



LABOR & EMPLOYMENT DEPARTMENT

# ALERT

## NEW JERSEY SUPREME COURT SAYS RESIGNING WHISTLEBLOWERS CAN RECOVER LOST WAGES IN THE ABSENCE OF CONSTRUCTIVE DISCHARGE

By Ian W. Siminoff

Earlier this month, in *Donelson v. DuPont Chambers Works*, the New Jersey Supreme Court held that where an employee is rendered psychologically disabled as a result of retaliation for engaging in whistleblowing activity, he can recover lost wages, without having to prove constructive discharge.

### The Background

DuPont manufactures chemical products. John Seddon (Seddon) was a 30-year employee and operator technician in the phosgene building at one of DuPont's facilities. In December 2002, he reported to a shift manager his concerns about the dangerous manner in which DuPont's security guards were conducting random searches of employees at night. When DuPont did not respond, he filed an OSHA complaint. Following the filing of his OSHA complaint, Seddon alleged that DuPont took retaliatory action against him, including assigning him a new supervisor who imposed sick and vacation reporting requirements specific to Seddon.

In October 2003, Seddon filed complaints with DuPont management about unsafe conditions in the phosgene area. Seddon alleged that the retaliation continued after that complaint, including removing the DuPont Guardian Manual (to which Seddon referred in

detailing his safety concerns), and falsely accusing him of: forging timecards, failing to take a proper reading of a caustic chemical, making a fictitious entry in a log and threatening other employees. He further alleged that DuPont gave him a negative performance review, began requiring performance reviews every three months, and subjected him to verbal abuse.

Following his report of harassment to management, DuPont placed Seddon on an eight-week short-term disability leave, with pay, causing him to lose overtime. As a condition of reinstatement, DuPont required Seddon to be examined by three mental health experts, who cleared him to return to work. However, he was placed on probation, subjected to continued quarterly performance reviews, falsely accused of threatening workers, and required to work 12-hour shifts in isolation, which caused him additional emotional distress. As a result, in January 2007, Seddon took a voluntary six-month leave of absence, following which he retired with a disability pension from DuPont.

### The Jury Award

Seddon filed suit pursuant to the Conscientious Employee Protection Act (CEPA), New Jersey's whistleblower statute. The jury awarded Seddon,

amongst other damages, \$724,000 for the economic losses he suffered, representing, at least in part, the difference between the wages Seddon would have earned had he retired in the ordinary course, and the disability pension he was receiving (approximately \$50,000-\$60,000 per year). Interestingly, the jury did not award Seddon any sum for pain and suffering.

### The New Jersey Supreme Court's Decision

The issue before the New Jersey Supreme Court was whether the award of lost wages (\$724,000) was appropriate under CEPA where Seddon was neither terminated nor claimed constructive discharge. The Supreme Court answered the question in the affirmative, citing to *N.J.S.A.* 34:19-2(e) which defines retaliatory action under CEPA broadly to include, in addition to discharge, suspension or demotion, **“other adverse employment action taken against an employee in the terms and conditions of employment.”** The court held that the actions taken by DuPont in response to Seddon's complaints, as set forth above, which caused him to suffer a mental breakdown, constituted “other adverse employment action” qualifying Seddon for CEPA's remedies, which include “[a]ll remedies available in common law tort actions” and “compensation for all lost wages, benefits and other remuneration.” *N.J.S.A.* 34:19-5.

### The Takeaways

The big takeaway from *Donelson* is that a resigning CEPA plaintiff, under certain circumstances, does not need to prove constructive discharge to recover lost wages. Given the facts of *Donelson*, plaintiffs who resign, retire or go out on disability in the face of borderline retaliatory conduct are suddenly more attractive to plaintiffs' employment attorneys, especially if they can obtain an expert report (or two) connecting the resignation with the reprisals.

It is unclear if the same result follows under the New Jersey Law Against Discrimination (LAD), which courts normally read consistently with CEPA. For example, New Jersey's intermediate Appellate Division, on several occasions, has held, pursuant to the LAD, that lost wages cannot be recovered for a resignation where there is no constructive discharge. Numerous federal courts have held likewise.

In addition to the CEPA fallout, it will be interesting to see, going forward, how New Jersey's courts deal with *Donelson* in the LAD context.

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