



Maximizing emotional-distress damages in employment cases

An expert psychological witness lends credence to claims for emotional distress, in mediation as well as trial

BY ALEXIS MCKENNA

In enacting California's various employment laws, such as the Fair Employment and Housing Act (Gov. Code, § 12940, et seq.), the Legislature intended for plaintiffs to receive their full measure of damages, including emotional-distress damages. Emotional-distress damages, however, are not as simple as economic damages – bills, paystubs, and other such documents do not exist to allow us to just “do the math.” Yet, often in employment cases the most important component of damages stem from the plaintiff's emotional distress. Many cases involve plaintiffs who were making low or minimum wages, who found a job shortly after a wrongful termination, or who are still working for the defendant employer. Therefore, their lost wages, to the extent they exist, will not be significant. Further, even if a punitive-damages award seems plausible, the courts will require these to bear some “reasonable relationship” to the compensatory damages. (*BMW of N. Am. v. Gore* (1996) 517 U.S. 559.) Thus, to receive a substantial punitive-damages' award, the emotional-distress damages must be increased.

Certainly anyone who has suffered from discrimination, harassment, or wrongful termination, knows that the resulting emotional distress is not minimal. Ongoing mistreatment at one's place of employment – the stress of job loss and concern for how one will pay her bills and support her family; the humiliation of discrimination and harassment – this type of conduct can take a significant toll on a

person's emotional and psychological well being. However, conveying this to jurors who have not experienced these types of situations, or to defense counsel in settlement discussions, can prove challenging. How then can emotional distress be demonstrated to a trier of fact or in settlement negotiations in order to maximize your client's damages?¹

Plaintiff should seek therapy

If your client has not yet sought psychological treatment for his injuries, strongly suggest that he start doing so immediately. Do not recommend a psychologist for him yourself. Even though you would have no input at all on his therapy, the objectivity of the therapist will be in question if it comes to light that the plaintiff was recommended to this particular therapist by his lawyer. Instead, suggest to the plaintiff that he ask his general practitioner for a referral, or ask his friends or family for a recommendation if he is comfortable in doing so. If neither of these sources will work for him, he can utilize several on-line resources that are designed to help find a good therapist in his geographic vicinity.

This suggestion is not simply strategic. Most plaintiffs in employment cases are suffering from serious emotional distress and would benefit personally from therapy. However, psychological treatment will also help to maximize emotional distress damages. Defense counsel often argues that if the plaintiff has not sought treatment, he must not be damaged emotionally. Obviously this is not true – an injury is a matter of fact, regardless of whether a person

sought treatment. If a person broke his arm but didn't immediately go to the ER, that does not change the fact that the arm, objectively, is broken.

It is easier for defendants to make this argument with respect to emotional-distress damages, though, because we don't have anything as unquestionable as an X-ray to prove an emotional injury. This defense argument also ignores a whole host of issues, such as the cost of treatment (especially for someone now out of work)²; the practicalities of fitting therapy into a busy schedule; a fragile plaintiff who cannot face talking about what happened to him; the stigma a plaintiff may feel comes with seeking therapy; a plaintiff who does not understand that he can benefit from therapy; just to name a few. But, the defendant will rarely understand these issues (and will almost always claim not to), and unfortunately your jury might not either. Part of your job is to try to get your client, if possible, to overcome these issues.

Retain a psychological expert

Even if your client cannot or will not seek therapy, you should send your client for a forensic exam with a psychologist or psychiatrist. An expert will be able to testify at trial as to any psychological conditions the plaintiff now has, and to tie the unlawful conduct the plaintiff experienced in the workplace to those conditions. The plaintiff will need to testify himself about his emotional distress; however, such testimony has limitations. While he can describe his symptoms, he cannot diagnose himself with psychological conditions. While he can testify that he didn't have these symptoms prior to



APRIL 2014

the unlawful conduct, he cannot explain scientifically about causation. Most important, an expert lends authority and credibility to the plaintiff's self-described symptoms. For example, a jury may be impacted by a plaintiff saying he is experiencing chronic tension, headaches and has had trouble sleeping. However, the impact will be greater if a credentialed expert says that she has diagnosed the plaintiff with Generalized Anxiety Disorder.

An expert not only lends credence to the plaintiff's description of his emotional distress, but can also maximize damages because she can also increase economic damages. The expert can testify that any treatment your client already received was reasonable and necessary, and therefore he should be able to recover for those costs. Furthermore, she can offer an opinion regarding future psychological treatment. Depending on the client's condition(s), this may include both therapy and medication, which mean many thousands more awarded to your client in special damages.

Having an expert in your corner helps in settlement negotiations as well. Some defense attorneys, surprisingly even experienced ones who should be well aware of significant jury awards for emotional distress, give little measure to these damages. The opinion of an expert, or the knowledge that a jury will be hearing from an expert, can go a long way with opposing counsel. In federal court cases, you will of course have a report to refer to and discuss. In state cases, if you are attending a mediation or having serious settlement discussions, you may want to consider getting a report from your psychological expert, even if it is only limited to the mediation context. At the very least, you should be armed with all the necessary information you will need from your expert, including diagnoses, and opinions on future damages. Most likely, the defense will be planning some argument regarding alternative stressors as the

causation for the plaintiff's emotional distress. Be sure to anticipate that argument and discuss it with your expert, so that you are sufficiently prepared to counter the argument when it arises.

Prepare your client for deposition

You also need to prepare the plaintiff thoroughly to testify regarding his emotional distress at his deposition. Do not assume that he will know how to communicate his feelings. You also should not wait to prepare him for this testimony at trial. You certainly don't want to have him impeached at trial with poor responses at his deposition. Further, you will want to have this ammunition for the settlement discussions.

Flat out ask how your client feels about what happened to him, and let him practice articulating his feelings. Some clients might be quite comfortable sharing their feelings; others will not and will have to have it dragged out of them. Some clients will never have really thought about how this made them feel, other than just generally knowing it was a very unpleasant experience. So, they will need the practice.

If applicable to the particular case, you should also ask your client to provide you with some concrete examples of how he felt differently about his job as a result of the unlawful conduct. For example, he may have driven around the parking lot at work several times to get up the nerve to go in each day. He might have increasingly been late to work because it was hard to motivate himself to get out of bed. A client of mine once explained she was almost hit by a truck on her way to work, and she had, at the time, wished the accident had occurred because she would rather be in the hospital in physical pain than have to face the ongoing harassment and retaliation she had been experiencing at work. These types of examples give an anchor to the emotional distress, making it easier for those hearing it to understand what the plaintiff was going through.

Also be prepared to go over a checklist of potential physical manifestations of the plaintiff's emotional distress. While these may seem obvious to us, not every client will be psychologically sophisticated. They simply may not have connected a physical ailment to their psychological trauma.

Seek out lay witnesses

Finally, you should talk with your client about what witnesses he may have to his emotional distress. If he confided in a friend or family member, see what that person has to say. Also, even if the plaintiff did not specifically confide in them, significant others or other adults with whom he resides may have useful testimony to provide. Sometimes your client might not even realize what others may have observed in terms of his emotional distress. For example, a spouse may have noticed that the plaintiff tosses and turns at night, has changed his eating habits, or has been withdrawn. An expert witness is important, but lay witnesses provide a good complement to the expert's testimony. They can speak to their observations of the plaintiff on a daily basis, and provide a "before and after" perspective of the plaintiff's emotional and psychological state. The expert can further use lay witnesses' testimony to bolster her own opinions and diagnoses.

Conclusion

Maximizing emotional distress damages is key to getting our clients the best possible recovery in employment cases. Our jobs would certainly be a lot easier if emotional distress damages were mathematically quantifiable. Then again, most defense counsel would find a way to fight over simple math anyway, wouldn't they? Regardless, there are tools at our disposal to demonstrate as clearly as possible the plaintiff's emotional distress damages in employment cases.

Bio and Endnotes follow:



APRIL 2014



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Endnotes

¹ The first two suggestions here assume that you and your client have discussed and are willing to allow for the potential privacy intrusions that will likely ensue in discovery if he makes a claim for "severe" as opposed to "garden variety"

emotional distress. While this is the best way to maximize emotional distress damages, for other strategic reasons beyond the scope of this article, or because your client wishes not to undergo such intrusions, you may choose not to go this route.

² The Affordable Care Act requires insurance plans offered in the new marketplaces to cover a core set of services called "essential health benefits." Included on the list of 10 benefits are mental-health services which include counseling and psychotherapy. These services are not unlimited however, and still require the upfront payment of any co-pay and deductible, costs that an out-of-work plaintiff may not be able to afford.