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EMPLOYMENT DISCRIMINATION—SEXUAL
HARRASSMENT—FIRST CIRCUIT
HOLDS THAT CONSTRUCTIVE
DISCHARGE IS GENERALLY NOT
A TANGIBLE EMPLOYMENT ACTION,
THEREBY NOT PRECLUDING THE *Ellerth/
Faragher* Affirmative Defense—*Reed v.
MBNA Marketing Systems, Inc.*

Marc A. Hearron

IN *Burlington Industries, Inc. v. Ellerth*¹ and *Faragher v. City of Boca Raton*,² the United States Supreme Court clarified the rules regarding employer liability for sexual harassment by a supervisor. The court held that, in general, the employer is liable, but when there is no tangible employment action³ the employer may assert an affirmative defense to vicarious liability.⁴ Left undetermined by the court was whether constructive discharge⁵ would preclude the employer from raising the affirmative defense, and the circuit courts of appeal are split on this issue.⁶ The First Circuit recently decided in *Reed v. MBNA Marketing Systems, Inc.* that constructive discharge does not generally preclude the defense but

1. 524 U.S. 742 (1998).

2. 524 U.S. 775 (1998).

3. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761.

4. *Id.* at 765; *Faragher*, 524 U.S. at 807-08.

5. "A constructive discharge occurs when an employee resigns his or her current position because the employee considers the conditions intolerable and a reasonable employee also would have found the conditions made remaining in the job unbearable." *Robinson v. Sappington*, No. 02-3316, 2003 U.S. App. LEXIS 24723, at *47-48 (7th Cir. Dec. 9, 2003).

6. *Compare Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999) ("[C]onstructive discharge does not constitute a 'tangible employment action,' as that term is used in *Ellerth* and *Faragher*."), with *Suders v. Easton*, 325 F.3d 432, 461 (3d Cir. 2003), *cert. granted, sub nom. Pennsylvania State Police v. Suders*, 124 S. Ct. 803 (Dec. 1, 2003) (No. 03-95) ("[A] constructive discharge, when proved, constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher*.").

that in rare circumstances it may do so.⁷ However, following *Ellerth* and *Faragher*, once constructive discharge is proved, the affirmative defense should not be available, and *Reed*'s contrary holding, although seemingly pro-defendant, actually harms the employer by shifting the burden of proof to the defendant-employer.

Bobbi-Lyn Reed, a seventeen-year-old female, began working as a telemarketer for MBNA in June 1999, reporting to William Appel.⁸ Viewing the facts in the light most favorable to Reed, Appel began making sexually motivated comments toward Reed shortly after her employment began.⁹ In August 1999, after Reed babysat for Appel one evening in Appel's home, "Appel came up behind [Reed], put his arm around her neck and dragged her into the living room where he pressed her to perform oral sex on him."¹⁰ At Appel's insistence, Reed did not report the incident.¹¹ After the comments continued, she left MBNA in the fall of 1999 without having reported Appel's behavior to anyone at MBNA.¹² Reed returned to work at MBNA in May 2000, with Appel as her supervisor again, and the harassment quickly resumed until finally, in August 2000, Reed reported Appel's behavior to MBNA officials.¹³ "MBNA began an investigation that day leading swiftly to a decision to terminate Appel. Appel resigned before the paperwork for his dismissal could be completed."¹⁴

Reed sued MBNA on December 11, 2001, claiming that she was subjected to a hostile work environment and that she was constructively discharged when she left MBNA in 1999.¹⁵ The district court found that Reed had been subjected to a hostile work environment, but it granted summary judgment for MBNA on the *Ellerth/Faragher* affirmative defense, finding that Reed was unreasonable in not reporting her harassment to company officials.¹⁶ Furthermore, the court held that Reed's claim of constructive discharge did not preclude the affirmative defense because constructive discharge is not a tangible employment action.¹⁷ On appeal, MBNA did not deny the hostile work environment claim; however, it denied vicarious liability, relying on the affirmative defense.¹⁸ The First Circuit agreed with the district court's holding that constructive discharge is not a tangible employment action and allowed MBNA's as-

7. 333 F.3d 27, 33 (1st Cir. 2003).

8. *Id.* at 30.

9. The comments included compliments on her appearance, references to Appel's ex-girlfriend, and "dropp[ing] green M&M's on Reed's desk claiming that they would make [her] horny." *Id.* (internal quotation marks omitted).

10. *Id.*

11. *Id.*

12. *Id.* at 31.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 32.

sertion of the affirmative defense.¹⁹ However, it reversed the district court's grant of summary judgment for MBNA on the merits of the defense and remanded the case to the district court.²⁰

The Supreme Court first recognized sexual harassment as a violation of Title VII in *Meritor Savings Bank, FSB v. Vinson*.²¹ However, it stated that the employer is not always liable for a hostile work environment; traditional rules of agency law apply when determining employer liability.²² *Ellerth* and *Faragher* clarified how agency law is to be applied in the sexual harassment context by holding the following:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action.²³

The court defined tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."²⁴

The court's analysis in *Ellerth* and *Faragher* relies on principles of agency law as stated in the Restatement (Second) of Agency. The court quoted section 219(2) of the Restatement, which defines when a master is liable for the actions of his servants when the servant is not acting within the scope of his duties: (1) the intent standard ("the master intended the conduct or the consequences"), (2) the negligence standard ("the master was negligent or reckless"), and (3) the aided in the agency relation standard ("the servant . . . was aided in accomplishing the tort by the existence of the agency relation").²⁵ The aided in the agency relation

19. *Id.* at 33.

20. *Id.* at 37.

21. 477 U.S. 57, 66 (1986). Title VII of the Civil Rights Act of 1964 prohibits an employer from "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (2003).

22. *Meritor Sav. Bank, FSB*, 477 U.S. at 72.

23. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

24. *Ellerth*, 524 U.S. at 761. The court also noted that "[a] tangible employment action in most cases inflicts direct economic harm." *Id.* at 762.

25. *Id.* at 758 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2) (1957)). The court also mentioned a fourth standard: "the conduct violated a non-delegable duty of the master." *Id.* However, this standard is not relevant to the analysis here.

standard was the primary basis for the new tangible employment action rule: "When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . . [O]nly a . . . person acting with the authority of the company[] can cause this sort of injury."²⁶ Thus, once a tangible employment action is proved, the aided in the agency standard for vicarious liability is also automatically proved. However, even without a tangible employment action, there is still vicarious liability unless the employer can prove the elements of the affirmative defense.²⁷

On the surface, constructive discharge seems to lie in the twilight zone between a simple hostile work environment and a tangible employment action. The Supreme Court has not defined constructive discharge, but circuit courts have required, at a minimum, a hostile work environment where working conditions are so intolerable that a reasonable employee would feel compelled to resign.²⁸ The resignation is treated as if the employer actually discharged the employee.²⁹ Some circuits require that the employer must have intended for the employee to resign;³⁰ however, many circuits require only foreseeability—that the employer knew or should have known that the employee felt compelled to resign.³¹ As part of the requirement of a reasonable employee, courts require that the employee gave the "employer a reasonable opportunity to correct the problem," but that the intolerable conditions continued.³²

The circuit courts of appeal are split as to whether constructive discharge precludes the *Ellerth/Faragher* affirmative defense. The Second Circuit, the first circuit court to rule on this issue, determined that a constructive discharge is not a tangible employment action,³³ and the Sixth Circuit has agreed.³⁴ The Second Circuit, considering only the aided in the agency relation standard, not the intent or negligence standards, reasoned, "[C]o-workers, as well as supervisors, can cause the constructive discharge of an employee. And, unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer."³⁵ The Third and Eighth Circuits have dis-

26. *Id.* at 761-62.

27. *See id.* at 766. Prior to *Ellerth* and *Faragher*, the plaintiff had the burden of proving employer liability as part of the prima facie case for hostile work environment. *Ellerth* and *Faragher* shift the burden to the employer to prove the affirmative defense to escape vicarious liability.

28. *See, e.g., Jaros v. LodgeNet Entm't Corp.*, 294 F.3d 960, 965 (8th Cir. 2002).

29. *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999).

30. *E.g., Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490, 494 (8th Cir. 1996).

31. *Suders v. Easton*, 325 F.3d 432, 444 (3d Cir. 2003), *cert. granted, sub nom. Pa. State Police v. Suders*, 124 S. Ct. 803 (Dec. 1, 2003) (No. 03-95).

32. *Jackson v. Ark. Dep't of Educ., Vocational & Technical Educ. Div.*, 272 F.3d 1020, 1027 (8th Cir. 2001).

33. *Caridad*, 191 F.3d at 294; *see also Mack v. Otis Elevator Co.*, 326 F.3d 116, 128 (2d Cir. 2003).

34. *See Turner v. Dowbrands, Inc.*, No. 99-3984, 2000 U.S. App. LEXIS 15733, at *4 (6th Cir. June 26, 2000).

35. *Caridad*, 191 F.3d at 294.

agreed.³⁶ In holding that constructive discharge is a tangible employment action, the Third Circuit reasoned that a constructive discharge is “the functional equivalent of an actual termination”; it “constitutes a significant change in employment status, by ending the employer-employee relationship”; and it inflicts “direct economic harm.”³⁷ Moreover, “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.”³⁸

In *Reed*, the First Circuit declined to declare a bright-line rule. Instead, it declared that, in general, “the constructive discharge label cannot be used to preclude the affirmative defense; but possibly, on rare facts, it might be appropriate for that purpose.”³⁹ The court concluded that the Supreme Court’s reasoning in *Ellerth* for not allowing the affirmative defense when there has been a tangible employment action is that “a supervisor who takes official action against an employee should be treated as acting for the employer.”⁴⁰ The court held that since all of Appel’s actions were “exceedingly unofficial and involved no direct exercise of company authority,” they were “exactly the kind of . . . conduct for which the affirmative defense was designed.”⁴¹

The First Circuit’s reasoning in *Reed* is flawed in several respects. First, constructive discharge does fit within *Ellerth*’s definition of tangible employment action. *Ellerth* lists several examples of tangible employment actions. Although the list does not specifically name constructive discharge,⁴² it defines tangible employment action as “a significant change in employment status,”⁴³ a definition in which constructive discharge clearly fits since the employer-employee relationship is terminated.⁴⁴ Moreover, *Ellerth* did list discharge as an example of a tangible employment action, and constructive discharge is a type of discharge; it is treated under the

36. See *Suders*, 325 F.3d at 461; *Jaros*, 294 F.3d at 966; *Jackson*, 272 F.3d at 1026.

37. *Suders*, 325 F.3d at 460 (internal quotation marks omitted).

38. *Id.* at 461.

39. *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (1st Cir. 2003). The court’s refusal to declare a bright-line rule, and its failure to give examples of what “rare facts” may preclude the affirmative defense serve only to add confusion to an already confusing issue. Following the court’s reasoning, it is difficult to conceive of a constructive discharge context in which the court would disallow the assertion of the defense.

40. *Id.*

41. *Id.*

42. See *supra* text accompanying note 3. At least one court believes that the Supreme Court’s failure to include constructive discharge in its clearly non-exhaustive list of tangible employment actions is dispositive. See *Powell v. Morris*, 37 F. Supp. 2d 1011, 1019 (S.D. Ohio 1999).

43. See *supra* text accompanying note 3.

44. *Ellerth* also noted that with tangible employment actions, the employee generally suffers direct economic harm. *Supra* text accompanying note 24. Under constructive discharge, the employee suffers from a direct economic harm since he or she no longer receives income from the employer. Thus, it more closely resembles termination and other tangible employment actions than it does simple hostile work environment, where the employee stays on the job with no economic injury.

law as if the employer terminated the employee.⁴⁵

Second, the First Circuit misinterpreted *Ellerth* and *Faragher's* reasoning for excluding the affirmative defense from tangible employment action cases. The court focused on the following statement in *Ellerth*: “[A] supervisor who takes *official* action against an employee should be treated as acting for the employer.”⁴⁶ Since constructive discharge is not necessarily an official action by the supervisor, the court permitted the affirmative defense. However, the statement on which the court relied only refers to one situation when vicarious liability is to be imposed; it does not describe every situation when the affirmative defense is to be excluded. *Ellerth's* actual reasoning for not allowing the affirmative defense when there has been a tangible employment action is that in those circumstances “there is assurance the injury could not have been inflicted absent the agency relation.”⁴⁷ It is guaranteed that the aided in the agency relation standard for imposing vicarious liability is met in the case of a tangible employment action; therefore, there is no reason to allow an affirmative defense. It follows that in situations where the intent or negligence standard is necessarily met that there is also no reason to allow the affirmative defense.

Third, the intent and negligence standards for imposing vicarious liability will always lead to employer liability in the case of a constructive discharge. Although *Ellerth* naturally focused on the aided in the agency relation standard when considering tangible employment actions, the Supreme Court did not reject the use of the Restatement's intent and negligence standards. In fact, *Ellerth* reiterated *Meritor's* holding that traditional agency principles—as stated in the Restatement—must apply.⁴⁸ In those circuits that require as an element of constructive discharge that the employer intended the employee to resign, the intent standard is always met. Likewise, in those circuits that require mere foreseeability, that the employer knew or should have known that the conditions were so intolerable that the employee would resign, the negligence standard is always met.⁴⁹ Therefore, applying traditional agency principles as stated in the Restatement (Second) of Agency, a valid claim of constructive discharge always leads to employer liability. This is the very reason the *Ellerth* court did not permit the affirmative defense when there is a tangible employment action—in such a case “it would be implausible to interpret agency principles to allow an employer to escape liability.”⁵⁰

Allowing the affirmative defense for a constructive discharge actually makes it more difficult for the employer to escape vicarious liability. In

45. *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999).

46. *Reed*, 333 F.3d at 33 (emphasis added).

47. *Ellerth*, 524 U.S. at 761-62.

48. *See id.* at 758-59.

49. “An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.” *Id.* at 759.

50. *Id.* at 763.

order for a plaintiff to prove constructive discharge, he or she must essentially disprove at least one element of the affirmative defense. First, the plaintiff must prove that the employer knew or should have known that conditions were intolerable but failed to stop it; this often disproves the first element of the affirmative defense, that the employer exercised reasonable care. Second, the plaintiff must prove that he or she was reasonable in feeling compelled to resign; this always disproves the second element of the affirmative defense, that the plaintiff unreasonably failed to take advantage of corrective opportunities offered by the employer. In a cause of action for constructive discharge, the plaintiff bears the burden of persuasion for both of these elements, but for an affirmative defense, the employer-defendant bears the burden. Thus, allowing the affirmative defense in this context may have the effect of lowering the standard for constructive discharge claims and shifting the burden of persuasion for two elements of constructive discharge to the employer. *Reed* is a perfect example of this. The *Reed* court should have upheld summary judgment for MBNA on the constructive discharge claim because the Reed was not reasonable in feeling compelled to leave in 1999 since she had not reported Appel's actions to management. Instead, without even seriously considering the merits of the constructive discharge claim, the court overturned summary judgment for MBNA because it had not met its burden of persuasion on the second element of the affirmative defense.

The Supreme Court recently granted certiorari to decide whether constructive discharge constitutes a tangible employment action.⁵¹ Applying *Ellerth's* definition, constructive discharge is clearly more similar to a tangible employment action than to a simple hostile work environment. Moreover, the court should not be reluctant to not allow the affirmative defense because either the intent standard, the negligence standard, or the aided in the agency relation standard noted in *Ellerth* will always be met. Finally, provided that the standard for constructive discharge is set sufficiently high, employers need not fear that the lack of the affirmative defense would lead to greater liability because the plaintiff-employee will rightly bear the burden of persuasion, rather than the defendant-employer bearing the burden of proving the affirmative defense.

51. See *Pennsylvania State Police v. Suders*, 124 S. Ct. 803 (Dec. 1, 2003) (No. 03-95).

