The Case I Lost

Doctors love to brag about the patients they save and the incredible miracle of new medical devices and drugs, no matter what the cost or whose pockets are being lined. Accountants love to brag about how much money they save their clients, regardless of how dicey some of those gimmicks may be. Lawyers love to brag about how they brought justice to the world, regardless of how ineffective that might be.

The truth is, of course, that nobody wins every time, and success in life is by no means assured, regardless of how just the cause.

If you asked ten people on the street whether they thought they could be fired from their jobs for refusing to give their employer private, confidential financial information about their own business, at least nine out of those 10 people would say "no." There are certain issues that from a gut perspective alone, seem so obvious that no further analysis is needed.

Then comes along, this case that I lost. My client and her husband are two of the nicest, fine and upstanding people you would want to meet. It is no fault of theirs that they are related to me through marriage.

Lisa Kelchner was employed at Sycamore Manor for 19 years, not in the financial department or in any security position, but rather as a recreation person. In February of 2001, she and other employees of Sycamore's parent, Presbyterian Homes, Inc., were told to sign an authorization permitting the employer to obtain "investigative consumer reports," which could include personal interviews with neighbors, friends, or associates. When Lisa refused to sign the authorization, she was effectively fired because her hours were reduced to zero. On June 12, 2001, Ms. Kelchner was told to sign a so-called "revised" authorization to obtain "consumer reports" relating to employees' credit standing, character, general reputation, personal characteristics, or mode of living. Kelchner was again warned that if she did not sign the authorization, her employment would be considered "abandoned."

Lisa Kelchner stood on her principles, and of course was fired.

Why did the employer want all this personal financial information and confidential information about its employees' general reputation, personal characteristics or mode of living? The justification was that at some time in the future, the employer may want to investigate fraud or some other nefarious activity that could arise in the future.

The dispute arose under the Fair Credit Reporting Act, which states that personal financial information about an employee could only be obtained if an authorization is given. The

question as to whether a person can be fired for exercising their rights was decided by the United States Court of Appeals for the Third Circuit, the second highest court in the land. The Court answered the question in the affirmative.

In a footnote, the court noted that under state law, employers violate the public policy of the Commonwealth of Pennsylvania by discharging employees for exercising legal rights. Public policy can be expressed in federal law.

Ultimately, therefore, the court had to hold that there is nothing wrong with firing somebody for exercising their legal rights, because in this case the legal rights were unimportant. The court said "Kelchner is right that Congress implicitly recognized employees' privacy interest in avoiding procurement of their credit reports for invalid purposes." The court went on to state that an employer's ability to "investigate allegations pertaining to an employee would be substantially impaired if it had to wait until the investigation was underway before it could obtain authorization from her." Of course, there was no investigation underway, there was no reason to investigate the employee in question, and there was no reason to believe that an investigation would ever be undertaken of Lisa Kelchner. The employer simply wanted to have the authorizations tucked away in its file drawer in case at some future time it decided that an intrusive search of the employee's financial and other information would be of interest.

The court concluded by finding that "we see nothing in the statute that implies…a limit on an employer's ability to obtain blanket authorization from an employee, at least in the context of an at-will employment relationship." What this means is that in Pennsylvania, an employee has no rights unless they have a collective bargaining agreement containing a "good cause" ground for dismissal or unless they have some sort of Civil Service protection. In the absence of either one of those protections, there must be some specific law that says you cannot fire somebody for reasons such as race, color, creed, nationality or gender.

The court never even addressed the fact that there is an inconsistency between requiring an authorization before an employer can get an employee's personal, confidential financial information, and then permitting the employer to fire the person for exercising their right not to give that authorization.

Not long ago I asked a lawyer who works for the legislature what the biggest issue was that legislators are hearing about these days. The answer I was given was that people today are most concerned about privacy issues.

Isn't it odd that at a time when people are most concerned about privacy issues, the courts are trampling all over them?

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