K&L UPDATE

Employment News

CURRENT ISSUES IN EMPLOYMENT LAW SPRING 2001

Court Describes Contours of Constructive Termination Doctrine

When an employer is hesitant to terminate an employee for fear of being sued, sometimes it will make the employee's life miserable with the hope that the employee will quit. But the fact that the employee quits doesn't always protect the employer. Courts have held that when the employer makes the situation bad enough, the employer will be deemed to have terminated the employee even though the employee quit. The result is called a "constructive termination" or "constructive discharge."

This concept was recently discussed in *Suarez v. Pueblo International, Inc., et al.*, a decision of the First Circuit Court of Appeals. Mr. Suarez was the president of a wholly owned subsidiary of Pueblo International, Inc. As a result of a restructuring, some of the employees he supervised were transferred to a different location, although still under his supervision, and his responsibilities were changed so that his principal responsibility was generating more business. After other changes, Mr. Suarez sued, claiming among other things that the parent company had constructively discharged him.

The Court held that Mr. Suarez had not been constructively discharged. The Court stated that although "[a]n employer cannot accomplish by indirection what the law prohibits it from doing directly," the former employee must prove that the working conditions were "so onerous, abusive, or

Continued on Page 2

Employer Entitled to Act on Unbiased Reasonable Belief About Employee's Performance

The United States Court of Appeals in Boston recently confirmed that in an employment discrimination case, an employer who terminates an employee for unsafe acts does not have to prove that the acts were in fact unsafe. Instead, the employer must convince the court that it truly ***believed*** that the acts were unsafe.

In *Griel v. Franklin Medical Center and William Gerrand*, the plaintiff nurse was hired by Franklin Medical Center while she was in a drug rehabilitation program. On 3 occasions, Griel engaged in conduct which led the hospital to believe that she was signing out an excessive amount of drugs for patients and that she was not maintaining records accurately. After a hearing, she was terminated for presenting an unacceptable risk to patients.

Griel claimed that as a recovering drug addict she was protected by the Americans with Disabilities Act. She alleged that she had not excessively signed out drugs, and she had experts who supported her. The hospital's medical personnel stated that they

Continued on Page 4

Contents

Court Describes Contours of Constructive Termination Doctrine 1

Employer Entitled to Act on Unbiased Reasonable Belief About Employee's Performance 1

Retirement and IRA Plans - Mandatory Distribution Rules Simplified 2

Heavy-handed Treatment of Minority Shareholder/Employee Very Costly 3

Inability to Work Overtime Not Necessarily a Disability 4

Kirkpatrick & Lockhart LLP

Retirement and IRA Plans - Mandatory Distribution Rules Simplified

The IRS has proposed new rules (which can be utilized for distributions beginning in 2001) which reduce the amounts that must be withdrawn from a qualified retirement plan or IRA by persons over age 70 ½.

Regardless of who your beneficiary may be in the event of your death, beginning with the year in which you attain age 70 ½ you must withdraw the following percentage of the balance in your plan or IRA at the beginning of such year:

Age Achieved During Year	Percentage of Account Balance that Must be Withdrawn
70	3.8168%
71	3.9526%
72	4.0984%
73	4.2553%
74	4.4053%
75	4.5872%
76	4.7847%
77	4.9751%
78	5.2083%
79	5.4348%

For example, in the year in which you attain age 72, you would have to withdraw 4.0984% of the balance in your plan or IRA at the beginning of that year. If you had $100,000 in your plan at the beginning of the year, you would have to withdraw only $4,098.40. This is considerably less than was the case under the prior rules.

For company plans that do not permit distributions equal to the minimum required by the IRS, employees who want to slow down their withdrawals may be well advised to have all of their company plan accumulation transferred to an IRA from which the employee can take discretionary withdrawals provided they meet the minimum amount required for the particular year.

This is a significant opportunity for employees who do not need to withdraw significant amounts each year from their retirement plan accumulations for living expenses.

STEPHEN E. MOORE
smoore@kl.com

Court Describes Contours

Continued from Page 1

unpleasant that *a reasonable person in the employee's position* would have felt compelled to resign." The test is what a *reasonable person* would have felt in the situation, not how the particular employee felt.

The Court recognized that many changes were imposed on Mr. Suarez. However, the parent company did not increase his workload to a level that exceeded "reasonable expectations," the parent made other changes as to Mr. Suarez which it made to everyone else at his level of the organization, and the parent did not alter the chain of command. In short, "a reduction in responsibility or a change in the way that a business is done, unaccompanied by diminution in salary or some other marked lessening of the quality of the working conditions, does not constitute a constructive discharge."

Employers should remember that the doctrine of constructive discharge applies only when it may have been unlawful to terminate the employee. So, if the employee is an at will employee and is not in a protected category (age, gender, etc.), the doctrine may not apply.

TRACY E. THOMAS
tthomas@kl.com

HENRY T. GOLDMAN, Editor

Kirkpatrick & Lockhart's Labor and Employment Group is dedicated to helping employers anticipate and cope with legal issues in a manner which contributes toward a productive work environment. Consistent with this goal, this newsletter will be published quarterly to provide information on current issues in employment law.

The Labor and Employment Group has experience in many aspects of employment law, including the myriad state and federal laws regulating employment relations, benefit issues, and labor relations. The Group also represents clients in litigation, including proceedings before administrative agencies and in state and federal courts.

This publication is for informational purposes only and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting with a lawyer.

© 2001 KIRKPATRICK & LOCKHART LLP. ALL RIGHTS RESERVED.

OUR CLIENTS ASK US

QUESTION: When we terminate or lay off an employee, we like to try to get a release. Do we have to give the employee any specific amount of time to decide whether to sign the release?

ANSWER: It depends on the age of the employee.

For employees under 40 years of age, you don't have to give the person any particular amount of time. However, bear in mind that you want to be sure that you have a release that stands up in court against a possible claim that the person was coerced into signing the release or acted under duress. Therefore, you should give the person a reasonable amount of time to decide whether to sign the release. Depending on the circumstances, that can be as little as a few days.

You should also be sure that you make clear to the person, in writing, what he will get if he doesn't sign the release and what he will get if he signs the release. For example, Massachusetts law does not require that an employer pay severance, so one of the additional things you could give the person if he signs the release is severance. Or it could be help with COBRA payments, or a good reference, or almost anything else of value.

If the person is over 40 years of age, the law requires that you give the person at least 21 days to decide whether to sign the release and then if she signs it she has 7 days to rescind her signature. There are a number of other requirements for a release of age claims to be valid and you should consult with your attorney about them.

HENRY T. GOLDMAN
hgoldman@kl.com

If you have any questions you would like addressed in this column, please let us know.

Heavy-handed Treatment of Minority Shareholder Employee Very Costly

Closely held corporations need to be particularly careful of their relations with minority shareholders/employees and the way they handle company trade secrets, or they may lose valuable rights they might otherwise have.

In the recent Massachusetts Superior Court case of *Alder Food Distributors v. Keating*, the company founder (and majority shareholder) and his son (the company's president and a minority shareholder) had a falling out over the son's management style, which led to the son's suspension. The father gave the son a list of "conditions" for his return to the company, which his son refused to accept. Instead, the son founded a competing company and successfully solicited important customers and employees to follow him. The company sued the son for breach of fiduciary duty and wrongful taking of trade secrets, and sought a preliminary injunction.

Finding that the father's "conditions" were "too harmful a means of achieving a legitimate business objective" and that the father had acted unreasonably by inflexibly insisting upon them, the Court ruled that the son had not violated his "fiduciary duties" and was entitled to found a competing firm. In so ruling, the Court used a balancing test—weighing whether the majority shareholder's legitimate business interest could have been achieved through an alternative course of action less harmful to the minority's interest. The majority shareholder's conduct failed that test. Moreover, the son was allowed to use his knowledge of the company's contracts, pricing, costs, profit information, employee compensation and the specifications of its customized computer system in his competitive efforts because the company had not adequately protected them as "confidential information". Only a few of the company's employees had been required to sign confidentiality agreements, the company had no procedures for identifying documents as confidential or directing employees how to deal with confidential information, and the information itself was widely known throughout the company.

The lessons from the case are clear. Have policies and procedures in place for the identification and handling of information the company considers "confidential". Follow and enforce those policies. Act reasonably towards minority shareholders. And don't let emotions override sound business judgments.

KEITH C. LONG
klong@kl.com

Quick Quiz YES OR NO

1. **Y / N** - Is "serious health condition" under the FMLA the same as "disability" under the ADA?
2. **Y / N** - Is COBRA coverage always for 18 months?
3. **Y / N** - The Fair Labor Standards Act requires that wage records be kept at least 5 years.

Inability to Work Overtime Not Necessarily a Disability

Is a person who can't work overtime disabled under the Americans with Disabilities Act? In *Kellogg v. Union Pacific Railroad*, the United States Court of Appeals for the Eighth Circuit answered that question in the negative, holding that the employee was not disabled solely by virtue of the fact that he couldn't work overtime.

Mr. Kellogg's management-level job required that he work 60 – 80 hours a week, but after an illness his doctors said that he could work only 40 hours a week. Union Pacific accommodated that limitation for a short while, but then told him that he could not continue in his position if he couldn't work overtime.

Under the ADA, an person must show that "he is physically or mentally impaired such that he is substantially limited in one or more major life activities." The Court assumed that working is a major life activity, so the issue was whether Mr. Kellogg's inability to work overtime was a significant barrier to employment for him across a broad range of jobs for which he was qualified in his geographical area.

The court concluded that there were many jobs available to Mr. Kellogg in his geographical area for which he was qualified and which did not require overtime. As a result, he was not disabled within the meaning of the ADA.

This decision is consistent with a decision by the First Circuit Court of Appeals, which covers Massachusetts, that inability to work overtime does not necessarily mean that an employee is disabled under the ADA. In *Tardie v. Rehabilitation Hospital of Rhode Island*, the First Circuit held that although Tardie's inability to work overtime disqualified her from the job of Director of Human Resources, there were many other employment opportunities available in her geographic area which did not require overtime.

When an employee claims disability under the ADA because of inability to work overtime, an employer should be careful to determine whether there are other jobs in the same geographic area for which the employee is qualified. If there are such jobs, the fact that the employee cannot work overtime does not by itself mean that he is disabled under the ADA. However, an employer should also be careful to analyze the employee's claim of disability under state law, since not all states follow the Federal definition of what is a disability.

SARAH C. KELLOGG
skellogg@kl.com

Employer Entitled

Continued from Page 1

believed that she had an excessive propensity to prescribe narcotics and that only rarely did other medical personnel violate the record keeping rules which she had violated.

The First Circuit upheld a finding in favor of the hospital without a trial. The court said that where the hospital reasonably believed that Griel had overprescribed, the fact that her experts came to a different conclusion was irrelevant. The hospital didn't have to prove that what Griel had done was in fact unsafe. The hospital had to prove that it ***believed*** that what she had done was unsafe. In addition, the hospital had to show that Griel was not treated differently than others who had engaged in similar acts, which the court said the hospital had proved.

This decision teaches that an employer observing what it believes to be misconduct or unsafe acts should conduct a careful investigation and, upon determining that there has been misconduct, should be sure that the discipline imposed is consistent with discipline imposed in similar situations. Rarely will a court require that an employer prove that the alleged acts were in fact unsafe or constituted misconduct so long as the employer had engaged in a careful and fair minded review of the facts and so long as the discipline was similar to discipline of others in similar situations.

HENRY T. GOLDMAN
hgoldman@kl.com

Quick Quiz ANSWERS

1. **NO** - The definitions are very different.
2. **NO** - For example, when a dependent child is no longer a dependent, the continuation period is 36 months. IRC §4980B(f)(2)(B)(i).
3. **NO** - FLSA regulations suggest at least 3 years (29 CFR §516).

For additional information about this issue or to discuss other legal issues, please consult with:

Boston	Henry T. Goldman	617.951.9156	hgoldman@kl.com
Harrisburg	Andrew H. Cline	717.231.4514	acline@kl.com
Los Angeles	Paul W. Sweeney, Jr.	310.552.5055	psweeney@kl.com
Miami	Carlos M. Sires	305.539.3336	csires@kl.com
Miami	Daniel A. Casey	305.539.3324	dcasey@kl.com
New York	Loren Schechter	212.536.4008	lschechter@kl.com
Pittsburgh	Hayes C. Stover	412.355.6476	hstover@kl.com
Pittsburgh	Stephen M. Olson	412.355.6496	solson@kl.com
San Francisco	Charles L. Thompson IV	415.249.1017	cthompson@kl.com
Washington	Lawrence C. Lanpher	202.778.9011	llanpher@kl.com

Kirkpatrick & Lockhart LLP
Challenge us.