Connecticut Law Tribune
June 2, 2014 Vol. 40, No. 22 ctlawtribune.com An ALM Publication

EMPLOYMENT & IMMIGRATION LAW

# Punitive Damages Claimed Under Fair Employment Act

## Appellate Court to decide matter of statutory interpretation

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Are punitive damages available to plaintiffs who prove willful employment discrimination under the Connecticut Fair Employment Practices Act, Conn. Gen. Stat. 46a-60 et seq.? That question is currently before the Appellate Court in *Tomick v. United Parcel Service*, AC 35896.

Michael Tomick was fired after working for UPS as a package truck driver for almost 20 years. His termination occurred after he returned to work with a permanent partial impairment to his back from a prior work injury, which, as UPS conceded, rendered him disabled within the meaning of the CFEPA and qualified him for its protection.

After a six-day trial, the jury found that UPS had terminated Tomick because of his disability in violation of § 46a-60, and that UPS's discrimination had been willful. The jury awarded Tomick a total of $1 million in damages, including, under the CFEPA, $100,000 in compensatory damages and $500,000 in punitive damages. UPS moved to set aside both awards. The trial judge, New London Superior Court Judge Emmet Cosgrove, rejected UPS's argument that Tomick had not established a prima facie case of disability discrimination, but agreed with UPS regarding the jury's award of punitive damages. The court held that punitive damages were not authorized by the CFEPA's remedial provision, Connecticut General Statutes § 46a-104.


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Both parties appealed. On appeal, the Appellate Court concluded that the trial court had used an improper standard when it considered the defendant's motion for a directed verdict. Consequently, it reversed the trial court's denial of the defendant's motion and remanded the case for the court to reconsider the motion de novo. In light of the remand, the court declined to consider whether punitive damages are authorized by § 46a-104 in an action brought against a private employer such as UPS.

On remand, the trial court reconsidered the arguments and the evidence and reaffirmed its denial of the defendant's motion for a directed verdict. Both parties appealed a second time. Thus, the question of whether punitive damages are available under § 46a-104 is now back before the Appellate Court in *Tomick* II.

The question, which invariably raises its head at some point during every CFEPA action, is purely one of statutory interpretation, over which the Appellate Court will have plenary review. Connecticut General Statutes § 46a-104 provides in relevant part: "The court may grant a complainant in an action brought in accordance with Section 46a-100 such legal and equitable relief which it deems appropriate including, but not limited to, temporary or permanent injunctive relief, attorney fees and court costs."

Trial courts are currently split on the availability of punitive damages under

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the CFEPA in actions against private employers. (The Appellate Court has held that because of the state's sovereign immunity, punitive damages cannot be awarded in actions against state employers.) Not surprisingly, the plaintiffs bar and the defense bar have very different views of the matter. Plaintiffs argue that punitive damages are indisputably a form of legal relief; accordingly, the plain language of § 46a-104, which authorizes all forms of "legal and equitable relief," clearly supports such an award. Plaintiffs also point out that the CFEPA is a remedial statute and that the award of punitive damages under the CFEPA undeniably furthers the act's purpose of stamping out invidious workplace discrimination. Plaintiffs note that comparable federal antidiscrimination laws, such as Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, 42 U.S.C. § 1983 and 42 U.S.C. § 1981, all currently authorize some form of exemplary relief, and that our Supreme Court has never interpreted the CFEPA more narrowly than its federal counterparts.

Defendants, on the other hand, counter that punitive damages are an extraordinary remedy that must be expressly cited in a statute in order to be authorized by the legislature. Defendants argue that because the legislature has used the term "punitive damages" in numerous other statutory schemes, its absence here signifies the legislature's intent to exclude punitive damages as a form relief under the CFEPA.

## Plain-Language Arguments

Which side of the debate the Appellate Court will come down on remains to be seen. If the plain language and policy arguments do not win the day, the decision will likely turn on a comparison of the CFEPA with federal law. Although Title VII, the ADA and the ADEA expressly authorize exemplary relief (punitive damages under Title VII and the ADA, and liquidated damages under the ADEA), 42 U.S.C. §§ 1981 and 1983 do not.

Nevertheless, despite the lack of express statutory authorization, the U.S. Supreme Court has held, in rulings that came down well before § 46a-104 was enacted, that punitive damages were available under both statutes. This is the backdrop against which § 46a-104 was enacted, and is consistent with the principle that where a general right to sue exists, courts may use any available remedy to make good the wrong done.

Another key point in the comparison between the CFEPA and federal law is the timing of the 1991 amendments to Title VII vis-à-vis the passage of § 46a-104, and the marked differences between the language of pre-amendment Title VII and § 46a-104.

Section 46a-104 was enacted June 28, 1991, by Public Act 91-331. At the time § 46-104 was enacted, Title VII had not yet been amended to authorize punitive damages. Instead, the types of relief available under Title VII were exclusively equitable. Title VII provided in relevant part that: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice … the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay … or any other equitable relief as the court deems appropriate."

Although the Connecticut Legislature could have easily adopted Title VII's language when it enacted § 46-104, it did not. Instead, it appears to have modeled § 46a-104 after the ADEA, which, since its inception in 1967, has authorized "such legal or equitable relief as may be appropriate," including liquidated damages.

The Legislature's rejection of Title VII's narrow remedial model in favor of the much broader ADEA model is indicative of its belief that equitable remedies alone were not enough to achieve CFEPA's monumental goal, namely, to achieve true equality of opportunity in employment, and that all forms of relief—whether at law or in equity—should be at the court's disposal in the fight against discrimination.

A few months after § 46a-104 was signed into law, the Civil Rights Act of 1991 was enacted. It authorized compensatory and punitive damages in Title VII actions for the first time, and confirmed the clear trend in favor of broader remedies, including exemplary damages, in antidiscrimination actions.

From our vantage point, the bottom line is clear. The CFEPA was enacted to eradicate workplace discrimination. The availability of punitive damages under § 46a-104, which because of their statutory nature would not be limited to attorney fees, is not only consistent with that goal but is consistent with the plain language of § 46a-104. As the Supreme Court counseled in *Curry v. Allan S. Goodman*, 286 Conn. 390, 412 (2008), the CFEPA must not be interpreted in a way that would thwart its purpose. ■

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