ERVIN COHEN & JESSUP LLP
It's not a common practice.®

ECJ

March 2014

Reporter

Employment Law

by Kelly O. Scott, Esq.

Constructive Voluntary Quitting?

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 2014 Seminars at ECJ

Thursday, April 24, 2014

Hiring Mistakes You're Making and How to Stop Them *by Karina B. Sterman, Esq. - 8:30 a.m. - 9:30 a.m.*

Sexual Harassment Prevention Training *by Kelly O. Scott, Esq. - 10:00 a.m. - 12:00 p.m.*

Please contact Brandi Franzman at bfranzman@ecjlaw.com for registration information.

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.

If you have any questions regarding this bulletin, please contact Kelly O. Scott, Esq., Editor of this publication and Head of ECJ's Employment Law Department, at (310) 281-6348 or kscott@ecjlaw.com. If one of your colleagues would like to be a part of the Employment Law Reporter mailing list, or if you would like to receive copies electronically, please contact Brandi Franzman at (310) 281-6328 or bfranzman@ecjlaw.com.

Hiring Mistakes You're Making and How to Stop Them

Presented by *Karina B. Sterman, Esq.*

- **Registration Time:** 8:15 a.m.
- **Seminar Time:** 8:30 a.m. to 9:30 a.m. (continental breakfast provided)
- **Cost:** $35 per person

Thursday, April 24, 2014 at Ervin Cohen & Jessup LLP

Do you buy shoes without checking the fit and comfort level? Of course not. Yet, as an employer, you probably hire employees without even realizing the mistakes you are making in the process. No wonder, then, that so many new employees don't work out, are the wrong fit for the organization, and end up having so many HR problems. Join us in this interactive seminar to learn the best legal and practical practices in hiring that can be used to make your new hires fit in and be successful.

Register by Monday, April 21st. Contact Brandi Franzman at bfranzman@ecjlaw.com or (310) 281-6328 for registration information. Space is limited. Parking validation will be provided.

This seminar qualifies for 1.0 hours of Continuing Professional Education credit for Accountants.

What attendees are saying . . .

"Karina Sterman was articulate, confident in her subject matter and, at the same time, humorous when appropriate . . . an unbeatable combo. Excellent seminar. Very educational. I would strongly recommend it to others."

Karina B. Sterman, Esq. is a Partner in ECJ's Employment Law Department. Ms. Sterman has substantial expertise in advising employers on California and federal employment law, as well as representing employers in employment litigation and administrative matters. A published author and frequent guest speaker on employment law matters, Ms. Sterman maintains a Martindale-Hubbell peer review rating of AV Preeminent. Ms. Sterman has been recognized by her peers for many years as a Rising Star and most recently as a Super Lawyer in the field of Employment Law, as published by Los Angeles magazine.

Sexual Harassment Prevention Training

Presented by *Kelly O. Scott, Esq.*

- **Registration Time:** 9:45 a.m.
- **Seminar Time:** 10:00 a.m. to 12:00 p.m. (continental breakfast provided)
- **Cost:** $35 per person

Thursday, April 24, 2014 at Ervin Cohen & Jessup LLP

You know the drill: all managers and supervisors who are employed in California are required by law to complete at least two hours of interactive sexual harassment training. The training must take place every two years and within six months of promotion or hire. This workshop will not only meet these educational requirements, but exceed them. You will learn situation-specific techniques regarding the prevention and correction of sexual harassment under both federal and state law. In addition, you will walk away with a practical understanding of the remedies available to victims of sexual harassment as well as the defenses employers have at their disposal. Presented in a lively, entertaining and engaging format, what you learn in this workshop will stay with you for the next two years… and beyond.

Register by Monday, April 21st. Contact Brandi Franzman at bfranzman@ecjlaw.com or (310) 281-6328 for registration information. Space is limited. Parking validation will be provided.

This seminar qualifies for 2.0 hours of Continuing Professional Education credit for Accountants.

What attendees are saying . . .

"Kelly Scott was fabulous. His good-natured presentation was both informative and entertaining. His presentation style enabled the attendees to participate and I believe retain the presentation materials."

Kelly O. Scott, Esq. heads ECJ's Employment Law Department and has over 25 years of experience in wage and hour, wrongful termination, harassment, discrimination, retaliation, class action, disability, medical leave, investigation, compliance training and litigation matters. Mr. Scott was named Best Employment Lawyer in Southern California for 2010 by the 5W Report, and was selected for inclusion in Southern California Super Lawyers®, published in Los Angeles magazine, in 2014 for the tenth year. Mr. Scott is a published author and frequent speaker on employment law matters and maintains a Martindale-Hubbell peer review rating of AV Preeminent.