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Weekly Employment Brief

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Court Sends Case To Jury To Determine Whether Employee's Refusal To Work With A Specific Supervisor Constituted A "Constructive Resignation"

The federal court of appeals for the Seventh Circuit recently reversed a grant of summary judgment to an employer, holding that whether an employee's refusal to work with a specific supervisor constituted a "constructive resignation" was a question for a jury. In *Bean v. Wisconsin Bell*, a black customer service representative was placed on a "performance team" coached by her supervisor because of unsatisfactory performance. As part of this process, Bean was required to make joint calls to customers with her supervisor, with whom she had a poor working relationship. Bean was suspended for refusing to make the joint calls without a union representative's listening in—a right not contained in Bean's union's collective bargaining agreement. Upon return from suspension, management explained to Bean that she was required to make the joint calls with the supervisor. Bean indicated she would not continue with the meeting until she consulted with her attorney. Despite management's repeated warnings that if she left the room without agreeing to do the calls the company would deem her to have resigned, Bean left anyway (although first saying that she was not resigning). Accordingly, the company declared her employment terminated because of resignation.

Bean sued the company for race discrimination in violation of Title VII. The company counterclaimed to recover $14,500 in relocation benefits it had given Bean pursuant to a contract which specified the benefits would be forfeited if she resigned within two years. On summary judgment, the trial court dismissed Bean's lawsuit and entered summary judgment for the company on its counterclaim. On appeal, the court affirmed the dismissal of Bean's race discrimination claim, because her insubordination was sufficient reason for the termination. On the counterclaim, however, the appellate court sent the case back for trial, holding that although a company might consider an employee to have "constructively resigned" if the employee engaged in conduct inconsistent with continuing her job, it was too close to call whether Bean's refusal to participate in the joint calls without a union representative's oversight rose to that level. The court recognized that Bean's actions may have left the company with no choice but to fire her, but decided it was a factual question for the jury to decide. Although not a complete victory for the employer, this case demonstrates that employers are not without legal options when an employee places unreasonable demands on the company.

Intervening Misconduct Dooms Employee's ADA Claim Based On Termination Shortly After Announcement Of AIDS

The federal court of appeals for the Seventh Circuit held that prior and subsequent misconduct, and not an employee's announcement he had AIDS, was the reason for his termination. In *Buie v. Quad/Graphics, Inc.*, a printing company was on the brink of terminating Anthony Buie for excessive absenteeism when Buie suddenly announced he had AIDS, which he claimed was the cause of his absenteeism. While the company determined that many of Buie's absences would be excused, 14 absences were

not excusable (including six "no-call, no-show" absences). The company presented Buie with a "last chance" agreement, which indicated that Buie could be terminated immediately for any future violations of company policies. Two weeks later, when Buie's supervisor reprimanded Buie for falling behind in his work, Buie yelled back that he would work how and when he pleased, which resulted in the two men (both black) exchanging racial epithets. During the company's investigation of the incident, one of Buie's colleagues supported the supervisor's version of events. Buie later got in that colleague's face, pointed at her and said "I'll get you, bitch," which Buie confirmed was a threat. The company terminated Buie the next day, and Buie subsequently was found guilty of disorderly conduct in a criminal prosecution related to the incident.

Buie nonetheless sued the company for, among other things, disability discrimination under the ADA. The appellate court affirmed the lower court's grant of summary judgment for the company. Despite the closeness in time between Buie's announcement he had AIDS and his termination, the court found that the unexcused, documented absenteeism and his intervening threat of workplace violence justified the termination decision. Significantly, the court noted, "An eleventh-hour declaration of disability does not insulate an unruly employee from the consequences of his misdeeds." This case demonstrates that a company that separates disability issues from performance issues and conducts timely investigations into misconduct will not have its hands tied by the fact of the employee's disability, but rather will be permitted to exercise their prerogative to discipline and terminate problem employees.

Sacramento Jury Awards $19 Million To Terminated Employee Who Was Harassed Because Of Body Odor

A jury in Sacramento recently awarded $19 million, including $15 million in punitive damages, to an employee who was harassed because of severe body odor that was a symptom of her panic attacks, and who was terminated for using vacation days to take time off for her illness. Charlene Roby, who worked at a McKesson Corporation distribution center in Sacramento, claimed she was extremely embarrassed on several occasions when she would arrive at work to find shampoos, deodorants and bath soaps on her desk, in apparent reference to her body odor problem that was associated with her medical condition. She also claimed her supervisor brought gifts and sweets into the office for her coworkers, but would exclude her. After Roby exhausted her allotted sick leave, she used four vacation days as sick days. As a result, however, Roby claimed she was asked to resign or be fired—she refused to resign and was terminated. Roby sued McKesson and her supervisor for violating the FMLA, the California Family Medical Rights Act, and the Fair Employment and Housing Act. Of the $4 million the jury awarded Roby, $2.7 million was for claimed emotional distress, and $500,000 was awarded against her supervisor personally. McKesson has indicated it would appeal the verdict. While this large verdict may not survive appeal, it serves as a reminder to employers that they should be sensitive to employee's medical conditions and that individuals can be personally liable for participating in inappropriate behavior.