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## FOR YOUR INFORMATION

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News For School and Municipal Clients

### **Employee Retirement or Prohibited Discharge?**

The United States Court of Appeals for the Seventh Circuit (which includes Wisconsin, Illinois and Indiana) recently rejected the claim of a retired teacher who argued that her retirement was really a constructive discharge because she decided to retire after being notified in January 2003 that the superintendent would recommend nonrenewal of her contract after the 2002-03 school year. The doctrine of constructive discharge holds that an employee's reasonable decision to resign because of unendurable working conditions is the legal equivalent of a discharge. See *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342, 2351, (2004); *Strozinsky v School District of Brown Deer*, 2000 WI 97, 237 Wis.2d 19, 614 N.W.2d 443. To establish a constructive discharge, a plaintiff must show that the working conditions became so intolerable that the employee's resignation qualified as a fitting response. Whether working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign is an objective inquiry.

In *Cigan v. Chippewa Falls School District*, 388 F.3d 331 (7<sup>th</sup> Cir. 2004), the teacher did not contend that her working conditions in January 2003 were unendurable. In fact, she did not resign at that time but, instead, gave six months notice that she would retire and left at the end of the school year. In her claim against the district, she argued, however, that her working conditions were irrelevant to the question of whether she was constructively discharged because the employer had communicated its intent to not renew her contract. Given this "lurking" prospect of termination, she argued

that her resignation should be regarded as a constructive discharge.

The court distinguished Cigan's situation from prior decisions, which held that when a discharge is imminent, the employee's resignation would not necessarily preclude an employment discrimination suit. Unlike the employees in these prior cases, however, "Cigan was not turned out of her office or given tasks demeaning to her education and accomplishments," the court stated. Cigan's argument boiled down to the contention that "a notice of intent to commence a process leading to discharge may be treated, at the employee's election, as a completed discharge, even if the employer does not undermine the employee's position, perquisites, or dignity in the interim." The court found this argument incompatible with the constructive discharge doctrine. The court commented: "Even if, as Cigan contends, the superintendent's earlier personnel recommendations had carried the day with the Board of Education, how could the court know the probability that *this* recommendation would do so? How, indeed, could a judge or jury be confident that the superintendent would not have changed his mind once Cigan responded to the initial proposal?" In the end, the court refused to adopt a legal rule that employees may leave at the first sign of dissatisfaction and then sue for damages. "[T]he prospect of being fired at the conclusion of an extended process," the court concluded, "is not itself a constructive discharge."

The court pointed out that public schools must offer notice and an opportunity to be heard as a

matter of constitutional law. The only way to know how matters will turn out is to allow the process to run its course. “It would be odd,” the court noted, “for courts to say something like: ‘Well, it’s all a sham, so we’ll treat the commencement of the process as a final decision to discharge.’”

Cigan’s claim was brought under the Americans with Disabilities Act (ADA), which she claimed the School District violated by failing to accommodate her ailments and thereby forcing her to retire. She allegedly suffered from arthritis, bursitis, degenerating spinal discs, scoliosis and spondylitis. Cigan had begun to take more time off and come to school late, allegedly because of her physical condition. In addition, she needed other teachers to cover her duties while she rested. The School District took the position that Cigan either had become “a slacker” or had accumulated so many physical problems that she could no longer do the job even with accommodations; in other words, that she was not “a qualified person with a disability,” as defined by the ADA, and could not seek relief under the Act. While not conceding that Cigan had a disability, the School District nevertheless provided some accommodation for Cigan, including providing a specially designed chair to use when she took the breaks her physician recommended.

As a prerequisite for obtaining relief under the ADA, the employee must establish that she was disabled or, in the alternative, that the employer regarded her as disabled. Cigan did not attempt to prove that she was disabled under the ADA. She did not contend that her conditions were so bad that they impaired her ability to perform one

or more major life activities. She agreed that she could carry out the normal tasks of life.

She argued instead that the School District regarded her as disabled, because the District made some effort at accommodation and, therefore, must have believed that she had an impairment that substantially limited one or more major life activities. The court rejected Cigan’s theory, commenting: “Thus the chain of inferences becomes circular: an employer must provide reasonable accommodations to a disabled worker . . . ; provision of *any* accommodation shows that the employer regards the worker as disabled; the worker therefore *is* (statutorily) disabled; so the worker must receive the full set of accommodations appropriate to a genuinely disabled person, not just the tentative or incomplete steps the employer took voluntarily.”

According to the court, Cigan’s argument was based on the false premise that an employer offers accommodation only if it thinks that the employee suffers from a substantial limitation of a major life activity. Her premise is false, however, because “[d]ecent managers help employees cope with declining health without knowing or caring whether they fit the definition in some federal statute.” In short, Cigan provided no evidence tending to show that the principal at her school “knew, supposed, or cared anything about the effect of her conditions on ‘major life activities’ when providing breaks, chairs, and other assistance to continue teaching.” She had, therefore, failed to prove that her employer regarded her as disabled and thus she had no claim under the ADA.

*If you have any questions regarding this topic, please call the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.*

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