

PLAINTIFF'S ATTORNEY FEE RECOVERY SLASHED IN HALF EVEN AFTER MASSACHUSETTS TRIAL WIN: A LESSON FOR EMPLOYERS

Insights

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A Massachusetts jury found that a Boston hospital retaliated against a former employee – but a court ruling just capped the plaintiff's attorney fee recovery at less than half of what she sought. Why? Because the employer made a strategic settlement offer through a tool known as a Rule 68 Offer of Judgment, and the final jury award came in well below that offer. This April 1 decision offers a textbook example of how employers can work with their trial counsel to limit their financial exposure – even after a trial loss – through thoughtful litigation strategy.

Employer Deploys Critical Litigation Tactic Ahead of Trial

According to the Superior Court's April 1 order, Amy Tishelman worked at Boston Children's Hospital for many years. After her employment ended, she filed a lawsuit under Massachusetts anti-discrimination law alleging:

- Gender discrimination
- Age discrimination
- Retaliation for complaining about discrimination

The Hospital made a formal Rule 68 Offer of Judgment in March 2024 offering to resolve the case for \$3.2 million plus attorneys' fees and costs accrued to that point. Tishelman rejected the offer and decided to roll the dice at trial.

What is Rule 68?

Rule 68 of the Massachusetts Rules of Civil Procedure allows

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defendant to offer to settle a case before trial. If the plaintiff rejects the offer and ultimately wins less than what was offered, the plaintiff cannot recover legal costs and attorney's fees incurred after the offer date.

Why it matters: Rule 68 is designed to encourage early settlement and to discourage exorbitant settlement demands from plaintiffs. It mirrors similar rules in federal court and in many other states, where early offers can shift the risk of post-offer legal expenses to the plaintiff.

The case proceeded to trial. On November 7, 2024, a jury found in favor of the Hospital on the gender and age discrimination claims, but found in Tishelman's favor on the retaliation claim. It awarded her a total of \$1.49 million in back pay, front pay, and emotional distress damages – less than half of what the Hospital had previously offered to settle the case.

The Legal Fight After the Verdict

After the trial, Tishelman's attorney requested about \$675,000 in attorneys' fees as the prevailing party. The Hospital opposed the fee petition, arguing the plaintiff wasn't entitled to fees beyond the Rule 68 offer date and that her recovery should be far lower.

The Court Vindicated the Employer's Use of an Offer of Judgment

In an April 1 order, Judge Anthony Campo of the Massachusetts Superior Court agreed with the Hospital and capped Tishelman's attorney fee recovery as of the date of the March 28, 2024, Rule 68 offer. The judge only awarded her \$277,000 instead of the \$675,000 requested – slashing the award by 59%.

The court emphasized that the jury's verdict (\$1.49M) was significantly less than the \$3.2M offer made by the Hospital eight months before the trial award. Critically, the court rejected the plaintiff's argument that the jury's finding of retaliation provided "greater relief" than the offer simply because it included a finding of wrongdoing. The court found that monetary outcome – not moral vindication – controls any Rule 68 analysis. "At its heart," the judge said, "Rule 68 is a rule of compromises. It cannot be construed to only empower offers of judgments that provide plaintiffs with their every possible desire."

Why This Matters for Employers

Even though the employer lost at trial, its early Rule 68 strategy paid off, significantly limiting attorney fee exposure – a major cost factor in litigation under state law. This case reinforces the strategic use of Offers of Judgment to mitigate risk in costly litigation, especially when a plaintiff may push a weak case to trial or over-inflate the value of a meritorious case.

What Employers Should Do

To protect against runaway costs in future cases:

1. **Coordinate with counsel early** in litigation to evaluate whether a Rule 68 Offer of Judgment is appropriate.
2. **Make offers explicit** – including terms for attorneys' fees and scope of relief – so there's no ambiguity later.
3. **Use your financial resources wisely.** Sometimes, a bold Rule 68 offer is the smartest financial move.

Conclusion

We will continue to monitor cases of this type and any related developments. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to ensure you gather the most up-to-date information about labor and employment issues affecting Massachusetts employers. If you have questions, please contact your Fisher Phillips attorney, the author of this alert, or any attorney in our [Boston](#) office.