

**N.J. SUPREME COURT POISED TO CLARIFY WHETHER EMPLOYMENT PLAINTIFFS MUST FIRST ESTABLISH ACTUAL OR CONSTRUCTIVE DISCHARGE IN ORDER TO GET FRONT OR BACK PAY IN A CEPA CASE**

In Donelson v. DuPont Chambers Works, 412 N.J. Super. 17 (App. Div. 2010), the New Jersey Appellate Division held that in the absence of a constructive or actual discharge, there can be no damages for front or back pay or other economic damages under the Conscientious Employee Protection Act, N.J.S.A. § 34:19-1 to -14 (“CEPA”). The New Jersey Supreme Court heard oral argument on November 30, 2010 and is expected to rule shortly and provide some much-needed guidance in this complicated area.

CEPA, New Jersey’s “whistleblower” statute, defines “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). In Donelson, the Court held that economic damages such as back pay, front pay and lost overtime are only recoverable under CEPA where there has been an actual or constructive discharge of the employee.

The employee in Donelson was successful at trial in obtaining a significant verdict, but the jury rejected his argument that he had suffered any compensable emotional harm. The employee had decided to retire under a disability pension prior to trial, but nonetheless had been permitted to argue entitlement to damages for lost front and back pay. In setting aside the verdict, the Appellate Division pointed to a long line of decisions involving the Law Against Discrimination (“LAD”) which hold that a plaintiff cannot recover economic damages where there has been no constructive or actual discharge. 412 N.J. Super. at 32 (citing T.L. v. Toys 'R' Us, Inc., 255 N.J. Super. 616, 662, (App. Div. 1992) (observing that “an employee who has taken the initiative in terminating his or her employment will be awarded back pay *only* if he or she can show that the employer's discriminatory conduct has resulted in a ‘constructive discharge.’” (emphasis added)); see also Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 277 (App. Div. 1996) (noting that once the trial court properly dismissed the plaintiff's constructive discharge claim, the dismissal of the claims for back pay and front pay was required “because they depend on finding constructive discharge”). The Donelson court reasoned that “New Jersey courts have construed CEPA and the LAD identically on a wide variety of substantive issues,” id. at 33, and that “CEPA and the LAD share the same remedial purpose.” Id. at 34. 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.” Id. at 36.

The plaintiff in Donelson obtained a voluntary disability pension, and later claimed that he was entitled to damages which resulted from the “diminished earnings” that resulted from taking that voluntary disability pension. Yet, the plaintiff had made no effort to put on the (substantial, some would argue “impossible”) proofs necessary to show an actual or constructive discharge. Judging from the nature of the probing questions posed by the Justices at oral

argument, it would appear that the Court is poised to issue a rule of law that will provide much-needed clarification for employers.