



NUCLEAR VERDICT CASE STUDY

Provided by Barnard Donegan Insurance

What Is a Nuclear Verdict?

Nuclear verdicts refer to exceptionally high jury awards—generally, those exceeding \$10 million. Such verdicts have become increasingly common in the past decade. In fact, the National Law Journal reported the average jury award among the top 100 U.S. verdicts more than tripled between 2015 and 2019, skyrocketing from \$64 million to \$214 million. Furthermore, 30% more verdicts surpassed the \$100 million threshold in 2019 compared to 2015.

A variety of factors have contributed to these trends, including rising litigation funding, eroding tort reform and, above all, deteriorating public sentiment toward businesses. Amid growing corporate distrust, businesses have not only been expected to meet higher standards in their operations but have also been held more

accountable for their wrongdoings. Upon being sued and taken to court, businesses have frequently encountered juries that are sympathetic to plaintiffs. Compounding this issue, there's a rising perception that businesses (especially large ones) can always afford the cost of damages. This means juries are likely to have fewer reservations when awarding substantial damages to plaintiffs, resulting in nuclear verdicts.

Nuclear verdicts can carry significant consequences for businesses of all sizes and sectors, causing lasting reputational harm, posing underinsurance concerns and wreaking large-scale financial havoc. That's why it's vital for businesses to better understand these verdicts and how to prevent them. This case study summarizes a recent nuclear verdict, outlines factors that led to the verdict, highlights associated compliance considerations and provides related risk mitigation measures.

\$464 Million Employment Practices Liability Loss

In February 2017, an employee at electric utility company Southern California Edison (SCE)—located in Los Angeles County—made an anonymous report to the company's ethics hotline, alleging that a supervisor was sexually harassing and using racist language toward other employees on-site. One month later, another employee made two separate reports to the same hotline, alleging that several of their women co-workers were subjected to sexual harassment from their supervisors in the workplace.

CASE DETAILS



In February 2017, an employee at electric utility company Southern California Edison (SCE)—located in Los Angeles County—made an anonymous report to the company’s ethics hotline, alleging that a supervisor was sexually harassing and using racist language toward other employees on-site. One month later, another employee made two separate reports to the same hotline, alleging that several of their women co-workers were subjected to sexual harassment from their supervisors in the workplace.

As a result of these reports, both employees faced adverse employment actions from SCE. The employee who made the first report encountered various threats and harassment from other co-workers, even though the ethics hotline was supposed to be anonymous. The employee filed complaints regarding the threats and harassment, but the complaints were largely ignored by SCE leadership. These issues ultimately motivated the employee to transfer from their position at SCE’s South Bay office to the company’s Fullerton location. However, the employee continued to experience poor treatment at their new position, eventually causing them to take a leave of absence and never return to their role.

On the other hand, the employee who made the two separate reports—a worker with 16 years of experience at SCE and a previously spotless employment record—had six different workplace complaints filed against them within a month. Some of these complaints were anonymous, while others were from the supervisors the employee had reported. From there, SCE leadership used the complaints to conduct an investigation and determined the employee violated multiple workplace policies. Upon hearing the results of this investigation, the employee resigned from their position at SCE to avoid termination. Yet, even after their resignation, SCE leadership banned the employee from returning to company property, therefore limiting their future employment opportunities with any SCE contractors.

After facing these adverse employment actions, the two employees sued SCE and its parent company, Edison International, for retaliation and harassment. Throughout the course of an eight-week trial in Los Angeles County between May and June 2022, SCE’s legal team claimed that the company was not guilty of any wrongdoing, as it responded to the employees’ reports by performing an investigation, confirming the validity of these reports and promptly terminating

the three supervisors who had engaged in sexual harassment and racist behavior.

Nonetheless, the employees’ legal teams argued that simply terminating the supervisors wasn’t enough, as these supervisors’ actions were part of more systemic, ongoing issues throughout SCE. **The employees’ legal teams leveraged 25 witnesses and hundreds of exhibits to establish that SCE had adopted a “fraternity-like culture,” in which harassment and other employment concerns were “widespread, common and sometimes swept under the rug.”** Further, the employees’ legal teams claimed that the poor treatment and negative outcomes the workers faced for making their reports served as clear evidence of retaliation and showcased a lack of concern from SCE leadership for preventing similar incidents in the future.

At the conclusion of the trial, the jury found SCE and Edison International responsible for permitting intolerable work conditions and forcing the two employees out of their jobs following their reports. As such, the jury awarded the employees \$24.6 million in compensatory damages and \$440 million in punitive damages, contributing to a total verdict of more than \$464 million.



FACTORS THAT LED TO THE VERDICT

In taking a closer look at this case, the main factors that contributed to the nuclear verdict were sexual harassment, race discrimination and retaliation.

Here's a breakdown of these factors:



- **Sexual harassment**—The U.S. Equal Employment Opportunity Commission (EEOC) defines sexual harassment as any unwelcome or offensive sexual advances, requests or favors, as well as other forms of verbal or physical harassment deemed sexual in nature. Both the victim and the harasser in a sexual harassment incident can be individuals of any sex; the victim and the harasser can also be of the same sex. **Between fiscal year 2018 and fiscal year 2021, the EEOC recorded 27,291 employment charges related to sexual harassment—representing more than one-quarter (27%) of all harassment incidents.** In the scope of this verdict, the supervisors who were initially reported for their poor treatment of other employees engaged in sexual harassment.

- **Race discrimination**—The EEOC classifies race discrimination as treating an individual unfavorably due to their race or race-related characteristics (e.g., hair texture, skin color or facial features). This discrimination can occur among individuals of all races, and the victim and the perpetrator can be of the same race. Common examples of race discrimination include using racial slurs, making offensive remarks about an individual's race, displaying racially-insensitive symbols or basing employment decisions (e.g., hiring, firing, pay, work assignments, benefits and layoffs) on an individual's race. **The EEOC reported more than 22,064 employment charges in**

fiscal year 2021 involving race discrimination—representing nearly one-third (32%) of all discrimination incidents. As it relates to this verdict, the supervisor who used racist language toward other employees engaged in race discrimination.

- **Retaliation**—In the employment landscape, retaliation refers to a company taking inappropriate actions against an employee for exercising their workplace rights (e.g., reporting instances of harassment or discrimination, requesting job accommodations due to a disability or religious practice, and filing or being a witness in employment charges). Key examples of retaliation by employers include verbally or physically abusing an employee, giving them a bad performance review without proper cause, transferring them to a less desirable position or changing their work schedule after they exercise their workplace rights. Retaliation has repeatedly reigned as the top cause of employment litigation in recent years. **According to the EEOC, more than half (56%) of all employment charges filed in fiscal year 2021 involved retaliation.** Regarding this verdict, the employees facing adverse conditions in the workplace and being forced out of their positions after making their reports constitute retaliation





COMPLIANCE CONSIDERATIONS

This nuclear verdict also poses some compliance considerations related to harassment, discrimination and retaliation. In particular, **Title VII of the Civil Rights Act of 1964 (Title VII) forbids harassment and discrimination in essentially all employment scenarios on the basis of race, color, religion, sex and national origin.** In addition, this law requires applicable employers to focus solely on objective, job-related criteria when making their employment decisions—therefore prohibiting retaliation. This federal regulation applies to all U.S. employers with 15 or more employees.

The EEOC states that instances of sexual harassment and race discrimination are deemed unlawful under Title VII when they become so frequent or severe that they generate a hostile or offensive work environment for the victim or they lead to harmful employment actions (e.g., the victim getting fired or being demoted). Further, all instances of retaliation—regardless of severity—are considered unlawful under Title VII.



RISK MITIGATION MEASURES



To avoid nuclear verdicts similar to the one resulting from this case, businesses should follow these risk mitigation tactics:

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- **Minimize harassment, discrimination and retaliation exposures.** Businesses should take various steps to limit the likelihood of harassment, discrimination and retaliation incidents among their employees. These steps may include:
 - o Establishing an employee handbook that includes appropriate policies and detailed language on harassment, discrimination and retaliation
 - o Implementing effective sexual harassment prevention measures (e.g., a zero-tolerance policy and a sexual harassment awareness program)
 - o Promoting diversity, acceptance and inclusion in the workplace through employee training
 - o Encouraging employees to report all instances of harassment, discrimination and retaliation
 - o Taking all reports of harassment, discrimination and retaliation seriously by following documented investigation and response protocols
 - o Educating managers and supervisors on what constitutes retaliation and making it clear that such behavior is prohibited

- o Documenting all complaints, evaluations and situations that result in an employee's termination

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- **Ensure compliance.** Businesses should also regularly assess their employment practices to maintain compliance with harassment, discrimination and retaliation laws as well as any other applicable federal, state and local regulations. Consult legal counsel for additional compliance assistance.
 - **Secure proper coverage.** In this increasingly litigious environment, it's crucial for businesses to purchase adequate insurance. Businesses should reach out to trusted insurance professionals to discuss their specific coverage needs.

For additional risk management guidance and insurance solutions, **contact us today.**