Does Constructive Discharge Bar an Employer’s Defense?

Supreme Court to Decide if Employers May Assert Affirmative Defense to Liability for Constructive Discharge

Part Two of a Two-Part Article

By Albert J. Solecki, Jr. and Lori A. Mazur

I

dl in last month’s Employment Law Strategist, we explored the background to a growing conflict among the circuit courts regarding the availability of the so-called Ellerth/Faragher affirmative defense in constructive discharge cases. We began with an analysis of Suders v. Easton, 325 F.3d 432 (3d Cir. 2003), in which the Third Circuit held that holding an employer strictly liable for a constructive discharge resulting from the actionable harassment of its supervisors more faithfully adheres to the policy objectives set forth in Ellerth and Faragher. Granting certiorari to consider the Third Circuit’s ruling, the U.S. Supreme Court has now undertaken to resolve the discord among the circuits.

CONFlict AMONG THE COURTS OF APPEALS

The Ellerth/Faragher defense allows an employer to avoid liability for unlawful harassment where the employer has an effective anti-harassment policy in place, but despite that, a harassed employee who knows about the policy fails to take advantage of it. However, the defense depends on the absence of a “tangible employment action.” Where an employee is terminated, for instance — thus giving an employee a chance to complain of an adverse “tangible employment action” rather than of a hostile work environment — an employer cannot take advantage of the defense and can be held strictly liable for the acts of its employees.

In Suders v. Easton, the Third Circuit held that an employer can be held strictly liable for harassment so severe that it forces an employee to leave the employer — that is, where it results in a constructive discharge. In rendering its decision, the Third Circuit considered carefully the opinions of the other circuit courts that have addressed this issue before it. Indeed, it is not surprising that the Third Circuit felt the need to do so given the number of circuit courts that have spoken on this issue with widely divergent conclusions. For instance, the Second Circuit (in Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294 (2d Cir.), cert. denied, 529 U.S. 1107 (2000)) and the Sixth Circuit (in Turner v. Dowbrands Inc., No. 99-3984, 2000 WL 924599 at *1 (6th Cir. June 26, 2000)) have held that a constructive discharge does not constitute a tangible employment action warranting the imposition of strict liability under Ellerth/Faragher. Likewise, the First Circuit (in Reed v. MBNA Marketing Sys., Inc., 333 F.3d 27, 33 (1st Cir. 2003)) held recently that a constructive discharge resulting from supervisor harassment was not a tangible employment action, but left open the possibility that on “rare facts,” it might hold otherwise. And the Tenth Circuit (in Mullison-Montague v. Pocrnick, 224 F.3d 1224, 1231-32 (10th Cir. 2002)), while it has not decided the issue, has suggested that it too agrees with the Second Circuit.

In sharp contrast, the Eighth Circuit (in Jaros v. LodgeNet Enter. Corp., 294 F.3d 90, 966 (8th Cir. 2002)) has held that a constructive discharge is a tangible employment action that bars the Ellerth/Faragher affirmative defense. Additionally, the Fifth Circuit (in Wyatt v. Hunt Plywood Co., 297 F.3d 405, 409 n.15 (5th Cir. 2002) and Webb v. Cardiothoracic Surgery Assocs. of No. Texas, P.A., 139 F.3d 532, 540 (5th Cir. 1998)) has suggested that it is in agreement with the Third Circuit and Eighth Circuit on this issue. Most recently, the Seventh Circuit (in Robinson v. Sappington, No. 03-3316, 2003 WL 22889501 *16 (7th Cir. Dec. 9, 2003)) concluded that “in circumstances where ‘official actions by the supervisor … mak[e]s employment intolerable,’ we believe a constructive discharge may be considered a tangible employment action.” Further, the Ninth Circuit and the Eleventh Circuit have recognized the split among the circuit courts, but have not decided this issue.

Not surprisingly, in analyzing those decisions in contrast with its own, the Third Circuit focused on the leading decision of the Second Circuit in Caridad v. Metro North Commuter Railroad. In Caridad, the Second Circuit based its decision on three grounds. First, the court noted “[c]o-workers as well as supervisors can cause the constructive discharge of an employee,” thereby suggesting that an employer should not be held strictly responsible for the same. Second, “unlike demotion, discharge, or similar economic sanctions, an employee’s constructive discharge is not ratified or approved by the employer,” which would appear to contravene the Supreme Court’s observation in Ellerth that a tangible employment act generally requires a “company act.” Third, the Second Circuit observed:
“Moreover, the facts of Ellerth, where the plaintiff, like Caridad, did not complain of the harassment prior to quitting her job, indicate that constructive discharge is not a tangible employment action depriving the employer of the availability of the affirmative defense to Title VII liability. Ellerth alleged that she had been constructively discharged as a result of sexual harassment by her supervisor; in remanding the case for a determination of whether the employer could make an affirmative defense, the Supreme Court noted that “Ellerth has not alleged she suffered a tangible employment action at the hands of [her supervisor].”

The Third Circuit, however, was not persuaded that any of the above grounds advanced by the Second Circuit in Caridad compelled the conclusion that a constructive discharge does not constitute a tangible employment action. First, the Third Circuit concluded that a co-worker as well as supervisor can cause a constructive discharge “beside the point” since “[t]he Supreme Court recognized that many tangible employment actions may be perpetrated by either supervisors or co-workers ... It is of no consequence that constructive discharge may be caused by a co-worker because we are only concerned here with that which is caused by a supervisor.”

Second, the Third Circuit conceded that a constructive discharge may not bear the “imprimatur of the enterprise” in the same way as a formal termination. The court was not convinced, however, that this distinction was material since there existed sound reasons for treating a constructive discharge as the functional equivalent of a termination. For instance, the direct economic harm a constructively discharged employee suffers is identical to that of a formally discharged employee. Additionally, “an employee’s constructive discharge is no more unilateral an action of the victimized employee and no less coerced by the employer than submission to sexual advances in a quid pro quo situation ... Moreover, because a constructive discharge will necessarily involve the termination of employment relationship, the employer will be on notice and have the opportunity to determine the cause of the separation from employment.”

Third, the Third Circuit disagreed that the Supreme Court implicitly held a constructive discharge was not a tangible employment action by remanding Ellerth to permit the employer to try to establish its affirmative defense because Ellerth’s constructive discharge claim was not before the Supreme Court when it ruled. While Ellerth had initially pleaded a constructive discharge claim, the Seventh Circuit’s focus on appeal was limited to her claims of quid pro quo and hostile environment harassment. Further, the issue presented on certiorari to the Supreme Court was narrowed to whether Ellerth could assert a claim of quid pro quo harassment and whether her employer had vicarious liability for the alleged misconduct. Thus, the Third Circuit concluded that Ellerth left open the question of whether a constructive discharge resulting from a supervisor’s conduct can constitute the type of tangible employment action that deprives an employer of the Ellerth/Faragher defense.

In sum, the Third Circuit found that placing a constructive discharge within the rubric of tangible employment actions adhered more faithfully to the Supreme Court’s guidance and to its own Title VII jurisprudence. In fact, the appellate court “emphasize[d] that removing constructive discharge from the category of tangible employment actions could have the perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment.” The court was concerned that if it were to hold a constructive discharge does not constitute a tangible employment action, the temptation to employers would be too great to preserve their affirmative defense by waiting for the victimized employee to quit or, even worse, tacitly approving increased harassment to achieve that result. By holding that a constructive discharge constitutes a tangible employment action, the Third Circuit sought to encourage employers to be watchful of harassment and to remedy complaints at the earliest possible moment upon risk of losing the benefit of the affirmative defense should the victimized employees feel compelled to resign. Further, the court believed that its holding would likewise encourage responsible behavior from victimized employees because it is equally unlikely “employees will walk off the job at the first sign of harassment and expect to prevail under Title VII” given the stringent test for proving constructive discharge.

**CONCLUSION**

While the Third Circuit’s ruling in Suders v. Easton is well reasoned, the court itself recognized the practical dilemma it has created by holding that a constructive discharge constitutes a tangible employment action. That is, a plaintiff alleging constructive discharge must prove the harassment or discrimination was so intolerable that a reasonable person would have felt compelled to resign and, further, the employee’s decision to resign was reasonable under the circumstances. Thus, whether the employer had an effective remedial scheme in place, whether the employee knew of and failed to utilize that scheme and whether the employer attempted to address the alleged misconduct become inquiries directly relevant to the second prong of this test. Of course, these are the same considerations relevant to the Ellerth/Faragher affirmative defense. It is difficult to imagine then, as a practical matter, how a trial court can prevent a jury from considering the Ellerth/Faragher affirmative defense where the employee has asserted successfully a constructive discharge claim. Indeed, as the Third Circuit acknowledged: “Consequently, there is a substantial risk that the test for constructive discharge may become a back door for the introduction of evidence amounting to the assertion of the affirmative defense to liability.” In the end, however, the court resigned itself to “rely on the wisdom and expertise of the trial judges to exercise their gate-keeping authority.” Practitioners can only hope the Supreme Court will provide more guidance on navigating this “Catch-22” when it considers whether a constructive discharge constitutes a tangible employment action that precludes the use of the Ellerth/Faragher affirmative defense.

This article is reprinted with permission from the March 2004 edition of the LAW JOURNAL NEWSLETTERS - EMPLOYMENT LAW STRATEGIST. © 2004 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. #055/081-02-04-0005