NJ Ruling May Widen Exposure To Excessive Jury Awards

By Jeannie O'Sullivan

Law360, New York (September 23, 2016, 10:27 PM EDT) -- A recent New Jersey Supreme Court decision that judges considering motions to modify jury awards should rely on the specific facts of a case as opposed to past verdicts leaves defendants vulnerable to arbitrarily determined, and possibly excessive, damage payouts, experts say.

In a unanimous Sept. 19 decision, the justices upheld a trial judge’s refusal to reduce a $1.4 million emotional distress award to two former Wentworth Property Management Group executives in a racial discrimination case. The high court said the judge rightly relied on testimony and observations of the jury in the specific case, rather than on her own judicial experience or previous verdicts in other cases. Wentworth had earlier said the damages figure “shocked the judicial conscience.”

The total verdict to former Wentworth regional vice president Ramon Cuevas and his brother, former Wentworth executive director Jeffrey Cuevas, was $2.5 million.

The judge’s approach in denying a “remittitur” motion to slash the respective $800,000 and $600,000 awards to the brothers for emotional distress marks a significant and disturbing departure from the status quo, according to some management-side employment law and trial attorneys in the Garden State.

The Cuevas ruling makes an already ambiguous concept in the courts “even more of a crapshoot” and creates new difficulty for corporate defendants because, unlike back pay and front pay awards, emotional distress damages don’t rely on hard numbers, according to Sills Cummis & Gross PC member David I. Rosen, who specializes in employment and labor law.

Rosen said in his experience at trial, the average award for emotional distress ranges between $50,000 to $75,000 for cases in which the plaintiff simply testified that they suffered emotionally but didn’t seek out mental health treatment, suffer employment or personal ramifications, or provide an expert witness to link the alleged discrimination to the distress.

The Cuevas brothers, who accused the company of violating the New Jersey Law Against Discrimination, contended their fellow employees referred to them as “Rico Suave brothers” and “Latin lovers,” among other things, and joked about how the company had to order Mexican food to serve at meetings, according to court records. The brothers were allegedly terminated after complaining to management.

Both testified to feeling depressed during the alleged discrimination and after what they considered to
be retaliatory firings, yet neither sought mental health treatment, according to court records. Noting the lack of evidence presented, Rosen called the amount of their emotional distress awards “stunning.”

“The question is, where do you come up with [$1.4 million]? That’s the big mystery here. That’s the part that’s frightening from a defense standpoint,” he said. “It kind of changes things. Now there’s a significantly higher exposure than a defense attorney would have assumed, based on [the Cuevas] level of proof of the emotional damages.”

In reaching their decision, the justices stressed the deferential standard of review of a jury’s award of damages. The trial court had determined that, given the evidence presented, the emotional-distress damages award didn’t shock the judicial conscience, according to the opinion.

As for why a judge’s personal experience with past verdicts shouldn’t factor into a remittitur ruling, the justices noted those experiences aren’t part of the record.

“Those experiences are not subject to testing through the adversarial process. The judge cannot be examined to determine whether her recollection is accurate, whether the facts are sufficiently similar to the unique circumstances of the case tried, or whether the cohort of cases in the judge’s mind is a statistically significant number from which to draw any definitive judgment,” the justices said in their ruling.

But the ruling is “inherently inconsistent,” said John P. Lacey, a partner in Connell Foley LLP’s commercial litigation group and co-managing partner of the firm’s Newark office. The court’s suggestion that a trial judge should objectively evaluate a verdict based on his or her impressions of the instant case and not prior experience or verdicts fails to recognize that, in reality, such an analysis is inherently subjective, according to Lacey.

“The judge’s ‘feel’ of the case, as well as its determination whether a verdict is ‘excessive,’ are necessarily subjective elements of the remittitur decision,” Lacey said. “Accordingly, if a judge has had significant experience with many cases involving similar damages, he or she may have seen the entire spectrum of possible damage awards, including those that were so inherently unreasonable as to constitute a miscarriage of justice.”

The Cuevas ruling, he said, requires the judge to check his or her knowledge and experience “at the courtroom door.”

One attorney had some sympathy for the justices’ plight in taking on a mercurial concept such as emotional distress damages.

“In a way, I understand this case because, generally speaking, a trial court just has to make a credibility decision, and a lot of times, it’s a he-said-she-said situation,” said Gary S. Young, a partner at Lynhurst-based Scarinci Hollenbeck and chair of the firm’s employee benefits and ERISA group. “It’s not like workers comp, where if you have a leg cut off, you get ‘x’ number of dollars.”

Young noted there’s “a good reason” motions to decrease or increase awarded damages come after the verdict, given the emotion a jury may have felt at the moment.

But, like Rosen and Lacey, he has problem with the “nebulosity” of emotional distress award decisions that would be based on the method outlined in the Cuevas ruling, and supports the idea of
establishing parameters for assessing whether an award shocks the judicial conscience or not.

The method of comparing a verdict to those in other cases — which the high court endorsed in its 2011 decision in Ming Yu He v. Miller, the Cuevas justices noted — “gives you a perspective,” Young said.

“I think there should probably be some sort of formulation. There should probably be some weighted factors that go into the assessment of the damage,” Young said.

Some examples might be consideration of how many times the discrimination occurred and how many times the plaintiff complained, he said.

“Otherwise, you’re just [making a decision] in a vacuum,” Young said. “That disturbs me because there’s no parameter. The judge can’t divorce herself from her experience.”

In fighting the remittitur motion, the Cuevas brothers argued that theirs wasn’t a “case of harmless teasing or offhand comments,” but one of racial harassment and discrimination, according to the opinion. They contend there was credible evidence in support of the emotional distress award, and cited the judge’s observations of an “attentive jury.”

The National Employment Lawyers Association of New Jersey, which sided with the brothers in an amicus brief, said the high court had repeatedly upheld “very significant” emotional distress damage awards in LAD cases, even when the victims didn’t seek medical or psychological treatment, the opinion said.

Also supporting the brothers was the New Jersey Association for Justice, which argued in support of judges relying on the facts of the case because experiences outside the record “cannot be scrutinized through the adversarial process.” The association urged the court to abandon the practice of relying on “similar verdicts” to assess remittitur motions.

Scoffing at the notion of comparable verdicts, an attorney representing the association, Amos Gern, told the justices during oral argument last year that emotional distress verdict awards weren’t “like real estate” and noted that “every snowflake was different.”

“Well, every plaintiff is different, and every count is different. Every jury that’s selected is different,” Gern, of Starr Gern Davison & Rubin PC, told the justices.

In the wake of the decision, parties seeking remittitur will have to focus more intensely on the contents of the trial record and may also consider noting the judge’s observations of the witnesses and the jury’s reactions to them, according to Adam N. Saravay, an employment litigation partner at McCarter & English LLP’s Newark office.

Case law won’t necessarily go by the wayside in remittitur motions, he added.

“I expect that litigators will still cite other cases in which remittitur has been granted or denied, but it will probably be harder to convince trial judges that such comparisons are material,” Saravay said.

--Editing by Philip Shea.