EMPLOYMENT LAW

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3rd Circuit Dishes Out Pay Cut to Successful Attorney

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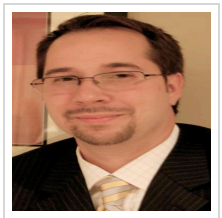

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The economy is in such a downturn that even the courts are dishing out pay cuts for attorneys. Attorneys who make some or all of their living off of the hope that a contingency fee agreement amounts to some pecuniary award have been handed the additional fear and financial uncertainty that a decision to reject a settlement offer could result in the court throwing it back in the attorney's face in the form of a fee reduction. Apparently, prevailing at trial no longer means you will get paid a reasonable sum for winning.

In the recent 3rd U.S. Circuit Court of Appeals case of *Lohman v. Duryea Borough* , the court reviewed a decision from the district court in a wrongful discharge case based on First Amendment retaliation. Following trial, the jury found for the plaintiff on one of the three claims. The plaintiff was awarded $12,205 in lost wages and nominal damages, as noted in the 3rd Circuit opinion. Since the plaintiff did not win on all counts, the district court dubbed this a mere "partial success."

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In considering the plaintiff's fee petition, the district court considered evidence of a $75,000 settlement offer that the plaintiff had turned down, as noted in the 3rd Circuit opinion. In light of the large disparity between the jury award and the settlement offer, the trial court decided to reduce the amount of plaintiff's fee petition from $112,883.73 to $34,251.77, according to the opinion. Not surprisingly, the plaintiff appealed this fee decision.

In a disheartening decision to successful plaintiffs lawyers, the 3rd Circuit affirmed. The rationale was that the plaintiff's attorney did not have the foresight to know the jury would award her client less money than the defendant did in a last-minute settlement offer. Since the attorney only achieved a "partial success," winning on only one of three claims at trial, in the court's view, the attorney did not incur or did not earn the full amount of the fee petition.

In comparing the jury decision to the settlement offer, the 3rd Circuit made a presumption that the attorney's contingent fee was 33.3 percent, as noted in the opinion. In doing so, the court stated that it was giving the attorney the fee she would have been awarded had she taken the settlement offer, according to the opinion. While a one-third contingency is not uncommon in personal injury cases, it certainly is not always the case, and even less so in more complicated employment discrimination cases under federal law. Of course, even if the settlement offer had

been accepted, it was a global offer meaning it was inclusive of attorney fees and costs — so the attorney still would have been at a loss and had unpaid fees even assuming the fee agreement was one-third.

The court stated that it "reduced the fee award in part because Lohman was ultimately awarded substantially less than he sought." However, there was no evidence presented to the court as to what amount, or other non-monetary remedies were sought. All the court relied on was the rejected $75,000 settlement offer, and assumed that the plaintiff was seeking more than that amount. This reasoning appears to be flawed for two reasons. First, it is impossible to predict the outcome of a trial, let alone the projected value of the award. Second, money damages are not the only remedy available in discrimination cases. In fact, many plaintiffs will not agree to a settlement that, in discrimination cases, often comes with a confidentiality clause, and no hope of getting the plaintiff's job back. By contrast, a court decision often comes with the imprimatur of a judge or jury — a decision that can be made public — that the defendant acted unlawfully; an order for the unlawful activity to cease; the opportunity for reinstatement; and the knowledge that one's individual rights have been vindicated rather than swept under the rug by a payoff.

Further, the court used the comparison of the actual award to the settlement offer to point out how much more "successful" the attorney would have been had she taken the settlement offer, according to the opinion. Again, this ignores the fact that it was a global offer and still would not have covered the full amount of the attorney's accrued fees and costs. And, without knowing more about the client's expectations, this is rarely enough information to determine whether the attorney did her best for her client. Bad lawyer jokes aside, it is not a given that a lawyer makes a decision about a settlement offer solely on the basis of the lawyer's own financial stake. The *Lohman* opinion, however, seems to be assuming that all decisions in a case are based on financial outcomes. For any attorney who has ever taken a pro bono discrimination case or been in the trenches carrying out Congress' mandate to act as "private attorneys general" knows that these cases are rarely about the "money."

Unfortunately, the *Lohman* opinion also seems to miss the mark by forgetting the simple fact that settlement decisions are made by the client. The goal of getting a large monetary award to deter further unlawful conduct is no greater than the desire for justice to be served. Rarely is the client's primary goal to ensure that the attorney gets paid enough. And, obviously, even more rare is the ability to predict the future in order to compare the current settlement offer against the jury decision. After the fact, a court may deem the decision not to settle to be unfortunate, but it's hardly the basis for drastically cutting a fee award — especially when the attorney getting the pay cut actually won the case and may have turned down the settlement offer for any number of reasons.

The *Lohman* decision also operates under the assumption that every plaintiff is willing to negotiate a settlement in the middle of a trial. While settlement negotiations during trial are not unusual, oftentimes offers are made solely to drive a wedge between an attorney, who may have hundreds of thousands of dollars in time invested, and a client who simply wants justice. If a scrupulous defendant makes repeated offers during trial, armed with the knowledge that the fee award will be reduced based on those offers, there will be little incentive for an attorney to act as a private attorney general in handling a civil rights case. Never one to be deterred, this writer suggests using the following language, suggested by a notable employment lawyer, Michael Salmanson: "The parties hereby stipulate that no offer of settlement, or rejection thereof, shall be used for any evidentiary purpose whatsoever, including but not limited to, a claim that plaintiff had only limited success in the litigation."

Federal Rule of Evidence 408 renders inadmissible evidence of settlement negotiations offered to prove "either liability for or invalidity of the claim or its amount." Since one of the remedies available to a prevailing civil rights plaintiff is the right to receive reasonable attorney fees, it follows that a fee petition should constitute a "claim" under Rule 408. The amount of the fee petition is the amount of the claim. The problem in using evidence of settlement negotiations in determining the fee, by definition, means you are using the evidence to address "liability for or invalidity of" the fee amount. Clearly, evidence of settlement discussions is highly prejudicial as to the issue of the amount of the claim and should not be used to invalidate the prevailing attorney's right to a fee.

The court, however, considered the evidence to be probative of "the degree of success obtained by Lohman's counsel." It is difficult enough to prevail at trial. Winning one of three claims should hardly be considered a "limited" success, nor is success solely judged by financial outcome. The plaintiff's civil rights were vindicated, and the plaintiff had the satisfaction of getting a judgment against an employer who treated him unlawfully. Plaintiffs do not always expect to win on every single claim at trial, so for a court to judge how great or "limited" the success was based on the monetary award and the number of claims that succeeded is simply unrealistic and unfair to the attorney — whose strategies and expectations are not part of the record.

The attorney in *Lohman* argued that the ability to reduce fees is "against public policy, because it will penalize civil rights attorneys who achieve only partial success, and will discourage settlement discussions," as noted in the opinion. With hardly any discussion, the court referred to the arguments as having "superficial appeal." Yet these concerns are hardly superficial, as they reflect the true implications of this decision. This poses the question: What is a civil rights attorney to do when there is a potentially good settlement offer but the client wants to continue to trial? By the 3rd Circuit's reasoning, the attorney better make sure the jury views the case with the same measure of value as the settlement offer, or be prepared to not be paid for trying to vindicate her client's legal rights.

At the time of this writing, a petition for rehearing, en banc, was filed in the *Lohman* matter. Plaintiff's lawyers are waiting with bated breath to see if the entirety of the court agrees with the premise that prevailing attorneys deserve

less pay for their work. •

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