NELA/NY
ADVOCATES FOR EMPLOYEE RIGHTS

# S17/A2865
# PROTECTING JURY VERDICTS
# IN DISCRIMINATION AND SEXUAL HARASSMENT CASES

Jury verdicts for emotional distress damages in employment discrimination and sexual or other discriminatory harassment claims under the New York State Human Rights Law ("NYSHRL") are often drastically and arbitrarily reduced. Most judges are hostile to such claims and are not only free to substitute their judgment for that of juries – they are required to do it under existing law. This is because New York State has a unique rule requiring judges to reduce verdicts if they "deviate materially from what would be reasonable compensation". CPLR 5501(c). Every savvy New York employer is aware that in most cases, any jury award that could deter future discrimination or harassment can reliably be reduced by the courts to a manageable cost of doing business.

Thus, when any verdict is taken on any state law claim in state or federal court, the defendants make a motion to reduce the verdict as excessive under NY state law, CPLR § 4404. Even if the case is in federal court, the federal judge must apply New York law in deciding whether to reduce the verdict, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, *Consorti v. Armstrong World Ind. Inc.*, 103 F.3d 2, 4 (2d Cir. 1995), that is, they must decide whether it "deviates materially from what would be reasonable compensation", CPLR § 5501(c).

"Reasonable Compensation" is only determined by what appeals court judges have allowed in the past – it has nothing to do with what other juries have awarded. As the federal judges usually say: **this so-called "'deviates materially' standard [for reviewing jury awards] is less deferential to a jury verdict than the federal 'shock the conscience' standard"** because it does not allow a judge to let a jury verdict stand if it's out of line with other cases which allowed awards for similar injuries, even if the amount the jury awarded was not shocking to the court's conscience. *Welch v. UPS*, 871 F. Supp. 2d 164, 191-92 (E.D.N.Y. 2012). Under federal law, a compensatory damage award is excessive, and may be reduced, if the "award shocks the judicial conscience and constitute[s] a denial of justice." *Kirsch v. Fleet Street. Ltd.*, 148 F.3d 149, 165 (2d Cir. 1998). *Norville v. Staten Island Unnersity Hosp.*, No. CV 96-5222 (RJD), 2003 U.S. Dist. LEXIS 28399, at *10 (E.D.N.Y. Oct. 17, 2003)

## *THE "GARDEN VARIETY" HURDLE*

In deciding what they believe to be "reasonable compensation" for the emotional distress caused by discrimination and harassment, judges have arbitrarily placed these cases in categories. As a result, every claim in which the employee has not sought medical or psychological treatment is classified as "garden variety" and damages are limited to $30,000 to $125,000. *Kennedy v. City of N.Y.*,

2019 NY Slip Op 33397(U), ¶ 34 (Sup. Ct.). This effectively means that no matter what the jury decides, the judge or the appellate court will throw out the jury verdict and insert an amount within the "garden variety" range. There are numerous examples of cases in which emotional anguish verdicts in employment cases have been reduced to less than $30,000, some to as little as $5,000. This judge-made rule fails to take into account that many people have no access to psychiatric or psychological help because their insurance is cut off when they were fired. It is also representative of the pervasive discrimination against low wage workers and people in communities less likely to have access to health care, and particularly mental health care, because their claims are automatically limited. This enables management attorneys to ignore the claims of low-paid workers with impunity.

Some Notable Examples Follow:

$125,000 emotional distress verdict reduced to $30,000 - A black voodoo doll was hung next to the bulletin board with a noose around its neck, the "N' word was frequently used without consequence, and the manager that had bought the voodoo doll was not disciplined in any way, and all of the minority employees were offended by the conduct. The judge found that it was just a "garden variety" damages case, and reduced the award to $30,000. *MacMillan v. Millenium Broadway Hotel*, 873 F. Supp. 2d 546 (S.D.N.Y. 2012)

$140,000 emotional distress award reduced to $10,000 – Citing plaintiff;s admission that he did not suffer from sleeplessness or loss of appetite, and finding only "minimal" physical manifestations from his loss of self-esteem, stress and anxiety caused by the demeaning conditions and isolation from his peers, the award was reduced to $10,000. *Reiter v. Metro. Transp. Auth. of N.Y.*, 2003 U.S. Dist. LEXIS 17391, at *22 (S.D.N.Y. Sep. 30, 2003).

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$30,000 reduced to $7.500 - the complainant testified that he felt "devastated" and that his emotional distress disturbed his sleep and caused him to gain weight, exacerbating his high blood pressure. But because he did not seek medical or psychiatric assistance for his emotional turmoil, and there is no indication of the duration of his distress or evidence that his weight gain and the resultant worsening of his high blood pressure was related to the case, the court reduced his award to $7,500. *Manhattan & Bronx Surface Transit Operating Auth. v. N.Y. State Exec. Dep't*, 220 A.D.2d 668, 669, 632 N.Y.S.2d 642, 644 (App. Div. 2nd Dept. 1995)

$50,000 reduced to $20,000 – The Transit Authority ("TA") doctor (she was suing the TA) referred her to a psychologist, and the psychologist she saw at the TA medical center documented that she became overwhelmed by the harassment and started crying uncontrollably and had a headached that lasted for days.. The court pointed out that she missed 4 of her scheduled visits and that there were other sources of stress such as not being able to pay her bills, and reduced the award to $20,000. *Fowler v. N.Y. Transit Auth.*, 96 Civ. 6796 (JGK), 2001 U.S. Dist. LEXIS 762 (S.D.N.Y. Jan. 22, 2001)

$200,00 Verdict reduced to $30,000 Age and Disability Discrimination – Plaintiff was in a state of shock, didn't leave the house for a week, experienced loss of memory, took him a while to remember the names of people he'd worked with for years, sleepless nights and his lifestyle had considerably changed because of the level of income of income he was reduced to, and little things set him off, he was short-tempered where he used to be a very carefree individual. *Tanzini v. Marine Midland Bank, N.A.*, 978 F. Supp. 70, 78 (N.D.N.Y. 1997).