

Proper Jury Instructions for Punitive Damages in Whistleblower Cases

When a whistleblower is seeking punitive or exemplary damages in connection with a claim pursuant to New Jersey's Conscientious Employee Protection Act ("CEPA"), *N.J.S.A. 34:19-1, et seq.*, an "upper management" jury instruction is required. The same standard applies to claims pursuant to New Jersey's Law Against Discrimination ("LAD"), *N.J.S.A. 10:5-1 to -49*.

In *Longo v. Pleasure Productions, Inc.*,ⁱ decided on July 24, 2013, the New Jersey Supreme Court vacated a punitive damages award of \$500,000.00 (from a total verdict of \$650,000.00). The matter was remanded for a new trial on damages because the proper instruction was not given.

In a CEPA case, punitive damages are only available if compensatory damages are awarded first.ⁱⁱ To be eligible for punitive damages, the plaintiff must prove by clear and convincing evidence "that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions."ⁱⁱⁱ Proof of negligence, including gross negligence, is not sufficient to support a punitive damages award.^{iv}

Additionally, punitive damages are available against an employer only if there is proof of "actual participation by upper management [in the unlawful conduct] or willful indifference [to the claimant's rights]."^v This concept is so essential to a fair trial that the failure to give the "upper management" jury instruction is plain error.^{vi}

In *Longo*, the conduct of numerous employees was presented to the jury, but the jury was not instructed that only the conduct of upper management employees could be considered for determining a request for punitive damages.^{vii} The jury also was not instructed about the standard of conduct necessary to warrant a punitive damages award.^{viii} The Supreme Court determined that the lack of guidance could have resulted in an unjust result, and was exacerbated when plaintiff's counsel argued during the punitive damages phase that the company was responsible for the behavior of every employee.^{ix}

The Court was additionally concerned about the trial court's failure to make clear that the jury's findings under the preponderance of the evidence standard during the first (compensatory damages) phase of the trial were not sufficient to award punitive damages in the second phase. Rather, the jury must be instructed to assess the employee's level of involvement under a higher standard and award punitive damages only if the jury finds wrongful conduct by clear and convincing evidence.^x As a result of these errors, the jury verdict on punitive damages was vacated, and the matter was remanded.

ⁱ *Longo v. Pleasure Productions, Inc.*, 2013 WL 3811800 at *7 (N.J.S.C. Jul. 24, 2013).

ⁱⁱ *N.J.S.A. 2A:15-5.13.*

ⁱⁱⁱ *N.J.S.A. 2A:15-5.12.*

^{iv} *Id.*

^v *Abbamont v. Piscataway Twp. Bd. of Educ.*, 138 N.J. 405, 419 (1994).

^{vi} *Longo*, 2013 WL 3811800 at *7 (quoting *Baker v. National State Bank*, 161 N.J. 220, 223 (1999)).

^{vii} *Id.* at *9.

^{viii} *Id.*

^{ix} *Id.*

^x *Id.*