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AUG 19 2002
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Jose B. Vasquez,
Plaintiff,
vs.
Atrium Door and Window Company of
Arizona, Inc.,
Defendant.

No. CIV 00-1265-PHX-LOA

ORDER

This matter arises on Plaintiff's Motion Regarding Whether Constructive Discharge Constitutes a Tangible Employment Action. (document # 80). Plaintiff requests that the Court issue an order that a constructive discharge resulting from the discriminatory conduct of a supervisor constitutes a "tangible employment action" and, consequently, bars the affirmative defenses established by the Supreme Court in Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998). The Court has received and considered all the pleadings on the matter including Defendant's Response to Plaintiff's Notice of Supplemental Authority.

SUMMARY OF FACTUAL BACKGROUND

In the Complaint,¹ Plaintiff claims that Defendant, his former employer, engaged in racial and national origin discrimination which created a racially hostile work environment and led

¹ The parties have consented to magistrate judge authority pursuant to 28 U.S.C. §636(c).

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1 to Plaintiff's constructive discharge in violation of Title VII of the Civil Rights Act of 1964, 42
2 U.S.C. §2000e-2(a)(1), and the Civil Rights Act of 1991, 42 U.S.C. §1981. Defendant denies
3 any wrongdoing and asserts that Plaintiff voluntarily resigned for reasons unrelated to his claims
4 of discrimination. Plaintiff, a native of Mexico living lawfully in the United States as a
5 permanent resident alien, claims that his former supervisor and plant manager, Don Dezonias,
6 a Caucasian, frequently called Plaintiff and other Hispanic employees "wet backs," "spics,"
7 "beaners," or "braceros" in the workplace from August 1998 to July 1999. Plaintiff attests that
8 he asked Dezonias many times not to use the offensive language. Dezonias, however, allegedly
9 continued to use the racial slurs. Plaintiff asserts that he then complained to Defendant's
10 General Manager, Fred Bengston, after threatening to quit because of the racial slurs.
11 According to Plaintiff, Bengston's only action was telling Plaintiff and Dezonias that they
12 needed to work together. Plaintiff testified that two weeks later, the racial slurs began again.
13 Plaintiff claims that on July 29, 1999, upon the realization that the name-calling would not stop,
14 Plaintiff resigned from his job.

15 On April 29, 2002, the Court denied Defendant's Motion For Summary Judgement (doc.
16 #62), indicating, among others, that questions of fact existed for jury resolution on Plaintiff's
17 claims of hostile work environment and constructive discharge.

18 Both parties request a pretrial ruling that the Court determine now, a few weeks before
19 trial, whether a constructive discharge constitutes a tangible employment action. In agreeing
20 to do so, the Court limits its holding to situations in which a supervisor has harassed a
21 subordinate and does not reach the issue of whether the Court's holding herein extends the
22 availability of the Ellerth/Farragher affirmative defense when the constructive discharge is
23 caused by a non-supervisor.

24 **ELLERTH/FARAGHER AFFIRMATIVE DEFENSES**

25 The Supreme Court, in Ellerth and Faragher, determined that "an employer is subject to
26 vicarious liability to a victimized employee for an actionable hostile environment created by a
27 supervisor with immediate (or successively higher) authority over the employee." Ellerth, 524
28 U.S. at 765; Faragher, 524 U.S. at 807. The Supreme Court further stated that an employer may

1 raise an affirmative defense to liability or damages “when no tangible employment action is
2 taken.” Id. Therefore, no affirmative defense is available to an employer “when the supervisor’s
3 harassment culminates in a tangible employment action, such as discharge, demotion, or
4 undesirable reassignment.” Id.

5 TANGIBLE EMPLOYMENT ACTION

6 A tangible employment action is “a significant change in employment status, such as
7 hiring, firing, failing to promote, reassignment with significantly different responsibilities, or
8 a decision causing a significant change in benefits.” Ellerth, 524 U.S. at 761. The Supreme
9 Court elaborated by stating the following:

10 A tangible employment action in most cases inflicts direct economic harm. As
11 a general proposition, only a supervisor, or other person acting with the
12 authority of the company, can cause this sort of injury . . . Tangible employment
13 actions fall within the special province of the supervisor. The supervisor has
14 been empowered by the company as a distinct class of agent to make economic
15 decisions affecting other employees under his or her control.

16 Ellerth, 524 U.S. at 762.

17 CONSTRUCTIVE DISCHARGE

18 The Ninth Circuit has held that a “constructive discharge occurs when, looking at the
19 totality of the circumstances, a reasonable person in [the employee’s] position would have felt
20 that he was forced to quit because of intolerable and discriminatory working conditions.”
21 Satterwhite v. Smith, 744 F.2d 1380, 1381(9th Cir. 1984); Nolan v. Cleland, 686 F.2d 806, 812
22 (9th Cir. 1982).

23 The issue before the Court appears to be an issue of first impression in, at least, the
24 District of Arizona. The Ninth Circuit has yet to consider whether constructive discharge
25 constitutes a tangible employment action. Kohler v. Inter-Tel Technologies, 244 F.3d 1167,
26 1179 n.8 (9th Cir. 2001)(stating that the Ninth Circuit has yet to determine if constructive
27 discharge is a tangible employment action); Montero v. Agco Corp., 192 F.3d 856, 861 (9th Cir.
28 1999)(declining to reach the issue). Other Courts, including the First, Third², Fourth, Fifth,

² Cardenas v. Massey, 269 F.3d 251, 267 n.10 (3rd Cir. 2001)(stating that though the
Court assumed constructive discharge was a tangible employment action for purposes of

1 Sixth³, and Tenth⁴ Circuits, have also not yet directly addressed the issue. The remaining
2 circuits, however, are split on the issue.

3 REVIEW OF OTHER CIRCUITS

4 The majority view is held by the Seventh, Eighth, and Eleventh Circuits, which have
5 determined that a constructive discharge constitutes a tangible employment action. The Seventh
6 Circuit has determined that “[c]onstructive discharge, like actual discharge, is a materially
7 adverse employment action.” EEOC v. University of Chicago Hospitals, 276 F.3d 326, 331 (7th
8 Cir. 2002). Similarly, the Eighth Circuit has found that “constructive discharge constitutes a
9 tangible employment action which prevents an employer from utilizing the affirmative defense.”
10 Jaros v. Lodgenet Entertainment Corp., 294 F.3d 960, 966 (8th Cir. 2002); Jackson v. Arkansas,
11 272 F.3d 1020, 1026 (8th Cir. 2001)(stating that “if [the plaintiff] were constructively
12 discharged, then the constructive discharge would constitute a tangible employment action and
13 prevent [the employer] from utilizing the affirmative defense.”). Finally, the Eleventh Circuit
14 has concluded that “[c]onstructive discharge qualifies as an adverse employment action.” Poole
15 v. The Country Club of Columbus, Inc., 129 F.3d 551, 554 (11th Cir. 1997).

16 The minority view is held by the Second Circuit. The Second Circuit has held that
17 constructive discharge is not a tangible employment action. Caridad v. Metro North Commuter
18 R.R., 191 F.3d 283, 291 (2nd Cir. 1999)(stating that constructive discharge does not constitute
19 a tangible employment action). In Caridad, Court stated that “when a supervisor makes a
20 tangible employment decision, there is assurance the injury could not have been inflicted absent
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22 discussion of the case, the Court left the issue for the District Court in the first instance.)

23 ³ Plaintiff cited Policastro v. Northwest Airlines, ___ F.3d ___, 2002 WL 1732809 (6th
24 Cir. 2002) in Plaintiff’s Notice of Supplemental Authority. However, there was no finding of
25 constructive discharge in Policastro, so the explanation by the court is likely unreliable dicta.
Furthermore, there are no other published opinions that address this issue by the Sixth Circuit.

26 ⁴ Plaintiff cited Mallinson-Montague v. Pocrnick, 224 F.3d 1224 (10th Cir. 2000) in the
27 instant motion. However, the jury in Mallinson did not find the employee was constructively
28 discharged. Therefore, the language used by the court is likely unreliable dicta. There are no
other published opinions that address this issue by the Tenth Circuit.

1 the agency relationship.” Id. Caridad, however, is factually distinct from the instant case. In
2 Caridad, the employee never complained that she was being sexually harassed. In the instant
3 case, Plaintiff complained to Defendant’s General Manager, Fred Bengston, after threatening
4 to quit because of the harassment. Plaintiff further attests that Bengston did nothing to resolve
5 the situation, and the harassment subsequently continued. Bengston’s failure to act and his
6 apparent acquiescence allow a reasonable juror to conclude that Atrium, the corporate employer,
7 consented to the actions of the supervisor.

8 ANALYSIS

9 After careful consideration of the issue, the Court finds that a constructive discharge
10 constitutes a tangible employment action. The Court has given considerable weight to the
11 following factors: (1) the Ellerth/Farragher list of tangible employment actions was not intended
12 to be exhaustive; (2) the majority’s view that a constructive discharge is a tangible employment
13 action is more consistent with the remedial purposes of Title VII; and (3) the economic damage
14 to the employee is the same regardless of whether he or she is unlawfully fired or constructively
15 discharged.

16 First, the Supreme Court’s list of tangible employment actions in Ellerth was likely not
17 intended to be either exhaustive or exclusive of a constructive discharge. Ellerth, 524 U.S. at
18 765 (stating that “no affirmative defense is available . . . when the supervisor’s harassment
19 culminates in a tangible employment action, *such as* discharge, demotion, or undesirable
20 reassignment.”)(emphasis added); Farragher, 524 U.S. at 808. Therefore, the exclusion of
21 constructive discharge from the list of examples does not exclude the possibility that
22 constructive discharge may be a tangible employment action.

23 Second, the Court’s holding herein is consistent with the remedial purposes of Title VII.
24 Washington County v. Gunther, 452 U.S. 161, 178 (1981)(stating that “a ‘broad approach’ to
25 the definition of equal employment opportunity is essential to overcoming and undoing the
26 effect of discrimination . . . We must therefore avoid interpretations of Title VII that deprive
27 victims of discrimination of a remedy”). Precluding an interpretation that constructive
28 discharge was not a tangible employment action would be contrary to this purpose. Such a

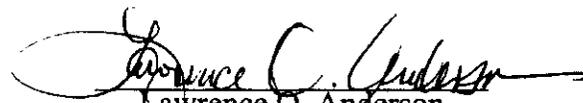
1 holding would not protect an employee from the unlawful behavior of a supervisor who creates
2 "intolerable and discriminatory working condition[s]" and would likely insulate the employer
3 from liability if the victimized employee were forced to quit.

4 Third, as the Supreme Court noted, "a tangible employment action in most cases inflicts
5 direct economic harm." Ellerth, 524 U.S. at 762. No doubt, so does a constructive discharge.
6 The economic injury and impact to the employee is the same, i.e., loss of employment,
7 regardless of whether he or she is unlawfully terminated from employment or constructively
8 discharged. A constructive discharge is usually more drawn out over time and, thereby, subjects
9 the employee to more painful abuse than a direct unlawful termination and yet, in an unfair
10 irony, a contrary holding would leave the employee with no legal remedy for enduring the
11 discriminatory working condition in the optimistic hope that it would stop.

12 Accordingly,

13 **IT IS ORDERED** that Plaintiff's Motion Regarding Whether Constructive Discharge
14 Constitutes a Tangible Employment Action (document # 80) is **GRANTED** as the Court
15 **FINDS** that a finding by the jury of constructive discharge in this case will be deemed a
16 tangible employment action and will, therefore, preclude the Ellerth/Farragher affirmative
17 defense to the Defendant in the trial of this matter.⁵

18 DATED this 13th day of August, 2002.

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21 Lawrence O. Anderson
22 United States Magistrate Judge
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27 ⁵ The Court expresses its gratitude to Rebecca Ruchalski, a summer extern and second
28 year law student at Arizona State University's College of Law, for her assistance to the Court
in the initial preparation and legal research on this matter.