

## Spare the Rod, Spoil the Employer: Punitive Damages and Workplace Investigations

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How much could an employer be punished for a bad investigation of workplace discrimination or harassment? Could punitive damages be at stake?

Although punitive damages under the New Jersey Law Against Discrimination are only awarded by juries in rare circumstances, it is possible that they could be awarded because of a bad investigation. However, a plaintiff employee must prove more than that the investigation was negligent, a plaintiff employee must show that the defendant's "upper management" actually participated in or was "willfully indifferent" to discrimination or harassment against the plaintiff employee, as evidenced by the manner in which the investigation was conducted. In addition, for punitive damages, a plaintiff employee must show that the defendant's conduct toward the employee was "egregious."

What would such an investigation look like? It would be a sham, meant only to relieve the employer of any liability for the alleged discrimination or harassment. In other words, it would be conducted with the intent of getting the employer off the hook and not finding out whether the plaintiff employee's allegations were true. The plaintiff employee would have to show that "upper management" participated in ensuring a bogus investigation was conducted. For example, in a Massachusetts case where punitive damages were awarded, the supervisor doubted the employee's sexual harassment complaint against her supervisor. The employer did not interview all relevant personnel and did not involve the complaining employee. At trial, the employee put former co-workers on the witness stand who testified as to the sexual harassment, belying the employer's position that he conducted an adequate investigation.

New Jersey employers should note that it is against public policy in the State to insure an employer against punitive damages because they are intended to address a defendant's bad behavior. Thus, employment practices liability policies do not cover punitive damages. Punitive damages awarded by a jury must simply be paid by the employer.

The best practice for an employer is to perform a thorough investigation as to any workplace harassment or discrimination claims and make sure to interview all potentially relevant witnesses. It is also prudent to have upper management uninvolved in investigations involving discrimination or harassment. Moreover, an employer should neither pressure an investigator to make a certain determination, nor give the impression that the employer wants the investigator to make a certain determination. Otherwise, punitive damages may be a possibility, should a jury find that the employer swayed an investigation.

**TAKEAWAY:** It is important for employers to ensure a comprehensive and defensible investigation is established in the event of claimed workplace harassment or discrimination, and employers must remain as neutral as possible when retaining an investigator, or having its human resources personnel conduct an investigation.

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