DAVIS V. LEGAL SERVS. ALA., INC: ELEVENTH CIRCUIT HOLDS AS A MATTER OF FIRST IMPRESSION THAT PAID SUSPENSION PENDING INVESTIGATION IS NOT AN ADVERSE EMPLOYMENT ACTION

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In *Davis v. Legal Services of Alabama, Inc.*[1] the United States Court of Appeals for the Eleventh Circuit addressed as a matter of first impression whether paid suspension constitutes an "adverse employment action" under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act.[2] Plaintiff-Appellant Artur Davis ("Davis"), a Black man, was suspended from his position with Legal Services of Alabama ("LSA") with pay pending an investigation into complaints from other employees.[3] Davis sued LSA for racial discrimination, claiming that his suspension with pay constituted an adverse employment action under 42 U.S.C. § 1981 and Title VII.[4] The Eleventh Circuit held that suspension with pay pending an investigation is not an adverse employment action and affirmed the district court's grant of summary judgment in favor of LSA.[5]

Davis, a former Congressman from Alabama, started working as the Executive Director of LSA in 2016.[6] A year into his employment, Davis began having problems with subordinates, and as a result these employees filed complaints to LSA's Executive Committee.[7] On August 18, 2017, following a vote by the Executive Committee, Davis was suspended with pay pending an investigation of the complaints made against him.[8] Davis was suspended for four reasons: (1) unauthorized spending, (2) not following LSA policies and procedures (3) unauthorized creation of new initiatives, and (4) creating a hostile work environment.[9] LSA then hired a public relations consultant, David Mowery ("Mowery")—someone with whom Davis "did not have a good relationship"—and gave him documents relating to Davis's

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[1] Davis v. Legal Servs. Ala., Inc., 19 F.4th 1261 (11th Cir. 2021) (per curiam).
[2] *Id.* at 1264.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 1266.
[6] *Id.* at 1264.
[7] *Davis*, 19 F.4th at 1264.
[8] *Id.*
[9] *Id.*

suspension.[10] On August 22, 2017, Davis notified LSA's Board that he intended to resign.[11]

Following his resignation, Davis filed suit in the United States District Court for the Middle of District of Alabama against LSA and two LSA Board members, Alex Smith and Laveeda Battle.[12] In his complaint, Davis asserted claims for racial discrimination under 42 U.S.C. § 1981 and state law defamation claims against all three Defendants.[13] Davis also asserted race discrimination under Title VII of the Civil Rights Act against LSA.[14] Davis claimed that two previous LSA directors, both of whom were white, were treated more favorably for participating in worse alleged conduct and that LSA took no action in either case, allowing the white directors to resign without first being suspended.[15]

After discovery, the Defendants moved for summary judgment on all claims, which the district court granted.[16] The district court "held that, as a matter of law, Davis was not subjected to an adverse employment action, and that circumstance was fatal to his discrimination claims."[17] Specifically, the district court held that "being placed on paid leave was not an adverse employment action."[18] The district court also dismissed Davis's state-law defamation claims because the provided evidence—LSA's disclosure of documents related to Davis's suspension to Mowery—"could not constitute 'publication,' [which is] an essential element of defamation."[19] Davis filed a notice of appeal to the Eleventh Circuit regarding his race discrimination claims, and the Defendants cross-appealed on the grounds that the district court erred in not awarding them costs.[20]

The Eleventh Circuit reviewed the district court's summary judgment decision *de novo*.[21] While the opinion began with Davis's race-discrimination claims, it also addressed Davis's defamation claim and the cross-appeal from the Defendants for costs. Because the latter two issues are not matters of first impression, these two claims will be discussed first.

As for the state law defamation claim, Alabama law provides that a plaintiff alleging defamation must establish five *prima facie* elements: "(1)

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[10] *Id.*
[11] *Id*.
[12] *Id*.
[13] *Davis*, 19 F.4th at 1264.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 1265.
[17] *Id.*
[18] *Id.*
[19] *Davis*, 19 F.4th at 1265.
[20] *Id.*
[21] *Id.*

the defendant was at least negligent (2) in publishing (3) a false and defamatory statement to another; (4) that the statement concerned the plaintiff; and (5) the claim is actionable either without having to prove special harm or upon allegations and proof of special harm."[22] Although Davis alleged LSA published a defamatory statement about him by giving Mowery two documents—the Executive Committee's Resolution on Davis's suspension and his Suspension Letter—the district court agreed with LSA's assertion that Mowery only received the documents for public-relations guidance.[23]

The district court, relying on *Brackin v. Trimmier Law Firm*,[24] held that Mowery and LSA had an agency relationship at the time LSA delivered the Resolution and Suspension Letter to Mowery—therefore, this did not constitute "publication" for the purposes of a defamation claim.[25] On appeal, Davis attempted to distinguish his case by arguing that the *Brackin* investigation was ordered by a state agency, and his investigation was not.[26] The Eleventh Circuit reasoned that while Davis's contention was true, it was "legally irrelevant" because Mowery was acting like an agent of the employer similar to the accountant in *Brackin*.[27]

Davis also argued that Mowery was not an agent of LSA because he was acting as a consultant and was thus not an employee.[28] The Eleventh Circuit was unpersuaded, reasoning that "[o]ne can be in an agency relationship with another without being that person's employee."[29] If Davis was correct in his assertion that consultants are not agents, employers would risk defamation every time they hire and provide consultants with employee documentation.[30] For these reasons, the Eleventh Circuit affirmed the lower court's holding that LSA's giving of documents to Mowery "did not constitute purposes of a defamation claim under Alabama law."[31]

The Eleventh Circuit also addressed whether it had proper jurisdiction over the Defendants' cross-appeal.[32] In actuality, the district court was completely silent about costs in granting summary judgment.[33] Federal Rule of Civil Procedure 54(d) provides that, unless otherwise

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[22] *Id.* at 1269 (citing Gary v. Crouch, 867 So. 2d 310, 315 (Ala. 2003)).
[23] *Id*.
[24] Brackin v. Trimmier L. Firm, 897 So. 2d 207 (Ala. 2004).
[25] *Davis*, 19 F.4th at 1269.
[26] *Id*.
[27] *Id.* at 1269–70.
[28] *Id.* at 1270.
[29] *Id.*
[30] *Id.*
[31] *Davis*, 19 F.4th at 1270.
[32] *Id.*
[33] *Id.*

provided for by statute, rules of procedure, or court orders, the prevailing party should be awarded costs.[34] The Eleventh Circuit held that the Defendant's cross-appeal was premature because the judgment entered by the district court was not the final decision on costs.[35] Because the Defendants' appeal was not from a final judgment, the Eleventh Circuit dismissed the appeal for lack of jurisdiction.[36]

With respect to Davis' racial discrimination claims, the Eleventh Circuit began its analysis explaining that a plaintiff is required under both Title VII of the Civil Rights Act and 42 U.S.C. § 1981 to show their employer subjected them to "an adverse employment action" on account of their race.[37] Unlike hostile-work-environment claims, a finding of racial discrimination requires "tangible employment actions[,]" which are "actions that affect continued employment or pay—things like terminations, demotions, suspensions without pay, and pay raises or cuts—as well as other things that are similarly significant standing alone."[38] Davis made two arguments on appeal.[39] First, Davis argued that the district court erred in concluding that suspension with pay pending an investigation was not an adverse employment action.[40] Second, Davis argued that the district court incorrectly concluded that Davis was not subjected to a constructive discharge.[41]

The question of whether suspension with pay is an adverse employment action in discrimination cases was an issue of first impression for the Eleventh Circuit.[42] This issue, however, has been litigated in other circuits, and the Eleventh Circuit looked to these decisions for guidance.[43] A survey of the caselaw from these circuits pointed the Eleventh Circuit towards one conclusion: that paid suspension is not an adverse employment action.[44] The Eleventh Circuit reasoned that suspension with pay can be a

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[34] Fed. R. Civ. P. 54(d)(1).
[35] *Davis*, 19 F.4th at 1271.
[36] *Id.*
[37] *Id.* at 1265*; see* 42 U.S.C. § 2000e-2(a)(1) (prohibiting employers from discriminating in compensation, terms, conditions, or privileges employment on account of race); 42 U.S.C. § 1981 (prohibiting racial discrimination in employment).
[38] *Davis*, 19 F.4th at 1266 (citing Monaghan v. Worldpay US, Inc., 955 F.3d 855, 860 (11th Cir. 2020)).
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Davis*, 19 F.4th at 1266–67. Circuit courts that have addressed this issue all held that paid suspension does not constitute an adverse employment action. *See* Joseph v. Leavitt, 465 F.3d 87 (2d Cir. 2006); Jones v. Se. Pa. Transp. Auth., 796 F.3d 323 (3d Cir. 2015); Von Gunten v. Maryland, 243 F.3d 858 (4th Cir. 2001); Breaux v. City of Garland, 205 F.3d 150 (5th Cir. 2000); Peltier v. United States, 388 F.3d 984 (6th Cir. 2004); Nichols v. S. Ill. Univ.

"useful tool" for an employer when an employee in a supervisory role has been accused of misconduct.[45] This is because "employers cannot expect employees to speak freely to investigators when the person under investigation is looking over their shoulders."[46]

Davis did not argue against this rationale; rather, he asserted that the manner in which LSA handled his suspension rose to an adverse employment action.[47] Davis argued that certain circumstances made his suspension "atypical," such as the suspension occurred just days before a "high-profile" reception with the state bar, the placement of a security guard outside of LSA, the disclosure of the suspension to Mowery, and that LSA created a "narrative of reasons for the suspension."[48] Davis also asserted that because he was "the public face of LSA" as Executive Director and not a subordinate employee, paid suspension was "more adverse" to him.[49] The Eleventh Circuit was not persuaded by this argument as Davis offered no evidence to support any of his claims.[50]

Furthermore, Davis argued that the district court incorrectly concluded that he was not subjected to a constructive discharge.[51] The Eleventh Circuit explained that under Title VII, a constructive discharge "is tantamount to an actual discharge, so it constitutes an adverse employment action."[52] The court defined constructive discharge as when "an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job."[53] Davis seemingly abandoned his constructive discharge claim in district court as he failed to argue why his voluntary resignation did not defeat his claim.[54] The district court, nevertheless, held that even if Davis had not abandoned his claim, LSA was entitled to summary judgment on Davis's constructive discharge claim.[55]

Edwardsville, 510 F.3d 772 (7th Cir. 2007); Pulczinksi v. Trinity Structural Towers, Inc., 691 F.3d 996 (8th Cir. 2012); Haddon v. Exec. Residence at the White House, 313 F.3d 1352 (Fed. Cir. 2002).

[45] *Davis*, 19 F.4th at 1267.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* ("Davis has offered no authority . . . to support the notion that whether an action constitutes an adverse employment action should depend on whether the employee is high-ranking in the organization.").

[51] *Davis*, 19 F.4th at 1267.

[52] *Id.* (citing Green v. Brennan, 578 U.S. 547, 555 (2016)).

[53] *Id.* at 1268.

[54] *Id.*

[55] *Id.*

The Eleventh Circuit held that while the district court reached the correct conclusion, it's analysis was incorrect.[56] The district court erroneously relied on *Hargray v. City of Hallandale*, which dealt with "whether a resignation from public employment that has been requested by the employer was sufficiently involuntary to trigger the protections of the Due Process Clause."[57] Davis argued, and the Eleventh Circuit agreed, that the district court erred in using the standard set out in *Hargray* because "whether a government entity's conduct violates a litigant's constitutional rights . . . is a more demanding standard than whether a litigant advances to a post prima face stage, or its equivalent, in an employment lawsuit."[58]

The Eleventh Circuit explained that this standard is "too exacting" for determining whether Davis was constructively discharged.[59] Citing *Green v. Brennan*, the court provided that the proper standard is "whether the employee can demonstrate that he was discriminated against by his employer to the point where a reasonable person in his position would have felt compelled to resign."[60]

Although the district court used the improper standard, the Eleventh Circuit affirmed the decision because the district court reached the proper conclusion.[61] Even under the proper standard, the Eleventh Circuit found that "no reasonable factfinder would conclude that a reasonable person would have felt compelled to resign under Davis's circumstances."[62] The evidence that Davis used to support his constructive discharge claim did not show there was "intense" or "intolerable" harassment.[63] Davis was also unable to claim constructive discharge because "paid suspension alone is not an adverse employment action."[64] Furthermore, Davis resigned four days after his suspension without giving LSA the chance to remedy the situation.[65] For these reasons, the Eleventh Circuit affirmed the district court's grant of summary judgment against Davis's constructive discharge claim.[66]

In affirming the district court's ruling in *Davis*, the Eleventh Circuit aligned with other circuit courts in settling the issue of whether paid

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[56] *Id.*
[57] *Davis*, 19 F.4th at 1268 (quoting Hargray v. City of Allandale, 57 F.3d 1560, 1567–68 (11th Cir. 1995)).
[58] *Id.* (citation omitted).
[59] *Id.*
[60] *Id.* (citing *Green*, 578 U.S. at 555).
[61] *Id.*
[62] *Id*.
[63] *Id.*
[64] *Davis*, 19 F.4th at 1268.
[65] *Id; see* Kilgore v. Thompson & Brock Mgmt., Inc. 93 F.3d 752, 754 (11th Cir. 1996) ("A constructive discharge will generally not be found if the employer is not given a sufficient time to remedy the situation.").
[66] *Davis*, 19 F.4th at 1269.

suspension constitutes as an adverse employment action under 42 U.S.C § 1981 and Title VII of the Civil Rights Act. While *Davis* only dealt with discrimination on the basis of race, this decision will affect other protected classes of employees in future discrimination decisions as the Eleventh Circuit narrowed the scope of conduct considered to be an adverse employment action. To constitute an adverse employment action, the conduct must affect the employee's compensation or status within the business; paid suspension neither touches the employee's wallet nor the employee's position. The Eleventh Circuit in *Davis* has essentially shown leniency to employers who utilize paid suspension to further investigate an employee's conduct without fear of triggering §1981 or Title VII liability. It is possible that this rationale could be expanded to include other employment actions that would not constitute "adverse employment actions" and, therefore, could not form the basis of discrimination claims.