

Say what? An Employee can sue for Discriminatory Termination After Resigning?

2 min read

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The employee who causes you to lose sleep at night — you know, the poor performer with a worse attitude — saunters into your office Friday afternoon and QUILTS. As she walks out the door with her belongings, you exhale a deep sigh of relief and smile. You won't lose another wink of sleep over this again...

Fast forward two months. It's Monday morning. You stop by the mail room to pick up your mail, and find a letter from the EEOC. Curious, you open it to find a charge of discrimination filed by your old friend. You scratch your head, thinking: "This employee quit. How could she claim we discriminated against her by terminating her. This claim *must* be frivolous." Yeah? *Think again.*

"Constructive discharge" occurs when working conditions became so unbearable that a reasonable employee would have no choice but to quit. One form of constructive discharge occurs when an employer behaves in a manner that effectively communicates to an employee that she will be terminated. Earlier this week, the Seventh Circuit Court of Appeals clarified the standard for assessing these cases, and employers should take note of their answer to avoid being lulled into the false sense of security described above.

In the case, called *Wright v. Illinois Dep't of Children & Family Servs.*, the plaintiff was a caseworker who was infamous for mishandling cases and verbally abusing clients and coworkers. After receiving notice that she had sent a ten-year-old ward of the state into a "manicking frenzy," the Department decided that it was time for the employee to undergo a fitness-for-duty evaluation. Not surprisingly, she refused. After several more orders, union grievances, and discipline, she retired and sued for constructive discharge, claiming that she believed the Department was going to terminate her. Her case went to the Seventh Circuit, giving that court an opportunity to clarify the appropriate test in this situation. Ultimately, **the court endorsed an objective test**: the proper inquiry is whether a *reasonable* employee in the plaintiff's position would believe, based on her employer's *actions*, that termination was *imminent* and *inevitable*. The plaintiff's subjective belief about what her employer was going to do was not relevant.

Sensibly, the Seventh Circuit determined that termination in this case was not imminent and inevitable at the time that the caseworker quit. The court noted that at the time of the resignation, the Department had not decided to terminate the employee, nor had it told her she would be fired. Further, the court underscored that—although termination was likely in this case given the caseworker’s pending discipline for failure to undergo the fitness-for-duty evaluations—the *possibility* of termination at the conclusion of her disciplinary proceedings did not amount to a constructive discharge.

So what is the takeaway? Let disciplinary proceedings play out. The Seventh Circuit’s decision reminds litigants that, because it is possible for employers to change their mind, courts will not speculate as to whether the employee would have been fired at the conclusion of those proceedings. In the interim, do not take any actions that would communicate to the employee your present intent to fire him or her, even if you expect termination to be the result. Here’s an easy example: in the case of a Performance Improvement Plan, do not suggest to the employee that it will be impossible for him or her to meet the Performance Improvement Plan’s terms or that it is a mere formality. Just let the plan run its course.

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