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TERMINATION WITHOUT CAUSE?: WRITTEN NOTICE REQUIREMENT SAVES EMPLOYER SEVERANCE PAY

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When an executive resigns in anticipation of being terminated without cause, is that a voluntary termination or a termination without cause? The answer in a recent court case was that the executive's resignation was just that, a resignation. It was not, under the terms of the executive's employment agreement, a termination by the employer because the employer had not provided the executive with the written notice required under the agreement for a termination without cause. As a result, the executive, by resigning before being involuntarily terminated, lost his entitlement to severance benefits. *Barnes v. Bradley County Memorial Hospital*, 2006 WL 20551 (6th Cir. 2006)(unpublished).

Circumstances of the Termination. The lawsuit was brought by the administrator of a hospital following the hospital's refusal to pay severance amounts that were due under the administrator's employment agreement in the event of a termination "without cause." The administrator had, according to his account, been embattled prior to his resignation. He had come under considerable criticism from the hospital's physicians and, it appeared, the hospital's board of trustees was actively considering terminating his employment. In particular, a special meeting of the hospital's medical staff had been called to discuss the administrator's leadership, after which the chief of the medical staff had talked to each member of the hospital's board to advise them of the medical staff's "feeling [of] no-confidence in the administration." About a week later, the board met to consider and approve the hospital's liability insurance, but after resolving that question and after the administrator left the meeting, the board continued to meet for another 45 minutes or so. According to the administrator, this was the only time the board had met without the administrator in attendance. Three days later, the chairman of the board contacted the administrator's assistant to schedule a meeting with the administrator. This was unusual because typically the chairman would call the administrator directly to schedule a meeting, rather than working through the administrator's assistant.

From these circumstances, the administrator concluded that the board was going to ask for his resignation. The administrator, therefore, drafted a letter of resignation in case it was requested at his meeting with the chairman, which was to be held the next day.

The administrator did, in fact, meet with the chairman of the board the next day, as well as with the secretary of the board. According to the administrator's description of the meeting, which the court took to be accurate for purposes of ruling on the employer's motion for summary judgment, the chairman and secretary of the board entered the administrator's office without any of their customary warmth or familiarity. Further,

"The employer prevailed. . . because the employment agreement included a written notice requirement for termination without cause."

> [The Chairman] made various statements such as: "this is the most difficult thing I've ever had to do"; "I've never had to do anything like this before"; and "[t]his is so onerous to me that I haven't been able to sleep for three nights." [The Chairman] also told [the administrator] that he had gone to the Board attorney two days before "to see if I could resign from the Board rather than doing what I have to do" [The Chairman] said the Board attorney "told me I could not resign, but I had to carry out the desires of the Board." [The Chairman] then said, "[o]ne reason why this is so hard is because I like you so much."

The administrator said he believed these statements had only one logical meaning, and he therefore produced his letter of resignation. The chairman and secretary of the board accepted the administrator's letter without objection or question, and without any indication of surprise. The chairman told the administrator that "this" was not the unanimous decision of the board, but that it was a "majority decision."

Claim for Severance Pay. The administrator argued that he was entitled to severance benefits payable under his employment agreement upon termination without cause. There is no indication in the court's opinion that the hospital argued that had it terminated the administrator that termination would have been for cause. Instead, the hospital argued that it had not, in fact, terminated the administrator at all. The administrator had simply resigned.

The hospital prevailed because the employment agreement under which severance benefits were to be paid provided that employment could be terminated by the hospital without cause by giving to the employee notice of termination without cause. The agreement required that the termination date be set forth in the notice, and that the termination date be at least 30 days from the date the notice was received by the employee. Importantly, the agreement provided that the notice must be in writing.

The court concluded that because there was no written notice of termination from the board, the administrator could not have been terminated without cause within the meaning of the employment agreement. As a result, the administrator was not entitled to severance benefits.

Lesson. The court, in its opinion, assumed that the facts asserted by the administrator were true. It is, of course, possible that the facts recited in the court's opinion could not be proved. Nevertheless, when reading the court's opinion, one is inclined to conclude that the hospital's board had decided to terminate the administrator (and, presumably, without cause). The employer prevailed, though, because the employment agreement included a written notice requirement for termination without cause. The case, therefore, teaches the value of including in employment and compensation agreements a requirement that an employer give an executive written notice of any termination of a type entitling the executive to severance or other special compensation. The inclusion of such a requirement should reduce the chance an employer's actions will be misunderstood as a termination entitling an executive to compensation when that was not, in fact, the intention.

Perhaps notably, the court did not designate the decision for official publication. It is possible other courts faced with similar facts would ignore the agreement's written notification requirement, instead concluding that the executive was terminated without cause under a constructive discharge theory. The inclusion of a written notice requirement would, nonetheless, seem to offer at least some protection for employers concerned about disputes over whether they have taken action in connection with an executive's termination that entitles the executive to severance or other special compensation.

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