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Whistleblower Law Permits Recovery of Economic Loss Without Showing Termination

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Until this year, there had been some question of whether an employee could recover front and back pay in an employment case without proving he had been actually or constructively discharged by the employer. In a recent opinion by the New Jersey Supreme Court interpreting the Conscientious Employee Protection Act, N.J.S.A. § 34:19-1 to -8 (CEPA), a former employee of DuPont Chambers Works who had sued the company as a whistleblower and took retirement during the pendency of his lawsuit was permitted to recover substantial front and back pay without having to satisfy the rigorous test for constructive discharge that has historically been required in such cases.

Writing for the majority of the Court in this 4-2 decision (Justice Rivera-Soto abstained), Justice Albin rejected the notion that an employee in a CEPA case must prove actual or constructive discharge to recover front or back pay. *Donelson v. DuPont Chambers Works*, 206 N.J. 243, 263 (2011). In the process, the decision has cast serious doubt on whether such proofs will be necessary in seeking economic damages in a Law Against Discrimination case as well.

Donelson represents a significant departure from the rule followed in federal courts in employment cases requiring such proofs, and could potentially expose employers to significantly greater damages in future cases in the not-so-uncommon scenario where an employee who has sued an employer takes permanent disability or retires from employment while the action wends its way through the court system. See, e.g., *Spencer v. Wal-Mart Stores, Inc.,* 469 F.3d 311, 317 (3d Cir. 2006).

The result achieved by the employee, John Seddon, in *Donelson* was rather anomalous. Seddon was a technician for DuPont whose job required that he ensure safe operation of equipment and handling of chemicals in DuPont's building. In late 2002, he complained to DuPont about the manner in which its security guards were conducting searches of employees' cars at nighttime, and later filed a complaint with the Occupational Safety and Health Administration (OSHA). After DuPont learned of the complaint to OSHA, it appointed Paul Kaiser to serve as Seddon's direct supervisor, and Kaiser began to impose sick- and vacation-time reporting requirements that were specific to Seddon. In late 2003, Seddon filed complaints about the manner in which chemicals were being handled in the workplace. Thereafter, according to Seddon, DuPont, through Kaiser, engaged in numerous acts of retaliation, such as falsely accusing Seddon of forging his timecards and threatening others.

Ultimately, Seddon was placed on short-term disability with pay for 53 days, and was diagnosed by one mental health expert as exhibiting "features of significant dysphoria and vulnerability to depression." He lost overtime opportunities during this disability period. In early 2005, he filed suit against DuPont, and the case did not come to trial until January 2008. In the interim, he took a six-month leave of absence, and ultimately was given a disability pension. He never amended his complaint to assert constructive discharge.

Although DuPont moved in limine

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to preclude Seddon from seeking front or back pay because he had failed to allege constructive discharge, the trial court disagreed with DuPont's conclusion that precedent required such a showing. It ruled that "if Seddon could prove that DuPont's retaliation caused him to suffer a psychological breakdown that led to his acceptance of an early disability retirement, then he would be entitled to the difference between the wages he would have earned had he worked and retired in the ordinary course and the disability pension he was receiving." This was the charge given to the jury: "In order to obtain economic damages related to his psychiatric disability, Mr. Seddon must prove that DuPont proximately caused his disability, and that his disability rendered him unable to perform work for DuPont."

Interestingly, the jury found a CEPA violation, and awarded Seddon $724,000 for "economic losses," and $500,000 in punitive damages, but awarded nothing for pain and suffering, ostensibly finding no emotional harm.

The Appellate Division in *Donelson* reversed the judgment below, ruling that economic damages claimed by Seddon were only recoverable under CEPA where there had been an actual or constructive discharge, and since Seddon had taken a voluntary disability pension, he was not entitled to such damages. *Donelson v. DuPont Chambers Works*, 412 N.J. Super. 17 (App. Div. 2010). The result of this decision was to eviscerate the attorneys' fees and punitive damage award as well, all of which totaled in excess of $1.74 million when coupled with the economic damage award.

The Appellate Division in *Donelson* pointed to a long line of decisions involving the Law Against Discrimination (LAD), which held that a plaintiff cannot recover economic damages where there has been no constructive or actual discharge. See *T.L. v. Toys 'R' Us, Inc.,* 255 N.J. Super. 616, 662 (App. Div. 1992); *Woods-Pirozzi v. Nabisco Foods*, 290 N.J. Super. 252, 277 (App. Div. 1996). The *Donelson* court reasoned that "New Jersey courts have construed CEPA and the LAD identically on a wide variety of substantive issues," and that "CEPA and the LAD share the same remedial purpose." The court thus concluded that, under CEPA, as under LAD, an "award of economic damages for back pay, front pay, and lost overtime was improper when plaintiff had not been terminated or constructively discharged."

In reversing the Appellate Division, the majority of the Supreme Court held that CEPA was intended to be applied broadly and to permit recovery to the fullest extent permitted at common law. CEPA defines the term *retaliatory action* as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. § 34:19-2(e). An adverse employment action may consist of a reduction in pay, or the withdrawal of benefits formerly provided. *Maimone v. City of Atlantic City,* 188 N.J. 221, 235-36 (2006). The Court held that nothing in the text of CEPA or its legislative history supported the conclusion that recovery of economic damages should be dependent on a finding of constructive or actual discharge.

The net result of the Court's decision was to approve the trial court's decision to permit the employee to argue for lost wages even where the employee acknowledged he had not pled, and did not even try to show, the test for constructive discharge: that DuPont's conduct was "so intolerable that *a reasonable person* would be forced to resign rather than continue to endure it." The employee put on expert testimony that he had suffered mental illness as a result of the alleged retaliation by his employer, and was rendered unable to work, which prompted him to take the disability pension. However, the jury was not asked to consider whether the employee had *an objectively reasonable basis* to leave employment based on the conduct of the employer — the test articulated in numerous prior decisions at both the appellate and Supreme Court levels.

In a strongly worded dissent, written by Justice LaVecchia and joined by Justice Hoens, the justices provided a lengthy explanation for why the majority's decision represented a significant departure from past precedents and would present significant practical problems going forward. The dissent explains that the Court has now set up a lower standard for obtaining lost wages, permitting an employee to present his claim to the jury merely by offering expert testimony that he suffered psychiatric impairment sufficient to force him to take retirement. The dissenting justices recognized that the practical effect of this lessening of the proofs will be to diminish the policies previously in place to require an employee to remain employed when at all possible.

The majority's decision, no doubt, represents a significant change to how lost-wage claims are presented in CEPA cases, and increases the probability that an employee pursuing a discrimination claim will be incentivized to retire from employment or take a permanent disability and seek to hold the employer liable for additional damages. It has shifted the focus in CEPA cases from an objective standard in which the totality of the conditions of work were evaluated to determine if an employee had a sufficient basis for walking away from his employment, to a subjective, lesser standard that is driven by an isolated focus on the employee's state of mind. The constructive discharge standard adopted by the Court in prior cases recognized that the proofs necessary to recover front and back pay are significant:

> In contrast, constructive discharge requires not merely 'severe or pervasive' conduct, but conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it. More precisely, the standard envisions *a sense of outrageous, coercive and unconscionable requirements*. Simply put, a constructive discharge claim requires more egregious conduct than that sufficient for a hostile work environment claim.
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> 174 N.J. at 28 (emphasis added).

The simple juxtaposition of the jury charge given by the trial court in *Donelson* (set out above) with the above-referenced language from the Court's own prior decisions, shows the sea change in the law stemming from the *Donelson* decision. Only time will tell how this decision will impact employers, and whether it will apply equally in the context of an LAD case. ■