Avoiding the Catastrophic Loss

Jury trials (and arbitrations) and the multi-million-dollar verdict

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Introduction

With the increase in restrictions on employers and expansion of the scope in whistleblowing and disability related laws, we are seeing a continued trend in the number of large awards both from juries and arbitrators in single plaintiff employment cases. These materials will look at the basics behind this trend and will provide key tips employers can utilize to fight back to avoid a large jury verdict.

Included herein is statistical data regarding single plaintiff jury verdicts across the country and a discussion of the now relatively well known "reptile theory" and the "gatekeeper effect" and how to deal with this both legally and practically.

Finally, there are tips for trial and approaches to trial strategy a Company should consider when faced with trial. This starts long before the lawsuit is filed and continues with selection of counsel, preparation of the case, and ultimately decisions as to which cases to try and how to try them.

I. Overview of Catastrophic Losses in Employment Cases

Catastrophic jury losses, which we categorize as jury verdicts (and arbitration awards) starting at $5,000,000 and above in single plaintiff cases, once thought to be solely within the realm of personal injury and products liability cases, have bled into the world of single plaintiff employment litigation. The world of catastrophic jury losses is headline grabbing and inspires plaintiff's counsel around the country to make a demand for higher and higher damages.[1] What news headlines with multi-million dollar awards don't tell you, is the extent to which these awards include actual hard damages, such as lost wages, versus other damages, such as emotional distress and the dreaded punitive damages.

[1] Richard Winton, *Jury awards former Times sports columnist $15.4 million,* LOS ANGELES TIMES (Last Accessed January 10, 2020), https://www.latimes.com/california/story/2019-08-19/jury-awards-tj-simers-former-times-sports-columnist-15-4-million.

For example, Robert Braden sued Lockheed Martin Corp. for age discrimination when his position as a senior staff project specialist was eliminated during a reduction-in-force.[2] When a jury found in his favor, they awarded him $520,000 in lost wages and benefits, as well as $520,000 for emotional distress.[3] The jury also awarded a staggering $50,000,000 in punitive damages.[4] This vast difference between actual wages lost and punitive damages is becoming ever more popular in catastrophic employment verdicts.[5] In the Braden case, the trial judge did end up throwing out the punitive damages awarded after Lockheed Martin sought a new trial.[6] However, since a retrial on punitive damages has been granted, this case is far from over.[7] Catastrophic jury losses, even where the high punitive award is thrown out, needs to be safeguarded against. Indeed, the eye-popping amount of such verdicts has had the impact of bringing more attention to employment litigation and caused inflation in the expectations of plaintiffs and their lawyers.

When we examined employment cases (particularly discrimination, harassment, retaliation, and wrongful termination cases) over the last five (5) years that resulted in a jury verdict between $5,000,000 and $99,000,000, we found sixty-five (65) jury verdicts that met this criterion. Of those, here are some of the notable results we found:

- Over forty percent (40%) of these jury verdicts were in California
    - Twenty (20) occurred in Los Angeles County Superior Court.
    - Seven (7) cases occurred in other California courts – specifically, in state courts located in San Diego, San Bernardino, Sacramento, and San Francisco, and in Federal Court in both the Northern and Central Districts of California.
- Almost twelve percent (12%) of these jury verdicts were in Florida and New York.
- Almost twelve percent (12%) of these jury verdicts were in New Jersey and Washington.
- The remaining thirty-six percent (36%) were fairly spread out across the country with only Missouri, Pennsylvania, Massachusetts, and Illinois having more than one jury verdict within

[2] See Braden v. Lockheed Martin Corp., JVR No. 1706211013 (Dist. NJ), January 26, 2017.
[3] *Id.*
[4] *Id.*
[5] *See e.g.,* King v. U.S. Bank National Association, JVR No. 1705180059 (Cal. Superior), May 4, 2017 (resulting in $2.5 million in past and future wages, and $15.6 million in punitive damages).
[6] Lynne Anne Anderson, *New Jersey District Judge Discard's Jury's $50 Million Punitive Damage Award to Age Discrimination Plaintiff,* NATIONAL LAW REVIEW (Last Accessed January 10, 2020), https://www.natlawreview.com/article/new-jersey-district-court-judge-discard-s-jury-s-50-million-punitive-damage-award-to.
[7] *Id.*

this range.[8] Under our sample-set, there were also many states without any high-dollar verdicts found at all.

This tells us that whether to take a case to trial can be impacted significantly depending on the jurisdiction. With such verdicts in other jurisdictions across the country, however, the phenomenon cannot be blamed solely on location. Other key factors not only include the obvious – like facts of the case or the witnesses, but also that the ability of a plaintiff's lawyer to incite a jury also plays a significant role when it comes to these enormous jury verdicts. While this white paper focuses primarily on jury trials and verdicts, it is important to note that arbitration can result in large losses as well, albeit usually not quite as catastrophic. Many of the tactics, downfalls, and tricks discussed below can also be applied and implemented into the arbitration context.

II. Jury Trial Strategies That Can Lead to High-Dollar Verdicts

Plaintiffs' counsel has created and implemented many strategies to increase the number of high-dollar verdicts, and the amount of damages awarded. This section will focus on two jury trial trends that Plaintiffs' counsel are increasingly utilizing at trial to obtain a high-dollar verdict: the Reptile Theory and the Gatekeeper Effect. The Reptile Theory focuses on how to influence the minds of the jury to find the defendant at fault, regardless of the actual legal standard. The Gatekeeper Effect surrounds the role of the judge and expert witnesses in a trial, and how their perceived status can influence and shape the decisions and perceptions of jurors.

a. The Reptile Theory

Over a decade ago in 2009, David Ball and Don Keenan wrote a book introducing the so-called "reptile theory." This reptile theory would become an increasingly popular litigation strategy amongst the Plaintiff's bar as it helped spark the growing trend in the last decade of catastrophic verdicts. Akin to the prohibited Golden Rule,[9] the reptile theory attempts to appeal to the inner *reptilian* portion of the brains of jurors to influence the outcome of a case. The reptilian portion of the brain focuses primarily on personal safety and safety of one's community. Thus, when an attorney implements the reptile theory, they are appealing to the part of a juror's mind where they are concerned for their safety and the safety of those around them. This can highly influence the outcome of a case because a juror, rather than focusing on the law and facts presented, fixates on their own personal safety and how the actions of the defendant impacts that safety. In addition, if unchecked by proper objection, a plaintiff's attorney can strategically question a defense witness until they have admitted some minor

[8] All statistics were pulled from Westlaw's case evaluator report. For a full case list, see Appendix A.

[9] The Golden Rule, as we all know it from childhood, is to treat others as you would want to be treated. In the legal context, it is an illegal practice where an attorney tells the jury to "put themselves in the plaintiff's shoes." This can affect a juror's perception of a case and manipulate them into ignoring the law or legal standard, and instead award to the plaintiff what they (the juror themselves) would want.

safety violation, which distracts the jury from the law, instead pulling their focus to personal safety or the safety of their community.[10]

While this reptilian model fits easily into personal injury and products liability cases, it also has found its way into employment cases. For example, a reptile-styled attorney may question a human resources manager about their job in the workplace. In the following example, a Plaintiff off-handedly and vaguely mentioned to the HR director that she was experiencing harassment at work. Following company policy, the HR manager requested the Plaintiff submit a written complaint so that the HR manager could move forward with a proper and complete investigation. In fact, without this written complaint, the HR manager would have no information with which to start the investigation. So, the HR manager waited for the written complaint to start an investigation. The following exchange occurs in trial:

Reptile Attorney – "As the HR manager, you're responsible for investigating claims of alleged harassment, aren't you?"

HR Manager – "Yes I am."

Reptile Attorney – "As the person responsible for investigating harassment claims, wouldn't you agree that the sooner you investigate, the sooner you can determine if the claim is valid?"

HR Manager – "Yes."

Reptile Attorney – "So isn't it true, that if you had started investigating the harassment brought to your attention sooner, you would have determined its validity sooner?

HR Manager – "Yes."

Reptile Attorney – "Had you started investigating immediately, the continued harassment faced by Plaintiff could have been stopped at that time?"

HR Manager – "Yes."

Reptile Attorney – "Wouldn't you agree that since you waited two weeks to start investigating the harassment brought to your attention by Plaintiff, you were neglecting your obligations as HR Manager?"

HR Manager – "Yes."

These reptile questions unfortunately led the HR manager into admitting a failure to comply with their "HR" and legal obligations, even though, the HR manager actually took the necessary steps to begin

[10] For more information regarding the reptile theory and its origins, *see generally* David Ball & Don Keenan, *Reptile: The 2009 Manual of the Plaintiffs Revolution* (1st ed. 2009).

the investigation, including requesting a written explanation. This admission then appeals to the reptilian nature of a juror, specifically their concern for personal safety and to be free from harassment, leaving them with no doubt that the Plaintiff should win, even though the HR manager and the company did not violate any law or legal standard.

This exchange, if occurring at trial, could lead to a significant monetary verdict, despite a lack of fault on the part of the company. And even if this exchange occurred before trial in deposition, the company could face a significantly higher settlement price than they otherwise would have, just to avoid the risk the deposition testimony would create at trial.

Trying to combat and avoid the results of the reptile theory can be accomplished by awareness of the tactic, careful witness preparation (forewarned is forearmed) and – to some degree -- pre-trial motions and/or remedies. It also is important for the trial lawyer to know what to do during trial to defuse the reptilian efforts with questioning of their own both in terms of pointing out the manipulation and responding to the improper questioning. For instance, the lawyer could combat the reptile theory by re-focusing the jury to the case in front of them. The lawyer could even flip the reptile theory by pointing out the overall public benefit the employer provides the community through job-creation, goods, services, etc.

b. The Gatekeeper Effect

Another tactic employed by Plaintiffs' counsel is utilization of the gatekeeper effect to the detriment of the Defendant. In jury trials, the judge is often viewed as the gatekeeper of the jurors regarding evidence, deciding what they will hear and who they will hear it from. In 1993, the Supreme Court in *Daubert* altered the federal court test for admission of evidence.[11] This holding led to a litany of follow-up cases, including *General Electric v. Joiner,* which placed the responsibility of "gatekeeping" squarely on the shoulders of the trial court.[12] While a federal standard, the so-called Daubert standard has become the law in over half of the states as well. After this decision, the gatekeeper effect began to receive greater attention from legal scholars.

The basic premise of the gatekeeper effect, as it relates to expert witnesses, is that in qualifying an expert, the source of that qualification impacts the jury. A jury has been found to be highly sensitive to differences in the source of information.[13] This is particularly true when the type of evidence is

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[11] *See* Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993); see also N.J. Schweitzer and Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony,* 15 Psychol. Pub. Pol'y & L. 1, 1 (2009) ("More specifically, Daubert suggests that judges examine (a) whether the principles underlying proffered expert (scientific) testimony are testable and have been tested, (b) whether the methodology of that testing was sound (usually tagged as the "peer review and publication" factor), (c) what the results were of that testing (labeled as error rates), (d) maintenance of standards by the field using the proffered knowledge, (e) and whether the basis of the expert testimony was generally accepted, the central element of Frye v. United States (1923).")

[12] *See* General Electric Co. v. Joiner, 522 U.S. 136 (1997).

[13] See N.J. Schweitzer and Michael J. Saks, supra at 4.

scientific or otherwise complex.[14] Since expert witnesses are ordinarily called-upon to testify about scientific or complex data/information, the gatekeeper effect can play a large role in how the testimony is absorbed by the jury.

Specifically, where the judge themselves introduces the expert and states the expert's qualifications, or admits certain expert testimony, a jury is more likely to find the expert and his/her testimony more persuasive, reliable, and credible. One study completed suggests that the reliability of scientific evidence, in the mind of the jury, is artificially inflated simply by a judge admitting it into evidence.[15] This leads us to believe that jurors assume a judge has reviewed and evaluated expert qualifications and/or testimony, prior to admitting it, which creates a presumption of reliability. This assumption of judicial filtering has made jurors give credit to experts in circumstances where no credit is due.

Learning about the gatekeeper effect, and recognizing when it is influencing the jury, is the biggest step toward combatting it. Whether you require an expert to introduce their own qualifications or explain to the jury that simply because evidence is admissible does not make it reliable, are steps Defense counsel can take to avoid the negative impacts of the gatekeeper effect.

Indeed, in employment cases this can be seen regarding mental health and other medical experts, but more and more it also is bleeding into the attempted use of "HR" experts who are used to point out all of the "errors" and/or violations of law committed by the unwitting employer. To make their experts seem more credible, Plaintiffs' counsel often will not object to the judge introducing expert witnesses to the jury or Plaintiffs' counsel may even propose a stipulation to allow the trial judge to introduce expert witnesses to the jury. While a decision to allow the judge to introduce expert may appear harmless and time efficient, it could have a significant influence on a jury.

c. Pre-Trial Approaches to Combat the Reptile Theory and Gatekeeper Effect

Pre-trial planning includes various methods to attempt to limit what the jury will hear. When you limit what the jury will hear, you can help nullify the problems that arise when plaintiffs' counsel utilizes the reptile theory and/or the gatekeeper effect. We will examine two common pre-trial motions that can be used to negate: motions in limine and bifurcation of punitive damages.

i. Motions in Limine

Motions in limine can be used pre-trial to preclude certain evidence or testimony from being brought to the attention of the jury. Specific to this discussion, a motion in limine can be brought to exclude certain evidence or testimony that could fall prey to the gatekeeper effect, or to preclude the plaintiff's use of the reptile theory.

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[14] See N.J. Schweitzer and Michael J. Saks, supra at 4.
[15] See N.J. Schweitzer and Michael J. Saks, supra at 12.

A motion in limine to exclude certain evidence can help eliminate the gatekeeper effect. The most common motion in limine filed as it relates to expert testimony is to preclude certain expert testimony because of the expert's lack of expertise to testify about a certain subject area at trial. Avoiding the introduction of certain expert testimony can be highly more effective than attempting to disprove or invalidate that testimony in front of the jury at trial. Unfortunately, it could be difficult to persuade a judge to grant a motion to exclude an entire witness or subject matter of testimony. If a viable option however, motions in limine can also be filed to preclude the introduction of expert witnesses by the court to the jury because it is highly prejudicial and could confuse the jury.

A motion in limine can also be used to preclude use of the reptile theory. This motion is premised on the concept that the reptile theory is improperly used to appeal to the jurors' own concerns for personal and community safety, like a motion to prevent use of the Golden Rule.[16] While these motions can be successful, it is a strategic decision whether or not to file one. Even with a signed motion in limine, plaintiffs' counsel may still attempt to use the reptile theory, to which defense counsel will then have to object. Whether these objections will alert the jury to improper questioning, cause the jury to disregard the effects of the reptile theory, bring more attention the line of questioning, or even annoy the jury into disliking defense counsel, the overall effect of objecting during trial is hard to predict. With that in mind, careful review of opposing counsel and their trial style should be considered prior to filing a motion in limine to prevent the use of the reptile theory.

Overall, motions in limine can help to prevent up-front an attorney's attempt to use either the reptile theory or the gatekeeper effect to their advantage. However, determining whether to bring a motion in limine under these circumstances is highly tactical and fact-specific. With that in mind, starting the conversation about your pre-trial motions early-on, during case evaluation, can help make the best tactical decisions as the case evolves.

ii. Bifurcation of Punitive Damages

There are many strategical and tactical decisions that need to be made prior to deciding for or against bifurcation of punitive damages. As discussed throughout this paper, high-dollar verdicts in employment cases often result in substantial punitive damages, but whether bifurcation will help or hurt your case, depends on the facts and issues in play.

The federal courts, and many state courts, allow a defendant to request bifurcation of punitive damages, and have discretion in granting such requests. When a case is bifurcated, the jury first

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[16] The Golden Rule is used during a jury trial to persuade the jurors to put themselves in the place of the victim or the injured person and deliver the verdict that they would wish to receive if they were in that person's position. For example, if the plaintiff in an employment case has suffered emotional distress, the plaintiff's lawyer might ask the jury to come back with the verdict they themselves would want to receive had they been treated the same way. As a rule, judges frown upon this type of argument, because jurors are supposed to consider the facts of a case in an objective manner. In many jurisdictions, use of the Golden Rule is prohibited. *See e.g. Caudle v. District of Columbia*, 707 F.3d 354, 359, 404 U.S. App. D.C. 56 (D.C. Cir. 2013).

hears and determines liability. Following a determination of liability, the jury is then presented with evidence on damages.

Bifurcation can be an effective tool in nullifying or lessening the reptile theory. Since punitive damages rest on punishment due to willful or malicious conduct, the reptile theory can help bolster and exaggerate the extent of the intentional conduct of the defendant, making it seem malicious and worthy of high damages. If every juror is asked to think of their own safety (common when the reptile theory is in play), then when they hear about the extent of the harm faced by the plaintiff, they may be more likely to find the defendant liable. In this way, bifurcation can help eliminate the negative consequences that stem from plaintiff's use of the reptile theory.

Bifurcation can also assist with minimizing the gatekeeper effect. As discussed, bifurcation excludes certain evidence and testimony on damages from the trial on liability. When a jury only hears testimony and evidence on liability experts, without hearing expert testimony on the extent of damage and harm, the gatekeeper effect is lessened through that separation alone.[17]

This said, an alternative argument can be made that when a company or individual is known to be wealthy, bifurcation can hurt more than it helps. For instance, everyone knows Bill Gates is incredibly wealthy or that Amazon is wealthy. If you bifurcate and lose, what do you say at the punitive damages stage. In addition, where a plaintiff is forced to talk about how rich a defendant is in their case in chief, this can be distracting to a jury and can help the defense defuse the potential issue. Also, it can avoid the jury hitting you twice. First, because they are mad at you and don't know they get to "punish" you and second, when they learn they get to hit you again in proportion to your wealth. Overall, we find this to be potentially one of the key decisions. Also, in some jurisdictions, if the witnesses as to net worth are not in state and plaintiff has not deposed them, plaintiff may be out of luck in trying to put on any evidence of net worth –see, *Amoco Chemical Co.,* a California case.[18]

III. Specific Case Studies: An In-Depth Look at a Catastrophic or High-Dollar Loss

The following case studies take a more in-depth look at catastrophic losses and what we can learn from them. The Simers case illustrates how a catastrophic loss can occur with a high-salaried employee, and how these types of cases can last for an indefinite period of time. The Pierre case

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[17] For more information and a comprehensive study on the effects of bifurcation of damages, see Stephan Landsman, Shari Diamond, Linda Dimitropoulos, & Michael J. Saks, *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims For Punitive Damages,* 1998 WIS. L. REV. 297 (1998).

[18] Amoco Chemical Co. v. Certain Underwriters at Lloyd's of London, 34 Cal. App. 4th 554, 559 (1995) (holding that non-resident employees of corporate parties cannot be required to attend).

illustrates the stark parity that can result between actual hard damages, and punitive damages, and illustrates the importance of the federal court punitive damages caps.

a. Simers v. Los Angeles Times Communications, LLC[19]

i. The Facts & Circumstances

T.J. Simers, at the time of the initial trial in 2015, was 63-years old and had been employed as a sports columnist for the LA Times for over twenty years. As a columnist, Simers earned $234,000 per year. Simers sued for disability and age discrimination, and constructive discharge. Simers claims that beginning in 2013, his employer began reducing the number of columns he wrote, despite his exemplary work as a writer. He claimed he was told to "take it easy," while younger employees got significantly more work than him. Eventually, Simers was demoted to an entry level position – to which the LA Times claims they had a legitimate, non-discriminatory reason for doing so. Even when the LA Times later offered to reinstate him to his prior columnist position, Simers apparently felt the work environment would be unbearable and so instead resigned from his employment.

Before trial, both the defense and the Plaintiff designated expert psychologists to testify. Subsequently, Plaintiff also designated a psychiatrist as an expert as well. Both parties filed many pre-trial motions, including numerous motions in limine. Notable motions in limine included Defendant's motion exclude expert testimony of Philip Sieb, a journalism professor from USC; Defendant's motion in limine to exclude cumulative evidence of Plaintiff's claimed emotional distress damages; and Plaintiff's motion to allow extensive oral voir dire. All of these pre-trial motions are indications that the above-discussed tactics were being considered by Plaintiff's counsel.

Specifically, extensive voir dire allows Plaintiff's counsel to learn more about the personalities and traits of potential jurors – which in turn helps Plaintiff's counsel determine how to structure their arguments most effectively and to identify ways to implement the reptilian theory against jurors. It also allows plaintiff's counsel more time to begin working to "condition" the jurors and to lay the foundation for both the reptile and gatekeeper attacks. Additionally, Defendant's motion to exclude cumulative evidence of Plaintiff's emotional distress damages indicates that the defense was concerned about Plaintiff's testimony, and its cumulative nature reinforcing to the jury that the plaintiff has been harmed.

ii. The Result

The initial jury in 2015 found in Simers' favor and awarded him over $7.1M, $5M of which was awarded for **pain & suffering**. The LA Times subsequently appealed the decision and the judge reduced the award, causing Simers to appeal that reduction. Following post-trial motions and

[19] See Simers v. Los Angeles Times Communications LLC, JVR No. 1511060032 (Cal. Superior), November 4, 2015.

appeals, ultimately the case was ordered to undergo a second jury trial solely on the issue of damages. In August of 2019, the new jury awarded nearly $15.5M to Simers – more than doubling the original award for emotional distress damages. However, just recently in December of 2019, a judge overturned the latest jury award, of $15.5M, as being "excessive" and not justified by the evidence.

This means that the Simers case is still ongoing, and the issue of damages will now eventually be heard by a third jury.

iii. What This Tells Us

First, this case was heard in the Los Angeles Superior Court, which as mentioned above, is well-known for these catastrophic awards, making the awarding of over $7M and, then awarding over $15M, not entirely surprising. What may be more surprising is that it was tried by one of top plaintiff's employment lawyers who brought in a top personal injury lawyer (read reptile) to help try the case. This illustrates the importance of knowing the history of a jurisdiction and opposing counsel so you can plan accordingly. Going to trial in Los Angeles Superior Court has certain significant risks that simply do not exist in other jurisdictions. Completing a thorough case evaluation early can help determine at the outset the level of jurisdictional risk in not only jury pool, but in the adept-ness of local plaintiff's counsel as well.

Second, the facts of the Simers case are not one-sided, with both sides proffering evidence and testimony to argue their side. This is troubling given that the jury awarded such a high figure for a case that could have reasonably been decided for the defendant.

Finally, the duration of this litigation indicates that even where a judge consistently overturns a high jury verdict, the case does not end. The legal fees and expended energy required to combat a case that results in a catastrophic loss should be considered upfront in pre-litigation. The importance of appropriately and diligently evaluating a case before all hope of settlement is lost cannot be undervalued when looking at high-damages employment litigation.

b. Pierre v. Park Hotels & Resort Inc.[20]

i. The Facts & Circumstances

Park Hotels & Resorts, Inc. (formerly known as Hilton Worldwide), hired Marie L. Jean Pierre (the plaintiff) in 2006 as a housekeeper for a **Miami** hotel. Throughout her tenure, Pierre expressed her need to have Sundays off work (or simply not to be scheduled on Sundays) due to her sincerely held religious beliefs. Pierre's religious beliefs were consistently accommodated until late 2015 when her

[20] See Pierre v. Park Hotels & Resort, Inc., JVR No. 19 FJVR 5-19 (S.D. Fla.), January 14, 2019.

work schedule changed to include Sunday shifts. Despite her complaints, her schedule did not change. When Pierre consistently failed to report to her Sunday shifts, she was terminated.

Pierre sued Park Hotels for failure to accommodate, religious discrimination, and retaliation. Park Hotels claimed that Pierre was offered multiple different accommodations, which she denied, and that she was terminated following a string of unexcused absences.

Before trial, both the defense and the Plaintiff designated expert psychologists to testify. Plaintiff also designated a psychiatrist as well. Both parties filed many pre-trial motions, including numerous in limine. Notably, Defendant filed a motion in limine to exclude questions regarding Hilton Worldwide's net worth in voir dire. This was likely filed in order to prevent Plaintiff's counsel from trying to prejudice the jury up-front against the Defendant. This motion was in fact granted by the judge; however, despite this motion, a high punitive damages award still occurred.

ii. The Result

The jury found that Pierre had engaged in protected activity and was terminated because of her participation in that protected activity. Interestingly, the jury did not find that Pierre's religion was a motivating factor for her termination and did find that Park Hotels had provided her with a reasonable accommodation. Regardless, based on that determination the jury awarded $36,000 in back pay, $500,000 in emotional pain and mental anguish, and a staggering $21M in punitive damages.

However, the judge reduced the punitive damages award to $300,000 – the maximum amount of punitive damages allowed under Title VII of the Civil Rights Act.

iii. What This Tells Us

First this case was heard in Florida District Court. It is important to remember that federal court is not immune to catastrophic losses despite a punitive damages cap, and that Florida jurors have not shied away from handing out staggering damages. Indeed, in many states with strong employee protection, state law claims can and are tried in federal court and can and do result in large verdicts.

Second, the Pierre case did not involve a high-wage earner, and in turn back pay awarded was only $36,000. There also were significantly lower pain & suffering damages awarded in Pierre versus in the Simers case as well. The punitive damages are shocking, but the statutory cap in federal court does not allow those awards to stand. Outrageous punitive damages award should not be ignored however simply because a cap exists. These types of awards make headlines, not entirely welcome publicity to many companies and employers.[21]

[21] See Dave Simpson, "Devout Dishwasher Fired for Resting Sundays Wins $21.5M," Law 360 (Last Visited Jan. 15, 2020), https://www.law360.com/articles/1118554/devout-dishwasher-fired-for-resting-sundays-wins-21-5m; see also Marcia Pounds,

Third, the result of this case is even more interesting when considering that the jury found that the plaintiff's religion was not a motivating factor in her termination. The jury awarded such a high punitive damages amount, when they only found the defendant liable for retaliation, not religious discrimination or failure to accommodate.

Like above, these takeaways illustrate the importance of case evaluations and doing your due diligence on your jurisdiction.

IV. How Best to Avoid Catastrophic Losses

To best avoid catastrophic losses and combat the strategies to achieve these losses, there are many tools which we could discuss. Below we will discuss key actions for every employer to reduce the increased likelihood of a substantial jury verdict.

a. Investing Upfront

The importance of investing in appropriate and forward-thinking human resources practices is essential to avoiding litigation altogether, and especially important for when you end up in trial. Working toward a positive corporate culture and living up to your corporate promises is critical. Particularly living up to your "corporate" promises.

- **Invest in Your Company's Handbooks and Policies**. A critical step when investing upfront is creating employee handbooks and policies. While not litigation-proof, a comprehensive handbook with detailed policies can help bolster your defense and curtail a zealous plaintiff's counsel from pursuing a matter with an eye toward a catastrophic win. In addition, hiring competent employees, specifically within human resources department, is necessary to carry-out and implement these policies. The most well-written handbook in the country will not prevent a minor loss, let alone a catastrophic loss, without personnel who can ensure the policies are followed. Finding these individuals, and creating and maintaining these policies, will likely take significant time and cost. However, doing so will help ensure the future and longevity of your company.
- **Invest in your Human Resources team.** Your HR Team are the front line and working with in-house and outside counsel where appropriate can limit risk and help identify potentially explosive situations up front so they can be timely resolved. This also includes empowering your HR team and getting buy-in from your managers to building a positive and healthy culture. In other words, we need folks to attend

"Hotel dishwasher awarded $21 million after boss made her work on Sundays," South Florida Sun Sentinel (Last Visited Jan. 15, 2020) https://www.sun-sentinel.com/business/fl-bz-miami-dishwasher-jury-award-20190116-story.html.

diversity training, anti-harassment and other trainings with buy-in and fervor as opposed to seeing it as just something they must do. Think of it this way – if magically someone could poor "truth fog" over your workforce, what would they say? Really say about working at your company. About whether the company cares and takes its policies seriously. Whether they issues are resolved and employees are heard?

b. Five-Step Action Plan for Trial

While most employment cases settle before trial, at the outset of a lawsuit, a Company should always have a "trial game plan" that includes the following:

(1) Select and assemble your defense team including the trial attorney(s).

(2) Stay involved with pre-trial strategy.

(3) Identify the best company witness to be present at trial.

(4) Establish a protocol for keeping informed of the trial's key developments.

(5) Ensure potential opportunities for settlement are not overlooked.

1. Select and assemble your defense team, including trial attorney(s).

To assemble the best defense team possible, you want to ensure you are selecting individuals with enough familiarity with your business, its culture and the case file. The individuals who will try the case to verdict ideally should have trial experience, experience with the judge, the opposing counsel or both. A decision about who will actually try the case to verdict is key– will the Company retain outside counsel who was originally assigned the matter to try the case to verdict or will the Company transfer the file to one of its established "trial counsel," who has represented the Company's interest in previous cases at trial. You need someone who can find the key to making your case, not just on the law, but on a basic level so a jury sees finding for you as the "right" thing to do.

It is also important to consider whether retention of appellate counsel is appropriate. Appellate counsel can assist with both pre-trial and trial planning by looking at the potential implications of your trial strategy and the trial courts pre-trial decisions. Once some discovery has been completed, a Company may also want to consider using its resources to assemble a mock trial to test its trial themes and obtain third party feedback regarding witness credibility and likeability before trial. A Company should also determine whether a jury consultant should be added to the defense team by looking objectively at the jurisdiction and the history of its jurors.

2. Stay involved with pre-trial strategy.

Have your defense team evaluate your witnesses and develop a theme for the defense going forward as early as possible after the lawsuit is filed. This will allow the Company to identify its strengths and weaknesses early in the case and lay the foundation for the development of the Company's public relations strategy internally or externally to combat any rumors, low morale or negative press that may arise based on a Plaintiff's allegations against the Company. Don't ignore or overlook "bad facts" and don't let your trial team do so either. Bad facts need to be dealt with and so do weaknesses in your case.

To ensure all necessary persons stay involved with pre-trial strategy, it is important to develop an effective communication plan. This involves having a point person for each necessary party involved, including a person from the legal department, the human resources department, senior management, outside counsel, and anybody else determined to be on the defense team you created in step one. Staying involved with pre-trial strategy also includes keeping eye on the trial budget, as well as court fees and vendor invoices as the trial date gets closer.

3. Identify the best company witness to be present at trial.

Selecting the best company representative for trial requires taking an honest look at who will best present themselves in court and be taken seriously by the jury. The company representative should understand the circumstances of the case, without being too closely connected so as to make their credibility questionable. As to witnesses, you likely will not have a lot of choice in who they are. Be realistic as to their strengths and weaknesses and invest in working with them so they can succeed as a witness. Not everyone will be a star, but a witness can learn from counsel, consultants, mock trials and the like.

4. Establish a protocol for keeping informed of the trial's key developments.

If you have developed an effective communication plan, then establishing protocols for reporting key trial developments is relatively easy. Develop which communication methods are preferred amongst contact persons and implement those accordingly. Also, determine which of persons will be attending the trial, and who can disperse a daily summary to all parties.

5. Ensure potential opportunities for settlement are not overlooked.

It is important to never overlook settlement opportunities. There is always a potential to settle a case, even after the trial has begun. Consider being proactive in raising settlement issues periodically to continuously determine if a settlement is plausible and makes sense based on the current development of the case and/or trial. Be sure your team understands it has two hats – both of which

are important. They have their trial hat – when wearing it we are in the fight to win and deal with all adversity to win at trial. They also have their settlement hat – when wearing it we are realistically handicapping our odds at trial and looking realistically for a reasonable settlement including, identifying leverage points that may tip settlement including timing of trial and favorable pre-trial motion decisions regarding excluding or limiting experts and damages.

IV. List of Additional Resources

- David Ball & Don Keenan, *Reptile: The 2009 Manual of the Plaintiffs Revolution* (1st ed. 2009).
    - This book created the wave of reptile lawyers and is the starting point for plaintiffs' counsel to learn how to implement this strategy in litigation.
- Association of Southern California Defense Counsel, *Slay the Reptile – How to Defend and Defang Plaintiff's Reptile Theory,* 55th Annual Seminar (2016).
    - This material was developed in connection with a seminar on strategies and tactics that help defeat reptile arguments, and even prevent their introduction entirely.
- Stephan Landsman, Shari Diamond, Linda Dimitropoulos, & Michael J. Saks, *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims For Punitive Damages,* 1998 Wis. L. Rev. 297 (1998).
    - This paper highlights the advantages and disadvantages to bifurcating claims for punitive damages and disproves some assumptions that have long surrounded bifurcation and its impact (or lack thereof).
- N.J. Schweitzer and Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony,* 15 Psychol. Pub. Pol'y & L. 1, 1 (2009).
    - This is a statistical analysis on the gatekeeper effect. It depicts multiple studies which tested various aspects of the gatekeeper effect on individuals to determine the impact of its use and outlines how this data should be used to help anticipate this impact in litigation.

Appendix A: Case List[22]

Alabama**:**

- PETER J. FERRARI vs. D. R. HORTON, INC.; N.D. AL; 2017; $8,027,721.30.
- WHITTED v. NORFOLK SOUTHERN RAILWAY COMPANY INC.; N.D. AL; 2016; $10,596,522.

California:

- RAMIREZ v. JACK IN THE BOX INC.; Los Angeles, CA; 2019; $15,392,801.
- HADSELL v. CITY OF BALDWIN PARK; Los Angeles, CA; 2019; $7,020,000.
- CARTER v. FEDERAL EXPRESS CORPORATION; Los Angeles, CA; 2019; $5,317,162.
- GRUZALSKI v. FEDERAL EXPRESS CORPORATION; Los Angeles, CA; 2018; $8,008,817.
- MEADOWCRAFT v. SILVERTON PARTNERS INC.; Los Angeles, CA; 2018; $11,000,000.
- RAEL v. SYBRON DENTAL SPECIALTIES, INC.; Los Angeles, CA; 2018; $31,089,793.
- MARTINEZ vs. RITE AID CORPORATION; Los Angeles, CA; 2018; $6,000,000.
- BROWN v. REGENTS OF THE UNIVERSITY OF CALIFORNIA; Lost Angeles, CA; 2018; $13,011,671.
- MOLAND vs. MCWANE INC.; Los Angeles, CA; 2018; $16,673,514.
- MITCHELL v. SEIU LOCAL 721; Los Angeles, CA; 2017; $8,461,391.
- ASTORGA v. SNAP-ON LOGISTICS COMPANY; Los Angeles, CA; 2017; $15,000,000.
- SANTOS-VIDAL v. HONGYE L.L.C.; Los Angeles, CA; 2017; $15,544,413.
- PEARL v. CITY OF LOS ANGELES; Los Angeles, CA; 2017; $17,394,972.
- BABYAK v. CARDIOVASCULAR SYSTEMS INC.; Los Angeles, CA; 2017; $25,142,120.
- SAIED, M.D. v. CENTRO MEDICO COMMUNITY CLINIC; Los Angeles, CA; 2017; $6,169,140.
- FLORES v. OFFICE DEPOT INC.; Los Angeles, CA; 2017; $10,000,000.
- TORRES v. B.E. AEROSPACE INC.; Los Angeles, CA; 2016; $8,516,000.
- MINAKSHI JAFA-BODDEN vs. BIKRAM CHOUDHURY; Los Angeles, CA; 2016; $7,396,432.
- SIMERS v. LOS ANGELES TIMES COMMUNICATIONS L.L.C.; Los Angeles, CA; 2015; $7,137,391.
- LEGGINS v. THRIFTY PAYLESS INC.; Los Angeles, CA; 2015; $8,769,128.
- KING v. U.S. BANK NATIONAL ASSOCIATION; Sacramento, CA; 2017; $24,289,696.
- ORTIZ v. CHIPOTLE MEXICAN GRILL INC.; Fresno, CA; 2018; $7,974,539.
- TILKEY v. ALLSTATE INSURANCE CO.; San Diego, CA; 2018; $18,64,959.
- COLUCCI v. T-MOBILE USA INC.; San Bernardino, CA; 2017; $5,020,042.

[22] Please note that the monetary sums listed below are the total damages awarded by the jury in each case including actual damages, emotional distress damages, and punitive damages. These do not reflect the eventual final dollar amount awarded by either the judge or subsequent jury due to the ongoing nature of these cases, many of which are still in the appellate process, as well as the various statutory caps and state laws that require courts to lessen jury verdicts in certain circumstances.

- WILLIAMS v. WYNDHAM VACATION OWNERSHIP; San Francisco, CA; 2016; $20,000,000.
- WADLER v. BIO-RAD LABORATORIES INC.; N.D. CA; 2017; $7,960,000.
- YOWAN YANG vs. ACTIONET INC.; C.D. CA; 2016; $7,400,000.

Colorado:

- CAMARA v. MATHESON TRUCKING; D. CO; 2015; $14,968,100.

Connecticut:

- BARHAM vs. WAL-MART STORES ET AL.; D. CT; 2017; $5,500,000.

Florida:

- MARIE L. JEAN PIERRE vs. PARK HOTELS & RESORT INC.; S.D. FA; 2019; $21,536,000.
- SWATERS vs. OCCUPATIONAL HEALTH CARE; Broward, FA; 2018; $5,550,000.
- EEOC, EX REL. MARTINEZ v. MORENO FARMS INC.; S.D. FL; 2015; $17,425,000.

Georgia:

- JAMES v. CSX TRANSPORTATION INC.; M.D. GA; 2016; $5,020,000.

Illinois:

- DAVIS v. PACKER ENGINEERING INC.; N.D. IL; 2017; $6,450,000.
- ARROYO v. VOLVO GROUP NORTH AMERICA LLC; N.D. IL; 2016; $7,800,000.
- RIVERA v. ALLSTATE INSURANCE; N.D. IL; 2016; $27,114,848.

Iowa:

- DANIELLE RENNENGER vs. TOYQUEST LTD ET AL; S.D. IA; 2015; $11,882,727.

Massachusetts:

- TOUSSAINT & BERTHOLD v. BRIGHAM AND WOMEN'S HOSPITAL; Suffolk, MA; 2018; $28,213,000.
- BRYAN ABRANO ET AL. vs. FRANK ABRANO ET AL; Suffolk, MA; 2018; $6,550,000.
- CHANTAL CHARLES vs. CITY OF BOSTON ET AL; Suffolk, MA; 2015; $10,888,160.

Michigan:

- KHALAF, PH.D. v. FORD MOTOR COMPANY; E.D. MI; 2018; $16,800,000.

Missouri:

- HARTMANN v. ASTELLAS PHARMA; Jackson, MO; 2018; $6,433,000.
- BROVONT, M.D. v. KS-I MEDICAL SERVICES P.A; Jackson, MO; 2018; $28,817,045.
- MILLER v. AMERICAN FAMILY INSURANCE; Jackson, MO; 2016; $20,450,000.
- GENTRY v. ORKIN L.L.C.; Jackson, MO; 2016; $10,125,892.
- MCGAUGHY v. LACLEDE GAS COMPANY; St. Louis City, MO; 2018; $8,500,000.
- MAYES v. UNITED PARCEL SERVICE INC.; St. Louis City, MO; 2018; $7,350,000.
- VACCA v. MISSOURI DIVISION OF LABOR & INDUSTRIAL RELATIONS; St. Louis City, MO; 2015; $7,000,000.

New Hampshire:

- MCPADDEN v. WAL-MART STORES EAST L.P.; D. NH; 2016; $31,222,485.

New Jersey:

- BRADEN v. LOCKHEED MARTIN CORP.; D. NJ; 2017; $51,000,000.
- MALTA-ROMAN vs. COUNTY OF HUDSON ET AL; Hudson, NJ; 2016; $8,450,000.
- EASLEY vs. NJ DEPT OF CORRECTIONS; Burlington, NJ; 2015; $7,765,778.

New York:

- SMALL v. NEW YORK STATE DEPARTMENT OF CORRECTIONS; W.D. NY; 2018; $7,020,000.
- EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EX REL. ONTANEDA v. UNITED HEALTH PROGRAMS OF AMERICA INC.; E.D. NY; 2018; $5,102,000.
- MAYO-COLEMAN vs. AMERICAN SUGAR HOLDING INC.; S.D. NY; 2018; $13,400,000.
- BOUVENG v. NYG CAPITAL L.L.C.; S.D. NY; 2015; $18,000,004.

Ohio:

- KATZ vs. CLEVELAND CLINIC FOUNDATION ET AL; Cuyahoga, OH; 2018; $28,650,000.

Pennsylvania:

- MIDDLEBROOKS vs. TEVA PHARMACEUTICALS; E.D. PA; 2018; $6,314,000.
- ALBERT GUCKER vs. U.S. STEEL CORPORATION; W.D. PA; 2016; $5,550,000.

Washington:

- ZACHRISSON v. THE PORT OF SEATTLE; King, WA; 2017; $16,097,342.
- NEWELL, M.D. v. PROVIDENCE HEALTH & SERVICES; King, WA; 2017; $17,500,000.
- ATWOOD v. MISSION SUPPORT ALLIANCE, LLC; Benton, WA; 2017; $8,100,000.
- EEOC vs. GLOBAL HORIZONS INC.; E.D. WA; 2016; $7,658,500.