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Assessing emotional distress damages in mediation

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Emotional distress damages can be among the most challenging aspects of litigating and mediating personal injury, discrimination, harassment and other claims that allege individual harm. Such damages reflect wholly internal and subjective experiences and can thus be difficult to prove and quantify.

In California, there is no formal standard for measuring or quantifying the amount or range of emotional distress damages. Courts have recognized the subjective nature of such claims: "One of the most difficult tasks imposed on a fact finder is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. The inquiry is inherently subjective and not easily amenable to concrete measurement." (*Pearl v. City of Los Angeles* (2019) 36 Cal.App.5th 475).

According to one court, "there is no fixed or absolute standard by which to compute the monetary value of emotional distress." (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590). Another said the only appropriate standard would be "such an amount as a reasonable person would estimate as fair compensation." (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664-1665).

PLAINTIFF'S EVIDENCE

Even though proving emotional distress is challenging, there are ways for plaintiffs in mediation to support their claims for emotional distress damages. These may include the following types of evidence:

Plaintiffs can testify about how their emotional distress has impacted their lives, describing their symptoms and the impact those symptoms have had on their ability to work, socialize, interact with family, or generally enjoy life.

Witnesses can provide testimony about what they observed in the plaintiff's behavior or heard the plaintiff say about his or her emotional distress to support the claim. Testimony from a spouse or family member can also be used to show the changes they have seen in the plaintiff's behavior as a result of a physical injury or loss of a job.

Plaintiffs may also present medical records, such as those from a therapist or psychiatrist, to show that they have received treatment for their emotional distress. Expert testimony from a mental health professional may be introduced to explain symptoms and how they are related to the defendants' conduct.

Evidence might also be introduced to show how the plaintiff's behavior changed because of their emotional distress. The plaintiff, for example, may have sought therapy or avoided social situations.

Other evidence might be presented to show how the emotional distress has caused economic damages, such as lost wages or medical expenses.

DEFENDANT'S EVIDENCE

Defendants who are seeking to contradict the plaintiff's emotional distress claims might present their own evidence at mediation. Such evidence

would attempt to push back on the emotional distress claim and might take one of the following forms:

Evidence from the plaintiff might be used to show that his or her life has not changed significantly since becoming injured or aggrieved. This could be in the form of testimony directly from the plaintiff, or it could come from the plaintiff's social media posts or comments.

A defendant might also present evidence showing that the plaintiff was able to find and maintain comparable employment shortly following the termination of his or her employment.

Evidence from witnesses, such as friends or family members, might be used to contradict the plaintiff's position, especially testimony to the effect that they observed no changes in the plaintiff's behavior following the injury.

Defendants might also point to a lack of medical treatment by the plaintiff or the presence of other stressors in the plaintiff's life – such as past trauma (past abuse/treatment) or intervening events (relationship breakdowns/substance abuse) – that constitute the root cause of any emotional distress. Parties should, however, be mindful of CACI 3928, which advises jurors to decide on an amount "that will reasonably and fairly compensate the plaintiff for all damages caused by the wrongful conduct of defendant, even if the plaintiff was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury."



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EMPLOYMENT DISPUTES

In employment disputes, employers often focus on the fact that the plaintiff failed to seek treatment. They might point to this as proof that the plaintiff suffered no emotional distress. Although treatment can certainly be a factor in assessing the viability of an emotional distress claim, there may be many reasons why an employee did not seek treatment for emotional distress, such as cultural taboos about mental health treatment, as well as the cost of such treatment.

If a jury believes that an employer subjected an employee to discriminatory or harassing conduct, they are likely to also conclude that the offending conduct caused some amount of emotional distress beyond "garden variety."

VALUATION OF CLAIMS

Given the subjective and uncertain nature of emotional distress damages, it is not uncommon at mediation for the parties to have wildly different valuations of a plaintiff's emotional dis-

stress claims. Mediators must therefore approach the topic in a way that provides the plaintiff with a safe space to describe the impact of the alleged wrongful conduct, while also offering honest feedback on the strengths and weaknesses of the emotional distress case.

Employers often make the mistake of tying emotional distress valuation to the salary/wages of the employee. They might argue, for example, that because an employee suffered little by way of economic loss, the emotional distress award should be commensurately small. Jurors hearing the case at trial, however, may be more inclined to provide a subjectively larger non-economic award in cases where economic recovery is limited.

Conversely, employees may be able to bolster their emotional distress claims at mediation – especially when apportioning a large amount to this component of compensatory damages – by providing tangible evidence that sup-

ports their demand. Depending on the stage of the case, this might include deposition excerpts, medical records, independent medical examination reports and other documentation.

Emotional distress awards in employment cases can vary widely, depending on the facts and circumstances of each case. Such awards are subject to review by courts and may be subject to reduction. In 2021, a jury awarded the plaintiff in a whistleblower retaliation case \$2 million for past emotional distress and an additional \$1.5 million for future emotional distress (*Briley v. City of West Covina* (66 Cal App 5th 119)).

On appeal, the court overturned the award, finding that “the jury’s total award of \$3.5 million in noneconomic damages is shockingly disproportionate to the evidence of Briley’s harm and cannot stand.” Economic damages, the court said, should have eliminated any remaining financial concerns tied to the plaintiff’s termination. The court re-

manded the case for a new trial unless the plaintiff agreed to a substantial reduction of emotional distress damages: \$1 million for past damages and \$100,000 for future damages.

Courts will consider a number of factors in determining whether emotional distress awards are excessive. Among these is the severity of the emotional distress suffered by the plaintiff: its duration, intensity, and impact on the plaintiff’s daily life and ability to work. The defendant’s conduct will also be reviewed; if it was particularly egregious or intentional, a higher award may be warranted. A court may look at the frequency of the conduct; ongoing or repeated conduct could warrant a higher award. Evidence presented by the plaintiff in support of a claim for emotional damages, such as medical and financial records, will be evaluated as part of the court’s review, along with emotional distress awards in other similar cases.

CONCLUSION

Case law involving emotional distress damages underscores the inherent unpredictability of jurors and judges in assessing these claims. For parties who seek to resolve their employment disputes, the most important lesson is to do the work in advance. The unpredictability of emotional distress claims should be a powerful catalyst for both sides to work toward resolution in a mediation setting.

For the employee seeking a large award of damages for emotional distress, and for the employer seeking to downplay the emotional distress component of a settlement, the final settlement may hinge on the strength of their respective positions. Both sides must, therefore, do their homework prior to mediation so that they can present credible arguments to support their claims or to rebut the other party’s position.