

LABOR & EMPLOYMENT REPORT

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MN Court Breaks News & Troubling Ground in Defining "Disability"

If allowed to stand, a recent decision of the Minnesota Court of Appeals could put Minnesota at odds with the U.S. Supreme Court, and all of the other states, in deciding when an individual is disabled. Minnesotans are often proud of being individualists and not following the crowd but this is one time when we might be better off being one of the sheep instead of the shepherd.

This decision also offers a good reminder on how to avoid liability for defamation when firing an employee - just remember everything the employer did in this situation and do the opposite!

Question: What is the difference between a request and a directive?

The employee in this case, Gerri Kuechle,

was a long time sufferer from panic disorder and agoraphobia, which caused her to be fearful of leaving home and of traveling. These fears could certainly impact a number of jobs but perhaps none more so than the job Kuechle held - home care nurse, where she would have to travel every day from one client location to another. Fortunately, the symptoms of these conditions were largely under control for a number of years until 1996 when they resurfaced. Kuechle sought help from a number of medical experts, and was given a prescription for medication to control the symptoms. However, she was worried about becoming addicted to the medication so she never took it. Instead, she developed a regimen for acclimating herself to the outside world by taking Fridays off and forcing herself to go to public places during the day, when the crowds were thinner.

For a while, the Company granted Kuechle's request for Fridays off but then rescinded the accommodation, telling her that she either had to work full time or simply be on call. Kuechle persisted in seeking a more flexible schedule, offering a physician's letter in support, but she was consistently rebuffed. She therefore decided to file a disability discrimination charge alleging she was unlawfully denied accommodation of her disability.

Just three weeks later, there was an incident where the father of one of the Company's clients (a disabled five-year-old) called in to say that he needed his son's care provider to meet the boy at the school bus, but he could not reach the provider. Another care provider was dispatched to meet the bus, taking care of the immediate need. Thereafter, Kuechle's supervisor left the office, asking Kuechle "if she would be around for a few minutes and if so, could she ask the original care provider to call the father if she calls in." Kuechle remained in the office for a full 20 minutes but never heard from the missing care provider before she also left the office.

That afternoon, Company representatives met and decided, without ever asking Kuechle for her version of the facts, to terminate her employment. They sent her a letter stating that she was terminated for disobeying a direct order to stay until the care provider called, which amounted to abandoning a vulnerable client. The letter further stated that they had no choice but to report the incident to the Minnesota Board of Nursing (although apparently they never actually made the report).

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Answer: About \$125,000.00, according to the jury

As Kuechle undertook a search for new employment, she assumed that she had been reported to the Board of Nursing and that any prospective employer would find out about the incident. She therefore decided to raise the issue first in her interviews so that she could offer a defense. Kuechle then sued for defamation, disability discrimination and reprisal, winning almost \$125,000.00 in damages and attorney's fees.

The Court of Appeals first addressed the defamation claims, noting at the outset that the Company's defense that the statements were true was a losing proposition. Although Kuechle was charged with leaving the office without attending to the needs of the client, the facts readily showed that she was never directed to remain in the office. Explaining the difference between a request for a favor and a supervisory directive, the judges quickly moved on from this defense.

The Court also had little sympathy for the company's claim that the supposed defamatory statements were privileged because they were made in the course of an investigation. The court noted that this privilege only exists if the investigation was conducted in good faith, a fact that did not appear to be present. Indeed, the judges pointed to the employer never asked Kuechle for her position in the matter, and they ignored the supervisor's acknowledgment that she never did issue a direct order. As such, the court could not find that the investigation was conducted in good faith, and ruled that the privilege did not exist in this case.

Finally, the court addressed the claim that the employer never repeated the defamatory remarks by noting the existence of the theory of compelled self-publication. Since Kuechle was told that the matter would be communicated to the Board of Nursing, she had reason to believe that a prospective employer would learn of the facts of the separation. Therefore, she had no choice but to defend her professional

reputation by disclosing the termination and seeking to explain it.

The retaliation claim was quickly affirmed, with the court noting that the timing of the termination, together with the knowledge of the previously-filed charges and the inadequacy of the investigation, could certainly support a finding of reprisal.

Is Disability a Choice?

The Court's conclusions in the defamation and reprisal claims are not surprising - the employer presented a text-book example of how not to terminate someone. However, the disability discrimination decision is most alarming. The employer contended that Kuechle was not a "qualified disabled person" because she would not have suffered from the symptoms of agoraphobia if she had taken the medication prescribed to her. They pointed to the decision of the U.S. Supreme Court in *Sutton v. United Airlines*, where it was established that the existence of a disability must be evaluated with reference to medication, corrective devices and other correcting measures that mitigate the individual's impairment. The company argued that Kuechle's was correctable and taking the medication would prevent the condition from limiting any of her major life activities. Therefore, she could not be considered to have a disability under the Minnesota Human Rights Act.

The Court of Appeals judges viewed the *Sutton* decision differently, however, claiming that the existence of a disability is not determined by what "might," "could," or "would" mitigate the effect of a disabling condition. Instead, the court has to look at the individual's present capabilities to determine if actual limitations exist. They observed that since the *Sutton* decision cautioned against speculating on a person's condition absent mitigating devices, they should not speculate about what the employee's condition might be with the mitigating devices.

Consequently, the Court affirmed the finding that Kuechle was disabled since, despite the efforts that she made to overcome her

condition, it still limited her substantially in one or more of her major life activities.

Flawed Analysis

The court's reasoning here just does not hold up. Their comments about not speculating about the individual's condition misapply the lessons of *Sutton*. In that case, the Supreme Court made it clear that the ADA was intended to be narrower in scope than had previously been decided. They made it clear (at least to most of us) that physical and mental conditions were to be considered disabilities only if they truly limited the person's ability to perform major life functions. Where glasses, hearing aids, pacemakers, etc. could improve a person's impairment to a point where there was no real limitation, or where medication could correct the disorder that limited a life activity, no disability should be found.

The decision of the Court of Appeals, on the other hand, seems to put the employee in complete control of whether the law protects them. If the employee does not want to use the mitigating device, they can assert that they are disabled and entitled to protection and accommodation under the Human Rights Act, even though others with exactly the same medical condition would not be protected if they made the choice to use corrective or mitigating measures. The result is that our state's discrimination law would not cover those people who struggle and work overcome life's afflictions, yet would assist and even reward those who simply wait for the employer to refashion their jobs to their liking.

This is a decision that simply cries out for appeal to our Minnesota Supreme Court - we'll alert you to any developments in that area. *Kuechle v. Life's Companion*
P.C.A., No. C9-02-233,
November 19, 2002
(Minn.Ct.App.).



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At-Will Employee Can't Sue the Company, but can Sue the Bad Guy

We all know quite well that without a separate legal right to invoke, a truly at-will employee can not successfully sue the employer when the employment is terminated. This can be frustrating to people who live by the motto of “sue first, ask questions later” and need to haul somebody into court whenever their lives take an unpleasant turn. In this case, the terminated employee had no claims against her employer but that didn't stop her from suing. She just turned her guns toward another target - the fellow who provided the information that led the employer to fire her.

I don't like you, you don't like me

Jana Metge was the Executive Director of the Central Neighborhood Improvement Association, a Minneapolis neighborhood improvement association. Early in the year 2000, Metge became suspicious that Basim Sabri, an occasional member of the Board of Directors and Chair of the Business Development Committee, was using his leadership role in the organization to obtain monetary benefits for his private real estate business. Sabri took offense at the accusations and publicly vowed to procure Metge's termination. Thereafter, Sabri began to publish accusations of Metge's own misconduct in directing the affairs of the agency. According to Metge, Sabri also formed a slate of candidates to run for the Board of Directors, then procured a large number of disinterested but eligible voters from the neighborhood to vote his slate of candidates in. Once elected, the new Board of Directors immediately voted to terminate Metge's employment with the agency.

You got me fired so you are going to pay

Despite being an at-will employee, Metge sued both the agency and Sabri. The claim against Sabri was for tortious interference with contract, a recognized claim in Minnesota that seeks damages against anyone who intentionally and wrongfully influences another party to break a contract with a third person. In this instance, Metge

If the employer's termination of the contract could not be deemed unlawful, how could a third party be held liable for causing the contract to be terminated?

alleged that Sabri wrongfully interfered with the employment contract that she had with the Agency and that doing so was malicious and intentional. Sabri argued, among other things, that Metge was an at-will employee and that since her oral contract of employment could be terminated for any reason or no reason at all, it was impossible to hold anyone legally responsible for its' termination. In other words, if the employer's termination of the contract could not be deemed unlawful, how could a third party be held liable for causing the contract to be terminated?

The Minnesota Court of Appeals sided with Metge, noting that a previous Minnesota decision (Nordling v. Northern State Power Co.), allowed such a claim against a

supervisor on the theory that even if the contract was terminable at will, the employer had demonstrated no intention to terminate until being wrongfully influenced to do so by the supervisor. In this case, Sabri “meddled” with the contract between the agency and Metge in a manner that the court found to be wrongful, and he should have to compensate Metge for the damage that he caused, namely the lost wages arising from the contract that he wrongfully caused to end.

What's next?

Interestingly, the court specifically refused to address a question that they said remained open after the Nordling decision - whether a non-supervisory employee could be held liable for procuring the termination of a co-worker's at-will contract. Can a co-worker be sued for reporting a co-worker's policy violation that eventually results in termination? How about if the employee contributes information that leads the employer to terminate for poor performance? We'll have to wait for answers to these puzzlers.



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Join Us For A Complimentary Client Seminar

Consider attending one of our upcoming seminars, with timely discussions on a variety of legal topics. The seminar presenters include Felhaber attorneys who have expertise in the seminar subject matter. The following seminars have been scheduled for 2003. Please contact Karen Dyck, Marketing Director, at kdyck@felhaber.com if you would like to receive a seminar invitation. Please state your name and address with the name of the seminar you would like to attend. You may also log on to www.felhaber.com, which will offer on-line registration approximately three weeks ahead of the seminar date.

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2003 SEMINAR DATES:

Commercial Real Estate Leasing - January 23

Workers Compensation - April 10

Association Management - April 24

Multi-Employer Benefit Seminar - April 29

Labor & Employment Law - October 10

Estate Planner - Date to be determined

Builder/Developer - Date to be determined

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What's new at the EEOC?

We thought you would appreciate some interesting items coming from the Equal Employment Opportunity Commission (EEOC) recently.

New Regulations:

The EEOC has proposed new regulations for health care benefits under the Age Discrimination in Employment Act (ADEA). They say these new regulations are intended to insure that employers are not discouraged by the ADEA from offering health benefits to retirees. The new regulations, among other things, rescind EEOC's previously asserted position that the offer of lesser benefits to retirees who have reached Medicare eligibility was illegal under the Act. This is in response to a federal court decision in Erie County, Pennsylvania that found the lower offer to Medicare recipients to be illegal.

We will update you when further action is taken on these proposed regulations.

New Guidance:

The EEOC has issued a new and rather lengthy National Origin Discrimination Guidance that offers an excellent glimpse of how that agency intends to pursue such claims. Citing the rapid growth in our country's immigrant population, EEOC anticipates a surge in national origin discrimination cases, and offers a number of insights into how such claims are analyzed. Some of the interesting tidbits offered in this document are the recognition of "perceived national origin" claims (allegations that an employee was treated adversely because the employer perceived that he was part of a national origin group that is different from what he really is); "Accent discrimination" (since linguistic characteristics are a component of national origin); and "Citizen-related Discrimination.

The Guidance is very informative and can be accessed easily at the EEOC web site, www.eeoc.gov.

EEOC Web Site:

Speaking of the EEOC web site, we suggest that you give it a look. they have redesigned it to be more user friendly (When is the last time EEOC did anything user friendly???) and helpful, even to employers. In addition to making it simple to find the law, regulations and policy guidelines, the site announces new cases and policy initiatives, and offers two excellent "Quick Start" information resources - one for employees and one for employers. Click on to www.eeoc.gov.

Mediation:

EEOC has recently been funded to permit a growth in their mediation efforts for resolving cases. If you have recently received a charge, you probably have noticed that the EEOC is aggressively pushing mediation as a form of dispute resolution. The local Minneapolis office has assigned one of their senior personnel to do nothing but mediate charges where the parties have agreed to the process, and they say so far that the success rate of mediation has really helped in reducing the case loads for investigation. Lower case loads mean faster investigations and quicker results.

Of course, quicker does not necessarily mean better. We will have to wait and see whether reduced case loads will help bring about an increase in the quality of those investigations, too.

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(pictured on page 4)

Firm Founder Thomas M. Vogt Retires after 40 years

Tom Vogt will be retiring next month after more than 40 years of practice with Felhaber, Larson, Fenlon & Vogt. In that time, Tom has earned the distinction of being recognized as one of the country's premier labor lawyers. He has served on the faculty of the University of Minnesota Law School and has chaired the Labor Law Section of the Minnesota Bar Association. He also has been a role model, mentor and valued colleague of every labor and employment lawyer at the Firm.

We wish Tom the best and we thank him for his incalculable contribution to the Felhaber Law Firm.



Welcome Aboard!

Felhaber, Larson, Fenlon and Vogt, PA, is pleased to announce that Catherine L. Sjoberg has joined our firm. Please join us in welcoming her to Felhaber.

Catherine L. Sjoberg

Ms. Sjoberg graduated from the University of St. Thomas in 1993 with her B.A. cum laude in Business Administration. She received her J.D. from the University of Denver College of Law in 1999, graduating in the Top 10 percent of her class. Ms. Sjoberg has several years of commercial real estate and corporate law experience, the focus of her practice.



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The *Labor & Employment Report* is an update on legal developments. It is not intended to be legal advice and should not be relied on without consulting counsel.

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