Discrimination Damages are Expensive
by Darren Feider

In *Collins v. Clark County Fire District, No. 5*, 2010 WL 820039 (March 11, 2010), a Washington appellate court reversed the trial court's post trial reduction of the jury damage award for loss wages and emotional distress and affirmed the plaintiff's attorney fee award. In Collins, the plaintiff was a first aid and health care instructor at a regional training center for the fire department. Her supervisor routinely made sexually inappropriate comments about the female employees and female visitors. He commented on their breasts, their legs, and other body parts. He also made "boys club" comments and excluded women from staff meetings and conversations. Further, he made derogatory comments about women's intelligence and attitude. He would sexually curse the plaintiff when he was frustrated with her. The plaintiff did not complain to the training center's HR department because her supervisor was the contact person. At the Christmas party she did complain to the fire department chief who said he would attempt to steer her aware from her supervisor. She received no follow up from him concerning her concerns. She then pushed her concerns up to the board commissioner and, as a result, her supervisor gave her the cold shoulder and became hyper-critical about her performance. He became extremely angry toward her. At the same time, the plaintiff was suffering from depression and anxiety because her child had been molested and she was going through a divorce. She began to lose weight.

The training center needed to retain a degreed and experienced EMT to teach the training programs and the plaintiff recommended an individual for that position. After his hiring, the supervisor told the plaintiff that the center lacked sufficient funds to pay her and the trainer. The supervisor then informed the plaintiff that her position was being cut because they did not have sufficient funds to pay her compensation and benefits along with the newly hired trainer. She sought temporary counseling for her mental health problems caused by her treatment and her personal issues. She also sought a new job but injured her knee in a ski accident thereby cutting off her ability to mitigate her damages.

Another employee experienced similar treatment when she was retained. She tried to fit in with the "boys club" atmosphere by engaging in sexual banter with the supervisor and exchanging inappropriate emails with him. She too suffered demeaning comments from the supervisor causing panic and anxiety attacks, depression, insomnia, and recurring nightmares about the supervisor. Her physician recommended that she not return to the job because of her mental health condition. She began meeting with a psychotherapist who advised her not to return to work. She remained on the city's benefit plan until she was terminated for failure to return to work. After her termination, she attempted to get a degree and start her own business, but she was unsuccessful and instead took an executive assistant position in a manufacturing company.

Two other female employees had similar experience and they both quit because of the supervisor's remarks. All four individuals filed a lawsuit against the supervisor, and the county. The supervisor testified that none of the four plaintiffs told him his remarks were inappropriate, he admitted to making some of the alleged inappropriate and discriminate comments including commenting on female anatomy, using the word bitch with female employees, dreaming about them, claiming that they were in their menstrual period, and

discussing their anatomy. He explained that the lead plaintiff's termination was because there was no budget for her position and the training center needed someone with a degree.

The plaintiff's expert witnesses calculated their wage and pension loss for 10 years arriving at a figure in excess of $2 million. Plaintiffs had their physicians, counselors, and psychotherapist testify at trial along with retaining a forensic psychiatrist who testified to the long term effects of the training center environment. Plaintiff's counsel asked for $1 million in emotional distress damages for each plaintiff in closing argument. The jury awarded over $3.2 million. That included awarding the plaintiff who had sent her own sexually explicit emails and pictures to the supervisor over $300,000.

Although recognizing that Collins' behavior was in appropriate, the supervisor knowingly permitted her conduct to occur but promoted it. Therefore, the employer is responsible for the supervisor's actions. The plaintiffs were awarded approximately $700,000 in attorneys fees. The court allowed a higher average hourly rate than the local rate to reflect the highly specialized nature of the lawsuit and because the plaintiff's lawyer had funded over $160,000 in costs to bring the lawsuit. The trial court awarded almost $753,000 in attorneys fees and costs.

On appeal the court refused to reduce the amount of damages awarded as this is a factual question which is constitutionally designated for the fact-finder. The court found that there was substantial evidence to support the damage awards. The trial court noted that the jury had reduced the requested damages, thereby showing evidence that the damage award was not excessive. The plaintiff withdrew from the labor market and had her life destabilized.

The appellate court refused to overturn the plaintiff's attorney's closing remarks in which he asked the jury to send a message to the fire department and the county that the behavior was inappropriate and, while at the same time, the award wouldn't hurt the fire services. The defendants pointed out that the argument implied that the fire department wouldn't be impacted because it had insurance coverage. Although such reference to liability insurance would have been improper, the plaintiff's attorney never specifically mentioned it so it was not an issue. The plaintiff's argument to send a message although implicitly request punitive damages which are unavailable in the state of Washington, the argument was indirect and was coupled with a reference to the plaintiff's suffering that needed to be valued.

The court allowed for an adjustment up (i.e., a loan star) of the requested attorneys fees because of the risk factor in bringing the lawsuit. Thus the plaintiff's counsel was able to recover more than the hours billed in bringing the lawsuit. Based on the out of jurisdiction rate, courts will base the hourly rate on the market buyou, skill level involved, complexity of the case, customary _____ fees, the risk of contingency and benefit to the plaintiffs. In this case, it was a highly specialized field of employment law with a substantial risk, noting that plaintiffs usually face well financed defendants. The court did exclude copying costs and word processing costs as overhead. The court did not use a contingent multiplier because it had raised the hourly rate. The defendants sought to cut more time for the plaintiff's unsuccessful claims of outrage, negligence, constructive discharge, and retaliation. The

appellate court rejected that because the trial court had already cut $21,000 from the unsuccessful claims. Finally, the plaintiffs were awarded their attorneys fees on appeal.

The lessons from *Collins* are numerous. First, employers should probably train their supervisors on sexual harassment and discrimination. Supervisors need to understand that lewd, remarks, references to body parts, degrading comments and sexually based references are not acceptable and will lead to discipline. Second, employers must have multiple avenues to address complaints about workplace. In *Collins* the supervisor was the only source for the plaintiffs to complain to and when the HR department received an informal complaint, they did not follow up. The HR department should have followed up and taken action with this supervisor. Next, *Collins* teaches that supervisors cannot engage in the "cold shoulder approach" in retaliation for employee complaints. Third, *Collins* teaches that an employee's participation in the alleged harassing conduct is no defense to an employer. Juries will go out of their way to find that employees are just joining in to fit it. The supervisor must understand that there is no excuse if he or she engages in this conduct. More importantly, *Collins* teaches that the employer will be held responsible for a supervisor's conduct. When a supervisor engages in sexual harassment or, as in this case, severe demeaning conduct and comments toward women, the jury will punish the employer for putting someone in authority. Certain words should not be used because they cause severe emotional distress.