

2.11 WRONGFUL DISCHARGE IN VIOLATION OF A CLEAR MANDATE OF PUBLIC POLICY¹ (Approved 3/91; Revised 7/10)

Plaintiff has alleged that he/she was wrongfully discharged from his/her position in violation of public policy. I charge you that the policy of _____ is a clear mandate of public policy²; you must decide whether plaintiff was discharged:

[choose appropriate option below:]

- (1) in violation of that policy; or
- (2) for exercising rights protected by that policy; or
- (3) for declining to perform an act or acts which require a violation of that policy;

[or] whether, as defendant states, plaintiff was not discharged for a reason related to that policy.

[choose appropriate corresponding option below:]

(1) In order to establish that plaintiff was discharged in violation of a public policy, you must find by a preponderance of the evidence that plaintiff's

¹ This charge is to be given only if a claim is asserted under *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980).

² Whether there is a clear mandate of public policy prohibiting the conduct is a question for the trial judge. *Warthen v. Toms River Community Hospital*, 199 N.J. Super. 18, 25 (App. Div. 1985).

CHARGE 2.11 — Page 2 of 4

discharge violated the [state the public policy]. If plaintiff does not prove this, you need not consider whether plaintiff's discharge was wrongful. If plaintiff does prove that his/her discharge violated the [public policy], then you must consider whether³ a determinative factor for his/her discharge was a violation of the [public policy], and not some other reason such as _____, which defendant has asserted.

(2 or 3) In order to establish that plaintiff was discharged for exercising rights under [public policy] or for declining to perform an act or acts which require a violation of the [public policy], you must find that plaintiff has proved by a preponderance of the evidence that he/she:

- a. had a reasonable basis for believing defendant engaged in a violation of the [state the public policy];⁴ and
- b. brought the alleged violation of the [state the public policy] to the attention of an appropriate governmental outside authority or took other action reasonably calculated to prevent the objectionable conduct.⁵

³ *Erickson v. Marsh & McLennan*, 117 N.J. 539, 560, 561 (1990). This seems tautological, but that is what the opinion says.

⁴ *Pierce v. Ortho Pharmaceutical Corp.*, *supra*, at 72.

⁵ *Tartaglia v. UBS PaineWebber Inc.*, 197 N.J. 81, 111 (2008).

Plaintiff must prove that he/she sufficiently expressed his/her disagreement with defendant's [state the conduct alleged to be in violation of public policy] to support the conclusion that his/her discharge violates the mandate of public policy and is unlawful. That is to say, a complaint to an outside agency or a direct complaint to senior corporate management will ordinarily be sufficient. On the other hand, a complaint to an immediate supervisor or passing remarks to co-workers generally will not.⁶

[charge the following in every case]

It is the plaintiff's obligation to prove, by a preponderance of the evidence, that his/her [describe the alleged adverse action in question, such as demotion, firing, etc.] violated a clear mandate of public policy.^{7, 8} In this regard, I remind you that plaintiff was a so-called "at will" employee, that is he/she did not have a

⁶ *Tartaglia v. UBS PaineWebber Inc.*, *supra*, at 109.

⁷ *Tartaglia v. UBS PaineWebber Inc.*, *supra*, at 112.

⁸ Although the New Jersey Supreme Court and Appellate Division have held that plaintiffs bringing claims under the *New Jersey Law Against Discrimination* (LAD), *New Jersey Conscientious Employee Protection Act* (CEPA), and *New Jersey Family Leave Act* (FLA) need only prove that the unlawful motive was a determinative factor in the adverse employment decision rather than the sole motivating factor, *see, e.g., Bergen Commercial Bank v. Sisler*, 157 N.J. 188, 207 (1999) (so holding with regard to LAD), *Donofry v. Autotote Systems, Inc.*, 350 N.J. Super. 276, 293 (App. Div. 2001) (so holding with regard to CEPA), and *DePalma v. Building Inspection Underwriters*, 350 N.J. Super. 195, 214 (App. Div. 2002) (so holding with regard to FLA), no reported New Jersey state or federal court decisions appear to have addressed that issue with regard to New Jersey common-law wrongful discharge claims.

CHARGE 2.11 — Page 4 of 4

contract of employment. In New Jersey, such an employee can be discharged at the wish of the employer for any reason or for no reason. He/she could be discharged for a false cause, or for no cause at all, provided only that the reason the employer discharged the employee did not violate any clear mandate of public policy. A person fired unfairly, but not fired in violation of a specific public policy, does not have a cause of action for wrongful discharge in violation of public policy.