

One Minute Memo[®]



New Jersey Raises the Bar for Punitive Damages in CEPA Suits

On July 24, 2013, the New Jersey Supreme Court delivered a victory for employers, raising the bar for assessing punitive damages in whistleblowing cases under New Jersey's broad Conscientious Employee Protection Act ("CEPA"). In *Longo v. Pleasure Productions, Inc.* (A-37-11), a unanimous supreme court held that jurors considering punitive damages in CEPA suits must consider whether, by clear and convincing evidence, upper management was complicit in egregious wrongful conduct.

In *Longo*, Plaintiff sent repeated emails to her direct supervisor and the general manager complaining that a co-worker had, among other things, threatened to sexually assault her, suggested she trade sexual favors with a client, and threw office furniture. No action was taken. Later, each employee received written warnings and the co-worker was eventually fired. Shortly afterwards, Plaintiff herself was told that her complaints had disrupted the laid-back office environment and she too was terminated.

Plaintiff bought a CEPA claim and the matter went to trial, where a jury found for Plaintiff and awarded \$120,000 in economic damages and \$30,000 in emotional distress damages. The jury then turned to punitive damages, where the trial court's jury charge neither defined "upper management," nor explain that liability hinged on upper management's involvement in or willful indifference. The trial court also instructed the jury to use the preponderance of the evidence standard, rather than the clear and convincing standard. The jury returned a \$500,000 punitive damages verdict.

The supreme court reversed the punitive damages award, holding that an upper management jury charge is absolutely necessary to award punitive damages in CEPA suits. A jury must both determine whether wrongful conduct was committed by upper management employees and whether that wrongful conduct was "especially egregious," meaning upper management actually participated in or displayed willful indifference to the retaliatory action. The court noted that upper management charge is "especially important" where wrongful conduct was allegedly committed by multiple employees, because the jury must determine which employees are properly considered upper management. Upper management includes employees who have either supervisory powers over the involved employees, including the power to hire, fire, promote, and discipline, or delegated responsibility to implement an employer's policies. The supreme court also held that the correct evidentiary standard for assessing punitive damages is the more demanding clear and convincing standard, and not the preponderance of the evidence standard.

Although the supreme court announced a clearly higher standard for assessing punitive damages in CEPA suits, employers must remain vigilant over how managerial and supervisory employees handle complaints. Continued training and clear policies for upper-level management and supervisors will help reduce instances of egregious wrongful conduct which may support a punitive damages award down the road. Nonetheless, this ruling is welcome news for employers in New Jersey.

By: *Christopher Lowe*, *Caroline A. Keller* and *Ephraim J. Pierre*

Christopher Lowe is a partner in Seyfarth's New York office. *Caroline A. Keller* and *Ephraim J. Pierre* are associates in the firm's New York office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Christopher Lowe at clowe@seyfarth.com, Caroline Keller at cakeller@seyfarth.com or Ephraim Pierre at epierre@seyfarth.com.