

SUPREME COURT OF NEW JERSEY
Docket No. 65,628

**JOSEPH A. DONELSON, PLAINTIFF,
AND JOHN SEDDON, PLAINTIFF-
RESPONDENT/ CROSS-APPELLANT,**

v.

**DUPONT CHAMBERS WORKS,
DEFENDANT-APPELLANT/ CROSS-
RESPONDENT, AND PAUL KAISER,
DEFENDANT.**

On Appeal From the
SUPERIOR COURT OF NEW JERSEY
Appellate Division, App. Div.
Docket No.: A-2028-08T1

Sat Below:
Hon. Lisa, Baxter and Coburn.

CIVIL ACTION

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**BRIEF OF AMICUS CURIAE NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION/NEW JERSEY**

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*On Behalf of National Employment
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PRELIMINARY STATEMENT

The issues before this Court are of such consequential import to the rights of employees of this State, that the New Jersey Chapter of the National Employment Lawyers Association ("NELA/NJ") respectfully submits this Amicus Brief in support of granting Certification and ruling that: (1) under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq., ("CEPA"), neither actual termination nor constructive discharge is required to recover lost earnings economic damages when the defendant's retaliatory conduct proximately caused plaintiff's disability that prevented plaintiff from working; (2) CEPA liability supports an award of attorneys' fee and costs, regardless of the amount or absence of compensatory damages; and (3) under CEPA, punitive damages should be recoverable irrespective of the amount or absence of compensatory damages.

John Seddon ("Seddon" or "plaintiff") was forced out on disability retirement by the retaliatory actions of DuPont Chambers Works ("DuPont" or "defendant") after Seddon complained about plant safety violations. The jury awarded Seddon \$724,000 as compensatory damages for lost earnings and \$500,000 as punitive damages, based upon its finding that DuPont violated CEPA. The compensatory damages award consisted entirely of economic damages, and no award for emotional pain and suffering. The trial judge awarded attorney's fees to plaintiff in the amount of \$523,289.

Although the trial court accepted plaintiff's argument that he was entitled to an award of back and front pay without being required to prove a constructive discharge or an actual termination of his employment, Donelson v. DuPont Chambers Works, 412 N.J.Super. 17, 22-23 (App. Div. 2010), the Appellate Division reversed and remanded.

Disagreeing with the trial court, the Appellate Division concluded that an actual termination or constructive discharge is required to recover economic damages. See Id. The Appellate Division further held that as plaintiff was not entitled to recover compensatory and punitive damages, plaintiff was not a prevailing party entitled to an award of attorney's fees under the fee shifting provisions of CEPA. Id. Finally, the Appellate Division found that punitive damages were barred based upon the restrictions of the Punitive Damages Act. Id. at 36.

NELA/NJ respectfully contends that the Appellate Division erred and that these issues are of general concern to employees in the State of New Jersey. Additionally, NELA/NJ submits its attached certification which further discusses the reasons why this court should grant certification and reverse the decision of the Appellate Division below.

PROCEDURAL AND FACTUAL BACKGROUND

For purposes of this Brief, we rely on the recitation of the relevant procedural history and factual background found in the Appellate Division's decision below. See Donelson v. DuPont Chambers Works, 412 N.J.Super. 17, 23-29 (App. Div. 2010).

POINT I

UNDER CEPA, NEITHER TERMINATION NOR CONSTRUCTIVE DISCHARGE IS REQUIRED TO RECOVER ECONOMIC DAMAGES FOR LOST EARNINGS WHEN THE DEFENDANT'S WRONGFUL CONDUCT PROXIMATELY CAUSED PLAINTIFF'S DISABILITY THAT PREVENTED PLAINTIFF FROM WORKING

Seddon experienced numerous incidences of retaliation for engaging in whistleblower activity. The impact of the retaliation caused Seddon to suffer emotional consequences which, in turn, led to him severing his employment. Seddon was not terminated and he was not constructively discharged. However, this does not undermine the fact that the unlawful retaliation by his employer resulted in his employment being severed.

This fact pattern is, unfortunately, a common experience to whistleblowing employees who have the fortitude to stand up to

their employer. And this employee should not be left without a remedy for lost earnings. It is this very employee whose loss of back and front pay were intended to be compensated by such remedial and broadly construed statutes as CEPA and the LAD. For this reason, the trial court allowed Seddon to reach verdict and for this reason the jury awarded significant economic and punitive damages. Unfortunately, the Appellate Court interpreted this remedial statute in a narrow manner, which was never intended by our legislature - as reflected by a plain reading of CEPA itself. If the Appellate Court's unduly narrow reading of CEPA is left undisturbed, it will be to the detriment of working citizens of this State.

It is true that Seddon did not experience an actual discharge, as he was not terminated. It is equally true that Seddon did not prove a constructive discharge. However, what the Appellate Court failed to appreciate is that Seddon did not resign. Rather, Seddon became medically unable to continue in his employment due to the retaliatory actions of his employer. A medical doctor mandated that Seddon could not continue his employment due to depression. Seddon testified that the cause of the depression was the retaliatory conduct of DuPont after and because Seddon engaged in protected whistle-blower activity. Thus, it was DuPont's actions that resulted in the loss of earnings. The proximate cause of plaintiff being removed from his employment was the conduct of his

employer. Damages flowing from that conduct are recoverable under traditional tort proximate causation principles to proving liability. For this reason, the jury's award of lost wages should not have been set aside.

To hold otherwise in this case is to: (1) leave an "aggrieved employee" bereft of a legal remedy for lost wages for exercising their protected rights; (2) discourage whistle-blowing employees; (3) minimize protections for a group of employees who are especially vulnerable to victimization by the employer; and (4) marginalize the consequences to an employer who retaliates against whistle-blowing employees.

There is nothing in the plain text of CEPA or LAD that prohibits an economic recovery absent an actual termination or constructive discharge.¹ This is particularly so because CEPA's remedy provision, as does the LAD's remedy provision, specifically provides for "all remedies available in common law tort actions". N.J.S.A. 34:19-5; N.J.S.A. 10:5-13. To hold to the contrary does

¹ The Appellate Division below undertook a thorough analysis of whether CEPA cases should be treated in the same fashion as LAD cases. It acknowledged that CEPA and the LAD have a shared remedial purpose to overcome victimization of employees in the workplace. Donelson, supra, at 34. It then reviewed the legislative history of CEPA and the LAD, compared the similarity of the remedy provisions of both statutes and listed numerous cases to illustrate that New Jersey Courts "construe CEPA and the LAD identically on a wide variety of substantive issues." Id. at 33-34. Based upon this review, the Appellate Division concluded that CEPA cases should be treated in the same fashion as LAD cases. Id. at 33-35.

nothing to further the shared purpose of CEPA and the LAD, but, rather, undermines it.

As the Appellate Division aptly observed, "[b]ecause CEPA is remedial legislation, it must be liberally construed to effectuate its important social goal." Donelson, supra at 29. Restricting compensatory economic recovery to only those cases which include an actual termination or constructive discharge runs counter to serving CEPA's remedial purpose.

In fact, this Court alluded to that very issue in Shepherd v. Hunterdon Development Center, 174 N.J. 1, 26-29 (2002), when it explained that even where the facts do not rise to the level of a constructive discharge, there may be additional facts which set forth a hostile work environment claim. Thus, despite the absence of a constructive discharge or actual termination in Shepherd, a compensatory recovery could still be based upon the employer's wrongful conduct being the proximate cause of the plaintiff's injuries.

In the facts, *sub judice*, plaintiffs allegations supported that his employer's conduct was the proximate cause of the depression which disabled him from being able to work, and resulted in lost wages.

Moreover, this Court has held that an injured party has the right to recover damages for diminished-earning capacity if there is a "basis in the evidence" to warrant submission of the issue to

the jury. Lesniak v. County of Bergen, 117 N.J. 12, 20 (1989); Dombroski v. City of Atlantic City, 308 N.J. Super. 459, 469, App. Div. 1998) citing Caldwell v. Haynes, 136 N.J. 422, 433 (1994). The threshold inquiry prior to submission of this issue to the jury is whether plaintiff has presented evidence that "their psychological injuries made it reasonably probable that their ability to earn a livelihood would be impaired." Lesniak, supra at 22.

Seddon presented evidence that, as a proximate result of his employer's retaliatory actions, he developed depression, which made him medically unable to continue his employment and thus, at a minimum, reasonably probable that his ability to earn a livelihood would be impaired.

Thus, Seddon satisfied the threshold inquiry under the Lesniak rule.

Moreover, a medical doctor mandated that Seddon could not continue his employment due to depression. Thus, there was expert testimony which supported a causal connection between Seddon's injury with his loss of ability to work. Lesniak, supra at 31. [Plaintiff also presented expert testimony regarding the amount of the predicted lost income]. Id.

Thus, under traditional tort principles, regardless of the absence of an actual termination or constructive discharge, Seddon is entitled to recovery of for the diminishment of his earning capacity due to depression caused by the retaliatory actions of

DuPont.

NELA/NJ attorneys have seen many employees who experience situations similar to the one Seddon experienced. These employees suffer because they show the common fortitude to do exactly what CEPA encourages, exactly what is in the best interests of citizens of this State, exactly what assists in promoting the public interest. They put the interests of others before their own welfare, in an effort to prevent harms from occurring to the detriment of the general citizenry. It is these employees that deserve the full protections of remedial statutes such as CEPA. And it is these employees that these remedial statutes were designed to protect by the very wording of the statute. In fact, the Appellate Court had to look no further than the CEPA statute itself, which addressed the decision that the Trial Court made, when it allowed for back wages for employees who were not the victim of either an actual termination or constructive discharge. This is why CEPA the LAD must be liberally interpreted to allow for "all remedies available in common law tort actions". N.J.S.A. 34:19-5; N.J.S.A. 10:5-13. To the extent LAD cases or the decision below say otherwise, it is time to overturn these cases, as they fly contrary to the wording of these statutes.

It is not uncommon for employees to endure extreme suffering from retaliatory conduct for lengthy periods of time, and yet not establish the objectively intolerable circumstances that give rise

to a constructive discharge. If the Appellate Division's prohibition on economic recovery absent a termination or constructive discharge is affirmed, employees facing this common scenario would be left without a remedy that would make them whole.

There is also authority in other jurisdictions which has construed remedial retaliation legislation with language nearly identical to CEPA as not requiring a constructive discharge or termination as a prerequisite to recovery of economic damages. Relying on language in its statute that is analogous to CEPA's "all remedies available in common law tort actions," the Supreme Court of Washington applied traditional tort proximate causation standards to permit recovery of compensatory damages absent any constructive discharge. Martini v. The Boeing Company, 945 P.2d 248, 251-53 (Ct. App. 1997).

The Martini case is remarkably factually similar to the within matter. Martini, like Seddon, suffered from major depression which was caused by the employer's actions. The depression resulted in his being unable to continue to work, and, thus, he discontinued work, although not as a result of a termination or constructive discharge.

The defendant, like DuPont, argued that since the plaintiff had proven neither actual nor constructive discharge, economic damages were not recoverable. However, the Martini Court disagreed.

The Martini Court concluded that “the determinations of proximate cause and mitigation are factual matters for the jury, operating to limit front and back pay awards in cases where there has been discrimination but no finding of constructive discharge.” Id., 971 P.2d at 51.

In the Seddon case, the Appellate Division mischaracterizes CEPA’s legislative history as precluding lost pay in the absence of an actual termination. Donelson, supra, at 34-35. The language, upon which the Appellate Division relies, however, does not support that conclusion.

The bill states that the court must order . . . an injunction against continuing violations, reinstate to employment, compensation for lost pay and costs of the case, but only where appropriate. The bill thus takes into consideration that not all of these measures are always applicable, as, for example, in a case where the employer retaliation did not include a termination of employment.

Donelson, supra, at 34-35.

(emphasis added)

Thus, for example, “reinstatement” would not ordinarily be appropriate where the employer retaliation did not include a termination of employment. However, the statement that “not all of these measures are always applicable” does not mean that compensation for lost earnings is a fortiori inapplicable to a case where the “aggrieved employee” suffers from a medical ailment

caused by the employer, which renders said employee medically unable to continue to perform his job. To the contrary, just because not all such measures are always applicable, does not, in any way, preclude application of such measures "where appropriate" -- such as where the employer caused the condition which prevents the employee from continuing to work.

Thus, reversal of the Appellate Division's conditioning economic damages upon an actual or constructive discharge is supported by CEPA's plain language, legislative intent and broad remedial goals to fully compensate victims of whistle-blower retaliation. To hold otherwise would thwart those goals and run counter to the express provision of CEPA, as well as the identical provision of the LAD, which allow for "all remedies available in common law tort actions".

It is for this reason, that NELA/NJ urges this esteemed body to grant certification and overturn the Appellate Division's decision.

Point II

CEPA LIABILITY SUPPORTS FEE SHIFTING REGARDLESS OF THE AMOUNT OR ABSENCE OF COMPENSATORY DAMAGES

A. Attorneys' Fees and Costs Must Be Awarded Based Upon the O'Connor Factors

Even if this Court declines to reverse the Appellate Division's holding that compensatory damages are not recoverable because there was no actual termination or constructive discharge, plaintiff Seddon was a prevailing party under CEPA entitled to an award of attorney's fees based upon the "O'Connor Factors".

Justice Sandra Day O'Connor, concurring in Farrar v Hobby, 506 U.S. 103 (1992), set forth the analysis that the Court should utilize in determining the issue of awarding attorneys' fees and costs, even when there are no actual damages.

In Farrar, Justice O'Connor, in her concurring opinion, stated that "an award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved." Id. at 121. Justice O'Connor outlined other factors that courts also must consider to determine success, such as the difference between the amount recovered and the damages sought, the significance of the legal issue decided, and whether the decision served an important public purpose. Id. at 121-22.

Moreover, "wherever there is a breach of contract, or the invasion of a legal right, the law ordinarily infers that damage has ensued. And, in the absence of actual loss, the law vindicates the right by awarding nominal damages. The injury imports damage." Spiegel v. Evergreen Cemetery Co., 117 N.J.L. 90, 97 (Sup. Ct. 1936). Thus, the consequence of a verdict that defendant violated CEPA imports damage.

Third Circuit Federal courts have recently applied the "O'Connor Factors" to support an award of attorney's fees and their reasonableness in the context of the Religious Freedom Restoration Act Jama v. Esmor Correctional Services, 577 F.3d 169 (3d Cir. 2009))and civil rights actions (Halpin v. Gibson, 2009 WL 3271590 (D.N.J.)²; Buss v. Quigg, 91 Fed. Appx. 759, 761 (3d Cir. 2004); Butler v. Frett, 2006 WL 1806412, at *5 (D.N.J. June 29, 2006))".

The Jama court cited with approval, precedent in other jurisdictions which have applied such factors in discrimination and retaliation lawsuits to justify counsel fee awards -- despite the award of only nominal damages. (See Jama, supra at 175-76, citing Mercer v. Duke University, 401 F.3d 199 (4th Cir. 2005) (female college football player awarded \$350,000 in attorney's fees in Title IX discrimination claim, despite the de minimus compensatory relief, because legal issue was significant and litigation served a public purpose); Diaz-Rivera v. Rivera-Rodriguez, 377 F.3d 119 (1st Cir. 2004) (terminated municipal employees' successful claim against city officials for retaliation based upon political affiliation awarded attorney's fees, despite only nominal damages, as the determination that municipality violated plaintiffs' constitutional rights represented a significant legal conclusion serving an important public purpose).

Thus, the Jama court concluded that "a plaintiff's success

² Not reported.

should consider not only the difference between the relief sought and achieved, but also the significance of the legal issue decided and whether the litigation served a public purpose.” Jama, supra at 176.

1. **The O’Connor Factors**

i. Extent of Relief

The “extent of relief” factor “weighs the judgment recovered against the judgment sought by the prevailing party.” Butler, 2006 WL 1806412 at *5. A major discrepancy between the amount recovered and the amount sought existed in Farrar, since the amount sought was \$17 million, while nominal damages of \$1 were awarded. However, even substantial differences in the hundreds of thousands, such as was the case in Butler and Buss, supra, are not considered significant to make this factor weigh against the award of attorney’s fees. Halpin, supra, at *8. .

In the within matter, the amount sought by plaintiff was his economic loss, which the jury determined to be \$724,000. Nominal damages of \$1 may be inferred. See Spiegel, supra at 97. Thus, this discrepancy does not “rise to the level that concerned the court in Farrar”, and this factor weighs in favor of awarding attorney’s fees. See Halpin, supra, *8, citing Buss, 2003 WL 31262060, at *6; Butler, 2006 WL 1806412 at *5-6.

ii. Significance of Legal Issue

The legal issue in this matter, the protection of rights under CEPA for whistleblowing about OSHA safety violations, is undeniably a significant legal issue and consequential health and safety issue to the employees and citizenry of the State of New Jersey. Vindication of such rights serves the statute's purpose of "overcome[ing] 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." Abbamont v. Piscataway Township Board of Education, 138 N.J. 405, 431 (1994).

This factor weighs in favor of awarding attorney's fees.

iii. Public Purpose

The fee-shifting provision of CEPA reflects the intent of the legislature to serve CEPA's important public purpose of protecting employees from retaliatory action by employers. "The aim of the bill is to discourage collusion between employers for the purpose of inhibiting disclosure by their employees of violations of law committed by either employer." N.J.S.A. 34:19-3, *Assembly Labor Committee Statement*.

Thus, this factor also weighs in favor of awarding attorney's fees.

B. Attorney's Fees Must Be Awarded Based Upon The Legislative History and Structure of CEPA

CEPA's remedy provision, N.J.S.A. 34:19-5, provides in

relevant part:

Upon a violation of any of the provisions of this act, an aggrieved employee or former employee may, within one year, institute a civil action in a court of competent jurisdiction. Upon the application of any party, a jury trial shall be directed to try the validity of any claim under this act specified in the suit. All remedies available in common law tort actions shall be available to prevailing plaintiffs. These remedies are in addition to any legal or equitable relief provided by this act or any other statute. **The court shall also order, where appropriate and to the fullest extent possible:**

- a. An injunction to restrain any violation of this act which is continuing at the time that the court issues its order;
- b. The reinstatement of the employee to the same position held before the retaliatory action, or to an equivalent position;
- c. The reinstatement of full fringe benefits and seniority rights;
- d. The compensation for all lost wages, benefits and other remuneration; and
- e. **The payment by the employer of reasonable costs, and attorney's fees.**

(emphasis added)

The structure of CEPA's remedy provision and its legislative history reflect the legislative intention that the different forms of relief are alternate and not conditioned upon each other. Moody v. Township of Marlboro, 855 F.Supp. 685, 689 (D.N.J. 1994).

As the Moody court observed:

Essentially, the mechanics of the statute, clearly and unambiguously outlined therein, apparently reflects the legislature's intention to afford employees a range of remedies conferred to the court's discretion in addressing each and every unique CEPA claim litigated before the courts. Any other construction would negate the plain and ordinary meaning of the statute.

Therefore, the Moody court found that in a CEPA action the court has the discretion to "shape the form of relief," including any award of attorney's fees. Id. at 690.

In determining the reasonableness of the award, the court should consider factors such as the deterrent value of the award, the results obtained, and the amount of hours spent by counsel on the successful CEPA claim. However, there is no set formula and this determination is discretionary. Id. at 690-91. In addition, no one factor is determinative. Rather, in making the determination whether to award attorney's fees, the Court should take into account all of these considerations together.

When these factors are taken together in the within matter, they support the trial court's award of reasonable attorneys' fees and costs. Thus, the Appellate Division's striking of attorneys' fees and costs in the within matter should be reversed.

POINT III

UNDER CEPA, PUNITIVE DAMAGES SHOULD NOT BE BARRED OR LIMITED BASED UPON THE AMOUNT OR ABSENCE OF COMPENSATORY DAMAGES

A. The PDA Should Not Limit Punitive Damages In CEPA Cases, Since It Should Not Limit Punitive Damages In LAD Actions

As noted in Point I, supra, after an extensive analysis of the legislative history and case law, the Appellate Division below concluded that CEPA cases should be treated in the same fashion as LAD cases. Donelson, supra, at 33-35. Nevertheless, the Appellate

Division applied the Punitive Damages Act ("PDA") to vacate the jury's award of punitive damages in this CEPA action, despite the PDA's express exclusion of LAD cases from its cap on punitive damages. See N.J.S.A. 2A:15-5.14(c).

i. The PDA Should Not Limit or Bar Punitive Damages in a CEPA or LAD Case

The Appellate Division vacated the punitive damages award based upon the provision under the Punitive Damages Act that "an award of nominal charges cannot support an award of punitive damages." N.J.S.A. 2A:15-5.13(c), citing Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 390 N.J. Super. 557, 57 (App. Div. 2007), aff'd, 194 N.J. 212 (2008). Thus, in vacating the punitive damages award, the Appellate Division relied upon the provision of the PDA that concerns the relationship of nominal damages to a punitive damages award. However, that provision of the PDA should not be used to limit or bar punitive damages in a LAD or CEPA action, despite the absence of a compensatory damages award.

Excluding the LAD from the PDA's cap serves to eliminate the PDA's restrictive standards on punitive damage awards in LAD actions. To impose the restriction that punitive damage awards be limited to a minimum compensatory damage award in LAD matters would thwart that intent.

ii. The PDA Should Not Bar or Limit Punitive Damages in CEPA Actions, Which Are to be Construed in the Same Manner as LAD Cases

As the Appellate Division correctly concluded, LAD actions should be treated in the same fashion as CEPA cases. Thus, the PDA's restrictions on punitive damages should likewise not apply to CEPA actions. Therefore, punitive damages in CEPA actions, as in LAD actions, should not be barred or limited based upon the amount or absence of compensatory damages.

B. The Clear Language Of CEPA Supports An Award Of Punitive Damages Even Absent An Award Of Compensatory Damages

Moreover, the intent of the legislature that the PDA should not restrict or bar punitive damages in a CEPA action is also evident because CEPA does not expressly exclude punitive damages where there is no award of compensatory damages.

CEPA's damages provision, N.J.S.A. 34:19-13, expressly provides that punitive damages are a permissible form of recovery. N.J.S.A. 34:19-13, provides, in pertinent part:

The court shall award a prevailing employee all appropriate relief, including any of the following which are applicable to the violation: . The payment of any lost wages, benefits or other remuneration; and d. The payment of reasonable attorneys' fees and costs of the action. ***In addition, the court may award the prevailing employee punitive damages not greater than treble damages, or an assessment of a civil fine of not more than \$1,000 for a first violation of the act and not more than \$5,000 for each subsequent violation,*** which shall be paid to the State Treasurer for deposit in the General Fund."

(emphasis added)

This provision does not exempt punitive damages from CEPA cases in which there is no award of compensatory damages. Our Legislature could have chosen to exempt punitive damages for CEPA cases in which no compensatory damages are awarded. The legislature chose not to do so. This intended omission reflects a remedial intent that no such exemption exists.

This same statutory interpretation was used by the Court in Green v. Jersey City Bd. of Educ., 177 N.J. 434 (2003), where the Court held that CEPA permits an award of punitive damages against a public entity because CEPA does not specifically exclude punitive damages against public employers.

As the Green Court stated

the omission of a provision in CEPA specifically excluding "punitive damages against public employers ... must be deemed purposeful" because the Legislature easily could have exempted government entities from CEPA's punitive damages provision had it wished to do so. * * * Rather, CEPA defines employers to include governmental entities and does not then expressly exclude them from the imposition of punitive damages. When another statute clearly establishes a remedy and does not limit the application of that remedy, as in the case of CEPA, the general immunity of the TCA must fall.

Green, supra, at 442-43, citing Abbamont v. Piscataway Bd. Of Educ., 138 N.J. 405 (1994) (Abbamont I), appeal after remand, 314 N.J. Super. 293 (App. Div. 1998), aff'd, 163 N.J. 14 (1999).

Upon this same reasoning, since CEPA does not expressly exempt an award for punitive damages where no compensatory damages are awarded, such an omission is powerful evidence that the intent of

the legislature is consistent with Seddon's argument in support of the punitive damages award made by the jury.

C. Case Law Supports An Award Of Punitive Damages In CEPA Actions Even Absent An Award Of Compensatory Damages

As this Court has held, "a claim for punitive damages may be sustained even absent an award of compensatory damages..." Smith v. Whitaker, 160 N.J. 221, 243 (1999).

At issue in Smith, was whether punitive damages could be sustained in a survival action where compensatory damages were not recoverable because there was no violation of the Survivor's Act. Id. at 226. Under the Survivor's Act, "pain and suffering comprise the sole compensable injury in a survival action."³ Id. at 236. In Smith, there was no pain and suffering found and thus New Jersey compensatory damages were recoverable. Defendant therefore argued that punitive damages should be barred. The Smith Court disagreed and affirmed the Appellate Division's sustaining of the punitive damages award, even in the absence of an underlying award of compensatory damages. Id. at 230, citing Smith v. Whitaker, 313 N.J. Super. 172, 175-90 (1998).

As the Smith court observed, the basis for not sustaining punitive damages when there are no compensatory damages awarded, is the assumption that the non-award of compensatory damages by the

³ Although not expressly provided for in the Survivor's Act, the Smith Court concluded that punitive damages were a permissible form of recovery thereunder, construing the Act broadly to further its remedial purpose.

jury "reflects that jury's determination that no harm accrued to the plaintiff". Id. at 243-244. In Smith, as in the case at bar, that was not the reason that compensatory damages were not awarded. In both Smith and the within matter, punitive damages were not awarded based upon the absence of a compensatory damages award, not that no harm accrued to the plaintiff.

However, an award of compensatory damages is not necessarily the foundation for a punitive damages award. Rather, punitive damages "are awarded 'upon a theory of punishment to the offender for aggravated misconduct and to deter such conduct in the future.'

* * * "[p]unitive damages are not designed to compensate plaintiffs for their losses so they don't depend on the extent of injury or loss sustained by plaintiff." Id. at 242 (citations omitted).

In fact, in some instances, a punitive damages claim may be the sole basis of recovery. Id. at 237. As the Smith Court further observed, compensatory damages are:

'a monetary amount awarded in court to compensate or indemnify a plaintiff.' (citation omitted), citing Nappe v. Anshelewitz Barr, Ansell & Bonello, 97 N.J. 37, 41, n. 1. When the value of a real legal injury cannot be measured in money. Id. at 56. (O'Hern, J., concurring), a plaintiff who has been substantially harmed may not be able to establish an entitlement to compensatory damages. Under such circumstances, we held in Nappe that a defendant should not be freed of responsibility for aggravated conduct because of the fortuitous circumstance that an injured plaintiff cannot prove compensatory damages. Id. at 50.

Id. at 238.

Relying upon the Smith Court's holding, the Appellate Division in Kluczyk v. Tropicana Products, Inc., 368 N.J.Super. 479, 496-97 (App. Div. 2004), held that, in the context of an LAD action, "the amount of punitive damages does not depend on the award of a specific amount of compensatory damages or injury to the plaintiff." Rather, punitive damages are recoverable where the jury finds that the defendant's actions were egregious. Id.⁴

The Appellate Division below erroneously concluded that the jury's punitive damages award should be entirely stricken based upon its determination that compensatory damages were not recoverable absent an actual termination or constructive discharge. Rather, under CEPA, as under the LAD, punitive damages should be available based upon the defendant's culpability, irrespective of the amount or absence of compensatory damages. See Smith, supra, 160 N.J. at 243; Kluczyk, supra at 496-97.

⁴ The determination of whether a defendant's actions rise to the level of egregiousness warranting punitive damages is a jury question. See e.g., Spragg v. Shore Care, 293 N.J. Super. 33, 59 (App. Div. 1996) (denying summary judgment on striking of punitive damages since intent and motivation is a jury determination); Weiss v. Parker Hannifan Corp., 747 F.Supp. 1118, 1135 (D.N.J. 1990) ("under New Jersey law, the exceptional nature of a given case and the wanton or malicious nature of the defendant's conduct are questions for the finder of fact."); Santiago v. City of Vineland, 107 F.Supp.2d 512, 570 (D.N.J. 2000) (punitive damages is ordinarily a question for fact finder).

CONCLUSION

For the foregoing reasons, NELA/NJ respectfully submits that (1) under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq., ("CEPA"), neither termination nor constructive discharge is required to recover economic damages when the defendant's wrongful conduct proximately caused plaintiff's disability that prevented plaintiff from working; (2) CEPA liability supports fee shifting regardless of the amount or absence of compensatory damages; and (3) under CEPA, punitive damages should not be barred or limited based upon the amount or absence of compensatory damages.

As such, NELA/NJ respectfully urges that this Court grant certification in order that the Appellate Division's decision be reversed.

Respectfully submitted,

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By:

Dated: April 25, 2010

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