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RCBA NewsBrief

Volume 5

May 2010

COMMERCIAL LITIGATION ISSUES OF INTEREST

*Submitted by Paul Savad, Esq., Chair, Commercial and Corporate Law Committee;
Joseph Churgin, Esq., and Susan Cooper, Esq., of SAVAD CHURGIN, Attorneys at Law*

Your client, the operator of a nursery school, fired the director of education for poor performance and for repeatedly leaving work, due to illness, without notifying anyone before leaving. The director, who suffered from abdominal pain due to chemotherapy treatments for cancer, was given accommodations by the nursery school for her health issues, as required by law. Although the director had been warned on numerous prior occasions to notify someone before leaving, she sued your client after discharge, claiming that she was illegally terminated because of her disability. Will your client's motion for summary judgment to dismiss the discharged employee's complaint be successful?

The answer is no.

In *Candiotti v. Little Lamb Preschool*, 4/6/10 N.Y.L.J. 27 (col. 1) (Sup. Ct. Richmond Co.), Elizabeth Candiotti was employed by Little Lamb Preschool in May of 2000. She was the Director of Education in 2007, when she was fired.

In November of 2005, she was diagnosed with breast cancer, which is a health impairment and disability as defined by the New York City Human Rights Law (similar to New York State's Human Rights Law). Accordingly, the school gave Candiotti accommodations for her illness, as required by law.

On multiple occasions, Candiotti left school, due to pain from irritable bowel syndrome, which may have been a result of chemotherapy. She did not notify anyone that she was leaving, and received numerous verbal warnings that she must notify the school when she was leaving early. She also received verbal warnings of her poor performance evaluations, and received two written performance warnings in January and February of 2007 for her inappropriate handling of teachers and other matters.

On February 27, 2007, Candiotti again left school without notifying anyone that she was leaving. Her employment was terminated for her poor performance and for her repeated failures to notify anyone of her early departures.

Candiotti sued Little Lamb Preschool, alleging that her termination constituted unlawful discrimination due to her cancer. Although she conceded that the employer had given her accommodations for her illness, she claimed that reasonable accommodation included allowing her to leave without notification. She claimed that her performance was excellent.

The Court noted that in a wrongful termination claim, the initial burden is on the plaintiff to establish that the adverse decision was motivated in some capacity by an impermissible reason, citing *Nelson v. HSBC Bank*, 41 A.D. 3d 445 (2d Dept. 2007). To ultimately prevail, the plaintiff must prove: (1) that she is a member of a class protected by the statute; (2) that she was actively or constructively discharged; (3) that she was qualified to hold the position from which she was terminated and (4) that the discharge occurred under circumstances giving rise to an inference of discrimination, quoting *Balsamo v. Savin, Corp.*, 61 A.D. 3d 622, 623 (2d Dept. 2009). The court held that Candiotti had made a prima facie showing of these elements.

The burden then shifted to the employer to establish that the termination was based on legitimate non-discriminatory reasons, citing *Alvarez v. Prospect Hosp.*, 68 N.Y. 2d 320, 324 (1986).

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CLE Calendar
Automated Attorney
Check-in

We welcome your articles.

****All articles submitted will be reviewed by the Executive Committee for approval****

In support of its submission, Preschool provided the two warning letters as well as testimony regarding verbal warnings given to Candiotti concerning her poor performance and her leaving early without notification. The Court found that Preschool provided ample evidence that the termination was based on performance-based issues, not on her cancer disability.

Now the burden shifted back to the plaintiff to prove that the defendants alleged reasons were merely a pretext for discrimination. Here the Court found issues of fact that barred summary judgment. The plaintiff claimed that her performance was excellent and that a reasonable accommodation to her disability included the ability to leave without notification. These were both issues of fact for a jury to decide.

The lesson?

Advise your business owner clients that although discrimination claims are hard to defeat by motion, chances improve if employers carefully document employees unsatisfactory performances as they occur over periods of time. This practice avoids having to rely on verbal testimony and writings first made just before terminations.

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Writing Tip of the Month

by Susan Cooper, Esq.

Use commas carefully.

There are those who say that the notorious failure of attorneys to use proper punctuation is intended to allow wiggle room by creating ambiguity.

Hogwash. It is usually just carelessness, sometimes with dreadful consequences, as in the Canadian case of Rogers v. Aliant, known as “the million dollar comma” case.

The agreement provided that it “shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party.”

The second comma, the one before “unless”, led the court to allow Aliant to terminate the contract in the first five years, even though that was neither the understanding nor the intent of the parties.

Why? Because paired commas are traditionally used to set off “interrupting” words, phrases or clauses. The pair of commas surrounding the “successive five year terms” provision interrupted the first and last clauses, making the termination clause apply to the first five years as well.

The misplaced comma cost Rogers over \$2 million, until an appellate court reversed the decision, based on the French language version of the contract, without the second comma, consistent with the intended meaning.

Don’t trust the grammar corrections in your word processing program. They are wrong more often than they are right. Buy yourself a copy *The Elements of Style* by Strunk and White, and consult it often. It costs under \$10.

Susan Cooper, Esq., has provided legal research and writing services to the Rockland Bar for over 25 years. She can be reached at SusanCooperEsq@gmail.com.

Michael Zall

Attorney

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Family Law

In the world of child support are you responsible for what you sow?

By William P. Warren, F.C.J.

This story began with the hiring of an au pair in 1989 and to this day, we do not know how it will end. When H.M. was hired in 1989 she began as an au pair for E.T. E.T. was married with a husband and children and was attending school to become a professional. After some time working as an au pair, the relationship between H.M. and E.T. blossomed into a sexual relationship and it continued for about five years. Over time they jointly arranged for E.T. to become pregnant via a sperm donor. In fact, in the process of attempting to conceive a child, E.T. traveled to sperm banks with H.M., worked jointly with H.M. to select genetic characteristics of the child, assisted H.M. by inserting vials of sperm into her and eventually, after several attempts, H.M. became pregnant and gave birth to a male child in September of 1994.

Unfortunately, as with so many cases which find themselves in the Family Court, several months after the birth of the child, E.T. decided that she no longer wanted a relationship with H.M., nor did she desire to have any relationship with the child who had been born to H.M. Notwithstanding that together the parties had actively participated in bringing into the world this child, E.T. determined that it was not her responsibility to provide support. She gave H.M. a small sum of money and essentially left her to support the child.

Many years later, H.M. determined that she wanted E.T. to be responsible for the support of the child claiming that she was unable to provide adequate support on her own. A proceeding was commenced in the Family Court seeking child support. H.M. and E.T. were never married (since they were of the same sex they never could marry in New York) and E.T. had never adopted the child. What basis, if any, was there for H.M. to seek child support against a non-biological, non-adoptive, non-step-parent of the child?

In 2006, the New York State Court of Appeals had decided the *Matter of Shondel J. v. Mark V.*, 7 NY3d 337. In *Shondel*, in a Family Court Act Article 5 proceeding it was alleged that the respondent was the father of the child and an Order of Filiation and support was sought. In fact, *Mark V.* was not the biological father and was excluded by DNA Testing. Nonetheless, when the proceeding got to the Court of Appeals, that Court allowed the application of the Doctrine of Equitable Estoppel to estop *Mark V.* from denying parentage under facts where there was no biological relationship between the person sought to be held responsible and the child and even where that individual did not have any substantial ongoing relationship with the child. Relying to a great degree on the principles announced in *Matter of Shondel*, the Family Court, when determining the case brought by H.M., found that the Doctrine of Equitable Estoppel was applicable to the facts of its case and held that “the Court of Appeals decision in *Shondel* mandates that it is not in the best interest of children for couples to enter into relationships and bring children into the world, only to abandon all responsibility for that child.”

When the case of H.M v E.T. was appealed and heard in the Appellate Division Second Department a reversal occurred with three Justices in the majority and a vigorous dissent by the two Justice minority. The majority concluded that because the Family Court was a court of limited jurisdiction - and since the unambiguous language the Family Court Act Article 5 indicates that proceedings there are only for resolving a controversy of a male's fatherhood of a child - the Family Court did not have jurisdiction to adjudicate the issue. The majority noted that although the Family Court lacked subject matter jurisdiction to entertain an application such as H.M.'s, she was not left without remedy since under the New York Constitution, Article VI, Section 19(e), the Family Court may transfer to the Supreme Court this type of proceeding.

Continued on Page 5.....

In the dissent, two Justices of the Appellate Division reviewed Article 5 of the Family Court Act and found that within that statute there were multiple uses of gender-neutral terms such as “parent,” “party,” “individual” and others. They also noted that where statutes were susceptible of two constructions, courts will adopt that which avoids injustice, hardship or other objectionable results. Then they concluded that jurisdiction did lie with the Family Court.

Once having jumped the hurdle of jurisdiction, the dissent went on to argue that since it is clear that a person of the opposite sex, relative to a birth parent, can be deemed a parent by estoppel even where there is no biological connection to the child, there is no justification for not holding that, under identical circumstances, a person of the same sex, relative to the birth parent, cannot also be deemed a parent by estoppel for the purpose of providing support for the child.

The decision of the Family Court was argued in the Court of Appeals in February of 2010. As of the date of this writing, no decision has been issued. The New York Law Journal reported in its April 7, 2010 edition that the Court of Appeals has held over until its next session *H.M. v. E.T.* The article stated that the Court usually hands down rulings in the sessions succeeding the one in which it heard oral arguments. It also noted that the need to carry over matters is generally interpreted by observers as a sign the Judges are having difficulty resolving close cases among themselves. We will have to wait and see how that court comes to grips with this intriguing issue, one of many, that are surfacing as reproductive science has expanded how children are conceived and as our modern society continues to see an evolution in how families are structured.

H.M v E. T. Addendum

After the article was written, on May 4, 2010, the New York State Court of Appeals issued its opinion. In a 4-3 decision the Ct. of Appeals reversed the decision of the Appellate Division, Second Department and held that the Family Court has subject matter jurisdiction to determine a support petition brought by a biological parent seeking child support from a former same sex partner. On the same date it decided the Matter of Debra H, a case involving a visitation petition brought by a same sex partner and in it re-affirmed its decision of Alison D v. Virginia M., 77NY 2d 651, which had held that a non biological, non adoptive party had no standing to seek visitation with a child. The reasoning of the Court of Appeals in these two cases will be the subject of a follow up article in a future edition.

LAW DAY 2010

On Friday, April 30, 2010, the Lawyers and Judiciary of Rockland County celebrated LAW DAY, a day in which the legal profession reaffirms their loyalty to the Judiciary System and to the United States of America. This years' theme was Law in the 21st Century". Stephen Younger, Esq., delivered a powerful Law Day Message followed by our guest speaker Herald Price Fahringer, Esq., who spoke about modern technology and the law. The Suffern Select Choir under the direction of Deborah Phillips sang beautiful renditions of the Star Spangled Banner, America the Beautiful and This Land is Your Land. The Mock Trial Award was given to Nyack High School and Patricia Zippilli, Commissioner of Jurors was awarded the Liberty Bell Award. Thanks to Alden Wolfe, Esq., and Sonia Crannage, Esq., co-chairpersons of the Law Day Committee and all who were in attendance to make Law Day 2010 a success.

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CLE CALENDAR

Tuesday, May 25, 2010

CLE: Mediation and Arbitration

Time: 6:00 p.m.– 9:00 p.m. (Registration @ 5:30 p.m.) *Light Dinner*

Level: Transitional/Non-Transitional

Cost: \$75.00 in advance; \$85 at the door; \$95 non-members
\$30 paralegals and students

Place: **Good Samaritan Hospital Auditorium, Suffern**

Credits: 3 (2.5 Professional Practice; .5 Ethics)

Wednesday, June 2, 2010

CLE: Town Attorney Update

Time: 12:00 p.m.– 2:00 p.m. (Registration @ 11:30 a.m.) *Light Lunch*

Level: Transitional/Non-Transitional

Cost: \$50.00 in advance; \$75 at the door; \$85 non-members
\$20 paralegals and students

Place: **Ramapo Town Hall, 237 Route 59, Suffern**

Credits: 2 (1.5 Professional Practice; .5 Ethics)

Dear Family Law Practitioner:

I am pleased to announce that, a new Automated Attorney Check-in will be available for attorneys appearing in Westchester County Family Court. The purpose of this system is to aid in the reduction of time that litigants, agency personnel, and attorneys wait in the courthouse for their cases to be called. The use of this system is mandatory for attorneys for children; all other attorneys are strongly encouraged to use it.

By knowing in advance when attorneys are available, the call clerks will be able to call the cases before the Judges based on attorneys availability.

Attorneys can check-in by computer, starting at 5:00 p.m. the day before a scheduled appearance up and continuing up to 9:30 a.m. the day of the calendar appearance. Check-in is available through the Internet and can be done from a desktop, laptop, Blackberry or from an iPhone. Access is also available from 9:00 a.m. until 9:30 a.m. from the "Do-It-Yourself" terminal in the courthouse.

Having an electronic check-in system will alleviate the need for court staff to check in attorneys or physically look for attorneys scheduled to be on the calendar. However, if after checking-in an attorney encounters an unanticipated problem (*e.g.*, traffic), the attorney must contact the court clerk in order to provide that updated information.

By having this information, the part clerks will be able to print to reports on the calendar day (Part Report and Time Report) which shows each attorney who has checked in for the part. These reports allow the Judge/Clerk to know the location and availability of the attorneys throughout the business day.

This system is presently being used by Kings County. The system will go "live" in all three Westchester Family locations (White Plains, New Rochelle, and Yonkers), as well as in the Bronx and in New York County, within the next few days. Your comments, concerns and suggestions are welcome and may be sent by e-mail to: 9thJDAdministration@nycourts.gov. For more information, including instructions, frequently asked questions please visit the 9th JD Website <http://www.nycourts.gov/familycourtcheckin/>. These sites will have the information as to the precise start date.

Very Truly Yours,

Alan D. Scheinkman
Administrative Judge
Ninth Judicial District