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Employment Practices Liability

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Connecticut Supreme Court Clarifies Standard for Constructive Discharge

By Robin Kallor, Partner, Rose Kallor, LLP

Employees often base their claims of discrimination, retaliation, violation of public policy, whistleblower protection, or other workplace statutory claim on the termination of employment, claiming that the termination was the "adverse employment action" that violated the employee's rights. When the employee is not terminated, but rather resigns, an employee can use the resignation as an adverse employment action in the same manner. Recently, in *Karagozian v. USV Optical, Inc.,* the Connecticut Supreme Court clarified the standard for analyzing these constructive discharge cases. To plead a *prima facie* case of constructive discharge, a plaintiff must allege that (1) the employer intentionally created the complained of work atmosphere, (2) the work atmosphere was so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign, and (3) the plaintiff in fact resigned. In doing so, the Connecticut Supreme Court departed from lower courts' interpretation of a 1998 decision which required that employees demonstrate that the employer intended to force the employee to resign.

Factual Background: The plaintiff's complaint alleged that the plaintiff began working in an optical department operated by the defendant and located in a JCPenney Store in Trumbull. As a licensed optician manager, the plaintiff's role involved providing optometric assistant services to the doctor of optometry at the store. His specific duties included, but were not limited to, maintaining records, scheduling appointments, preparing patients for vision examinations, adjusting and repairing glasses, modifying contact lenses, measuring intraocular pressure of eyes using a glaucoma test, and measuring the axial length of eyes using ultrasound equipment. About three months into his employment, the plaintiff asked his supervisors that ''he not be required to perform such duties . . . .'' According to the plaintiff, he made this request on at least three separate occasions on the basis of his belief that these duties violated the public policy of the State of Connecticut.

As support for his belief that these duties violated the State's public policy, the plaintiff attached to his complaint copies of a declaratory ruling issued by the Board of Examiners for Optometrists on May 1, 2002, and a cease and desist consent order issued by the Board of Examiners for Optometrists and the Board of Examiners for Opticians in February, 2006. In the plaintiff's view, the declaratory ruling ''prohibits employees under the control of unlicensed third parties from performing services for licensed optometrists.'' The cease and desist consent order, the plaintiff alleged, provided that Walmart, Inc., had agreed not to permit licensed opticians to perform the duties of an optometric assistant or to perform services for optometrists by whom they were not employed. Additionally, the plaintiff alleged that his duties violated public policy, as set forth in General Statute § 31-130(i) ("No person shall engage in the business of procuring or offering to procure employees for persons seeking the services of employees or supplying employees to render services where a fee or other valuable thing is exacted, charged or received from the employer for procuring or assisting to procure or supplying such employees unless he registers with the Labor Commissioner") in that ''neither the defendant nor JCPenney had a staffing permit allowing either of them to provide staffing services to the doctor.'' The plaintiff's complaint alleged that the defendant refused the plaintiff's requests and failed to excuse him from these duties. As a result, the plaintiff claimed, he was compelled to resign his position. He then brought an action for constructive discharge.

Procedural History: The defendant moved to strike the plaintiff's corrected revised complaint on the ground that the allegations in the complaint could not, as a matter of law, satisfy the requirements of a constructive discharge claim. The trial court granted the defendant's motion to strike, relying on *Brittell v. Dept. of Correction,* 247 Conn. 148, 178, 717 A.2d 1254 (1998), for the proposition that a claim of constructive discharge requires a plaintiff to demonstrate that the employer **intended to force the employee to resign**. The trial court determined that the plaintiff had not only failed to allege this intent requirement in his complaint, but also failed to allege the second requirement of a constructive discharge claim—that his work conditions became so intolerable that a reasonable person in his shoes would have felt compelled to resign. Interpreting and applying *Brittell* in the same fashion as the trial court, the Appellate Court affirmed the trial court's judgment, concluding that there was ''no allegation in the complaint that reasonably [could] be construed to claim that the defendant *intended* to create conditions so intolerable that a reasonable person would be compelled to resign." The plaintiff appealed to the Connecticut Supreme Court.

Connecticut Supreme Court's Decision: To plead a *prima facie* case of constructive discharge, a plaintiff must allege that (1) the employer intentionally created the complained of work atmosphere, (2) the work atmosphere was so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign, and (3) the plaintiff in fact resigned. The Supreme Court reiterated that *Brittell* does not, as the Appellate Court ruled in several cases, require a plaintiff claiming constructive discharge to allege that the employer intended to force the employee to quit, but only to allege that the employer intended to create the *conditions* that the plaintiff claims compelled the employee to quit. The Supreme Court disagreed with the Appellate Court's interpretation of *Brittell*, although affirmed its judgment on the ground that the plaintiff failed to plead that the work atmosphere was so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. While the distinction appears subtle, the effect is not. Instead of the Appellate Court's interpretation, requiring that an employee plead and prove that the employer intended for the employee to resign, the Supreme Court requires only that an employer intentionally create the environment which was so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. The Supreme Court concluded that its holding is not only consistent with its ruling in *Brittell*, but also a recent United States Supreme Court decision, *Green v. Brennan,* –U.S.–, 136 S. Ct. 1769, 195 L. Ed. 2d 44 (2016).

In Practice: This loosening standard for employees reminds us of the importance of ensuring a positive workplace atmosphere for all employees. Employers must continue to be vigilant by reporting and responding to workplace behaviors that are unlawful or violate company policies. Employers should create anti-harassment, anti-discrimination policies with

appropriate complaint procedures, investigate workplace complaints promptly and thoroughly and take appropriate remedial action where necessary.

If you have any questions or concerns about compliance with federal or state law, Rose Kallor, LLP provides a full range of labor and employment counseling to private and public-sector employers.

Robin Kallor is a partner at Rose Kallor, LLP. Rose Kallor, LLP regularly represents and advises private and public sector employers on matters pertaining to the employer-employee relationship, including the selection process, discrimination and harassment related issues and frequently conducts neutral workplace investigations. If you have questions about this legal update, please contact us at 860-361-7999. If you wish to receive future updates on labor and employment related topics, please contact Jacqueline Smith, Marketing and Creative Design Associate at jsmith@ccm-ct.org.

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