

**A CEPA CLAIM FOR LOST WAGES IS NOT
DEPENDENT UPON A CONSTRUCTIVE OR ACTUAL DISCHARGE**

Will *Donelson v. DuPont* Apply to LAD Retaliation Claims?

By: Ty Hyderally and Francine Foner

In early June 2011, the New Jersey Supreme Court, in a 4-2 decision, reversed the Appellate Division's narrow interpretation of the Conscientious Employee Protection Act¹ ("CEPA") conditioning recovery of economic losses upon the existence of an actual or constructive discharge. Guided by CEPA's broad remedial purpose and expansive remedies and protections, the Supreme Court of New Jersey held in *Donelson v. DuPont Chambers Works*² that neither an actual nor a constructive discharge is a prerequisite to recovery of lost wages where an employer's retaliatory conduct causes an employee to suffer from an emotional condition that renders the employee incapable of working.³

In *Donelson*, the plaintiff, John Seddon,⁴ worked for DuPont Chambers Works ("DuPont") for approximately 30 years. As an Operator Technician in the phosgene building, Seddon was responsible, in part, for ensuring the safety of employees and those who lived in the surrounding area. In late 2002, Seddon expressed concern to his shift manager about the dangerous manner in which security guards were conducting random searches of employees in the dark alongside passing traffic. When DuPont did nothing to address these safety hazards, Seddon filed a complaint with OSHA.⁵ Upon learning of Seddon's complaint, Dupont assigned a supervisor to oversee Seddon who began to impose sick and vacation reporting requirements that were specific to Seddon.

Seddon filed subsequent complaints with DuPont's management about unsafe conditions in the operation of equipment through which a highly toxic and reactive chemical was processed. Specifically, Seddon warned that deficiencies in the equipment could potentially cause an explosion that could result in the release of deadly gas into the atmosphere, which would kill and/or seriously injure residents in surrounding areas. In response, Seddon's supervisor took further retaliatory actions against Seddon, including providing him with negative evaluations, falsely accusing him of performance failures, requiring him to undergo performance reviews every three months, and subjecting him to constant verbal abuse. Seddon complained to Dupont that he was being targeted for harassment because he complained about safety issues.

During the investigation into Seddon's complaints, DuPont's investigators focused on allegations that Seddon threatened DuPont employees even though Seddon denied making any such threats. DuPont subsequently placed Seddon on short-term disability leave and conditioned his reinstatement upon examination by three mental health experts and a fitness-for-duty evaluation. Seddon remained suspended for 53 days, which caused him to suffer lost wages because of the overtime compensation he no longer earned, made him feel "worthless" and "beaten," and caused him to suffer anxiety attacks. Upon returning to work, DuPont placed Seddon on probation, required that he undergo performance reviews every three months, and assigned him to 12-hour shifts in isolation, which further exacerbated his psychological condition. Additionally, Seddon's supervisor continued to lodge false accusations against him.⁶ As a result, Seddon sought treatment and took a six-month leave of absence. Seddon, however, never returned to DuPont. Rather, he applied for and was granted a disability pension.

Seddon Did Not Plead Constructive Discharge

Seddon filed a complaint against DuPont in which he asserted violations of CEPA as well as claims of intentional and negligent infliction of emotional distress. He sought compensatory damages for "loss of earnings and other employment benefits."⁷ The trial court charged the jury that lost wages were not dependent upon Seddon proving a constructive discharge. The jury found in favor of Seddon and awarded him \$724,000 for the "economic losses he ha[d] suffered as a proximate result of DuPont's violations of [CEPA]," \$500,000 in punitive damages, and \$523,289 in counsel fees.⁸

The Appellate Division reversed and, in doing so, held that an award of lost wages is dependent upon the existence of an actual or constructive discharge.⁹ In reaching this conclusion, the Appellate Division relied, in part, on case law holding that economic damages are not recoverable in the absence of an actual or constructive discharge under the New Jersey Law Against Discrimination¹⁰ ("LAD").¹¹ Thus, the Appellate Division concluded that the trial court's denial of the defendant's motion for JNOV was erroneous and remanded for an order vacating the compensatory damages award, punitive damages award (because of the absence of a compensatory damages award), and the award of counsel fees.¹²

The Supreme Court rejected the Appellate Division's restrictive interpretation of CEPA conditioning recovery of economic losses upon the existence of an actual or constructive discharge. Rather, based upon the remedial nature of CEPA and its underlying purposes, which

require that it be liberally construed, the Supreme Court declined to find that an actual or constructive discharge is a prerequisite to recovery of back wages where an employer's retaliatory conduct causes an employee to suffer from an emotional condition that renders the employee incapable of working. The Supreme Court further opined that LAD precedent, while sometimes appropriate to rely upon in a CEPA matter, did not compel a different finding.

The Supreme Court Left the Door Open on the Application of LAD Retaliation Claims to CEPA

The Supreme Court of New Jersey acknowledged its ability to rely upon holdings in LAD cases in interpreting disputes brought under CEPA “when appropriate,” but simultaneously emphasized the distinction between the purpose underlying each act and the differing statutory language.¹³ The Court was deliberate in its reluctance to draw any bright line rules as to when and under what circumstances a CEPA plaintiff can look to a LAD holding, or visa versa. Rather, the Court limited its holding to the facts before it “based on the controlling statutory language in CEPA without resolving different scenarios that might arise under LAD.”¹⁴

Thus, the majority rejected DuPont's assertion that *Shepherd v. Hunterdon Development Center*¹⁵ stands for the proposition that in a LAD retaliation case, a constructive discharge is always a prerequisite to a claim for lost wages.¹⁶ In fact, the Court distinguished *Shepherd* factually from *Donelson* because the plaintiff in *Shepherd* claimed that his employer's harassing conduct resulted in his constructive discharge but failed to establish that “his employer's conduct was ‘so intolerable that a reasonable person would be forced to resign rather than continue to endure it.’”¹⁷ In contrast, the Court noted that the plaintiff in *Donelson* did not allege a constructive discharge and, unlike the *Shepherd* plaintiff, “presented expert testimony that his employer's harassing conduct caused him a psychological illness that rendered him incapable of working”¹⁸ In short, the Court concluded that *Shepherd* addressed different issues, under different facts, under a different statute.¹⁹ DuPont's reliance upon *Shepherd* was therefore not appropriate.

But what about future LAD retaliation cases that allege that employers' retaliatory conduct caused employees' mental illness rendering them incapable of working, under facts which are more analogous to those in *Donelson*?

When Will It Be “Appropriate” to Apply *Donelson*'s Holding to an LAD Retaliation Claim?

The Court expressly left open “whether, under the anti-retaliation provisions of the LAD, a plaintiff can proceed with a lost-wage claim when an employer’s misconduct causes a mental-illness-induced retirement.”²⁰ The Court declined to give any advisory opinion of whether the holding in *Donelson* can be used as a precedent in a LAD retaliation matter, or to consider various circumstances under which application of the *Donelson* holding to an LAD retaliation claim might be “appropriate.”²¹ However, the Court’s opinion suggests that guidance may be found by looking to the plain language of each of the LAD and CEPA as well as the remedial nature of each statute.

The two lynchpins of the *Donelson* opinion are the “plain language” of CEPA’s definition of “retaliatory action,” which includes any “other adverse employment action,” and its ever-expanding remedy provision, which entitles prevailing plaintiffs to “all remedies available in common law tort actions.”²² Thus, the similarities between these CEPA provisions to the analogous provisions in the LAD (i.e., “[a]ll remedies available in common law tort actions shall be available to prevailing plaintiffs” for unlawful employment practices or discrimination which includes “reprisals against any person”),²³ could support application of the *Donelson* holding to a LAD retaliation claim, where the incapacity to work was similarly caused by the employer’s retaliatory conduct.

The Plain Language of Both CEPA and LAD Reflects an Intent to Cover a Wide Range of Retaliatory Conduct

Though not identical, the anti-retaliation language of both CEPA and the LAD reflect a similar intent to cover a broad range of adverse actions so as to serve the important public policy underlying each act. The LAD’s main purpose is to prevent discrimination in the workplace based on protected categories.²⁴ CEPA’s fundamental purpose is to protect whistleblowers from retaliation for reporting a wide range of legal and unethical conduct.²⁵ Despite that the statutes have distinct purposes, they also share the common purpose of “deterrence of improper employer conduct to protect society from the vestiges of discrimination.”²⁶ Both CEPA and the LAD “seek[] to overcome the victimization of employees and to protect those who are especially vulnerable in the workplace from the improper or unlawful exercise of authority by employers.”²⁷ The “overriding” policy underlying both acts is to “protect society at large.”²⁸

The Court emphasized that the plain language of CEPA’s definition of “retaliatory action” includes not only “discharge, suspension or demotion,” but also any “other adverse

employment action taken against an employee in the terms and conditions of employment.”²⁹ This broadly-worded definition persuaded the Court to reject the Appellate Division’s narrow construction of CEPA, which would condition an award of lost wages on an actual or constructive discharge (or arguably a suspension or demotion) -- at least where the employer’s retaliation induces the employee into retirement or disability leave. This interpretation is consistent with a long line of cases that broadly construes the remedial language of the LAD and CEPA to effectuate the purpose of “eradicating the cancer of discrimination” and rooting out retaliation in the workplace.³⁰ Although the LAD does not contain a parallel definition of “retaliatory action,” its anti-retaliation provision forbids “reprisals” and prohibits retaliation designed to “coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment” of one’s exercise of his or her rights under the LAD, without mention of discharge, suspension or demotion.³¹ Thus, the plain language of LAD’s anti-retaliation provision is arguably even broader than CEPA’s definition of “retaliatory action.” The language in both acts, therefore, reflects a similar intent to cover a broad spectrum of retaliatory actions which can justify an award of compensatory damages, without conditioning the same upon an actual or constructive discharge.

Similarities of Available Remedies Under CEPA and LAD

Also common to both CEPA and LAD, is their provision of “all remedies available in common law tort actions.”³² CEPA’s remedy provision goes somewhat further in its requirement that the court order “where appropriate and to the fullest extent possible[,] . . . compensation for all lost wages, benefits and other remuneration.”³³ The “remedies” provision of the, LAD similarly allows recovery of “all remedies available in common law tort actions” as well as any other remedies “provided by this act or any other statute.”³⁴ Moreover, the LAD’s Legislative Findings section calls attention to the fact that under the common law, available damages include compensatory and punitive damages and is followed by the directive that the act should be liberally construed.³⁵

Thus, the LAD contains the identical CEPA language of “all remedies available in common law tort actions.” The LAD, like CEPA, is to be liberally construed, which includes interpretation of its remedy provision. Such similarities of remedies and the mandate of liberal construction support providing the same relief in a LAD retaliation claim as that awarded in *Donelson* where the employer’s retaliation caused the employee to be mentally unfit to work.

The end result of this holding will likely be that both defendants and plaintiffs will attempt to rely upon *Donelson*. Plaintiffs will argue that *Donelson* supports a lost wage claim in their LAD retaliation cases in the absence of an actual or constructive discharge as long as the employer's retaliation rendered the plaintiff incapable of working. Defendants, on the other hand, will attempt to distinguish the facts and issues from those in *Donelson* to argue that it is not "appropriate" to look to CEPA precedent in construing a LAD claim with facts analogous to those presented in *Donelson*. In both LAD and CEPA actions, employers will inevitably dispute that their conduct caused the employee's inability to return to work, as opposed to some other event or pre-existing condition. In any event, the *Donelson* holding is sure to spawn a new succession of case law that will either provide more predictability, or create further uncertainty, as to whether and when an employee may recover lost wages in the absence of an actual or constructive discharge.

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1. *N.J.S.A.* 34:19-1 to 8.

2. 2011 WL 2224538 (N.J. June 9, 2011). Justice Roberto Rivera-Soto filed a separate, abstaining opinion for the reasons expressed in *Hopewell Valley Citizens' Group, Inc. v. Berwind Property Group Development Co., L.P.*, 204 N.J. 569, 585-87 (2010) (Rivera-Soto, J., dissenting).

3. *Donelson*, 2011 WL 2224538, at *10. Justices Jaynee LaVecchia and Helen E. Hoens dissented based on a different interpretation of CEPA's "traditional tort remedies" language, opining that the majority "conflates proximate causation and the extent of damages." The dissent opined that proximate causation exists in the absence of an actual discharge only where plaintiff meets the standard for a constructive discharge, i.e., "only if the defendant's conduct was severe or pervasive enough to amount to constructive discharge." Therefore, in the dissent's view, an award of lost wages without a constructive discharge effectively permits an employee to reap the benefits of a constructive discharge claim "through the back door," without having to prove that one occurred. *Id.* at *14-15.

4. Joseph Donelson was also a plaintiff whose claim was tried jointly with Seddon before the same jury. Unlike Seddon, Donelson plead constructive discharge and a CEPA violation (as well as intentional infliction of emotional distress). The jury instruction for Donelson's claim included a specific instruction regarding the standard for prevailing upon on a constructive discharge claim, which the jury found was not met and rejected Donelson's claims. *Id.* at *16, n.7, *15.

5. *Id.* at *1.

6. *Id.* at *2.

7. *Id.* at *3.

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8. *Id.* at *4.
 9. *Donelson DuPont Chambers Works*, 412 N.J. Super. 17, 35 (App. Div. 2010).
 10. *N.J.S.A.* 10:5-1, *et seq.*
 11. *Donelson*, 412 N.J. Super. at 32-33.
 12. *Id.* at 36.
 13. *Donelson*, 2011 WL 2224538, at *9.
 14. *Id.*
 15. 174 N.J. 1 (2002).
 16. 174 N.J. 1 (2002).
 17. *Donelson*, 2011 WL 2224538, at *9 (quoting *Shepherd*, 174 N.J. at 28).
 18. *Id.*
 19. *Donelson*, 2011 WL 2224538, at *9.
 20. *Id.* at *10.
 21. *Id.*
 22. *Id.* at *6-8. The majority reflected upon amendments to CEPA in 1990 and 2005 which strengthened CEPA’s remedy provision, giving it more “teeth.” In 1990, CEPA’s remedy provision was expanded to add as available relief: “[a]ll remedies available in common law tort actions shall be available to prevailing plaintiffs.” *See* L. 1990, c. 12, § 4. In 2005, CEPA was further strengthened to mandate the court to order “where appropriate and to the fullest extent possible[,] . . . compensation for all lost wages, benefits and other remuneration.” (L. 2005, c. 329, § 2)(emphasis added). The prior version had provided only that the “court may also order . . . compensation for lost wages, benefits and other remuneration.” L. 1990, c. 12, § 4. (emphasis added).
 23. *N.J.S.A.* 10:5-13 and *N.J.S.A.* 10:5-12.
 24. *N.J.S.A.* 10:5-3.
 25. “The essential purpose behind CEPA is to provide ‘broad protections against employer retaliat[ion]’ for workers whose whistle-blowing actions benefit the health, safety and welfare of the public.” *Feldman v. Hunterdon Radiological Assoc.*, 187 N.J. 228, 239 (2006)(citing *Mehlman v. Mobil Oil Corp.*, 153 N.J. 163, 179 (1998)).
 26. *Cedeno v. Montclair State Univ.*, 163 N.J. 473, 478 (2000).
 27. *Abbamont v. Piscataway Twp. Bd. of Educ.*, 138 N.J. 405, 418 (1994).
 28. *Cedeno*, 163 N.J. at 478.
 29. *Donelson*, 2011 WL 2224538, at *6. *N.J.S.A.* 34:19-2(e).
 30. *See e.g.*, *Nini v. Mercer Community College*, 202 N.J. 98, 108-09 (2010); *Abbamont v. Piscataway Township Board of Education*, 138 N.J. 405, 418 (1994); *Fuchilla v. Layman*, 109 N.J. 319, 334 (1988), *cert. denied*, *Univ. of Med. & Dentistry v. Fuchilla*, 488 U.S. 826 (1988) (quoting *Jackson v. Concord Co.*, 54 N.J. 113, 124 (1969)).
 31. *N.J.S.A.* 10:5-12(d).
 32. *N.J.S.A.* 34:19-5 and *N.J.S.A.* 10:5-13.
 33. *N.J.S.A.* 34:19-5(d).
 34. *N.J.S.A.* 10:5-13.
 35. *N.J.S.A.* 10:5-3.
