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SEXUAL HARASSMENT VERDICTS

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SEXUAL HARASSMENT VERDICTS
Emotional Distress and Counsel Fee Awards
In New Jersey Courts

In a claim based on hostile work environment as the result of sexual harassment, a plaintiff can recover damages for emotional distress, and can also obtain an award of counsel fees. These damages are often difficult to evaluate. A jury is given few guidelines to assess emotional distress claims, and as a result the verdicts vary widely. The key problem associated with the right to counsel fees is that the more the case is defended, the higher the plaintiff's fee claim. It is beneficial to consider early settlement, prior to significant discovery and trial preparation. An early *Offer of Judgment* should be considered. Set forth below is a general description of the basis for emotional distress claims and counsel fee awards, followed by a review of some of the leading precedents in this area of the law.

EMOTIONAL DISTRESS DAMAGES

In a hostile work environment a sexual harassment case brought under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 et seq., a victim of discrimination may obtain redress for mental anguish and embarrassment without having to establish severe emotional or physical ailments. The Legislature amended the LAD to authorize recovery of emotional distress damages for discrimination claims. Emotional distress claims and damages need not be supported by expert testimony. The purpose of the LAD is to eradicate discrimination in the workplace. Underlying the LAD's expansive language advocating the elimination of discrimination is also the directive that victims of discrimination be compensated for economic and non-economic injuries attributable to an employer's discriminatory conduct. It is the harasser's conduct, not the plaintiff's injury, that must be severe or pervasive.

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. Thus, in discrimination cases, which by definition involve willful conduct, the victim may recover all natural consequences of that wrongful conduct, including emotional distress and mental anguish damages arising out of embarrassment, humiliation, and other intangible injuries. Tarr v. Ciasulli, 181 N.J. 70 (2004).

COUNSEL FEE AWARDS

Counsel who prevail in a suit brought under the LAD are entitled to recover a *reasonable* counsel fee. N.J.S.A. 10:5-27.1. Calculating a reasonable counsel fee is a multi-step process. The first step is to determine a reasonable hourly rate and then multiply that sum by the number of hours reasonably expended. The resulting figure is called the "lodestar." Determination of the lodestar amount has been described as the "most significant element in the award of a reasonable fee." After settling upon the lodestar, the court may, in appropriate cases, enhance that lodestar by a percentage amount to reflect the uncertainty of collection in contingent fee matters, and, if warranted, that the litigation in some measure advanced the public interest. Rendine v. Pantzer, 141 N.J. 292 (1992). The enhancement in typical LAD cases should range between twenty and thirty-five percent of the lodestar.

In other words, a successful plaintiff's counsel can be awarded not only his or her hourly rate times the number of hours worked, but also an additional "enhancement" of the fee (an increase), usually determined by a percentage of the fee (i.e., adding 20% of the fee amount to the award). For example, in Lockley v. Turner, 344 N.J. Super. 1 (App. Div. 2001) aff'd 177 N.J. 413 (2003), the court found that an hourly rate of **\$325.00 was reasonable** for the law firm partners that worked on the matter. After multiplying that rate by the number of hours worked, the court then added 60% of that amount to the fee award (total \$855,350.19).

A plaintiff who is awarded some affirmative relief by way of an enforceable judgment against defendant (or other comparable relief through a settlement or consent decree) is a prevailing party under the LAD, and entitled to counsel fees and litigation costs. Moreover, a plaintiff who is awarded nominal damages is a prevailing party under the LAD. In the case of nominal damages, however, whether to award minimal attorney's fees or no fees at all is left to the discretion of the trial court. Tarr v. Ciasulli, 181 N.J. 70 (2004).

SIGNIFICANT CASELAW

1. Mancini v. Township of Teaneck, 349 N.J. Super. 527 (App. Div. 2002), aff'd 179 N.J. 846 (2004). The jury awarded **\$1M for emotional distress** and \$500,000.00 for punitive damages. The trial court vacated the punitive damages claim and reduced the emotional distress verdict to \$625,000.00. The court awarded **counsel fees of \$625,272.21** and costs of \$20,280.61.

The police chief suggested that plaintiff police officer should stay home with her children, and that women do not make good police officers. She had to use the men's locker room and the male officers walked around naked. The chief suggested that a sexual relationship would help her career. He offered to give her a shower himself. There were pornographic magazines and pictures in the locker room and squad cars. There were sexual cartoons and jokes about plaintiff, and obscene gestures. She was called derogatory names by other police officers. The alleged abuse took place from 1981 until 1996. She was diagnosed with post-traumatic stress disorder, anxiety, and depression.

2. Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286 (2006). The jury awarded plaintiff awarded plaintiff economic damages of \$50,000 and **emotional distress damages of \$100,000**. The trial judge also awarded plaintiff **counsel fees of \$462,927.15**.

The plaintiff claimed that the employer engaged in a campaign of sexual harassment against her. She claimed the boss carried out his harassment in numerous ways such as making comments about her legs, continuously calling her at home to invite her out on dates, taking her to a massage parlor, and ordering her to take off her clothes and report to his office. When she was terminated from employment, the boss informed her that she was "being downsized" and added that she was now free to sleep with him because he was no longer her boss. The plaintiff alleged that she suffered insomnia, fatigue, and an inactive thyroid gland along with a recurrence of symptoms related to the Epstein-Barr virus as a result of defendants' treatment of her. At trial, plaintiff's expert, Dr. Richard Podell, testified that she suffered from chronic fatigue syndrome due to the stress of the harassment. The Supreme Court on appeal vacated the trial court's verdict due to various evidential errors during trial.

3. Wigginton v. Servidio, 324 N.J. Super. 114 (App. Div. 1999), certif. den. 163 N.J. 11 (2000). The jury awarded **\$300,000 in compensatory damages** and punitive damages of \$2,500. The trial judge awarded **counsel fees of 37,390.48**, and reduced the jury verdict for compensatory damages to **\$90,000**.

The plaintiff was a civilian employee of the Army. She claimed that her supervisor asked her to come around to the back of the building. There was a van there, and the supervisor asked her to perform a sex act on him while two other male employees watched. She left immediately and locked herself in the building. There was no actual physical contact. Plaintiff claimed that she was continuously upset at work. She claimed she suffered nausea and diarrhea and had difficulties in her personal relationship with her husband and children. Plaintiff spoke with an Army base chaplain, with a medical officer, Dr. Steven Smith, and was referred by him to Edith Grant, a licensed clinical social worker. Dr. Smith described plaintiff as "distraught." Grant described plaintiff as "quite distressed, frightened, and depressed." Although Grant scheduled a second appointment, plaintiff failed to attend that appointment. Due to various trial court errors, the verdict was reversed for a new trial.

4. Rush v. Scott Specialty Gases, 113 F.3d 476 (3d Cir. 1997). The jury awarded \$203,000 in lost wages, **\$1,000,000 in pain and suffering**, and \$3,000,000 in punitive damages. The trial court ordered a reduction of the jury award (remittur) that left plaintiff with an award of \$203,000 in compensatory damages, \$100,000 for pain and suffering, and \$300,000 for punitive damages, resulting in a final judgment of \$603,000. The court awarded plaintiff **counsel fees of \$210,062.50** and costs of \$ 11,562.05.

The plaintiff claimed that she was denied promotions due to her gender. Also, plaintiff claimed that she was harassed by male co-workers on a daily basis. This harassment included disparaging remarks and criticism of her work. A co-worker touched her inappropriately and sexually at work, made sexual comments to her, and was rude to her. She was told that a co-worker "wanted to engage in [sexual relations] with her in his van, and then shoot her in the head so that no one would ever know." On appeal, portions of the verdict were reversed based on statute of limitations issues.

5. Ferrante v. Sciaretta, 365 N.J. Super. 601 (Law Div. 2003). The plaintiff recovered economic damages in the amount of \$340,659, which included an award of back pay and front pay. She also received **\$26,250 for emotional distress and suffering**. Pre-judgment interest in the amount of \$72,298.16 and **\$895,025.77 for counsel fees** and disbursements were awarded.

Plaintiff claimed that she was the victim of sexual harassment by the Police Chief while she was an employee of the police department. The jury determined that the Borough failed to take reasonable steps to prevent the sexual harassment. The jury also found the actions of the Chief and the Borough created a sexually hostile work environment and resulted in a constructive discharge of the plaintiff.

6. Blakey v. Continental Airlines, 992 F. Supp. 731 (D.N.J. 1998). The jury awarded plaintiff \$480,000 in back pay, \$15,000 in front pay, and **\$500,000 for emotional distress, pain and suffering**. On appeal, the court reduced the emotional distress award to \$250,000. The amount of counsel fees was not set forth in the opinion.

The only testimony on emotional distress came from plaintiff herself and from her expert witness, a forensic psychiatrist who met with Blakey once for two hours and reviewed her medical records for 90 minutes. The expert found that plaintiff suffered some emotional distress from her work environment but that other events in her life unrelated to work, particularly the volatile relationship with her boyfriend's ex-wife, contributed to this mild emotional distress. The plaintiff claimed that there was pornography in the workplace, including some directed at her, and she experienced frustration with the employer's ineffective sexual harassment policy relating to pornography. She claimed anxiety and depression. She met with her psychologist approximately 25 times. She suffered from stomach pains and sleeplessness.

7. Hurley v. Atlantic City Police Dep't, 174 F.3d 95 (3d Cir. 1999). The jury awarded **\$575,000 in compensatory damages** and punitive damages of \$700,000. The court reduced the compensatory damages award to \$175,000, and awarded **counsel fees of \$516,046** and costs \$70,135. The verdict was modified on appeal relating to punitive damages.

The plaintiff police officer claimed that her supervisor harassed her by making sexually derogatory comments about her hygiene during roll call, disturbed her while she was changing in the drill room, spoke to her in condescending tones during radio transmissions, and held her to stricter standards than male officers. During that year, fellow officers allegedly referred to plaintiff in obscene terms and placed a tampon and a copy of Hustler magazine in her squad car. The plaintiff claimed she suffered severe emotional distress that interfered with her work, her personal life, and her family life. Plaintiff's husband alleged that the harassment detrimentally affected his relationship with his wife.

8. Tarr v. Ciasulli, 181 N.J. 70 (2004). The trial court dismissed plaintiff's claims of emotional distress because the plaintiffs did not submit any expert testimony or objective corroboration of severe emotional distress. On appeal, the Supreme Court reversed and ordered a trial on emotional distress damages, finding that the Legislature intended victims of discrimination to obtain redress for mental anguish, embarrassment, and the like, without limitation to severe emotional or physical ailments. Expert testimony and medical or psychiatric treatment is not required to obtain a damages award. On later re-trial, the jury awarded plaintiff **\$25,000 for emotional distress** and **\$150,000 in counsel fees**.

Plaintiff claimed extensive and pervasive sexual harassment from a group of particularly offensive male employees during the course of her employment. She asserted that although the general manager heard much of the abusive conduct, he made no effort to stop it. The employees would refer to women in demeaning gutter slang. An employee would leave pornographic material on his desk, draw sexually explicit pictures on deal envelopes, open his legs and describe his sexual organ in detail, and discuss his sexual escapades with various women, some of whom were very young. Another employee regularly commented to plaintiff about his wishes to have a sexual encounter with her, and propositioned her to have sex in a "broom closet." Plaintiff also had to deal with another employee who regularly made offensive sexual comments to her in the presence of strangers, intimating that his presence would sexually stimulate her. Plaintiff was constantly embarrassed by the disgusting comments and conduct of the male employees. She often wanted to crawl under her desk. She regularly cried on her way home from work. Plaintiff eventually quit.

9. Lockley v. Turner, 344 N.J. Super. 1 (App. Div. 2001) aff'd 177 N.J. 413 (2003). The jury awarded **compensatory damages of \$750,000** and punitive damages of \$3,000,000, and the trial judge awarded **counsel fees of \$855,350.19**. The appellate court refused to reduce the compensatory damages or counsel fee awards, but did vacate punitive damages.

The plaintiff was a male prison guard who claimed that a female co-worker harassed him. She would flirt with him at work. She began to express directly an interest in having a sexual relationship. The plaintiff told her that he was happily married, with children, and was not interested in pursuing such a liaison. She persisted in her efforts to attract Plaintiff. She was not the least hesitant to express her interest in plaintiff, both to him and to other corrections officers, with the result that a large number of the staff knew that she was actively pursuing him. When she was unsuccessful, she turned against plaintiff. She began a campaign in which she enlisted her friends to insult plaintiff publicly about his sexuality. The language was obscene and vulgar, with persistent opinions about his alleged sexual preferences or lack thereof, alleged sexual abilities or lack thereof, and physical endowments. She also subjected him to continuing petty indignities, such as making him wait before opening the gates. The plaintiff never sought any form of professional counseling or treatment for the stress he said he suffered at work, stress which he said led to his emotional withdrawal from his family. During the course of the trial he presented no expert testimony in support of his claim of emotional distress. The problems went on for several years, during which plaintiff experienced a daily sense of dread which required that he prepare himself, psychologically and emotionally, to return each day to work, certain only that the assaults would continue unabated.

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