CONSTRUCTIVE VOLUNTARY QUITTING?

03.05.2014
Employment Law Reporter, Ervin Cohen & Jessup LLP

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Kelly O. Scott

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Many employers are familiar with the concept of constructive wrongful termination, a legal theory invoked by plaintiffs who claim that they were forced to quit as a result of intolerable and illegal working conditions. But what about constructive voluntary quitting? Constructive voluntary quitting is a doctrine codified under California Code of Regulations as well as earlier cases which establish that an employee is deemed to have quit "by engaging in a voluntary act or course of conduct which leaves the employer no reasonable alternative but to discharge the employee and which the employee knew or reasonably should have known would result in his or her unemployment." Cal. Code Regs., Tit. 22, § 1256-1(f).

The doctrine of constructive voluntary quitting or leaving was recently addressed by the California Court of Appeal in the case of Stephanie Kelley vs. California Unemployment Insurance Appeals Board. Stephanie Kelley ("Kelley") went on a stress leave from her job as a marketing director for Merle Norman Cosmetics, Inc. ("Merle Norman") one month after she filed a claim with the Department of Fair Employment and Housing alleging that the company was retaliating against her for reporting ongoing sexual harassment. Following seven months of unpaid leave, Kelley, through her counsel, made several requests of Merle Norman regarding her return to work as well as the possible settlement of Kelley's sexual harassment claim. The requests included that Kelley be provided with: (1) a written job description; (2) a written statement of goals and objectives; (3) written confirmation of her job title, duties, pay and benefits; (4) information regarding the status of her earlier request for vacation during the upcoming Christmas holiday; and (5) confirmation that she would not be subjected to retaliation for her earlier complaints of sexual harassment. Following an email exchange that occurred between counsel for Kelley and counsel for Merle Norman, Kelley was ultimately terminated as a result of Merle Norman not agreeing to the conditions that Kelley had set for her return to work.

Following the termination, Kelley was denied unemployment benefits because the Employment Development Department ("EDD") believed Kelley had set conditions for her return to work that Merle Norman did not meet and that she voluntarily quit when she did not return to work at the end of her leave. On administrative appeal, the administrative law judge reversed the decision, finding that Merle Norman had fired Kelley for reasons that did not amount to misconduct that disqualified her from unemployment benefits. In an unusual move, the EDD rejected the administrative law judge's ruling, finding instead that Kelley had been more interested in pursuing a lawsuit against Merle Norman and demanded concessions which she had no right to receive. Kelley appealed the decision by filing a writ of administrative mandate action to the California Superior Court, which held that, while Kelley's counsel had engaged in posturing and had threatened civil action, the emails contained requests rather than ultimatums or conditions. Accordingly, Kelley had not placed Merle Norman in a position where its only reasonable alternative was to fire her.

The California Court of Appeal agreed and held that there were sufficient facts to support the trial court's findings that Kelley's requests were not conditions or ultimatums and that Merle Norman had a reasonable alternative to firing Kelley: it could have waited to see whether she reported to work after the company declined to provide the requested information. In addition, Merle Norman could have asked whether Kelley would report for work despite the company's refusal to supply the information. As the appellate court put it, "even if the emails amounted to some form of pre-litigation poker, Merle Norman could not simply declare itself the winner – it had to call and see whether Kelley was bluffing." Kelley was therefore entitled to receive unemployment benefits.

The *Kelley* decision serves not only to illustrate the doctrine of constructive voluntary quitting, but the dangers of misusing or misapplying the doctrine. Like its constructive wrongful termination counterpart, the doctrine of constructive voluntary quitting essentially requires the party invoking the doctrine, in this case the employer, to demonstrate that it had no other alternative than to terminate employment. Indeed, in connection with receiving unemployment benefits, the doctrine of constructive voluntary quitting requires the employer to overcome a rebuttable presumption against a finding of constructive quitting. This can only be done by an employer submitting substantial evidence that the employee took some action that prevented the employer from retaining the employee, or otherwise made some unequivocal demand as a condition to his or her continued employment that the employer had no obligation to meet and that the employee reasonably knew would result in termination. As the Kelley court noted, the doctrine would not apply when an employee merely engages the employer in a dialogue that includes "an irritating or ungracious" request.