

## Failure to follow constructive discharge preconditions dooms claims

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*The Arizona Employment Protection Act (AEPA) codifies the state's public policy favoring at-will employment, which provides that absent a written employment contract stating otherwise, "the employment relationship is severable at the pleasure of either the employee or the employer." The AEPA effectively limits potential claims an employee may have against his employer based on wrongful termination or constructive discharge (e.g., transforming a resignation into a discharge if the employee can show an employer's failure to remedy "objectively difficult or unpleasant working conditions" compelled him to resign). For employers that exercise their rights to the AEPA safe harbor, employees wishing to pursue constructive discharge claims must comply with certain preconditions.*

### ***Moving on up or out***

Thomas Gerard was hired in sales at a project management company. He claims he accepted employment based on misrepresentations and material omissions. Specifically, he alleges the company overstated its products' efficacy and viability and set unattainable goals. According to him, the situation caused him not to receive expected commissions and bonuses.

After eight months with the company, Gerard resigned, claiming he had been "strung along, lied to, pressured to falsify his results and otherwise mistreated until he literally couldn't take it anymore." He sued the company, asserting claims for fraudulent misrepresentation and negligence. His claimed damages for thousands of dollars in lost bonus pay and commissions and emotional distress.

The company sought dismissal of Gerard's claims, arguing they were precluded by the AEPA. The Maricopa County Superior Court dismissed the claims because as alleged, they fell within the purview of the AEPA, and the former employee failed to establish the prelitigation requirements to succeed. He appealed to the Arizona Court of Appeals.

### ***Fraudulent misrepresentation claim***

On appeal, the court looked to the substance of the fraudulent misrepresentation allegations, rather than the label Gerard attached to his claim. The gist of the claim was that the company knowingly made false statements about the product he was meant to sell and his ability to earn commissions and bonuses. He claimed:

- He relied on the statements;
- The product was unsalable;
- His quota requirements doomed him to failure; and
- He was forced to resign.

In the complaint, Gerard stated that "had he known the truth about the initial . . . false or fraudulent misrepresentations and omissions made to him, he would not have accepted the position in the first place." The statement (that he wouldn't have accepted employment in the first place) is sufficient to state a claim for fraudulent misrepresentation, independently from the AEPA. Thus, the superior court erred in dismissing the claim on that basis.

The court of appeals upheld the dismissal, however, because Gerard failed to allege he suffered damages based on his acceptance of employment. He merely claimed the employment failed to meet his expectations.

### ***Negligence claim***

Gerard also pursued a negligence claim, alleging the company's vice president was unqualified to perform the work for which he was hired. The incompetence, according to Gerard, led to intolerable working conditions that forced him to resign. The appeals court held the claim fell squarely within the AEPA's constructive discharge claim for which he failed to comply with the notice provisions, and it affirmed the dismissal of the negligence claim. *Gerard v. Kiewit Corporation*.

### ***Words to the wise***

Several Arizona employment law statutes provide employers with safe harbor provisions, so long as they follow the requisite steps. One such example is the AEPA, which provides that any employer that posts a constructive discharge notice advising employees of their rights under the statute is protected by the preconditions within the law.

In Gerard's case, the employer benefited from requiring the employee to provide it with 15 days' written notice of the objectively difficult or unpleasant working conditions that were making him feel compelled to resign and allowing it time to correct them. This one posting allowed it to dismiss the claims early on in the litigation.

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