MASSACHUSETTS LAWYERS WEEKLY

#MeToo, voir dire seen as part of big-verdict bonanza

Juries warming to bias, retaliation claims

By: Kris Olson January 24, 2019

Prior to 2017, the number of million-dollar verdicts in employment discrimination and retaliation cases over the previous two decades could more or less be counted on one hand, according to plaintiffs' attorney Elizabeth A. Rodgers.

Then, the floodgates opened. Since 2017, juries have awarded at least nine seven-figure verdicts, headlined by the $28 million sum awarded last May to a Haitian-American nurse who sued Brigham and Women's Hospital for bias and retaliation.

To explain the trend — if it indeed is one — attorneys point to a number of possible causes, from changes in court procedure to changes in politics and culture.

Attorney voir dire

In 2014, the Legislature opened the door to attorneys and self-represented parties examining prospective jurors. Experiences of lawyers and judges with the new form of voir dire helped refine the procedure, leading to new Superior Court Rule 6, which took effect in September 2017.

Though voir dire has no doubt benefited both sides in employment cases to some degree, one theory is that attorney voir dire has been particularly helpful to the plaintiffs' bar. Jurors who would have been disinclined to render a large verdict — or side with the plaintiff at all — are now being weeded out.

Attorney voir dire helps tease out jurors' views on certain matters that are going to be important to the case, says Newton Center's Matthew J. Fogelman, who in late 2017 secured a verdict of $1.2 million for James Beresford in an age discrimination suit tried in Norfolk County.

Beyond basic matters, like whether they understand the difference between preponderance of the evidence and beyond a reasonable doubt, perhaps no issue is more important to plaintiffs' lawyers than whether jurors would be willing to provide damages for emotional distress, Fogelman says.

"There are a minority of people who do not believe that emotional damages are legitimate," he says.

Springfield attorney Tani E. Sapirstein says she had used panel voir dire only once in an employment case but plans to use it more frequently going forward.

"It is amazing what people will tell you when you engage in discussion," Sapirstein says, recounting that several jurors acknowledged they would have a problem following the judge's instructions on awarding damages for emotional distress and punitive damages.

But Fogelman says voir dire is also helpful to learn whether jurors have personal experiences with discrimination or harassment in the workplace, and whether they have ever been fired or had to terminate someone else's employment.

"We simply didn't have access to that information before," he says.

The 2014 changes in the law also allowed plaintiffs' attorneys to begin

Employment awards at a glance

Sept. 28, 2018

Serabian v. SAP America Inc.

$1.9 million (if post-trial motion for automatic trebling of damages granted)

Issue: Failure to pay commission, retaliation

U.S. District Court

Aug. 28, 2018

Roosa v. Central Motors, Inc. of Norwood, et al.

$3.02 million

Issue: Gender discrimination and sexual harassment

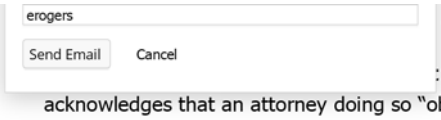
Suffolk Superior Court

June 18, 2018

Duda v. Baystate Medical Practices

$1.9 million

Issue: Disability discrimination



damages to jurors.

case," Fogelman says, though he acknowledges that an attorney doing so "obviously runs the risk of undershooting or overshooting, which could prove to be problematic."

He points to the $28 million verdict a Suffolk Superior Court awarded in May to Brigham & Women's nurse Gessy Toussaint after more than three days of deliberations. Her attorney, Allison A. MacLellan of Dorchester, had suggested that number.

Back in January 2017, Boston attorney Philip J. Gordon suggested a $15 million figure to the jury deciding a case brought against the city of Brockton by Russell Lopes. The plaintiff alleged he was denied a job as a diesel mechanic with the Department of Public Works due to his race. The jury instead awarded $4.05 million.

"Oftentimes, jurors simply don't know" what a reasonable number might be, Fogelman says.

Changes in attitude

The last couple of years have seen prominent men like film producer Harvey Weinstein, Fox News CEO Roger Ailes and "Today" show host Matt Lauer face consequences for particularly egregious examples of sexual harassment, giving rise to the #MeToo movement.

Underlying the #MeToo movement is a newfound empowerment, which may be spreading into other areas of employment law, theorizes Marblehead attorney Mark M. Whitney, who previously practiced at a Boston management-side employment boutique.

Fogelman agrees.

"This is a very volatile climate in which we find ourselves in this country, and to the extent that a jury has found that a company has violated the law, whether it is discrimination, sexual harassment or retaliation, juries are demonstrating their willingness to hold companies accountable for their misconduct," he says.

In March, Jonathan J. Margolis and colleague Beth R. Myers helped win a verdict of over $2 million in a sex discrimination and retaliation case on behalf of Judy Racow, a veteran Winthrop police officer.

Though Margolis says he's not certain #MeToo, specifically, had an effect in Racow's case, he acknowledges there has been more discussion in society about discrimination and its effects.

Rodgers agrees, pointing to the proliferation of dash cam videos, which has helped overcome jurors' resistance to the idea that racism and discrimination are still happening.

Moreover, judges are being trained on implicit bias, and discriminatory arrest and sentencing practices have also increasingly entered the public's consciousness, the Boston lawyer notes.

Whitney says he has detected a trend of people who may later become defendants in employment lawsuits by "following the president's lead," thinking they don't have to be "PC" anymore and instead can be brash and obnoxious in the workplace.

Hampden Superior Court

May 24, 2018

Toussaint v. Brigham and Women's Hospital

$28.213 million

Issue: Discrimination and retaliation

Suffolk Superior Court

March 28, 2018

Racow v. Town of Winthrop

$2.028 million

Issue: Gender discrimination

Suffolk Superior Court

Jan. 18, 2018

DaPrato v. Massachusetts Water Resources Authority

$1.2 million

Issue: Retaliation for taking approved medical leave

Suffolk Superior Court

Dec. 22, 2017

Beresford v. Charles River Automotive

$1.2 million

Issue: Age discrimination

Norfolk Superior Court

April 14, 2017

Rinsky v. Cushman & Wakefield, Inc.

$1.275 million

Issue: Age discrimination

U.S. District Court

Jan. 30, 2017

Lopes v. City of Brockton

$4.05 million

Issue: racial discrimination

Plymouth Superior Court

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> *demonstrating their willingness to hold companies accountable for their misconduct."*
>
> *— Matthew J. Fogelman, Newton Center*

Rise of emotional distress, punitives

Whitney says he came away from a recent seminar hosted by the Massachusetts Employment Lawyers Association struck by the size of jury awards for emotional distress not backed by medical evidence, what some call "garden variety" emotional distress, a term the plaintiffs' bar disfavors.

Jurors are increasingly inclined to accept "soft" testimony about how discrimination or retaliation impacted a plaintiff's family, or mood and outlook on life, he says.

In a blog post about the James Beresford age bias verdict, Whitney theorized that the jury may have been moved by the plaintiff's long, generally spotless history with his employer, Charles River Automotive, and his likability as a witness. Beyond the timing of his termination and being called an "old timer" by the general manager, Beresford seemingly had not put forth the type of "remarkable or particularly shocking evidence" that in the past would have been needed to justify such a verdict, Whitney wrote.

Sapirstein says that discrimination cases — more so than retaliation cases — are "still hard to win." But once a jury becomes convinced that discrimination or retaliation has occurred, the door to the vault seems to be swinging open wider.

Case in point: Last June she convinced a Hampden Superior Court jury to award $1.9 million in damages to Dr. Francis J. Duda, a 73-year-old pediatrician born with cerebral palsy who claimed he had been fired because of his disability and age.

The phenomenon is not limited to Massachusetts, Sapirstein notes, pointing to a recent case in which a jury in Miami awarded $21 million to a hotel dishwasher — a devout Christian missionary born in Haiti — because the hotel had forced her to work on Sundays.

Jurors are increasingly recognizing that discriminating on the basis of gender or race "is a bad way to run a business or government agency," Margolis says.

That acknowledgement may be manifesting itself in a newfound openness to assessing punitive damages, which juries had historically been "hostile" to, Margolis adds.

In the Winthrop police officer's case, the jury awarded Racow $676,000 for emotional damage and twice that — $1,352,000 — in punitive damages. The award for the pediatrician with CP, too, had a large punitive damage component ($1,146,000).

Perhaps an even more striking example of the newfound willingness of juries to award punitive damages came on Oct. 15, 2015, when a panel awarded $10 million to plaintiff Chantal Charles, a senior administrative assistant in Boston's Treasury Department.

Superior Court Judge Elizabeth M. Fahey subsequently ruled that the punitive damages award was excessive and reduced it to $2 million. Charles' attorneys appealed, asking for the jury's punitive damages verdict to be reinstated. They argued before the Appeals Court on Nov. 15 that Fahey used an incorrect threshold standard for remittitur and made legal errors when analyzing the reasonableness of the jury award. A decision in the case is pending.

But Margolis suggests that Fahey's decision is an outlier. Judges seem to be more inclined these days to uphold a punitive damages award, he says.

What to make of fewer filings

Even as jury awards have gotten bigger, however, the number of discrimination charges filed with the Massachusetts Commission Against Discrimination has been on a steady decline, from a peak of around 6,000 filings to 4,150 new complaints in 2002, to 3,082 in 2016, and 2,951 in 2017, according to MCAD's annual reports.

Similarly, Equal Employment Opportunity Commission charges seem to have peaked in FY 2010-2012, and have been down significantly in recent years, particularly FY 2017, when they hit a 10-year low, according to Boston management-side attorney Peter J. Moser.

"To me, this factor — number of filings — would seem to be a better indicator of a change in public opinion than a

few plaintiffs-side verdicts," Moser says.

However, the EEOC in October released preliminary data for FY 2018 specific to sexual harassment, which revealed a 12-percent increase in charges filed with the EEOC alleging sexual harassment.

The EEOC also chronicled an increase of more than 50 percent — from 41 to 66 — in the number of harassment lawsuits it had filed in FY 2018, and said that it had recovered nearly $70 million for victims of sexual harassment through litigation and administrative enforcement in FY 2018, up from $47.5 million in FY 2017, a hike of about 47 percent.

And a decrease in sheer number of filings is not necessarily incompatible with the exploding size of verdicts, others note.

No doubt, the increased attention being brought to issues of discrimination and retaliation in the workplace has increased the appreciation of the value of compliance, Whitney says. Companies are now more likely to proactively call and ask for training or give their human resources directors a seat at the table with senior management, and that could explain a reduction in the number of filings, he says.

A decrease in the number of filings is also a "symptom of a strong economy," Whitney says.

If someone can find new work quickly, they are less apt to "sit at home and stew" and come to construe their dismissal as having been based on improper considerations, he says.

If there is an economic downturn and more people are out of work, Whitney says he expects an "explosion of claims."

Issue: JAN. 28 2019 ISSUE

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