

New Jersey's High Court Adopts More Lenient Test for Recovering Lost Wages Under State Whistleblower Law

In the latest opinion by New Jersey's high court interpreting the Conscientious Employee Protection Act, N.J.S.A. § 34:19-1 to -8 ("CEPA"), a former employee of DuPont who had sued the company as a whistleblower was permitted to recover substantial lost wages 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 in protest of the current constitution of the Court), 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, 2011 N.J. Lexis 638 (June 9, 2011).

The majority held that CEPA was intended to be applied broadly and to permit recovery to the fullest extent permitted at common law. In the case before it, the employee took a voluntarily disability pension while his case was pending and awaiting trial. The employee did not plead constructive discharge, and declined to do so when the issue was raised prior to trial.

The trial judge permitted the employee to argue for lost wages even where the employee acknowledge 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." Id. * 9 (emphasis added). 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. The jury awarded lost wages, but, importantly, awarded no money for his psychiatric injury or pain and suffering.

On appeal, the Appellate Division reversed the trial judge's decision to send the lost wages claim to the jury. 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.

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. 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.