1989)).

359. *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1287 (7th Cir. 1995).

360. *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 615 (8th Cir. 2000) (citing *Hathaway v. Runyon*, 132 F.3d 1214, 1220 (8th Cir. 1997)).

361. *Hardin v. Caterpillar, Inc.*, 227 F.3d 268, 272 (5th Cir. 2000).

362. 257 F.3d 780 (8th Cir. 2001).

363. *Id.* at 804.

other awards based on different facts, the court may usurp the jury's role in awarding punitive damages to plaintiffs who have already succeeded in establishing that their employer discriminated against them with intent or reckless disregard of the law.

Appendix

Rights to and Limits on Punitive Damages in State Statutes

<u>State</u>	<u>Statute</u>	<u>Limit/Right to Punitive Damages</u>
Alabama	ALA. CODE §§ 21-7-8, 25-1-29 (Michie 2001)	No express right to punitive damages for disability discrimination or age discrimination
	ALA. CODE § 6-11-21 (Michie 2001)	Limit on punitive damages generally: greater of 3 times compensatory damages or \$500,000; \$50,000 or 10% of net worth for small businesses
Alaska	ALASKA STAT. § 22.10.020(c) (LEXIS through 2001 Sess.)	Other relief including punitive damages available for employment discrimination ³⁶⁴
	ALASKA STAT. § 09.17.020 (LEXIS through 2001 Sess.)	Limit on punitive damages generally: 3 times compensatory damages or \$500,000 (500 or more employees) ³⁶⁵
Arizona	ARIZ. REV. STAT. § 23-1501 (3)(b) (LEXIS through 1st Spec. Sess. 45th Legis.)	No right to punitive damages under Arizona Civil Rights Act
	ARIZ. REV. STAT. § 41-1463 Sess. 45th Legis.)	Punitive damages available for disability discrimination (LEXIS through 1st Spec.
Arkansas	ARK. CODE ANN. § 16-123-107 (Michie 2001 Supp.)	Right to punitive damages for intentional discrimination; Limits of \$15,000 to \$300,000 (500 or more employees)
California	CAL. GOV. CODE § 12965(c)(3) (LEXIS through 2001 Sess.)	Unlimited punitive damages available for employment discrimination ³⁶⁶

364. See *Loomis Elec. Protection, Inc. v. Schaefer*, 549 P.2d 1341, 1342-43 (Alaska 1976) (stating that punitive damages are available for employment discrimination).

365. See *Norcon, Inc. v. Kotowski*, 971 P.2d 158, 174-77 (Alaska 1999) (reducing punitive damages for sexual harassment, in part, based on general state limit on punitive damages).

366. *Murillo v. Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833, 842 (1998) (stating that

	CAL. CIV. CODE § 52 (LEXIS through 2001 Sess.)	Limit on punitive damages: 3 times actual damages
Colorado	COLO. REV. STAT. 24-34-306(9) (LEXIS through 2001 Spec. Supp.)	No express right to punitive damages for employment discrimination
	COLO. REV. STAT. § 13-21-102 (1)(a), (3) (LEXIS through 2001 Spec. Supp.)	Punitive damages generally no greater than actual damages, if conduct was wanton & willful
Connecticut	CONN. GEN. STAT. ANN. § 46a-104 (West LEXIS through 1999-2000 Sess.)	Right to legal & equitable relief for employment discrimination
	CONN. GEN. STAT. ANN. § 52-240b (West LEXIS through 1999-2000 Sess.)	Limit on punitive damages: 2 times compensatory damages
Delaware	19 DEL. CODE ANN. §§ 712, 718 (LEXIS through 2001 Reg. Sess.)	No express right to punitive damages available; fines of \$1,000 to \$5,000 for violations of Discrimination in Employment statute
	Del. Super. Ct. Civ. R. 59 (2001)	New trial if punitive damages are disproportionate to compensatory damages
District of Columbia	D.C. CODE ANN. § 2-1403.16 (LEXIS through Aug. 2001)	Right to punitive damages for discrimination claims ³⁶⁷
Florida	FLA. STAT. ANN. § 760.11 (West Supp. 2002)	No greater than \$100,000 for civil rights claims
	FLA. STAT. ANN. § 768.73(1)(a), (b) (West LEXIS through 2001 Sess.)	Limit on punitive damages generally the greater of 3 times compensatory damages or \$500,000
Georgia	O.C.G.A. § 51-12-5.1(g)	Punitive damages available for

punitive damages are available for employment discrimination).

367. *Daka, Inc. v. Breiner*, 711 A.2d 86-98 (D.C. 1998) (stating that punitive damages are available for employment discrimination).

	(Harrison LEXIS through 2001 Extra. Sess.)	culpable employment discrimination; maximum of \$250,000
Hawaii	HAW. REV. STAT. ANN. § 368-17 (Michie LEXIS through 2001 3d Sp. Sess.)	Right to punitive damages for employment discrimination
	HAW. REV. STAT. ANN. § 347- (Michie LEXIS through 2001 3d Sp. Sess.)	Limit of 3 times actual damages for public accommodation of disabilities
Idaho	IDAHO CODE § 67-5908(3)(e) (LEXIS through 1st Reg. Sess., 56th Legis.)	Punitive damages available for employment discrimination not to exceed \$1,000 for each willful violation
	IDAHO CODE § 6-1604 (LEXIS through 1st Reg. Sess., 56th Legis.)	Procedural limitations only for punitive damages generally
Illinois	775 ILL. COMP. STAT. ANN. § 5/8A-104 (LEXIS through 92nd G.A.)	Express right to actual damages only for employment discrimination
	ILL. COMP. STAT. ANN. § 5/2-1115.05 (LEXIS through 92nd Gen. Assem.)	Limit on punitive damages: 3 times damages
Indiana	IND. CODE ANN. § 22-9-1-6 (Michie LEXIS through 2001 Reg. Sess.)	No express right to punitive damages for employment discrimination ³⁶⁸
	IND. CODE ANN. § 34-51-3-5 (Michie LEXIS through 2001 Reg. Sess.)	Limit on punitive damages: greater of 3 times compensatory damages or \$50,000
Iowa	IOWA CODE ANN. § 216.15(8) (West LEXIS through 2001 Sess.)	No right to punitive damages for employment discrimination ³⁶⁹

368. *Indiana Civil Rights Comm'n v. Alder*, 714 N.E.2d 632-38 (Ind. 1999) (stating that no right to punitive damages without explicit statutory authorization).

369. *City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 536-37 (Iowa 1996). See generally *Fink v. Kitzman*, 881 F. Supp. 1347 (N.D. Iowa 1995).

	IOWA CODE ANN. § 668A.1 (West LEXIS through 2001 Sess.)	25% to claimant, remainder to state trust fund if conduct not directed at plaintiff
Kansas	KAN. STAT. ANN. § 44-1004 (2000)	No express right to punitive damages for employment discrimination ³⁷⁰
	KAN. STAT. ANN. § 60-3701(e), (f) (2001)	Limit on punitive damages generally: less than annual gross income or \$5 million
Kentucky	KY. REV. STAT. ANN. § 344.450 (Michie LEXIS through 2001 Reg. Sess.)	Interpreted by some courts to allow right to punitive damages for employment discrimination ³⁷¹
	KY. REV. STAT. ANN. § 411.186 (Michie LEXIS through 2001 Reg. Sess.)	Factors to consider in assessing punitive damages generally
Louisiana	LA. REV. STAT. ANN. § 23:303 (West LEXIS through 2000 Sess.)	No express right to punitive damages for employment discrimination ³⁷²
Maine	ME. REV. STAT. ANN. tit. 5, § 4613 (West 2001 Supp.)	Right to punitives for discrimination; Limits from \$50,000 and \$300,000
Maryland	MD. CODE ANN. 49B § 11 (2001)	No right to punitive damages for employment discrimination
Massachusetts	MASS. ANN. LAWS ch. 151B, §§ 4, 9 (Law. Co-op LEXIS through 2001 Sess.)	Two to three times actual damages for age discrimination; punitive damages available for other violations ³⁷³

370. See generally *Woods v. Midwest Conveyor Co.*, 648 P.2d 234 (Kan. 1982).

371. See generally *Timmons v. Wal-Mart Stores, Inc.*, 33 F. Supp. 2d 577 (W.D. Ky. 1999); *Kentucky Dep't of Corr. v. McCullough*, 2000 Ky. App. LEXIS 57 (Ky. Ct. App. May 26, 2000), cert. granted, 2001 Ky. LEXIS 37 (Ky. Feb. 14, 2001) (noting that the state statute provides for punitive damages); but see *Steinhoff v. Upriver Rest. Joint Venture*, 117 F. Supp. 2d 598, 606 (E.D. Ky. 2000); *Lewis v. Quaker Chem. Corp.*, 2000 U.S. App. LEXIS 22321 (6th Cir. Aug. 24, 2000) (stating that Kentucky Civil Rights Statute does not authorize punitive damages).

372. See *Devillier v. Fid. & Deposit Co.*, 709 So. 2d 277, 282 (La. Ct. App. 1998).

373. See *Bain v. City of Springfield*, 678 N.E.2d 155, 161-63 (Mass. 1997) (allowing punitive damages without cap).

Michigan	MICH. COMP. LAWS ANN. § 37.2801 (2000)	No express right to punitive damages for employment discrimination beyond actual damages ³⁷⁴
	Mich. Court Rule 2.611 (2001)	New trial if excessive damage award influenced by passion or prejudice
Minnesota	MINN. STAT. ANN. § 363.071 (West 2002 Supp.)	Right to punitive damages for willful discrimination, not to exceed \$8,500
	MINN. STAT. ANN. § 549.20 (2001)	Punitive damages only available with certain proof, including deliberate disregard
Mississippi	MISS. CODE ANN. § 25-9-149 (2001)	No express right to punitive damages for employment discrimination
	MISS. CODE ANN. § 11-1-65 (2001)	Requirements to prove right to punitive damages generally
Missouri	MO. ANN. STAT. § 213.111.2 (West LEXIS through 1st Ex. Sess., 91st Gen. Assem.)	Right to punitive damages for employment discrimination ³⁷⁵
	MO. ANN. STAT. § 537.675 (West LEXIS through 1st Ex. Sess., 91st Gen. Assem.)	50% of punitive damages to state
Montana	MONT. CONST. Art. II, Sec. 4	No constitutional right to punitive damages for employment discrimination ³⁷⁶
	MONT. CODE ANN. § 49-2-506(2) (LEXIS through 2001 Sess.)	Punitive damages for employment discrimination precluded ³⁷⁷
	MONT. CODE ANN. § 39-2-905	Right to punitive damages for wrongful

374. See *Eide v. Kelsey-Hayes Co.*, 427 N.W.2d 488, 493 (Mich. 1988).

375. *Sullivan v. Curators of Univ. of Mo.*, 808 F. Supp. 1420, 1422 (E.D. Mo. 1992); *Kizer v. Curators of Univ. of Mo.*, 816 F. Supp. 548, 562 (E.D. Mo. 1993).

376. *Moran v. Shotgun Willies, Inc.*, 889 P.2d 1185, 1188 (Mont. 1995).

377. See *Romero v. J & J Tire*, 777 P.2d 292, 295-96 (Mont. 1989) (holding that it is constitutional for the state statute to preclude punitive damages).

	(LEXIS through 2001 Sess.)	discharge
Nebraska	NEB. REV. STAT. ANN. § 25-1142 (Michie LEXIS through 2001 Sess.)	New trial for excessive damages arising from passion or prejudice
	NEB. REV. STAT. ANN. § 48-1119(4) (Michie LEXIS through 2001 Sess.)	Right to general and special damages for discrimination does not allow for punitive damages ³⁷⁸
Nevada	NEV. REV. STAT. § 233.170 (5)(a)(1) (LEXIS through 71st Reg. Sess. & 17th Sp. Sess.)	Right to unlimited punitive damages for employment discrimination
	NEV. REV. STAT. § 42.005(1)(a), (b)(2001) (LEXIS through 71st Reg. Sess. & 17th Sp. Sess.)	Punitive damages limited to 3 times compensatory damages if greater than \$100,000; \$300,000 limit if compensatory damages less than \$100,000
New Hampshire	N.H. REV. STAT. ANN. § 354-A:7 (LEXIS through 2001 Sess.)	No express right to punitive damages for discrimination
New Jersey	N.J. STAT. ANN. § 34:11B-11 (West LEXIS through 209th Sess.)	Limit of \$10,000 for family medical leave damages
	N.J. STAT. ANN. § 10:5-3 (West LEXIS through 209th Sess.)	Right to punitive damages for exceptional claims ³⁷⁹
New Mexico	N.M. STAT. ANN. § 28-1-7, 13 (Michie LEXIS through 2d Spec. Sess. of 45th Legis.)	No express right to punitive damages for discrimination ³⁸⁰
	N.M. STAT. ANN. § 41-4-19 (Michie LEXIS through 2d Spec. Sess.)	Limit on punitive damages against governments only

378. *Pedersen v. Casey's Gen. Stores, Inc.*, 978 F. Supp. 926, 932 (D. Neb. 1997) (stating that there is no right to punitive damages that would violate Neb. Const. art. VII, § 5).

379. *See Catalane v. Gilian Instrument Corp.*, 638 A.2d 1341, 1353-54 (N.J. Super. Ct. App. Div. 1994) (stating that punitive damages are available under the state statute).

380. *Behrmann v. Phototron Corp.*, 795 P.2d 1015, 1020 (N.M. 1990) (stating that "actual damages" excludes punitive damages).

Sess. of 45th Legis.)

New York	N.Y. EXEC. LAW § 297 (5, 9) (LEXIS through Feb. 5, 2002)	Housing discrimination punitive damages: no more than \$10,000 to plaintiff, \$50,000 to state; no right to punitive damages for any other discrimination claim ³⁸¹
North Carolina	N.C. GEN. STAT. § 1D-25(b) (LEXIS through 2000 Reg. Sess.)	Any punitive damages limited to greater of \$250,000 or 3 times compensatory damages
	N.C. GEN. STAT. § 143-422.2 (LEXIS through 2000 Reg. Sess.)	No express right to punitive damages for employment discrimination ³⁸²
North Dakota	N.D. CENT. CODE § 32-03.2-11(4) (LEXIS through 2001 Reg. Sess.)	Limit on punitive damages: greater of 2 times compensatory damages or \$250,000; none without compensatory damages
	N.D. CENT. CODE § 14-02.4-03 (2001 Reg. Sess.)	No express right to punitive damages for employment discrimination
Ohio	OHIO REV. CODE ANN. § 4112.99 (Banks Baldwin LEXIS through 2001)	Punitive damages available for discrimination with showing of actual malice ³⁸³
Oklahoma	OKLA. STAT. tit. 25, 1901(c) (Supp. 2001)	Actual damages expressly allowed for employment discrimination
	OKLA. STAT. tit. 23, 9.1	Limit of \$100,000 for reckless disregard;

381. See *Thoreson v. Penthouse Int'l, Ltd.*, 80 N.Y.2d 490, 497-499 (N.Y. 1992) (stating that there is no right to punitive damages).

382. See *Newton v. Lat Purser & Assoc., Inc.*, 843 F. Supp. 1022, 1025 (W.D.N.C. 1994) (stating that the statute does not indicate right to punitive damages).

383. See *Pelletier v. Rumpke Container Serv.*, 753 N.E.2d 958, 964 (Ohio Ct. App. 2001) (holding that punitive damages available). See generally *Bailey v. Container Corp. of Am.*, 594 F. Supp. 629 (1984), later proceeding at 660 F. Supp. 1048, 1060 (S.D. Ohio 1986) (stating that punitive damages are available for age discrimination under state law, but not when duplicative of ADEA liquidated damages); but see *Hoops v. United Tel. Co.*, 553 N.E.2d 252, 256-57 (Ohio 1990) (stating that punitive damages available under one statute prohibiting age discrimination, but not another).

	(B)-(D) (Supp. 2001)	\$500,000 or 2 times actual damages for malice for any punitive damages
Oregon	OR. REV. STAT. 659.121(2) (1999) (LEXIS through Aug. 2000)	Right to punitive damages for employment discrimination
Pennsylvania	43 PA. CONS. STAT. ANN. § 962 (LEXIS through 2001 Sess.)	No statutory right to punitive damages generally ³⁸⁴
Rhode Island	R.I. GEN. LAWS § 28-6-20 (LEXIS through Jan. 2001 Sess.)	No express right to punitive damages for employment discrimination but interpreted to allow for punitive damages ³⁸⁵
South Carolina	S.C. CODE ANN. § 1-13-80, -90 (LEXIS through 2000 Sess.)	No express right to punitive damages for employment discrimination
South Dakota	S.D. CODIFIED LAWS § 20-13-42 (Michie LEXIS through 2001)	Punitive damages excluded as remedy for employment discrimination
	S.D. CODIFIED LAWS § 21-2-2 (Michie LEXIS through 2001)	General right to punitive damages for oppression, fraud or malice
Tennessee	TENN. CODE ANN. §§ 4-21-306, 311 (2001 session of 102nd G.A.)	Remedies necessary to eliminate discrimination do not include punitive damages; allows punitives for housing discrimination ³⁸⁶
Texas	TEX. LAB. CODE ANN. § 21.2585 (West LEXIS through 2001 Sess.)	Right to punitive damages for discrimination; limits from \$50,000 to \$300,000 (greater than 500 employees)

384. *See* Hoy v. Angelone, 720 A.2d 745, 748-50 (Pa. 1998) (stating that no punitive damages provided by statute); *but see* Cain v. Hyatt, 734 F. Supp. 671 (E.D. Pa. 1990) (holding that punitive damages available for race discrimination under Pennsylvania law); Smith v. General Elec. Co., 1996 WL 24762, at *4-5 (E.D. Pa. Jan. 22, 1996) (stating that punitive damages are available for sexual harassment).

385. FUD's v. State, 727 A.2d 692, 696 (R.I. 1999).

386. *See* Carver v. Citizen Util. Co., 954 S.W.2d 34, 35-36 (Tenn. 1997) (stating that general language regarding right to damages does not provide right to punitive damages).

Utah	UTAH CODE ANN. §§ 34A-5-106 to -107 (LEXIS through 2001 2d Spec. Sess.)	No express right to punitive damages for employment discrimination
Vermont	VT. STAT. ANN. tit. 21, § 495b(b) (LEXIS through Sept. 2001)	No statutory right to punitive damages for employment discrimination ³⁸⁷
Virginia	VA. CODE ANN. § 2.2-3900 (Michie LEXIS through 2001)	Right to punitive damages for employment discrimination with malice or reckless disregard
	VA. CODE ANN. § 8.01-38.1 (Michie LEXIS through 2001)	Cap of \$350,000 on any punitive damages
Washington	WASH. REV. CODE § 49.60.030(2) (LEXIS through 2001 Sess.)	Only attorney fees and remedies available under Title VII are available under state statute re: employment discrimination ³⁸⁸
West Virginia	W. VA. CODE § 5-11-13 (LEXIS through Reg. & 6th Extra. Sess.)	Punitive damages available for employment discrimination as "other legal or equitable relief" ³⁸⁹
	W. VA. CODE § 56-6-28 (LEXIS through Reg. & 6th Extra. Sess.)	Right to new trial if damages are excessive
Wisconsin	WIS. STAT. ANN. §§ 111.321, .322 (LEXIS through 1999-2000 Sess.)	No express right to punitive damages for employment discrimination ³⁹⁰
	WIS. STAT. ANN. § 805.15 (LEXIS through 1999-2000 Sess.)	Right to new trial if verdict excessive

387. See *Fernot v. Crafts Inn, Inc.*, 895 F. Supp. 668, 682 (D. Vt. 1995).

388. *McGinnis v. Kentucky Fried Chicken*, 51 F.3d 805, 807 (9th Cir. 1994) (holding that punitive damages are only available under Washington law if authorized under Title VII).

389. See *Haynes v. Phone-Poulenc, Inc.*, 521 S.E.2d 331, 344-46 (W. Va. 1999) (stating that punitive damages are available).

390. *Watkins v. Labor & Indus. Review Comm'n*, 345 N.W.2d 482, 486-87 (Wis. 1984) and *Zimmer v. Manitowoc Shipbuilding, Inc.*, 603 F. Supp. 1159, 1164 (E.D. Wis. 1985) (stating that no punitive damages are available for employment discrimination under state Fair Employment Act).

Wyoming

WYO. STAT. ANN. §§ 27-9-105, No express right to punitive damages
106 (LEXIS through 2001 Reg. for employment discrimination
Sess.)