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In a decision that will make it significantly easier for employees to recover lost wages in a state law retaliation action, the New Jersey Supreme Court ruled that an employee may recover front and back pay without proving or even alleging that he was terminated or constructively discharged, if he can prove that his employer's retaliation proximately caused a disability that rendered him unable to work.

New Jersey Supreme Court Holds that Back and Front Pay Are Recoverable Even Absent Actual or Constructive Discharge

By Eboneé Hamilton Lewis and Jacqueline McClintock

In a noteworthy decision under the New Jersey Conscientious Employee Protection Act (CEPA), the New Jersey Supreme Court ruled on June 9, 2011, in *Donelson v. DuPont Chambers Works*, that an employee may recover front and back pay for lost wages without proving or even alleging that he was terminated or constructively discharged, if he can prove that he engaged in protected activity and his employer's retaliation proximately caused a disability that rendered him unable to work.

The *Donelson* decision is noteworthy because it expands the concept of "adverse action" under the CEPA and thus falls in line with the U.S. Supreme Court's decision in *Burlington Northern v. White*, 126 S.Ct. 2405 (2006), which interpreted adverse employment action under Title VII, as well as a number of federal court decisions on whistleblower retaliation. *Burlington Northern* and other federal cases broadly define the scope of an adverse employment action beyond discharge, constructive or otherwise, and demotion to include false accusations, negative performance reviews, suspension, and pretextual mental-health examinations.

The Facts

DuPont employed the plaintiff for approximately 30 years as an operator technician. His job duties included ensuring the safe operation of equipment and handling of harmful chemicals, ensuring the safety of those who worked at the plant and those who lived in the surrounding community. In December 2002, he reported to a manager his belief that company security guards conducted random nighttime searches of employees' cars in a manner that endangered their safety. The plaintiff subsequently made a complaint to the Occupational Safety and Health Administration (OSHA). After this complaint, the plaintiff claimed, the company required him, for the first time, to report directly to a shift supervisor, who imposed sick- and vacation-day reporting requirements specific to him.

In October 2003, the plaintiff again complained to management, this time about purported unsafe conditions in a chemical reactor. The plaintiff claimed that thereafter, the company retaliated against him. Specifically, he claimed that the company removed from his work area the safety manual to which he had referred when making his prior complaints. He further claimed that his supervisor falsely accused him of forging

timecards and failing to make proper chemical readings and log entries. The plaintiff also claimed that his supervisor subjected him to constant verbal abuse, gave him a negative performance review and started giving him reviews every three months. He reported the alleged harassment and retaliation to the company's corporate headquarters. The company investigated the complaint and also investigated allegations that the plaintiff threatened other employees, including his supervisor. In April 2004, the company placed the plaintiff on short-term disability with pay, based on a recommendation from its employee-assistance counselor. During his two-month leave of absence, the plaintiff claimed he lost considerable overtime.

As a condition of reinstatement, the company required the plaintiff to submit to examination by three mental-health experts and undergo a fit-for-duty evaluation. One of these experts diagnosed him as exhibiting significant dysphoria and vulnerability to depression. The plaintiff argued that the "suspension," which lasted 53 days, resulted in the plaintiff feeling "worthless" and "beaten." Additionally, the plaintiff claimed that after he returned to work, the company continued to subject him to performance reviews every three months and his supervisor continued to make false charges of misconduct against him, which caused him to suffer anxiety attacks and "live[] in constant fear."

In February 2005, while still working for the company, the plaintiff filed a civil complaint, alleging that the company violated CEPA and inflicted emotional distress on him. He sought compensatory damages for lost wages and other employment benefits. In response to his allegations, the company no longer required him to report directly to a shift supervisor. This resulted in the plaintiff working 12-hour shifts in isolation. According to the plaintiff, working alone was "torture." Shortly thereafter, he sought treatment for his mental health issues and then took a six-month leave of absence. At the expiration of the leave, the plaintiff did not return to work. Instead, he received a disability pension from the company.

At the beginning of the trial on his CEPA and emotional distress claims, the company moved to bar the plaintiff's claims for front and back pay because he had pled neither actual nor constructive discharge. The trial court denied the motion and instructed the jury that the plaintiff could recover lost wages without proving a discharge. The trial court stated that if the plaintiff proved that the company's retaliation caused his "psychological breakdown" and that the breakdown led to his acceptance of an early retirement, then he could recover the difference between what he would have received by retiring in the ordinary course and the amount of his disability pension. The jury found in the plaintiff's favor and awarded him \$724,000 for economic damages, \$500,000 in punitive damages, and \$523,298 in attorneys' fees. The jury did not award the plaintiff any damages for pain and suffering.

Following the company's appeal, the Appellate Division reversed and entered judgment in favor of the company. The New Jersey Supreme Court granted the plaintiff's petition for certification for the purpose of addressing "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 a constructive discharge."

The New Jersey Supreme Court's Decision

The New Jersey Supreme Court held that retaliation is not limited to discharge, constructive or otherwise, but includes any adverse action, such as false accusations, negative performance reviews, suspension, and pretextual mental-health examinations. This interpretation of the CEPA is consistent with the U.S. Supreme Court's decision in *Burlington Northern*, defining adverse action under Title VII, and a number of federal court decisions under federal whistleblower statutes.

In *Burlington Northern*, the Court held that an adverse action is not limited to discharge, constructive or otherwise, or demotion, but can be any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The adverse employment actions at issue in *Burlington Northern* were: (1) changing the plaintiff's job responsibilities; and (2) suspending her for 37 days without pay – even though she was subsequently reinstated with back pay. Like the Court in *Burlington Northern*, the New Jersey Supreme Court concluded that what constitutes an "adverse employment action" under the CEPA must be interpreted broadly to allow recovery to the fullest extent permitted at common law.

To the extent that the company's retaliatory actions caused the plaintiff to suffer a mental breakdown rendering him unfit for continued employment, the court also concluded that he could recover damages for his diminished earning capacity. As to the issue of causation

and proximate cause, the court deferred to the jury, which credited medical testimony from plaintiff's psychologist and a psychiatrist, who testified as an expert, that DuPont's retaliatory actions caused him to suffer a mental breakdown rendering him unfit for continued employment. According to the court, that testimony constituted a sufficient basis for the jury's award of lost wages. Thus, the court reversed the Appellate Division and reinstated the jury's award, holding that the jury had authority to award the plaintiff front and back pay for lost wages based on its finding that the company's retaliation rendered the plaintiff unfit for work.

Import of the Supreme Court's Ruling

The *Donelson* case continues the New Jersey Supreme Court's trend of issuing employee-friendly decisions. Additionally, the case will likely have the practical effect of expanding the volume of retaliation claims under the CEPA.

To reduce the risk in these cases, employers should consider:

- Developing a separate policy, similar to the company's discrimination and harassment policies, prohibiting retaliation against employees who make complaints of misconduct or wrongdoing.
- Investigating employee complaints promptly and effectively.
- Making employees aware that the company takes their complaints seriously.
- Training managers on the CEPA's requirements, including the retaliation provisions, and instructing them to report any complaints of misconduct, wrongdoing or retaliation to the company's human resources department.

By consulting with experienced employment counsel, New Jersey employers may be better able to prevent and defend retaliation claims under CEPA and may be less likely to find themselves liable for the heavy damages awarded in the *Donelson* case.

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