

Court Opens Pandora's Box for Lost Wages in Retaliation Cases

AMY KOMOROSKI WIWI AND JOY N. EAKLEY

An employee of 30 years makes a complaint about a perceived safety violation and then claims that a supervisor is retaliating against him for making the complaint. He seeks psychological counseling for anxiety, depression, and insomnia; goes out on a short term disability leave with pay; and eventually retires with a disability pension. He sues, alleging that acts of retaliation caused his mental breakdown and inability to continue working. He wants front and back pay. Does he have to prove constructive discharge, i.e., that he was subjected to working conditions so intolerable that no reasonable employee would endure it? No, not in New Jersey. According to the New Jersey Supreme Court's recent decision in *Donelson v. DuPont Chambers Works*, he has to prove only that he could not endure it.

THE CASE

Plaintiff, John Seddon, worked for DuPont for 30 years. His job responsibilities included ensuring safe use of equipment in a building housing a dangerous chemical, and ensuring the safety of the people working in the building and living in the surrounding community. Seddon made a complaint to OSHA in 2002 regarding what he perceived as dangerous searches by security guards of employees' cars while the employees stood nearby on a dark and busy street. At some point after this complaint, DuPont appointed Paul Kaiser as Seddon's supervisor, although Seddon previously had worked unsupervised. According to Seddon, Kaiser retaliated against him by imposing sick and vacation reporting requirements on Seddon that were not applicable to other employees.

In 2003, Seddon complained to DuPont about unsafe conditions in a reactor, which he believed could result in an explosion and release of deadly gases. Afterward, DuPont removed the safety manual—which Seddon had referred to when making his complaints—from Seddon's work area. Then, according to Seddon, Kaiser made false accusations against him, verbally abused him, gave him a bad

performance review, and instituted additional reviews every three months.

Seddon reported the alleged retaliation to DuPont's headquarters, which conducted an investigation of Seddon's allegations. Seddon also saw an "employee-assistance counselor," who recommended that Seddon be placed on a short-term disability leave of absence, with pay. At the end of a roughly two-month leave, DuPont required Seddon to undergo a mental health fitness-for-duty evaluation. Three mental health professionals cleared Seddon to return to work, although one noted that he exhibited symptoms of depression. According to the court, this "suspension" left Seddon feeling "worthless and beaten" and caused him to lose "considerable overtime."

Seddon claimed that Kaiser's false accusations continued after his return to work, causing him to suffer anxiety attacks and "live in constant fear." In February 2005, Seddon filed a civil complaint, alleging retaliation in violation of the New Jersey Conscientious Employee Protection Act (CEPA). Given the allegations contained in Seddon's complaint, DuPont attempted to ameliorate the alleged retaliatory conduct by separating Seddon and Kaiser. Despite his earlier assertions that (1) Kaiser's appointment as his supervisor was retaliatory, (2) Kaiser subjected him to verbal abuse and other harassment, and (3) he had lost "considerable" overtime (implying that he regularly worked long hours), Seddon then complained that working 12-hour shifts alone was "torture." Seddon started seeing a therapist to address his mental health issues, and in January 2007, he took a six-month disability leave. At the end of that leave, Seddon did not return to work. Instead, DuPont provided him a disability pension.

Although Seddon did not amend his complaint to assert a claim for constructive discharge, he did seek economic damages including front and back pay. At the beginning of the trial, DuPont's counsel moved to dismiss Seddon's claim for lost wages because Seddon was neither actually nor constructively discharged. The trial judge denied DuPont's

motion and, instead, explained to the jury that if Seddon proved that DuPont caused his mental disability and that the disability made him unable to work, his damages would be the difference between the amount of a regular pension had he worked to ordinary retirement age and the amount of his disability pension. The jury awarded Seddon \$724,000 in economic losses, \$500,000 in punitive damages, and \$523,289 in attorneys' fees. Notably, the jury did not award Seddon any amount for pain and suffering.

DuPont appealed, and the Appellate Division reversed. It reasoned that Seddon could not be awarded lost wages unless he had been actually or constructively discharged. It analogized the situation to a claim for retaliation under the New Jersey Law Against Discrimination ("LAD"), in which constructive discharge is commonly understood to be a prerequisite to recovery of lost wages. To prevail on a claim for constructive discharge, a former employee must prove that he or she was subjected to working conditions so intolerable that no reasonable employee would endure them.

Seddon petitioned the New Jersey Supreme Court for certification. The court framed the question before it as "whether, under CEPA, an employee who becomes the victim of employer retaliation for engaging in statutorily protected whistle-blowing activities and who becomes psychologically disabled due to that retaliation can pursue a lost-wage claim without having to prove constructive discharge." The court answered in the affirmative: the employee need not prove constructive discharge.

CEPA prohibits an employer from taking "any retaliatory action against an employee" for reporting or objecting to an activity or practice

that he "reasonably believes ... is in violation of a law, or a rule or regulation" or that is against public policy. There was no question that Seddon's complaints were protected activity under CEPA.

CEPA 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." The Supreme Court focused on the "other adverse employment action" segment of the statutory language, reasoning that "causing [an] employee to suffer a mental breakdown and rendering him unfit for continued employment" fits into this category. Specifically, the court held:

To the extent that DuPont, by its retaliatory action, proximately caused Seddon to suffer a mental injury incapacitating him from his former employment, he had 'the right to recover damages for diminished-earning capacity.'

Furthermore, the court discussed and limited its 2002 decision in *Shepherd v. Hunterdon Development Center* regarding proof of constructive discharge in LAD cases. It distinguished that case by noting that the plaintiff there had not presented expert testimony of a psychological illness caused by the employer. In no uncertain terms, the court explained that it "has never concluded in a LAD retaliation case that front and back pay can be awarded only in cases of actual or constructive discharge."

The dissenting opinion in *Donelson*, authored by Justice LaVecchia, argued that the majority confused the concept of an "eggshell plaintiff" with proximate causation.

In tort law, there is a common understanding that a wrongdoer "takes his victim as he finds him." In other words, if you harm someone who is unusually fragile and susceptible to injury, you are responsible for his or her damages, even if such damages are greater than what would normally be expected. In the context of a retaliation claim, Justice LaVecchia argued that liability should be determined by the severity of the employer's conduct and not by the employee's propensity for injury.

CONCLUSION

Unfortunately for employers, Justice LaVecchia's view did not prevail. The majority opinion allows a former employee to recover constructive discharge-type damages (i.e., lost wages) without meeting the standard of proof required to prevail on a constructive discharge claim. It would appear that if a former employee can present sufficient expert testimony to establish that the employer's conduct caused his or her medical need to resign, the employee will be permitted to proceed with a claim for lost wages, the amount of which ultimately will be determined by a jury. Although the full impact of the *Donelson* decision is not yet known, one certainly can expect an increase in litigation regarding lost wages following employee resignations. 🌟

Amy Komoroski Wiwi is counsel to the Litigation Department and a member of the Employment Law Group and Employment Litigation Group of Lowenstein Sandler PC, where she practices employment and general commercial litigation. She can be reached at awiwi@lowenstein.com. Joy N. Eakley, an associate with the firm, can be reached at jeakley@lowenstein.com.