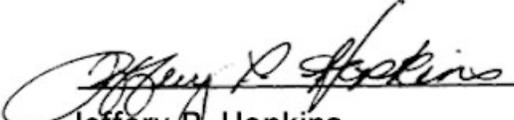


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: May 04, 2007


Jeffery D. Hopkins
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re :
:
:
SIGHT RESOURCE : Case No. 04-14987
CORPORATION, ET AL. : Chapter 11
: Judge Hopkins
Debtors :

**MEMORANDUM ON ORDER OVERRULING DEBTORS'
OBJECTION TO CLAIM OF CAROLYN S. KUNKLER**

Presently before the Court is the Debtors' objection (Doc. 620) to the claim of Carolyn S. Kunkler (Claim 92). The issue presented is whether Ms. Kunkler, former president and chief executive officer ("CEO") of Sight Resource Corporation ("SRC"), is entitled to severance pay under her employment contract with SRC. To answer this question the Court must determine if SRC terminated Ms. Kunkler "without cause."¹

¹ Section 7(b) of Ms. Kunkler's employment contract provides: "Your employment with the Company may be terminated Without Cause by the Company at any time upon written notice to you, provided, however, that if the Company terminates your employment Without Cause, the Company shall continue to pay your Base Salary . . . for the two (2) year period immediately following the termination of your employment."

(continued...)

SRC contends that it did not terminate Ms. Kunkler because she chose to resign in lieu of being terminated. Although Ms. Kunkler tendered a written resignation, the inquiry does not end there. Resignation may constitute a termination by an employer if the employee was constructively discharged.

DOCTRINE OF CONSTRUCTIVE DISCHARGE

The doctrine of constructive discharge has been summarized as follows:

Terminating an employee triggers potentially significant legal consequences for an employer. Accordingly, employers may, on occasion, attempt an "end run" around these consequences by engaging in conduct calculated to induce an employee to quit. The doctrine of constructive discharge recognizes that some resignations are coerced and that employers should not be permitted to escape liability simply because they forced an employee to resign. The doctrine disregards form and recognizes that some resignations, in substance, are actually terminations.

Courts today recognize two varieties of constructive dismissal. The first, and currently most frequently encountered, variety appears in the context of hostile work environment discrimination claims. . . .

The second variety of constructive discharge . . . involves the demotion of executive employees who have a position-specific contract. . . . [W]hen an employee with a position-specific employment contract resigns after the employer forces the employee to choose among demotion, termination, or resignation, the employer remains liable for breach of contract unless the facts clearly demonstrate a fairly bargained for release of the employer.

Walker v. City of Cookeville, No. M2002-01441-COA-R3-CV, 2003 WL 21918625, at *7 (Tenn. Ct. App. Aug. 12, 2003) (citations omitted) (analyzed by Sixth Circuit in *Barnes v. Bradley County Memorial Hospital*, No. 04-6317, 2006 WL 20551 (6th Cir. Jan. 4, 2006)).

¹ (...continued)

Section 7(c) provides the same severance benefits if Ms. Kunkler terminated her employment with "Good Reason." However, this subsection only applies if Ms. Kunkler provided written notice which "states the specific provision(s) of this Agreement upon which the termination is based." Ms. Kunkler did not provide written notice citing specific provisions of the contract.

Ms. Kunkler's employment agreement is governed by Ohio law² which recognizes the doctrine of constructive discharge. *See Mauzy v. Kelly Servs., Inc.*, 75 Ohio St. 3d 578 (1996).³ Under Ohio law, "the test for determining whether an employee was constructively discharged is whether the employer's actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign." *See Id.* at paragraph 4 of the syllabus. "In applying this test, courts seek to determine whether the cumulative effect of the employer's actions would make a reasonable person believe that termination was imminent. They recognize that there is no sound reason to compel an employee to struggle with the inevitable simply to attain the 'discharge' label." *Id.* at 589.

FACTS

SRC hired Ms. Kunkler as its president and CEO in 2001. SRC filed a chapter 11 petition on June 24, 2004. During the weeks preceding the filing, the SRC board of directors concluded that SRC needed a leader with more experience than Ms. Kunkler in the areas of accounting, financial management and reorganization. At that time, board member Christian Callsen knew of an available candidate, Dale Fuller, that possessed these skills. The board authorized Mr. Callsen to speak to Mr. Fuller about the possibility of becoming SRC's CEO. Days before the bankruptcy filing, the board reached an agreement with Mr. Fuller to become SRC's CEO.

Mr. Callsen described the board's subsequent actions toward Ms. Kunkler as follows:

Q: And once [the board reached an agreement with Mr. Fuller], what did the board then decide to do with respect to Ms. Kunkler's situation?

² Section 19 of the employment contract provides: "This Agreement shall be construed under and be governed in all respects by the law of the State of Ohio."

³ *Mauzy* was an age discrimination action where the Supreme Court had to determine whether Phyllis Mauzy, who was terminated when she did not report to work after being transferred, was "discharged" by her employer. The Supreme Court applied the doctrine of constructive discharge to make this determination. The relevance of the doctrine was explained as follows:

[W]hen a plaintiff chooses termination in lieu of transfer, her decision is not construed as an actual discharge. Instead, she is required to show as a part of her prima facie case that her choice to be terminated was involuntary or coerced. . . .

Since Mauzy in effect chose termination over transfer, she must show that her decision was involuntary or, as the doctrine is more familiarly known, that she was constructively discharged.

Mauzy 75 Ohio St. 3d at 588.

A: . . . It was the board's desire to try to make the circumstances as least unpleasant as possible for Ms. Kunkler.

Q: And so how did the board decide to approach Ms. Kunkler about her situation?

A: The decision was made that it should be up to her to decide how she wanted to handle a circumstance whereby she would leave the firm, the company.

Q: And what options did you as a member of the board believe were available to her?

A: The options were that she could resign, she could be fired, or she could be fired for cause.

. . .

Q: So given those concerns and those options, what did the board decide to communicate to Ms. Kunkler again?

A: The board communicated to . . . our own attorneys and asked them to communicate to Ms. Kunkler's attorneys that, in fact, the decision was up to her.

The board directed attorney David Daniels to contact Ms. Kunkler's attorney, John Fedders, with this information.

According to the testimony of Mr. Fedders, Mr. Daniels telephoned Mr. Fedders on Thursday, June 24, 2004, and advised that the board: (1) hired a new CEO; (2) wanted Ms. Kunkler's resignation before the start of business on Monday, June 28, 2004; and (3) would terminate Ms. Kunkler if she did not resign. The Court found Mr. Fedders to be a very impressive witness. His recollection of the events surrounding his involvement, although more than two years removed, was detailed and precise. He left no doubt about the credibility of his testimony.

Ms. Kunkler tendered her resignation on June 26, 2004. The board never decided whether "cause" existed to terminate Ms. Kunkler "with cause."

ANALYSIS

I. Termination By Ms. Kunkler or SRC?

As of June 24, 2004, SRC had replaced Ms. Kunkler and gave her an ultimatum: resign or be terminated. Based upon these facts alone, the Court concludes that a reasonable person in Ms. Kunkler's circumstances would have believed that termination was imminent and felt compelled to resign. Accordingly, under the *Mauzy* standard, SRC constructively discharged Ms. Kunkler.

Although the analysis need not go any further than *Mauzy*, the *Walker* and *Barnes* decisions are instructive.⁴

A. *Walker*

In *Walker*, defendant hospital hired plaintiff Walker and executed an employment contract providing Ms. Walker with severance benefits if terminated "without cause." Following a change in management, the hospital notified Ms. Walker that: (1) she had been demoted to another position; (2) her old position was being abolished; (3) a new position had been created; (4) someone had been hired to fill the new position; (5) she would report to the new hire; and (6) she was expected to teach the new hire everything she knew. Thereafter, Ms. Walker left her employment with no severance benefits. In a breach of contract action to recover the benefits, the appellate court held that the hospital constructively discharged Ms. Walker "without cause."

The hospital seeks to circumvent its obligation to pay severance benefits . . . by arguing that it did not terminate Ms. Walker. It asserts that Ms. Walker voluntarily terminated her contract . . . and, therefore, that she is not entitled to severance benefits We disagree. Like the trial court, we find that Ms. Walker did not terminate her contract and employment "without cause." Rather, we find that the hospital constructively discharged Ms. Walker. She resigned only after the hospital terminated her contract without cause by demoting her

[T]he hospital decided to demote Ms. Walker to Director of Quality Management, to reclassify her former position, and to hire someone to replace her. . . . Thus, she had the choice of either accepting the demotion or resigning. . . .

[N]ot only were Ms. Walker's duties and rank significantly diminished, but Mr. Lambert hired her replacement and instructed Ms. Walker to teach her everything she knew.

⁴ Both *Walker* and *Barnes* were decided under Tennessee law. Nevertheless, they are instructive given their similarity to the facts of this case and the absence of a similar fact-pattern under Ohio law.

Walker, 2003 WL 21918625, at *6 to *9 (citing *Miller v. Winshall*, 400 N.E. 2d 1306, 1310 (Mass. Ct. App. 1980) for the proposition that "[g]iving an employee's job to someone else amounts to a constructive discharge").

If Ms. Walker was constructively discharged, then certainly Ms. Kunkler was constructively discharged. SRC hired Mr. Fuller to assume Ms. Kunkler's position, not a reclassified position. Moreover, SRC did not even give Ms. Kunkler the option of demotion.

B. *Barnes*

As noted earlier, the Sixth Circuit analyzed *Walker* in *Barnes*. In *Barnes*, a hospital administrator, John Barnes, claimed he was entitled to severance pay under his employment agreement, despite his resignation, because he was constructively discharged "without cause." After several meetings between various constituencies in the medical community, it became abundantly clear to Barnes and the hospital's board that Barnes was very unpopular with many of the physicians serving the hospital. Thereafter, the chairman of the board, Herbert Lackey, scheduled an April 23, 2003 meeting with Barnes and board secretary John Powell. In the meantime, Barnes drafted a letter of resignation in the event it was requested. The meeting transpired as follows:

Lackey and Powell entered [Barnes'] office without any of their customary warmth or familiarity. Lackey made various statements such as: "this is the most difficult thing I've ever had to do"; "I've never had to do anything like this before"; and "[t]his is so onerous to me that I haven't been able to sleep for three nights." Lackey also told Barnes that he had gone to the Board attorney two days before "to see if I could resign from the Board rather than doing what I have to do." Lackey said the Board attorney "told me I could not resign, but I had to carry out the desires of the Board." Lackey then said, "[o]ne reason why this is so hard is because I like you so much." Barnes felt he was faced with words which had only one logical meaning, and he produced his letter of resignation. Lackey and Powell accepted Barnes' letter without objection or question, and without any indication of surprise.

Barnes, 2006 WL 20551 at *2.

Affirming summary judgment in favor of the hospital, the Sixth Circuit proceeded to distinguish these facts from those presented in *Walker*.

Unlike the facts in *Walker*, there is no evidence that [the hospital] forced Barnes to make any choice or do anything against his will. Barnes was not deprived of his office or stripped of any of his job duties. Neither Lackey nor Powell exerted pressure on Barnes at the April 23, 2003 meeting, nor did they inform him that he had been terminated or was being asked to resign. . . .

. . . Perhaps the Board intended to terminate Barnes or induce him to resign, but neither of these things actually happened prior to Barnes' tendering his resignation.

The district court properly concluded that Barnes was not constructively terminated.

Barnes, 2006 WL 20551 at *6.

This Court believes that *Barnes* is distinguishable from the facts of the present case. Whereas Mr. Barnes resigned before Mr. Lackey could "carry out the desires of the Board," Ms. Kunkler resigned after Mr. Daniels communicated the SRC board's ultimatum to her attorney. Whereas Mr. Barnes "was not deprived of his office or stripped of any of his job duties" prior to his resignation, Ms. Kunkler had been replaced prior to her resignation. Whereas Mr. Barnes resigned before the board exerted any pressure or asked him to resign, Ms. Kunkler resigned after the SRC board gave her the choice to resign or be terminated within four days.

In light of the foregoing, the Court concludes that this case bears a greater resemblance to *Walker* than to *Barnes*. Consequently, the Court finds that SRC terminated Ms. Kunkler by constructive discharge.

II. Termination With or Without Cause?

It is undisputed that the SRC board never decided whether "cause" existed to terminate Ms. Kunkler.⁵ As such, SRC's termination of Ms. Kunkler was "without cause."

CONCLUSION

For the foregoing reasons, the Court concludes that SRC terminated Ms. Kunkler "without cause." Consequently, the Debtors' objection (Doc. 620) to the claim of Carolyn S. Kunkler (Claim 92) will be **OVERRULED**. On account of her severance claim, Ms. Kunkler will share in the pro rata distribution to general unsecured creditors holding allowed claims.

⁵ Section 7(a) of the employment contract provides: "A determination that Cause exists shall be made only by the Board of Directors at a duly conducted meeting of a majority of the Board of Directors." Mr. Callsen testified that the board never made such a determination.

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