

Public agencies lose in high court

Justices rule government may face punitive damages, and Legislature is urged to act

BY ROBERT SCHWANEGER
STAR-LEDGER STAFF

Rejecting arguments that taxpayers should not be punished for the misdeeds of public servants, a sharply divided state Supreme Court ruled yesterday that punitive damages can be awarded to people who suffer discrimination or retaliation from government agencies.

In a 4-3 vote, the court upheld a \$565,000 award — including \$300,000 to punish the state-run Jersey City school district — to a former teacher who blew the whistle on a payroll scheme.

In a second case, an evenly divided court gave a male corrections officer a second chance to convince a jury that the state should pay him punitive damages for the years of sexual harassment he endured. The court ordered a new hearing because the first jury, which awarded him \$3 million in punitive damages, was given an incorrect explanation of the law.

In recent years, New Jersey's legislative efforts to ban punitive damages against governmental agencies have always stalled. It is among a shrinking minority of states that permit such damages. Yesterday, lawyers for victims of workplace harassment lauded the rulings for protecting the rights of public employees.

"Sometimes the worst offend-

ers are people who work for public entities who perhaps feel they are beyond retribution," said Alan Krumholz, who argued the case for the former Jersey City science teacher, Doris Green. A jury found she was hounded out of a 30-year teaching career as retaliation for refusing to launder payments to another teacher who lacked proper credentials.

If school districts and other public bodies could not be forced to pay punitive damages in such circumstances, Krumholz said, "you would give them carte blanche to ruin people's lives."

William Dressell, executive director of the New Jersey State League of Municipalities, called the decision "extremely bad, not only for government, but for the property taxpayers who will have to pick up the tab." He said the league will call on lawmakers to renew efforts to outlaw punitive damages against public entities.

Sen. Leonard Connors (R-Ocean) said yesterday's ruling amounts to "punishing the taxpayer. That's not our way of government." For several years, Connors has sponsored legislation to exempt public entities from punitive damages. "Now I think the tide will swing in my favor," he said.

The question is one that has divided the state Supreme Court

for the past decade. In 1994, the court split, 3-3, on whether a teacher who was not rehired as retaliation for reporting unsafe conditions in a school's metal shop could collect punitive damages. As a result, an appeals court decision allowing punitive damages stood.

In 1999, the court voted, 4-3, in favor of allowing a victim of age discrimination to collect punitive damages from NJ Transit. At the time, Chief Justice Deborah Poritz was one of the three justices arguing that punitive damages should not be allowed.

Yesterday, however, Poritz wrote the court's opinion upholding an award of \$300,000 to punish the Jersey City school district for violating Green's rights under the state whistleblower law. Poritz said the Legislature's failure to address the issue was a key consideration.

"For nine years, the court repeatedly has requested that the Legislature take up the issue of punitive damages against public entities if it deems our interpretation to have been mistaken," Poritz wrote. "The Legislature has not acted. We can only assume from that silence that it intended to subject public entities to punitive damages" under the whistleblower law.

Justices Virginia Long and

James Zazzali and former Justice James Coleman, who retired last month, agreed with Poritz.

Justices Peter Verniero, Jaynee LaVecchia and Barry Albin dissented. Noting that the Jersey City school district is among the poorest in the state, they said the ruling drains "scarce resources from needy students" and "inflicts punishment not on the wrongdoer but on the innocent taxpayer."

In a second case decided yesterday, the court upheld an appeals court ruling setting aside a \$3 million punitive damage award to Robert Lockley, a state corrections officer who complained that he was subjected to years of harassment for refusing to have an affair with a female officer.

Poritz, Long and Coleman said that when the case is reheard, the jury may not consider the state's financial condition and ability to pay, which is a key consideration in assessing punitive damages against a corporation.

Verniero, LaVecchia and Albin agreed with that ruling, but added that it "illustrates the difficulty — and perhaps the impossibility — of fashioning jury instructions that will allow the rational assessment of punitive damages against a public entity."

Zazzali did not take part in the Lockley case.

environment. A Burlington County jury awarded him \$750,000 in compensatory damages and \$3 million in punitive damages. The trial judge also ordered the state to pay \$850,000 in attorneys' fees and costs.

The Appellate Division upheld the compensatory damages and attorneys' fees, but remanded the damages award back to the trial court because it found the jury instructions "fatally flawed."

The judge had not told the jury to assess the roles of particular staff members so it could determine whether upper management was involved in the alleged harassment and retaliation.

"It is unlikely that every employee within the DOC command structure had the authority to take remedial action in this case; it is also unlikely that, without instruction from the trial court, the jury examined the duties, responsibilities, and powers of the DOC employees whose conduct or willful indifference affected Lockley to determine whether they were part of DOC's upper management," Poritz wrote.

"Only on such a finding could the jury properly have awarded punitive damages against the DOC," she continued.

The Court also drew a distinction between calculating punitive damages awards against private entities and against public ones.

In cases involving a private entity, juries must be told of its financial status so they can craft an award that serves the primary purpose — to punish bad behavior.

That same method is not to be used for public entities, Poritz said. "[C]oncepts of wealth and ability to pay are irrelevant in connection with public

entities because public entities do not create their own wealth and are not driven by a profit motive," Poritz said.

In determining the amount of punitive damages against a public entity, the standards established by the Punitive Damages Act, N.J.S.A. 2A:15-5.12b, with the exception of a calculation of the defendant's financial status, should apply, Poritz said.

The League of Municipalities is calling on the Legislature to act so that public entities are protected from LAD and CEPA punitives.

Linda Wong, Lockley's attorney, says that should make it easier to win punitive damages claims against public entities. "It's a lesser burden. We don't have to show that [the defendants] have the ability to pay," says Wong, a partner at Princeton's Wong & Fleming.

The *Green* and *Lockley* rulings drew

the immediate attention of the state League of Municipalities, which represents the parties most likely to be adversely affected: local governments.

The league called on "the Legislature to act to protect the public by clarifying the law to ensure the protection of public entities from punitive damages under the LAD and CEPA," says executive director William Dressel Jr.

He says the dissent in *Green* addresses the issue best. "The problem with punitive damages against public entities is that it is unworkable and inflicts punishment not on the wrongdoer, but on the innocent taxpayer."

State Sen. Leonard Lance, R-Hunterdon, considered an expert on public financing issues, agrees that the Legislature needs to listen to the Court and take a stand. "The Court has asked us repeatedly to examine it.

"To those who argue that the Court is a 'super-legislature,' this is a clear example of the Court repeatedly attempting to defer to the Legislature for guidance," Lance says.

Green's lawyer, Jersey City solo practitioner Alan Krumholz, says he does not believe the rulings will have a major impact on state or local governments.

"The Punitive Damages Act is always going to give them some protection," he says. "You don't always want to spend it that way, but there's always some surplus."

Then again, Krumholz adds, perhaps the ruling will make public entities take greater notice of their employees' actions. "Maybe they'll realize they need to clean house a little bit," he says. ■