

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE TIMOTHY J. FLAHERTY IAS PART 35

Justice

-----X  
JANET BIANCO

Plaintiff,

- against-

Index No.:18702-04  
Motion Dated: July 23, 2009  
Sequence No.: 3

FLUSHING HOSPITAL MEDICAL CENTER and  
MATTHEW MILLER, M.D.

Defendants.

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The following papers numbered 1 to 10 read on this motion by defendant Flushing Hospital Medical Center against plaintiff.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits and Memorandum of Law.....	1-4
Memorandum in Opposition.....	5-7
Reply Memorandum.....	8-10

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendant moves for an order dismissing the complaint or, in the alternative, granting a new trial on liability and damages. Plaintiff opposes.

In this action Janet Bianco alleges violations of Executive Law Section 290 et seq [NYS Human Rights Law] and NYC Administrative Code Title 8 [the NYC Human Rights Law] by defendant Flushing Hospital Medical Center and defendant Matthew Miller, a physician who had privileges at the hospital. Plaintiff alleged that while an employee of the hospital she was sexually harassed by Miller with the knowledge of the hospital which failed to take reasonable steps to prevent his misconduct.

Ms. Bianco, a nurse at the hospital, contended that over a period of several years Miller engaged in a course of inappropriate conduct toward her.. On September 7, 2001 while plaintiff was taking the blood pressure of a bedridden patient, Miller blocked her path, felt her vagina and squeezed her right buttock. Plaintiff filed a written complaint with the risk management department of the hospital and an investigation was immediately commenced. On September 11, 2001 Miller resigned his privileges. The hospital continued its investigation and ultimately reported Miller to the Office of Professional Medical Conduct [OPMC] of the New York State Department of Health.

In 2004 OPMC suspended Miller for a period of three months. Ms. Bianco brought this suit in August 2004 and shortly thereafter began treatment with Dr. Linda Berman, a clinical psychologist.. She continued to work at the hospital until 2005 when she left, as a result of a back injury.

In an order dated November 29, 2006 the Hon. Arnold N. Price granted the hospital's motion for summary judgment and dismissed the complaint. The Appellate Division reversed, finding there to be a triable issue as to whether the hospital knew about the alleged misconduct prior to her filing of a formal complaint [[Bianco v Flushing Hospital Medical Center, 54 AD3rd 305 \(2<sup>nd</sup> Dept. 2008\)](#)].

Plaintiff settled her claims against Miller and went to trial against the hospital. The jury found for the plaintiff, apportioned the liability equally between Miller and the hospital and further found that hospital's conduct was sufficiently egregious to warrant the imposition of punitive damages. They awarded plaintiff the sum of \$8,000,000 for the emotional distress she suffered from the date of the injury to the date of the verdict, an additional \$5,500,000 for future emotional distress which the jury concluded would last for ten years, and awarded plaintiff an additional \$1,500,000 in punitive damages for a total award of \$15,000,000.

To be held liable in this case required that the hospital be on notice of the misconduct of Dr. Miller. For this reason the finding of liability both on the Human Rights Law violations and on the issue of plaintiff's entitlement to punitive damages rests largely, upon the a single incident, the circumstances of which were vigorously contested, wherein the jury, by their verdicts, concluded that Dr. Barra failed to affirmatively intercede when defendant Miller sexually harassed Ms. Bianco [referred to generally by the litigants as the "3 West incident"]. Defendant contends that proof of liability is legally insufficient and urges the court to vacate the liability verdict and dismiss the complaint.

A finding of legal insufficiency requires the court to conclude that the jury verdict was "utterly irrational" and that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" [[Cohen v. Hallmark Cards, Inc, 45 NY2d 493. 499 \(1978\)](#)]. Defendant alternatively contends that the liability verdict was against the weight of the evidence and moves for a new trial. To vacate a verdict as against the weight of the evidence requires the court to conclude that "the jury could not have reached the verdict on any fair interpretation of the evidence" [[Delgado v. Board of Education, 65 AD2d 547 \(2<sup>nd</sup> Dept.1978\)](#)], *aff'd.*, 48 NY2d 643 (1979).

The court finds that jury could have fairly concluded that Dr. Barra was a witness to at least portions of the 3 West incident wherein Dr. Miller grabbed plaintiff from behind, spun her around and tried to push his tongue into her mouth and that he failed to intercede. A finding that Miller's behavior constituted sexual harassment as that term is defined under the applicable statutes, and that he did so in the presence of Dr. Peter Barra, the Medical Director of the hospital, placing the hospital on actual notice triggering a responsibility on their part to take reasonable steps to take corrective action was neither irrational nor against the weight of the evidence. Accordingly, both defendant's motion to dismiss and their motion for a new trial are denied. Similarly, as the apportioning of liability by the jury had both a rational basis and was not against the weight of the evidence, the court will leave the jury's finding undisturbed.

Nor does the court find merit in that portion of defendant's motion for a new liability trial in which various evidentiary rulings are challenged. Two of the contentions warrant discussion.

The decision to withhold the issue of Dr. Barra's status as a high-level supervisor from the jury was made at the conclusion of the evidence - on the basis of the evidence presented by both sides. It was not made, as defendant suggests, on constraint of language in the Appellate Division decision reinstating her claim. Rather, at the conclusion of oral argument on this portion of defendant's motion in limine the court stated that it would wait to see what the evidence established before ruling.

At the conclusion of the proof a charge conference was held in chambers at which time the content of the charge and verdict sheet were discussed. Thereafter both sides were given access to the record to voice their objections. When the pertinent language in the charge was under discussion the court inquired of defense counsel if she wanted the phrase "if Dr. Barra is a supervisor" included, Defense counsel replied, "No, Dr. Barra is a supervisor." Defense counsel now challenges the ruling to which they agreed at the trial.

Dr. Barra was the medical director of the hospital, chaired the performance improvement committee, sat on a number of other committees including the board of trustees and had the power to unilaterally suspend attending physicians who engaged in egregious conduct. These undisputed facts amply established his status as a high-level supervisor and, as no rational fact finder could have found otherwise, the court withheld the issue from the jury.

The evidentiary rulings which permitted the jury to hear testimony concerning Dr. Miller's prior conduct toward the plaintiff and others, permitted her to develop proof of a hostile work environment, and to attempt to establish prior notice to another supervisor, a Dr. Orioli did not deprive the defendant of a fair trial. The jury and the plaintiff were entitled to a certain amount of context when evaluating plaintiff's claim and to have limited the proof to the single incident would have been far more prejudicial to her. The incidents were probative of the issues plaintiff was required to establish and its prejudicial impact, if any impacted defendant Miller, who was not on trial, rather than the hospital.

Defendant received a fair trial. Defendant's motion for a new liability trial because of the evidentiary rulings is denied.

At the conclusion of the second portion of this trifurcated trial the jury awarded compensatory damages to the plaintiff and concluded that the Hospital's conduct warranted the imposition of punitive damages. Defendant challenges each of these verdicts as both legally insufficient and against the weight of the evidence.

As an initial matter defendant contends that the court inappropriately directed the jury to separately consider an award for both past and future damages, citing [Boodram v Brooklyn Developmental Center, 2 Misc3rd 574 \(Civil Court of the City of New York, Kings County, Battaglia, J., 2003\)](#). But [Boodram](#) does not specifically hold such a bifurcation as error and since

there is no question that a plaintiff is entitled to recover for past and future emotional distress under the statutory scheme the fact that the jury was asked to pass on these issues separately is neither inappropriate nor prejudicial. Indeed, as is discussed hereinafter, in this case it provided a perfect line of demarcation between that portion of the damages verdict which is sustainable by the proof and that portion which is not.

The jury determination that plaintiff had suffered emotional distress from the time of the incident to the day of the verdict as a result of the hospital's nonfeasance was supported by testimony from plaintiff herself and Dr. Linda Berman, a clinical psychologist. Dr. Berman concluded that plaintiff suffered from post-traumatic stress disorder and major depressive disorder. The jury's finding that plaintiff was entitled to damages on the issue of past emotional distress was supported by the proof, was legally sufficient and not against the weight of evidence and defendant's contentions to the contrary are without merit.

Since the plaintiff herself was not competent to offer an opinion about her future emotional state, the sufficiency of the proof of future emotional distress necessarily turned on the testimony of Dr. Berman. As to her future prognosis she testified as follows:

Q. Doctor, can you tell us, with a reasonable medical degree of certainty, how long you believe her symptoms will persist?

A. No, I can't do that.

Q. Let me ask you this way.

Are the symptoms that Janet suffers from, based on your treatment of her, are these symptoms that can alleviate themselves in a matter of days or does it take, weeks, months, years of treatment.

....

Again, you know, I saw her for a number of years. There was minimal progress, so just based on past behavior, I can't imagine the symptoms will disappear in a matter of weeks, but I think it's going to be slow, you know, slow, steady steps, and I just hope - I hope she does get over it. I can't predict that.

Q. You can't predict one way or another whether she will or she wouldn't?

A. Correct. [emphasis added].

Thus, when faced with the time honored phrase posed to all doctors when an opinion is being solicited, to wit, whether she could state "with a reasonable medical degree of certainty" what, if any, emotional damages plaintiff would suffer in the future, Dr. Berman candidly acknowledged that she could not do so. While the Court of Appeals has rejected the notion that no case can be upheld absent an affirmative response to that specific question, it remains necessary that it is "reasonably apparent" that "the doctor intends to signify a probability supported by some rational basis" [\[Matott](#)

[v Ward, 48 NY2d 455,461 \(1979\)](#) quoting [Matter of Miller v National Cabinet Co., 8 NY2d 277,282 \(1960\)](#)].

In the case at bar, a fair reading of this testimony would allow a jury to conclude that Dr. Berman believed that plaintiff's condition was likely to continue into the future. The difficulty, however, is that when pressed to express an opinion both as to the degree and length of her continued infirmity, Dr. Berman was quite resolute in stating that she could not do so.

Dr. Berman's testimony notwithstanding, the jury awarded the plaintiff \$5,500,000 for future emotional distress and concluded that she would continue to suffer for a period of ten years. Given Dr. Berman's testimony on these issues the court concludes that the verdict lacks a rational evidentiary foundation and cannot stand, ([Cohen, supra](#)). The verdict awarding damages for future emotional distress is stricken.

Defendant also challenges the verdict concluding that the facts warranted the imposition of punitive damages, as either legally insufficient or against the weight of the evidence. Legally, of course, both the standard of proof and the elements needed to make out a case are significantly higher than what is required to establish liability under the state and city Human Rights Law.

In the Second Department plaintiff must prove entitlement to punitive damages by clear and convincing evidence [[Randi A.J. v Long Island Surgi-Center, 46 AD3rd 74 \(2<sup>nd</sup> Dept. 2007\)](#); PJI 1:64]. The test has been variously described as requiring that plaintiff must establish that the conduct or inaction was reckless or malicious, that is, that it showed a conscious indifference or utter disregard to the safety and rights of plaintiff or others, or that it was deliberate, vindictive, reprehensible, oppressive, outrageous, or with knowledge of and with intention to interfere with her rights. [[Ross v Louise Wise Services, Inc., 8 NY3rd 478 \(2007\)](#); [Hartford Accident & Indemnity Co., v Hempstead, 48 NY2d 218 \(1979\)](#)]; PJI 1:64].

As punitive damage awards reflect society's condemnation of a wrongdoer, it should be "reserved for rare cases exhibiting malice, fraud, oppression, insult, wantonness, or other aggravated circumstances which effect [sic] a public interest" ([Laurie Marie M. v Jeffrey T.M., 159 A.D.2d 52, 58, \(2<sup>nd</sup> Dept 1990\)](#)). "[S]omething more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" ([Prosser and Keeton, Torts § 2, at 9-10 \[5th ed 1984\]](#); see [Prozeralik v Capital Cities Communications, 82 N.Y.2d 466, 479 \(1993\)](#)).

By its verdict this jury clearly ascribed at least some of the aforementioned levels of misconduct to the single instance [the 3 West incident] wherein it found Dr. Barra was present and took no action. Although the court has already indicated its belief that the imposition of liability, based upon the 3 West incident, is neither irrational nor against the weight of the evidence, the radically different standards for the imposition of punitive damages mandates a separate analysis.

Standing alone, the jury's conclusion seems extreme, although perhaps not so extreme to

warrant judicial intercession. But this incident does not stand alone. Rather the passive response of Dr. Barra to an incident about which plaintiff did not lodge a formal protest must be considered together with the events of September 7, 2001 when, after plaintiff did make a formal protest, the hospital moved swiftly and effectively, causing the removal of Dr. Miller's privileges a mere four days later. Significant as well is the fact that Dr. Barra himself played a prominent role in the post September 7<sup>th</sup> response of the hospital

This is not to suggest that plaintiff's failure to lodge a formal protest either bars her from recovery or necessarily exonerates the hospital for failing to intercede.. Nor can the hospital avoid responsibility solely because it had actual notice of but a single incident. But neither can these factors be ignored in evaluating whether this failure, considered in conjunction with the action it did take once a protest was lodged, and the resultant swift withdrawal of Dr. Miller's privileges makes out a case of reckless or malicious conduct by clear and convincing evidence [cf., [Swinton v Potomac Corp., 270 F3rd 794 \(9<sup>th</sup> Cir. 2001\)](#); [State Farm Mutual Automobile Insurance Co. V Campbell, 538 US 408](#)].

In the view of the court, no "valid line of reasoning" can support the jury's conclusion that the hospital's inaction was malicious or willful [[Cohen, supra](#)] unless the jury simply ignored the conduct of the hospital and Dr. Barra following the September 7<sup>th</sup> incident. Since the facts supporting the hospital's response to the September 7<sup>th</sup> incident were essentially unchallenged by the plaintiff, it follows that the verdict was "utterly irrational" and, accordingly, the imposition of punitive damages is set aside and that portion of the complaint is dismissed.

The same reasoning warrants the conclusion that the punitive damage award is against the weight of the evidence and, were it not dismissing that portion of the claim, would order a new trial on the issue. As indicated earlier the test for evaluating a challenge to a jury verdict as against the weight of the evidence requires a court to conclude that "the jury could not have reached the verdict on any fair interpretation of the evidence" [[Delgado v. Board of Education, 65 AD2d 547 \(2<sup>nd</sup> Dept.1978\)](#)], [aff'd., 48 NY2d 643 \(1979\)](#); quoted with approval in [Nicastro v. Park, 113 AD2d 129, 134 \(2<sup>nd</sup> Dept 1985\)](#)]. After acknowledging that the phraseology setting forth tests for sufficiency and weight challenges are arguably not dissimilar, former Associate Justice Leon Lazer, the author of the [Nicastro](#) decision underscored that the real distinction between them is that they stand for discrete "underlying principles"[[id.](#), at 134]. Unlike a motion challenging the sufficiency of the proof, a finding the verdict is against the weight of the evidence is an "intrinsically discretionary judicial function" rather than an issue of law, one that requires the court to call upon his own "professional judgment gleaned from the Judge's background and experience as a student, practitioner and Judge", [[id.](#), at 134, citing with approval, [Mann v Hunt, 283 App Div 140, 141 \(3<sup>rd</sup> Dept 1953\)](#)]. As Associate Justice Francis Bergan wrote in [Mann, supra](#), at p 141, a half century ago,

The point of interference is not fixed on the caprice of judicial individualism; it is rather arrived at by a synthesis of all the experience that the judge has had; in the beginning as a law student, in the later controversies of law practice, in the hearing of cases and the writing of decisions, in the sum of all that he has absorbed in the

courtroom and the library.

In the end it is an informed professional judgment; and although lawyers might differ greatly about how the components of the judgment are arranged and added up, there would be a very considerable agreement about the result to be reached in any case once the facts were thoroughly understood.

This is clearly such a case. Moreover, although the vacatur of the verdict moots the jury award of \$1,500,000 in punitive damages, the court notes that had it not dismissed the claim entirely it would have substantially reduced the award. According to the unchallenged testimony at the third portion of the trial, Flushing Hospital is a not for profit institution whose purpose is to provide health care to the community. It is teetering on financial ruin [[Mathie v Fries, 121 F3rd 808 \(2<sup>nd</sup> Cir. 1997\)](#) [Vasbinder v Ambach 926 F2d 1333 \(2d Cir. 1991\)](#)]. During the course of the trial two Queens hospitals, St. John's Hospital and Mary Immaculate Hospital, closed their doors imposing a still greater burden onto Flushing Hospital and an even greater necessity that this award not further imperil the very survival of the institution. Finally, given the enormous compensatory verdicts, the additional jury award of \$1,500,000 seems more the product of passion than reason. Given all of the circumstances, were it not vacating the punitive award in its entirety the court would have reduced the award as excessive.

Defendant also challenges the award of \$8,000,000 for past emotional distress as excessive. Plaintiff gave expert and lay testimony which established that she suffered from post-traumatic stress disorder which was attributed to Dr. Miller's conduct. She also suffered from major depressive disorder, flashbacks, anxiousness and related emotional problems which she also attributes to the conduct of Dr. Miller.

The test, first set forth in dissent by Justice James D. Hopkins in [Miner v. Long Island Lighting Company, 47 AD2d 842 \(2<sup>nd</sup> Dept 1975\)](#) but later adopted by the majority in [Grcic v City of New York, 139 AD2d 621\(2nd Dept 1988\)](#) is whether the "verdict is clearly beyond what ought to be reasonable compensation to the plaintiff in terms of uniformity and community expectations." The unprecedented amount of money awarded in this case clearly mandates judicial intervention.

That the award this court finds appropriate is in no way intended to disrespect the jury's obvious conclusion that it found the damage done to this plaintiff to be serious and dismaying. But juries making monetary awards for unquantifiable damages do so in a vacuum. They are not afforded the informative guidance of comparable awards given by other juries, administrative agencies or reviewing courts. Under the circumstances, it is essential that courts step into the breach when the amount of the award so radically departs from an admittedly erratic line of legal precedent. Giving due consideration to the mental and emotional ailments that the jury found to be causally related to the defendant's conduct the court finds that an award of \$750,000 is the maximum amount supported by the proof which would constitute reasonable compensation. [CPLR 5501c); cf., [Matter of Kondracke v Blue, 277 AD2d 953 \(4<sup>th</sup> Dept 2000\)](#)]

Accordingly, defendant's motion for dismissal on the issue of violation of the State and City Human Rights Laws is denied. The motion for a new trial on the issue of violation of the State and City Human Rights Laws is denied. The motion to dismiss that portion of the verdict which awarded damages for future pain and suffering is granted and the verdict is stricken in its entirety and the court directs a judgment for the defendant on this issue [CPLR 4404(a)]. The motion to dismiss that portion of the verdict which awarded punitive damages is granted and the court grants a judgment for the defendant on this issue [CPLR 4404(a)]. Defendant's motion for a new trial on compensatory damages is granted as to past emotional distress only, unless, within 30 days of service upon her of a copy of this order, plaintiff serves and files a written stipulation consenting to a reduction of the jury's award for past emotional distress from \$8,000,000 to \$750,000.

Dated: September 11, 2009

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Timothy J. Flaherty, J.S.C.