



'Freak case' reminds employers of delicacy of layoffs

By Kathleen Koster
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In February, the Massachusetts Supreme Court ruled that Claire Cole, a former secretary for the department of public works in Salem, Mass., should have received full disability benefits after she suffered a heart attack within an hour of learning she would be laid off due to budget cuts in March 2000.

Cole, who died of a separate illness in 2006, claimed that past years of job-related stress in addition to hearing that her position would be eliminated caused the attack, leaving her unable to do her job and thereby deserving full disability benefits. Countering Cole's assertions, the Salem Contributory Retirement Board argued that Cole had pre-existing conditions of hypertension and chronic anxiety.

The two key questions the court answered in *The Retirement Board of Salem vs. Contributory Retirement Appeal Board* were whether Cole's heart attack occurred "as a result of and while in the performance of her duties" and whether the city is liable for the damages despite conducting a routine management practice.

The majority of legal experts in the labor and benefits field regarded the situation as a "freak case," as Alden Bianchi, of the Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. firm in Massachusetts puts it. He says that he would advise clients that there was nothing they could do to avoid a case like this, as its circumstances were highly unlikely.

"I think the real takeaway is that there's really nothing employers can do about this. Moreover, there's nothing employers can do to prepare for this issue. You need to be mindful that employees are going to have certain reactions, and I truly don't think there's anything employers can do to prevent it because you don't know who is going to be predisposed," says David B. Ritter who chairs Neal Gerber & Eisenberg's labor and employment practice group.

Those who do fit the qualifications for this type of case will be extremely small in number because in order to qualify for disability benefits, the physical reaction must be severe, real and a direct result of the firing and/or job environment. Employees who merely become upset or unhappy do not qualify, says Ritter.

Though disturbing, the aspects of this case are unlikely to be repeated. However, experts do expect a rise in workplace litigation, concerning both termination and benefits, stemming from radial layoffs. Therefore, complying with the ever-changing legislative landscape is imperative if employers hope to make it through what promises to be challenging legal times.

Advice for conducting layoffs without litigation

"If employers have to do a set of layoffs, [they should] make sure all of their ducks are in a row in regards to COBRA," says Karen Glickstein, a shareholder of Polsinelli Shughart in

Kansas City and former chair of the Employment Law Committee of Defense Research Institute, the voice of the Defense Bar.

Bianchi supports Glickstein's advice advocating that special attention be paid to Employee Retirement Income Security Act and Worker Adjustment and Retraining Notification Act regulations. He estimates that if examined, nine out of 10 employers would not be compliant with ERISA.

He explains that federal and state legislation are not the only legal holes to patch up; their own plans may contain loopholes through which former employees could squeeze. Have the language of an insurance carrier's plan reviewed by legal counsel and insist that the carrier takes fiduciary responsibility in the case of a potential lawsuit, advises Bianchi.

When it comes to delivering the bad news, it should not come as a surprise if employers hope to avoid conflict. "Most of what drives litigation is emotion," explains **Paul Lopez**, the labor and employment practice leader for **Tripp Scott**. One suggestion he offers is to conduct layoffs in reverse order of seniority, so that employers have a clear and legal reason to lay someone off.

"Firing is a process," Francie Dalton, founder and president of Dalton Alliances, a workplace consulting firm in Maryland, adds: "It should not come suddenly. Employees should be warned, talked to and unless the cause is illegal, be given the opportunity to correct their behavior."

She suggests regular performance check-ups, either quarterly or semi-annually or more if an individual's work is substandard. During the final meeting, which should be well-documented and have a witness if possible, the employee should be esteemed against clear, previously agreed upon and documented metrics and outcomes. The supervisor should be compassionate, thoughtful and honest, but try to keep their thoughts short and sweet while giving the employee an opportunity to explain.

Offering a severance pay, even one to three months for smaller employers, is a kind gesture, as is offering recommendations or an EAP program or career services seminar for mass layoffs, experts suggest. In a mass-layoff situation, employers should begin providing information as early as possible, even if they do not yet have all the answers.

"Think of it more as a transition," says Dalton, "rather than a termination and that might help those who are skittish about terminating someone more holistically."