

CASE ANALYSIS: DONELSON V. DUPONT CHAMBERS WORKS, A-2028-08

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Is a plaintiff employee asserting a CEPA claim entitled to a jury award of back pay and front pay damages without being required to prove constructive discharge or actual termination of employment?

That was the question the NJ Superior Court - Appellate Division was faced with in the case of *Donelson v. DuPont Chambers Works*, which was approved for publication on February 24, 2010.

In the case, plaintiff, a chemical plant operator, claimed he was retaliated against by defendant for engaging in protected whistleblower activity in violation of the Conscientious Employee Protection Act ("CEPA"). Specifically, plaintiff made complaints to the Occupational Safety and Health Administration (OSHA) and plant management about certain safety practices at the plant. In response, plaintiff alleged defendant took retaliatory actions against him, including placing restrictions on him, not imposed on any other employee, with regard to the use of his vacation and sick time; falsely accusing him of failing to complete required employee training; accusing him of failing to attend safety meetings; falsely accusing him of being lazy; requiring him to notify his supervisor when and where he was going to lunch; and describing him in an email as "high maintenance." Plaintiff indicated that the reprisals got progressively worse over time, culminating in an accusation that he failed to perform one of his principal job duties as chemical plant operator; namely, failing to take a sample of a certain solution, and then entering a made up solution level in his daily log sheet. Plaintiff was also subjected to a mental status evaluation performed by another employee of Defendant.

The result of the evaluation was that plaintiff was too emotionally unstable to work, and he was forced to take an eight week disability leave. During that time, plaintiff was not able to work and earn overtime hours. When he returned to work, he was assigned to a new shift with a new supervisor, and did not have the same opportunities to earn overtime as he did previously.

Ultimately, plaintiff left his position on a disability pension. After he left his position, plaintiff indicated that he earned \$30,000-\$60,000 less per year than he did when he was working.

After trial, a Salem County jury awarded plaintiff \$724,000 in back pay and front pay damages, \$500,000 in punitive damages, and \$523,000 in attorneys fees. Defendant argued throughout the proceedings that such an award would be improper, as plaintiff did not argue that he was constructively discharged when he left the employ of defendant.

On appeal, the Appellate Division agreed with defendant, holding that "plaintiff was not entitled to an award of economic damages in the absence of a constructive discharge." In holding this way, the court largely relied on the case of *Padilla v. Berkeley Educational Services of New Jersey*, 383 N.J. Super.177 (App. Div. 2005), which actually interpreted the Law Against Discrimination rather than CEPA. In that case, the court held that even though the defendant engaged in unlawful discrimination under the LAD, this was not an adequate basis to justify the plaintiff's resignation, and thus plaintiff was not entitled to wage loss damages.

Recognizing that it was not relying CEPA precedent in its holding, the court noted that "New Jersey courts have construed CEPA and LAD identically on a wide variety of substantive issues," and cited numerous cases to that effect. The court also looked to the legislative history of CEPA, citing a committee statement indicating that CEPA wage loss remedies would not be available where there was no "termination of employment."

Because the court ruled that wage loss damages were unavailable to plaintiff, it also threw out the punitive damages and attorney fee awards. Interestingly enough, the court stated in a footnote that plaintiff's claim for lost overtime pay that occurred before he left his employment with defendant could have been upheld, but there was nothing in the record on appeal that indicated what, if any, of the \$724,000 wage loss award was attributable to lost overtime.

The Donelson case had naught to do with liability and everything to do with damages. Indeed, the case law cited by the court indicated that a defendant could be liable for invidious discriminatory or retaliatory conduct, and still not be liable for damages if the employee was not terminated, either actually or constructively. Donelson underscores how important mitigation of damages is in employment cases. Clearly, an employee who is terminated must actively seek new employment to mitigate damages. However, another part of mitigation if an employee is not terminated is maintaining their employment unless conditions are so egregious that they constitute constructive discharge.

Additionally, at least for now (plaintiff plans to seek review of the NJ Supreme Court in this matter), Donelson demonstrates that going forward, it will be a necessity for an employee who is seeking wage loss damages in a CEPA (and LAD for that matter) case, who was not actually discharged, to assert constructive discharge in their complaint.