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Pennsylvania Cases May Portend Expansion of Whistleblower Damages

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Case Digest Summary

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“You have to explain to the individual, ‘You’re probably right. You probably weren’t treated fairly. But in the great majority of cases, that doesn’t mean anything,’” Clarke said.

However, these cases are becoming a bit more attractive to lawyers like Clarke since a growing body of case law has begun to establish that plaintiffs in whistleblower cases involving retaliation claims should be able to recover for noneconomic damages, including humiliation and emotional distress.

The issue of whether plaintiffs should be able to recover noneconomic damages is a hotly contested one in state court, and the state Supreme Court is expected to weigh in on the issue soon. But Clarke said a series of recent cases has loosened the reins on these historically limited cases.

“It makes it tough to bring a case, and to prove a case. And when you layer on the narrow damages that had just been assumed up until recently, that might dampen the likelihood of bringing these cases,” Clarke said. “As the law stands now, I think that there may be some plaintiffs attorneys looking at [recent cases] asking, ‘What does this mean for this particular client who’s walking through the door?’”

As it stands, Pennsylvania case law outlining what a plaintiff can recover on whistleblower retaliation claims says awards should ensure that plaintiffs are “in no worse a position for having exposed the wrongdoing.”

The question of whether that means plaintiffs can recover noneconomic damages has arisen in a string of high-profile cases lately, but the Supreme Court is likely to weigh in on the issue when it reviews last year’s [\\$3.2 million award in the case *Baillets v. Pennsylvania Turnpike Commission*](http://www.thelegalintelligencer.com/id=1202769840999?keywords=baillets) (<http://www.thelegalintelligencer.com/id=1202769840999?keywords=baillets>).

That case, which was heard with the Commonwealth Court acting as the court of original jurisdiction, resulted in the plaintiff receiving \$1.6 million in noneconomic damages, and a pronouncement by Commonwealth Court Judge Rochelle Friedman that “actual damages” in whistleblower cases “must include compensation for the mental anguish, humiliation and reputation damage.” (<https://s3.amazonaws.com/zldev/wp-content/uploads/2016/12/PA-Whistleblower-Jury-Verdict-3.2M.pdf>) Because the Commonwealth Court heard the case initially, the appeal was taken by the Supreme Court as of right, rather than at the court’s discretion. Although that means the justices did not agree to address any specific issue on appeal, the turnpike’s appellate brief specifically raises the viability of noneconomic damages as one of its key issues on appeal.

According to the brief, filed April 10 by Duane Morris attorney Robert Byer, the Commonwealth Court’s ruling “expands the potential liability for the commonwealth and goes far beyond what the statute itself provides.”

Sprague & Sprague attorney Jason Pearlman, who handled the *Baillets* case, said attorneys in the state should take note of the appeal.

“The *Baillets* case, which is presently on appeal to the Supreme Court of Pennsylvania, should be watched closely by lawyers who practice in this field, and also by citizens who are concerned about responsible and ethical governance in Pennsylvania,” Pearlman said in an emailed statement.

The turnpike commission did not return a call seeking comment.

Friedman’s opinion in *Baillets* was issued in October, and less than two months later it was cited as the basis for another large award in [the high-profile whistleblower lawsuit](http://) (<http://>) that Mike McQueary, a star witness for the prosecution of convicted child molester Jerry Sandusky, brought against Penn State.

The judge handling that case, Judge Thomas Gavin, noted that the state legislature did not define the term “actual damages,” but said Friedman’s reasoning was persuasive before he awarded McQueary \$1 million in noneconomic damages.

According to attorneys who litigate whistleblower cases, the issue will likely remain a hotly contested one in state court until there is a clear pronouncement on it.

“It’s a growing tool that the aggrieved-employee may be able to wield in certain circumstances,” Clarke said.

Clarke recently won a liability verdict against Philadelphia and a police lieutenant in the case *Allen v. McCann*. The case is set to begin its damages phase soon, and Clarke said he expects to push for his client to be able to recover noneconomic damages.

“He was ostracized and labeled as someone dangerous to deal with,” Clarke said. “There was just so much more involved than just the mere fact that he lost his job.”

The city declined to comment since the case is still in litigation.

Flaster Greenberg litigation chair Michael Homans, who has represented companies on whistleblower claims, said federal courts in Pennsylvania have generally interpreted the law as allowing plaintiffs to recover noneconomic damages. However, he noted that whistleblower cases are quite limited in Pennsylvania, as its statutes do not allow for jury trials and rarely allow for punitive damages. He said he was not surprised that defendants would seek to bar recovery on these damages.

“That obviously has a big appeal in these types of cases for plaintiffs,” Homans said, adding that evidence of humiliation or emotional distress can raise sympathies for the plaintiff.

A ruling against allowing in noneconomic damages could also significantly alter how cases are litigated, he said, and could make it harder for defendants to raise issues about a plaintiff’s mental health in defending against the claims.

However, Homans said he doubted a ruling from the Supreme Court on this issue would likely lead to more cases being filed.

“I think these claims are pretty attractive to plaintiffs lawyers, so when they have them, they bring them already,” he said.

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