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## Former Employee Accused Of Misconduct Could Not State A Claim For Constructive Discharge Where He Chose To Retire And Retain His Health Benefits Rather Than Face Possible Termination

In *Knappenberger v. City of Phoenix*, (--- F.3d ---, C.A.9 (Ariz.), May 28, 2009), the United States Court of Appeals for the Ninth Circuit considered whether a police commander who was being investigated for allegedly making sexually suggestive comments to another officer stated a claim for constructive discharge where he chose to take early retirement to maintain his health benefits, which he would not keep if the police department terminated him. The Court of Appeals held that the commander failed to show that his retirement was involuntary and therefore, he could not state a claim for constructive discharge.

### Facts

Bruce Knappenberger ("Knappenberger") worked for the Phoenix Police Department ("Department") for over twenty years and most recently worked as a commander. In July 2004, Department informed him that he was going to be investigated for making sexually suggestive comments and unwelcome physical contact towards a female officer. Department placed Knappenberger on administrative leave in August 2004. Department gave Knappenberger a copy of its report from its initial investigation in November 2004. At the first review hearing, Knappenberger accused investigators of using improper procedures. At a second hearing, the reviewing committee told Knappenberger it would not revise the investigative report. The committee informed Knappenberger that Department was going to implement a new rule that would allow it to "terminate employees who had committed the sorts of infractions for which [he] was being investigated."

Knappenberger claims the day after the second hearing he learned from the employee benefits department that he was required "to retire 19 months early in order to continue to receive his lifetime health insurance coverage." Knappenberger claims he could not afford to lose his health insurance coverage because his

wife had a history of breast cancer. Knappenberger retired on December 17, 2004, because he did not want to run the risk of being terminated and losing his health insurance coverage.

Knappenberger brought a lawsuit against the City of Phoenix ("City") claiming it violated his due process rights because it deprived him of property and liberty interests without due process of the law. The trial court granted judgment in favor of City on the ground that Knappenberger failed to show he was constructively discharged because he did not show that he was subjected to "intolerable or discriminatory working conditions."

### Decision

City did not dispute that Knappenberger had a property interest in his employment. It instead claimed Knappenberger only established he retired voluntarily, and therefore failed to show City deprived him of his property interest. Knappenberger claims he was constructively discharged because City made him choose between retirement or termination of his employment, which would leave him without health benefits.

A constructive discharge can occur when an employee is forced to quit his or her employment because of "intolerable and discriminatory working conditions." The Court of Appeals, however, recognized that constructive discharge may also be found in situations that do not involve discriminatory or intolerable working conditions. In a case where an employee was given the choice between retiring and receiving retirement benefits or remaining employed but having his disability benefits reduced to nothing, the Court of Appeals held that the employee involuntarily retired. The court reached this decision "because of the coercion inherent in the choice between retirement and a complete deprivation

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of income.” Accordingly, the court recognized that “an employee’s decision to retire can amount to an involuntary retirement under some circumstances.”

Other federal circuit courts have also recognized a “duress or coercion” theory of involuntary retirement. Under this theory, “a resignation may be found involuntary if, under the totality of the circumstances, it appears that the employer’s conduct in requesting or obtaining the resignation effectively deprived the employee of free choice in the matter.” The Court of Appeals found the trial court’s decision, which held Knappenberger could not establish constructive discharge because he did not allege intolerable or discriminatory conditions, was too limited. Under current case law, “a retirement or resignation may be involuntary and constitute a deprivation of property for purposes of a due process claim in the absence of intolerable working conditions.”

The appellate court, however, found that even under the coercion theory, Knappenberger did not establish his retirement was involuntary. The concept of “voluntariness” must be judged by an objective standard, rather than by an employee’s subjective viewpoint. The court stated it must “reject cases in which the employee did have a choice, even if between comparatively unpleasant alternatives.” It must additionally consider factors “such as whether the employee was given an alternative to resignation or retirement, understood the choice, had a reasonable time in which to decide, or could select the timing of the retirement or resignation.”

Knappenberger merely claims he anticipated he would be terminated and retired so he could keep his health insurance. Department did not request that Knappenberger retire or actually tell him he would be terminated. Department did not force him to make an “on-the-spot decision” about retiring, and he could, and in fact did, choose his date of retirement.

Although Knappenberger may have felt that he had to choose between two unpleasant alternatives, he did in fact have a choice. The court concluded that Knappenberger failed to prove City forced him into involuntary

retirement and therefore, he failed to state a claim for deprivation of his property interest.

### **Questions**

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

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