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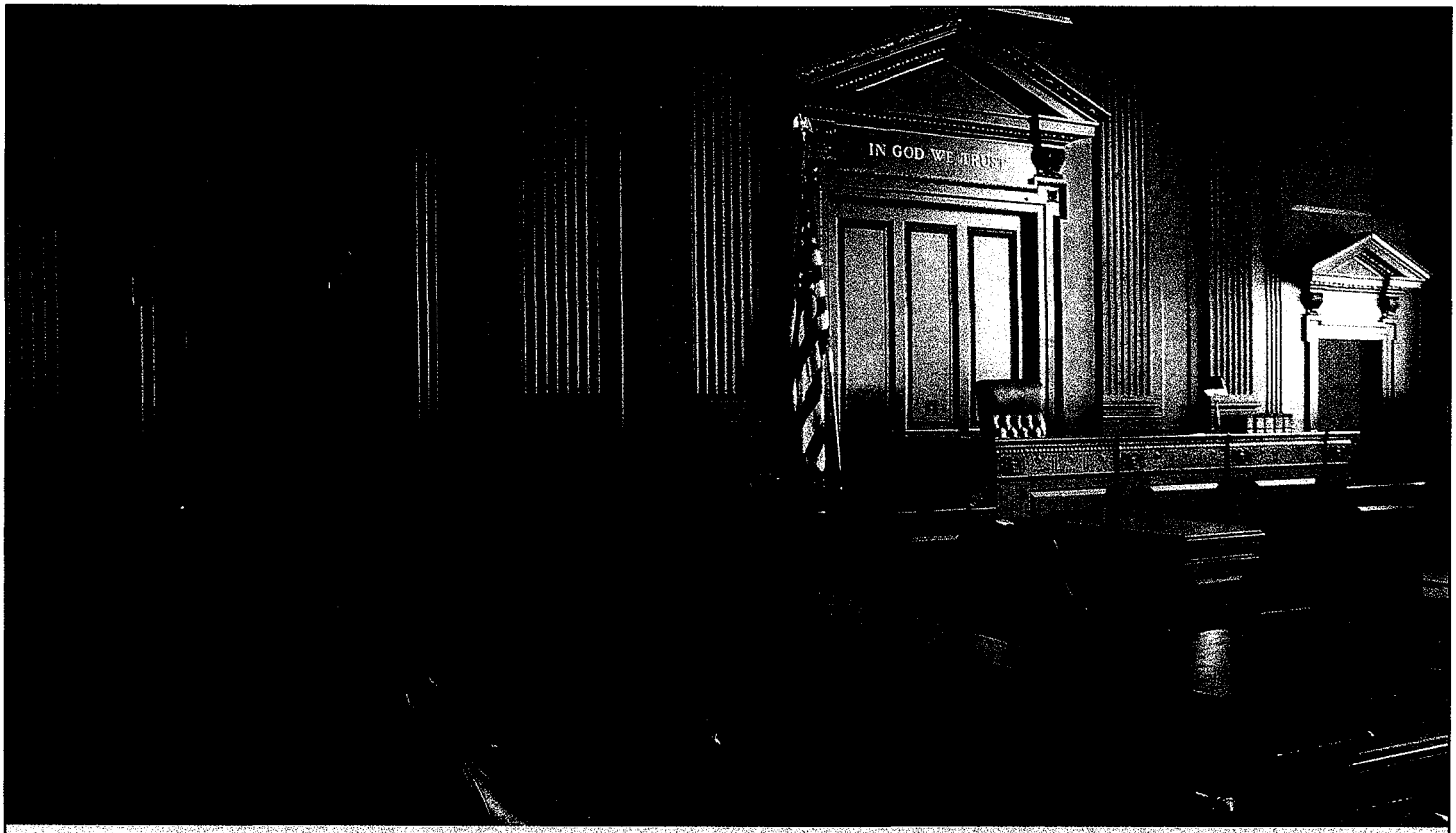

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Between a Rock and a Hard Place: When does an employee have "good cause" to quit his job in order to avoid performing an unethical or inappropriate, but not illegal, act?

By David K. Kessler

In New York, an employee who quits his job is entitled to unemployment insurance benefits only if that employee quits for "good cause." A number of situations can provide the grounds for "good cause," including one in which an employer asks an employee to participate in illegal conduct. For instance, there is no doubt that if a truck driver were asked to transport stolen property, that driver would have good cause to quite his employment. The rationale behind the rule is straightforward: the unemployment system should not force an employee to choose between breaking the law and not receiving unemployment benefits. But what if the employer asks an employee to do something that is not illegal, or at least not clearly illegal, but that nevertheless strikes the employee as immoral or unethical? What if the employee is forced to choose between his unemployment benefits and his ethical compass?

The Third Department of the Appellate Division has suggested in several cases that an employee has good cause to quit when her employer asks her to perform not an illegal act but rather an "unethical" or "inappropriate" one.[1] The unemployment appeals board has recognized that an employee may have good cause to quit in order to avoid a task that would cause "an offense to claimant's conscience on the basis of religion and morals," but those cases all seem to involve the classic conscientious objector who, for reasons related to his religion, refuses service in aid of a war or to work on the Sabbath.[2] Neither the Appeal Board nor the Appellate Division has provided a clear definition of just what kinds of acts are sufficiently unethical or inappropriate to provide good cause for quitting, nor have they provided explicit guidance about whether the act must be merely subjectively immoral or improper or whether it must be objectively so. This article distills a few key principles from the cases involving a claimant who alleged that he quit in order to avoid performing an unethical or inappropriate act.

Acts that seem very close to actual crimes fall on the "good cause" side of the ledger. For example, in *In re Collen*, the claimant, an associate attorney who had joined her firm just three weeks earlier, quit her job because he employer had "sent a client a letter using claimant's signature without her knowledge or permission," which letter "contained misrepresentations and false information," and had "requested that claimant misrepresent to certain clients that she was an independent contractor."[3] The Third Department held that the claimant had good cause for quitting because she had quit "in order to avoid the required performance of an illegal or unethical act." The court did not discuss whether the acts in question were illegal or merely unethical. In another case, ALJ Case No. 525-1427-52R, an ALJ held that a claimant, a bookkeeper and secretary, had quit with good cause because her employer had "paid her salary in the correct amount, but carried her on the record in a smaller sum."[4] The ALJ found that the employee's "leaving was the moral and ethical one and that the arrangement was in violation of law."

The court in *In re Ormerod* suggested an exception to this general rule about illegal or near-illegal acts. There, the claimant quit because he believed his employer, a car dealership, was engaged in a price fixing conspiracy.[5] In determining that the claimant lacked good cause for quitting, the court explained that, even if such a conspiracy had existed, there was no evidence that the *claimant* had been "exposed to criminal liability." *Id.*

On the other hand, mere "disagreement with the employer's method of conducting business"[6] does not constitute good cause.[7] For example, in *In re Donnelly*, the claimant, a sales manager at MCI Worldcom, was concerned about "questionable business practices," including "frequent billing errors," and "their potential impact upon her business reputation."[8] The court held that the claimant's "disagreement with the employer's business practices" did not provide sufficient cause. *Donnelly* is basically a less extreme version of *Collen*, in which the questionable practices were more questionable, if not illegal, and directly implicated the claimant's reputation. *In re Kunzler* involved a situation similar to that in *Donnelly*, with a similar result. There, the claimant, a financial manager in the accounting department of a not-for-profit corporation, resigned because "she disagreed with the employer's financial practices and was concerned that her reputation would be tarnished by her association with an organization that made unprofessional billing errors."[9] The Third Department agreed with the Unemployment Insurance Appeal Board that the claimant lacked good cause for quitting—she "presented no evidence of misconduct on the employer's part" and "conceded in her hearing testimony that the employer did not ask her to do anything illegal or inappropriate." And in case 54969 before the Unemployment Insurance Appeal Board, the

claimant quit after his employer allowed an employee the claimant believed to be unlicensed to drive a truck [10] The Board concluded the claimant lacked good cause to quit where "the claimant himself was [not] asked to do something illegal" and where the claimant had "primarily a matter of philosophical differences with the owner" Finally, in *In re Fumia*, the claimant, an underwriter, quit because "he felt his employer engaged in unprofessional practices "[11] The court held that the claimant did not have good cause because his "employer did not direct him to do anything illegal or in violation of applicable regulations "

Read together, these cases suggest what an employee must show in order to establish good cause for quitting based upon moral or ethical concerns First, the action that the employee does not want to take must be very wrong—close to a violation of some law or regulation—if not actually illegal Thus in *Collen* and ALJ Case No 525-1427-52R, the conduct at issue was essentially fraud, whereas in *Kunzler* it was not even clear that the employee actually believed the conduct to be inappropriate

Second, the court appears to evaluate the "wrongness" of the action at issue based upon an objective, rather than a subjective, standard That is, the question is not whether the employee herself *believed* the action to be inappropriate but rather whether the action was objectively inappropriate Thus in *Fumia* the court emphasized that although the employee "felt" that his employer engaged in unprofessional practices, there was no evidence that anything the employer asked the claimant to do was unprofessional Similarly, in *Appeal Board No 54969*, the court ignored that the claimant "believed" the actions at issue to be illegal More generally, in each of the "no good cause" cases, the court's analysis focused on objective factors—evidence of actual misconduct—rather than upon the employee's own belief

Third, the wrongful act must directly implicate the defendant Thus, in *Ormerod* and in *Appeal Board No 54969*, what mattered was whether the claimant himself had been exposed to criminal liability, not whether the employer was engaged in a price-fixing conspiracy that did not involve the defendant Similarly, in *Appeal Board No 137,451*, an employee did not have good cause to quit because he disagreed with the political endorsements made by a newspaper editor because the editorials were unsigned and, therefore, did not implicate the employee or connect him personally with the newspaper's opinions Compare those situations to that in *Collen*, in which the wrongful act was inextricably intertwined with the employee himself

As a final note, an employee asked to compromise his ethics or morals must still make reasonable efforts to raise his concern to his employer before quitting In *In re Frenya*, for example, the court criticized the claimant for failing to "take the actions of a prudent person in bringing her alleged problems with her employer to the attention of her supervisor who was ready to assist claimant at all times "[12] Similarly, the *Ormerod* court faulted the claimant for "fail[ing] to pursue available options to preserve his employment "[13]

The analysis in this article suggests that a claimant faces an uphill battle in establishing that he had good cause to quit a job because he was asked to perform an unethical or inappropriate, although perhaps not illegal, act Lawyers representing such clients would be well-advised to focus upon the objective inappropriateness of the action in question, rather than upon their clients' own beliefs Moreover, lawyers advising clients who are considering quitting should urge those clients to take all possible steps to alert their employers of the problem before quitting

Endnotes

1 *In re Appeal Board No 540389* N Y State Unemployment Insurance Appeal Board (Mar 31 2008)

2 Appeal Board Case Number 34 048 52 (refusal to work at factory assembling tanks) Appeal Board Decisions 174 361 et al (refusal to continue participating in civilian service as alternative to the draft) Appeal Board Case Number 452 775 (refusal to work on the Sabbath)

3 74 A D 3d 1644 1645 (3d Dep t 2010)

4 Referee s Decision Case Number #525 1427 52R

5 242 A D 2d 804 804 (3d Dep t 1997)

6 *In re Dunster* 304 A D 2d 1015 (3d Dep t 2003)

7 *In re Donnelly* 308 A D 2d 630 (3d Dep t 2003) *see also e g In re Appeal Board No 54969* N Y State Unemployment Insurance Appeal Board (June 5 2010) (It is well settled that a claimant does not have good cause to voluntarily quit his job based on dissatisfaction with the employer s method of operation)

8 308 A D 2d 630 (3d Dep t 2003)

9 297 A D 2d 846 (3d Dep t 2002)

10 *In re Appeal Board No 54969*, N Y State Unemployment Insurance Appeal Board (June 5 2010)

11 222 A D 2d 923 (3d Dep t 1995)

12 212 A D 2d 921 (3d Dep t 1995) *see also In re Stewart* 48 A D 3d 873 (3d Dep t 2008) (claimant advised the employer that he was leaving his employment without first affording the employer an opportunity to address his concerns and rectify any actual problems) *In re Appeal Board No 54969* N Y State Unemployment Insurance Appeal Board (June 5 2010) (claimant must tr[y] to protect his employment by notifying management of his concerns)

13 242 A D 2d 804 804 (3d Dep t 1997)

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