

2.36 PAST AND FUTURE EMOTIONAL DISTRESS IN AN EMPLOYMENT LAW CASE
(Approved 12/2014)

NOTE TO JUDGE

In *Battaglia v. United Parcel Service, Inc.*, 214 N.J. 518 (2013), the Supreme Court held that it was error for a court to instruct a jury in an employment law case to consider life expectancy in connection with emotional distress damages where the plaintiff did not offer any expert testimony as to the permanency of the emotional distress. The Court held that while an employment law plaintiff can claim emotional distress damages without expert testimony, such damages are limited to past emotional distress through the time of trial. For an employment law plaintiff to claim future emotional distress, he or she must offer expert testimony as to the permanency of the distress. *Id.* at 551-55.

The following charge is intended for use in cases in which the plaintiff has offered expert testimony and is claiming future emotional distress in addition to emotional distress through the time of trial.

If you find for plaintiff, (s)he is entitled to recover fair and reasonable money damages for the full extent of the harm caused, no more and no less.

A plaintiff who is awarded a verdict is entitled to fair and reasonable compensation for any emotional distress, which was proximately caused by the defendant's [adverse employment action]. "Emotional distress" includes embarrassment, humiliation, indignity, and other mental anguish.

The measure of damages is what a reasonable person would consider to be adequate and just under all the circumstances of the case to compensate plaintiff for his(her) emotional distress. You may consider the plaintiff's age, usual activities, occupation, family responsibilities and similar relevant facts in evaluating the probable

consequences of the [adverse employment action] on plaintiff's emotional state. You should consider the nature, character, severity and duration of the emotional distress in determining how much to award, as any award you make must cover the damages suffered by plaintiff since the [adverse employment action] to the present time and into the future if you find that plaintiff's emotional distress has continued to the present time and can reasonably be expected to continue into the future.

Plaintiff has the burden of proving his/her damages through credible, competent evidence. To recover damages for past or present emotional distress, plaintiff does not have to present corroborating testimony from any witness; the distress need not be permanent; physical or psychological symptoms are not necessary; and plaintiff need not have obtained any type of professional treatment.¹ The plaintiff's testimony standing alone may be sufficient to support an award of past or present emotional distress damages. On the other hand, you are free to disbelieve all or part of the plaintiff's testimony and, if you do, you should act accordingly by either reducing the amount of damages you award or by not awarding any emotional distress damages at all.

Unlike past or present emotional distress, the law requires a plaintiff to prove that his/her emotional distress will continue into the future through evidence of

¹ *Battaglia v. United Parcel Service, Inc.*, 214 N.J. 518, 551-555 (2013); *Tarr v. Ciasulli*, 181 N.J. 70, 81 (2004).

permanence or other likely duration in the form of expert testimony. This ensures that the plaintiff will be made whole while preventing an improper award of damage based on conjecture or speculation.² Therefore, in determining whether plaintiff has suffered emotional distress that will continue into the future, you should consider the testimony of plaintiff's expert in addition to the other evidence presented by the parties. If, after considering all of the evidence, you find plaintiff's expert's testimony on plaintiff's future emotional distress credible, you should award plaintiff damages for future emotional distress. If, after considering all of the evidence, you do not find plaintiff's expert's testimony on plaintiff's future emotional distress credible, you should not award future emotional distress damages. You should keep in mind that you can award past or present emotional distress damages even if you do not find that the plaintiff has proven future emotional distress.

The law does not provide you with any table, schedule or formula by which a person's emotional distress may be measured in terms of money. The amount is left to your sound discretion. You are to use your discretion to attempt to make plaintiff whole, so far as money can do so, based upon reason and sound judgment, without any passion, prejudice, bias or sympathy. You each know from your common experience the nature of emotional distress and you also know the nature and function of money. The task of equating the two so as to arrive at a fair and reasonable award of damages

² *Battaglia*, 214 N.J. at 553.

requires a high order of human judgment. For this reason, the law can provide no better yardstick for your guidance than your own impartial judgment and experience.

You are to exercise sound judgment as to what is fair, just and reasonable under all the circumstances. You should consider all the evidence presented by both parties on the subject of plaintiff's emotional distress, including the testimony of the doctor(s) who appeared. After considering the evidence, you shall award a lump sum of money that will fairly and reasonably compensate plaintiff for his/her emotional distress you find that she/he has proven.