COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC No. _____
Appeals Court Nos. 2013-P-0505, 2013-P-1217

Deborah Kiely
Plaintiff - Appellant

v.

Teradyne, Inc.
Defendant - Appellee-Cross-Appellant

PLAINTIFF - APPELLANT DEBORAH KIELY'S APPLICATION FOR FURTHER APPELLATE REVIEW

Inga Bernstein (BBO# 627251)
ibernstein@zalkindlaw.com
Emma Quinn-Judge (BBO# 664798)
equinn-judge@zalkindlaw.com
Zalkind Duncan & Bernstein LLP
65a Atlantic Avenue
Boston, MA 02110
(617) 742-6020

June 26, 2014

PLAINTIFF DEBORAH KIELY'S APPLICATION FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Massachusetts Rule of Appellate Procedure 27.1, Plaintiff-Appellant Deborah Kiely hereby requests leave to obtain further appellate review. A copy of the Appeals Court opinion is appended hereto as Exhibit A.

This Court should grant further appellate review to consider two important legal questions affecting the public interest. The first is an issue of first impression, namely, whether G.L. c. 151B, § 9, requires an award of attorney's fees where a jury finds liability but the plaintiff receives no damages. The Appeals Court construed the fee provision narrowly: it applied c. 93A jurisprudence to c. 151B and concluded that an award of fees under c. 151B requires a showing of "harm" or "actual damage or loss" before a plaintiff may recover fees. The court held, moreover, that a bare finding of liability under c. 151B - that is, a finding of discrimination or retaliation - is insufficient to meet this standard. This decision ignores c. 151B's liberal interpretation mandate and differences in the language and intent of

cc. 151B and 93A. Moreover, the conclusion that an employer who discriminates or retaliates does not cause harm or damage undercuts the fundamental remedial policy and purpose of the state antidiscrimination statute. See infra Part V(A).

The second substantial issue in this case is how to apply the punitive damages standard articulated "specifically for discrimination claims" in Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 110 (2009), to a retaliation claim. No prior published decision has applied Haddad to a retaliation claim and this court should grant further review to clarify how the Haddad factors should be modified for a retaliation case. See infra Part V(B).

II. STATEMENT OF PRIOR PROCEEDINGS

Deborah Kiely, a 24-year employee of Defendant-Appellee Teradyne, Inc. ("Teradyne"), brought claims in Suffolk Superior Court alleging, inter alia, gender discrimination and retaliation. The case was tried before then-Judge Geraldine S. Hines from October 28, 2011, through November 14, 2011. The jury was properly instructed that it could award punitive damages only if Teradyne's behavior was so outrageous or egregious that it warranted public condemnation and punishment.

Fifteen jurors deliberated for more than fourteen hours over three days, then returned a verdict in favor of Kiely on the retaliation count and awarded $1,100,000 in punitive damages. The jury did not find for Kiely on the discrimination count and did not award compensatory or other damages.

Teradyne moved, pursuant to Massachusetts Rule of Civil Procedure 50, for judgment notwithstanding the verdict ("JNOV") or, in the alternative, to vacate the award of punitive damages. The trial court upheld the retaliation verdict, but vacated the punitive damages award, concluding that there was insufficient evidence to support the jury's decision. The trial court then denied Kiely's motion for fees and costs, concluding that, absent an award of damages, the jury verdict finding retaliation was not enough to render Kiely a "prevailing party" and that she therefore was not entitled to fees.

Kiely appealed the decisions to vacate the jury's punitive damages award and to deny fees, and Teradyne cross-appealed the denial of JNOV on the underlying retaliation verdict. The Appeals Court affirmed the trial court's decisions in all respects. No party is seeking a rehearing in the Appeals Court.

III. FACTS

The Appeals Court's opinion correctly summarizes many of the facts, but omits the following facts that support the jury's decision to award punitive damages.

Kiely was eliminated from rehire at Teradyne on December 4, 2006, just thirteen days after she had filed a charge at the Massachusetts Commission Against Discrimination ("MCAD"). A1255, A2579.[1] Teradyne never considered Kiely for reemployment, despite its acknowledged policy of seeking internal placements when jobs were eliminated, A1258, A1641, A1915, and her multiple requests for reemployment, 85 Mass. App. Ct. at 437.[2] Indeed, after her non-rehire, a Teradyne lawyer falsely stated to Kiely's counsel that Teradyne does not "rehire people that get laid off," A1461, A1654, although Teradyne was then actively rehiring the two men laid off with Kiely and had a policy of seeking internal placements.

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[1] Citations beginning with "A" refer to pages in the Appendix filed with Appeals Court Docket No. 13-P-505.

[2] Here and in one other instance, this recitation of facts includes facts not omitted from the Appeals Court's decision. These facts are cited to the opinion and are included here merely to provide context for omitted facts.

Kiely testified that she "felt worthless" after Teradyne made its decision not to rehire her, A1302, and her husband and daughter testified to the many ways in which Teradyne's conduct impacted Kiely, A1994-2006, A2088-98.

The jury could have inferred that during this litigation and at trial, Jay Fitton, the manager who made the decision not to rehire Kiely, and other Teradyne employees (including a human resources ("HR") manager) took steps to conceal Teradyne's wrongful conduct by lying or misleading the jury about the rehire process, knowledge of the MCAD charge, and Kiely's qualifications. Teradyne's concealment was not limited to what the jury could have found were lies by Fitton; it also included material misstatements throughout the litigation by Kiely's former supervisor, Charles Trapani, who is not mentioned in the Appeals Court opinion.

Rehire manager Fitton testified that he was seeking to hire the "best technical troubleshooters," A2254, but the jury could have inferred that this was untrue, because he eliminated Kiely from consideration before learning of her skill set, see 85 Mass. App. Ct. at 434. Moreover, the jury could have concluded

that Fitton's claim that he eliminated Kiely precipitously due to "the immediate need of the situation" was false in light of the many steps he took after eliminating Kiely and the fact that he did not complete the rehire process for more than a month after eliminating her. See A2220, A2230-32, A2583-85.

The jury could also have inferred that Fitton was untruthful when he testified that one of Kiely's former managers - a longtime colleague and her prior supervisor - was unable to tell Fitton anything about Kiely's technical skills. A2236-37, A1959-60, A1987.

There was also evidence to support a jury finding that Teradyne witnesses sought to conceal their knowledge of the MCAD charge. The jury could have disbelieved HR Manager Bill Burns' testimony that he was unable to recall whom he informed of Kiely's charge, especially in light of Trapani's testimony that Burns may have been the person who interviewed him about the charge. A1643, A1736-37. The jury could also have disbelieved attempts by Trapani to distance himself from knowledge of the charge, because he repeatedly revised his statement about when he learned of the MCAD charge. A1736-38, A1847.

Teradyne sought to conceal its retaliatory conduct by claiming that Kiely lacked skills necessary for rehire. The jury could have noted that before Kiely filed her MCAD charge - that is, before Teradyne witnesses had a motive to lie about her qualifications - she was a highly-rated employee and that during this litigation Teradyne manager Trapani repeatedly sought to downplay Kiely's skills and credentials.

Prior to trial, Trapani submitted a sworn affidavit claiming that from 2000 to 2005, Kiely was rated lower than the male technicians in all but one year, when in fact she was rated lower in 2000 and 2001, equal in 2002 and 2003, and higher in 2004 and 2005. A1740-41, A2669-73. At trial, Trapani claimed that the two male technicians had "been my best technical debug guys for years," A1848, when in reality, he had rated Kiely higher than both men in 2004, a rating that reflected Kiely's performance when she and the men were all Level 10 technicians being compared directly to one another. A1829, A2606, A2669-73. Before her MCAD charge, Trapani had singled out Kiely's technical skills for praise in a 2004 promotion memorandum. A2675-76.

Indeed, the jury could have inferred that Trapani changed his view of Kiely immediately after she filed at the MCAD. Five days before she filed her charge, Trapani sent an email to Kiely and the two male technicians laid off with her (and then rehired), describing the three as the "Best of the Best," and offering his assistance finding a job. A1254-55, A2624. Two weeks later - after Kiely had filed her charge - he failed to mention Kiely when asked about candidates for rehire. A1761. The jury could have inferred that Trapani lied at trial to conceal the true reason for his change of heart: he claimed that this "Best of the Best" message went to two additional recipients and not just the three individuals whose rehire (or non-rehire) was at the center of this case, but the jury could have disbelieved this testimony because the additional alleged email recipients were not laid off until three months after Trapani sent this email offering job placement assistance. A1841, A1859-60, A1972, A2573-74, A2624.

Finally, the jury could have concluded that Teradyne engaged in retaliatory conduct both before and after the decision not to rehire Kiely: Kiely's job was restructured after she complained to her

manager that she was being scapegoated by a male colleague, A1171-79, A1181-82, A1725; Kiely's performance rating was downgraded after she went to HR and management to discuss concerns about her treatment, A1220-24, A2549, A2677; Kiely also ceased to be invited to meetings and was moved to a more isolated workspace after she went to HR, A1233; and Kiely was notified of her termination fifteen days after she requested pay and personnel records relating to prior promotion attempts, A1248-51, A2618-23. After her non-rehire, Teradyne repeatedly refused to consider Kiely for reemployment and falsely stated that it did not rehire laid-off employees, see supra at 4, and Kiely was also unable to obtain employment while using Teradyne references. A1279-83, A2019-21.

IV. STATEMENT OF POINTS AS TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

A. Whether a jury finding of retaliation is a "find[ing] for the petitioner" under G.L. c. 151B, § 9, such that the court "shall … award the petitioner reasonable attorney's fees and costs," even where the plaintiff receives no damages.

B. Whether the standard for punitive damages awards set forth in Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91 (2009), specifically for discrimination claims, must be modified when applied to a retaliation claim.

V. STATEMENT OF REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

A. On an Issue of First Impression, the Appeals Court Wrongly Narrowed Chapter 151B

Whether G.L. c. 151B, § 9, requires an attorney's fees award where a jury finds liability but the plaintiff receives no damages is a "question of first impression." 85 Mass. App. Ct. at 443. The statute mandates fees when there is liability: "If the court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount in controversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust." G.L. c. 151B, § 9 (emphasis added).

Contrary to § 9's explicit liberal interpretation mandate, the Appeals Court construed the fee provision narrowly: it applied precedent interpreting a similar - but not identical - fee provision in G.L. c. 93A, § 11, and concluded that the phrase "in addition to any other relief" in c. 151B requires a showing of "harm" or "actual damage or loss" to recover fees. See 85 Mass. App. Ct. at 442-49; see also Jet Line Servs., Inc. v. Am. Employers Ins. Co., 404 Mass. 706, 718

(1989). In other words, the court held that a liability finding under c. 151B does not establish "harm" or "actual damage or loss." This was error.

Holding that an employer who discriminates or retaliates does not cause harm or damage undermines the principles of c. 151B. Discrimination is "a practice viewed as harmful to our democratic institutions and a hideous evil that needs to be extirpated[;]" it "harm[s] not only the targeted individuals but the entire social fabric." Flagg v. AliMed, 466 Mass. 23, 28, 29 (2013) (emphasis added). Chapter 151B's antiretaliation provision likewise protects both the individual who is "materially disadvantaged" by an employer's retaliation, see MacCormack v. Boston Edison Co., 423 Mass. 652, 663 (1996), and the public interest in "[m]aintain[ing] unfettered access to statutory remedial mechanisms," see Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997), cited in Psy-Ed Corp. v. Klein, 459 Mass. 697, 708 (2011). To rule that discrimination and retaliation do not create "harm" or "actual damage or loss" is thus antithetical to the policies of c. 151B.[3]

[3] The Appeals Court also wrongly conflated the jury's failure to award compensatory damages with the absence

The Appeals Court so held because it erroneously applied c. 93A case law to c. 151B. The purpose and interpretive requirements of cc. 151B and 93A are fundamentally different. See infra Part V(A)(1) (purpose), (2) (interpretation). The court should have analyzed c. 151B's plain language, interpreted it liberally, and concluded that the statute requires attorney's fees upon a liability finding. See infra Part V(A)(3).

1. The Appeals Court Failed to Recognize that Chapters 151B and 93A Target Qualitatively Different Unlawful Acts

The Appeals Court concluded that the "underlying policies" of the fee-shifting provisions in cc. 151B and 93A are the "same." See 85 Mass. App. Ct. at 444. They are not.

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of harm. The trial court pointedly instructed the jury not to "speculate, conjecture, or guess" in awarding compensatory damages. A2408. The jury thus could have found harm but been unable to affix a precise figure to that harm. Cf. Bains LLC v. Arco Prods. Co., 405 F.3d 764, 771 (9th Cir. 2005) (award of nominal damages rather than compensatory damages "does not establish the absence of economic harm"). The jury could also have found harm but chosen "to award a single sum under the punitive category rather than apportion between compensatory and punitive damages." See Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008, 1010 (7th Cir. 1998). The absence of compensatory damages thus does not establish the absence of harm.

Chapter 93A protects consumers and competitors from certain unlawful acts. However, a business can engage in an unfair trade practice without causing harm, e.g., by falsely advertising a product that no one then buys. Accordingly, "[a] plaintiff suing under [c. 93A] ... cannot recover attorney's fees merely for identifying an unfair or deceptive act or practice," Jet Line, 404 Mass. at 718, because the statute discourages "vicarious suits by self-constituted private attorneys-general," see Lord v. Com. Union Ins. Co., 60 Mass. App. Ct. 309, 323 (2004).

Chapter 151B, on the other hand, embodies an "overriding governmental policy proscribing various types of discrimination." See Warfield v. Beth Israel Deaconess Med. Ctr., 454 Mass. 390, 398 (2009). The statute therefore specifically enables suits that "are not likely to pay for themselves, but are nevertheless desirable because they vindicate important rights," Stratos v. Dep't of Public Welfare, 387 Mass. 312, 323 (1982), and an "appropriate award of attorney's fees promotes Chapter 151B's policy of enlisting the help of private attorneys general in the fight against discrimination," Borne v. Haverhill Golf & Country Club, Inc., 58 Mass. App. Ct. 306, 324 n.17 (2003)

(citation omitted); see also Haddad, 455 Mass. at 1025 (noting "public interest in allowing claims under [the] statute to proceed with competent counsel"). The "underlying policies" thus are not the same.

2. The Legislature Has Required That Chapter 151B Be Interpreted Broadly

Moreover, c. 151B contains a specific directive: it "shall be construed liberally for the accomplishment of its purposes." G.L. c. 151B, § 9. The Appeals Court largely ignored this provision. See 85 Mass. App. Ct. at 444. Chapter 93A has no such interpretive mandate,[4] and if c. 151B's legislative directive is to have any meaning, the language of c. 151B must be interpreted more broadly than similar language in statutes without such a directive. Indeed, this Court has used c. 151B's liberal construction mandate in declining to "follow the reasoning" of decisions construing Title VII - a statute whose purpose mirrors c. 151B - if doing so would narrow c.

[4] Instead, the legislature instructed: "[i]t is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended." G.L. c. 93A, § 2(b).

151B. See Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 536-37 (2001). If c. 151B's liberal interpretation mandate is sufficient to distinguish - and broaden - c. 151B as compared to Title VII, that mandate must be more than sufficient to distinguish c. 151B from c. 93A, a statute with a different purpose.

3. The Plain Language of Chapter 151B, Interpreted Liberally, Must Be Construed to Mandate Fees Upon a Liability Finding

The Appeals Court should have focused on the plain language of c. 151B. See Norfolk & Dedham Mut. Fire Ins. Co. v. Morrison, 456 Mass. 463, 468 (2010). Moreover, in light of c. 151B's liberal interpretation mandate, "it would be an error to imply ... a limitation where the statutory language does not require it." Psy-Ed Corp., 459 Mass. at 708.

The plain language of c. 151B does not require a narrow reading: the court shall award fees where it finds for the petitioner. G.L. c. 151B, § 9. The dispute is over the second clause, which states that fees shall be awarded "in addition to any other relief and irrespective of the amount in controversy." Applying Jet Line, the Appeals Court concluded that this language narrows the fee provision by requiring "other relief" before a party may recover fees.

However, read as a whole, the provision in dispute supports an expansive reading: fees are permitted no matter what the recovery or the amount in controversy. The Appeals Court ignored the "amount in controversy" language, thereby stripping "any other relief" of its context. That context, however, includes the legislature's mandate that fees be awarded even if the "amount in controversy" is zero.

The Appeals Court failed to consider this broader reading because it viewed this Court's decision construing c. 93A in Jet Line as decisive. But the statutory language in cc. 93A and 151B is different: c. 93A refers narrowly to "other relief provided for by this section," G.L. c. 93A, § 11, whereas c. 151B refers broadly to "any other relief," G.L. c. 151B, § 9. The word "any" in c. 151B, which is absent from c. 93A, encompasses the possibility that no other relief will be granted, and shows that fees are nonetheless available. Moreover, this Court stated in Jet Line that the question presented there was "not so easily resolved," Jet Line, 404 Mass. at 718, and on a close question, c. 151B's liberal interpretation mandate requires that the statute be read broadly.

Because cc. 93A and 151B are different - in language, purpose, and interpretive mandate - the Appeals Court erred in applying Jet Line to c. 151B.

B. This Court Should Grant Review to Explain How to Apply Haddad v. Wal-Mart's Punitive Damages Standard to a Retaliation Case

The Appeals Court's decision is the first published appellate decision to apply the Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91 (2009), punitive damages standard to a retaliation claim. Haddad "fashion[ed] a definition of outrageous conduct appropriate specifically for discrimination claims." 455 Mass. at 110. This court should now clarify that Haddad must be modified for a retaliation case.

The Appeals Court erred in applying Haddad without differentiating between discrimination and retaliation.[5] Haddad first inquires if there is "a conscious or purposeful effort to demean or diminish

[5] This Court should also clarify what showing constitutes "any" evidence sufficient to sustain the jury's damages award. Haddad articulated a flexible test, 455 Mass. at 110-11 (judges should "tailor" and "select[] from among" factors), but the Appeals Court found that a showing on one factor was not enough. 85 Mass. App. Ct. at 436. This court should clarify that Haddad does not modify the JNOV standard: a reviewing court does not sit as a second jury, analyzing whether the evidence crosses some indeterminate threshold within the Haddad factors. Cf. O'Brien v. Pearson, 449 Mass. 377, 383-84 (2007) (weighing evidence inappropriate under JNOV standard of review).

the class of which the plaintiff is a part (or the plaintiff because he or she is a member of the class)." 455 Mass. at 437. Reviewing the jury award on Kiely's retaliation claim, the Appeals Court concluded that "the jury's rejection of Kiely's gender discrimination claim seriously undermines any suggestion that Teradyne's action in failing to rehire Kiely was part of a conscious or purposeful effort to demean females as a class (or to demean Kiely because of being female)." 85 Mass. App. Ct. at 437. The court noted that "this factor may be less relevant in a retaliation case," where the question is protected conduct, 85 Mass. App. Ct. at 437 (emphasis added), but nonetheless analyzed only the gender-focused version of this factor and never considered whether Kiely had been demeaned or diminished for her protected activity, 85 Mass. App. Ct. at 437. This was error.[6]

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[6] The Appeals Court also erred in its analysis of other Haddad factors. For instance, it wrongly conflated the absence of compensatory damages with the absence of harm, see supra note 3, and disregarded much of Kiely's punitive damages evidence, including evidence that Teradyne continued its retaliatory conduct after Kiely's non-rehire and sought to conceal its wrongful conduct throughout this litigation and at trial.

Whether Teradyne engaged in a purposeful effort "to demean females as a class" has no bearing on Kiely's retaliation claim. See, e.g., Burlington N. & Santa Fe Ry Co. v. White, 548 U.S. 53, 63 (2011) (explaining that antidiscrimination law seeks to prevent injury based on status and antiretaliation law seeks to prevent injury based on conduct). A plaintiff may prove retaliation without proving underlying discrimination, Psy-Ed Corp., 459 Mass. at 706, and the obvious corollary is that a plaintiff may recover damages - including punitive damages - without prevailing on a discrimination claim, see, e.g., Bain v. Springfield, 424 Mass. 758, 765, 767 (1997).

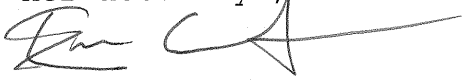
This court should grant further review to correct the Appeals Court's failure to follow long-standing precedent holding that a retaliation claim is independent of any underlying discrimination claim. Moreover, this court should use this opportunity to consider more broadly whether to adopt different factors to analyze punitive damages in a retaliation case: an employer's decision to take action against an employee for her protected conduct implicates different considerations than an employer's decision to take action against an employee for her status.

VI. CONCLUSION

WHEREFORE, Plaintiff-Appellant, Deborah Kiely, respectfully requests that this Court GRANT further appellate review. Plaintiff-Appellant also requests an award of attorney's fees and costs relating to the appeal.

Respectfully submitted,

Deborah Kiely,
By her attorneys,



Inga S. Bernstein (BBO#627251)
Emma Quinn-Judge (BBO#664798)
Zalkind Duncan & Bernstein LLP
65a Atlantic Avenue
Boston, MA 02110
(617) 742-6020

June 26, 2014

EXHIBIT A

Term
85 Mass.App.Ct. 431 (2014)

DEBORAH **KIELY** *vs.* TERADYNE, INC.

Nos. 13-P-505 & 13-P-1217.
Suffolk. March 7, 2014. - June 6, 2014.

Present: KAFKER, FECTEAU, & AGNES, JJ.

Anti-Discrimination Law, Employment, Sex, Damages, Attorney's fees. *Employment,* Discrimination, Retaliation. *Damages,* Under anti-discrimination law, Attorney's fees. *Practice, Civil,* Judgment notwithstanding verdict, Instructions to jury.

CIVIL ACTION commenced in the Superior Court Department on December 30, 2008.

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The case was tried before *Geraldine S. Hines*, J., and motions for judgment notwithstanding the verdict and for attorney's fees were heard by her.

Emma Marion Quinn-Judge for the plaintiff.

Jonathan D. Rosenfeld for the defendant.

James A.W. Shaw, for National Employment Lawyers Association & others, amici curiae, submitted a brief.

FECTEAU, J. These two separately docketed appeals arise from the same underlying case, namely, claims brought by the plaintiff Deborah Kiely against the defendant, Teradyne, Inc. (Teradyne), for gender discrimination and retaliation. After an eight-day trial, the jury found for Teradyne on Kiely's discrimination claim and for Kiely on her retaliation claim; although Kiely failed to obtain any award of compensatory damages from the jury, they did award her $1.1 million in punitive damages. Acting upon Teradyne's timely postjudgment motion under Mass.R.Civ.P. 50(b), as amended, 428 Mass. 1402 (1998), the trial judge denied Teradyne's request for full judgment notwithstanding the verdict (judgment n.o.v.) but allowed its alternative request to vacate, in its entirety, the jury's award of punitive damages. The judge also denied Kiely's motion for attorney's fees under G. L. c. 151B, § 9, as she was not a "prevailing party."

Case No. 13-P-505 concerns Kiely's appeal from the modified judgment, in which she contends that her gender discrimination claim must be remanded for a new trial due to the trial judge's failure to give certain jury instructions and that the judge erred in vacating the award of punitive damages on the retaliation claim. In its cross appeal, Teradyne contends that the judge erred in denying its motion for judgment n.o.v. as to Kiely's retaliation claim. We discern no error in the trial judge's jury instructions, her decision to vacate the jury's award of punitive damages, or her denial of the defendant's motion for judgment n.o.v.

In No. 13-P-1217, Kiely contends separately that the judge erred in denying her postjudgment motion for attorney's fees under G. L. c. 151B, § 9, even in the absence of compensatory or punitive damages. We disagree and affirm this order.

1. *Background.* Kiely worked at Teradyne from 1982 until *433 2006, primarily as a test technician in Teradyne's global customer services (GCS) department, which was responsible for repairing computer circuit boards returned to Teradyne from its customers around the world. In 2004, Kiely

was promoted to group leader in the GCS repair group, a position that involved less repair work and more administrative duties.

Between 2000 and 2006, by a series of layoffs, Teradyne reduced the number of GCS test technicians from approximately thirty-one to three. [FN1] Kiely survived these layoffs until November 2, 2006, when the last group of three test technicians, Kiely, Dennis Hodgdon, and Steve Senecal, were told they would be laid off effective December 2, 2006. Kiely filed a gender discrimination charge before the Massachusetts Commission Against Discrimination (MCAD) on November 21, 2006, with notice being sent to Teradyne's general counsel's office and a human resources (HR) manager, Bill Burns.

Shortly after these layoffs, Teradyne's assembly test division (ATD), a different department from GCS where Kiely had been working, recognized a need for two test technicians to service a particular account. Jay Fitton, a manager in the ATD department, was designated to make the hiring decisions; he learned that Kiely, Hodgdon, and Senecal were the last three employees to have been let go from GCS and so he considered them for the two positions. Contrary to Teradyne's usual practice, none of the three was offered an interview or told they were being considered for the newly available positions.

Burns, the HR manager, instructed Susan Blair, another HR manager, to tell Fitton to document the hiring decision. [FN2] This directive was also a departure from Teradyne's typical hiring practice. Fitton testified, without contradiction, that the HR *434 department never explained the reasons why he was told to document the hiring process or that Kiely had filed a discrimination charge at the MCAD. Ultimately, the ATD department rehired Hodgdon, by December 6, 2006, and Senecal, by January 15, 2007. Fitton admitted that his inquiries concluded, as a practical matter, after learning of the technical skills of Hodgdon and Senecal, but that he had not learned of Kiely's. In a memorandum explaining his decision, Fitton stated he based his decision to rehire Hodgdon and Senecal on their superior qualifications as test technicians and on the fact that Kiely's most recent experience had been mostly administrative.

2. *Discussion*. a. *Punitive damages*. We first address Kiely's claim that the trial judge erred in allowing Teradyne's postjudgment motion to vacate the jury's award of punitive damages. When considering a defendant's motion for judgment n.o.v., "the evidence is viewed in the light most favorable to the plaintiff, and all evidence favorable to the [defendant] is disregarded." *Ciccarelli* v. *School Dept. of Lowell*, 70 Mass. App. Ct. 787, 791 (2007). The verdict must be sustained if "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff." *Haddad* v. *Wal-Mart Stores, Inc. (No. 1)*, 455 Mass. 91, 94 n.5 (2009), quoting from *Boothby* v. *Texon, Inc.*, 414 Mass. 468, 470 (1993). Motions for judgment n.o.v. should be granted "cautiously and sparingly," Wright & Miller, Federal Practice & Procedure § 2524, at 248 (3d ed. 2008), and should be granted only if the trial judge is satisfied that the jury "failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law," *Turnpike Motors, Inc.* v. *Newbury Group, Inc.*, 413 Mass. 119, 127 (1992), quoting from *Robertson* v. *Gaston Snow & Ely Bartlett*, 404 Mass. 515, 520, cert. denied, 493 U.S. 894 (1989). However, a party cannot avoid entry of judgment n.o.v. if any essential element of her case rests on a "mere scintilla" of evidence. *Stapleton* v. *Macchi*, 401 Mass. 725, 728 (1988), quoting from *Hartmann* v. *Boston Herald-Traveler Corp.*, 323 Mass. 56, 59 (1948).

"Chapter 151B provides for the award of punitive damages *435 in appropriate cases. Such damages 'may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.' " *Ciccarelli* v. *School Dept. of Lowell*, 70 Mass. App. Ct. at 795, quoting from *Dartt* v. *Browning-Ferris Indus., Inc. (Mass.)*, 427 Mass. 1, 17a (1998). "An award of punitive damages requires a determination of the defendant's intent or state of mind, determinations properly left to the jury, whose verdict should be sustained if it could 'reasonably have [been] arrived at . . . from any . . . evidence . . . presented.' " *Haddad* v. *Wal-Mart Stores, Inc. (No. 1)*, 455 Mass. at 107, quoting from *Dartt* v. *Browning-Ferris Indus., Inc. (Mass.)*, *supra* at 16. Nonetheless, "the award of punitive damages cannot be left to the unguided discretion of the jury." *Bain* v. *Springfield*, 424 Mass. 758, 769 (1997).

Such a review of punitive damages is essential given that they implicate constitutional principles. As the Supreme Judicial Court stated in *Aleo* v. *SLB Toys USA, Inc.*, 466 Mass. 398, 412-413 (2013) (citations omitted),

> "The due process clause of the Fourteenth Amendment to the United States Constitution . . . prohibits the imposition of a ' "grossly excessive" punishment' on a tortfeasor. 'Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.' "

Accordingly, "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* at 413, quoting from *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417 (2003).

In *Haddad* v. *Wal-Mart Stores, Inc. (No. 1)*, 455 Mass. at 110-111 (*Haddad*), the Supreme Judicial Court articulated the standard for an award of punitive damages under G. L. c. 151B:

> "Punitive damages may be awarded only where the defendant's conduct is outrageous or egregious. Punitive damages are warranted where the conduct is so offensive that it justifies punishment and not merely compensation. In making an award of punitive damages, the fact finder *436 should determine that the award is needed to deter such behavior toward the class of which plaintiff is a member, or that the defendant's behavior is so egregious that it warrants public condemnation and punishment."

Whether a plaintiff has met this standard of "outrageous or egregious" conduct is to be measured by applying a number of nonexclusive factors set out in *Haddad*, *supra* at 111: (1) "whether there was a conscious or purposeful effort to demean or diminish the class of which the plaintiff is a part (or the plaintiff because he or she is a member of the class)"; (2) "whether the defendant was aware that the discriminatory conduct would likely cause serious harm, or recklessly disregarded the likelihood that serious harm would arise"; (3) "the actual harm to the plaintiff"; (4) "the defendant's conduct after learning that the initial conduct would likely cause harm"; and (5) "the duration of the wrongful conduct and any concealment of that conduct by the defendant."

In her memorandum, the trial judge thoroughly addressed the *Haddad* factors and concluded, correctly in our view, that the evidence, even viewed most favorably to Kiely, did not show conduct by Teradyne that was so outrageous or egregious as to warrant public condemnation and punishment.

As an initial matter, we reject Kiely's argument that a showing on a single *Haddad* factor is sufficient to support an award of punitive damages. Such a position directly conflicts with the settled principle that "mere liability" is insufficient to sustain an award for punitive damages. *Id.* at 110. If a single factor, like factor three, actual harm to the plaintiff, *id.* at 111, was sufficient to uphold such an award, then punitive damages could be awarded in virtually every discrimination case in which a jury awards some compensatory damages. We also note that the judge considered not giving an instruction on punitive damages as she doubted whether the evidence presented at trial supported such an award. However, in an abundance of caution, the trial judge reasoned the better course was to submit the question to the jury to avoid the possibility that a reversal would require another jury trial. The judge wisely waited until after the close of evidence, the verdict, and the parties' postverdict briefing to *437 correctly conclude upon further reflection that the award of punitive damages could not be sustained. [FN3]

As the judge noted, only one of the *Haddad* factors weighs in favor of Kiely. As to the first factor, the jury's rejection of Kiely's gender discrimination claim seriously undermines any suggestion that Teradyne's action in failing to rehire Kiely was part of a conscious or purposeful effort to demean females as a class (or to demean Kiely because of being female). Nevertheless, we note that the Supreme Judicial Court fashioned the *Haddad* standard "specifically for discrimination claims," 455 Mass. at 110, and therefore, this factor may be less relevant in a retaliation case such as this, where the question is whether Kiely was singled out for engaging in a protected activity, rather than being part of a protected class.

Second, the jury could reasonably have concluded that Teradyne was aware or should have known that not rehiring Kiely would inflict serious harm (the second *Haddad* factor). Teradyne was aware that

Kiely was seeking reemployment, as she inquired about open positions at least three times. Kiely also had spent her entire technical career at Teradyne and was grandfathered into generous benefits.

Although factor two favors Kiely, importantly, the jury found no actual harm (the third *Haddad* factor) in that they awarded no compensatory damages. [FN4] See *Labonte* v. *Hutchins & Wheeler*, 424 Mass. 813, 827 (1997) ("Where, as here, there is no cap on punitive damages, a judge or an appellate court must scrutinize the relationship between actual damages and the award of punitive damages"). Contrary to Kiely's argument, there is nothing ***438** in the record to suggest that the jury were confused about the damages that they could award and how they should apportion them. Kiely's contention that the jury may have folded damages for the harm she suffered into their award of punitive damages is mere speculation. The jury instructions clearly described and delineated the damages -- compensatory and punitive -- available for their consideration; moreover, the special verdict form differentiated between the separate forms of damages.

Most significant is the lack of evidence as to *Haddad* factors four and five in that there was no evidence at trial that the defendant took any adverse action against Kiely beyond the retaliation itself. Kiely asserts that the jury's apparent disbelief of Fitton's testimony that he was unaware of Kiely's MCAD complaint at the time he made the rehiring decision, which is the apparent basis for the retaliation verdict, [FN5] is also proof that Teradyne attempted to cover up its wrongdoing.

However, the fact that the jury drew an inference against Fitton does not equate with positive evidence that he lied or that Teradyne orchestrated a cover-up. Since there is no affirmative evidence, beyond this inference, that the defendant orchestrated a cover-up of its wrongdoing, or that there were other aggravating factors beyond the retaliation itself, the jury's award of punitive damages cannot stand. See, e.g., *Dalrymple* v. *Winthrop*, 50 Mass. App. Ct. 611, 621 (2000) (punitive damages warranted where defendant police chief who was "charged with the public duty to enforce the law equally [was] shown to have deliberately violated it for reprehensible reasons"); *Ciccarelli* v. *School Dept. of Lowell*, 70 Mass. App. Ct. at 796-797 (punitive damages upheld where there was affirmative evidence of attempted concealment of wrongdoing and where defendant had public duty to enforce law equally). This is especially true where, as mentioned above, the jury found no actual harm to Kiely. See *Aleo* v. *SLB Toys USA, Inc.*, 466 Mass. at 415, quoting from *BMW of N. America, Inc.* v. *Gore*, 517 U.S. 559, ***439** 580 (1996) ("The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff").

Therefore, this case is in contrast to those cases where there was *affirmative* evidence of an attempted concealment of wrongful conduct. For example, in *Ciccarelli* v. *School Dept. of Lowell*, 70 Mass. App. Ct. at 798, this court upheld an award of punitive damages where the jury could have found that a deputy superintendent's testimony was false *and* was designed to facilitate a cover-up of her wrongdoing. In that case, the city's deputy superintendent of personnel, Flanagan, made the decision not to rehire the plaintiff, Ciccarelli, four days after learning that Ciccarelli appeared on the witness list on behalf of a coworker, Kealy, in Kealy's MCAD case against the school district. *Id.* at 789-790, 796. Flanagan claimed her reason for failing to rehire Ciccarelli was that Ciccarelli had not completed coursework toward advanced certification, despite the fact that this was the first criticism of Ciccarelli's progress and she still had three years to complete the coursework. *Id.* at 789-790. Significantly, Flanagan was an active participant in the Kealy case and was even present at the defense table when Ciccarelli testified at Kealy's MCAD hearing in 1997. *Id.* at 794 & n.3. However, at trial in Ciccarelli's court case, Flanagan testified that, until her deposition in 2002, she was unaware that Ciccarelli had testified on Kealy's behalf. *Id.* at 790- 791. Therefore, in *Ciccarelli*, there was affirmative evidence that Flanagan not only lied on the stand about her recollection of Ciccarelli's role in the MCAD case, but also fabricated an excuse for her wrongful conduct in failing to rehire Ciccarelli. [FN6] See *Hall* v. *Ochs*, 817 F.2d 920, 928 (1st Cir. 1987) ("[A] factfinder might infer that the stark clash could not have resulted from innocent misrecollection, and that its *intentional* quality intensified any need the jury may have found for punishment and deterrence"). Likewise, in *Hall* v. *Ochs*, *supra* at 927-928, the court upheld ***440** an award of punitive damages where the defendant police officers argued that the plaintiff's testimony against them was deliberately false and they provided a highly suspect police report to support their allegations.

By contrast, in this case, the defendant's conduct after learning that its failure to rehire Kiely would likely cause harm, and whether the defendant purposely concealed its wrongful conduct, were, as the judge noted, "left to the realm of speculation as these issues were not addressed directly or indirectly by the evidence at trial." As the Supreme Judicial Court made clear in *Haddad*, 455 Mass. at 110, "[t]o sustain an award of punitive damages under G. L. c. 151B, § 4, a finding of intentional discrimination alone is not sufficient." Likewise here, a finding of retaliation alone is insufficient to support the jury's award of $1.1 million in punitive damages; "[a]n award of punitive damages requires a heightened finding beyond mere liability and also beyond a knowing violation of the statute." *Ibid.*

We are also unpersuaded by Kiely's argument that the judge did not consider all of the defendant's underlying retaliatory conduct. The judge examined all the evidence relating to the retaliation and, after careful review of relevant case law, correctly determined that "the retaliation in this case, while reprehensible, simply does not meet the threshold for an award of punitive damages." For example, in *Clifton* v. *Massachusetts Bay Transp. Authy.*, 445 Mass. 611, 613-614, 622, 624 (2005), the Supreme Judicial Court concluded that an award of punitive damages would be appropriate where the jury could have found that the African-American plaintiff was subject to a pattern of egregious racial harassment and retaliation by both his supervisor and coworkers, who "shot bottle rockets at him, turned the lights off when he used the bathroom, sprayed water at him through fire hoses, dropped firecrackers near him, set water boobytraps that would fall on him when he opened his office door, and painted 'fag bait' and 'Sanford and Son' on his locker," among other things. [FN7] We recognize that "[d]etermining what conduct rises to the level at which an award of punitive damages *441 is appropriate is a difficult task, but the evidence shows that the actions at issue in this case do not." *McMillan* v. *Massachusetts Soc. for the Prevention of Cruelty to Animals*, 140 F.3d 288, 307 (1st Cir. 1998).

b. *Kiely's gender discrimination claim*. Second, Kiely contends that her gender discrimination claim must be remanded for a new trial because the judge erred in (1) failing to instruct the jury on Kiely's termination claim, separate and apart from the rehire claim, and (2) failing to give a statistical evidence jury instruction. We discern no error. The trial judge has wide discretion in framing the language used in jury instructions. *General Dynamics Corp.* v. *Federal Pac. Elec. Co.*, 20 Mass. App. Ct. 677, 684 (1985). "[A] good objection to a charge 'will lie only if a critical issue was not dealt with at all or was dealt with erroneously as a matter of law.' " *Ibid.*, quoting from *Torre* v. *Harris-Seybold Co.*, 9 Mass. App. Ct. 660, 678-679 (1980). An appellate court must review the charge as a whole and in the context of the evidence. See *Wilson* v. *Boston Redev. Authy.*, 366 Mass. 588, 591-592 (1975).

As the trial judge noted, Kiely's case centered on the defendant's decision not to rehire her, in the context of its having laid off her and the two males from GCS and then rehiring the males. Kiely did not claim, and there was no evidence to warrant a trial on a claim, that her termination, by itself, was discriminatory. Indeed, Kiely survived a series of layoffs from 2000 to 2006 until she was one of the last three remaining GCS test technicians at Teradyne, and she was not terminated until the unit was shut down. In making this argument, Kiely seems to rely on the fact that a motion judge had denied Teradyne's motion for summary judgment as to Kiely's termination claim. However, the judge only did this because to separate Kiely's termination claim and her failure to rehire claim "would elevate form over substance." Thus, the motion judge recognized that "the facility closure, termination of the employees, and the rehiring of the two male technicians must logically be considered together." Nevertheless, the motion judge stressed that Kiely's termination, considered by itself without reference to the failure *442 to rehire, cannot support a discrimination claim. This correctly aligns with the trial judge's decision not to give a separate instruction on termination; we therefore discern no error.

Likewise, the trial judge's decision to not instruct the jury regarding Kiely's statistical evidence was soundly within her discretion and consistent with the record evidence. As the judge recognized, Kiely "was given an opportunity to put on expert testimony to explain the significance of the statistics and declined to do so." Additionally, both the motion judge at summary judgment and the trial judge questioned the reliability of Kiely's statistical evidence in demonstrating a general pattern of discrimination. See *Rathbun* v. *Autozone, Inc.*, 361 F.3d 62, 79-80 (1st Cir. 2004) (requiring statistical evidence to "cross a threshold of dependability" to be probative of discriminatory intent).

c. *Teradyne's motion for judgment n.o.v.* We discern no error in the judge's decision to deny the defendant's motion for judgment n.o.v. as to Kiely's retaliation claim.

Here, although the vast majority of evidence presented at trial concerned Kiely's discrimination claim rather than her retaliation claim, and the sufficiency of evidence to support the jury's finding of retaliation was a close question, Kiely established enough of a "toe-hold" to retain her verdict. While the hiring manager, Fitton, testified that he was not told of Kiely's protected activity, i.e., the filing of the MCAD complaint, at the time he made the rehiring decision, the jury could have reasonably inferred from the HR manager's unusual instruction to document this hiring process that Fitton, an experienced manager, understood the reason for this departure and concluded it was because of Kiely's protected conduct. As the trial judge noted, "[a]lthough not compelling by any means, the directive to document the hiring process could have tipped the balance ever so slightly in the minds of the jurors who were instructed to determine if Fitton was aware of the MCAD charge at the time of his hiring decision."

d. *Kiely's motion for attorney's fees under G. L. c. 151B, § 9*. Given our decision to uphold the judge's order to vacate the award of punitive damages and to allow the verdict on retaliation to stand, we must decide whether G. L. c. 151B, § 9, requires an award of attorney's fees where there is a verdict of liability **443* for discrimination or retaliation, but no damages are awarded. This appears to be a question of first impression. Kiely contends that the plain language of § 9 permits recovery of fees based solely upon a "finding" of liability. This section states: "If the court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount in controversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust." G. L. c. 151B, § 9, as amended by St. 1974, c. 478. Although in answering the special verdict form, the jury may have "found" for the plaintiff on the retaliation count, the defendant relies on other limiting language in the statute. By analogizing to other statutes and interpretations, the defendant suggests that the statute's use of the phrase "in addition to any other relief" undermines Kiely's argument.

"Where possible, we seek to harmonize statutory provisions, recognizing that the Legislature did not intend one provision of a statute to contradict another." *Birchall, petitioner*, 454 Mass. 837, 849 (2009). Importantly, as the defendant notes, § 9 states the court shall award attorney's fees "*in addition* to any other relief" (emphasis added). In *Jet Line Servs., Inc.* v. *American Employers Ins. Co.*, 404 Mass. 706, 708-709 (1989) (*Jet Line*), the Supreme Judicial Court confronted a situation similar to this case: a motion for attorney's fees under the analogous attorney's fees provision of G. L. c. 93A, § 11, [FN8] that was also premised on a finding for the plaintiff where there was no relief given. There, the court stated that "the reference [in G. L. c. 93A, § 11,] to an award 'in addition to other relief' indicates that relief solely in the form of attorneys' fees may not be had." *Jet Line*, *supra* at 718. See *Lord* v. *Commercial Union Ins. Co.*, 60 Mass. App. Ct. 309, 324-325 (2004).

Kiely, however, contends that the statutory differences between G. L. cc. 93A and 151B require us to depart from *Jet Line* in interpreting G. L. c. 151B, § 9. She asserts that G. L. c. 93A is **444* narrowly focused on recovery for a specific type of loss in that a claim under G. L. c. 93A, § 11, requires a "loss of money or property, real or personal." *Id.*, inserted by St. 1972, c. 614, § 2. Kiely argues that by contrast, G. L. c. 151B has a broad remedial purpose. See G. L. c. 151B, § 9, as appearing in St. 2002, c. 223, § 2 (G. L. c. 151B to be "construed liberally for the accomplishment of its purposes"). See also *Gasior* v. *Massachusetts Gen. Hosp.*, 446 Mass. 645, 654 (2006) ("[T]he broad remedial purposes of G. L. c. 151B mandate[] that the provision concerning remedies available . . . be construed liberally for the accomplishment of the statute's purposes"); *Psy-Ed Corp.* v. *Klein*, 459 Mass. 697, 708 (2011).

We conclude that Kiely's attempts to differentiate G. L. cc. 93A and 151B so as to render the reasoning in *Jet Line* inapplicable to the present case are unpersuasive. First, *Jet Line* expressly rejected Kiely's reading of G. L. c. 93A, § 11, as narrowly tailored to award fees only if the claimant sustained a loss of money or property due to the defendant's unfair or deceptive acts or practice. In fact, the court stated that § 11 "says nothing explicitly about proof of a loss of money or property as a condition to a right to recover attorneys' fees." *Jet Line*, 404 Mass. at 718. Moreover, the Supreme Judicial Court has previously looked to cases interpreting G. L. c. 93A for guidance in deciding issues under G. L. c. 151B, § 9. For example, on the separate issue of how attorney's fees are to be properly calculated under G. L. c. 151B, § 9, the Supreme Judicial Court, in *Fontaine* v. *Ebtec Corp.*, 415 Mass. 309, 324-325 (1993), looked to the "analogous" case law addressing the same issue under G. L. c. 93A. Moreover, the underlying policies of the fee-shifting provisions in both G. L. c. 93A and G. L. c. 151B, § 9, are the same: to encourage attorneys to represent plaintiffs with such claims, where otherwise such actions "are not likely to pay for themselves, but are nevertheless desirable because they vindicate important rights." *Stratos* v. *Department of Pub. Welfare*, 387 Mass. 312, 323 (1982). See *Fontaine* v. *Ebtec*

Corp., *supra* at 326.

Next, Kiely argues that even if we apply the reasoning in *Jet Line* to this case, she is still entitled to attorney's fees. She asserts that although the *Jet Line* court fashioned a rule that damages *445 usually must be found in order to trigger fee shifting, *Jet Line* still allows for an award of fees upon a showing of "adverse effect." Specifically, the *Jet Line* court stated that "a plaintiff suing under [G. L. c. 93A,] § 11, . . . cannot recover attorneys' fees for merely identifying an unfair or deceptive act or practice. Under § 11, that unfair or deceptive conduct must have had some *adverse effect* upon the plaintiff, even if it is not quantifiable in dollars" (emphasis added). *Jet Line*, 404 Mass. at 718. Because a plaintiff must prove an adverse employment action to prove retaliation, see *Mole* v. *University of Mass.*, 442 Mass. 582, 591-592 (2004), Kiely reasons that she has sufficiently shown a requisite "adverse effect" under *Jet Line* to be entitled to attorney's fees under G. L. c. 151B, § 9.

Such language, however, does not entitle Kiely to attorney's fees when she has been denied any form of relief. In stating that the "unfair or deceptive conduct must have had some adverse effect upon the plaintiff" to sustain an award of attorney's fees, the *Jet Line* court sought to reconcile two previous Appeals Court decisions, *Levy* v. *Bendetson*, 6 Mass. App. Ct. 558 (1978), and *Shapiro* v. *Public Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. 648 (1985). In *Levy*, *supra* at 566-567, we reversed an award of attorney's fees where the plaintiff failed to prove any damages under G. L. c. 93A, § 11. We reasoned that "[w]here, as here, a single plaintiff is seeking damages as an individual on his own behalf and has been denied any relief under § 11, it would indeed be anomalous to grant him attorneys' fees under that section." *Ibid.*

By contrast, in *Shapiro*, we upheld a grant of attorney's fees under § 11 where "the plaintiff appeared to have lost the use of money but offered no proof of the dollar amount of that loss." *Jet Line*, 404 Mass. at 718. Unlike the party in *Levy*, who was unable to show proof of damages, the plaintiff in *Shapiro* did suffer actual damages but "offered no evidence to show the amount of that loss." *Shapiro*, *supra* at 657. In *Shapiro*, the plaintiff was required to clean up oil that leaked from his underground fuel tank. *Id.* at 649. However, the defendant insurer, Public Service, disclaimed coverage under the pollution exclusion clause of the policy. *Ibid.* Shapiro then sought recovery on the policy and recovery under G. L. c. 93A, § 11, "based upon *446 the allegation that Public Service failed to effectuate a prompt settlement of his claim when liability was reasonably clear." *Id.* at 656. To prove his c. 93A claim, Shapiro sought documents as to how Public Service addressed similar claims over the previous five years. *Ibid.* Public Service, however, failed to provide these documents, and thereafter, a motion judge ordered that the documents be produced. *Ibid.* After Public Service again failed to produce the documents pursuant to the discovery order, another judge sanctioned Public Service by entering a finding that its "failure to effectuate prompt, fair and equitable settlement when liability was reasonably clear was wilful." *Ibid.* The discovery sanction, in conjunction with the finding of coverage under the policy, established that Public Service had wilfully committed an unfair or deceptive act or practice in violation of G. L. c. 93A, § 2. Acting under G. L. c. 93A, § 11, the trial judge awarded damages equal to the damages awarded on the policy (costs and expenses of spill clean-up), as well as attorney's fees. *Id.* at 656-657. However, we held the judge erred in awarding Shapiro damages on his c. 93A claim. We reasoned that Shapiro was not entitled to count the amount due to him under the policy, which was the basis of his award under the first count of his complaint, as the basis for an award under G. L. c. 93A, § 11. *Id.* at 657, citing *DiMarzo* v. *American Mut. Ins. Co.*, 389 Mass. 85, 101-102 (1983). Nonetheless, we upheld the award of attorney's fees under § 11. *Id.* at 657, 660. In *Jet Line*, 404 Mass. at 718, the Supreme Judicial Court clarified that "[t]he *Shapiro* case reached the proper result on its facts because the defendant's violation of G. L. c. 93A, § 2, caused a loss of money that, on proper proof of the amount, would have entitled the plaintiff to relief and the award of attorneys' fees was within the statute's purpose."

Arguably, *Shapiro*, *supra* at 660, is unique in that "the unfair act [under G. L. c. 93A, § 2,] [was] established by sanction rather than evidence." Still, the *Jet Line* court concluded that *Shapiro* reached the "proper result" because the sanction presupposed that the plaintiff had been harmed by the defendant's wilful violation of G. L. c. 93A, § 2. Therefore, unlike in *Levy* where the plaintiff was found to have suffered no harm, harm in *Shapiro* was proven by the sanction, and only the amount of *447 that harm was left in doubt. In effect, the sanction in *Shapiro* was akin to an injunction in that it was a nonmonetary

response to harm.

Accordingly, in the c. 93A context, courts have also upheld an award of attorney's fees where a plaintiff received only injunctive relief, but no monetary damages, as an "adverse effect" under *Jet Line*. See *Jillian's Billiard Club of America, Inc.* v. *Beloff Billiards, Inc.*, 35 Mass. App. Ct. 372, 377 (1993) ("The plaintiffs obtained injunctive relief and were also successful in proving that the defendants violated G. L. c. 93A, § 2. The award was warranted. The violation 'had some adverse effect upon the plaintiff[s], even if it [was] not quantifi[ed] in dollars,' " quoting from *Jet Line*, 404 Mass. at 718); *Advanced Sys. Consultants Ltd.* v. *Engineering Planning & Mgmt., Inc.*, 899 F. Supp. 832, 833-834 (D. Mass. 1995). By contrast, in *SMS Financial V, LLC* v. *Conti*, 68 Mass. App. Ct. 738, 748 (2007), this court determined that an award of a preliminary injunction alone cannot support an award of attorney's fees under G. L. c. 93A, § 11. We reasoned that a preliminary injunction, meant to preserve the status quo, cannot provide a basis for attorney's fees where the case was ultimately resolved against the plaintiff. *Ibid.*

Thus, the "adverse effect" language of *Jet Line*, in context, clarifies that a party need not necessarily receive monetary relief to be entitled to attorney's fees under G. L. c. 93A, § 11; a form of nonmonetary relief is sufficient. As this court noted in *Martha's Vineyard Auto Village, Inc.* v. *Newman*, 30 Mass. App. Ct. 363, 369 (1991), the important distinction is between "actual but not clearly measurable damages or loss, contrasted with no actual damage or loss." Actual but not clearly measurable damages or loss, like injunctive relief, would entitle a party to attorney's fees. By contrast, an absence of actual damages or loss would not. Kiely clearly falls into the latter category. Kiely's expert testified that her back pay losses were $213,732 and her front pay losses were $700,292. [FN9] The jury, however, expressly rejected this testimony by awarding Kiely zero compensatory damages. As discussed above, the jury's award of punitive damages **448* also was rightfully vacated by the trial judge. Therefore, Kiely received no form of relief, damages, an injunction, or otherwise.

Significantly, putting aside the perhaps esoteric distinctions between *Shapiro* and *Levy* in the c. 93A context, to award attorney's fees absent any form of recovery is contrary to the underlying policies of G. L. c. 151B, § 9, see *Fontaine* v. *Ebtec Corp.*, 415 Mass. at 326 ("[General Laws c. 151B, § 9,] is not designed to provide a windfall recovery of fees"), and the great weight of authority that suggests a party must recover in some form to be entitled to attorney's fees. [FN10] See *Lord* v. *Commercial Union Ins. Co.*, 60 Mass. App. Ct. at 325. See also *Gasior* v. *Massachusetts Gen. Hosp.*, 446 Mass. at 654 n.13 ("If he prevails on his discrimination claim, [the plaintiff] would be entitled to all of the remedies available to a prevailing plaintiff under G. L. c. 151B"); *Ciccarelli* v. *School Dept. of Lowell*, 70 Mass. App. Ct. at 799 ("As we conclude that [the plaintiff] is the prevailing party, we affirm the trial judge's award of attorney's fees"); *Diaz* v. *Jiten Hotel Mgmt. Inc.*, 704 F.3d 150, 153 (1st Cir. 2012) ("Because she was a prevailing party on her state law age discrimination claim, [the plaintiff] was entitled to attorney's fees under [G. L. c. 151B, § 9]"). We also decline to engage in impermissible appellate fact finding by looking beyond the jury verdict to speculate whether Kiely suffered actual, but not clearly measurable, harm. The jury awarded Kiely zero compensatory damages. The award of punitive damages was rightfully vacated. Kiely has obtained no relief.

Consequently, we conclude that a finding of retaliation alone, without *any* form of relief or recovery, cannot support an award of attorney's fees under G. L. c. 151B, § 9. Cf. *Jet Line*, 404 Mass. at 718 ("Under [G. L. c. 93A,] § 11, a plaintiff must be entitled to relief in some other respect in order to be entitled to an award of attorneys' fees"). The judge correctly declined to award attorney's fees to Kiely.

3. *Conclusion*. The judgment, as modified by the order vacating the award of punitive damages, is affirmed. The order vacating the award of punitive damages and otherwise denying **449* Teradyne's motion for judgment notwithstanding the verdict is affirmed. The order denying Kiely's motion for attorney's fees is affirmed.

So ordered.

FN1 These layoffs were part of a larger reduction in Teradyne's American workforce. Hal Pierce, a

former manager at Teradyne, testified that he was hired to help the defendant transfer its repair operations overseas.

FN2 Burns first described his wanting "to make sure that the managers that were involved in making the hiring decision were going to be making that hiring decision based on skills and the skill sets needed to fill the position and to document it" and also that he wanted the hiring decision documented in writing "[i]n the event that we ever needed to review that circumstance, they would be well-documented, given the fact that I knew that an action had been taken against the company by Ms. Kiely."

FN3 See *Smith* v. *Ariens Co.*, 375 Mass. 620, 627-628 (1978) ("[T]he better procedure in a case in which it is a close question whether the standard for granting a directed verdict is met is to allow the matter to go to the jury. If the judge then decides that the jury's verdict cannot stand, a motion for judgment notwithstanding the verdict may be allowed. . . . This procedure is more efficient than initially allowing a motion for a directed verdict. If the granting of the motion for judgment notwithstanding the verdict is found to be erroneous on appeal, the jury's verdict can be reinstated, while the erroneous granting of the motion for a directed verdict requires a new trial").

FN4 While this factor is important to the analysis, we are careful not to overvalue it. See *Bain* v. *Springfield*, 424 Mass. at 767 ("[T]here is no requirement in our law that punitive damages may only be awarded if there is an award of compensatory damages").

FN5 The judge clearly instructed the jury in connection with the retaliation count that "[w]ith regard to the knowledge element, Ms. Kiely must prove by a preponderance of the evidence that Mr. Fitton was aware of the MCAD complaint at the time he decided not to rehire her." In addition, the judge reiterated this instruction in response to a question from the jury during deliberations.

FN6 In addition, in *Ciccarelli* there was another factor, absent from the case at bar, that weighed in favor of upholding punitive damages: "[D]eliberate violations of G. L. c. 151B, by 'those charged with the public duty to enforce the law equally' present a heightened degree of reprehensibility." 70 Mass. App. Ct. at 796, quoting from *Clifton* v. *Massachusetts Bay Transp. Authy.*, 445 Mass. 611, 623-624 (2005).

FN7 The court in *Clifton* v. *Massachusetts Bay Transp. Authy.*, 445 Mass. at 621-622, ultimately remanded for a new trial on the issue of damages because it concluded that the employer was entitled to the benefit of a jury instruction under the standard expressed in *Cuddyer* v. *Stop & Shop Supermarket Co.*, 434 Mass. 521, 541-542 (2001).

FN8 Under this provision, "If the court finds . . . a violation of section 2 [prohibiting unfair competition and unfair or deceptive acts or practices in trade or commerce], the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount of controversy, be awarded reasonable attorneys' fees and costs . . . ." G. L. c. 93A, § 11, inserted by St. 1972, c. 614, § 2.

FN9 Teradyne also presented its own witness who testified that Kiely's back pay losses were as low as $44,697.

FN10 We need not specifically compare the Federal prevailing party standard under 42 U.S.C. § 1988, despite the parties' extensive briefing on the subject.

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