EMPLOYMENT LAW- MISCONDUCT- THE CASE OF THE $2 MILLON "MOONING"

By: Joette S. Doran

The issue of whether an employee was terminated for "misconduct" so as to avoid a $2 million contingent payment was addressed in *Selch v. Columbia Management*, 977 N.E.2d 287, 2012 IL App 111434 (1st Dist. 2012). In *Selch*, the plaintiff brought suit alleging breach of contract and tortious interference with contract when he was denied a $2 million contingent payment under a non-qualified profit-sharing plan as a result of his termination for misconduct of "mooning" his immediate supervisor and another corporate executive in protest of the employer's dismissal of a friend and work colleague.

Selch was hired by the company as an investment analyst. Pursuant to a letter agreement and employment agreement he would lose his right to receive contingent payments and severance if he was terminated for "cause" or for "good reason." "Cause" was defined as a "conviction of a felony, engaging in misconduct that injures the Company, performing your duties with gross negligence or any material breach of your fiduciary duties as an employee of the Company."

The facts of plaintiff's termination as follows: On April 27, 2005, plaintiff was informed that a friend and colleague, Chris O'Dea, had been terminated because he refused to accept a lower wage in his new position. Plaintiff additionally found out that Roger Sayler, Columbia's chief operating officer and Charles McQuaid, chief investment officer in Chicago and plaintiff's direct boss had terminated O'Dea earlier that day. In response, plaintiff testified that he was very upset and wanted to tell Sayler and McQuaid how he and the rest of the team felt about O'Dea's termination. After confirming that he did not have a noncompete agreement with the company, plaintiff proceeded to unbuckle his pants, pull them down, and "moon" Sayler and McQuaid. Afterwards, Sayler and McQuaid testified that plaintiff pulled up his pants and stated that he hoped Sayler would never come back to the Chicago office.

As a result of the "mooning" the plaintiff was issued a Formal Warning letter. Plaintiff did not bargain for or negotiate the terms of the warning; he simply signed the Formal Warning. Days after the Formal Warning Letter was issued, the company CEO, Keith Banks returned from vacation and decided that based on Selch's behavior, he should be terminated which resulted in plaintiff's loss of the 2 million dollar contingent payment which he would have been vested a few months after his termination.

On appeal, the court addressed whether summary judgment was proper because plaintiff was justly terminated for cause and the Formal Warning was not a contract. The parties disagreed as to: the definition of "cause" in the employment agreement; whether an injury was caused by plaintiff's conduct; and whether the evidence established the requisite "cause" for termination. In deciding the issue, the court looked to the language of the plaintiff's employment agreements, company policies and to the definition of misconduct as provided by

the Illinois Unemployment Insurance Act. The Act defines a violation of this standard of conduct, or "misconduct," as "the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees." The court found that plaintiff violated the rules and regulations in the handbook by behaving in a disruptive, unruly, and abusive manner -- "mooning" and informing Sayler that he was not welcome in that office and that plaintiff hoped he would never return to the Chicago office -- which also may be considered obscene behavior. Therefore, the court concluded that according to the Agreement, plaintiff violated his duties as an employee of the company.

With regard to plaintiff's claim of breach of contract he argued that a question of material fact remains as to whether defendants breached a contractual agreement with plaintiff when they terminated him for cause after issuing him a Formal Warning. The court found that that the Formal Warning, did not have such specific and mandatory language constituting an offer. The court found that at no point did the Formal Warning outline a specific course of action for dealing with potential disruptive, unruly, or abusive behavior in the future; it only stated that if there was any future violation of the company's standards in any aspect of plaintiff's job, he would be subject to further disciplinary action, up to and including termination. Furthermore, at no point did the letter state that it was a contract; to the contrary, it was explicitly called a warning and not a contract." Accordingly, the court upheld summary judgment for the defendant.

Overall, while the plaintiff did not economically harm the company by his "mooning" the court found that he behaved in a disruptive, unruly and abusive matter which constituted misconduct resulting in denial of the $2M dollar contingent payment under the agreement.

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