

EMPLOYMENT LAW: TWO NEW DECISIONS

By: Donna Russo, Esq.

The New Jersey Supreme Court and the Appellate Division issued two new significant opinions on employment law issues. The Supreme Court opinion decided the issue of whether a constructive discharge is required in order to pursue a CEPA claim for back and front pay. The Appellate Division held that company wide policies can create an implied contract that circumvents the bold disclaimer found in employee handbooks that no contract is created.

In Joseph A. Donelson v. DuPont Chambers Works (A-112-09) decided June 9, 2011 by the NJ Supreme Court, the employer, DuPont challenged a jury award of 1.2 million because the Plaintiff did not allege constructive discharge and he was not terminated. This lawsuit was contentious. Plaintiff contended that after he filed complaints with DuPont's management about unsafe conditions, he was subjected to ongoing harassment. He was falsely accused of forging his time cards and falsely accused of taking improper readings and making fictitious entries. He received a negative performance review and was subject to constant verbal abuse. He was also accused of threatening other employees. DuPont's employee-assistance counselor recommended that Plaintiff be placed on short-term disability with pay which resulted in considerable loss of overtime earnings. As a condition of reinstatement, Plaintiff was required to undergo examinations with three mental health professionals and undergo a fit-for-duty evaluation. Plaintiff was determined to be fit to return to work. The suspension lasted 53 days and left Plaintiff feeling worthless and beaten. Plaintiff was subject to continued harassment, false accusations and threats. Plaintiff was placed in a 12 hour isolated shift. Plaintiff suffered

anxiety attacks and consulted a therapist. He took a 6 month leave of absence and then took a disability pension and did not return to work.

Plaintiff filed a CEPA lawsuit against DuPont. DuPont argued that Plaintiff cannot seek damages for front and back pay because he had not pled constructive discharge and he was not terminated. The trial court disagreed with DuPont. The jury awarded the Plaintiff \$724,000 for economic losses and \$500,000 in punitive damages.

DuPont appealed. The Appellate Division reversed and entered judgment in favor of DuPont ruling that Plaintiff could not prevail on a lost wage claim because he had not proven actual or constructive discharge. Since punitive damages could only be awarded if compensatory damages existed, the Appellate Division reversed the punitive damage award. Therefore, according to the Appellate Division, Plaintiff was not entitled to any recovery.

The Supreme Court granted certiorari. The Court ruled that "... the possible retaliatory actions under CEPA is greater than discharge, suspension and demotion; it includes "other adverse employment action taken against an employee in the terms and conditions of employment...Cast in that light, an 'adverse employment action' is taken against an employee engaged in protected activity when an employer targets him for reprisals—making false accusations of misconduct, giving negative performance reviews, issuing an unwarranted suspension, and requiring pretextual mental-health evaluations—causing the employee to suffer a mental breakdown and rendering him unfit for continued employment." The Supreme Court reinstated the jury award.

In Sara Lapidoth v. Telecordia Technologies, Inc. (A-1545-09T1, decided June 9, 2011) , the Appellate Division held that although the FMLA and the NJFLA require reinstatement of employment only when the employee takes a 12 weeks or less leave of absence, an employer can

create an implied contract to extend this time period by creating an implied contract by having a company-wide policy extending leaves of absences and guaranteeing the job. Plaintiff had requested a six month maternity leave. In the past, the company had granted extended maternity leaves. The employer in a letter, approved the 6 month leave, setting forth that the unpaid FMLA and NJFLA allows for 12 weeks, and guaranteed Plaintiff's job for 12 months. In fact, Plaintiff had requested an additional 6 month leave which was granted under the same terms. During the leave, the employer reorganized and eliminated Plaintiff's position which was part-time. Defendant had one full time position which Plaintiff would accept. However, another employee had filed that position and had better reviews than the Plaintiff. Since no other positions were available, Plaintiff was terminated.

Plaintiff brought suit contending discrimination under FMLA and NJFLA because she took maternity leave. Plaintiff also alleged breach of contract to reinstate her after her leave. Defendant's employee handbook clearly stated that all employees were "at will" and can be terminated at any time, with or without grounds. The Court found that Defendant did not violate the FMLA or NJFLA because these statutes guaranteed reinstatement upon leave of 12 weeks or less. On the breach of contract claim, Plaintiff alleged that the letters approving leave and guaranteeing employment created a contract. The Appellate Division held that the letters could have created a contract although the employment manual clearly set forth at-will employment and that nothing in the policies, practices, and procedures created any contractual rights.