

IN PRACTICE

EMPLOYMENT LAW

Navigating the Maze of Offers of Judgment in Fee-Shifting Cases

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The offer of judgment rule is designed to promote the early settlement of disputes. It does so by discouraging the rejection of reasonable settlement offers, by shifting litigation costs and attorneys' fees to parties who refuse reasonable offers to settle.

New Jersey's version of the offer of judgment Rule 4:58-1 et seq is loosely modeled on the federal offer of judgment rule (F.R.C.P. 68), but differs in several key aspects, most notably that only defendants can make offers of judgment under the federal rule, and the federal rule does not account for percentages of recovery in determining allowance entitlement status.

The state rule provides that a defendant can recover its costs, post-offer litigation expenses, attorneys' fees and interest if the plaintiff recovers, exclusive of prejudgment interest and attorneys' fees, 80 percent or less than the defendant's unaccepted offer of judgment. In the alternative, the state rule states that the plaintiff can recover its costs post-offer litigation ex-

penses, attorneys' fees and interest, if it recovers, exclusive of prejudgment interest and attorneys' fees, 120 percent or more of its unaccepted offer.

Over the years, several complications have arisen regarding application of the state rule. For example, let's assume that a plaintiff sues under a fee-shifting statute, such as the New Jersey Law Against Discrimination ("LAD"), and recovers a judgment against the defendant, which would otherwise entitle it to attorneys' fees as a "prevailing party" under the LAD. Now, let's assume further that the defendant filed an offer of judgment during the litigation and that the plaintiff's recovery, excepting attorneys' fees and interest, was 80 percent or less than the defendant's offer. In such a scenario, the plaintiff, pursuant to the LAD, would be entitled to its attorneys' fees as a "prevailing party." However, the defendant could recover its costs, post-offer litigation expenses, attorneys' fees and interest under the state rule, thereby creating a conflict, whereby, conceivably, the defendant's state rule award could eclipse the plaintiff's prevailing party fee recovery.

Of course, as observers have noted, the problems with this result are, at a minimum, two-fold: (1) what of the public policy behind fee-shifting

statutes, such as the LAD, which are designed to encourage plaintiffs' attorneys to risk taking cases on a contingency basis to vindicate the rights of their clients?; and (2) what of the language in the LAD which provides that defendants in LAD cases can only be awarded attorneys' fees where the claim is brought in "bad faith"? This rigid "bad faith" test exists with the recognition that a more liberal standard might have a chilling effect on the institution of LAD claims. Thus, under the LAD there is an intentional dichotomy regarding what it means to be a prevailing plaintiff vs. what it means to be a prevailing defendant.

In part to resolve the above dilemma, the New Jersey Supreme Court amended Rule 4:58 in 2006 to provide, in pertinent part, that a nonplaintiff could not be awarded its attorneys' fees and costs under the state rule where such an award would "conflict with the policies underlying a fee-shifting statute or rule of court." See Rule 4:58-3(c)(4).

Recently, the New Jersey Supreme Court addressed the parameters of the 2006 3(c)(4) amendment in *Best v. C&M Door Controls, Inc.*, 981 A.2d 1267 (2009).

In *Best*, an individual sued his former employer pursuant to the Conscientious Employee Protection Act ("CEPA") [New Jersey's employee whistleblower statute], and the Prevailing Wage Act ("PWA"). After the close of discovery, the defendant employer ("C&M") filed an offer of judg-

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ment in the amount of \$25,000. The jury returned a no-cause verdict on the plaintiff's CEPA claim and awarded the plaintiff \$2,600 dollars on his PWA claim.

Following trial, C&M sought fees under R. 4:58-(3) (b), because the jury verdict was less than 80 percent of its offer and sought fees under the frivolous-claim provision of CEPA. Best sought counsel fees of \$122,000 plus costs under the fee shifting provisions of the PWA. The trial court awarded the plaintiff, as a prevailing party on the PWA claim, \$62,529.65 in attorneys' fees, representing the fees plaintiff accrued through the defendant's offer of judgment, minus a discount of 40 percent based upon the no cause verdict on the CEPA claim. It denied defendant's application for fees both under the state Rule (based upon the 3(c) (4) exception), and CEPA (for not having met CEPA's "without basis in law or fact" standard).

Both parties appealed. The Appellate Division affirmed the denial of C&M's fee application under the frivolous-claim provision of CEPA. As to C&M's application for fees under the state rule, the court explained that since the 2006 state Rule amendments did not completely "carve-out" all fee-shifting statutes, "we must presume the Court intended that [the Rule] could be applied in some cases to grant allowance to a non-claimant who attained a favorable outcome." Latching onto that language, the court held that the PWA was one such case, because, according to the Appellate Division, the PWA, unlike CEPA, was designed to benefit both the employer and the employee. And because the plaintiff recovered less than 80 percent of C&M's offer, C&M could

recover its attorneys' fees pursuant to the state rule as to the PWA claim. The Appellate Division also reversed the trial court regarding the award to Best under the PWA because the trial judge had failed to make specific findings regarding the 40 percent reduction based on "limited success." The Court affirmed the decision to limit Best's award to the fees accrued prior to the defendant's state rule offer.

The New Jersey Supreme Court granted Best's petition for certification.

The New Jersey Supreme Court, departing from the Appellate Division, held principally that a defendant can never be awarded fees under Rule. 4:58 in a case involving CEPA, the PWA, or a similar fee-shifting statute." Presumably, the LAD is a "similar fee-shifting statute." The reason for this is that each of these statutes delineates a narrower basis for an employer to recover its attorneys' fees than the state rule, and statutes trump rules. In essence, because C&M did not satisfy the more exacting statutory standards for recovery of attorneys' fees under CEPA and the PWA, it could not employ the state rule to make an end run around those statutes. Interestingly, a similar result follows under federal rule.

Notwithstanding the foregoing, the Supreme Court instructed that a successful plaintiff's unjustified failure to accept a reasonable offer of judgment is "a factor to be taken into account in determining plaintiff's entitlement to fees" in a fee-shifting case, and that a plaintiff's award of fees can be cut off at the point a reasonable offer of judgment has been made, and unjustifiably rejected. Interestingly enough, this proposition has already been espoused by New Jersey's courts, and is also in

accordance with United States Supreme Court precedent.

Without giving much detailed direction, the New Jersey Supreme Court reversed the plaintiff's fee award and remanded for the lower court to determine the reasonableness of that award, given: (a) the disparity between C&M's offer of judgment and the trial court's attorneys' fees award, which raised a question as to whether or not C&M's offer, which included attorneys' fees, or the attorneys' fee award itself, was reasonable; (b) C&M's offer of judgment did not specifically identify what portion of the offer was attributable to Best's PWA claim, the only successful claim; and (c) the trial court failed to adequately explain why it discounted plaintiff's fee application by 40 percent due to the plaintiff's failed prosecution of his CEPA claim.

While we will need to see how the *Best* directive plays out, two things seem apparent, from the defense perspective: (1) a well-reasoned offer of judgment, especially early in a case, remains a viable defense strategy to force the plaintiff's hand in settling; and (2) a defendant's offer of judgment should attempt to parse out the amounts being offered as to each claim, and attempt to distinguish attorneys' fees from liability.

Of course, *Best* leaves open at least one critical question: are there fee-shifting statutes whose guiding principles will not be violated by awarding defendants their post-offer attorneys' fees pursuant to the state rule, and if so, what are those statutes? The answer to that question, and others, will be left to the hand of skilled attorneys presenting sophisticated arguments to shrewd judges. ■