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Labor Relations & Employment Law Bulletin

Federal Circuit Courts Split over Whether the Ellerth-Faragher Affirmative Defense Is Available on a Constructive Discharge Claim

Nearly five years ago, the United States Supreme Court gave employers guidance on how to take certain kinds of preventive and remedial measures in order to avoid liability, where possible, for certain kinds of discriminatory acts occurring in the workplace. Among other things, the Supreme Court advised that employers were required to implement effective complaint procedures for claims of discriminatory harassment, and that an employee could not succeed on a harassment claim if he or she failed to utilize those procedures.

Specifically, an employer could protect itself from liability for what the Supreme Court categorized as "intangible", or non-economic, discrimination, such as sexual comments or advances, if the employer implemented an effective complaint procedure to quickly investigate and remedy such conduct. (This has become known as the *Ellerth-Faragher* affirmative defense).[1] In contrast, an employer is automatically strictly liable for "tangible", or economic, discrimination as soon as it occurs, such as a termination, demotion, or other denial of economic benefits, and the employer is restricted to trying to prevent additional damages from accruing. Therefore, the employer has a legal opportunity and obligation to correct intangible (non-economic) discrimination, while the employer can only attempt to prevent tangible (economic) discrimination before it occurs.

The distinction between so-called intangible and tangible discrimination has therefore become critically important. Unfortunately, the distinction blurs considerably with respect to one type of discrimination claim, constructive discharge, in which the employee alleges that he or she experienced discriminatory working conditions that were so intolerable that he or she was forced to resign. More frequently than not, the alleged intolerable working conditions involve the sort of intangible conduct about which the employee is obligated to complain and attempt to resolve in good faith prior to bringing a lawsuit. A constructive discharge, however, has a clearly economic quality because it operates as the functional equivalent of a tangible termination.

As a result, the following dilemma presents itself: should a constructive discharge, which results from intangible discriminatory conduct but has economic consequences, be treated as tangible or intangible for purposes of determining whether an employer should be strictly, or only vicariously, liable? Or, in more practical terms, assuming that the employer has an effective complaint procedure, should the employee be required to complain by utilizing the procedure, and try to resolve the situation before quitting? The answer is not yet clear. Federal and state courts, applying nearly identical laws, disagree.

Case in point: the recent Third Circuit Court of Appeals case *Suders v. Easton*, decided on April 16, 2003. In *Suders*, the employee, a police communications operator for the Pennsylvania state police, was allegedly subjected to five months of sexual and other discriminatory harassment. The

employee made a vague internal complaint but did not follow-up on it, resigned soon afterward, and sued on the grounds of hostile work environment and constructive discharge. On appeal, the Third Circuit held that the effectiveness of the state police's complaint procedure and the sufficiency of the employee's utilization of that procedure were issues of fact for a jury on the employer's assertion of the *Ellerth-Faragher* affirmative defense to the employee's intangible hostile work environment claim.

However, the *Suders* court broke new ground when it held that the constructive discharge claim was tangible (economic) under Title VII. Therefore, the state police would not be able to raise the *Ellerth-Faragher* affirmative defense as to that claim. Of course, as the court recognized, this does not make it entirely irrelevant whether the employee could have and did complain before quitting; it would still be relevant to whether the employee's decision to resign was reasonable. However, since the affirmative defense is unavailable, the employer would not be able to avoid trial by prevailing on summary judgment, and would be less likely to prevail at trial.

Needless to say, the Third Circuit has created some confusion about what are the rights and obligations of employees and employers when sexual or other discriminatory harassment occurs. What is clear is that the constructive discharge claim is inextricably intertwined with the underlying harassment claim, and that, under *Suders*, the rights and obligations of the parties may vary depending on the degree of harassment. For example, if the harassment is relatively mild, then it will probably be neither sufficiently severe nor so pervasive to create a hostile environment claim, and, as a result, also not sufficiently intolerable to justify constructive discharge. Therefore, an employee's complaint and an employer's complaint procedure will be irrelevant on both claims. If the harassment is more serious and/or frequent, it may create a hostile work environment, but will still not rise to the level of sufficient intolerability to make resignation reasonable, so the employer must have an effective complaint procedure which the employee must utilize as a condition precedent to success on the hostile environment claim, but it will still be irrelevant on the constructive discharge claim.

However, if the harassment is so serious and/or frequent that it is not only severe or pervasive for hostile environment purposes, but also intolerable for constructive discharge purposes, a strange contradiction reveals itself. When the harassment is intolerable, the employee need not complain or try to resolve it before quitting and claiming constructive discharge, regardless of how effective the employer's complaint procedure could have been. Under those circumstances, the employer will be granted summary judgment on the hostile environment claim, but the constructive discharge claim will proceed to trial and all evidence of the same harassment will be admissible, defeating the purpose of summary judgment.

This situation encourages employees to not complain, wait until the harassment escalates to the point of intolerability, quit - and sue without ever trying to notify the employer or resolve it in good faith. It also discourages employers from trying to resolve harassment about which it may or may not have received a complaint because employers may believe that they would not be able to shield themselves from liability anyway.

It is very likely that the Third Circuit's *Suders* case is not the last word on this subject. Although the Eighth Circuit[2] agrees with the Third Circuit,[3] the Second Circuit[4] and Sixth Circuit[5] have reached the opposite conclusion: that constructive discharge is intangible, and that employers, therefore, have the opportunity to shield their exposure to liability with the *Ellerth-Faragher* defense. The other eight federal appellate courts have not yet decided this issue.

State courts are similarly inconsistent. For example, in August 2002, the New Jersey Supreme Court held that an employee must complain and try to help resolve his or her complaint of sexual harassment before quitting and suing for constructive discharge under the New Jersey discrimination statute, the Law Against Discrimination. Notwithstanding, a New Jersey

appellate court failed to follow the New Jersey Supreme Court in April 2003 and held that an employee need not complain first because constructive discharge is tangible.[6] Until these federal and state inconsistencies are reconciled, employers will have inconsistent expectations if federal and state claims arise under the nearly identical statutes. As a result, an employee who quits without complaining, or who complains but does not follow up enough, will be able to bring a federal constructive discharge claim but not a state one, and vice versa.

The United States Supreme Court will probably grant certification and hear this issue. The Supreme Court has already denied certification twice, in Second and Eighth Circuit cases which reached opposite conclusions. It is too soon to know whether the employer in *Suders* will petition the Supreme Court to decide whether constructive discharge is tangible or intangible, or to create a new test in light of the breakdown in logic as to whether or not the tangibility test applies to constructive discharge. Either way, employers would be well advised to guide themselves as follows:

- make all reasonable efforts to implement "zero tolerance" discrimination policies,
- train employees to prevent harassment,
- quickly and thoroughly investigate all complaints of harassment that may nevertheless arise, and
- effectively remedy all harassment that may have occurred.

Even if an employee is not required to complain or help resolve the complaint in good faith before quitting and claiming constructive discharge, evidence that the employer would have responded with zero tolerance and did do so in other situations would very likely be admissible evidence at trial to show that the employee's decision to quit was not reasonable.❖

1 *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

2 The Eighth Circuit includes Iowa, North Dakota, South Dakota, Minnesota, Missouri, Nebraska, and Arkansas.

3 The Third Circuit includes New Jersey, Pennsylvania, Delaware and the U.S. Virgin Islands.

4 The Second Circuit includes New York, Connecticut and Vermont.

5 The Sixth Circuit includes Michigan, Ohio, Kentucky and Tennessee.

6 Compare *Shepherd v. Hunterdon Developmental Center,* 174 N.J. 1 (2002), with *Entrot v. The BASF Corp.*, 359 N.J. Super. 162, (App. Div. 2003); New Jersey Law Against Discrimination, N.J.S.A. §§ 10:5-1 to -49.

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