

When Avoiding Work is Your Only Option

By Mathew B. Tully

People who have worked in federal government offices long enough have their fair share of stories about coworkers and customers who were a few cards short of a full deck. Some of these stories are amusing, while others border on disturbing. Last February's news about a U.S. Bureau of Immigration and Customs Enforcement agent based in Long Beach, Calif., who allegedly shot a co-worker during a performance evaluation highlights the dangers some unstable federal employees can pose.

Federal employees have a right to work in a safe and healthy environment. In the 1990s, the Office of Personnel Management made a significant effort to address workplace violence and, subsequently, most agencies have adopted policies on the issue. Despite these commendable actions, not all federal employees feel safe at work.

When an agency fails to address an employee's communicated concerns and work conditions become intolerable, some employees stop going to work to safeguard their well-being. However, this type of response will likely cause management to charge the employee with being absent without leave—a removable offense. However, when employees have lost at least 14 days without pay due to an absence, they may be able to claim they were wrongly placed on enforced leave and appeal this personnel action to the Merit Systems Protection Board. Such claims concern what is referred to as "constructive suspension."

According to the MSPB, employees usually make constructive suspension claims when an agency refuses to let them work until it receives medical documentation attesting to their ability to perform. Such claims may also arise in situations where an agency refuses to make accommodations for an employee who wants to return from medical leave. However, the constructive suspension theory also applies to situations where workplace conditions become so intolerable that the employee has no other option than to stay out of the workplace to avoid danger at work, according to the board.

That was what happened when three female Department of the Navy employees stopped reporting to their work stations because of a male co-worker's strange and frightening behavior. Specifically, the co-worker yelled and screamed at the women, told them they were "working with the devil" and claimed he was an "avenging angel." Two of the women were told by their psychiatrist that they would suffer emotional harm if they returned to work and they notified the agency about these medical risks. In the 1999 case of *Peoples v. Dept. of the Navy*, the MSPB vacated an administrative judge's dismissal for lack of jurisdiction and remanded the case.

Key to a constructive suspension claim, the Board noted, is whether the absence was voluntary or involuntary. In *Peoples*, the MSPB said, that "Intolerable working conditions may render an action involuntary when, under all the circumstances, the working conditions were

made so difficult by the agency that a reasonable person in the employee's position would have felt compelled to leave the workplace." Further, the board noted that prior to the employee's absence the agency must have been placed on notice of the intolerable conditions.

Last November, the MSPB similarly vacated an administrative judge's dismissal of an appeal based on a lack of jurisdiction after finding that a U.S. Postal Service employee's constructive suspension claim did merit a hearing. This case, *Moore v. U.S. Postal Service*, involved a female postmaster who had been stalked by a male customer. After placing the agency on notice of her concerns and the customer's actions, the agency initially refused the employee's request for a reassignment to another post office.

The agency terminated the customer's post office box, moved the box to another location and prohibited the customer from entering the post office where the postmaster worked. However, the postmaster claimed she still did not feel safe at her work station and subsequently stopped going to work. A year after the postmaster first complained to her supervisor about the stalker, the agency reassigned her, but she contended it could have ended her enforced leave sooner by not delaying this action. Finding the postmaster's medical evidence to be ambiguous, an administrative judge dismissed her case for lack of jurisdiction. However, taking into consideration all the facts the postmaster raised, the full board said "these specific allegations of intolerable working conditions constitute a nonfrivolous allegation of absence of duty."

Federal employees do not need to live in fear of going to work. If conditions have gotten so bad that you stopped going to work, you should consult with a federal employment attorney to explore whether you can raise a constructive suspension claim or a hostile work environment claim under Title VII of the Civil Rights Act.

Mathew B. Tully is the founding partner of Tully Rinckey PLLC. He concentrates his practice on representing military personnel and federal employees and can be reached at mtully@fedattorney.com

. To schedule a meeting with one of the firm's federal employment law attorneys call 202-787-1900. The information in this column is not intended as legal advice.