SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILLMINGTON, DE 19801-3733
TELEPHONE (302) 255-0670

March 31, 2006

Jeffrey K. Martin, Esquire
1509 Gilpin Avenue
Wilmington, DE 19806

Kathleen Furey McDonough, Esquire
Jennifer Gimler Brady, Esquire
1313 North Market Street
P.O. Box 951
Wilmington, DE 19899

RE: Robert E. Pekala v. E.I. duPont de Nemours and Company, Inc.
C.A. No. 03C-04-175 WCC

Submitted: November 3, 2005
Decided: March 31, 2006

On Defendant's Motion to Dismiss
Plaintiff's Claims for Punitive Damages. **Granted.**

On Defendant's Motion to Dismiss
Plaintiff's Claims for Emotional Distress Damages. **Denied.**

Dear Counsel:

The Court has before it the request by the Defendant to dismiss both the Plaintiff's emotional distress claim and its request for punitive damages. In addition, to avoid confusion, the Court thought it would be helpful to reiterate in writing the

oral decision previously provided to counsel on Defendant's motion for summary judgment. This letter is intended to resolve all outstanding motions now before the Court in preparation for the upcoming trial.

I. Background

The Plaintiff was employed by DuPont from June 17, 1974 to June 30, 2001. During his tenure with DuPont, the Plaintiff held various engineering and construction related positions, including an engineering position with the facilities and administrative support organization of DuPont's crop protection business from which he was terminated. It appears the Plaintiff was a valued employee of the Defendant who, throughout his career, received positive annual performance reviews and regular salary increases and bonuses.

Beginning in 1992, Plaintiff began to experience allergic reactions associated with exposure to mold in various buildings operated by the Defendant. This led to the Plaintiff initiating, in October of 1992, a workman's compensation claim that remained open during the remainder of the Plaintiff's employment with DuPont.

Over the last decade of the Plaintiff's employment, the Defendant has conducted a series of downsizing initiatives throughout the company to reduce its overall employment base. The one that allegedly led to the termination of the Plaintiff was announced in April of 2001, and Plaintiff's workgroup was slated to be reduced by one position – from six employees to five. An evaluation procedure was developed by the Human Relations Department which was utilized by a selection team to rate and score the talents of each individual of the Plaintiff's team against nine identified skills for an engineering position. The Plaintiff received the lowest overall score, and thus was advised that his position was being eliminated. The Plaintiff appealed the selection team's decision to the Human Relations Department and his appeal was subsequently denied. Soon after the Plaintiff's employment with DuPont ended, Kemper Insurance Company, the Third Party Administrator for DuPont's workman's compensation benefits, advised the Plaintiff it was terminating his benefits and would cease paying the medical bills which were related to his medical claims associated with the mold allergy.

On April 17, 2003, the Plaintiff filed this complaint against the Defendant alleging that DuPont had (1) terminated his employment in retaliation for the filing

and continuation of his workman's compensation claim and (2) had breached the implied covenant of good faith and fair dealing. Subsequently, the Defendant filed a motion for summary judgment requesting this Court dismiss the complaint. That motion was fully briefed and argued, and the Court orally advised counsel at the pretrial conference before the previously scheduled trial, which unfortunately had to be continued due to the illness of Plaintiff's counsel, that the motion would be denied. In essence, counsel was advised that while the Court had significant concerns as to the Plaintiff's ability to establish the claims it had alleged, the Court believes genuine issues of material fact remain which prevented the granting of summary judgment at that time. While the Plaintiff has not discovered the "smoking gun" to support its position during the discovery process, the Court found there were sufficient circumstances which, if believed by the jury, could lead them to find in the Plaintiff's favor. The request, however, to dismiss the claims relating to emotional distress and punitive damages were not fully briefed at the time of the pretrial conference. As such, the Court requested additional submissions on these issues.

II. Summary Judgment

As the Court has previously indicated, it advised the parties at the pretrial conference that it was not inclined to grant summary judgment to the Defendant. While the Defendant's reasons for terminating the Plaintiff may ultimately be accepted by the jury, at this juncture, there remains significant factual disputes as to the reasonableness of that decision and its relationship to the Plaintiff's workman's compensation claim. Of particular note, it appears that in 1999 the perception of the Plaintiff's benefit to his engineering group was significantly different than when the termination decision was made in 2001. A performance review in 1999 reflects that he was the highest ranking employee of this engineering group. However, when rated in 2001 against most of the same individuals, he was rated the lowest. The credibility and reasonableness of the Defendant's explanation for that variation is a matter for the jury to decide. When the claim is also viewed in a light most favorable to the Plaintiff, it is bolstered by what appears to be a deteriorating relationship with his superiors, and instead of the downsizing process leading to the rational termination of the less competitive and least valued employee, the Plaintiff argues there is sufficient circumstantial evidence that it was simply a convenient mechanism to get rid of a problem employee who had a long-term workman's compensation claim relating to his mold allergy. While the Court may have significant concerns that when the precise rules of evidence are applied to the Plaintiff's factual presentation

at trial these claims will continue to survive, that is not sufficient to dismiss the claim at this juncture in the litigation.

While I have denied the summary judgment motion, the Court again cautions the Plaintiff that he has made a clear and concise claim in his complaint that the termination was in retaliation for the Plaintiff's outstanding workman's compensation claim. As in all trials, the parties are allowed to chip around the edges to support their allegations, but it does not open the door to allow the Plaintiff to complain generally about his twenty-seven years of employment with DuPont and the employment woes he allegedly has experienced with his mold allergy during the last nine years. Based upon the briefing and oral arguments that have occurred in this case, the Court is very concerned that the Plaintiff is failing to recognize this subtle but significant difference. The Court has now expressed orally and in writing this concern, and has advised counsel it will expect the trial to focus on the issues raised in the complaint and nothing more. It has done this so the Plaintiff will not be surprised at trial and so counsel can focus its presentation accordingly. As the Court has previously indicated at oral argument in October of 2005, it certainly will allow the Plaintiff to tell his story as to his mold sensitivity and the effect on his employment with DuPont to provide the jury some perspective as to the basis for the workman's compensation claim. It does not, however, mean that this opens the door for the Plaintiff to use the trial as a forum to publicly pronounce his dissatisfaction with the Defendant. Counsel for the Plaintiff should take particular care in preparing the Plaintiff for his testimony to avoid these concerns.

At the pretrial conference, the Court advised counsel that it appeared the good faith and fair dealing allegation in the complaint is really nothing more than another way to say the Plaintiff has been inappropriately discharged because of his workman's compensation claim, and the Court had concerns regarding the validity of this claim. However, the Court must recognize that the Supreme Court has ruled that, in every employment contract made under the laws of this State, there is an implied covenant of good faith and fair dealing.[1] In addition, one of the four narrowly defined categories for a breach of the covenant of good faith and fair dealing is when the employer falsifies or manipulates a record to create fictitious

[1] *E.I. duPont de Nemours & Co. v. Pressman,* 679 A.2d 436, 440 (Del Super. Ct. 1996) (citing *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 101 (Del. 1992)); *see also Shockley v. General Foods Corp.*, 1988 WL 102983 (Del. Ch.).

grounds to terminate the employee.[2] The record the Plaintiff alleges supports this claim is the rating document that disclosed the Plaintiff was the lowest rated employee by the selection team.

While the implied covenant of good faith and fair dealing exists in employment contracts, this does not necessarily mean that the claim should proceed forward. The Supreme Court has also ruled in *Merrill v. Crothall-American, Inc.*[3]*:*

> Nothing said here is to be construed as limiting an employer's freedom to terminate an at-will employment contract for its own legitimate business, or even highly subjective, reasons. Such a contract is still terminable by either party for any reason not motivated by bad faith.

Bad faith has been defined as conduct of an employer that constitutes "an aspect of fraud, deceit or misrepresentation."[4] In other words, by these decisions a company is provided significant latitude to make reasonable business decisions concerning the continuation of an individual's employment, and those decisions will not be interfered with by the Court absent fraud, deceit or misrepresentation.[5]

In this context, even if the Court assumes the allegation made by the Plaintiff was correct, that he was terminated because of his workman's compensation claim, such action would not constitute bad faith. In other words, absent the protection found in 19 *Del. C.* § 2365, if the company's business decision was to terminate the Plaintiff, who was an at-will employee, because of employment difficulty associated with his mold allergy, in the Court's opinion, it would not reach the threshold of bad faith as defined by *Shockley*. By this conclusion, the Court does not make a judgment about whether such a decision would be morally or ethically the right action to take, nor whether some other statutory or tort liability would be implicated. However, business decisions in which the Courts have provided significant latitude for

---

[2] *E.I. duPont*, 679 A.2d at 440.

[3] *Merrill,* 606 A.2d at 103.

[4] *Shockley v. General Foods Corp.*, 1988 WL 102983 (Del. Ch.), *4. (citations omitted).

[5] *Id.*

companies to make, generally will not be a violation of the covenant of good faith and fair dealing.

Unfortunately for the Defendant, the problem here is that if the jury accepts the Plaintiff's theory that the selection process was nothing more than a ruse and the rating document is a misrepresentation of the real reason for the Plaintiff's termination, that "lie" becomes a violation of the covenant. So, despite the Court's earlier inclination that this count should be dismissed or merged with the other count of the complaint, I am now convinced that it must remain at least for the moment as a separate claim. Obviously the Defendant will be free at the end of the presentation of the Plaintiff's case to raise the issue again in the appropriate procedural context.

III. Punitive Damages

Defendant has requested that the Court dismiss the Plaintiff's claim for punitive damages. Under 19 Del. C. §2365, the Court may award compensatory damages caused by the retaliatory termination of employment, as well as any related costs or attorney fees.[6] Section 2365 does not indicate punitive damages are available to a terminated employee. Punitive damages are those awarded, not to correct a wrong done to the Plaintiff, but instead to either deter or punish the actions taken by a Defendant.[7] Punitive damages have been awarded "only in situations where the Defendant's conduct, though unintentional, has been *particularly* reprehensible, *i.e.* reckless, or motivated by malice or fraud" (emphasis added) or for "egregious conduct of an intentional or reckless nature."[8] If there is no evidence submitted to the

---

[6]Section 2365 reads, in pertinent part, as follows:

> If the Court, after hearing, finds in favor of the employee, the employee shall be restored to employment or to the position, privilege, right or other condition of employment denied by such action and shall be compensated for any loss of compensation and damages caused thereby, as well as for all costs and attorney's fees, as fixed by the Court, except that if the employee shall cease to be qualified to perform the duties of employment, the employee shall not be entitled to such restoration and compensation.

19 Del. C. § 2365.

[7]*Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 528 (Del. Super. 1987).

[8]*Id.* at 529.

Court to show the conduct meets the above high standard, it is not an issue for a trier of fact to determine.[9]

The plain language of Section 2365 does not support a claim for punitive damages. In addition, the Court also finds that the Plaintiff has failed to articulate any egregious conduct of an intentional or reckless manner with respect to the termination process or the Plaintiff's specific termination that would rise to the level required for punitive damages. Mr. Pekala claims DuPont fired him out of retaliation for his prolonged workman's compensation claim, but even accepting the Plaintiff's theory of the case, there is absolutely nothing to suggest that DuPont did so in a particularly reprehensible manner which would compel this Court to grant punitive damages to deter or punish DuPont. There is no dispute that DuPont was going through a downsizing process and at least one employee of the Plaintiff's group would be terminated. This litigation is simply to resolve a dispute about the process that led to the Plaintiff being selected as that person. There is nothing to reasonably suggest that the Defendant's conduct was "outrageous" or "egregious" or done with "evil motive" or even with "reckless indifference to the rights of others." While the Plaintiff is clearly upset by the Defendant's actions, aside from his own perception of hard feelings, there is nothing to suggest this was anything other than a business decision which the Plaintiff argues was inappropriately made. To allow a punitive damages claim to go to the jury would only expose the Defendant to damages for who they are, not the conduct they are accused of committing. Because there has been no evidence to warrant punitive damages, and because the language under Section 2365 does not enumerate punitive damages as a means of recovery, the motion to dismiss with respect to punitive damages is granted.

IV. Emotional Distress

The Defendant is also seeking dismissal of the Plaintiff's claim for emotional distress. To succeed on this claim, the Plaintiff must provide more than simply his testimony.[10] The Plaintiff must include support such as evidence of physical suffering or need of medical care or corroborating testimony from friends, family or experts for

---

[9] *Id.*

[10] *Mondzelewski v. Pathmark Stores, Inc.*, 2000 D.Del. LEXIS 520, at *64 (citing *Spence v. Board of Educ.*, 806 F.2d 1198, 1201 (3d Cir. 1986); *Bolden v. SEPTA*, 21 F.3d 29, 33 (3d Cir. 1994)).

the jury to conclude with a reasonable probability that the emotional distress was the result of the alleged wrongful act.[11] In addition, since there is no claim of physical harm in the complaint, the conduct causing emotional distress must also be established to be intentional and outrageous.[12] Outrageous conduct is considered conduct which "exceeds bounds of decency and is regarded as intolerable in a civilized community."[13]

Unfortunately, counsel for the Plaintiff has provided little assistance to the Court regarding this issue. He did not respond to the Defendant's motion in limine on this issue other than to indicate he objected to the motion because it was filed too late. Even after the Court corrected this misconception by indicating that the motion had been filed based upon the Court's discussion with counsel at the pretrial conference, no subsequent response to the motion has been filed. As such, the Court has very little to assist it in making a decision on this issue. The complaint, while written appropriately, is done so in general terms regarding this matter, and other than perhaps the Plaintiff's own self-serving comments made in discovery, there is nothing to either support this argument or to find that the conduct of the Defendant was particularly outrageous.

While the Court will assume that the Plaintiff may be able to find other witnesses to support his emotional distress claim, the Court has difficulty envisioning that a business decision, even if made with lack of candor or forthrightness, would ever reach the level of exceeding the bounds of decency that our civilized community considers to be intolerable. This comment is made in the context of earlier decisions of this Court, where when discussing what would reach the level of outrageousness that would justify liability for emotional distress, the Court stated:

---

[11] *Id.*

[12] *Brzoska v. Olson*, 668 A.2d 1355 (Del. 1995) (Negligent or reckless emotional distress requires some physical manifestation of the emotional harm caused.) (citing *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647 (Del. Super. Ct. 1984)); *Cummings v. Pinder*, 574 A.2d 843, 845 (Del. Super. Ct. 1990) (A claim of emotional distress may survive without evidence of a physical harm if the conduct was intentional and outrageous.) (citing Restatement of Torts 2d § 46(1)).

[13] *Thomas v. Harford Mut. Ins. Co.*, 2004 WL 1102362 (Del. Super. Ct.), at *3. (citations omitted)

> It is not enough that a Defendant acted with tortuous or criminal intent, intended to inflict emotional distress, or even that his conduct has been characterized by malice or a degree of aggravation that would entitle the plaintiff to punitive damages under another tort.[14]

When this is used as a guide, it is difficult to imagine that the Plaintiff will reach the threshold necessary to meet this claim.

However, since the Court must recognize that this issue is normally one left for the jury to decide, and the Court has not had the benefit of hearing all the evidence in this case, it will not dismiss this claim at this juncture in the litigation. The Plaintiff will have an opportunity to establish the conduct of the Defendant merits the level of outrageousness as defined in these cases. To ensure fairness and that the Defendant is not inappropriately prejudiced by this ruling, the Court will require that the Plaintiff not put before the jury any specific conduct that he asserts supports the emotional distress claim until the Court has ruled that he has met the outrageous threshold. In addition, this subject and the request for damages of this nature may not be referenced in the opening statement of counsel.

Counsel is reminded that the pretrial conference is set for April 21, 2006 and the trial is scheduled for May 8, 2006. The Court expects counsel to confer before the pretrial conference to limit the disputes that the Court will need to address.

Sincerely yours,

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

WCCjr:twp

cc: Aimee Bowers, Case Manager

[14] *Id.*