



Valuation of Emotional Distress Damages in a Wrongful Termination Case

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Phillip Cha
Mediator at Cha Mediation Services
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One of the key steps to preparing for mediation is assessing the potential damages in the dispute. In a wrongful termination case, one of the big-ticket items is emotional distress damages. However, unlike other types of damages, for which there might be some rough formula, emotional distress damages are difficult to quantify and predict. This lack of predictability presents challenges at mediation, but that's OK, because lack of information and uncertainty put pressure on everyone to resolve the case.

Despite these challenges, there are a few guiding lights to work with. For starters, there is legal authority suggesting that emotional distress damages bear some relationship to economic damages, including loss of earnings, which are somewhat easier to calculate. Following that line of authority, the potential for a large emotional distress award may be lower in a case with limited economic damages, such as a case where a low wage earner promptly mitigated his or her loss of earnings by finding a new job.

Some litigants rely on prior jury verdicts to establish the value of emotional distress damages in the case at hand. In fact, the latest developments in artificial intelligence and big data in the legal industry have to do with aggregating jury verdicts and related damages information for this very purpose. This data may be very compelling when presented at mediation. However, the caveat to this approach is that every case, judge and jury is different, so apples-to-apples comparisons are not always possible.

Others rely on expert opinions. Plaintiffs who have received psychiatric treatment may have a more persuasive case for a large emotional distress award than plaintiffs who have not sought treatment, since the trauma will appear to be legitimized. For example, a treating psychiatrist's diagnosis that the plaintiff has severe depression as a result of the termination can be very powerful. Psychiatric experts also can highlight factors like whether the plaintiff was terminated from a proverbial "dream job" and will have difficulty moving on, which will help tell the story at trial.

On the flipside, defendants can compel plaintiffs to submit to a mental examination as part of the discovery process. A defense psychiatric expert can help undercut a plaintiff's emotional distress claim by exposing preexisting conditions and alternative sources of trauma. However, psychiatric experts are costly, so the parties and their counsel will have to weigh the costs and benefits of conducting a mental examination prior to the mediation, particularly where the mediation is early in the litigation.

From the mediator's perspective, parties who come to mediation armed with more information than the other side are at an advantage in the settlement negotiations, so it pays to put in the time and effort to collect as much as possible in advance.

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Phillip Cha

Mediator at Cha Mediation Services

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