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## Honoring a plaintiff's suffering

### FINDING A BETTER WAY TO CHARACTERIZE EMOTIONAL-DISTRESS DAMAGES IN EMPLOYMENT CASES

Emotional harms from employment cases can run the gamut; fear and anxiety, even insomnia, following a termination of employment arising from not knowing when one will get paid again; the strain that the sudden (and sometimes lengthy) loss of income places on personal relationships; anger or outrage at having been subjected to harassment and/or discrimination in an environment (the workplace) which is legally supposed to be free of both; shock at being summarily dismissed after having devoted so much to the job; feelings of betrayal or lack of trust that linger and affect subsequent work experiences; loss of identity for those who have invested so much in their careers (“If I am no longer a [fill in the blank], what am I”); loss of self-worth or self-esteem, particularly in cases of prolonged unemployment; loss of the camaraderie of coworkers; shame; humiliation, particularly in cases where a defamatory comment has led to the termination; depression; nightmares; panic attacks; suicidal ideation; and more. The types of harms our clients suffer can be extensive and far-reaching and not easily reduced to formulaic calculations. The catch-all term “emotional distress” often does not adequately describe the harms our clients have suffered, and the phrase, “non-economic damages,” even less so.

At the same time, as practitioners, we can predict that many of our clients will likely suffer emotional harms in ways that are very similar to those that other employees have suffered after similar adverse employment actions. There is a pattern or a rhythm to these types of situations. Yet it is unfair to automatically assign the same type of pain and suffering to each of our clients.

Cultural, gender, age, and other differences cause different people to experience the same circumstances in dif-

ferent ways. Some clients have preexisting trauma triggered by the newer trauma of their adverse employment actions that can cause them to have a more extreme reaction, or the opposite – to shut down emotionally and to not share what they are going through – either of which can make it challenging to assess the emotional harms that flow from the adverse employment actions.

The only assumption we can make is that our clients all have personal backgrounds or prior experiences that will cause them to react to the same adverse actions differently.

How, then, do we balance the inherent tension between those harms that seem “normal” or what a reasonable employee might suffer under the same circumstances with the subjective lived experiences of our clients? How can we express such damages through a lawsuit without minimizing our clients’ suffering by choosing inartful or inapt terms to refer to their pain? And can we shield our clients – or do we want to – from alternate stressor defenses, from intrusive requests for medical records, or from “independent” mental examinations that violate our clients’ privacy rights, simply by how we argue emotional damages?

This article explores several competing interests plaintiff-side employment practitioners should consider when framing the narrative of their clients’ emotional damages, from pleading to discovery to trial, and challenges the nomenclature or assumptions of certain commonly used tools, including characterizing client damages as “garden variety” emotional distress or intentional infliction of emotional distress, and how best to present emotional harms to a jury.

**Emotional-distress claims in employment cases exist independent of economic loss**

Traditionally, in the personal-injury context, emotional-distress damages have been viewed as ancillary to some sort of physical injury. Hence, the term “non-economic damages,” as in, “economic damages are driving this recovery, and any of that touchy-feely stuff can be categorized as ‘non-economics,’” which gives short shrift to the panoply of human emotions.

In employment cases, however, where the chief economic harm is loss of earnings stemming from a wrongful termination, emotional distress need not be tied to that economic loss. Rather, emotional-distress damages have their own independent statutory basis unrelated to any tort or negligence theory for recovery. (Gov. Code, § 12965, subd. (d) [“A court may grant as relief... any other relief that, in the judgment of the court, will effectuate the purpose of this part”].) This statutory remedy is construed very broadly and has been interpreted to include emotional distress. (*Peralta Comm’y College Dist. v. Fair Employment & Housing Comm’n* (1990) 52 Cal.3d 40, 48 [“There is absolutely no dispute in this case that employment discrimination, including sexual harassment as occurred here, can cause emotional distress,” defined further in footnote 4 as “the full gamut of intangible mental suffering”]; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 82 [“While the FEHA conferred certain new rights and created new remedies, its purpose was not to narrow, but to expand the rights and remedies available to victims of discrimination”].) Importantly, there is no cap or limit on emotional damages in statutory employment claims – another reason that they do not need to be tied to economic loss.

### **It is unnecessary to plead intentional infliction of emotional distress to recover emotional-distress claims in a FEHA action**

Because of the expansive interpretation of the employment civil rights statute, the Fair Employment and Housing Act (FEHA), it is unnecessary to plead a separate claim for emotional distress damages when pleading discrimination or harassment under FEHA. Nor is one required to plead or argue that a plaintiff has suffered *severe* emotional distress to recover emotional harm in an employment case, thus obviating the need for a claim for intentional infliction of emotional distress (IIED). (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1247 [“Proof of the elements of the tort of intentional infliction of emotional distress is not a prerequisite for the recovery of compensatory damages (under the FEHA) for mental anguish and humiliation”] (Citations omitted).) Instead, the harms which flow from alleged harassment or discrimination are part of the regularly anticipated harm in employment cases.

In fact, an IIED claim, except under very limited circumstances (such as when a FEHA claim is unavailable), does not add much to an employment action. To prove an IIED claim, a plaintiff must show: (1) that the defendant’s conduct was outrageous, (2) that the defendant intended to cause the plaintiff to suffer emotional distress or that the defendant acted with reckless disregard of the probability that plaintiff would suffer emotional distress “knowing that [plaintiff] was present when the conduct occurred,” (3) that the plaintiff suffered severe emotional distress, and (4) that the defendant’s conduct was a substantial factor causing plaintiff’s severe emotional distress. (California Civil jury instruction, or CACI, 1600.)

“Outrageous conduct” is defined as what a reasonable person would regard as “intolerable in a civilized society.” (CACI 1602.) Factors to consider include whether the defendant abused a position of authority, whether the plaintiff was par-

ticularly vulnerable to emotional distress, and whether the defendant knew their conduct would likely result in harmful mental distress. (*Ibid.*) “Severe emotional distress” is defined as “so substantial or long lasting that no reasonable person in a civilized society should be expected to bear it.” (CACI 1604.)

One could argue that discrimination and harassment in the workplace is conduct which should not be tolerated in a civilized society, and that such conduct is “outside the normal part of the employment environment.” (*Accardi v. Super. Ct.* (1993) 17 Cal.App.4th 351, 352-353.) Indeed, harassment cases usually involve a substantial power imbalance, as reflected within the company as well as historically in society at large, with the harassing supervisor seeking to exploit that imbalance to their advantage. (For this reason, the FEHA explicitly acknowledges that sexual harassment claims need not involve sexual attraction: “Sexually harassing conduct need not be motivated by sexual desire.” (Gov. Code, § 12940, subd. (j)(4)(C).))

Further, if the adverse employment actions caused the plaintiff to experience substantial or long-lasting emotional distress, which frequently they do, such suffering arguably would be more than a reasonable person should be expected to bear. As such, sexual harassment claims, “if properly pled,” can form the basis for IIED claims. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051.)

However, as the California Supreme Court has acknowledged, “With respect to the requirement that the plaintiff show severe emotional distress, this court has set a high bar.” (*Hughes, supra*, 46 Cal.4th at 1051.) Many workers suffer in silence for years without complaining and accept that silent suffering is what a reasonable person should be expected to endure. This is, in fact, one of the challenges we face as plaintiff-side practitioners: In employment trials, the jury is a box full of “experts” in that everyone has had a job, and many people have been fired or laid off from that job or harassed or discriminated against, or knows someone who has. Juror expectations of what constitutes “severe” emotional distress can vary

wildly, too.

Given all that, the challenge then becomes trying to determine how much a “reasonable” person should be expected to bear for being subjected to harassment or discrimination at work and wrongfully terminated. Asking juries to find severe emotional distress runs the risk of losing credibility with the trier-of-fact; some jurors may think, “I’ve had it worse; what’s the plaintiff complaining about, anyway?”

Moreover, alleging “severe” emotional distress implies the plaintiff either has been given a diagnosis or is sufficiently in distress that an “independent” mental examination (IME) is appropriate. (Code Civ. Proc., § 2032.310, subd. (a).) While a defendant seeking to have its paid-for expert (who, unsurprisingly, will find no emotional distress related to the adverse employment actions) perform a mental examination on the plaintiff will need to obtain leave of court, such motions are routinely granted, with a showing of good cause, where the plaintiff has placed their emotional suffering at issue. (Code Civ. Proc., § 2032.310 subd. (b); *Vinson v. Super. Ct.* (1987) 43 Cal.3d 833, 839 [relying on the predecessor statute, modeled after the federal Rule 35(a)(1), which required the party’s mental condition to be “in controversy in the action”: “[A] party who chooses to allege that he has mental and emotional difficulties can hardly deny his mental state is in controversy”].) An allegation of IIED makes your client’s medical records discoverable and subjects your client to a mental examination upon request. It also means costly expert depositions and trial testimony in which the danger is that in a “battle of the experts,” the testimony of each side’s hired gun cancels out that of the other in the eyes of the jury.

Thus, as a practitioner, you need to decide whether to plead a tort when the statutory remedy is more than sufficient. An important consideration is whether psychologically you are setting yourself and your client up for an unnecessary hurdle. Most of the time, it is not worth it.

**There is nothing “garden variety” about being separated from one’s employment**

At the other end of the emotional harms spectrum from severe emotional distress is “garden variety” emotional distress, a term which has been grafted over to employment law from personal injury. “Garden variety” emotional distress damages have “been described by one court as ‘ordinary or commonplace emotional distress,’ that which is ‘simple or usual.’” (*Fitzgerald v. Cassil* (N.D. Cal. 2003) 216 F.R.D. 632, 637.)

It is not “complex [emotional distress], such as that resulting in a specific psychiatric disorder.” (*Ibid.*, quoting *Ruhlmann v. Ulster County Dept. of Soc. Servs.* (N.D.N.Y. 2000) 194 F.R.D. 445, 449 n.6.) Under the test set forth in *Turner v. Imperial Stores* (S.D. Cal. 1995) 161 F.R.D. 89, “garden-variety” emotional distress is not sufficient to place a party’s mental state in controversy.” (*Id.* at 95.) There, plaintiff’s counsel argued on behalf of the plaintiff, “Her general damages consist of the distress and anxiety that arises in the normal course of human events when a person suffers indignities and deprivation of rights,” where she alleged sex discrimination and defamation, *inter alia*. (*Id.* at 92.) The *Turner* court found that “Turner’s claim for damages is basically a ‘garden-variety’ one, and therefore does not warrant an independent mental examination.” (*Id.* at 97.)

Strategically, reasons to plead or stipulate to garden-variety emotional distress include limiting a defendant’s access to the plaintiff’s private medical records, cutting off the need for an intrusive “independent” mental examination, and avoiding costly deposition and trial testimony from both sides’ experts. Too frequently, attorneys for both parties take for granted that a plaintiff’s mental-health history is automatically discoverable. (*Vinson, supra*, 43 Cal.3d at 841-42 [“Plaintiff is not compelled, as a condition to entering the courtroom, to discard entirely her mantle of privacy”]; *Davis v. Super. Ct.* (1992) 7 Cal.App.4th 1008, 1014 [“There must be a compelling and opposing state interest justifying the discovery” of private information, yet even when directly relevant, “there must then be a careful balancing of the com-

elling public need for discovery against the fundamental right of privacy”] (citing to *Britt v. Super. Ct.* (1978) 20 Cal.3d 844 and *Binder v. Super. Ct.* (1987) 196 Cal. App.3d 893).)

In *Britt*, the California Supreme Court specifically held, “The patient thus is not obligated to sacrifice all privacy to seek redress for a specific mental or emotional injury; *the scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant himself has brought before the court.*” (Final italics added; remaining italics in original.)” (Quoting *In re Lifschutz* (1970) 2 Cal.3d 415, 435.) Plaintiff’s counsel should have a healthy concern to limit the intrusion into a plaintiff’s private mental health records, to the extent possible.

Per code, the parties may stipulate to not conduct a mental examination if (1) “no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed,” and (2) “no expert testimony regarding this usual mental and emotional distress will be presented a trial in support of the claim for damages.” (Code Civ. Proc., § 2032.320, subd. (c).) Mental exams should only be relevant if the harm is ongoing and the plaintiff has identified diagnoses that a layperson could not testify about on their own.

One could also argue that alleging garden-variety damages means the defense should not be allowed to seek or introduce evidence of “alternate stressors,” since the subject of emotional distress will not fall under the purview of expert testimony and since the damages claimed are limited to those normally associated with being harassed, discriminated against, or fired.

Stressors like divorce, death, auto accidents, stresses from the lives of close family members or even the litigation itself are not harms that normally are associated with adverse employment actions and therefore should be foreclosed from inquiry. (*Tylo v. Super. Ct.* (1997) 55 Cal.App.4th 1379, 1388 [“Petitioner has tendered her psychological condition in this litigation only as it relates to termination of the employment contract.

Therefore, discovery is limited to those injuries resulting from termination of the contract”]; *Britt, supra*, 20 Cal.3d at 864 [“Disclosure cannot be compelled with respect to other aspects of the patient-litigant’s personality even though they may, in some sense, be ‘relevant’ to the substantive issues of litigation”].)

The downside, though, is that the plaintiff must plead, and provide discovery responses and testimony, that they no longer are suffering any ongoing emotional distress – which may be true where the plaintiff has gotten a better job and appears to be well-adjusted, but often is not the case. (*Doyle v. Super. Ct.* (1996) 50 Cal.App.4th 1878, 1885 [the plaintiff’s mental condition was not at issue because she alleged her emotional distress had ended as of a date certain].)

If a plaintiff volunteers to cut off their damages, the harm they have suffered before then needs to have been significant to make that tradeoff worthwhile. Regardless, the premise of the above stipulation undercuts the reality of many plaintiffs’ experience: The mental anguish they have suffered is not ancillary to any physical injury (even if one substitutes the word “termination” for “physical injury”) – *it is the injury*. Plus, as a practitioner, how certain will you be at the pleading stage (unless you have complete medical records, which may not be practical or even possible, if the plaintiff has not yet treated) that your client will not suffer any future emotional harm?

Beyond the question of whether damages are truly ongoing, practitioners must weigh the psychological impact of agreeing to the term “garden variety emotional distress.” It is human nature for a judge or juror to be preconditioned, even subconsciously, that damages must not be that significant when they hear that a plaintiff has suffered only “garden variety” emotional distress damages, even if the evidence shows the plaintiff has suffered great harm (and there have been high awards for emotional harms pled as garden variety). Enterprising defense counsel will wield that phrase like a bludgeon to try to convince everyone from a mediator to the trial court to the jury that

the plaintiff's injuries are, by definition, just ordinary, the sort of uncorroborated everyday stress that lots of people go through.

Further, there is nothing cookie-cutter or garden variety about the emotional damages that arise from adverse employment actions. While a plaintiff might not have been diagnosed with a complex disorder, what exactly is the non-clinical emotional distress "usually associated" with being sexually harassed? Or being discriminated against because of a protected characteristic?

It is somewhat offensive to refer to the mental anguish someone has suffered by being harassed or discriminated against, or the subsequent injustice of having been fired illegally, as just "garden-variety." In trials in which emotional harms are the primary or in some cases, the only damage being asserted, any strategy that runs the risk of minimizing that recovery should be questioned.

### **Finding a middle ground: Allowing your client's harm to speak for itself**

This is the ultimate tension for practitioners: Alleging garden-variety damages can act as a strategic evidentiary limitation, but if it is deployed as a shorthand for diminished harm, it can

quietly become a limitation on the value of a case. And the term "garden variety" fails to encapsulate the totality of the client's emotional experience: Setting aside the "eggshell plaintiff" who has suffered prior trauma, even "normal" plaintiffs respond to discrimination, harassment, and retaliation in complex and different ways.

How best, then, to present our clients' emotional damages? Through their own words. And if they are not very expressive, then through a close family member or close friend.

Why? Recall the challenge raised earlier: Not every juror will have suffered a devastating personal injury, but nearly every juror will have had a job and will be familiar with many of the issues in an employment law case. Jurors understand innately how upsetting it can be to be harassed, retaliated against, or fired. Having someone speak plainly and simply about a plaintiff's lived experience will resonate with jurors in ways that reports prepared by experts who have only spent a day or two with your client cannot. Those reports are useful to insurance adjusters, not jurors.

If you want to limit discovery but still have your client's treating mental healthcare provider testify as a non-retained expert, be prepared to argue the

emotional harm your client suffered in the past is no longer ongoing and is not severe. Just don't call it "garden variety" damages; argue that these are damages that are "usually associated" with adverse employment actions. And then have your client speak to their emotional harms, their full experience. ♦

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