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## Circuits Split on Considering Prior Settlement Offers in Attorney Fees

By Jeffrey Campolongo All Articles

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Jeffrey Campolongo

In 2009, this column reported on the U.S. Court of Appeals for the Third Circuit's use of a rejected settlement offer as a means of reducing an attorney's fee award to the prevailing party. In *Lohman v. Duryea Borough*, 574 F.3d 163 (3rd Cir. 2009), a wrongful discharge case based on First Amendment retaliation, the jury found for the plaintiff, Nicholas Lohman, on one of his three claims. Lohman was granted \$12,205 in lost wages and nominal damages. In considering the petition for attorney fees, the trial court went so far as to consider evidence of a \$75,000 settlement offer that Lohman previously turned down. In light of the large disparity between the jury award and the settlement offer, the district court reduced the amount of Lohman's \$112,883 costs and fees to \$30,000 in fees and \$4,251 in costs. The Third Circuit affirmed the trial court's discretionary decision, agreeing that the rejected settlement offer was probative of "the degree of success obtained by Lohman's counsel."

At the time, Lohman's counsel argued that reducing attorney fees based upon settlement negotiations is "against public policy, because it will penalize civil rights attorneys who achieve only partial success, and will discourage settlement discussions." The

Third Circuit declared that such an argument had only "superficial appeal." Three years later, the same argument was more palatable to the First Circuit in *Diaz v. Jiten Hotel Management*, No. 11-2400 (1st Cir. Oct. 12, 2012), wherein the plaintiff received the same type of monetary recovery as the plaintiff in *Lohman* after also rejecting the higher settlement amount of \$75,000.

In *Diaz*, Carmen Llerena Diaz appealed from the U.S. District Court for the District of Massachusetts' decision as to attorney fees. The district court, under Judge William G. Young, made a significant reduction in the award of fees to Diaz's attorney based in large part on Diaz's rejection of a global settlement offer that was higher than the damages ultimately awarded to Diaz by the jury.

According to the decision, Diaz worked as a housekeeper at a Holiday Inn Express operated by Jiten Hotel Management Inc. In the last years of her employment with Jiten, Diaz had a number of issues with the general manager, Mitesh Patel. As alleged by Diaz, she stopped receiving annual raises under Patel's management, and Patel made age-related comments about Diaz. When Diaz was terminated, she alleged that it was due to age discrimination and filed a complaint in federal court.

The parties ultimately went to trial on only two of Diaz's claims, violations of federal and state age



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discrimination laws. The jury found in Diaz's favor on her state law claim and awarded her damages of \$7,650. Diaz then petitioned for an award of attorney fees in the amount of \$139,622 and \$13,389 in costs. The district court awarded a reduced amount of \$25,000 in fees and \$9,434 in costs.

The First Circuit decision explained that the district court reduced the amount of attorney fees and costs sought by two-thirds to reflect that the attorney was only successful on one of the claims, and computed a lodestar of \$44,766. The district court then took into consideration Diaz's rejection of Jiten's midtrial settlement offer of \$75,000. The First Circuit interpreted the district court's decision-making to be based upon an apparent belief that Diaz's rejection of the settlement offer was at least partially a result of the attorney's desire to receive a higher amount of attorney fees through trial.

The First Circuit decision reversed the district court's attorney fees award based upon what it perceived as an improper focus on the rejected settlement offer. The court explained in its decision that it disagreed with the district court that a reduction in awardable attorney fees acts as an incentive for attorneys to accept settlement offers. The court acknowledged that attorneys working on a contingency-fee basis already have an incentive to encourage settlement. The contingency-fee attorney has to expend substantial time and resources on cases that go to trial and the attorney is only compensated if the cause of action is successful. The risk alone, therefore, is one that the court found to be sufficient incentive to enter into settlements.

The court also noted that a contingency-fee agreement between the attorney and client does not create a ceiling of fee recovery, as the attorney may be permitted by law to petition for an award of fees. Calculating a reduction of fees based upon an assumed contingency-fee percentage, therefore, is improper.

Finally, the court pointed out that the client makes settlement decisions and not the attorney. The First Circuit seemed to be admonishing the district court for its failure to recognize this, and declared that presuming the attorney made the decision to reject the settlement offer is a presumption that the attorney was violating her ethical duties.

In *Diaz*, the First Circuit accepted the arguments that were raised by the plaintiff and rejected by the Third Circuit in *Lohman*. With this emerging split in the circuits as to whether rejected settlement offers outside the Rule 68 "offer of judgment" context should affect an award of attorney fees and costs, perhaps the issue will wind its way to the U.S. Supreme Court. While it is this writer's strong opinion that prior settlement offers have no relevance whatsoever to the fee award, practitioners in this circuit are cautioned to be wary of the possibility that they could come back to bite you when it comes time to petition for fees. One does have to question, however, the logic behind a rule of law that disincentivizes private attorneys general from taking these kinds of cases in the first place. •

*Jeffrey Campolongo concentrates his practice in the areas of employment discrimination, specializing in the Americans with Disabilities Act, the Family and Medical Leave Act and Title VII of the Civil Rights Act of 1964.*

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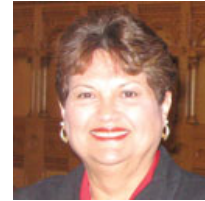
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