Awards in Garden-Variety Emotional Distress Cases Are Growing

New Jersey Supreme Court to weigh in on the matter

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Damages for emotional distress have become a main-stay in employment litigation. While both the LAD and CEPA authorize prevailing plaintiffs to recover damages for emotional distress, the law is clear that plaintiffs must present evidence of actual injury. As a result, at trial, plaintiffs often adduce evidence of emotional distress through psychiatric and/or psychological experts; testimony of treating doctors; and/or medical and pharmacy records. More frequently, however, Plaintiffs simply rely upon the testimony of family and friends or their own testimony as to their emotional well being. The presentation of emotional distress damages where the evidence of mental suffering is limited to the plaintiff's own testimony or the testimony of close family members, has been referred to by New Jersey courts as a claim for "garden variety emotional distress."

In years past, awards for "garden-variety" emotional distress have been nominal. In fact, on the rare occasion when a jury returned a large emotional distress damage verdict in a "garden-variety" case, the trial court would not hesitate to remit the award. In recent years, however, a trend appears to be developing with juries returning substantial emotional distress damage verdicts on "garden-variety" claims. These verdicts are sometimes sustained by the trial court and even affirmed on appeal. This phenomena is best illustrated by the recent case of *Cuevas v. Wentworth Group*, 2014 N.J. Super. Unpub. LEXIS 2237 (App. Div. Sept. 15, 2014*) certif. granted,* ___ *N.J.* ___ (Jan. 20, 2015).

In this article, we will examine: (1) the history of "garden-variety" emotional distress damages awards in New Jersey employment cases; (2) the potential implications of the New Jersey Supreme Court's review of the *Cuevas* decision; and (3) why the decision in *Cuevas* should be reversed.

Historically, in cases where plaintiffs have presented only evidence of "garden-variety" emotional distress, jury awards for pain and suffering have been nominal. For example, in *Andersen v. Exxon Co.,* 89 N.J. 483, 503 (1982), the Supreme Court held that "a moderate token award" of $500 was supportable where the complainant testified that he was emotionally affected by handicap discrimination. Similarly, in *Goodman v. London Metals Exchange, Inc.,* 86 N.J. 19 (1981), the Supreme Court affirmed an award of $750 for humiliation, pain and mental anguish due to sex discrimination. Indeed, in *Blakey v. Continental Airlines*, 992 F. Supp. 731 (D.N.J. 1998), the District Court aptly recognized that large emotional distress damages awards "are rarely awarded without expert testimony." *Id*. at 741.

Further, while neither the LAD or CEPA require that a plaintiff offer expert medical testimony or corroborative testimony from family members or friends as to their emotional distress, as a practical matter, New Jersey courts routinely remitted large emotional distress jury verdicts where the plaintiff failed to present such evidence. For

instance, in *Spragg v. Shore Care*, 293 N.J. Super. 33 (App. Div. 1996), the sole evidence at trial relating to the plaintiff's emotional distress was the plaintiff's testimony that due to the loss of his position, he had trouble paying his bills, was hounded by creditors, and was a "wreck" over his situation. *Id.* at 45. Accepting the plaintiff's testimony as true, the Appellate Division characterized the plaintiff's proofs regarding the emotional suffering he endured and the disruption to his life as a result of his job loss as "extremely thin, if not superficial" and held that the jury's emotional damages award of $42,500 was unsupported. *Id.* at 62. Accordingly, the Appellate Division remanded for reconsideration of defendants' motion for a new trial and suggested that the trial judge remit the excessive award. *Id.* at 63-64. Likewise, in *Grasso v. West New York Board of Education*, 364 N.J. Super. 109 (App. Div. 2003), the Appellate Division affirmed the trial court's reduction of a $110,000 jury award for emotional distress to $11,000 on a motion for remittitur where plaintiff offered "no expert testimony detailing how plaintiff was affected by the defendants' [unlawful] actions." Id. at 120. *See also Flores v. Guardian Drug Company*, 2006 N.J. Super. Unpub. LEXIS 961 at *8 and *22-24 (App. Div. May 11, 2006) (Appellate Division remitted a $750,000 emotional distress damages award in a CEPA case to $12,500 where only evidence of emotional distress was the plaintiff's testimony that his termination affected him financially and emotionally and impacted his marriage).

Indeed, even when a plaintiff has been required to seek professional treatment for emotional distress, including treatment with psychotropic medication, New Jersey courts have not hesitated to remit jury verdicts for excessive emotional distress damages. In *Mancini v. Township of Teaneck,* 349 N.J. Super. 527 (App. Div. 2002), the plaintiff was diagnosed with an adjustment disorder, posttraumatic stress disorder, anxiety and depression as a result of the actions of her employer and she treated with both a stress therapist and psychiatrist. *Id.* at 555. The trial court remitted the jury's $500,000 emotional distress damages award to $125,000. *Id.* at 565-566. The Appellate Division upheld the trial court's remittitur finding the trial judge reached a "fair" remitted award. *Id.* at 566.

Despite this well settled case law supporting the concept of nominal damages for "garden-variety" emotional distress awards, and remittitur when juries grant large awards without medical evidence or other corroborative proof, recently, New Jersey trial courts have upheld large "garden-variety" emotional distress jury awards. *See, e.g., Quinlan v. Curtiss-Wright Corp.*, 425 N.J. Super. 335, 345 (App. Div. 2012) (upholding a $405,000 emotional distress award); *Saffos v. Avaya*, 419 N.J. Super. 244, 258,269 (App. Div. 2011) (upholding $250,000 emotional distress award). *Cuevas* is the most recent example of this trend.

In *Cuevas,* two brothers alleged race based hostile work environment and unlawful termination in violation of the LAD. Following their terminations, neither plaintiff treated with a mental health professional or sought any medical treatment for their alleged emotional distress. At trial, the only evidence of the plaintiffs' alleged emotional distress was their own testimony. Specifically, plaintiff Ramon Cuevas testified that following his termination he felt "despondent." He described "feeling depressed and being afraid he

could lose everything again." He further testified that his termination caused stress and friction in his marriage and ultimately led to his divorce. *Cuevas*, 2014 N.J. Super. Unpub. LEXIS 2237 at *18 -*19. Plaintiff Jeffery Cuevas testified that as a result of his termination he "lost confidence", "fell into a depression", became "leery always almost watching over my shoulder", and could not trust people. *Id*. at *12-*15. With this testimony the only evidence of emotional distress damages, the jury awarded Ramon Cuevas $800,000 for mental pain and suffering and Jeffrey Cuevas $600,000 for mental pain and suffering. Defendants moved for a judgment notwithstanding the verdict, or alternatively, remittitur. The court denied the motion noting that the while it found the emotional distress verdict "generous" it "did not shock the judicial conscience." In so finding, the trial judge noted in his opinion that the jury was "extremely attentive throughout the trial," "fully understood this matter," and that "this was not a case of a runaway jury." The Appellate Division, in an unpublished decision, affirmed the emotional distress awards. Relying on the recently criticized case of *He v. Miller*, 207 N.J. 230, the Appellate Division noted that the trial court explained its reasons for not finding that the awards were excessive, and that the Appellate Division must refrain from "merely substituting its differing opinion without appropriate deference to the trial court." *Id*. at *54 *quoting He* 207 N.J. at 236; *but see Mickens v.Misdom*, 2015 N.J. Super. LEXIS 5 (App. Div. Jan. 7, 2015) (Appellate Division applied the standard for remittitur articulated in *He* in a personal injury case, but sharply criticized *He*'s holding that a judge may consider his or her "feel of the case" and the trial judge's own experience as a judge and lawyer in deciding a motion for remittitur).

On January 20, 2015 the New Jersey Supreme Court granted the defendants' Petition for Certification in the *Cuevas* case. The Court agreed to look at whether the trial court erred in not remitting the emotional distress verdicts. Thus, it appears the Court is primed to weigh in on the debate as to the quantum of damages available to a plaintiff in the absence of any medical evidence or expert testimony. The court should further clarify the type of damages available in a "garden variety" emotional distress case.

The Court's decision in *Cuevas* will likely have a significant impact on how employment claims seeking emotional distress damages are litigated in New Jersey. If, plaintiffs are able to recover hundreds of thousands of dollars in emotional distress damages on "garden-variety" claims, based solely on their own testimony, like the brothers is *Cuevas*, there will be little incentive for plaintiffs to retain experts or present any medical or corroborative testimony at trial. In this regard, plaintiffs often strategically choose to assert only a "garden-variety" claim to try to limit an employer defendant's discovery of the plaintiff's past medical history or treatment, and to avoid exposing the Plaintiff to an Independent Medical Examination ("IME") or psychological testing. In fact, New Jersey Court Rule 4:19 and its federal analog Fed. R. Civ. P. 35, both provide that before a court compels an IME a party's mental condition must be "in controversy." While one would think that six figure damages exposure would make a "garden-variety" plaintiff's emotional distress claim "in controversy," the New Jersey District Court has previously suggested that "most courts agree that for a plaintiff's mental status to be 'in controversy' requires more than 'garden variety' emotional distress allegations that are part and parcel of plaintiff's underlying claim." *See Bowen v. Parking Auth.,* 214 F.R.D.

188, 193 (D.N.J. 2003). With this case in mind, in some "garden-variety" cases, courts have denied a defendant's request for discovery of Plaintiff's prior medical treatment and counseling and courts have refused to compel the plaintiff to participate in an IME. This clearly hampers the defense from effectively rebutting the emotional distress claim. Perhaps such a determination could be understood if the defendant was only exposed to nominal damages for a "garden-variety" emotional distress claim. It certainly cannot be supported given the current landscape of large garden variety claims. A defendant should be able to effectively defend against a potential high six figure verdict.

Thus, the Court's upcoming decision in *Cuevas* is of critical importance. While the Court likely will clarify the proper standard for remittitur given the recent criticism of the *He* case by the Appellate Division, it is also likely that the Court will weigh in on the issue of the appropriate level of damages in a "garden-variety" case. In so doing, the Court must consider bringing the law on "garden-variety" claims back in line to what was originally intended: A modest token award to compensate a plaintiff who did not suffer a permanent emotional injury and where no medical treatment was necessary. If, on the other hand, the Court upholds the emotional distress verdicts in *Cuevas*, New Jersey trial courts must review the "in controversy" requirement and appropriately balance a plaintiff's desire for privacy with a defendant's need to appropriately defend the garden variety claim by obtaining past medical history and treatment and having the Plaintiff examined by a defense psychiatric expert. The one sure thing is that the Supreme Court's decision will likely result in more litigation on these issues and more strategic analysis about the claims to be brought and the appropriate defense to mount in response.

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