

Punitive against government OK'd

But courts must act as gatekeepers

By Michael Ann Knotts

Smacking the state, municipalities and other public entities with punitive damage awards is permissible, the New Jersey Supreme Court ruled, but warned judges they have a heavier burden to make sure such awards make sense.

This dual approach — permitting punitive but setting a stiff check-and-balance procedure — would appear to avert runaway awards against government.

The high court last week reached its determinations in two separate decisions that in part said a governmental agency's ability to pay punitives should not be considered by juries.

New Jersey is among the relatively few states that allow punitives against public bodies, and several justices openly called on the legislature to decide whether that should remain law.

Chief Justice Deborah T. Poritz, author of both decisions, pointedly noted Trenton lawmakers for years have been silent on the politically volatile issue.

For now, though, the court made clear that judges have an even higher responsibility as gatekeepers to review punitive awards against public bodies for reasonableness than against a private entity.

The two cases dealt with the state's whistleblower statute, the Conscientious Employee Protection Act (CEPA), and the Law Against Discrimination (LAD).

In *Green v. Jersey City Board of Education*, Doris Green, a science teacher for 30 years, blew the whistle on a payroll scheme set up by her principal to compensate another teacher for doing work for which he lacked credentials.

Green, after two years of retaliatory acts by the principal resulting in severe

headaches and other symptoms, took medical leave and never returned to teaching. She sued the school board, the principal and others under CEPA.

Her attorney, Alan L. Krumholz of Jersey City, called the high court's 4-3 decision upholding a \$300,000 jury award for punitive damages "very important for whistleblowers and other victims of discrimination."

He noted, "Employees of public entities who suffer as a result of employment discrimination deserve the same protection as employees in the private sector. And as he sees it, it is "very significant" that the legislature, in statutes supporting employees' rights, made no exception for public entities.

In the other case, *Lockley v. New Jersey Department of Corrections*, corrections officer Robert Lockley filed sexual harassment charges with the Department of Corrections against co-worker Rhonda Turner as a result of her alleged persistent and increasingly aggressive sexual advances.



Full texts of *Green*, Order No. 91410, and *Lockley*, Order No. 91409, are available from the NJL Facts-on-Call Service, 800-670-3370. See digests, Pages 13 and 21, respectively.

Although his complaint originally resulted in a recommendation of discipline against Turner, all charges against her ultimately were dropped, and Lockley sued under LAD.

The Appellate Division affirmed trial court awards of compensatory damages and counsel fees. But the appeals court reversed

the \$300,000 punitive damage award due to inadequate jury instructions. The appeals tribunal cited case law showing employers whose conduct violates LAD can be held liable for punitive damages only with the "actual participation by upper management or willful indifference" and declared the trial judge failed to explain to the jury what "upper management" meant.

In a 6-0 decision, the high court agreed, repeating standards it set in a previous case for identifying upper management. It remanded the case for retrial on punitive damages.

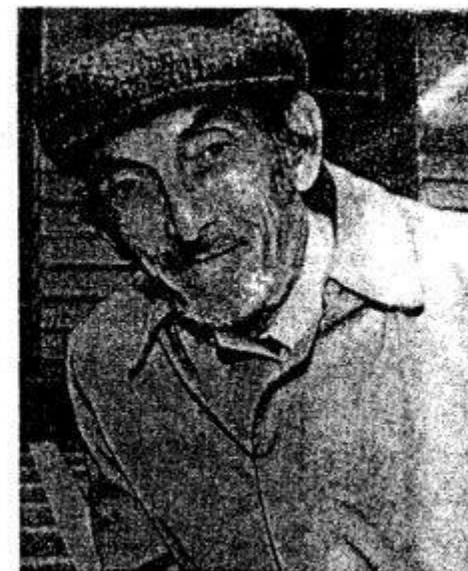
"We are glad the court upheld punitive damages under the LAD, and gave us standards for what trial counsel is supposed to show when seeking punitive damages," said Princeton attorney Linda Wong, who along with law partner Daniel C. Fleming, represented Lockley.

On the issue of whether punitive damages are available in a whistleblower case against a public body, Poritz referred to the high court's 1994 decision *Abbamont v. Piscataway Board of Education*.

In that case, said Poritz, then-Justice Alan B. Handler noted the legislature could easily have exempted government entities from CEPA's punitive damage provision, had it wished. Rather, CEPA specifically defines employers to include government entities.

Poritz noted, however, that Handler also emphasized a "heightened standard" for imposing damages against public entities, stating punitive damages may be awarded only if the conduct of management or supervisory officials "is particularly egregious and involves willful indifference or actual participation."

Emphasizing the importance of a heightened standard, Poritz also cited the court's 1999 decision *Cavuoti v. New Jersey Transit*, stating, "We set rigorous standards for the calculation of



Alan L. Krumholz
Victory for his client

punitive damages against a public entity, recognizing that 'public monies are the source of the award.' "

And in *Lockley*, she noted, "The judge in an ordinary case acts as a check on the jury's calculation of punitive damages; in the case of a governmental entity, when public monies are the source of the award, the judge must scrutinize with great care the amount of the award to determine whether it is proportionate to the harm suffered by the plaintiff."

In *Lockley*, too, Poritz discussed the standards for defining upper management.

Quoting *Cavuoti*, Poritz said that "at the margins, defining 'upper management' is easy. A chief executive officer, chief operating officer, or a member of the board of directors satisfies the definition. At the other extreme, an assembly-line worker or clerk ... does not."

To provide guidance in identifying upper management between those extremes, the court in *Cavuoti* suggested criteria for juries to use.

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