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COMMENT

WHAT CAN BROWN DO FOR YOU? YOU'RE FIRED: PUNITIVE DAMAGES FOR ROGUE EMPLOYEE CONDUCT IN *JONES V. UPS*

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I. INTRODUCTION

Fueled by the quest for judicial economy, tort reform in the United States continues to challenge the delicate balance between the public's right of access to the courts and the overwhelming costs of meritless lawsuits. Perhaps one of the most contentiously debated topics within the trend of tort reform is the administration of punitive damages, economic remedies which have the power to cripple losing defendants. Under the Kansas employment-at-will doctrine, there are several limitations on an employer's otherwise unrestricted ability to terminate at-will employees, some of which justify the assessment of punitive damages when violated.

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In *Jones v. United Parcel Service, Inc.* (UPS), the United States Court of Appeals for the Tenth Circuit made a valiant attempt to limit the application of unjustified punitive damages in a retaliatory discharge claim.[1] Despite this noble effort, however, the court fell short of truly taming the corrosive effect of punitive damages by failing to set aside the entire amount.

This Comment begins with a brief history of the development of workers' compensation, an overview of the retaliatory discharge claim, and an exploration into punitive damages available for such claims. Thereafter, the facts, procedural history, and opinion of *Jones v. UPS* are summarized with particular focus on the sole proposition of error recognized by the Tenth Circuit—the excessive amount of punitive damages.[2] Despite the court's step in the right direction, this Comment concludes with a critical analysis of the court's decision to reduce, but not completely eliminate, the jury's grant of punitive damages. In light of the evidence presented at trial, it was a stretch[3] for the jury to conclude UPS was liable for retaliatory discharge, let alone worthy of punitive damages.[4]

II. HISTORICAL DEVELOPMENT OF THE RELEVANT LAW

A. Workers' Compensation

During the industrial revolution of the early nineteenth century, new technology and mass production not only increased the productivity of

1. Jones v. United Parcel Serv., Inc. (*Jones III*), 674 F.3d 1187 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 413 (Oct. 1, 2012).

2. *Id.*

3. Jones v. United Parcel Serv., Inc. (*Jones I*), 658 F. Supp. 2d 1308, 1332 (D. Kan. 2009), *aff'd in part, rev'd in part*, 674 F.3d 1187 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 413 (Oct. 1, 2012).

> This was a close case at trial, both on liability and damages. Both parties were ably represented by outstanding trial lawyers, whom the court respects. Although the court acknowledges the possibility that senior management at UPS subjectively and genuinely believed they did nothing wrong in terminating plaintiff's employment, the bottom line is that the trial record reasonably supports the jury's finding that defendant retaliated against plaintiff for filing a workers' compensation claim. The jury's awards of damages, although on the high side . . . are sustainable given the record.

Id.

4. *Id.* ("The punitive damage award, in particular, comports with the Supreme Court's recent pronouncements dealing with due process.").

American workers but also concentrated the workforce into more centralized locations.[5] At factories, for example, employees were exposed to many new work-related dangers as a result of this new proximity, including powerful machines operating at break-neck speeds.[6] Unfortunately, at the time, negligence by the employer was the primary basis for imposing liability in tort for work-related injuries, a form of liability insulated by the powerful defenses of contributory negligence, assumption of risk, and common employment.[7] In an effort to level the playing field, state legislatures created workers' compensation statutes to provide economic remedies for work-related accidents absent any fault by the employer.[8] However, this employee-friendly legislation was not without compromise.[9] Generally, employees under the early statutes were required to give up their "common law right to sue" their employer in exchange for "automatic" compensation paid by their employer, albeit in amounts reduced and fixed to a statutory scheme.[10]

5. *See generally* Joseph A. Montagna, *The Industrial Revolution*, YALE-NEW HAVEN TCHRS. INST., http://www.yale.edu/ynhti/curriculum/units/1981/2/81.02.06.x.html (last visited Oct. 19, 2012).

6. *See generally* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982).

7. *Id.*

> Since negligence was widely regarded as the proper basis of liability, the requirements of the employee's prima facie case were not the principal legal issue. Instead, the legal battle raged over the famous trinity of defenses: contributory negligence of the employee, assumption of risk, and common employment.

Id. at 775–76.

8. *Id.* at 776.

> Yet more than bare theoretical interest attached to the articulation and justification of the appropriate legal rules, for the entire area of employers' liability was widely thought to go to the heart not only of tort law, but also of the relationship between capital and labor in the production and exchange of goods and services. Indeed, by virtue of its apparent social and economic consequences, not to mention its sheer emotional importance, the problem could not in the end be contained within the judicial system. When workers' compensation was introduced, it was done everywhere by legislation—legislation that in an explicit fashion adopted the views of the critics, not the defenders, of the nineteenth-century common law synthesis.

Id.

9. *See generally* Jean C. Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 HASTINGS L.J. 551 (1986).

10. Kelsay v. Motorola, Inc., 384 N.E.2d 353, 356 (Ill. 1978).

1. Kansas Workers' Compensation

In 1911, Kansas adopted the first version of its Workers' Compensation Act, and since 1975 the state legislature has made yearly changes to the various types of compensation paid to injured employees.[11] Currently, all Kansas employers are required to provide compensation coverage unless they fall in one of the few enumerated exceptions provided by law—for example, agricultural businesses or those with annual payroll expenses of less than $20,000.[12] For employees working for one of these excluded businesses, the state provides protection through the Kansas Workers' Compensation Fund.[13] On balance, all Kansas employers must be able to secure compensation for all injured employees by either keeping insurance, demonstrating the ability to pay for such claims themselves, or showing membership in a qualified group-funded pool.[14] In the event of a work-related injury for which an employee properly files a claim, a Kansas employer is required to pay the injured employee two-thirds of his or her gross average weekly wage, subject to the maximum benefits allowed by law.[15] In addition, injured employees are entitled to coverage for *all* medical treatment necessary to cure or relieve the effects of the injury, although the employer has the right to choose the treating physician.[16]

At this juncture, two particular facets of workers' compensation must be noted: workers' compensation is *paid by the employer*, and injured employees only receive such compensation *so long as they are*

> Pursuant to the statutory scheme implemented by the [Workers' Compensation] Act, the employee gave up his common law rights to sue his employer in tort, but recovery for injuries arising out of and in the course of his employment became automatic without regard to any fault on his part. The employer, who gave up the right to plead the numerous common law defenses, was compelled to pay, but his liability became fixed under a strict and comprehensive statutory scheme, and was not subjected to the sympathies of jurors whose compassion for fellow employees often led to high recovery.

Id.

11. *Current and Historic Benefit Levels*, KAN. DEP'T LAB., http://www.dol.ks.gov/WorkComp/current.aspx (last visited Oct. 21, 2012).

12. KAN. STAT. ANN. § 44-505(a)(1)–(2) (2000).

13. *See id.* § 44-566a(e).

14. *Id.* § 44-532.

15. *Id.* § 44-510c(a)(1).

16. *Id.* § 44-510h(a)–(b)(2). If unsatisfied with the chosen physician, employees may apply to the Director of Workers' Compensation for a change of doctor, or employees may see their own doctor but compensation from their employer is limited to $500. *Id.*

employed.[17] One cannot help but consider the situation of at-will employees. Correspondingly, some employers recognized this loophole and subsequently sought ways to creatively *cut costs*.

2. Kansas Employment-at-Will Exception

Pursuant to the doctrine of employment-at-will, employers may terminate an at-will employee "'for good cause, for no cause, or even for a wrong cause, without incurring liability to the employee for wrongful discharge.'"[18] While Kansas has long adhered to this doctrine, it has "gradually eroded" the principle through judicially created exceptions in an effort to provide protection to at-will employees.[19] One such exception is the prohibition against terminating an employee "in retaliation for filing a workers compensation claim."[20] In 1981, in *Murphy v. City of Topeka*, the Kansas Court of Appeals first recognized the tort of retaliatory discharge,[21] approximately eight years after the tort had first been judicially recognized in the United States.[22] Specifically, the court worried that employers could undermine the Kansas Workers' Compensation Act by intentionally and wrongfully coercing injured employees into ignoring their statutorily conferred rights by threatening termination.[23]

B. Retaliatory Discharge

In his treatise on workers' compensation, Professor Arthur Larson speculates that it took courts a relatively long time to recognize retaliatory discharge as a cause of action because employers likely took great steps to prevent such "contemptible" conduct from becoming public knowledge.[24] At the same time, Congress carved out federal exceptions to employment-at-will arrangements by enacting the Civil

17. *See id.* § 44-508(b).

18. Bracken v. Dixon Indus., Inc., 38 P.3d 679, 682 (Kan. 2002) (quoting Morriss v. Coleman Co., 738 P.2d 841, 846 (Kan. 1987)).

19. Ortega v. IBP, Inc., 874 P.2d 1188, 1191 (Kan. 1994), *overruled by In re* B.D.-Y., 187 P.3d 594 (Kan. 2008) (holding that "clear and convincing evidence" is evidence that shows the truth of the facts asserted is highly probable).

20. *Bracken*, 38 P.3d at 682.

21. *See* Murphy v. City of Topeka, 630 P.2d 186 (Kan. Ct. App. 1981).

22. *See* Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973).

23. *Murphy*, 630 P.2d at 192.

24. *See* Love, *supra* note 9, at 552.

Rights Act of 1964; specifically, Title VII made it unlawful for any employer to terminate an employee because of "race, color, religion, sex, or national origin."[25] By the same token, Title VII also protected employees who opposed unlawful business practices by their employer and those who assisted investigations into such illegal practices.[26] Consequently, the first raw form of retaliatory discharge was born.[27]

1. Determining the Appropriate Law in Diversity Cases

In diversity cases, such as the one this Comment critiques, courts utilize "'the substantive law of the forum state'" to determine the presence of an underlying claim, but "'federal law controls the ultimate, procedural question.'"[28] Therefore, in determining the factual question as to whether the defendant committed retaliatory discharge, state-specific law provides the elements necessary to establish a prima facie case.

25. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a) (2006)); *see generally* Delbert L. Spurlock, Jr., *Proscribing Retaliation Under Title VII*, 8 IND. L. REV. 453 (1975). *See also* Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 740 (2008).

> In many respects, Title VII was a "toothless tiger" prior to the 1991 amendments [to the Civil Rights Act], which gave litigants the ability to obtain significant monetary relief. Rather than simply making the plaintiff whole, the addition of punitive damages to Title VII gave courts and juries a way to punish employers for their illegal conduct. Indeed, Congress hoped that imposing additional damages on those employers that violate Title VII would help to prevent such discriminatory conduct, and the public certainly perceives that punitive damage awards are instrumental in eradicating unlawful employment practices. Even the mention of punitive damages strikes a certain fear in the hearts of executives of large and small corporations alike . . . . Punitive damages are thus widely regarded as one of the single greatest motivators in preventing employers from discriminating against their workers.

Id. (citations omitted).

26. Civil Rights Act § 704, 78 Stat. at 257.

27. *See* Love, *supra* note 9, at 554 ("Congress' creation of a retaliatory discharge action in Title VII may well have paved the way for *Frampton's* recognition of a retaliatory discharge action in the workers' compensation setting.").

28. Jones v. United Parcel Serv., Inc. (*Jones III*), 674 F.3d 1187, 1195 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 413 (Oct. 1, 2012) (quoting Wagner v. Live Nation Motor Sports, Inc., 586 F.3d 1237, 1244 (10th Cir. 2009)); *accord* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see also* Miller v. Cudahy Co., 858 F.2d 1449, 1457 (10th Cir. 1988) ("[T]he circumstances under which punitive damages are available are governed by state law, as are the substantive elements upon which such an award may be based.").

2. Prima Facie Retaliatory Discharge under Kansas Common Law

The Kansas Supreme Court adopted the *McDonnell Douglas* burden-shifting analysis[29] in *Rebarchek v. Farmers Cooperative Elevator*.[30] Accordingly, plaintiffs bear the initial burden of establishing a prima facie case of retaliatory discharge when alleging their employer terminated them in retaliation for filing a workers' compensation claim.[31] The *Rebarchek* court outlined four elements necessary to prove a prima facie case:

> (1) The plaintiff filed a claim for workers compensation benefits or sustained an injury for which he or she might assert a future claim for such benefits; (2) the employer had knowledge of the plaintiff's workers compensation claim injury; (3) the employer terminated the plaintiff's employment; and (4) a causal connection existed between the protected activity or injury and the termination.[32]

Once the plaintiff establishes a prima facie case, however, the employer is afforded the opportunity to avoid liability by demonstrating, for example, that the employee was physically unable to perform the tasks required of the position; in short, a plaintiff's physical deficiency may be a legal justification for his or her termination.[33] This is not to say that an employer is never liable for terminating an employee who is unable to return to work. On the contrary, a court must consider all of the evidence to properly determine the true motivation for the plaintiff's termination, not just the employer's stated reason.[34] If the employer provides evidence supporting a legal justification for the termination, the

29. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) ("The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

30. Rebarchek v. Farmers Coop. Elevator, 35 P.3d 892, 898 (Kan. 2001).

31. *Id.* at 898–99 (citing Sanjuan v. IBP, Inc., 160 F.3d 1291, 1298 (10th Cir. 1998)).

32. *Id.* at 899.

33. *See, e.g.*, *id.* at 898 (quoting Ortega v. IBP, Inc., 874 P.2d 1188, 1196–97 (Kan. 1994), *overruled by In re* B.D.-Y., 187 P.3d 594 (Kan. 2008)).

34. *See Sanjuan*, 160 F.3d at 1298–1300; *see also* Ingels v. Thiokol Corp., 42 F.3d 616, 621 (10th Cir. 1994), *abrogated on other grounds by* Semsroth v. City of Wichita, 304 F. App'x 707 (10th Cir. 2008) ("After the defendant meets the burden of producing a facially nondiscriminatory reason for the employment decision, the presumption of discrimination established by the prima facie showing 'simply drops out of the picture.'" (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993))).

plaintiff has a final opportunity to present evidence showing the employer's justification "is a mere cover-up or pretext for retaliatory discharge."[35]

In most retaliatory discharge cases, the central question will hinge on the fourth element—a causal connection between the filing and the subsequent termination—because the other three elements are more readily proven: workers' compensation claims are recorded documents, employers acknowledge claims by paying out compensation or recording it themselves, and termination is self-evident. Because employers "will rarely admit to retaliatory intent,"[36] plaintiffs seeking remedies for retaliatory discharge must often rely on circumstantial evidence to prove the causal connections required for a prima facie case.[37] Consequently, the precise proximity between the two can be highly persuasive evidence depending on the length of time and relevant precedent.[38] Using this evidence, the trier of fact must ultimately determine whether liability should be assessed against the employer and, if such liability attaches, whether punitive damages should be imposed in addition to compensatory damages.[39]

C. Punitive Damages

When first adopted as a cause of action in the United States, retaliatory discharge was characterized as "an intentional, wrongful act . . . for which the injured employee is entitled to be fully compensated."[40] Since such claims are tort actions, it follows that

35. Bracken v. Dixon Indus., Inc., 38 P.3d 679, 682 (Kan. 2002).

36. Weidler v. Big J Enters., Inc., 1998-NMCA-021, ¶ 31, 124 N.M. 591, 953 P.2d 1089 (1997).

37. *See* Marinhagen v. Boster, Inc., 840 P.2d 534, 540 (Kan. Ct. App. 1992).

38. *See* Gertsch v. Cent. Electropolishing Co., 26 P.3d 87, 90 (Kan. Ct. App. 2001) ("The trial court agreed that Gertsch presented evidence of close temporal proximity to his discharge and the protected activity. This is highly persuasive evidence of retaliation."); *compare* White v. Tomasic, 69 P.3d 208, 213 (Kan. Ct. App. 2003) (holding twenty days between the worker's injury and his termination was "sufficient to establish a prima facie showing of causal connection"), *with* Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997) (holding that a three-month differential, by itself, is insufficient to establish causation).

39. *See* Capital Solutions, LLC v. Konica Minolta Bus. Solutions U.S.A., Inc., 695 F. Supp. 2d 1149, 1155–56 (D. Kan. 2010) (holding part of KAN. STAT. ANN. § 60-3702(a) (2005) unconstitutional because "the Seventh Amendment guarantees [plaintiffs] the right to have the entirety of [their] claim for punitive damages, including the determination of the amount, decided by the jury").

40. Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973).

retaliatory discharge is a type of intentional tort.[41] Accordingly, punitive damages are available for a defendant's "conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."[42] In reference to retaliatory discharge, punitive damages are appropriate when the rights of employees are deliberately violated in such a way that requires conspicuous punishment to deter similar conduct by all employers in the future.[43]

1. Availability in Kansas Diversity Cases

In diversity cases in Kansas, the decision to award punitive damages is a task for the trier of fact.[44] To submit the option for punitive damages, a plaintiff must prove "by clear and convincing evidence" that the defendant acted with "willful conduct, wanton conduct, fraud or malice."[45] Even if the fact-finder determines the employer unlawfully retaliated against the plaintiff, punitive damages are not automatically imposed because the employer may have "reasonably believed that his retaliatory conduct was entirely lawful" and thus not acted willfully or wantonly.[46] An employer's reasonable belief, however, is not dispositive. Punitive damages may still be assessed against an employer seemingly acting in good faith as long as the employer "appreciate[d] the wrongfulness, harmfulness, or injuriousness of the act itself."[47] In short, the jury may infer that the employer offered a pretextual justification to camouflage its deliberate retaliation.[48] If punitive damages are

41. *See* Murphy v. City of Topeka, 630 P.2d 186, 190 (Kan. Ct. App. 1981); *see also* Carol Abdelmesseh & Deanne M. DiBlasi, Note, *Why Punitive Damages Should be Awarded for Retaliatory Discharge Under the Fair Labor Standards Act*, 21 HOFSTRA LAB. & EMP. L.J. 715, 730 (2004).

42. RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).

43. *See* Abdelmesseh & DiBlasi, *supra* note 41, at 730–31.

44. *See Capital Solutions*, 695 F. Supp. 2d at 1154:

> [I]n the Supreme Court's view, an award of punitive damages . . . has traditionally been a task for the jury; thus, under the required Seventh Amendment historical analysis, the right to a jury attaches not only to the issue of a plaintiff's entitlement to punitive damages, but also to the amount of such damages.

Id.

45. KAN. STAT. ANN. § 60-3702(c) (2005).

46. Hysten v. Burlington N. Santa Fe Ry. Co., 530 F.3d 1260, 1277–78 (10th Cir. 2008).

47. *Id.* at 1277.

48. *Id.*

determined to be appropriate, the question then becomes *who* determines the amount.

2. Determining the Amount: Judge or Jury . . . or *Erie*

The Seventh Amendment of the United States Constitution establishes that "the right of trial by jury shall be preserved."[49] Rule 38 of the Federal Rules of Civil Procedure further provides that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution . . . is preserved to [all] parties inviolate."[50] Thus, federal law demands that a jury determine the amount of any punitive damages imposed. By contrast, Kansas state law holds that if punitive damages are imposed by a jury, then the *state court* must hold a "separate proceeding . . . to determine the amount of . . . damages to be awarded."[51] Recently, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the Supreme Court resolved the dispute by holding that an *Erie* analysis was unnecessary when a federal rule conflicts with a state law.[52] Rather than wandering down the treacherous path of *Erie*, federal district courts sitting in diversity should embark on a two-prong analysis: if the federal rule addresses the specific question in dispute, and then, if the federal rule exceeds statutory authorization or Congress's rulemaking power.[53] This second prong is satisfied in favor of the federal rule if it regulates mere procedure—procedural rules, by definition, do not breach the Rules Enabling Act or Congress's rulemaking power.[54]

3. Authorization or Ratification by the Employer

Finally, to assess punitive damages, malicious conduct must be "authorized or ratified by a person expressly empowered to do so on behalf of the . . . employer" if the malicious conduct was committed by

49. U.S. CONST. amend. VII.

50. FED. R. CIV. P. 38(a).

51. KAN. STAT. ANN. § 60-3702(a) (2005) ("If such [punitive] damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded.").

52. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010).

53. *See generally id.*

54. *Id.* at 1437.

an unempowered employee.[55] *Authorization* refers to conduct approved before it occurs whereas *ratification* refers to approval of conduct after the fact.[56] In regard to the latter, ratification need not be expressly given since it may be implied "based on a course of conduct indicating the approval, sanctioning, or confirmation of the questioned conduct."[57] Therefore, if an unempowered employee commits questionable conduct that is not authorized nor expressly ratified, the plaintiff's last hope rests on implied approval after the fact.

III. JONES V. UPS

A. Facts

Like most retaliatory discharge cases, the central focus of *Jones* is on the causal connection between the filing of the plaintiff's workers' compensation claim and his subsequent termination.[58] In addition to analyzing the causal connection, it is also necessary to examine the precise relationship between all of the defendant's employees involved with the plaintiff's most recent injury.[59] Accordingly, the plaintiff's work history and a catalogue of the events surrounding his most recent injury are particularly relevant.

1. Jones's Work History

In 1985, Keith Jones started work at a UPS warehouse in Kansas City in an entry-level position where he loaded packages onto UPS delivery trucks.[60] Four years later, Jones was promoted to the position of delivery driver—an at-will position that required him to be able to lift packages weighing up to seventy pounds above his head.[61] During his

55. KAN. STAT. ANN. § 60-3702(d)(1); *see also* Smith v. Printup, 866 P.2d 985, 1004 (D. Kan. 1993) (defining what types of employees may be "empowered" per the language of the Kansas statute).

56. *Smith*, 866 P.2d at 1002 (defining "authorization" and "ratification" using WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 146 (1986) and BLACK'S LAW DICTIONARY 133 (6th ed. 1990)).

57. *Id.* at 1003.

58. Jones v. United Parcel Serv., Inc. (*Jones III*), 674 F.3d 1187, 1197 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 413 (Oct. 1, 2012).

59. *See id.* at 1198.

60. *Id.* at 1193.

61. *Id.*

fourteen years working as a delivery driver, Jones suffered several injuries for which he filed workers' compensation claims: a left-shoulder injury requiring surgery in 1991; a twisted knee in 1993; a right-shoulder injury requiring surgery in 1996; and another injury to the right shoulder in 1999 requiring "surgery and extensive rehabilitation."[62] While employed at UPS, Jones was also a member of the International Brotherhood of Teamsters Local Union No. 41 (Local 41) and was thus subject to the collective bargaining agreement (CBA) between UPS and Local 41.[63]

2. Timeline of Jones's Most Recent Injury

On October 6, 2003, Jones reinjured his left shoulder on the job and subsequently filed a workers' compensation claim.[64] On the day of the injury, Dr. Gary Legler, a UPS company doctor, examined Jones and determined that he could return to work subject to the restrictions that he could not lift packages weighing more than twenty pounds and could not lift any packages above his shoulder.[65] Consistent with Dr. Legler's restrictions, Jones returned to work on October 6, 2003, and was assigned to temporary alternative work,[66] which he worked for about six weeks.[67] On approximately October 10, 2003, Dr. Legler examined Jones again and referred him to Dr. Daniel Stechschulte, an orthopedic surgeon, who examined Jones four times during October and November of 2003.[68] During one of these examinations, Dr. Stechschulte administered a functional capacity exam (FCE)[69] to test Jones's ability to

62. *Id.*

63. *Id.*; *see also About Us*, TEAMSTERS LOCAL 41, http://teamsters41.org/index.cfm?zone=/unionactive/view_page.cfm&page=About20Us (last visited Oct. 21, 2012).

64. *Jones III*, 674 F.3d at 1193. Jones began receiving benefits by mid-November 2003. *Id.*

65. *Id.*

66. *See National Master United Parcel Service Agreement*, TEAMSTERS LOCAL 804, 35, http://teamsterslocal804.org/sites/teamsterslocal804.org/files/UPSContract.pdf (last visited Oct. 21, 2012) (though this agreement was not in force at the time of Jones's injuries, it is helpful for its description of the purpose of the Temporary Alternative Work program as a temporary work opportunity to injured employees who cannot perform their normal assignments due to their injury).

67. *See* Jones v. United Parcel Serv., Inc. (*Jones I*), 658 F. Supp. 2d 1308, 1313 (D. Kan. 2009), *aff'd in part, rev'd in part*, 674 F.3d 1187 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 413 (Oct. 1, 2012).

68. *Id.* at 1311; *Jones III*, 674 F.3d at 1193.

69. A functional capacity exam/evaluation (FCE) is an assessment of an employee's functional capacity in a particular position. *See Work Conditioning & Functional*

perform the specific tasks required of a delivery driver.[70]

After evaluating the results of Jones's FCE, a physical therapist determined that Jones was unable to satisfy the lifting demands needed by a UPS delivery driver.[71] On December 4, 2003, Jones returned to physical therapy and "took another FCE . . . with the same results."[72] Based on these tests, Dr. Stechschulte determined Jones had improved as much as possible, and he released Jones to return to work with permanent lifting restrictions.[73] After reviewing Jones's work release and work restrictions, Don Lewick, UPS's labor manager, informed Jones that he could not return to work as a delivery driver or to any other position at UPS.[74] Jones contacted his union representative and then scheduled an appointment with a different doctor pursuant to the union's recommendation.[75]

On February 3, 2004, Jones was examined by Dr. Poppa, who released him to work as a delivery driver without any lifting restrictions.[76] Before he could return to work, however, the CBA required Jones to be reexamined by Dr. Legler.[77] When Jones returned to Dr. Legler on February 9, 2004, Jones presented the work release issued by Dr. Poppa, but he "did not disclose the . . . permanent lifting restrictions" imposed by Dr. Stechschulte.[78] During the evaluation with Dr. Legler, Jones successfully lifted seventy pounds, and Dr. Legler released him to work as a delivery driver without any lifting restrictions.[79] "Dr. Legler sent a copy of [his] work release to Monica Sloan, an occupational health manager in the human resources department at UPS," who managed the disabilities of UPS employees in the Kansas City office.[80]

Capacity Evaluations, JOHNS HOPKINS MED., http://www.hopkinsmedicine.org/rehab/services/core.html (last visited Oct. 21, 2012).

70. *Jones III*, 674 F.3d at 1193.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 1194.

3. Monica Sloan's Influence

On the same day that she received the work release, Monica Sloan contacted Dr. Legler to inform him that Dr. Stechschulte had previously imposed a permanent lifting restriction in December 2003.[81] At trial, Dr. Legler later testified that "Sloan asked him 'if he would . . . mind changing [his] return to work evaluation to reflect the 20 pound lift limit that Dr. Stechschulte had given [Jones].'"[82] However, Sloan later testified that she merely asked Dr. Legler to review *all* of the medical reports and "'rethink the full duty release.'"[83] Regardless of what exactly Sloan said, Dr. Legler revised his work release to reflect the restriction of "'20 lb. overhead lift limit per ortho,'"[84] and UPS consequently refused to reinstate Jones when he subsequently reported for work.[85] Jones then filed a grievance with Local 41, and a panel of union and company representatives heard his complaint.[86] Following the guidelines set forth in the CBA, the grievance panel directed Jones to see an independent third doctor, selected by both parties, "'whose decision [would] be final and binding.'"[87] Moreover, the panel admonished both parties not to attempt to "'circumvent the decision' of the [independent] third doctor."[88] UPS and the union subsequently selected Dr. Frederick Buck who examined Jones on May 21, 2004.[89] During the examination, Dr. Buck observed Jones successfully complete a basic lifting and strength test, but Dr. Buck concluded that he needed to administer another FCE to properly give his diagnosis.[90]

When Dr. Buck called Sloan to get permission to perform the test, Sloan refused to authorize it because Jones already received one in December 2003.[91] Sloan further advised Dr. Buck that his examination was *only* to consider existing medical records and previous evaluations

81. *Id.*
82. *Id.* (omission in original) (alterations in original) (quoting trial appendix).
83. *Id.* (quoting trial appendix).
84. *See* Jones v. United Parcel Serv., Inc. (*Jones I*), 658 F. Supp. 2d 1308, 1312 (D. Kan. 2009), *aff'd in part, rev'd in part*, 674 F.3d 1187 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 413 (Oct. 1, 2012).
85. *Jones III*, 674 F.3d at 1194.
86. *Id.*
87. *Id.* (quoting trial addendum).
88. *Id.* (quoting trial addendum).
89. *Jones I*, 658 F. Supp. 2d at 1312.
90. *Jones III*, 674 F.3d at 1194.
91. *Id.* at 1194 & n.1. According to the CBA, UPS and Jones would have split the cost of the additional FCE, but Sloan refused to authorize UPS's payment of its half. *Id.*

by other doctors.[92] Although Dr. Buck testified at trial that he considered Sloan's instructions "unusual" because he had never performed an examination based solely on past medical records, he nonetheless relied on Dr. Stechschulte's permanent lifting restriction and concluded that Jones could not perform the tasks required of a delivery driver.[93] Jones filed a second grievance, alleging that UPS's failure to pay for another FCE was "'unfair,'" which the grievance panel heard in June 2004.[94] After the hearing, the panel ordered Jones to return to Dr. Buck to repeat the third-doctor procedure, which Jones did in August.[95] Although there was no contact between Dr. Buck and Sloan this time,[96] Dr. Buck was still under the impression he was to rely exclusively on previous medical records.[97] As such, Dr. Buck again concluded Jones was unfit to return to work as a delivery driver, and because Dr. Buck's opinion was controlling under the terms of the CBA, the union affirmed UPS's subsequent decision not to reinstate Jones.[98]

B. Procedural History

Jones filed suit against UPS in January 2005 in the United States District Court for the District of Kansas alleging two claims: "disability discrimination and retaliation in violation of the Americans with Disability Act of 1990 (ADA) . . . and . . . retaliatory discharge in violation of Kansas common law."[99] UPS moved for summary judgment on both claims, and the district court granted UPS's motion on Jones's ADA claims but denied its motion on the state law claim.[100] Since Jones did not allege diversity of citizenship in his suit in federal court, the court "declined to exercise supplemental jurisdiction over the claim prospectively."[101]

92. *Id.* at 1194.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 1198. Lewick testified that he instructed Sloan not to speak with Dr. Buck before the second evaluation so she would not "muddy the waters." *Id.*
97. *Id.* at 1194.
98. *Id.* at 1195.
99. *Id.*
100. *See* Jones v. United Parcel Serv., Inc., 411 F. Supp. 2d 1236, 1261–62 (D. Kan. 2006), *aff'd in part, rev'd in part*, 502 F.3d 1176, 1180–82 (10th Cir. 2007).
101. *Jones III*, 674 F.3d at 1195.

Consequently, Jones re-filed his state law claim in the District Court of Wyandotte County, Kansas, and UPS removed the action back to federal district court.[102] At the end of a six-day trial, a jury awarded Jones $630,307 in actual damages and $2 million in punitive damages after finding UPS acted "with willful conduct, wanton conduct, fraud, or malice."[103] UPS moved for a new trial and for a judgment as a matter of law, but both motions were denied by the district court.[104] Jones, meanwhile, moved to add prejudgment interest to the portion of his compensatory damages that related to his back pay, but this motion was also denied.[105] After the district court entered judgment on the jury verdict, UPS filed a timely appeal to the United States Court of Appeals for the Tenth Circuit.[106] On October 24, 2011, a three-judge panel[107] for the Tenth Circuit affirmed—in a split decision—all of the district court's holdings *except* the amount of punitive damages awarded to Jones.[108] Having found the amount of punitive damages to be "constitutionally excessive,"[109] the court remanded the case and gave Jones a choice: a new jury trial solely to determine the amount of punitive damages, or acceptance of a remittitur where the district court would determine the amount of punitive damages.[110]

Instead, Jones filed a petition for rehearing en banc and, in the alternative,[111] requested a panel rehearing to determine the maximum amount of punitive damages.[112] The Tenth Circuit submitted Jones's request for en banc consideration to all active judges of the court, but no member requested a polling to determine whether en banc consideration

102. *Id.*

103. *Id.* at 1195, 1200 (quoting KAN. STAT. ANN. § 60-3702(c) (2005)).

104. *Id.* at 1195.

105. *Id.*; *see also* Jones v. United Parcel Serv., Inc. (*Jones I*), 658 F. Supp. 2d 1308, 1331–32. (D. Kan. 2009), *aff'd in part, rev'd in part*, 674 F.3d 1187 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 413 (Oct. 1, 2012).

106. *Jones III*, 674 F.3d at 1195.

107. Jones v. United Parcel Serv., Inc. (*Jones II*), 32 Individual Emp. Rts. Cas. (BNA) 1633 (10th Cir. Oct. 24, 2011), *withdrawn*, 674 F.3d 1187 (2012). Chief Judge Briscoe, Judge McKay, and Judge Hartz comprised the three-judge panel.

108. *Id.* at 1646.

109. *Id.*

110. *Id.*

111. *Jones III*, 674 F.3d at 1192. Jones did not specifically request a rehearing en banc or panel review. Rather, the court treated the vague language of his appeal as a request for both.

112. *Id.*

was necessary.[113] Despite this denial, the Tenth Circuit granted Jones's request for a panel rehearing and withdrew its earlier opinion.[114] On March 5, 2012, the same three-judge panel issued an amended opinion in a similar split decision.[115]

C. Opinion

Upon rehearing, the Tenth Circuit reviewed UPS's five positions of error de novo.[116] In these propositions, UPS alleged:

> (1) it is entitled to judgment as a matter of law on Jones's retaliation claim; (2) the district court erred in giving two improper jury instructions; (3) it is entitled to judgment as a matter of law on Jones's claim for punitive damages; (4) the district court erred in allowing the jury to decide the amount of punitive damages; and (5) the jury's award of $2 million in punitive damages violated its federal due process rights.[117]

After analyzing the facts in the light most favorable to UPS, the court rejected all of UPS's claims of error *except* the amount of punitive damages.[118] This time, the Tenth Circuit panel determined the amount of punitive damages and remanded the case back to the district court to enter a punitive damage award equal to the compensatory damage award.[119]

1. Prima Facie Retaliatory Discharge

First, in determining whether Jones provided sufficient evidence to establish a prima facie case for retaliatory discharge, the court focused on the temporal proximity between the filing of Jones's workers' compensation claim and Sloan's contact with his doctors—it was undisputed that Jones filed a claim, UPS knew of such claim, and Jones was ultimately terminated.[120] After examining the record, the court

113. *Id.* at 1192.
114. *Id.*
115. *Id.*
116. *See generally Jones III*, 674 F.3d 1187.
117. *Id.* at 1192.
118. *Id.* at 1192–93.
119. *See id.*
120. *Id.* at 1197; *see also* Rebarchek v. Farmers Coop. Elevator, 35 P.3d 892, 898–99

concluded there was sufficient evidence to support the jury's determination that UPS retaliated against Jones.[121] The court next considered UPS's contention that Jones failed to prove its justification for terminating him was pretextual,[122] and the majority concluded there was sufficient evidence to support the jury's finding that UPS's proffered justification was merely a cover-up.[123]

2. Improper Jury Instructions

Second, the court analyzed whether UPS was entitled to a new trial based on two jury instructions that misstated Kansas state law.[124] While the court conceded the two instructions "did not inform the jury regarding the law as well as they could have," the court ultimately determined that UPS had not been unfairly prejudiced and accordingly denied UPS's request for a new trial.[125]

3. Appropriateness of Punitive Damages

Third, the court examined whether the facts of the case justified the imposition of punitive damages against UPS.[126] The court noted that Sloan "intentionally interfered with" Jones's doctors on multiple

(Kan. 2001) (defining the four elements necessary to prove retaliatory discharge in the state of Kansas).

121. *Jones III*, 674 F.3d at 1197.

122. *See* Ingels v. Thiokol Corp., 42 F.3d 616, 621 (10th Cir. 1994) (holding that proof of a prima facie case creates a rebuttable presumption of a retaliatory intent).

123. *Jones III*, 674 F.3d at 1198. *Contra id.* at 1209 (Hartz, J., dissenting). Judge Hartz stated that "the evidentiary support for the verdict [was] thin" and indicated a "particular concern [with] the element of causation—that is, whether Sloan's misconduct was motivated by Jones having filed a workers' compensation claim." *Id.* Moreover, Judge Hartz found there was insufficient evidence to prove by a "clear and convincing" standard that Sloan's conduct was actually motivated by the filing of Jones's workers' compensation claim. *Id.* In the same vein, Judge Hartz also found there was insufficient evidence to prove that Lewick knew about Sloan's specific conduct, knew her conduct was in retaliation for the workers' compensation claim, and consequently ratified both. *Id.* at 1210.

124. *Jones III*, 674 F.3d at 1199.

125. *Id.* at 1199–1200. *See also* McInnis v. Fairfield Cmtys. Inc., 458 F.3d 1129, 1141 (10th Cir. 2006) (holding that only defective instructions that misguide a jury *and* are prejudicial will require reversal).

126. *Jones III*, 674 F.3d at 1200; *see also* Miller v. Cudahy Co., 858 F.2d 1449, 1457 (10th Cir. 1988) ("In a diversity case, the circumstances under which punitive damages are available are governed by state law, as are the substantive elements upon which such an award may be based.").

occasions, which ultimately proved to be the prime reason for Dr. Buck's confusion.[127] The court determined the jury reasonably could have concluded that Sloan's actions were willful and malicious, thus justifying punitive damages against UPS.[128]

Additionally, the court addressed UPS's contention that it could not be liable for punitive damages, irrespective of the nature of Sloan's conduct, because Sloan's conduct was never authorized or ratified by someone "expressly empowered" by UPS, a requirement of Kansas law.[129] Since there was no evidence of prior authorization or express ratification after the fact, the court focused exclusively on whether Sloan's conduct was impliedly ratified by Lewick, whom the court found to be expressly empowered by UPS due to the nature of his position as the labor manager for the Kansas City office.[130] After reviewing the evidence, the court determined that a reasonable jury could have concluded Lewick ratified Sloan's actions because Lewick "knew that Dr. Legler [had] issued an amended report," he was aware that Sloan had previously spoken with Dr. Buck, "he instructed Sloan not to speak with Dr. Buck further," and he was "directly involved with Jones's union grievances."[131]

4. Determining the Amount

Fourth, the court evaluated UPS's argument that Kansas state law required the *district court* rather than the jury to determine the amount of punitive damages, as directed by Rule 38.[132] After determining Rule 38 to be a valid federal rule, the court recognized that an *Erie* analysis

127. *Jones III*, 674 F.3d at 1200; *contra id.* at 1211 (Hartz, J., dissenting) ("[O]ne would expect Jones to inform Dr. Buck of the reason for the repeated visit—Sloan's improperly telling Dr. Buck not to order a functional evaluation. . . . Indeed, it is baffling why Jones did not so inform Dr. Buck [of the reason for his return].").

128. *Jones III*, 674 F.3d at 1202.

129. *Id.*; *see also* KAN. STAT. ANN. § 60-3702(d)(1) (2005) (stating that punitive damages may not be assessed against an "employer for the acts of an . . . employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the . . . employer").

130. *Jones III*, 674 F.3d at 1201; s*ee also* Wrig v. Kinney Shoe Corp., 448 N.W.2d 526, 534 (Minn. Ct. App. 1989) (holding corporation implicitly ratified employee's improper conduct by recognizing it and permitting it to continue).

131. *Jones III*, 674 F.3d at 1202; *cf. id. at* 1210–11 (Hartz, J., dissenting) (questioning Lewick's actual involvement in Jones's grievance process given the fact he handled thirty-five to fifty grievances each week).

132. *Jones III*, 674 F.3d at 1202–03; *see also* FED. R. CIV. P. 38.

would be unnecessary,[133] and the court then applied the two-prong test from *Shady Grove*[134] to determine which law should control.[135] As a result, the court found that Rule 38 directly addressed the issue and further concluded the rule neither exceeded Congress's rulemaking power nor exceeded statutory authorization.[136] Put simply, the court concluded that Rule 38 governed procedure and thus trumped state law.[137] As such, the court held that the district court properly allowed the jury to determine the amount of punitive damages.[138]

5. Excessive Amount of Punitive Damages

Fifth, and most importantly, the court reviewed UPS's contention that the jury's $2 million punitive damage award violated its Fourteenth Amendment due process protection against grossly excessive punishments.[139] Using *Hardeman v. City of Albuquerque* as a guide, the court analyzed the excessive nature of the punitive damages by using three factors: "'(1) the degree of reprehensibility of [UPS's] action; (2)

133. *Jones III*, 674 F.3d at 1203.

> "The framework for our decision is familiar. We must first determine whether [the rule] answers the question in dispute. If it does, it governs—[state] law notwithstanding—unless it exceeds statutory authorization or Congress's rulemaking power. We do not wade into *Erie*'*s* . . . murky waters unless the federal rule is inapplicable or invalid."

Id. (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010)) (alterations in original).

134. *Shady Grove*, 130 S. Ct. at 1434, 1437 (holding that courts should "not wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid," and defining the two-prong test as "whether [the federal rule] answers the question in dispute" and does not "exceed[] statutory authorization or Congress's rulemaking power").

135. *Jones III*, 674 F.3d at 1204–06. The court examined previous Supreme Court holdings as well as a Kansas district court opinion which held that juries traditionally determined the amount of punitive damages. *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15–16 (1991); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001).

136. *Jones III*, 674 F.3d at 1204–06. "'The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.'" *Id.* at 1206 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

137. *Id.* at 1206.

138. *Id.* at 1202, 1206; *see also* Capital Solutions, LLC v. Konica Minolta Bus. Solutions U.S.A., Inc., 695 F. Supp. 2d 1149, 1150 (D. Kan. 2010) (holding that the jury determines the amount of any punitive damages awarded "because the Seventh Amendment guarantees the right to a jury trial on that issue").

139. *Jones III*, 674 F.3d at 1206; *see also* U.S. CONST. amend. XIV.

the disparity between the actual harm suffered by [Jones] and the punitive damage award; and (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases.'"[140]

Because "[t]he degree of reprehensibility of the defendant's conduct is 'the most important indicium of the reasonableness of a punitive damage award,'"[141] the court started by analyzing UPS's conduct against five considerations established by the Supreme Court.[142] The court concluded, though it was "a close question," that $2 million in punitive damages was excessive.[143] Next, after examining the ratio between the punitive damage award and the actual damage award, the court concluded the punitive damage award was excessive by mere comparison.[144] Although there is no bright-line ratio threshold, the court adduced that "'[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'"[145] The court agreed with UPS that Jones's compensatory damage award of $630,307 was indeed "substantial," thereby making the punitive damage award grossly excessive by comparison.[146] Finally, the court reviewed comparable employment cases from other circuits where courts struck down excessive punitive damages awarded by a jury.[147] From there, the court

140. *Jones III*, 674 F.3d at 1206–07 (quoting Hardeman v. City of Albuquerque, 377 F.3d 1106, 1121 (10th Cir. 2004) (echoing the guideposts delineated by the Supreme Court for determining whether punitive damages are grossly excessive in BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1995))).

141. *Id.* at 1207 (quoting *BMW*, 517 U.S. at 575).

142. *Id.*; State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. (citing *BMW*, 517 U.S. at 576–77).

143. *Jones III*, 674 F.3d at 1207.

144. *Id.* at 1207–08.

145. *Id.* at 1207 (quoting *State Farm*, 538 U.S. at 425).

146. *Id.* The court specifically noted that the ratio of compensatory to punitive damages did not "push the boundaries of due process." *Id.* at 1208. Instead, the compensatory damages violated UPS's due process rights by comparison. *Id.*

147. *Id.*; *see, e.g.*, Morgan v. N.Y. Life Ins. Co., 559 F.3d 425, 428 (6th Cir. 2009) (striking down $10 million in punitive damages where a former insurance company executive already won a substantial $6 million in compensatory damages); Watson v.

expanded its consideration to cases "outside of the employment arena" where courts specifically struck down punitive damage awards because they were excessive in comparison to compensatory damages.[148] After discussing all of these considerations, the court concluded that Jones's punitive damage award was excessive.[149]

Unlike in its first withdrawn opinion, the Tenth Circuit set the amount of Jones's punitive damages and remanded the case to have the district court enter that ruling.[150] The court reasoned that it had the power to decide the issue because a reduction in damages was a federal constitutional issue, not a sufficiency of the evidence issue, and appellate courts decide federal constitutional issues.[151] Consequently, the court adjusted Jones's punitive damages to equal his compensatory damages based on the standard articulated by the Supreme Court.[152] The district court, upon remand, was ordered to enter a punitive damage amount of $630,307 for Jones.[153]

E.S. Sutton, Inc., 225 F. App'x 3, 4 (2d Cir. 2006) (upholding punitive and compensatory damage award of over $2 million because the punitive damage portion was only half the size of the compensatory damage).

148. *Jones III*, 674 F.3d at 1208; *see, e.g.*, Mendez-Matos v. Municipality of Guaynabo, 557 F.3d 36, 55–56 (1st Cir. 2009) (striking down $350,000 in punitive damages because the $35,000 compensatory damage amply compensated the plaintiff); Bridgeport Music, Inc. v. Justin Combs Publ'g, 507 F.3d 470, 488–89 (6th Cir. 2007) (overturning punitive damages of $3.5 million when the plaintiff received a substantial compensatory damage award of $366,939); Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594, 603 (8th Cir. 2005) (remitting punitive damages of $15 million when compared to compensatory damages of $4 million).

149. *See Jones III*, 674 F.3d at 1208; *see also id.* at 1209 (Hartz, J., dissenting). Considering the fact that Judge Hartz dissented from the finding of a prima facie case, it is logical to conclude he also found the punitive damages excessive. As he states, "out of great deference to the jury, I can accept the verdict on liability. But that is as far as deference can take me." *Id.*

150. *Jones III*, 674 F.3d at 1209.

151. *Id.* at 1208 n.8; *accord* Cont'l Trend Res., Inc. v. OXY USA Inc., 101 F.3d 634, 642 (10th Cir. 1996) (holding that an excessive punitive damage award violates the substantive element of the Due Process Clause of the Federal Constitution, and thus such matter is a federal constitutional issue ripe for an appellate court to decide).

152. *Jones III*, 674 F.3d at 1208; State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

153. *Jones III*, 674 F.3d at 1208–09.

IV. ANALYSIS

A. Uncontroverted Facts

At the outset, this Comment agrees that a reasonable jury could have found for Jones in his retaliatory discharge claim, and it further concedes that Sloan's contact with Dr. Legler and Dr. Buck unequivocally prevented Jones from returning to work. At the same time, however, the reasoning behind the court's decision to uphold punitive damages (of any amount) can only be described as utterly mysterious. For one, Lewick never endorsed any of Sloan's contact at any time. Quite the opposite actually—Sloan was expressly forbidden from contacting Dr. Buck once Lewick first discovered her misconduct at the second grievance hearing.[154] Moreover, Sloan had nothing to do with Jones's final evaluation, which was a complete breakdown of communication between doctor and patient. Jones, for his part, can only blame himself. He filed a grievance, he attended the resulting hearing, and he specifically requested Dr. Buck for the second third-doctor evaluation. Yet for some reason he failed to tell Dr. Buck why he had returned for the second visit, and he willfully left Dr. Buck's office without receiving an FCE, the precise test he knew controlled his vocational fate.[155] Not to be outdone, Dr. Buck evaluated Jones using the same "unusual" examination process he had previously expressed hesitation about—a diagnosis solely using past records—even though Jones had returned for the exact same procedure.[156] The fact that neither person said anything is truly astonishing.[157] Given the incredible facts of this case, the Tenth Circuit arguably committed a grave injustice by permitting any amount of punitive damages to be imposed.

B. The Punitive Damage Objective

Because the purpose of punitive damages is to *increase* punishment and *amplify* public deterrence, punitive damages are not always appropriate, even when a defendant loses his case. In Kansas, retaliatory discharge cases are held to the preponderance of the evidence standard,

154. *Id.* at 1198.
155. *Id.* at 1197.
156. *Id.*
157. Neither Lewick nor Sloan could have informed the doctor why Jones had returned because both were abiding by the rules set forth by the grievance panel. *See id.* at 1194.

but punitive damages in the same cases must be proven by the heightened standard of "'clear and convincing evidence.'"[158] Generally, civil litigation is designed to compensate the plaintiff, not to punish the defendant as in criminal law.[159] Here, because the trial court and the Tenth Circuit both recognized this case was incredibly close,[160] punitive damages should have been precluded—Jones had already received what was necessary to "redress [the] actual injury."[161]

1. Deterrence

One purpose of punitive damages in civil litigation is to deter third parties from committing misconduct similar to that which subjected a defendant to the punitive damages. But, if the evidence in a retaliatory discharge case points heavily in both directions, then punitive damages will inherently be ineffective at sending a deterrent message to employers because of the facial unpredictability.[162] Moreover, the

158. Lindsey v. Miami Cnty. Nat'l Bank, 984 P.2d 719, 722 (Kan. 1999) (quoting KAN. STAT. ANN. § 60-3702(c) (1994)); *see also Jones III*, 674 F.3d at 1200 (quoting KAN. STAT. ANN. § 60-3702(c) (2005)).

159. *See* Bass v. Chi. & N.W. Ry. Co., 42 Wis. 654, 672 (1877).

> It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished.

Id. (Ryan, C.J.)

160. *See* Jones v. United Parcel Serv., Inc. (*Jones I*), 658 F. Supp. 2d 1308, 1332 (D. Kan. 2009), *aff'd in part, rev'd in part*, 674 F.3d 1187 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 413 (Oct. 1, 2012).

161. Brian C. McManus, Note, *Analyzing Excessive Punitive Damages under Massachusetts Law*, 36 SUFFOLK U. L. REV. 559, 560 (2003).

162. E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1057 (1989).

> The central failing of punitive damages that renders them incompatible with modern tort law is *unpredictability*. The modern conception of tort law as a regulatory system depends on predictability, so that the actions taken *ex post* in one case can be used by others as *ex ante* incentives to guide future behavior. From the perspective of potential tortfeasors, punitive damages are an unguided missile: it may or may not strike them, but *there is very little that potential tortfeasors can do to alter their risks of punitive damages.* As a consequence, punitive damages are fundamentally out of step with the new regime in tort law, which is committed to the concept of efficient deterrence.

Id. (citation omitted).

general idea that punitive damages consciously serve as a deterrent could arguably be considered legal fiction—few employers are cognizant of the punitive damages issued in their jurisdiction, let alone why the punitive damages were assessed.[163] Here, because the court imposed punitive damages on such close evidence, there is a high probability that the punitive damages will serve solely as a windfall to Jones, a wholly inappropriate result of civil litigation.[164] Thus, *Jones* operates as a poor mechanism for regulating malicious conduct in the employment arena.

2. Punishment

Furthermore, the actions by UPS (through Sloan) are not the traditionally despised conduct associated with evil employers—such as sexual harassment, racial discrimination, or offensive and hostile work environments—which inherently deserves stern punishment. Unlike criminal defendants who are protected by the principle of double jeopardy, civil defendants can theoretically be subject to multiple punitive penalties—surely a threat to constitutional protection.[165] In light of this danger, punitive damages should be used sparingly because they have the awesome power to financially cripple an employer, including those wrongfully charged, thereby exceeding any punitive purpose. In this case, although UPS will have no trouble footing a $1.2 million bill, the court should have been more mindful of the power of such a lethal legal weapon and considered alternative methods for punishing UPS. By brandishing punitive damages in response to these questionable facts, the court sets a dangerous precedent for the future with regard to the proportion of punishment warranted by ambiguously ratified conduct.

163. James D. Ghiardi, *The Case Against Punitive Damages*, 8 FORUM 411, 418 (1972); *see also Symposium: Reforming Punitive Damages: The Punitive Damage Debate*, 38 HARV. J. ON LEGIS. 469, 484 (2001) ("Because companies are unable to accurately assess either the risk of punitive damages or the likely magnitude of those damages, they are unable to make rational decisions.").

164. *See Bass*, 42 Wis. at 672 (Lyon, J.).

165. *See* Ghiardi, *supra* note 163, at 418–20 (discussing how, in reference to criminal law, punitive damages fail to utilize the three most critical factors in creating deterrent criminal sanctions—swiftness, certainty, and magnitude); *see also* Elliot, *supra* note 162, at 1062–68.

3. Sufficiency of the Evidence

In this case, there was no evidence tending to prove, by any standard of evidence, that Sloan interfered with Jones's ability to return to work *specifically because* he filed a workers' compensation claim. Assuming, *arguendo*, UPS did ratify Sloan's actions, the evidence heavily favors the proposition that UPS's ratification would in no way be motivated by the workers' compensation claim—Jones had filed multiple claims in the past without incident, Jones had already returned to temporary alternative work after filing the most recent claim, and more than three months elapsed between Jones's filing and Sloan's interference. While three months may push the outer limit of the time considered appropriate for a retaliatory discharge claim, the court mysteriously found it was perfectly sufficient for this contentious case.[166] If anything, a borderline question as to the causal connection should be ruled in favor of UPS—ties have always gone to the runner.

In truth, the court was far too suspicious of UPS, Sloan, and Lewick as master conspirators. The mere suggestion that Jones's demise was concocted behind closed doors casts incredible doubt on the imposition of over $600,000 in punitive damages. Jones was likely one of hundreds of employees working for UPS at the Kansas City location, and Lewick testified that he handled up to fifty employee grievances each week.[167] Sloan's conduct was improper, certainly, but Sloan was not empowered to represent UPS. With no evidence of authorization or express ratification, Jones was resigned to rely on the tenuous definition of implied ratification.[168] While the jury may have been convinced—albeit narrowly—and the court affirmed—albeit a 2-1 split decision—there is simply not enough evidence to justify the additional punishment embodied in punitive damages. Likewise, by holding Sloan's rogue conduct sufficient for punitive damages against UPS, the court subjects the law of retaliatory discharge to future inconsistent interpretations, which could have a massive effect as legal precedent. Here, Sloan was *not* the only person involved with controlling the outcome of Jones's

166. *Compare* Jones v. United Parcel Serv., Inc. (*Jones III*), 674 F.3d 1187, 1197 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 413 (Oct. 1, 2012), *with id.* at 1209 (Hartz, J., dissenting) (stating that a three-month separation between the filing of a workers' compensation claim and subsequent termination should be insufficient temporal proximity standing alone).

167. *See Jones III*, 674 F.3d at 1210 (Hartz, J., dissenting).

168. *See* Smith v. Printup, 866 P.2d 985, 1002 (Kan. 1993).

final diagnosis: Dr. Buck and Jones both inexplicably failed to intervene. Using this case as a guide, future employers will be forced to try to instruct their employees to conform their conduct in the event other people fail to intervene on their own behalf—it sounds absurd. Placing such pressure on a company and its employees is contradictory to the purpose of punitive damages.[169] With so much uncertainty, the court treks dangerously close to flinging open Pandora's box, despite valiant judicial and legislative efforts via tort reform to reign it back in.

C. The Case for Corporate Immunity

It is patently unfair to hold massive corporations liable for incidental conduct that may be committed by one of their employees—such a burden is intolerable. The dangers of demanding such broad responsibility from an employer are exhibited by the immunity typically granted to government agencies. In Kansas, government agencies are protected from liability for the acts committed by their employees in many different situations; the Kansas Tort Claims Act provides more than twenty-five different exceptions to governmental liability for the acts of government employees.[170] Perhaps the exception most similar to the present case, immunity is granted when governmental employees "perform a discretionary function of duty on the part of a governmental entity or employee, *whether or not the discretion is abused and regardless of the level of discretion involved*."[171] Here, Sloan's communication with Dr. Legler was part of her responsibility as disability manager, and such discretion was clearly abused. While not a perfect transposition, it is safe to assume that if a Kansas state agency were the defendant in this case rather than UPS, the case would have never been briefed.

For the sake of practicality, the government cannot be held responsible for the many actions made by its employees in the performance of their duties because, if it were, meritless lawsuits aimed at the government's treasury would clog the operation of government. In the same way, the finances of large employers make them similar targets. Big employers hardly deserve the same legal protection as a government,

169. *See* Elliott, *supra* note 162, at 1062.

170. KAN. STAT. ANN. § 75-6104 (2005).

171. *Id.* § 75-6104(e) (emphasis added); *see also* 28 U.S.C. § 2680(a) (2006). The Federal Tort Claims Act contains similar exceptions.

but protection from unwarranted punitive damages would further a principle that the Kansas legislature has already committed itself to. Moreover, tort reform is a direct response to the increasing number of frivolous civil lawsuits, and federal courts should not issue rulings that cut directly against Kansas's adopted objective. Considering the elimination of frivolous lawsuits is a primary goal of tort reform, the court's decision to impose punitive damages against UPS ensures tort reform will struggle to succeed. After all, Sloan's conduct hardly demands the dubious "oh-my-gosh-did-you-see-that-jury-award!" distinction.

D. The True Cost of Punitive Damages

By imposing punitive damages based on the weak evidence in *Jones*, the court sets the stage for a variety of future costs to employers. Thrilled by the prospect of winning the new punitive damages lottery, employees with meritless claims against an employer might feel compelled "to bring an action when he otherwise would not."[172] Even if innocent, however, meritless lawsuits still require the employer to pay for litigation to make the case go away, to settle, or to even proceed to trial. Consequently, because an employer can financially suffer in more than one scenario, employer costs will inevitably rise, with those costs likely passed on to buyers via higher prices or to employees via lower wages and benefits.[173] For context, the number of lawsuits filed by employees against an employer has quadrupled over the past two decades, and the cost to settle such cases has tripled in the past five years.[174] Given these trends, the last thing the court should encourage is more costly lawsuits and further

172. Ghiardi, *supra* note 163, at 417.

173. *See* Elliott, *supra* note 162, at 1061.

> An empirical study of corporate responses to tort liability in the product liability area . . . suggests a skeptical response to the claim that punitive damages have a significant influence on corporate decisions. . . .
>
> The most common corporate response to products liability awards was to increase prices slightly, but [the study author] also found modest effects on product labeling, design, and discontinuation.

Id. (citations omitted). By applying this research to the present case, it is clear that increased prices would affect the public, and discontinuation of products could result in termination of employees who happen to be assigned to those discontinued divisions.

174. *See* Elizabeth Erickson & Ira B. Mirsky, *Employers' Responsibilities When Making Settlements in Employment-Related Claims*, BLOOMBERG L. REP., http://www.mwe.com/info/pubs/Bloomberg_Employers.pdf (last visited Oct. 21, 2012).

erosion of the employer–employee relationship, which has dramatically improved since the industrial revolution.

Acknowledging that some retaliation claims will not be truthful, imagine the pressure on the employee innocently responsible for a massive jury verdict against the company. Employees responsible for the alleged misconduct can become ostracized themselves, or possibly even terminated, leading to a vicious cycle of retaliation—legal or not.[175] After a time, employees could begin to abuse the entire process and create distrust between the management and the employees. Correspondingly, distrust could manifest itself through strict office policies that restrain creativity or employee autonomy, or appear disguised as over-management causing poor employee morale. Thus, the cost to employers via punitive damages is simply not limited to the financial sense.

V. CONCLUSION

Punitive damages are a difficult problem to solve in the employment arena, but *Jones v. UPS* is far from the model answer. There are undoubtedly situations where employers deserve to be subjected to massive punitive damages to punish and deter conduct that is deleterious to society, but this case is not one; inappropriate contact by one employee to another employee's doctor (which was subsequently remedied by UPS via the terms of the CBA) followed by an inexplicable doctor's visit hardly compares to race-specific promotion or overt sexual harassment. What is particularly regrettable is the court's decision to not fully vacate Jones's punitive damage award once the court recognized the punitive portion of the jury's verdict was flawed. Linking all the way back to English common law, the Supreme Court has previously noted, "[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded."[176] Here, the court simply did not go far enough. Without espousing a clear guide, courts under the authority of the Tenth Circuit will likely struggle to apply the holding of *Jones* to future cases. Even though the reduction in punitive damages was well intended, it seems more than arguable that the court came up short in truly delivering the appropriate remedy given the unique facts of this case. In reality, this

175. *See* Elliott, *supra* note 162, at 1069 ("When everyone is responsible for a misdeed, no one is responsible.").

176. Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 421 (1994).

case is likely to have little impact beyond a few changes to an employee handbook or two, but the propensity demonstrated by the Tenth Circuit should draw serious attention from the legal community and advocates of tort reform, especially critics of punitive damages. After all, we have made tremendous progress in the public's perception of punitive damages since a spilled cup of McDonald's hot coffee.[177]

177. *See* Liebeck v. McDonald's Rests., P.T.S., Inc., No. CV-93-02419, 1995 WL 360309 (2nd Dist. Ct., Bernalillo Cnty., N.M. Aug. 18, 1994), *vacated*, 1994 WL 16777704 (Nov. 28, 1994).