

A Plaintiff's Uncorroborated Testimony Of Temporary Emotional Distress Is Sufficient For A Jury To Award Damages Under New Jersey's Law Against Discrimination

With its recent decision, *Tarr v. Ciasulli*, the New Jersey Supreme Court has now potentially opened the door to more frequent jury trials and higher awards of emotional distress damages in sexual harassment cases under the state's Law Against Discrimination ("LAD").

In *Tarr*, the plaintiff was employed as a finance and insurance manager at a car dealership for almost two years. She initially resigned from this job about a year into her employment due to alleged sexually harassing comments and conduct, but she soon returned. Eventually she resigned before the end of her second year due to the claimed continued harassment.

The harassment about which the plaintiff testified at trial was severe and/or pervasive according to the jury's conclusion in its verdict. However, her trial testimony about the emotional distress she allegedly suffered as a result was noticeably limited. Specifically, she testified that she was frustrated, intimidated, and constantly embarrassed, that the harassment made her blush deeply, and that she regularly cried in her car on her commute home from work. She did not offer any objective or corroborative proof of her emotional distress through other witnesses, doctors, or experts.

At the close of plaintiff's case, the employer moved to dismiss her claim for emotional distress damages. The trial court granted the motion, holding that plaintiff's limited testimony was not sufficient to allow the jury to award her any damages for emotional distress. The trial court reasoned that although a plaintiff in a LAD case is not otherwise required to offer corroborative or expert testimony, temporary upset is not sufficient, and that a plaintiff must show some degree of severity to justify entrusting the jury with setting a compensatory value. Consequently, the jury was left only with the question of economic damages, and it found that she had none. Nevertheless, because the jury also found the employer liable for sexual harassment, the court held that she was a "prevailing party" and awarded her attorneys' fees.

On appeal, however, on the issue of the standard of proof required for emotional distress on a LAD claim, the New Jersey Supreme Court reversed and held that emotional distress does not need to be severe or substantial to justify some amount of compensation. The court held that the proof required for the "severe emotional distress" element of a common law intentional infliction claim does not apply to LAD, resolving a disagreement on this issue among New Jersey courts.

The Supreme Court explained that a jury should not be completely prevented from awarding damages simply because of an absence of "corroborative proof, permanency of response, or other physical or psychological symptoms rendering the emotional distress severe or substantial." Instead, the court reasoned, the jury should determine the "quantum" of compensation, even if nominal - which presumably would have some proportionate relationship to the proof offered, even if minimal. Accordingly, the court remanded for a new trial on damages and for an award, in the trial court's discretion, "minimal attorney's fees or no fees at all."

In terms of jury verdicts in future LAD cases, *Tarr* suggests that exposure to higher verdicts may increase and that they will be more frequent. *Tarr's* clarified lower standard of proof is likely to build confidence in plaintiff-side attorneys, especially since the statute's damages are uncapped and it has no minimum number of employees. After *Tarr*, it may become more difficult for employers to reduce or avoid the cost of trials on weaker plaintiffs' cases through pre-trial motions, directed verdicts, and settlements.

As for settlement — *Tarr* certainly seems to provoke the question, why did this case not settle long before trial if plaintiff's claim for emotional distress was so limited? The answer cannot be found in the court's majority opinion, but it may be read between the lines of the dissent. The dissent notes, at the end of the opinion, that the plaintiff actually *had* sought therapy and treatment from psychiatrists, psychologists, and social workers around the time of the harassment. The plaintiff had even testified at her deposition that she had physical manifestations of her emotional distress, including headaches, high blood pressure, and loss of appetite. She chose not to offer any of this into evidence at trial — which, the dissent surmised, may have been because she had apparently been having marital problems during the same time frame, and made a tactical decision to try and avoid a causation issue at trial. It seems likely, therefore, that this case may not have settled because defense

counsel considered the information disclosed in discovery more appropriate for cross examination than settlement, and plaintiff's counsel did not disclose their trial strategy.

Ultimately, the lesson of *Tarr* is that, in New Jersey, it may become more difficult to keep harassment cases away from juries, increasing the costs of defense and the likelihood of an emotional distress damages award. More than ever, insurers and employers alike should implement the more cost-effective alternative dispute resolution method of arbitration with the assistance of experienced counsel. ❖

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