

Ex-Zimmer Exec Loses Benefits Bid In Sex Discrimination Suit

By **Dani Kass**

Law360 (November 28, 2018, 8:01 PM EST) -- A former Zimmer Biomet Holdings Inc. executive wasn't eligible for severance or stock options when she left the medical device manufacturer, as she failed to prove that her resignation fell under a carve-out in her employment contract, an Indiana federal judge has ruled as part of a sex discrimination suit.

U.S. District Judge Jon DeGuilio partially dismissed Robin Barney's suit Monday, saying she didn't follow the proper procedure to get severance after resigning for "good reason" and couldn't prove she would have otherwise stayed at the company long enough for her stock options to vest. Additionally, the judge found Barney didn't prove her bosses were coercing her into lying to investors and illegally firing other employees, as she had alleged.

Judge DeGuilio dismissed without prejudice Barney's breach of contract and wrongful constructive discharge claims. However, two sex discrimination claims under the Equal Pay Act and Title VII are still in play, as the company hadn't moved to dismiss them.

Barney was senior vice president of operations of Biomet Inc. starting in 2008, and then became senior vice president of global operations and logistics in 2015 after it merged with Zimmer Holdings Inc. In August 2016, the merged company's senior vice president of human resources told Barney that she would have to relocate to Switzerland at the end of 2017 as her role was being moved.

When she said that she wouldn't transfer, Barney was "left to conclude that her employment would therefore be terminated before the end of 2017, and that the company would pay her the lucrative severance package provided for in her employment agreement," the complaint states.

Then, in October 2016, Barney said the CFO told her to "concoct a 'story' to mislead Zimmer Biomet investors" about a downturn in business, which she refused to do.

That same month, Barney said the CEO told her to "make immediate, significant organizational changes ... which would result in employees being terminated for cause under a false pretext" as part of an audit by the U.S. Food and Drug Administration, which she also refused to do. Two other senior leaders were fired that same day, so Barney said she thought she would be fired as well. She provided her two weeks notice over email that day.

While Barney argues those firings may have been unethical or not truthful, she doesn't show how

they're illegal, the judge said as he shot down her wrongful constructive discharge claim. The claim also fails because she didn't prove she had reasonable belief that she'd be fired for not misleading investors, he said.

"All she alleges is that, after she refused to terminate employees, the CEO told her 'he was not happy with her refusal, and that they would talk further about it,' and that Zimmer terminated two other members of its leadership that same day," the opinion states. "Not only do these scant observations have nothing to do with her refusal to mislead investors, but they likewise do not support a constructive discharge claim on their own."

The good reason provision of her employment contract would have allowed her to receive a "substantial payout" if she resigns for good reason, including a relocation, within two years of the 2015 corporate change. However, in order for that to kick in, Barney had to provide written notice of that good reason within 30 days, which she didn't do, Judge DeGuilio said.

Barney would have been eligible for the stock options after she had been with the company for 10 years, which would have been through the end of 2017. She claims that if it wasn't for her "wrongful constructive discharge" she would have hit that mark and earned her stock options. But the judge called that "purely speculative."

Barney's gender discrimination claims are tied to the company having a "male dominated culture with an atmosphere like an old boys' club," with few women in senior leadership positions, and those women were blamed when things went wrong, the complaint states. She has also filed a claim with the U.S. Equal Employment Opportunity Commission.

"We regret the court's ruling, but will forge ahead undeterred," Barney's attorney, Kathleen DeLaney of DeLaney & DeLaney LLC, said in an email. "The remaining claims in the case will permit Ms. Barney to seek to recover the vast majority of her compensable damages in any event."

Representatives for Zimmer didn't immediately respond to requests for comment Wednesday.

Barney is represented by Kathleen A. DeLaney and Annavieve C. Conklin of DeLaney & DeLaney LLC.

Zimmer is represented by Troy S. Brown, Michael L. Banks and Meredith E. Riccio of Morgan Lewis & Bockius LLP, and John D. LaDue and Stephen M. Judge of LaDue Curran & Kuehn LLC.

The case is Barney v. Zimmer Biomet Holdings, Inc., case number 3:17-cv-00616, in the U.S. District Court for the Northern District of Indiana.

--Editing by Adam LoBelia.