RUTH DiPALMA, Plaintiff, v. CITY OF UNION CITY, SONIA SCHULMAN, BRIAN P. STACK, SUSAN COLDITZ, MARYURY A. MARTINETTI, JOHN DOES 1 THROUGH 10; AND ABC CORPORATIONS 1-10; Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION HUDSON COUNTY DOCKET NO. HUD-01151-18 Civil Action

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DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR JUDGMENT PURSUANT TO RULE 4:40-1 AS TO PLAINTIFF'S CLAIMS FOR ASSAULT AND BATTERY AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

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PRELIMINARY STATEMENT

Plaintiff Ruth DiPalma ("Plaintiff") was employed by Defendant the City of Union City ("Defendant" or the "City") as a cashier in the City's Department of Revenue and Finance.

In this matter, Plaintiff alleged that she was harassed, retaliated and discriminated against on the basis of her age. Plaintiff also alleged tort claims for assault and battery and intentional infliction of emotional distress against her supervisor, Sonia Schulman.

New Jersey has prescribed a heavy burden for one alleging intentional infliction of emotional distress. Indeed, 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. Plaintiff's claims in the case at bar clearly do not rise to the level of conduct necessary to sustain a claim for intentional infliction of emotional distress.

Even if Plaintiff had and could make such a showing, pursuant to Taylor v. Metzger, 152 N.J. 490 (1998), the case relied upon by Plaintiff in support of her claims, Plaintiff would be precluded from recovering damages as to her intentional infliction of emotional distress and assault and battery claims. In Taylor, the Supreme Court noted that because "the evidence that would be relevant to plaintiff's claim of emotional injury would overlap, if not duplicate, that proffered to establish her LAD claim . . . plaintiff is precluded from obtaining a double recovery." Id. at 509.

As to her claims of hostile work environment based upon age, intentional infliction of emotional distress and assault and battery, Plaintiff relied upon age-related comments such as that she was an "old bitch" and the conduct of Ms. Schulman in throwing a bag of money at Plaintiff on one occasion and pushing Plaintiff on one occasion. Because these claims were all based upon the same conduct, there should have been one amount of emotional distress damages awarded for all three claims. This principle is supported by Taylor v. Metzger. In Taylor, the Supreme Court

noted that because "the evidence that would be relevant to plaintiff's claim of emotional injury would overlap, if not duplicate, that proffered to establish her LAD claim . . . plaintiff is precluded from obtaining a double recovery." Id. at 509.

Given the fact that the jury assigned three different amounts to the exact same emotional distress renders the entire award as to emotional distress damages suspect. As a result, the jury's verdict is fatally defective and should be reversed in its entirety.

In the alternative, vacation of the award regarding the Fourth (intentional infliction of emotional distress) and Fifth (assault and battery) Counts would be required so as not to duplicate the Plaintiff's recovery as all of the damage allegedly suffered by those allegedly wrongful acts are subsumed in the award of emotional distress damages granted by the jury in conjunction with the First Count (Hostile Work Environment).

Lastly, as to her tort claims against Defendant Schulman, Plaintiff did not present any evidence of aggravating circumstances such as the permanent loss of a bodily function, a permanent disfigurement, or dismemberment, and/or medical expenses exceeding $3600. As a result, the emotional distress damages awarded as to Plaintiff's tort claims against Defendant Schulman are barred as a matter of law.

For the foregoing reasons and as further set forth below, Defendants respectfully request that this Court grant their motion for judgment as to Plaintiff's claim for intentional infliction of emotional distress. Defendants' also respectfully request that the jury's emotional distress award either be vacated as to the First, Fourth and Fifth Counts of Plaintiff's Third Amended Complaint or in the alternative, that the Court vacate the award of damages as to Plaintiff's claims for emotional distress as to the Fourth and Fifth Count.

LEGAL ARGUMENT

POINT I

PLAINTIFF'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS SHOULD BE DISMISSED BECAUSE THE CONDUCT ALLEGED IS NOT EXTREME AND OUTRAGEOUS WITHIN THE MEANING OF THE APPLICABLE LAW.

In order to form the basis of an independent claim for intentional infliction of emotional distress, the conduct involved must be "extraordinarily despicable" to an average member of the community. Cautilli v. GAF Corp., 531 F. Supp. 71, 72-73 (E.D. Pa. 1982)(applying New Jersey law); see also Taylor v. Metzger, 152 N.J. 490, 509 (1998)(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). In this regard, "the limited scope of the tort tolerates many kinds of unjust, unfair and unkind conduct." Ferraro v. Bell Atl. Co., 2 F. Supp. 2d 577, 588 (D.N.J. 1998)(internal quotations and citations omitted). "This is especially true in the employment context" where "it is extremely rare to find conduct . . . which will rise to the level of outrageousness necessary to provide a basis for recovery." Id. (internal quotations and citations omitted).

Plaintiff's claims in the case at bar clearly do not rise to the level of conduct necessary to sustain a claim for intentional infliction of emotional distress. See Marrero v. Camden Cty. Bd. of Soc. Servs., 164 F. Supp. 2d 455, 480 (D.N.J. 2001); see also Ferraro, 2 F. Supp. 2d at 589 (finding that that plaintiff's claims of sexual harassment, discrimination, name-calling and physical intimidation did not establish a claim for intentional infliction of emotional distress").

The fact that the jury also returned a verdict against Ms. Schulman as to Plaintiff's claim of assault and battery does not alter the above analysis. In particular, the jury found only that ". .

. defendant Schulman committed one or more acts of assault and battery upon plaintiff." (See Jury Verdict Sheet, Question 10). The jury was not asked to find that any specific conduct occurred. Indeed, Plaintiff only alleged two specific acts constituting the alleged assault and battery: that Ms. Schulman allegedly threw a bag of money at Plaintiff on one occasion and pushed Plaintiff on another occasion at some undisclosed time during the fourteen years that Plaintiff reported to Ms. Schulman. Plaintiff did not claim that she was physically injured in any way. No criminal complaint (or even an internal union grievance) was filed in either instance despite the fact that the union president, Lenny Lucente, worked in the same office as Plaintiff.

As a result, even giving Plaintiff the benefit of every reasonable inference, she still has not, and cannot, establish as a matter of law that Ms. Schulman's conduct was 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. Taylor, 152 N.J. at 509; Ferraro, 2 F. Supp. 2d at 589.

POINT II

THE JURY'S AWARD OF EMOTIONAL DISTRESS DAMAGES AS TO PLAINTIFF'S CLAIMS FOR HARASSMENT, ASSAULT AND BATTERY AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WAS WITHOUT RATIONAL BASIS AND DUPLICATIVE AND SHOULD BE STRICKEN IN ITS ENTIRETY.

"New Jersey has a strong public policy against permitting double recoveries." Finderne Mgmt. Co., Inc. v. Barrett, 402 N.J. Super. 546, 580 (App. Div. 2008)(citing N.J.S.A. 2A:15-97 (collateral source statute permits the court to deduct any duplicative award from a plaintiff's personal injury recovery); Taylor v. Metzger, 152 N.J. 490, 509, (1998) (plaintiff cannot obtain double recovery for intentional infliction of emotional distress and violation of LAD); Millison v. E.I. Du Pont de Nemours & Co., 101 N.J. 161, 187 (1985) (injured employee must reimburse

workers' compensation carrier in the event of recovery in civil action for employers' intentional actions that caused injury); Rosales v. State Dept. of the Judiciary, 373 N.J. Super. 29, 31 (App. Div. 2004) (long standing public policy prohibiting dual recoveries for the same disability), certif. denied, 182 N.J. 630 (2005); Kislak Co. v. Hirschfeld, 222 N.J. Super. 553, 559 (App. Div. 1988) (real estate agent is entitled to the commission for performance, diminished by any expense to accomplish result, which included commission of selling agent)).

Significantly, in Taylor, the Supreme Court noted that because "the evidence that would be relevant to plaintiff's claim of emotional injury would overlap, if not duplicate, that proffered to establish her LAD claim . . . plaintiff is precluded from obtaining a double recovery." Taylor, 152 N.J. at 509.

In the case at bar, Plaintiff sought to recover for the same damages for emotional distress on each of her claims for workplace harassment on the basis of age, intentional infliction of emotional distress and assault and battery. In this regard, these three claims were based upon the same wrongful conduct. Indeed, as to her claims of age discrimination/harassment, intentional infliction of emotional distress and assault and battery, Plaintiff relied upon the comment that she was an "old bitch" and that Ms. Schulman threw a bag of money at Plaintiff on one occasion and pushed Plaintiff on one occasion.

Plaintiff is not entitled to multiple recovery for her loss. Id. Nevertheless, the jury awarded three separate (and different) emotional distress awards for the same conduct and same alleged damage. In particular, the jury determined that Plaintiff was entitled to $20,000.00 in emotional distress damages as to her workplace harassment claim, $15,000.00 in emotional distress damages as to her assault and battery claim and $75,000.00 in emotional distress damages as to her intentional infliction of emotional distress claim. Because these claims were all based upon the

same conduct and the same damage, there should have been one amount of emotional distress damages awarded for all three claims. As a result, the jury's verdict is fatally defective and should be vacated as to the awards of emotional distress as to the First, Fourth and Fifth Counts of Plaintiff's Third Amended Complaint. Indeed, given the fact that the jury assigned three different amounts to the exact same emotional distress renders the entire award as to emotional distress damages on those three counts suspect. Moreover, given this, there is no rational basis upon which the Court may legitimately mold the verdict as to either the two tort claims or as to the tort claims and the harassment claim.

In the alternative, since molding of the verdict with respect to the Fourth (intentional infliction of emotional distress) and Fifth (assault and battery) Counts is impossible under the circumstances for the reasons articulated above, those awards should be vacated even if the award as to the hostile work environment claim is allowed to stand. In this regard, it should be noted that vacation of the award regarding those counts does not unfairly prejudice the Plaintiff or deprive her of compensation for the alleged wrongdoing since all of the acts upon which the Fourth and Fifth Counts were based, and all of the damage allegedly suffered by those allegedly wrongful acts are subsumed in the award of emotional distress damages granted by the jury in conjunction with the First Count (Hostile Work Environment).

POINT III

PLAINTIFF IS BARRED FROM RECOVERING EMOTIONAL DISTRESS DAMAGES FROM DEFENDANT SCHULMAN.

As the Tax Collector for Defendant City of Union City, Defendant Schulman is a public employee. As a result, in order to recover emotional distress damages as against Ms. Schulman, Plaintiff must establish by a preponderance of the evidence that she suffered permanent loss of a

bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3,600.00. N.J.S.A. 59:9-2(d).

In Ayers v. Jackson Twp., 106 N.J. 557 (1987), the Court noted that the Supreme Court "has recognized in other contexts involving damages for emotional distress that the injury sought to be redressed can fairly be described as pain and suffering." Id. at 576 (citing Evers v. Dollinger, 95 N.J. 399, 410 (1984)). Thus, the Ayers' Court held emotional distress constitutes "pain and suffering," within the meaning of N.J.S.A. 59:9-2(d). See Collins v. Union Cty. Jail, 150 N.J. 407, 416 (1997).

In the case at bar, the only damages which Plaintiff sought and which were awarded in relation to her Intentional Infliction of Emotional Distress and Assault and Battery claims fall within the Ayers' Court's definition of "pain and suffering." Plaintiff did not present any evidence or testimony that she suffered permanent loss of a bodily function, permanent disfigurement, or dismemberment, and/or medical expenses exceeding $3,600 from injuries caused by Defendant Schulman's actions. The New Jersey Tort Claims Act therefore bars Plaintiff's recovery of damages for her Intentional Infliction of Emotional Distress claim. See Gretzula v. Camden Cty. Tech. Sch. Bd. of Educ., 965 F. Supp. 2d 478, 490-91 (D.N.J. 2013).

Likewise, as to her assault and battery claim, Plaintiff did not present any evidence of aggravating circumstances such as the permanent loss of a bodily function, a permanent disfigurement, or dismemberment, and/or medical expenses exceeding $3600. In fact, in the case at bar, the only testimony as to the assault and battery was that Ms. Schulman threw a bag of money at Plaintiff on one occasion and pushed Plaintiff on one occasion. It is beyond dispute that N.J.S.A. 59:9-2(d) precludes recovery for emotional distress damages based on subjective evidence or minor incidents such as these. See Collins, 150 N.J. at 413. Indeed, this conduct was not "an

aggravating and intrusive assault that allegedly caused the plaintiff to sustain a permanent psychological injury." Cf. id. at 420 (holding that post-traumatic stress disorder suffered by an inmate as a result of a rape he endured at the hands of a corrections officer constituted a permanent loss of a bodily function pursuant to the Tort Claims Act.). There simply were no such aggravating circumstances in this case. As a result, the emotional distress damages awarded as to Plaintiff's claim for assault and battery against Defendant Schulman are also barred. N.J.S.A. 59:9-2(d).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant their Motion for Directed Verdict as to Plaintiff's intentional infliction of emotional distress claim pursuant to Rule 4:40-1. Defendants further respectfully request that the jury's award of emotional distress damages as to the First, Fourth and Fifth Counts of Plaintiff's Third Amended Complaint either be vacated in its entirety or, in the alternative, that the verdicts be molded so as to vacate the jury's award emotional distress damages as to Fourth and Fifth Counts of Plaintiff's Third Amended Complaint.

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