

**8.63 PUNITIVE DAMAGES — NEW JERSEY CONSCIENTIOUS  
EMPLOYEE PROTECTION ACT (CEPA) CLAIMS<sup>1</sup> (04/2014)**

***NOTE TO JUDGE***

Please review the comprehensive Note to Judge in Model Charge 8.60. Note also that the trial judge may reduce or eliminate the award if the judge considers such action necessary to satisfy the requirements of the PDA. *N.J.S.A. 2A:15-5.14(a)*.

You will now consider the issue of punitive damages. Specifically, you must first decide whether to award punitive damages against the *[employer defendant]* and, if you decide to do so, what amount must be awarded.

**1. INTENT OF PUNITIVE DAMAGES**

You may award punitive damages to (plaintiff)<sup>2</sup> only if you find that (plaintiff) has proved certain additional matters.

The purposes of punitive damages are different from the purposes of compensatory damages. Compensatory damages are intended to compensate (plaintiff) for the actual injury or loss he/she/it suffered as a result of (defendant's)

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<sup>1</sup> This charge covers claims for punitive damages only as against employers. The law is currently unsettled as to whether a co-worker or supervisor can be held personally liable under CEPA.

<sup>2</sup> Placing the words “plaintiff” and “defendant” in parentheses is intended to suggest that the trial judge may use the names of the parties, in lieu of their status in the lawsuit, if he or she wishes.

*retaliatory conduct*. In contrast, punitive damages are intended to punish a wrongdoer and to deter the wrongdoer from similar wrongful conduct in the future.<sup>3</sup> Punitive damages are designed to require the wrongdoer to pay an amount of money that is sufficient to punish (defendant) for particular conduct and to deter that party from future *retaliatory conduct*. Punitive damages are not to be awarded as a routine matter in every case; they are to be awarded only in exceptional cases, to punish a party who/which has acted in an especially egregious or outrageous matter and to discourage that party from engaging in similar *retaliatory conduct* in the future. Therefore, (plaintiff) is not entitled to punitive damages simply because you have found that (defendant) engaged in specific conduct or because you have awarded damages to compensate (plaintiff) for his/her/its injury. You may award punitive damages to (plaintiff) only if you find that (plaintiff) has proved certain additional matters.

## **2. STANDARD OF PROOF FOR PUNITIVE DAMAGES**

To support an award of punitive damages here, you must find that (plaintiff) has proved, by clear and convincing evidence, that the injury, loss, or harm suffered

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<sup>3</sup> The Appellate Division in *Tarr v. Ciasulli*, 390 N.J. Super. 557 (App. Div. 2007), aff'd, 194 N.J. 212, 224 (2008) found that the *New Jersey Punitive Damages Act*, N.J.S.A. 2A:15-15-5.9, *et al.* does not permit counsel to urge the jury to increase a punitive damage award to enhance the general deterrence of others. Accordingly prior language in earlier Model Charges allowing punitive damages to be awarded as a “deterrence to others” was deleted.

by (plaintiff) resulted from (defendant's) acts or omissions<sup>4</sup> and that either (1) (defendant's) conduct was malicious or (2) (defendant) acted in wanton and willful disregard of (plaintiff's) rights. Malicious conduct is intentional wrongdoing in the sense of an evil-minded act. Willful or wanton conduct is a deliberate act or omission with knowledge of a high degree of probability of harm to another who foreseeably might be harmed by that act or omission and reckless indifference to the consequence of the act or omission.

The standard of “clear and convincing evidence”, which I mentioned above, means evidence which leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. This is different – and less – than proof beyond a reasonable doubt. This is also different – and more – than a preponderance of evidence to support an award of punitive damages.

In determining whether to award punitive damages, consider all relevant evidence, including but not limited to the following: (1) the likelihood, at the relevant time, that serious harm would arise from (defendant's) conduct; (2) (defendant's) awareness or reckless disregard of the likelihood that such serious harm would arise from (defendant's) conduct; (3) consider the conduct of (defendant) upon learning that his/her/its initial conduct would likely cause harm; and (4) consider the duration

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<sup>4</sup> *N.J.S.A. 2A:15-5.12(a)*.

of the conduct or any concealment of that conduct by (defendant).<sup>5</sup>

### 3. PUNITIVE DAMAGES AGAINST *[Employer Defendant]*

You must first decide whether an award of punitive damages is justified against *[employer defendant]*. To award punitive damages against *[employer defendant]*, you must find that both of the following factors are present:

First, that the *retaliatory action by [defendant] against [plaintiff] based on plaintiff's protected activity* was "especially egregious."

Second, if you do find that the *[retaliatory action]* was especially egregious; you must then also find that at least one of *[employer defendant's]* "upper management" employees actually participated in, or was willfully indifferent to, the wrongful conduct.

You cannot award punitive damages against *[employer defendant]* unless there was some involvement by a member of its upper management.<sup>6</sup>

#### "Especially Egregious" Conduct

"Especially egregious" conduct is conduct that was motivated either by actual malice or that was done with a willful and wanton disregard of the rights of the plaintiff. "Actual malice" means that *[individual engaged in retaliatory action]*

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<sup>5</sup> See N.J.S.A. 2A:15-5.12(b), providing that the trier of fact must consider these four factors in determining whether punitive damages should be awarded. Other factors may be considered as well; the four statutory factors are not intended to be exclusive.

<sup>6</sup> *Cavuoti v. New Jersey Transit Corp.*, 161 N.J. 107, 113 (1999).

engaged in intentional wrongdoing in the sense of an evil-minded act designed, intended and done specifically to injure the plaintiff. "Willful and wanton disregard of the rights of the plaintiff" means that *[that individual]* deliberately acted with knowledge of a high degree of probability of harm to the plaintiff, and reckless indifference to the consequences of that act.

In making your determination as to whether that *[retaliatory]* conduct of *[individual engaged in retaliatory action]* was especially egregious or outrageous, you must consider all of the evidence surrounding the wrongful conduct, including:

1. the likelihood that serious harm would arise from the *[retaliatory action]*;
2. the awareness or reckless disregard by the *[individual engaged in retaliatory action]* of the likelihood that serious harm would arise;
3. whether the *[individual engaged in retaliatory conduct]* after learning that *[his/her]* initial conduct would likely cause harm; and
4. the duration of the wrongful conduct and any concealment of that conduct by *[individual engaged in retaliatory action]*.<sup>7</sup>

You may not award punitive damages based solely on a finding of negligence or even gross negligence by *[name of individual engaged in retaliatory action]*. You

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<sup>7</sup> See N.J.S.A. 2A:15-5.12(b). Section 5.12(b) provides that the trier of fact must consider these four factors in determining whether punitive damages should be awarded. Additional factors may also be considered, because the four statutory factors are not exclusive. The four statutory factors were derived from existing New Jersey case law, under which the jury was allowed, but not mandated, to consider them. In cases commenced prior to the effective date of the PDA, the jury should be instructed that it may consider these four factors. In cases subject to the PDA, the jury should be instructed that it must consider these four factors.

may not award punitive damages solely because you have determined that *[retaliation]* occurred. Rather, as I have said, punitive damages are to be awarded only in those exceptional cases where the *[retaliatory action]* was especially egregious or outrageous.

### **"Upper Management"**

The second factor you must find is that at least one of *[employer defendant's]* "upper management" employees was involved with the *[retaliatory action]*.<sup>8</sup> In a moment I will define the kind of involvement that you must find occurred. As an initial matter, though, you must decide whether certain of *[employer defendant's]* employees were part of its "upper management". Specifically, plaintiff contends that *[names of alleged upper management employees]* were members of *[employer defendant's]* "upper management" who had some involvement with the wrongdoing at issue.

To decide whether those employees of *[employer defendant]* were part of its upper management, you must consider this: the purpose of defining "upper management" is to give employers the incentive to provide voluntary compliance programs and to insist on the effective enforcement of their programs. The employees who acted wrongfully must have had sufficient authority to make the

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<sup>8</sup> In CEPA claims, the failure to charge the jury with the necessity of finding upper management's involvement to justify a punitive award is reversible error. *Longo v. Pleasure Prod. Inc.*, 215 N.J. 48, 60 (2013).

imposition of punitive damages fair and reasonable.<sup>9</sup>

Clearly, upper management includes a corporation's board of directors and its highest-level executive officers.<sup>10</sup> Upper management will also include those employees responsible to formulate the corporation's anti-discrimination policies, provide compliance programs and insist on performance of such programs, and those employees to whom a corporation has delegated responsibility to execute its policies in the workplace, who set the atmosphere or control the day-to-day operations of the unit. This group may include heads of departments, regional managers, or compliance officers.

Not all managerial employees, however, constitute "upper-level" management. To decide which employees below the highest levels of management are included in "upper management", you must analyze, weigh, and consider all of the surrounding facts and circumstances.

For an employee on the second tier of management to be considered a member of "upper management," the employee should have either (1) broad supervisory powers over the involved employees, including the power to hire, fire, promote and discipline, or (2) the delegated responsibility to execute the employer's policies to

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<sup>9</sup> *Cavuoti, supra* at 128.

<sup>10</sup> *Cavuoti, supra* at 122.

ensure a safe, productive and discrimination-free workplace.<sup>11</sup>

If you decide that none of the employees identified by (plaintiff) as acting wrongfully were part of upper management of [employer/defendant], you cannot award punitive damages.<sup>12</sup> If you decide that the employees identified by (plaintiff) were part of the upper management of [*employer defendant*], you must then consider whether any of those upper management employees actually participated in, or were willfully indifferent to, the [*retaliatory action*] that occurred.

### **"Actual Participation"**

To find that upper management "actually participated" in wrongful conduct, you must find that upper management employees not only knew about the wrongful conduct but also engaged in affirmative acts to accomplish that wrongful conduct. This factor would be satisfied, for example, if you find that [*individual engaged in retaliatory action*] is a member of [*employer defendant's*] upper management, or if you find that a member of upper management affirmatively assisted or otherwise participated directly in [*individual engaged in retaliatory action's*] wrongdoing.

### **"Willful Indifference"**

To find "willful indifference" to wrongful conduct on the part of upper management, you must find that upper management employees knew about the

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<sup>11</sup> *Cavuoti, supra* at 129.

<sup>12</sup> *Longo v. Pleasure Prod. Inc.*, 215 N.J. 48, 58-59 (2013).

wrongful conduct, but chose to disregard or ignore it rather than stop it. In other words, you cannot award punitive damages against *[employer defendant]* simply because upper management employees may have been negligent in failing to learn of or reasonably respond to the allegations of *[retaliatory action]*<sup>13</sup>; you must instead find that upper management employees actually knew about those allegations and consciously chose to ignore them.

In summary, to award punitive damages against *[employer defendant]*, you must find by clear and convincing evidence both that *[name of individual engaged in retaliatory action]* engaged in especially egregious conduct, and that the upper management of *[employer defendant]* either actively participated in the wrongful conduct or was willfully indifferent to it.

In summary, to award punitive damages against *[employer defendant]*, you must find by clear and convincing evidence both that *[name of individual engaged in retaliatory action]* engaged in especially egregious conduct, and that the upper management of *[employer defendant]* either actively participated in the wrongful conduct, or was willfully indifferent to it.

#### **4. AMOUNT OF PUNITIVE DAMAGES**

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<sup>13</sup> *Lehmann v. Toys 'R Us*, 132 N.J. 587, 624 (1993) ("a greater threshold than mere negligence should be applied").

If you find that (plaintiff) has proved that [*employer defendant*] has engaged in the type of wrongdoing that justifies awarding punitive damages, you must then decide the amount of punitive damages to award. That amount must be based on your sound judgment as to what is fair and reasonable under all the circumstances. As I earlier stated, punitive damages are not to be awarded to compensate a plaintiff for injuries but to punish (defendant) and to deter (defendant) from similar future wrongful conduct.

There is no schedule or formula to calculate the amount of punitive damages. The amount of your award of punitive damages must bear some reasonable relationship to the actual injury inflicted and the cause of the injury.<sup>14</sup> You must use your sound discretion in deciding this issue.

In exercising your discretion, you must consider all relevant evidence surrounding the wrongful conduct, including:

1. the likelihood, at the relevant time, that serious harm would arise from the conduct;
2. [*employer defendant's*] awareness or reckless disregard of the likelihood that such serious harm would arise from the conduct;
3. the conduct of [*employer defendant*] upon learning that its initial conduct would likely cause harm;
4. the duration of the conduct or any concealment of it by [*employer defendant*];

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<sup>14</sup> *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 675 (1987).

5. the profitability, if any, of the *retaliatory conduct* to *[employer defendant]*;
6. when the *retaliatory conduct* was terminated; and
7. *[employer defendant's]* financial condition and ability to pay the punitive damages award.<sup>15</sup>

In addition, you may also consider:

1. the nature of the wrongful conduct;
2. the extent of harm inflicted;
3. the intent of *[employer defendant]*;
4. whether *[employer defendant]* had adequate policies, procedures, training or monitoring measures designed to prevent retaliation;
5. whether *[employer defendant]* took sufficient steps after learning of the wrongful conduct to investigate and address that conduct; and
6. any other mitigating or aggravating circumstances that you believe should reduce or increase the amount of the damages awarded.

After considering all these factors, you must decide (1) whether punitive damages should be awarded in this case; and (2) if you decide to award punitive damages, what the proper amount should be.<sup>16</sup>

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<sup>15</sup> See *N.J.S.A. 2A:15-5.12(c)* and note 4 above. With regard to the “financial condition” factor, see *Herman v. Sunshine Chemical Specialties, Inc.*, 133 *N.J.* 329, 341 (1993), which states that consideration of the defendant’s financial condition is relevant to ensure that the amount of punitive damages is sufficient to punish and deter, but not so great as to cause financial ruin.

<sup>16</sup> Occasionally, as in *Rusak v. Ryan Automotive, L.L.C., at als.*, 418 *N.J.* 107 (A. D. 2011), one

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jury may award compensatory damages and a second jury must address a punitive damages claim. In that event, the second jury must be told that it was determined in a different forum that defendant(s) engaged in unlawful or improper conduct and that plaintiff was awarded compensatory damages resulting from that conduct in specific categories (e.g., back pay) and amounts. In *Rusak, supra*, the first jury declined to award damages for emotional distress; the Appellate Division ruled that the second jury must be told that no award was made for emotional distress.