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Employment Law Note

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"Victory" Against Excessive Emotional Distress Damages?

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In April 2021, the employer world gasped when a Seattle jury awarded a fired IBM manager $11 million in damages. IBM recently received some good news: The Ninth Circuit just overturned the $6 million emotional distress verdict as excessive in *Kingston v. International Business Machines Corp*. Unfortunately, they upheld the $5 million verdict in economic damages, which was based, in part, on speculation. This decision demonstrates the unpredictability of economic damages and should be viewed as a warning to Washington's employers. As stated in Judge Ikuta's dissent: "Can an employer be held liable for terminating an employee because of the employee's protected activities if the employer did not know about those activities? Apparently yes, according to the majority."

Background

Scott Kingston sued International Business Machines Corporation (IBM) for wrongful termination and retaliation in violation of public policy, alleging that he was fired for opposing wage theft and race discrimination. Specifically, upon learning that a black salesman would not receive his full commission, Kingston expressed concerns that the existing policy might look like racial discrimination. Kingston recommended ensuring that salary caps were known upfront so employees would not think that they were being singled out or treated unfairly.

By contrast, IBM asserted that Kingston was terminated because he approved a $1.6 million commission that exceeded the approved sales quota by 2000%. The person who initially recommended Kingston's termination, along with the person who ultimately approved the termination, did not know about any "protected activity." In fact, of the five decision-makers involved, only one had "knowledge" of the "protected activity" from receipt of an email that outlined Kingston's concerns about IBM's salary caps. The email did not use the term "racial discrimination" but there was also evidence that Kingston had been instructed not to use that term.

Without objection from IBM's attorney, Kingston's attorney argued to the jury that the verdict needed to "send a message" to IBM. The jury then awarded Kingston approximately $5 million in economic and $6 million in non-economic (emotional distress) damages.

Emotional Distress

Emotional distress damages are meant to be compensatory, not punitive, and can be based solely on a plaintiff's testimony without the support of any medical professional. These damages can be overturned if the amount is outside the range of substantial evidence in the record, if it shocks the conscience of the Court, or if it appears to have been arrived at as the result of passion or prejudice. Of concern, the Court rejected IBM's arguments that asking the jury to "send a message" was unduly prejudicial.

Regarding Kingston's distress, he testified that after his termination he felt "kind of lost" and worried about how he appeared to his wife, daughter, and friends. Kingston did not seek medical treatment for depression, sleeplessness, anxiety, or anything of that nature. While the Court did not dispute that Kingston suffered

psychological distress because of his termination, the distress did not appear to have been significantly greater than what anyone might have suffered from being fired. As such, the $6 million verdict was overturned as shockingly excessive.

The Court further reasoned that no Washington court has upheld an award of greater than $1.5 million in non-economic damages in a wrongful-termination case. While not expressly stated, it is worth noting that Kingston was a white male who reported discrimination and his verdict grossly exceeded verdicts given to persons who experienced discrimination. For example, in the 1985 case of *Grays Harbor Community Hospital*, a jury only awarded $412,000 in pain and suffering to a woman who experienced extreme pain, fear, and despair during her slow death due to medical malpractice. The Court was no doubt troubled by this disconnect.

Speculation of Knowledge

Case law and common sense support that because retaliation is an intentional act, an employer cannot retaliate against an employee for an act of which the employer is unaware. However, as Judge Ikuta's dissent describes, speculation concerning knowledge, as opposed to proof of actual knowledge, can be sufficient for a plaintiff to overcome this burden. Specifically, there was no evidence that four out of the five decision-makers had any knowledge of Kingston's complaints. Also, nothing in the record supported that Kingston confronted his employer with hard or searching questions or objections or offered any resistance to IBM with respect to alleged race discrimination. Rather, the "knowledge" of Kingston's concerns came from an email in which Kingston stated he was "not thrilled" with IBM's approach to commissions "but understood," and recommended IBM set the ground rules more clearly in advance to avoid future disappointment. This email was sufficient to confer liability.

Moving Forward

Judge Ikuta's dissent should be a chilling cautionary reminder for employers about the risks associated with any termination. Moreover, while emotional damages are intended to make an injured party whole rather than to punish a defendant, the Ninth Circuit's decision not to overturn the award, which was based on Kingston's argument to "send a message" to IBM, reveals the challenges employers face during trials involving allegations of discrimination or other wrongful conduct against an employee. To reduce the risks of facing a wrongful termination claim, employers should regularly update employee handbooks and policies to clearly communicate the steps employees must take to report wrongful activities so that corrective action can be promptly taken.

If you have questions or would like to discuss issues raised by this decision, please do not hesitate to reach out to our office.

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