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Emotional Distress Damages in Employment Law Cases
New Jersey Association of Justice Meadowlands Seminar
November 17, 2016

Types of Claims

Statutory

1. LAD

the LAD specifically allows for emotional distress damages that result from “the strain of employment controversies.” N.J.S.A. § 10:5-3

2. CEPA

emotional distress damages are allowed under CEPA. N.J.S.A. § 34:19-5. (“All remedies available in common law tort actions shall be available to prevailing plaintiffs”)

NJSC - stated explicitly that the LAD and CEPA allow for the recovery of emotional distress damages. *Battaglia v. United Parcel Service, Inc.*, 214 N.J. 518, 552 (N.J. 2013) (“Both statutes permit the recovery of an award of damages for emotional distress.”)

3. New Jersey Family Leave Act (“NJFLA”)

Cluney v. Mon-Oc Fed. Credit Union, 2006 N.J. Super. Unpub. LEXIS 2019, *42, 2006 WL 2128985 (App.Div. Aug. 1, 2006). The NJFLA, N.J.S.A. 34:11B-11, allows for the remedies set forth under the LAD. *See id.*

Thus, because the LAD recognizes damages for emotional distress, the NJFLA does as well.

4. FMLA

Does not allow for emotional distress damages.

5. Title VII

42 U.S.C. § 1981a(b)(3) allows for compensatory damages for “emotional pain” caused by unlawful intentional discrimination. Such damages, though, are capped at a maximum recovery amount, which depends on the size of the employer. *See id.*; *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843, 848 (U.S. 2001).

6. ADEA

Quirky statute. - Need 20 employees as opposed to the 15 required under Title VII

No punitive damages but you can get liquidated damages (double the amount of total monetary damages – front and back pay) if a willful violation.

No emotional distress damages for an age discrimination violation.

However, emotional distress damages for an age discrimination retaliation violation. Part 29 USCA 1216(b)

7. ADA

Allows for emotional distress damages.

Except for in Failure to accommodate cases where employer made a good faith attempt to accommodate, with consultation, but failed to accommodate . 42 USC 12117(a).

Split in opinion whether compensatory damages are available in ADA retaliation case.

Some circuits have said no, - 9th, 7th, and the 4th.

8. New Jersey's workers' compensation law

Psychological injuries incurred in the workplace are considered compensable injuries under New Jersey's workers' compensation law, N.J.S.A. 34:15-36. *See Saunderlin v. E.I. Du Pont Co.*, 102 N.J. 402 (N.J. 1986).

Thus, an individual whose emotional distress in the workplace results in psychological injury can maintain a workers' compensation claim.

In order to do so, however, the petitioner will have to prove the psychological injury by "demonstrable objective medical evidence," and that the injury was materially caused by "objectively verified work stress" which was greater than normal work stress levels. *See id.*; *Knight v. Audubon Sav. Bank*, 2012 N.J. Super. Unpub. LEXIS 1493, 2012 WL 2377685 (App.Div. June 26, 2012).

The assertions of the petitioner herself are insufficient. There must be corroboration.

COMMON LAW

1. IIED

Assert a claim for emotional distress damages

2. NIED

Assert a claim for emotional distress damages

STANDARDS

Statutory

The standard of proof for a tort claim for ED damages is significantly higher than what is required under the statutorily recognized claims of LAD, CEPA or FLA. *See Tarr v. Ciasulli*, 181 N.J. 70 (N.J. 2004); *Battaglia v. United Parcel Service, Inc.*, 214 N.J. 518 (N.J. 2013).

In contrasting the difference between emotional distress damages available under the LAD, and under the tort remedies of IIED and NIED, the New Jersey Supreme Court has stated explicitly that “compensatory damages for emotional distress, including humiliation and indignity resulting from willful discriminatory conduct, are remedies that require a far less stringent standard of proof than that required for a tort-based emotional distress cause of action.”

Tarr v. Ciasulli, 181 N.J. 70, 81 (N.J. 2004).

New Jersey courts have long recognized the important role that emotional distress damages play in helping discrimination statutes, such as the LAD, fulfill their purpose of redressing and combatting discrimination. *See id.* at 552.

Courts have applied the statutorily recognized damages of the LAD liberally, to allow “victims of discrimination to obtain redress for mental anguish, embarrassment, and the like, without limitation to severe emotional or physical ailments.” *Id.* (citing *Tarr v. Ciasulli*, 181 N.J. 70, 77-82 (N.J. 2004)).

The courts have also stated that the same public policy concerns that mandate the liberal application of the LAD apply to CEPA as well. *See State v. Saavedra*, 222 N.J. 39, 74 (N.J. 2015); *Green v. Jersey City Bd. of Educ.*, 177 N.J. 434, 448 (N.J. 2003).

As a result, courts have consistently looked to the LAD when interpreting CEPA. *Donelson v. DuPont Chambers Works*, 206 N.J. 243, 261 (N.J. 2011).

As opposed to a claim for IIED or NIED, an emotional distress damages claim under the LAD can prevail based on the testimony of the victim herself as to the emotional harm she suffered without independent corroboration or resulting symptoms. *See id.*

This would apply equally to CEPA and NJFLA claims, by extension, as discussed above. Federal courts have also ruled that under Title VII, emotional distress claims can succeed based on the testimony of the victim herself without independent corroboration. *See id.* at 79 (citing an extensive list of federal decisions).

EXPERTS

Expert testimony is not required in order to recover damages for statutorily recognized emotional distress claims. *Battaglia* at 552.

Emotional distress damages can be awarded based on the plaintiff's own testimony, without any corroboration whatsoever.

However, the New Jersey Supreme Court has distinguished between damages for past emotional distress and future awards. *See generally id.*

The *Battaglia* court stated that “although the humiliation, embarrassment and indignity suffered by the LAD plaintiff during the events complained of is obvious, once remedied through a verdict, any claim that those effects will endure so as to support a future award must be proven by credible, competent evidence lest that verdict be the product of speculation.” *Id.* at 554.

Credible, competent evidence as to the permanence of those effects typically requires the testimony of an expert that they will endure.

While there is no statutory requirement of providing expert testimony in order to receive recovery for emotional distress damages, traditionally, if a plaintiff were seeking more than nominal statutorily recognized (formerly known as “garden variety”) emotional distress damages, she would need to introduce expert testimony in order to prevail on her claim.

Emotional distress claims unsupported by expert testimony received nominal awards.

In fact, the United States District Court for the District of New Jersey has noted that large emotional distress awards are “rarely awarded without expert testimony.” *See Blakey v. Continental Airlines*, 992 F. Supp. 731, 735 (D.N.J. 1998).

As discussed earlier, the decisions in *Abrams* and *Spraggs* demonstrate that courts have even reduced emotional distress awards which were supported solely by the plaintiff’s own testimony.

However, in more recent cases, New Jersey courts have upheld large jury awards for statutorily recognized emotional distress.

See Cuevas v. Wentworth Group, 2014 N.J. Super.Unpub. LEXIS 2237 (App. Div. Sept. 15, 2014) certif. granted, 220 N.J. 266 (Jan. 20, 2015).

Ramon Cuevas - \$800k for ED. \$632,500 for back pay. \$400k for future pay. \$52,500 in punitive damages (\$50k Wentworth and \$2.5k Arthur Bartikofsky)). \$253k for attorney’s fees and costs

Jeffrey Cuevas - \$600k for ED. \$150k for back pay. \$32,500 for punitive damages. \$276k for attorneys’ fees. \$6213 for negative tax impact of back pay award.

Jury – 7 people of diverse backgrounds. Extremely attentive. Observed plaintiffs. Assessed credibility.

Court – Both plaintiffs presented extremely well. Articulate and well spoken. Genuine, earnest and credible in their presentation of testimony.

What happened

RC – Hired in May 2005 as a Regional VP. Only one of Hispanic descent. Managed high rise buildings and town house developments. Role grew from managing 9 to 24 properties.

JC – Hired in Dec. 2005. Initially a portfolio manager. July 2007 promoted to Executive Director.

RC and JC reported directly to Arthur Bartikofsky, Exec. VP of Ops.

Degrading remarks at senior executive meetings-

Pres. And CEO Michael Mendillo, Bartikofsky, and Alan Trachtenberg – In-house counsel, other execs. And regional VPs.

Some of the people reported to RC and JC.

The comments

Lunch meetings – No Mexican restaurants in the area. Can't get a good burrito or taco. When music was played, can we get Mariachi or salsa music? Something more to RC's taste.

RC should get his rolodex b/c he might know a salsa band or mariachi band that can perform.

Joke that Hispanic busboy looked like Ramon's twin brother.

AB – If AB did not pick up the check RC could join his father in the back and you guys can wash dishes.

RC had a flat tire. Was discussing this at work. Response? IF a Puerto Rican was observed with a crowbar kneeling by a car, he may be mistaken as trying to steal the car or the hubcaps.

RC talked about his cat. Response? I figured you had a little Taco Bell Chihuahua dog.

Networking event in Newark. I'm gonna walk with RC b/c he's with his people and I'm sure he has a switchblade.

AB – We will be safe in bad neighborhoods if accompanied by RC b/c he's one of them and he's Spanish (testified to by 2 former property managers for Wentworth).

JC – corroborated RC.

We have to order twice as much Mexican food and hire a salsa band b/c of Plaintiffs.

Referred to RC and JC as the two Chihuahuas.

AB called RC and JC the Rico Suave brothers.

Darlene Rasmussen (Dir. Of HR) referred to them as the Latin lovers

Particularly grotesque and demeaning as it came from the HR Director.

THE COMPLAINT

Nov. 30, 2007

JC got to boiling point and went to Alan Trachtenberg to complain.

AT – Calm down. Remarks are good natured ribbing. Not a big deal. Don't take them so seriously.

JC – We take this seriously. Warning of taking this to the next level.

4 days later, Dec. 4, AB fired JC.

4 weeks earlier, JC had rec'd a \$10k performance based raise.

RC complained about JC's firing to CEO Mendillo.

1/1/08, RC fired by AB.

Accusations of losing accounts and soliciting a kickback. No prior reprimands for such fabrications.

EMOTIONAL DISTRESS TESTIMONY

RC

RC was hurt and embarrassed – particularly b/c they were made in the company of people he supervised.

RC – Felt belittled by the remarks.

Chopped him down day by day, month by month. Leaving him feeling helpless.

Instead of focusing on his accomplishments, he was turned into a punchline.

Nowhere to go as the remarks made by or in the presence of senior executives.

Afraid to lose his livelihood and insurance coverage.

Beaten down.

Despondent.

Loss of Self-Confidence.

Too embarrassed to discuss the daily humiliations to his wife.

Became edgy. The two would fight. Months after termination, RC's wife filed for divorce.

After termination, RC became depressed and worried about financial security and effect of firing on his reputation.

No treatment from a mental health professional

JC

Extremely degraded

Affected his psyche.

Ruined his self – confidence.

Questioned whether people would judge him based on his skills and abilities, or merely
b/c of nationality and skin color.

Tarnished his reputation.

Limping his way through life.

Humiliating. Embarrassing. Pain of returning home to his wife and daughter just weeks
before Christmas w/o a job to support his family.

Fell into depression.

But no mental health counseling.

THE LAW

September 2016, Justice Albin writing for a unanimous court.

Substantial deference that must be accorded to a jury's decision and award, and the great restraint that a court must utilize in exercising the power of remittitur. *Id.* at 22-25.

The Court also overruled *He v. Miller*, 207 N.J. 230 (2011), - judges should not use their own personal experiences as jurists to assess whether or not jury awards are excessive. *Cuevas* at 27-31.

The Court also ruled that the practice of comparative verdict analysis to determine excessiveness of awards should be abandoned. *See id.* at 31-39. Rather, courts should rely solely on a thorough analysis of the case at bar, when deciding a remittitur motion. *See id.* Similar to many other states, Kansas, Montana, Virginia.

B/c no two juries will award the same damages for ED in a discrimination case, a permissible award may fall within a wide spectrum of acceptable outcomes. *Johnson v Scaccetti*, 192 NJ 256 (2007).

Don't disturb ED awards – shocks the judicial conscience. Manifestly unjust to sustain it. So wide of the mark. Pervaded by a sense of wrongness. *Jastruam v. Kruse*. 197 NJ 216, 235 (2008) and *Johnson*.

Jury's verdict cloaked with a presumption of correctness. *Baxter v. Fairmount Food Co.*, 74 NJ 588, 598 (1977)

ED recoverable for embarrassment, humiliation, indignity and other mental anguish.
Model Jury Charge (Civil) 2.36

JUSTICE ALBIN's TAKEAWAYS

How long do the injuries afflict the person's life.

The damage to relationships.

The timbre of the voice that recalls the emotional cuts and slashes felt from racially animated discrimination.

In-depth descriptions of daily workplace humiliations that mental beat down an employee.

First-hand accounts of mental anguish.

Anguish that leads to depression and frays personal relationships.

9 months of racial harassment and hostility.

Presence of the highest ranking officers of Wentworth.

Crude and degrading remarks that invidiously stereotyped them and their heritage.

Ps felt judged by their appearance and race rather than their talents and skills.

Although both Ps were senior managers, they were referred to as Chihuahuas, Latin lovers, and the Rico Suave lovers.

Repeated disparaging Hispanic stereotypes from food and music to busboys and stealing hubcaps.

Fired right before Christmas.

Can't support family.

Chopped down.

Feeling helpless, despondent, and exhausted. Best by anxiety over financial security and professional reputations.

Affected their psyche and ruined their self-confidence.

The *He* case. Jury awarded wife \$1M in pain and suffering. And Husband \$100k in loss of consortium. Trial judge. Remitter motion. Reduced wife to \$200k and husband to \$20k.

Plaintiff rejected. Trial 2. Jury awarded wife \$500k in pain and suffering. And Husband \$100k in loss of consortium. Trial judge affirmed.

LIMITS

No limits or caps set forth in the statutory schemes of the LAD, CEPA or FLA regarding emotional distress damages.

The language of the respective statutes makes clear that damages for emotional distress are available, without mention of any limits.

Jury awards can vary widely and have at times been reduced by the courts. *See Abrams v. Lightolier, Inc.*, 841 F. Supp. 584 (D.N.J. 1994) (reducing \$100,000 award for emotional distress damages to \$2,500 because the evidence relied on was solely the plaintiff's own testimony); *Spragg v. Shore Care*, 293 N.J. Super. 33 (App.Div. 1996) (remanding for reconsideration of motion for a new trial on the award of \$42,500 for emotional distress because it was excessive and represented a miscarriage of justice in light of the evidence presented).

While there are no statutory limits, practitioners have developed general working standards for assessing the amount of emotional distress damages which are likely to be awarded. *See Abrams* at 594 (referring to \$2,500 as a nominal mental distress award).

Uncorroborated claims that rely on the plaintiff's own testimony generally result in much lower awards than those supported by independent corroboration. *See generally id.; Spragg*.

As discussed above, Title VII does set forth limits on awards for emotional distress damages, as set forth in 42 U.S.C. § 1981a(b)(3).

\$50,000 for employers of 15 to 100 employees

\$100,000 for employers of 101-200 employees

\$200,000 for employers of 201 employees to 500

\$300,000 for employer with 501 employees or more. *Id.*