NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3872-09T2

DOREEN LONGO,

Plaintiff-Respondent,

v.

PLEASURE PRODUCTIONS, INC., EAST COAST NEWS CORP., INTERNATIONAL VIDEO DISTRIBUTORS, L.L.C., FRANK KORETSKY, CHRISTOPHER J. CURYLO, MICHAEL SAVAGE, DAVID ("BO") PEZZULLO, and MARC KERCHEVAL,

Defendants-Appellants.

Argued March 29, 2011 - Decided August 15, 2011

Before Judges Wefing, Payne and Koblitz.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-892-07.

Francis V. Cook argued the cause for appellants (Fox Rothschild, L.L.P and Stark & Stark, attorneys; Mr. Cook, of counsel; Mr. Cook and Eileen Powers, on the briefs).

Andrew Dwyer argued the cause for respondent (The Dwyer Law Firm, L.L.C., attorneys; Mr. Dwyer, of counsel; Mr. Dwyer and LaToya L. Barrett, on the brief).

PER CURIAM

Plaintiff, Doreen Longo, brought an action pursuant to the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8, after being terminated from her four-year employment as a sales representative for East Coast News Corp. (ECN), a wholesaler of adult sexually-oriented merchandise. Longo claimed her termination was in retaliation for her complaints about fellow-salesman, Marc Kercheval, whose conduct, she asserted, created a hostile work environment and constituted sexual harassment and intimidation. Specifically, she claimed that he had thrown a chair across the room; engaged in angry outbursts; held a fork to her face while threatening to gouge out the eyes of their boss, David "Bo" Pezzullo; called her a cunt; expressed the desire to clear her desk and then ravish her on it; stated that she would give oral sex to anyone for an order; and suggested that she engage in oral sex with an Ohio customer as a means of obtaining lucrative business for the company.

Longo complained orally and by e-mails sent on January 8 and February 1, 2006 to Pezzullo, the company's sales manager. Pezzullo claimed that he investigated plaintiff's complaints and found them not believable. However, any investigation that he conducted was cursory at best. No notes of the investigation

were produced. Moreover, Kercheval testified at trial that he was never contacted regarding plaintiff's complaints by either Pezzullo or his boss, Michael Savage. Additionally, Human Resources was not informed of the complaints, despite the fact that, if true, the conduct described would have violated the company's anti-harassment policy.

On February 1, plaintiff also contacted Savage, the company's general manager, and she forwarded to him the e-mails that she had sent to Pezzullo. Determining that it was "not [his] job to dive into this type of craziness," Savage took the communications from plaintiff to company president and co-owner, Frank Koretsky, who similarly conducted no investigation.

On February 8, 2006, plaintiff and Kercheval were brought, together, into Koretsky's office, where both were disciplined, allegedly in an obscenity-laced tirade, for non-collegiality and poor sales performance. According to plaintiff, Koretsky said "I don't need to put up with this bull shit from either one of you'se." He told them he was tired of the e-mails and that, with their sales numbers, plaintiff and Kercheval should be more concerned about doing business than yelling at each other. If their numbers did not improve, they would be fired. Additionally, both received written disciplinary notices, prepared at Koretsky's direction by a human resources employee a

day earlier, that threatened termination if the conduct continued.

In March 2006, Pezzullo, with the approval of Savage, terminated Kercheval's employment for poor sales performance. Longo was fired shortly thereafter on April 12, 2006 by Savage in the presence of the company's lawyer, Christopher Curylo. According to plaintiff, Savage told her: "Doreen, we really like you. You're a great sales rep, and I hate to do this, but I got to let you go." Plaintiff responded: "After my complaints?" And Savage replied: "Your complaints about Marc caused a commotion and we like a nice, laid back environment here." Savage testified at trial that his decision to terminate plaintiff was based on her poor sales, and that he, alone, made the termination decision. However, other evidence suggested Koretsky's involvement or at least knowledge of and acquiescence in the termination.

In his opening statement, counsel for the defense argued that plaintiff had been aware for more than one year that she was to be terminated for poor sales performance, and that she manufactured the claim that her termination resulted from her allegedly unaddressed complaints about Kercheval's sexual and physically threatening comments and behavior. Counsel pointed

out that, in fact, plaintiff was comfortable with ECN's sexually charged atmosphere. Counsel stated:

> She's going to say that a lot of sexual innuendos and such were directed at her in statements and such. You're going to hear though that she — not only is she very comfortable with this, she herself engaged in this on a regular basis.
>
> You're going to hear from her coworkers. They're going to say, yeah, she used to tell customers those kinds of things. She'd make comments like that. Sometimes, she was joking, sometimes who knows. But, she would make statements like that on a regular basis. So, for her to be suddenly offended by that, you're going to have to — you're going to be thinking, wait a minute, why is she suddenly offended here by this or saying she's suddenly offended by this?
>
> Again, it's because she realizes she's losing ground. She knows she's going to get fired. You're going to hear testimony from people saying, yes, she knew she was going to get fired for bad sales. And what she does is she sets the company up a little bit to get around this because she's going to have to leave.

In fact, considerable testimony was adduced by the defense and by plaintiff's counsel, without objection by the defense, regarding sexual conduct in the workplace and at gatherings sponsored by ECN by company employees, including such conduct by hired prostitutes and stars of pornographic films, and by plaintiff herself. Evidence included two photographs taken by plaintiff that allegedly depicted Pezzullo receiving oral sex

while seated at a table at an annual buyers' banquet and various photographs of plaintiff in sexually provocative poses with prostitutes or porn stars. Additionally, considerable testimony centered on warehouse shows conducted by ECN that featured porn stars performing sexual acts with each other and by use of devices and mechanical equipment. Plaintiff testified that she was not offended by this conduct, and that until the arrival of Kercheval in 2005, she enjoyed the workplace environment.

A complaint was filed by Longo against defendants Pleasure Productions, Inc., ECN, International Video Distributors, L.L.C., Koretsky, Curylo, Savage, Pezzullo, and Kercheval. Before the case was sent to the jury, claims against Pleasure Productions and International Video, associated companies involved in pornographic films; Curylo, ECN's in-house counsel; and Kercheval were dismissed. The case went to the jury against ECN, Koretsky, Savage, and Pezzullo. The jury found no liability on the part of Savage and Pezzullo. A verdict of $120,000 in economic loss and $30,000 in emotional distress damages was entered against ECN and Koretsky. Following a punitive damage trial, a verdict of $500,000 was entered against ECN, but not Koretsky. At the conclusion of defendants' case, the judge dismissed a counterclaim by ECN against Longo for

violation of a non-competition agreement as the result of the absence of proof of damages. Defendants have appealed.

On appeal, defendants make the following arguments:

POINT I

THE TRIAL COURT DEPRIVED DEFENDANTS OF A FAIR TRIAL BY ADMITTING EXTREMELY INFLAMMATORY HOSTILE WORK ENVIRONMENT-TYPE EVIDENCE THAT WAS ENTIRELY UNRELATED TO PLAINTIFF'S SOLE CEPA CAUSE OF ACTION AND SERVED ONLY TO CONFUSE THE MATERIAL LEGAL ISSUES AND PREJUDICE THE JURY AGAINST DEFENDANTS.

A. THE COURT ERRED IN ADMITTING "STATE OF MIND" AND "OTHER SEXUAL HARASSMENT" EVIDENCE WHEN PLAINTIFF DID NOT BRING A SEXUAL HARASSMENT CAUSE OF ACTION.

i. CEPA Does Not Prohibit Sexual Harassment.

ii. Evidence That Defendants Were of the "State of Mind" to Tolerate Purported Sexual Harassment was Irrelevant to Plaintiff's CEPA Cause of Action and Should Have Been Excluded.

B. THE COURT ERRED IN ADMITTING APRIL DEMAREST'S TESTIMONY BECAUSE ITS MINIMAL PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY ITS POTENTIAL TO PREJUDICE THE JURY AGAINST DEFENDANTS.

i. "Me Too" Evidence of Retaliation is Unduly Prejudicial Unless it is "Sufficiently Similar" to Plaintiff's Experience.

ii. Demarest's Experience at ECN Was Not Sufficiently Similar to that

of Plaintiff to Warrant the Admission of her Otherwise Inflammatory and Prejudicial Testimony.

C. THE COURT COMMITTED REVERSIBLE ERROR IN ADMITTING VULGAR AND EXPLICIT TESTIMONY REGARDING USED SEX TOYS AND LIVE SEX SHOWS AND PENETRATING MACHINES, AND INFLAMMATORY PHOTOGRAPHS OF PEZZULLO ALLEGEDLY RECEIVING ORAL SEX.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY CHARGING THE JURY ON THE ISSUE OF PUNITIVE DAMAGES THEREBY ENABLING THE JURY TO AWARD PUNITIVE DAMAGES WITHOUT FINDING "ACTIVE PARTICIPATION OR WILLFUL INDIFFERENCE" BY "UPPER MANAGEMENT" AS REQUIRED BY LAW.

A. PUNITIVE DAMAGES MAY ONLY BE AWARDED IN A CEPA ACTION WHERE UPPER MANAGEMENT ACTUALLY PARTICIPATED IN OR WAS WILLFULLY INDIFFERENT TO THE RETALIATORY CONDUCT.

B. THE COURT COMMITTED REVERSIBLE ERROR BY CHARGING THE JURY WITHOUT MENTIONING OR REFERENCING THE UPPER MANAGEMENT REQUIREMENTS.

C. THE COURT ERRED IN UPHOLDING THE PUNITIVE DAMAGES AWARD WHERE THERE WAS NO EVIDENCE THAT DEFENDANTS' CONDUCT WAS ESPECIALLY EGREGIOUS.

POINT III

THE TRIAL COURT ERRED BY DISMISSING DEFENDANTS' BREACH OF CONTRACT COUNTERCLAIM WHERE SUFFICIENT EVIDENCE OF DAMAGES WAS PRESENTED TO THE JURY.

A. PROFITS EARNED BY A COMPETITOR AS A RESULT OF AN EMPLOYEE'S BREACH OF A NON-SOLICITATION AGREEMENT ARE RECOVERABLE DAMAGES.

B. DEFENDANTS SET FORTH SUFFICIENT EVIDENCE DEMONSTRATING THAT PLAINTIFF'S SOLICITATION OF ECN'S CUSTOMERS RESULTED IN DAMAGES TO DEFENDANTS.

We affirm.

I.

In their first argument, defendants claim that admission of salacious evidence regarding the workplace environment at ECN and activities at its banquets and warehouse shows was improper, irrelevant and unduly prejudicial, because this was a CEPA case in which the only relevant evidence was the fact that Longo had brought conduct that she regarded as illegal to the attention of her superiors and as a consequence she had been fired.

Defendants additionally object to the admission of evidence involving a second ECN employee, April Demarest, who complained to Pezzullo and Koretsky regarding sexual harassment by her supervisor and, soon thereafter, was transferred to a distasteful job inspecting returns that included used sex toys and destroying, by hand, those that were defective. When she also complained to Savage about having to handle returns coated in dried semen, they got into an argument, he locked the door, and he said that if Demarest would sleep with him, things would

go a lot smoother. She refused. Disgusted with her job, Demarest then gave three-week's notice of her intent to leave the company, but was fired before the notice period had ended. On the day following her termination, plaintiff claims that ECN employees were instructed by Savage not to communicate with Demarest in any fashion, and were told that if they did, they too would be fired. Defendants argue that this evidence was unduly prejudicial and that the circumstances in Demarest's case were not sufficiently similar to those in plaintiff's case to warrant admission.

Pretrial, defendants moved to exclude photographs taken by plaintiff of Pezzullo allegedly receiving oral sex at an ECN banquet, but not testimony regarding the event. They also moved to exclude testimony from Demarest. Those motions were denied by the judge, who determined that the evidence was relevant to proving defendants' intent and motive to retaliate against plaintiff for complaining of sexual harassment, and that the prejudice occurring as a result of the introduction of the evidence, if any, would not be substantial. Otherwise, defendants raised no objection to the evidence that they now claim to have been erroneously admitted. Thus, with the exceptions we have noted, defendants must demonstrate plain error on the judge's part sufficient to have led the jury to

reach a conclusion it would otherwise not have reached. State v. Macon, 57 N.J. 325, 336 (1971); R. 2:10-2.

Our review of the record leads us to conclude that the judge did not misuse his discretion in admitting evidence of sexually-oriented workplace speech and conduct to which defendants now object, Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999), and that no plain error occurred.

With the exception of testimony by plaintiff relating to Kercheval and testimony by Demarest regarding harassment and retaliatory conduct, no testimony was provided by any witness that would suggest that the sexually charged atmosphere at ECN was deemed objectionable by its female employees or customers. Nonetheless, in any objective sense the conduct that occurred could be considered both harassing and objectionable. As a consequence, we find relevant to our analysis of defendants' arguments precedent regarding workplace harassment because it illustrates the principle that evidence of customary conduct by an employer or by others can be relevant to motive in cases alleging hostile work environment and retaliation.

The Supreme Court has held in the context of a suit alleging sexual harassment in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, that evidence that defendants engaged in conduct that could be considered

harassing, even if it constituted harassment of others as to which the plaintiff had no knowledge, was relevant and admissible "'to show defendants' motives, attitudes, and intentions.'" Mancini v. Twp. of Teaneck, 179 N.J. 425, 434-35 (2004) (quoting Mancini v. Twp of Teaneck, 349 N.J. Super. 527, 562 (App. Div. 2002)); see also Lehmann v. Toys 'R' Us, 132 N.J. 587, 610-11 (1993) (holding that evidence of harassment of others is, among other things, relevant to the character of the work environment); Rendine v. Pantzer, 276 N.J. Super. 398, 427-28 (App. Div. 1994) (noting that courts have held that evidence of other acts of discrimination is admissible to prove an employer's motive or intent to discriminate), aff'd as modified, 141 N.J. 292 (1995).

We have also found evidence of prior bad acts or evidence designed to demonstrate an improper motive to be admissible in connection with a CEPA action. Isetts v. Borough of Roseland, 364 N.J. Super. 247, 261 (App. Div. 2003) (citations omitted). As the Third Circuit has explained, other harassment evidence is relevant to prove retaliation because "harassers may be expected to resent attempts to curb their male prerogatives." Hurley v. Atl. City Police Dep't, 174 F.3d 95, 111 (3d Cir. 1999), cert. denied, 528 U.S. 1074, 120 S. Ct. 786, 145 L. Ed. 2d 663 (2000). A culture of condoned harassment increases the odds of

retaliation against complainants in individual cases. See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1086 (3d Cir. 1996); Glass v. Philadelphia Elec. Co., 34 F.3d 188, 195 (3d Cir. 1994); Hawkins v. Hennepin Technical Ctr., 900 F.2d 153, 155-56 (8th Cir.), cert. denied, 498 U.S. 854, 111 S. Ct. 150, 112 L. Ed. 2d 116 (1990); Conway v. Electro Switch Corp., 825 F.2d 593, 596-98 (1st Cir. 1987); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1423-24 (7th Cir. 1986); Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1103 (8th Cir. 1984); Phillips v. Smalley Maint. Serv's, Inc., 711 F.2d 1524, 1532 (11th Cir. 1983).

Moreover, as the extract that we have quoted from defense counsel's opening demonstrates, defendants purposefully utilized evidence of the sexually charged atmosphere at ECN in their attempt to demonstrate that plaintiff could not be offended by the coarse comments of Kercheval when she tolerated similarly coarse comments and conduct by others. As such, any error that occurred could be considered invited. Cf. N.J. Div. of Youth & Family Serv's v. M.C. III, 201 N.J. 328, 340-41 (2010); Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996).[1]

[1] We recognize in this regard that defendants did not urge the trial judge to admit this evidence. Nonetheless, introduction of the evidence, without objection, to undercut

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We have reviewed the photographs introduced by plaintiff, to which defendants did object, allegedly depicting Pezzullo receiving oral sex at a company banquet, together with plaintiff's testimony regarding the conduct that she observed. As a result, we conclude that the trial judge did not err in permitting their introduction into evidence. The photographs depict only the back of a woman's head positioned in Pezzullo's lap, and are considerably less graphic than the testimony as to which defendants made no objection.

We have also considered defendants' objections to the evidence offered by Demarest, and we find it neither unduly prejudicial nor insufficiently similar to plaintiff's situation to warrant its exclusion from the case. Both women complained of sexual harassment, albeit by different corporate employees. Both suffered retaliation, although of a somewhat different nature. Demarest experienced an unwelcome transfer and then termination after she had given notice that she planned to quit her job. Plaintiff was simply terminated. Both women's claims of retaliatory conduct involved Pezzullo, Savage and Koretsky. Although Demarest's testimony regarding the returns of used sex toys was extremely graphic, such testimony was necessary to

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plaintiff's claim of harassment was clearly, and not unreasonably, an element of defense counsel's trial strategy.

demonstrate that her job was, in fact, distasteful and that she could reasonably regard her assignment to it as retaliatory in nature. We thus find the testimony admissible under the precedent that we have previously cited.

As a final matter, our review of the record does not disclose any misuse of the evidence by plaintiff's counsel, who urged the jurors in his closing to consider the evidence of Pezzullo's sexual activity at the buyer's dinner and Demarest's testimony only as it was relevant to defendants' motive and intent in responding as they did to plaintiff's complaints about Kercheval. In that regard, counsel told the jury the following:

> It would be insane to say that because April Demarest was harassed by [her boss] Henry Batista, that means Doreen Longo was harassed by Mark Kercheval. It's moronic. We're not arguing that.
>
> What we are arguing though and the reason why this is admissible and more likely than not the judge will give you instructions on this, is that the evidence does go to the state of mind, the intent, the motive of the defendant. If Bo Pezzullo thinks this is normal behavior in a banquet room at a hotel with hundreds of people milling around, then he just might not take complaints of sexual harassment very seriously. And, in fact, evidence shows that's exactly right.

We therefore affirm the jury's finding of liability on the part of ECN and Koretsky on plaintiff's CEPA claim.

II.

Defendants additionally claim error in the judge's charge to the jury on punitive damages, arising from the fact that he did not instruct that the jury must find active participation in the wrongful conduct or willful indifference to it by "upper management" and defining that term, in order to award such damages. Defendants argue additionally that the punitive damage award should be vacated because there was no evidence that defendants' conduct was especially egregious.

Following the liability phase of the trial, the judge instructed the jury that to find Koretsky, Savage or Pezzullo individually liable under CEPA, it had to conclude that the person under consideration was plaintiff's "employer," and that he "was directly or indirectly involved in the retaliatory action." The judge properly defined "employer" in accordance with N.J.S.A. 34:19-2 to include "any person or group of persons acting directly or indirectly on behalf of or in the interest of an employer with the employer's consent." The judge additionally instructed that, "[u]nder this statute, for example, an employer includes any manager who is directly involved in the employment decision affecting plaintiff."

The verdict form provided to the jury asked, in question 3, "With respect to Frank Koretsky individually, has plaintiff

proved by a preponderance of the evidence that the termination was taken against her because she reported a violation of a law, regulation or public policy by her employer?" Question 4 made the same query with respect to Savage; the subject of question 5 was Pezzullo. No similar question pertained to ECN.

During deliberations, the jury asked:

> East Coast News is a defendant in the lawsuit. There is not a question on the jury verdict sheet about East Coast News. Is Frank Koretsky legally the same as East Coast News?

In response, the jury was instructed that "Frank Koretsky is legally not the same as East Coast News." It was also instructed that questions 1 and 2 on the jury verdict sheet related to the liability of East Coast News.[2] Thereafter, the jury returned a verdict against ECN and Koretsky, but not Savage and Pezzullo.

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[2] Echoing elements of a CEPA claim, those questions asked:

> 1. Has plaintiff proved by a preponderance of the evidence that she had an objective reasonable belief that defendants' conduct constituted a violation of law or was incompatible with a clear mandate of public policy concerning the public health, safety or welfare?
>
> 2. Has plaintiff proved by a preponderance of the evidence that the termination was taken against her because she reported a violation of a law, regulation or public policy by her employer.

Following the jury's verdict, a colloquy with the judge regarding the punitive damage phase occurred, during which counsel for the defendants stated:

> [W]ith regard to the two individuals for which there has been no count [sic] of liability, I assume there will be no charge with regard to them?

Plaintiff's counsel concurred.

> I agree. The jury has found that Mr. [Savage] and Mr. Pezzullo are not liable at all so obviously for the second half of the bifurcated trial, they're not parties for it and certainly they should be removed from the proposed instructions and they should be removed from the jury verdict sheet that I proposed.

Additionally, during the course of the discussion regarding the content of instructions to the jury with respect to punitive damages, plaintiff's counsel urged the judge to remove an instruction that, to award punitive damages, the jury was required to find "at least one of [ECN's] 'upper management' employees was involved with the [retaliatory acts]" Model Jury Charge (Civil), Punitive Damages - Law Against Discrimination (LAD) Claims, § 8.61 (2010), as well as the definition of upper management.[3] The judge agreed to do so over the objection of defense counsel.

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[3] That definitional instruction states:

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In his closing argument in the punitive damage phase of the trial, plaintiff's counsel argued over objection from counsel for defendants that not only Koretsky, but also Savage and Pezzullo either acted maliciously or in wanton disregard of plaintiff's rights. With respect to Koretsky, counsel argued that, after Savage brought plaintiff's complaints as contained in her e-mails to his attention, he first dictated disciplinary notices regarding the conduct of plaintiff and Kercheval, and on the next day, brought them to his office and "read them the riot

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Clearly, upper management includes the corporation's board of directors and its highest-level executive officers. In addition, upper management consists of 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 the 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 includes 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" is a fact sensitive question that requires you to 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 ensure a safe, productive and discrimination-free workplace.

act" without ever conducting any investigation to determine whether plaintiff's complaints, which if true, would have violated workplace policies promulgated by ECN, were in fact valid. According to counsel, Koretsky

> was affirmatively hostile to Doreen Longo for making her complaints. That's malice. It's also reckless disregard for her rights. He knew what her complaints were. He didn't care.

Plaintiff's counsel argued further that Savage recklessly disregarded plaintiff's rights by doing nothing and that Pezzullo "lied to you over and over again about what he did, about what the other witnesses told him, about his alleged investigation, where his investigative notes somehow disappeared." In counsel's view, Pezzullo's "coming into this courtroom and lying to you" constituted evidence of malice on his part.

On appeal, defendants argue that, in the circumstances presented, the judge erred in determining not to give an upper management instruction. We disagree. In Lehmann, supra, the Court held that in order for punitive damages to be awarded against an employer, there had to be proof of actual participation in or willful indifference to the wrongful conduct on the part of upper management. 132 N.J. at 625. As the Court stated in Cavuoti v. New Jersey Transit Corporation, 161 N.J.

107, 117 (1999), "Lehmann was the first New Jersey case to impose the requirement that in order for an employer to be held liable for punitive damages under the LAD, there must be some involvement by a member of the employer's upper management." Id. at 117 (emphasis supplied; footnote omitted). The reason for the requirement is to provide an incentive to employers to put into place programs designed to prevent wrongful conduct and to insist on compliance. Id. at 128 (citing Lehmann, supra, 132 N.J. at 626). Additionally, "[i]n order to justify the imposition of punitive damages on an employer, the employees who acted wrongfully must have had sufficient authority to make the imposition of punitive damages fair and reasonable." Ibid.

Turning to the present case, it is clear that Koretsky, as President of ECN and a co-owner, held an upper management position. Further his participation in the unlawful acts committed against plaintiff was determined by the jury in the compensatory damage phase of the trial. As a consequence, it is unquestionable that "some" involvement by upper management sufficient to impute liability to ECN existed. Evidence additionally demonstrated that Savage was a member of upper management. He was a co-founder of the company and he acted as its general manager, reporting directly to Koretsky. It was proven that he had broad supervisory powers over both plaintiff

and Kercheval, and he admitted that he possessed the power to fire employees at their level, claiming at trial that he was the one to have single-handedly fired plaintiff. See Cavuoti, supra, 161 N.J. at 129 (describing those second-tier employees who occupy positions in upper management).

It is arguable that Pezzullo, as sales manager, was likewise a member of upper management, since it was defendants' position that his efforts were responsible for the retention of plaintiff for the year after Savage determined she should be terminated, and it was he who terminated Kercheval. Thus, Pezzullo had "significant input into . . . personnel decisions" in both cases. Id. at 125 (quoting Canutillo Ind. Sch. Dist. v. Leija, 101 F.3d 393, 401-02 (5th Cir. 1996), cert. denied, 520 U.S. 1265, 117 S. Ct. 2434, 138 L. Ed. 2d 195 (1997)). Additionally, he had the power to terminate Kercheval's harassment of plaintiff and could have reasonably been expected to refer plaintiff's complaints to Savage, which he in fact testified that he had done. Id. at 127 (citing Young v. Bayer Corp., 123 F.3d 672, 675 (7th Cir. 1997)). However, even if he were not upper management, he could not have been solely responsible for plaintiff's termination, since the jury found otherwise in its verdict in the compensatory damage phase of the trial.

We note that the jury did not assess punitive damages against Koretsky. However, "the verdict can . . . be understood as implying that the award of punitive damages was warranted by the sum of the malice evidenced by the acts of all of the individual defendants acting together, but not by the acts of any one." Viviano v. CBS, Inc., 251 N.J. Super. 113, 131 (App. Div. 1991), certif. denied, 127 N.J. 565 (1992).

As a consequence, participation by upper management in the retaliatory action against plaintiff sufficient to warrant vicarious liability on the part of ECN is clear, and the determination not to instruct the jury on that issue was not error. Baker v. Natn'l State Bank, 161 N.J. 220, 226 (1999) (finding no prejudice to defendants from the absence of an upper management charge when the actors clearly were in that position).

Defendants claim additionally and for the first time that the judge erred in upholding the jury's punitive damage award, because there was no evidence that defendants' conduct was especially egregious. We decline to address this argument, which was not presented to the trial court in post-trial motions. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

III.

As a final matter, defendants argue that the judge erred when he dismissed at the end of defendants' case their counterclaim against plaintiff for breach of the non-competition agreement between plaintiff and ECN. At the close of all evidence, defendants moved for reconsideration, but the judge denied their motion, stating:

> The bottom line is that there's . . . absolutely no evidence in this case that . . . ECN lost any money as a result of plaintiff's solicitation. unlike the case that was cited, the [Totaro[4]] case, . . . in that case there was direct evidence and there was circumstantial evidence showing what the loss was as a result of the solicitation. Here, there's absolutely nothing.

A second motion, filed post-trial, was similarly denied.

Our review of the record satisfies us that the trial judge ruled properly on this issue, in accordance with Rule 4:37-2(b) and the standards set forth in Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) and Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).

To prove the breach of contract claim, defendants had to establish the existence of a legally binding contract, breach by plaintiff, and resulting damages. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007); Restatement (Second) of

[4] Totaro, Duffy, Cannova and Co., L.L.C. v. Lane, Middleton & Co., L.L.C., 191 N.J. 1 (2007).

Contracts § 1 (1981). The judge ruled that defendants had not established that ECN had been damaged by sales made by plaintiff following the termination of her employment at ECN, and we agree. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 441-42 (2005) (establishing that, on review, we are to apply the same legal standard employed by the trial judge).

Unlike cases in which the injured party was found to have presented sufficient evidence to support a damages award, such as Totaro, supra, 191 N.J. at 7-8 (relying on the testimony of twenty-six diverted clients and spreadsheets demonstrating profits and losses) and Platinum Management, Inc. v. Dahms, 285 N.J. Super. 274, 309 (Law Div. 1995) (utilizing expert testimony), in the present matter, ECN presented no evidence that the customers at issue, which purchased from plaintiff's new employer, ADI, after plaintiff began working there, either stopped doing business with ECN or began doing less business with ECN. For that reason, there is no basis in the record to conclude that the sales ADI made to ECN's customers represented actual losses to ECN, rather than business that would have gone to ADI in the normal course of events. For all we know, the sales made by ADI may have involved products that were not stocked by ECN.

As we stated in Barr & Sons, Inc. of Cherry Hill v. Cherry Hill Center, Inc., 90 N.J. Super. 358 (App. Div. 1966):

> Compensatory damages for breach of an agreement in restraint of trade are measured by the "loss" sustained by the plaintiffs by reason of the violation by the defendants of their agreement, and not by the profits made by the violator. Profits made by a defendant are not the measure of a plaintiff's damage unless plaintiff would have secured them in absence of the competition. In the latter event, defendant's profits would be direct proof of the loss sustained by plaintiff, and therefore recoverable by him as compensatory damages.
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> In a patent infringement case it may be inferred that sales of the patented article wrongfully made by defendant would have been made by plaintiff but for defendant's wrongful conduct. . . . However, in a suit for damages for breach of a restrictive covenant no such inference is permissible. It cannot be inferred that all persons who purchased merchandise from [defendant] in violation of the restrictive covenant would have purchased that merchandise from plaintiff but for [defendant's] wrongful conduct. The court must take judicial notice of the fact that plaintiff has many competitors in the . . . area to whom intended purchasers could and might very well would go in order to purchase a particular item.
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> [Id. at 374-75 (citations omitted).]

Further, ECN failed to produce evidence as to its historical rate of net profits. For that reason, even if we were to accept ADI's gross sales revenue achieved from customers

who were also customers of ECN as a basis for a damage calculation, net profits could not be calculated. See, e.g., Cameco, Inc. v. Gedicke, 157 N.J. 504, 518 (1999) (holding in a breach of duty of loyalty case the damages may be measured by profits earned by plaintiff in the other enterprise); Barr & Sons, Inc. of Cherry Hill, supra, 90 N.J. Super. at 373-74, 376 (holding it was error for trial judge to assume a profit rate when calculating damages for violation of a restrictive covenant).

As a consequence, we affirm the judgment entered dismissing defendants' counterclaim.

Affirmed

WEFING, P.J.A.D., dissenting.

My colleagues have done an estimable job of setting forth the underlying facts in this matter and analyzing why the defendants are not entitled to a new trial with respect to the award of compensatory damages on plaintiff's CEPA claim, and I concur with their analysis and conclusions. I part company, however, from their conclusion that the award of punitive damages can stand in the face of the trial court's failure to give an instruction to the jury that a necessary precondition to an award of punitive damages was a finding that upper management

had either actively participated in or been willfully indifferent to the violation of plaintiff's rights. In my judgment, the trial court's omission was error, entitling defendant East Coast News to a new hearing with respect to punitive damages.[1]

There is no need for me to restate the underlying facts of this matter. They are clearly set forth by my colleagues. The jury's conclusion that plaintiff's termination was wrongful under CEPA finds ample support in the record.

It is helpful, however, to identify the participants in this matter, and the roles they played. Defendant Savage was the general manager of ECN; he reported to defendant Koretsky. Defendant Pezzullo was the sales manager for defendant ECN and plaintiff's direct supervisor. Pezzullo reported to defendant Savage.

Pezzullo conducted the initial investigation of plaintiff's complaints with respect to defendant Kercheval and reported the results to defendant Savage. When plaintiff presented new complaints with respect to Kercheval to Pezzullo, Pezzullo notified Savage, who stated he would take over responsibility for the issue. He, in turn, notified Koretsky. It was Savage

[1] Since the jury did not assess punitive damages against defendant Koretsky, he is not affected by my analysis.

who ultimately informed plaintiff that she was being terminated. In the compensatory damage portion of the trial, the jury found no cause for action with respect to defendants Savage and Pezzullo.

Pezzullo described his job responsibilities in the following manner:

> I basically supervised the staff of sales people, primarily in New Jersey, but I did oversee some sales in Florida and in our California location. I was responsible for marketing the company and handling basically all aspects of promotion at the company, including making sure the orders went out in the warehouse sense, too, so it was sort of -- it covered many aspects of the full operation.

Pezzullo was not asked anything further about his job responsibilities. There is no indication that he had any involvement in initiating policy or formulating policy for his employer.

Defendant Savage was ECN's general manager at the relevant time period. He described his job responsibilities in the following manner:

> I oversaw sales in three locations, warehousing in three locations, and purchasing for the three locations.

He expanded upon these responsibilities:

> . . . I would meet with our buyers and we'd set up, you know, promotions two, three months in advance, we'd set up warehouse

> shows, I'd work with the warehouse again to make sure we're processing orders out on a timely basis, make sure we're processing returns. Returns are a big part of our customer service. And then I'd work with the sales managers and I'd have monthly sales meetings and try and teach the sales people and try and, you know, help the sales people grow their business.

In his position as general manager, he did have the authority to hire and fire people. The record does not make clear the extent of that authority, that is, what level employee he could terminate on his own initiative. Savage testified that he made the decision to terminate plaintiff and that Koretsky had no involvement in the matter. As with Pezzullo, there is no indication that he was involved in initiating policy or formulating policy for ECN. Neither Pezzullo nor Savage remained employed by ECN by the time this matter was tried.

My colleagues have set forth an analysis that could, analytically, sustain the award of punitive damages. In my judgment, however, to do so is to disregard the repeated statements by our Supreme Court that an award of punitive damages against a corporate defendant is sustainable "only in the event of actual participation by upper management or willful indifference," Cavuoti v. N.J. Transit Corp., 161 N.J. 107, 117 (1999) (quoting Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 625 (1998)), and that the omission of an instruction with respect to

upper management is "fatal." Lockley v. Dep't of Corr., 177 N.J. 413, 425 (2003). The Court recently restated this view, describing as an "essential prerequisite[]" to an award of punitive damages upper management's actual participation or willful indifference. Quinlan v. Curtiss-Wright Corp., 204 N.J. 239 (2010).

It is of further significance to me that in the present case, defendant specifically requested the trial court to charge the jury with respect to this issue, and the trial court refused to do so because of Koretsky's undeniable role in upper management. Plaintiff's summation on the topic of punitive damages, however, convinces me that the trial court's decision in this regard was fundamentally flawed.

After reviewing what he considered to be the conduct of Koretsky that warranted an award of punitive damages against him (an award the jury declined to give), he turned to the conduct of other individuals, saying "there were other people at East Coast News who were involved in other ways leading up to her termination and who also acted in ways that evidence reckless disregard." After the trial court overruled defendant's objection, plaintiff's counsel continued in the same vein, saying that East Coast News

> is responsible for the behavior of all of its employees . . . East Coast News is also

> responsible for the behavior of Pezzullo and it's also responsible for the behavior of Savage. In each case you have people who recklessly disregarded the plaintiff's rights.
> . . .
> So Bo Pezzullo's behavior was totally outrageous and quite frankly his coming into this courtroom and lying to you about it is, itself, evidence of malice and evidence of reckless disregard for the plaintiff's rights. So you have abundant evidence to assign punitive damages against East Coast News.

Having identified Pezzullo and Savage, whom the jury had found not responsible in the compensatory phase of the trial, he continued with the use of associational wording, saying "they knew that they were going to cause harm," "look at their actions," "[t]hey proceeded to terminate her," "they are trying to conceal their wrongful behavior," "they sat there and said to themselves, this person is complaining about retaliation. She's thinking about suing us for retaliation. Let's fire her," and "[t]hey are maintaining their defiance to the end here. And they are continuing to lie about what happened and they are not going to set the record straight on any of those lies."

In such a context, I consider it critical for the jury to have received appropriate instructions on the issue of upper management. Here, the jury was not even told that defendant Koretsky was upper management; the charge was utterly silent on the issue.

The court's charge was inherently inadequate, and made more so by the comments of plaintiff's counsel, only a few of which I have set forth. Accordingly, I dissent from that portion of my colleagues' opinion. I would reverse the award of punitive damages and remand for a new trial on that issue.