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February 5, 2020

VIA ECF AND EMAIL
Hon. Kimberly Espinales-Maloney, J.S.C.
Hudson County Administration Building
595 Newark Ave., 9th Floor
Jersey City, NJ 07306

Re: *Ruth DiPalma v. City of Union City, et al.*
Superior Court of New Jersey, Hudson County
Docket No.: L-001151-18

Dear Judge Espinales-Maloney:

Pursuant to Your Honor's request, please accept this letter on behalf of Plaintiff, Ruth DiPalma, regarding the proper treatment of the verdict in her favor on her claim for Intentional Infliction of Emotional Distress as against Sonia Schulman - Count Four of Plaintiff's Third Amended Complaint. As set forth herein, based upon the jury's unanimous and unambiguous award on this claim, there is no basis on which this Court may disrupt that finding or otherwise alter the jury's award. A Judgment should be entered in accordance with the jury's verdict (**Exhibit C-2**) for the full amount determined by the jury.

I. Defendants' Motion for Involuntary Dismissal Must Be Denied

There is substantial, largely unrefuted evidence in the record to sustain the jury's award for intentional infliction of emotional distress. This was true at the close of Plaintiff's case and has been finally resolved with the jury's unanimous verdict in her favor. Where, as here, the jury was properly instructed without objection by Defendants, there is simply no basis to invade the jury's determination.

"[B]oth Rule 4:40-1 and Rule 4:37-2(b) are governed by same standard: "if, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion ***must*** be denied." Zive v. Stanley Roberts, Inc., 182 N.J. 436, 441-42 (2005). Denial of such motions is particularly appropriate where the issue presented rests upon credibility of witness, because weighing credibility falls squarely within the ambit of the fact-finder. See Alves v. Rosenberg, 400 N.J. Super. 553, 566 (App. Div.

2008). Moreover, where, as here, there is uncontradicted testimony, it would be plain error for the Court to ignore it. Dolson v. Anastasia, 55 N.J. 2, 12 (1969).

"This approach respects the jury's singular role in resolving 'disputed factual matters.'" Besler v. Bd. of Educ. of W. Windsor-Plainsboro Reg'l Sch. Dist., 201 N.J. 544, 572 (2010). "A jury's verdict should not be disturbed merely because 'reasonable minds' might have reached different conclusions based on the evidence." Id. The cases are legion warning trial judges not to substitute their own opinions of the evidence for that of the jury because, the "Court is not a juror of last resort." Id. at 575. Stated differently, "the judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion; he is not a thirteenth and decisive juror." Dolson, supra, at 6.

Not every workplace harassment case satisfies the high burden of intentional infliction of emotional distress; rather, it requires a separate and distinct showing of "intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe." Taylor v. Metzger, 152 N.J. 490, 509-10 (1998). "The conduct must be 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" Id. It is a fact-sensitive analysis for the jury to determine. Among the relevant considerations is whether "the power dynamics of the workplace contribute to the extremity and the outrageousness of defendant's conduct." Id. at 511.

Ultimately, the jury determines whether outrageous conduct and severe emotional distress has been proven. Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 587-88 (2009). In Leang, the Supreme Court found that allegations of inaccurately reporting what a teacher had said and intentionally arranging for her to be taken away in a "public and notorious" way were sufficient to raise a fact question for the jury.

The Court does not approach this issue with a clean slate. Although Plaintiff is required, by law, to be given every reasonable inference, the simple fact is that the jury has spoken. They have rejected Defendants' arguments, in total, that Plaintiff was treated fairly and the same as other employees. The jury has categorically rejected Defendants' argument that she was fired for legitimate reasons or pursuant to some appropriate "process." The jury's verdict on all counts sends a resounding message that they found intentional, willful, and wrongful conduct by the City and Sonia Schulman. The jury found 6-0, unanimously, that Ms. Schulman engaged in intentional workplace harassment and, further, that she physically assaulted Plaintiff at work. Plaintiff's unrebutted testimony at trial included countless verbal assaults and attacks directly related to her age and including derogatory statements. Plaintiff also recounted the physical threats and attacks from Ms. Schulman. The jury clearly credited Plaintiff's testimony and rejected any arguments by Defendants to the contrary.

Here, as in *Leang*, there are also troubling facts regarding the pre-termination efforts to prosecute Plaintiff as well as the manner in which she was terminated after the Hudson County Prosecutor had made a determination of "no criminality." As demonstrated at trial, Ms. Schulman (and Ms. Colditz), shortly after reviewing the video at issue on May 10, 2018,

reported the incident to Chief of Police Molinari as a crime while knowing the whole time that there was no money missing from City funds. Schulman then showed both the Chief and Lieutenant Loaces an edited version of the video that excluded the exculpatory portion showing Plaintiff with the $20 bill in her hand as she approached the cashier drawer. Later, at the time she was terminated (and after the Prosecutor had determined not to charge her), Plaintiff was publicly accused of stealing and threatened with incarceration (i.e. "you are lucky you are not leaving here in handcuffs"). She was then paraded out of the office in front of her co-workers surrounded by police officers. At the time this charade occurred, the City admittedly already knew there was no theft and no possibility that Plaintiff would be arrested. Ms. Schulman also had this knowledge, but they allowed Plaintiff to be threatened anyway. This is particularly egregious conduct that the jury rightfully found could not and should not be tolerated. *See Hill v. New Jersey Dept. of Corrections Com'r Fauver*, 342 N.J. Super. 273, 297-298 (App. Div. 2001) ("a rationale factfinder could determine that a four-person conspiracy to file false charges which were intended to, and could have cost plaintiff his livelihood and severely impacted his career, is sufficiently outrageous behavior so as to warrant submission of the issue to the jury for its determination.")

Based on the facts presented at trial, the jury was well within its right, after being properly charged, to find that Ms. Schulman's conduct constituted intentional infliction of emotional distress and they did so, unanimously, entering a verdict against Ms. Schulman and awarding $75,000 in compensatory damages. There is absolutely no legal or factual basis to upset that award.

II. There is Absolutely No Authority to "Mold" the Jury's Award on the Intentional Infliction Claim

There is similarly no legal or factual basis that would permit this Court to invade the jury's verdict and "mold" the award to its own belief of what the jury could have – or should have – done. The verdict demonstrates unequivocally that the jury determined Ms. Schulman's conduct to be particularly reprehensible, by entering an award against her, individually.

The New Jersey Supreme Court explained the limited ability of the trial court to alter or mold a jury's proper verdict in Kassick v. Milwaukee Elec. Tool Corp., 120 N.J. 130 (1990), as follows:

> [T]he Rules of Civil Procedure expressly limit the trial court's power to interfere with or to modify a jury's findings of fact. See *R.* 4:39-2. Although an appellate court has a duty to canvass the record to determine whether a jury verdict was incorrect, ***that verdict should be considered impregnable unless so distorted and wrong, in the objective and articulated view of a judge, as to manifest with utmost certainty a plain miscarriage of justice***.
>
> That deference to a jury's findings is reflected also in the general rule that ***a trial court may not "mold" a jury verdict according to its perception of the jury's view***. A verdict may be molded in consonance with the plainly manifested

> intention of the jury, but such a determination is best performed in the presence of the jurors and with their consent. Moreover, molding a verdict is most appropriate when it pertains to form rather than substance. ***Once the jury is discharged, both trial and appellate courts are generally bound to respect its decision, lest they act as an additional and decisive juror***.

Id. at 134-36(Internal quotations and citations omitted)(Emphasis added).

Very simply, "[a] jury impropriety may not be assumed, especially in the absence of a special interrogatory." Kanellos v. Williams Termite Co., Nos. A-2428-04T3, A-2876-04T3, 2007 N.J. Super. Unpub. LEXIS 950, at *26-29 (App. Div. Feb. 2, 2007). In Boryszewski v. Burke, 380 N.J. Super. 361, 404, 882 A.2d 410 (App. Div. 2005), *certif. denied*, 186 N.J. 242, 892 A.2d 1288 (2006), the Appellate Division reversed a trial court order granting a new trial where the trial court exceeded his discretion in setting aside a jury's award of emotional distress damages because there was no basis in the record for the judge to assume that the jury had not heeded and applied the court's instructions. There the Appellate Division found that the trial judge impermissible substituted his own damages assessment for that of the jury.

Our Courts have long recognized that a claim for intentional infliction of emotional distress is separate and distinct from a claim for workplace harassment, compensating two separate wrongs, even if the same conduct is implicated. In Tarr v. Ciasulli, 181 N.J. 70 (2004), the Supreme Court recognized this distinction, permitting a victim of discrimination to recover for "humiliation, embarrassment and indignity" suffered, irrespective of their right to recover under the more stringent standard for intentional infliction of emotional distress. Id. at 81-82. Very simply, "[a] claim for intentional infliction of emotional distress is not duplicative of a statutory claim for wrongful discharge based on unlawful discrimination, even though both claims may rely on the same set of facts." Kwiatkowski v. Merrill Lynch, No. A-2270-06T1, 2008 N.J. Super. Unpub. LEXIS 3023, at *45 (App. Div. Aug. 13, 2008).

Here, there is no authority for the Court to disturb or "mold" the jury's verdict. The jury, having been properly charged and considered all of the relevant facts, was well within its providence to enter the separate award against Ms. Schulman on the intentional infliction claim. Although many of the same facts were likely, although not necessarily, considered by the jury in entering an award on the hostile work environment claim, neither the parties, nor the Court, are empowered to second-guess that determination or cast a different, decisive vote. The injury inflicted on Plaintiff on account of the workplace harassment, and attributed to the City, was determined by the jury to be $20,000. For reasons that we should not speculate, the jury – rightly or wrongly – determined that was the appropriate amount of damages on that claim for which the City should be liable. The jury, clearly, took a different view of Ms. Schulman's culpability and awarded $75,000 against her individual in the intentional infliction claim. On the facts of this case, such an award was wholly appropriate and supported by the evidence. Although Plaintiff would argue that all of Ms. Schulman's misconduct should be attributed to the City, the jury did not agree and, instead, found that liability for the extreme emotional distress should lie primarily with Ms. Schulman.

The facts support this determination and the Court should not invade that right. If Defendants believed further clarification from the jury was necessary, they could have requested special interrogatories be submitted, even after the verdict and prior to the jury being released. Defendants did not. It would be wholly inappropriate to now speculate on what could have been in the jury's mind.

Finally, although there is absolutely no legal support for the Court to alter the verdict, in the event the Court, nevertheless, intends to "mold" the award, the only colorable deviation would be to credit the $20,000 award against the City and Ms. Schulman on the harassment claim, against the intentional infliction award of $75,000. This would reduce the award on the intentional infliction claim to $55,000, with the remainder of the verdict intact. This would give Ms. Schulman a "credit" for the award for which she is jointly and severally liable, without permitting her to impermissible escape the remainder of the jury's verdict.

III. Conclusion

For the foregoing reasons, Defendants' motion for involuntary dismissal should be denied and a Judgment should be entered in accord with the Jury's Verdict.

Respectfully submitted,

REPPERT KELLY & VYTELL LLC

s/Nicholas A. Vytell
Nicholas A. Vytell
Christopher P. Kelly

cc: All Counsel (*via ECF and email*)