



DAILY LABOR REPORT



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Whistleblowers

DuPont Wins Reversal of \$1.2 Million Verdict; New Jersey Employee Cited Stress, Wage Loss

A chemical plant operator who convinced a jury that E.I. du Pont de Nemours & Co. disciplined, harassed, and humiliated him in violation of the New Jersey Conscientious Employee Protection Act did not show a firing or constructive discharge that justified the jury's awarding him more than \$1.2 million in economic and punitive damages, the New Jersey Superior Court, Appellate Division held Feb. 24 (*Donelson v. DuPont Chamber Works*, N.J. Super Ct., App. Div., No. A-2028-08T1, 2/24/10).

Writing for the court to set aside the verdict and order judgment for DuPont, Judge Linda G. Baxter said John Seddon alleged that anxiety and depression caused him to retire from DuPont, but he never claimed that he had been fired or constructively discharged by the company.

Finding that the claim Seddon submitted to the jury did not entitle him to back pay, front pay, or punitive damages, the appellate court held that the trial court should have entered judgment in favor of DuPont.

Former Employee Claimed Retaliation, Mental Stress.

According to the decision, Seddon was employed at DuPont's Deepwater, N.J., Plant, known as DuPont Chamber Works, until he retired on Dec. 31, 2007, with a disability pension from the chemical manufacturer.

Seddon later alleged that because he complained to the Occupational Safety and Health Administration and DuPont managers about safety issues, including a risk of hazardous gases escaping into the air, the company engaged in a lengthy campaign of reprisals against him.

Seddon alleged that the company subjected him to vacation and leave restrictions, falsely accused him of failing to attend training and safety meetings and being lazy, and referred to him in an e-mail as a "very high

maintenance" employee who required a "watchful eye."

The former employee alleged that reprisals escalated to a more serious accusation of work errors, and Seddon was given a verbal warning he insisted was unjustified. Seddon said he complained on a DuPont hotline that he was being harassed for filing an OSHA complaint, but the company took no action.

Seddon testified at trial that the company retaliated for his whistleblowing activities by requiring him to undergo a humiliating mental status examination and forcing him to take a paid disability leave that lasted eight weeks. According to the decision, a DuPont clinical social worker reported that Seddon was emotionally unstable and not able to work, but a psychologist and two psychiatrists found that Seddon posed no danger and should be returned to work. Nonetheless, the court said, DuPont insisted on the disability leave and notified Seddon that he return to work on probation.

Seddon testified that his eight-week suspension left him with symptoms of depression, and he began receiving psychiatric treatment and anti-depressant medication. Seddon retired at the end of 2007. He sued the company under CEPA, alleging that he earned \$50,000 to \$60,000 less per year in retirement than he had earned from salary and overtime payments when he was actively employed by DuPont. Seddon's claim against DuPont was made in a lawsuit in which another employee, Joseph Donelson, accused the company of age discrimination, but Donelson's claim was dismissed without a trial.

Jury Awarded \$1.2 Million on CEPA Claim. Seddon's case proceeded to trial, but before the parties even made opening statements, DuPont moved to bar Seddon from introducing evidence of any economic loss allegedly resulting from the company's actions. The former employee had not alleged in court pleadings that he had been fired or constructively discharged by DuPont, and the company argued that such an allegation was required before economic damages could be awarded.

Seddon's lawyer responded that he never considered the dispute a case of constructive discharge, but he argued that if an employer's "abuse" of an employee "causes the employee to have a nervous breakdown so he can no longer work, and so, then he has to go out on a reduced disability," it would be "just natural, just normal law, common law causation says of course he should get all the damages that flow from that."

The trial court allowed the case to proceed, and Seddon's lawsuit was submitted to the jury. "The judge's charge to the jury did not include an instruction on the elements of constructive discharge, nor did the verdict sheet ask the jury if DuPont's conduct constituted a constructive discharge," Baxter wrote.

When the jury returned a verdict in favor of Seddon, it answered "yes" to a question of whether "DuPont retaliated against him" in violation of CEPA. The jury awarded \$724,000 for economic losses, and \$500,000 for punitive damages, but gave Seddon no award for pain and suffering.

The trial court rejected DuPont's post-trial motions, and the company appealed the judgment.

Appellate Court Reverses, Vacates Judgment. The Conscientious Employee Protection Act, N.J. Stat. Ann. § 34.19-3, prohibits an employer from taking retaliatory action against an employee for complaining or protesting about employer conduct that the employee reasonably believes violates a law, rule, or regulation. The act authorizes an award of lost wages and other remedial relief "where appropriate."

DuPont argued on appeal that in cases decided under the New Jersey Law Against Discrimination, New Jersey courts have held that an employee cannot recover an award of lost wages as a result of an employer's conduct unless the employer's action resulted in an actual or constructive discharge.

Baxter said "New Jersey courts have construed CEPA and the LAD identically on a wide variety of substantive issues," observing that the Superior Court's Appellate Division has viewed the two statutes as shar-

ing "the same remedial purpose" of protecting employees from the unlawful exercise of authority by employers.

The court concluded that DuPont was entitled to judgment in its favor on the CEPA claim notwithstanding the verdict for Seddon. Finding that "the award of economic damages for back pay, front pay and lost overtime was improper when plaintiff had not been terminated or constructively discharged," the court added that the \$500,000 punitive damages award "must be vacated as well."

Baxter said Seddon was not entitled to a new trial on his CEPA claim against DuPont. "By persuading the judge to instruct the jury that it could award plaintiff damages for economic loss if it found that DuPont had committed an adverse employment action in retaliation for plaintiff's whistleblowing activity—and by simultaneously persuading the judge to refrain from instructing the jury that it must also find plaintiff was constructively discharged—plaintiff was able to achieve a significant tactical advantage at trial . . . [that] enabled plaintiff to secure a verdict without having to satisfy one of the required elements of the very cause of action he asserted," Baxter observed.

Stating that Seddon could not complain on appeal about a course of action he requested during trial, the appellate court reversed the judgment for the former employee and remanded the case, directing the trial court to enter a judgment for DuPont.

Judges Joseph F. Lisa and Donald S. Coburn joined in the opinion.

Neil Mullin and Nancy Erika Smith of Smith Mullin in Montclair, N.J., represented John Seddon. David S. Fryman, Jennifer L. Sova, and William J. Simmons of Ballard Spahr Andrews & Ingersoll in Philadelphia represented DuPont.

BY LAWRENCE E. DUBE

Text of the decision may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=ldue-83dqqp>.