LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
WEDNESDAY, JULY 10, 2024

PERSPECTIVE

Deconstructing constructive discharge

By JJ Johnston

Shutterstock

When an employee quits his or her job, that action might not have been a personal choice. Like a suspect's forced confession, a resignation may have been compelled rather than voluntary. A court might conclude that the worker had no real choice but to walk out the door.

"Constructive discharge" essentially shifts responsibility for a worker's resignation onto the employer. When work conditions become sufficiently intolerable and the employer knew about those conditions but did nothing to correct them, an employee may have no option but to quit.

Sufficiently intolerable

In the seminal case of *Turner v. Anheuser-Busch, Inc.* ((1994) 7 Cal.4th 1238, 1244 [32 Cal.Rptr.2d 223, 876 P.2d 1022]), the California Supreme Court laid out what constitutes constructive termination:

"In order to amount to constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to sup-port a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner*, supra, 7 Cal.4th at p. 1247)

To be deemed sufficiently intolerable, adverse working conditions must be unusually aggravated or they must amount to a continuous pattern. To be "intolerable" or "aggravated," the employee's working conditions must be "sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra*, at p. 1246.)

Single, trivial, or isolated acts of misconduct will generally be insufficient to support a constructive discharge claim, although "[i]n some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' "

But not every bad situation rises to a sufficient level of intolerability. California courts have ruled that the following situations, without more, do not constitute intolerable work conditions: a reduction in pay (Turner, supra, at p. 1247, 32 Cal. Rptr.2d 223, 876 P.2d 1022); a demotion (*Gibson v. Aro Corp.* (1995) 32 Cal.App.4th 1628, 1635, 38 Cal. Rptr.2d 882); transfer to a different branch; reassignment to a graveyard shift; promotion of a subordinate to a supervisory position over the employee; or unfair performance evaluations. "Bruised egos and hurt

feelings are not part of the Turner equation." (*Gibson, supra,* 32 Cal.App. 4th at p. 1637, 38 Cal.Rptr.2d 882)

In the 2022 case of *Gibson v. AL Jazeera* Int'l, the federal court for the Northern District of California declined to dismiss a former Al Jazeera International employee's constructive discharge claim. It found that even though she had been denied a promotion, she was nevertheless still required to perform tasks more advanced than her pay level. Requiring her to do such work, without a promotion, the court said, could constitute "intolerable" working conditions.

The plaintiff had essentially been asked to perform a more senior position's work "without credit, proper pay, or possibility of advancement," and she reasonably believed that she would never be promoted. In the court's view, she "reasonably understood her options were to either resign or be taken advantage of." This decision demonstrates that even though personnel decisions may not by themselves form the basis for a constructive termination claim, when work conditions are sufficiently intolerable, there may be sufficient grounds to sustain a claim for constructive discharge even when those conditions are not dangerous, painful, or humiliating.

Proving constructive discharge

Although *Turner* defined constructive discharge, it failed to explain what employees must prove to convince a court that the resignation was actually a termination. Courts have thus established a two-part test, laid out in CACI 2510: (1) the employer – either directly or through its officers, directors, managers or supervisors – "intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the plaintiff's position would have had no reasonable alternative except to resign"; and (2) the plaintiff resigned because of those working conditions.

The test is an objective one, using a reasonable employer and reasonable employee standard. It also requires a showing of knowledge on the employer's part. The employee must convince a court that the employer created or knowingly allowed work conditions to become so intolerable that any reasonable employer would realize that a reasonable individual in the employee's position would feel compelled to resign. "The essence of the test is whether, under all the circumstances, the working conditions are so unusually adverse that a reasonable employee in plaintiff's position `""would have felt compelled to resign."" (*Turner, supra* at p. 1247.)

In *Simers v. L.A. Times Communications, LLC* (18 Cal.App.5th 1248 (Cal. Ct. App. 2018) 227 Cal. Rptr. 3d 695), the Court of Appeal found that there was no constructive discharge when a sports writer quit after his column was suspended for a significant period of time, he was demoted, and he was subjected to disciplinary action. Contrary to the plaintiff's argument that evidence of "whether conditions were intolerable" should be assessed from the point of view of a "prominent columnist for [a] national publication," the court held that the law imposed an objective standard, requiring "the proper focus [to be] on the working conditions themselves," and "not on the plaintiff's *subjective* reaction to those conditions."

To prove a constructive discharge case, the employee must be able to show that the employer deliberately made working conditions so difficult or unbearable that he or she had no choice but to resign. Evidence that the employee notified a supervisor or manager of the issue should establish such knowledge, but simply telling other workers about the problem may not be enough to satisfy this requirement.

Conclusion

When constructive discharge is coupled with unlawful discrimination or retaliation, additional claims may arise. In the 2008 case of *Steele v. Youthful Offender Parole Bd.* ((2008) 162 Cal.App.4th 1241, 1253 [76 Cal. Rptr.3d 632]), the Court of Appeal found that because the plaintiff had been constructively discharged in retaliation for engaging in a protected activity, her discharge could constitute the adverse employment action required to establish a FEHA violation for discrimination or retaliation.

Constructive discharge, as with any employment claim, requires a showing of more than minimal injury, as well as a high tolerance for abuse. The reasonable employee standard sets a high bar for what is intolerable: A particularly shy or sensitive person may feel compelled to quit a job in which he is constantly berated by his boss, but reasonable workers are expected to buck up and keep on working.

JJ Johnston *is the founder of Johnston Mediation. He has been mediating employment and class action matters for more than two decades and has more than three decades' experience as an employment attorney representing both plaintiffs and defendants in a wide range of cases, including wage and hour class actions, PAGA claims, wrongful terminations, discrimination and retaliation cases, sexual harassment cases, prevailing wage claims, fair pay act claims, and defamation claims.*