

**Practice Tips for Overcoming the Title VII Damage Cap of \$50,000 for Compensatory and Punitive Damages for Small Employers with less than 100 employees**

**By Glenn C. McGovern  
Metairie, La.**

While there are Title VII caps on compensatory and punitive damages that severely limit Title VII general and punitive damages depending on the number of employees, but for the attorney who artfully pleads additional state causes of action, Title VII also allows for recovery of uncapped compensatory damages. (See Title IX Education Amendments of 1972 Sect. 901-902 as amended, 20 U.S.C. Sect. 1681-1688.) For employees working in academic settings, discrimination actions can be filed under Title IX, which allows recovery of uncapped compensatory damages. See *Franklin v. Gwinnett County Publ Schools*, 503 U.S. 60, 112 S.Ct. 1028, (1992). In a race claim, filing under Section 1981, may be another option to escape the caps. But for Title VII sexual harassment claims a plaintiff may face the caps on general and punitive damage limits that vary with the number of employees of the employer. These cap limits on damages are very low, old and out of date are as follows:

<b>Number of Employees</b>	<b><u>Damage Cap</u></b>
15-100 employees	\$ 50,000
101-200 employees	\$ 100,000
201-500 employees	\$ 200,000
500 plus employees	\$ 300,000

All is not lost. There is away to increase general damages against small employers thru artful pleading.

**A practice pointer: It is important that state law claims always be plead to get around the Title VII caps on damages.**

Louisiana state law claims for assault, battery, intentional infliction of emotional distress and negligent hiring and supervision, rape and sexual battery, all of which claims are state law unlimited damage claims can be considered by a court and can be awarded in excess of the Title VII caps on general and punitive damages. Pendant state law discrimination claims in a properly plead federal court complaint will allow a larger uncapped amount of awards than the \$50,000 cap that would be present for an employer of less than 100 employees.

Under, 42 U.S.C. §1981 (a). Damages in Cases of Intentional Discrimination in Employment (b)(3)(A), back pay and front pay are not treated as compensatory damages, thus are not subject to these damage caps. *Pollard v. E. 1. Du Pont de*

*Nemours & Co.*, 532 U.S. 843, 848, 121 S.Ct. 1946, 1949; *Johnson v. Spencer Press of Maine, Inc.*, (1st Cir. 2004) 364 F.3d 368, 378.

### **State law claims for discrimination under La. R.S. 23:301 are uncapped**

Note there is no cap for state sexual harassment claims under state discrimination law La. R.S. 23:301. This claim can often be combined with state causes for assault and battery for rape, sexual assault, sexual battery and intentional infliction of emotional distress, all of which are also not subject to any cap on damages. This must be plead in addition to the federal causes of action. You could just file a sexual harassment case in state court under Title VII and state causes of action, but the awards of attorney fees are generally much higher in federal court than state court. Sometimes, for example if the employer only has 15, (the minimum to be an employer under Title VII), but less than 20 employees ,(required to be a employer under state law), you may only have a Title VII cause of action with the caps. You can still plead the below state causes of actions and get around the Title VII caps.

### **Intentional Infliction of Emotional Distress Caused by Sexual Harassment is uncapped**

If the defendant acted with outrageous conduct and plaintiff is verbally and physically abused to the extreme with the harasser acting with malice, disregard and the harasser's conduct such that his conduct was truly outrageous and grossly inappropriate, a cause of action for intentional infliction of emotional distress may lie. A cause of action of emotional distress intentionally caused by extreme and outrageous conduct was recognized in *White v. Monsanto*, 585 So.2d 1205 (La. 1991). A plaintiff seeking to recover for intentional infliction of emotional distress must establish: (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *White v. Monsanto, cited supra*. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities and persons must necessarily be expected to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. *King v. Phelps Dunbar, LLP*, 743 So.2d 181, 185 (La. 6/4/99).

The essential elements of an intentional infliction of emotional distress claim are: (1) intent to cause (2) severe emotional distress by (3) extreme and outrageous conduct. *White v. Monsanto Co.*, 585 So.2d 1205 (La. 1991). "The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* at 1209. Merely tortuous or illegal conduct does not rise to the level of extreme and outrageous. *Nicholas v. Allstate Ins. Co.*, 765 So.2d 1017 (La. 8/31/00).

*Bustamento v. Tucker*, 607 So.2d 532 (La. 1992) has suggested that a claim of sexual harassment could be based on an intentional infliction of emotional distress. An employer's continued inaction may give rise to a claim for intentional infliction of emotional distress. *Martin v. Bigner*, 665 So.2d 709 (La. App. 2 Cir. 12/6/95).

A plaintiff may recover for unintentional or negligent infliction of emotional distress unaccompanied by physical injury, where the defendant's negligent conduct is deemed to be outrageous. See *Succession of Harvey v. Dietzen*, 716 So.2d 911, 916 (La. App. 4 Cir. 6/24/98). In order to recover, the plaintiff must show the existence of an "especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." *Doe v. Smith*, 913 So.2d 140 (La. App. 4 Cir. 7/13/05), citing, *Moresi v. State through Dept. of Wildlife and Fisheries*, 567 So.2d 1081 (La. 1990).

### **Assault and Battery of Plaintiff by Defendant Causes of Action are uncapped**

Defendant, under La. C.C. Article 2315, provides that a person may recover damages for injuries caused by a wrongful act of another. The fault concept includes the intentional tort or battery. *Landry v. Bellanger*, 851 So.2d 943, 949 (La. 5/20/03). Battery is "[a] harmful or offensive contact with a person resulting from an act intended to cause the plaintiff to suffer such a contact . . ." *Caudle v. Betts*, 512 So.2d 389, 391 (La. 1987); *Landry*, 851 So.2d at 954. The defendant's intention need not be malicious nor need it be an intention to inflict actual damage. *Landry*, 851 So. 2d at 954. It is sufficient if the defendant intends to inflict either a harmful or offensive contact without the other's consent. *Id. Brungardt v. Summitt*, 7 So.3d 879 (La. App. 4 Cir. 4/8/09).

"Assault is an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery." La. R.S. 14:36. A battery is an intentional harmful contact with another. *Caudle v. Betts*, 512 So.2d 389 (La. 1987). Mere words do not constitute an assault. *Muslow v. A.G. Edwards & Sons, Inc.*, 509 So.2d 1012 (La. App. 2 Cir. 1987), *writ denied*, 512 So.2d 1183 (La. 1987). Yet, a combination of threats, present ability to carry out the threats, and reasonable apprehension of harmful or offensive contact may suffice. *Id. Groff v. Southwest Beverage Co., Inc.*, 997 So.2d 782 (La. App. 3 Cir. 11/5/08).

### **Conclusion: Always plead all state causes of action to increase damages**

Just, yesterday I had a sexual harassment case for three employees in federal court. The employer only had 23 employees, so I was facing a \$50,000 cap on Title VII general and punitive damages for each plaintiff with the prospect of a dismally total small Title VII award of just \$150,000. Fortunately I plead the additional state causes of action for sexual assault, sexual battery, intentional infliction of emotional distress, retaliation and state discrimination claims. Instead of a facing a possible \$150,000 Title VII award for three plaintiffs, (one of which were sexually assaulted one of which was grossly sexually battered and a male with a pure retaliation/wrongful termination claim only), I received judgments totalling of over \$1,101,831 plus attorney fees using the above practice tips.