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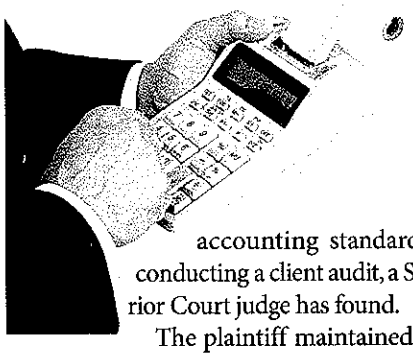
DOLAN MEDIA COMPANY

Accountant could be fired after warning over audit

Standards' complaint did not trigger at-will public policy exception

By Lisa K. Bruno
lisa.bruno@lawyersweekly.com

An accountant could not sue his former employer for termination in violation of public policy and the implied covenant of good faith and fair dealing — even where he claimed that he was fired for insisting on complying with applicable



accounting standards in conducting a client audit, a Superior Court judge has found.

The plaintiff maintained that because he was doing what the standards of his profession required, his termination amounted to a violation of public policy.

But Judge Janet L. Sanders disagreed and granted the defendants' motion for summary judgment, finding that the accounting rules relied upon by the plaintiff were too "amorphous."

"[T]his court declines to hold that these regulations create a public policy sufficient to diverge from the general rule allowing termination of an at-will-employee," she stated. "Indeed, how these regulations play out in the context of an audit raises questions best answered by professionals within the accounting firm itself."

The 10-page decision is *Dolph v. Vitale, Caturano & Company PC, et al.*, Lawyers Weekly No. 12-208-05.

Scope of protection

Robert R. Berluti of Boston, who represented the defendants with Patrick H. Millina, said the ruling is significant, particularly in the current age of the Sarbanes-Oxley Act, for delineating the limits of protection granted to accountants for asserted whistle-blowing.

"The court appropriately was not willing to extend the public policy exception to the essentially internal disputes of an accounting firm," he said.

Berluti added that the opinion stressed that there is no overriding public interest in the accounting affairs of a privately held company.

The ruling is of relevance beyond the accounting profession, he suggested, noting that the plaintiff had taken a difference of opinion in an internal matter to argue that he should be shielded.

"If you carry that out to other professions, it means that having a difference of opinion or creating a disagreement will in turn create a bubble or insulate that employee from an employment decision," Berluti explained. "That should not work and, in this case, did not work."

Elizabeth A. Rodgers of Boston, who together with Linda Evans represented the plaintiff, said that "[a]fter the Enron and Arthur Andersen scandals, we believe that Massachusetts should recognize that an important public policy should protect an auditor who believes that false statements are being made in an audit report relied upon by third parties."

She noted that in 2003 the Appeals Court in *Reisman v. KPMG Peat Marwick LLP* recognized that auditors could be liable for misrepresentations when they knew of particular uses that would be made of the audit report.

"We realize that this is an issue that the [Supreme Judicial Court] would have to resolve," Rodgers acknowledged.

Pointing out that her client lost his first job with Arthur Andersen when the accounting giant collapsed, she remarked that the plaintiff had next been discharged for attempting to address what he believed to be improprieties in an audit report.

"We argued that the posting of a false inventory amount is clearer than, say, mere poor management in a nursing situation," Rodgers said.

Risk assessment

The plaintiff, David Dolph, was hired to work for the defendant consulting firm, Vitale, Caturano & Co., as a senior accountant in September 2002.

While at the firm, the plaintiff did not receive the feedback on his work that he was promised. However, there were no complaints about his performance and when he applied to be licensed as a certified public accountant, two partners wrote letters of support praising his abilities.

In October 2002, the plaintiff was assigned to an audit team for an engagement

at Galaxy Tire & Wheel, a company brought to the firm by John Carucci, a VC&C partner and a defendant.

In the course of the audit, he noted that Galaxy's 2002 sales volume had fallen below expectations, while at the same time the company was having difficulties with meeting its financial obligations. An internal memorandum from the company's president, which raised red flags about the company's financial condition, underscored these concerns.

The plaintiff alleged his investigation confirmed that the company was having an inventory problem. Specifically, the inventory was, in his opinion, "under-reserved" — insufficient money had been set aside to cover inventory that could not be sold. Any increase in the inventory reserve, however, would constitute an expense, which would in turn reduce or eliminate any profit appearing on Galaxy's 2002 financial statements and imperil its financing, which was up for renewal.

Galaxy's controller advised the plaintiff that she and Carucci had already agreed that the inventory amount would not be changed. Convinced that the sum was inadequate, the plaintiff discussed his concerns with his supervisor, who concurred with him.

Following a visit to the Galaxy facility, Carucci sent an e-mail to VC&C's human resources director, listing what he called "grapevine grumblings" about the plaintiff. The e-mail did not specifically refer to the plaintiff's work on Galaxy, but cited general complaints and recommended that the plaintiff be terminated.

A few days later, after meeting with Galaxy's president, Carucci informed the plaintiff that there would be no change made to the amount allocated for inventory reserve and that he saw no need for a "going concern" evaluation to be performed.

The plaintiff immediately shared his concerns with other members of the audit team, who agreed that there were going concern issues that needed to be investigated. Upon the instruction of his supervisor, he delivered to Carucci the internal memorandum he had inadvertently received.

Three hours later, the plaintiff was advised he was being terminated. He subsequently filed suit against VC&C, Carucci and Richard Caturano, the firm's president, challenging his dismissal.

The defendants moved for summary judgment.

CASE: *Dolph v. Vitale, Caturano & Company PC, et al.*, Lawyers Weekly No. 12-208-05

COURT: Suffolk Superior Court

ISSUE: Can an accountant who claims that he was discharged for insisting on adhering to applicable accounting standards in the audit of a customer bring suit against his former employer for termination in violation of public policy and the implied covenant of good faith and fair dealing?

DECISION: No, because the regulations cited were not a source of a public policy sufficiently defined to modify the general at-will employment rule

Public interest not implicated

The public policy exception to the at-will doctrine had consistently been interpreted narrowly, Sanders stated, observing that to do otherwise would convert the general rule permitting discharge to one requiring just cause for termination.

"It is not enough, therefore, that the plaintiff was performing an appropriate or even socially desirable act," she said. "Public safety — or an issue of such public importance that the legislature has recognized it as such — must be at stake."

Sanders pointed out that in its 1992 ruling in *Wright v. Shriner's Hospital for Crippled Children*, the SJC had refused to extend protection to a nurse who had complained about patient care issues, noting that it had never held a regulation governing a particular profession to be a source of a well-defined public policy.

Likening the present case to *Wright*, she held that the ethical standards and regulations relied upon by the plaintiff did not create the kind of well-defined public policy that caselaw required.

The issues raised by the plaintiff — whether an inventory reserve must be increased or whether a "going concerns" opinion was necessary — were matters of accounting judgment, the judge said.

"Moreover, it is difficult to discern the public interest at stake here," she continued, noting that Galaxy was a privately-held company and that nothing suggested that the defendants insisted on misrepresenting facts in their financial statements.

"In any event, even acknowledging that there is a general public interest in accurate financial statements, it does not follow that an accountant like Dolph should be immune from the general at-will employment rule simply because he claims to have that interest at heart," Sanders wrote.

She issued summary judgment in the defendants' favor on the first two counts of the complaint, which alleged discharge in violation of public policy and in violation of the implied covenant of good faith and fair dealing, noting that both relied on the public policy exception.

With respect to the count asserted against the individual defendants for intentional interference with contractual relations, Sanders remarked that the only motive raised by the plaintiff was his claim that the defendants had recommended or approved his dismissal because of his adherence to certain accounting rules.

"Because this Court has already concluded that this would not violate any well established public policy, it necessarily follows that this alleged motive is not improper," she concluded. MLW