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EMPLOYMENT LAW

Employee Constructively Discharged After Co-worker's Demotion

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Special to the Legal

Even in a tight job market, employees resign regularly based on real or perceived problems at work. When they resign and then sue, they have an added degree of difficulty in establishing that they were “constructively discharged”—that is, that the conditions under which they were working were “so intolerable that a reasonable person would have had no choice but to resign.” The flip side to this standard is the well-settled law that employees are not being encouraged to resolve workplace situations with “the simple expedient of quitting.” The most recent case where this standard was discussed and applied by a court in the Eastern District of Pennsylvania was *Heppard v. EDSI Solutions*, No. 13-6124, 2014 U.S. Dist. LEXIS 175989 (E.D. Pa. Dec. 19, 2014).

UNFULFILLED PROMISE OF A RAISE

Shadeya Heppard was a data-entry clerk for EDSI Solutions, a workforce consulting company, when she was promoted to the position of quality-control



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coordinator in fall 2009. Along with her new responsibilities, EDSI discussed with Heppard the possibility of a retroactive salary increase. Heppard, however, worked for the next 17 months without an increase, according to the opinion. Although she was told that there was a wage freeze in effect, a white employee received an increase when she was promoted.

Due to the loss of a client contract, many of the positions at EDSI's two centers in Philadelphia were consolidated, which resulted in 24 employees losing their jobs and Heppard, who is an African-American woman, being demoted. Twenty-one of the 24 laid-off employees were African-American, the opinion said. Heppard's position was

filled by a white employee—whose pay was \$10,000 more per year than Heppard received (although it is not clear that Heppard knew that while she was employed with EDSI).

RESIGNATION

In January 2011, the African-American director of the center at which Heppard worked was demoted and replaced by a white employee. Heppard believed that this was racially motivated, prompting her to quit her position. Heppard subsequently sued EDSI for, in relevant part, discrimination under the Pennsylvania Human Relations Act. The lawsuit was heard in federal court due to diversity jurisdiction, as EDSI's headquarters are in Michigan.

Heppard's discrimination claim had two parts. Initially, Heppard claimed that she was discriminatorily denied the discussed/promised wage increase. While EDSI's purported wage freeze, due to financial difficulties, was a legitimate, non-discriminatory reason for denying the increase to Heppard, she was able to establish a genuine issue of fact, inasmuch as (a) there

was a dispute regarding the accuracy of EDSI's financial data and (b) EDSI had, as noted, given another promoted co-worker a raise similar to that denied to Heppard. Summary judgment on the discriminatory wage increase was, therefore, denied.

CONSTRUCTIVE DISCHARGE FOUND

Heppard's claim of constructive discharge required a more extensive discussion. As discussed, the standard in the Third Circuit is that an employee states a viable claim where he or she can establish that the employer "knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign," as in *Aman v. Cort Furniture Rental*, 85 F.3d 1074 (3d Cir. 1996). This is an objective standard that looks at whether the employee was "demoted, subjected to reduced pay or benefits, involuntarily transferred to a less desirable job, subject to altered job responsibilities or given unsatisfactory performance evaluations."

The court found that Heppard was able to establish that she was demoted during the consolidation (which had disproportionately affected African-Americans), had been questioned about a meeting at which African-American employees had discussed filing Equal Employment Opportunity Commission charges, had been criticized in her work performance, had been denied the referenced retroactive raise, had complained about discrimination and been told by an African-American manager that "this is how it works" and had seen that same manager demoted and replaced by a white employee. The court found that these events,

taken together, could lead a reasonable person to resign.

OBJECTIVE STANDARD

While the standard for constructive discharge is intended to be "objective," it should be noted that the "triggering" event for Heppard's resignation was the demotion of a co-worker that appears to have had nothing to do with her. The other allegations were circumstances under which Heppard had worked for many weeks or months. Moreover, there did not appear to be any evidence that EDSI had taken any action with the surreptitious intention that Heppard resign.

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While the *Heppard* court cited *Aman*, another U.S. Court of Appeals for the Third Circuit decision, *Gray v. York Newspapers*, 957 F.2d 1070, 1079 (3d Cir. 1992), held that "the employment discrimination laws require as an absolute precondition to suit that some adverse employment action have occurred. They cannot be transformed into a palliative for every workplace grievance, real or imagined, by the simple expedient of quitting." The *Gray* court found that a constructive discharge occurs if "the conduct complained of would

have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign." In *Clowes v. Allegheny Valley Hospital*, 991 F.2d 1159 (3d Cir. 1993), the court noted that "the law does not permit an employee's subjective perceptions to govern a claim of constructive discharge." The *Clowes* court based its affirmance of summary judgment to the employer, in part, on the finding that Janet Clowes "was never threatened with discharge; nor did her employer ever urge or suggest that she resign or retire." Nor did Clowes explore internal transfer options before resigning: "A reasonable employee will usually explore such alternative avenues thoroughly before coming to the conclusion that resignation is the only option," the *Clowes* court said.

BAR LOWERED?

The *Heppard* decision seems to lower the bar for an employee to claim that he or she was constructively discharged by allowing an employee's perception of an adverse action to a co-worker to be the act precipitating her resignation. While there appear to have been arguably adverse actions in the weeks and months before her resignation, Heppard continued in her employment, thereby calling into question how those events were perceived and whether they created the type of intolerable conditions necessary to support the claim. •