

High Hurdle Set for Punitive Damages in Employment Retaliation under New Jersey Law

Date: 7.31.2013

A unanimous New Jersey Supreme Court has ruled that individuals seeking punitive damages under the state Conscientious Employee Protection Act (CEPA) must present clear and convincing evidence of upper management's actual participation in the wrongful conduct or willful indifference to the wrongful conduct. *Longo v. Pleasure Productions, Inc., et al.*, No. A-37-11-069257 (July 24, 2013).

Doreen Longo was hired to work in East Coast News Corp.'s sales department in 2002. She filed a CEPA complaint against her former employer, its affiliated entities, and several employees asserting that her employment was terminated for complaining of harassment and intimidation by a coworker. Longo claimed that Michael Kercheval threatened her with physical violence, suggested that she perform sexual favors to increase sales, and engaged in other threatening behaviors. Longo claimed she was terrified of Kercheval and reported her fears to her supervisors. Shortly thereafter, Longo asserted, she was terminated because of her complaints.

A jury returned a verdict in Longo's favor and awarded her \$150,000 in compensatory damages as to her CEPA claim. During a separate phase of the trial to determine punitive damages, the trial court instructed the jury that punitive damages could be awarded "to punish defendants who have acted in an especially egregious or outrageous manner and to discourage the defendants from engaging in similar misconduct in the future." Despite objections by East Coast's attorneys, the trial court failed to instruct the jury that clear and convincing evidence of upper management's participation or willful indifference to the wrongful conduct must be found. The jury awarded Longo an additional \$500,000 in punitive damages.

On appeal, a three-judge panel upheld the compensatory damages award to Longo. In a split decision, the Appellate Division panel also upheld the punitive damages award. The majority found that an employer could be held liable for punitive damages so long as there was a showing of "some" involvement by an employer's upper management. The dissenter, however, found that reversal of the punitive damages award was appropriate because the trial court failed to instruct the jury that punitive damages could be awarded only if upper management actively participated in, or was willfully indifferent to, the wrongful conduct.

Following an appeal as of right, New Jersey's highest court, in agreement with the dissent in the court below, found that the jury instructions on punitive damages provided by the trial court were flawed. The Court stated that punitive damages under the New Jersey Law Against Discrimination (LAD) and CEPA should be treated similarly.

Under the doctrine of *respondeat superior*, "punitive damages can only be awarded against an employer for the actions of upper management employees." Thus, the Court explained, in order to award punitive damages, a jury must determine whether there is clear and convincing evidence of wrongful conduct committed by an upper management employee. To warrant a punitive damages award, the Court found that the wrongful conduct must be "especially egregious" and "must constitute actual participation or willful indifference to the claimant's rights."

The Court also found that identifying "upper management" employees is a fact-sensitive inquiry. As noted in *Cavuoti v. New Jersey Transit Corp.*, 161 N.J. 107, 122-29 (1999), "upper management" includes only those employees who have sufficient authority so that imposing punitive damages on the employer would be fair and reasonable. "Upper management" includes those who have supervisory authority over the employee or employees in question and those who have responsibility for implementing the employer's workplace policies. The Court determined that the trial court's failure to include an "upper management" jury instruction was a fundamental

flaw warranting reversal of the lower court's rulings. Accordingly, the Court remanded the matter to the trial court for a new trial on punitive damages.

If you have any questions about this decision or other workplace developments, please contact Richard Cino, at CinoR@jacksonlewis.com, Linda J. Posluszny, at PoslusznyL@jacksonlewis.com, in the Morristown office, (973) 538-6890, or the Jackson Lewis attorney with whom you regularly work.

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