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REPORT FROM COUNSEL

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CONSTRUCTIVE DISCHARGE AND HOSTILE WORK ENVIRONMENT: "WHEN IS ENOUGH ENOUGH?" CONSTRUCTIVE DISCHARGE DOES NOT CONSTITUTE A TANGIBLE ADVERSE EMPLOYMENT ACTION IN TITLE VII HOSTILE WORK ENVIRONMENT CASES

By Nicole L. Mangino, Esquire

Under the constructive discharge theory, an employee's resignation is treated as a formal discharge for remedial purposes when an employee makes a reasonable decision to resign because of intolerable working conditions. The standard for such an inquiry is objective: did the employee's working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign? In the context of sexual harassment, the question becomes even more defined: was the sexual harassment so severe and/or pervasive as to cause a reasonable employee to feel compelled to resign from his or her position?

The law recognizes two types of sexual harassment prohibited under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §2000e *et seq.* ("Title VII"): traditional "quid pro quo" harassment--consisting of a supervisor demanding sexual favors in return for job benefits

and/or to avoid job injury and "hostile work environment" sexual harassment claims involving bothersome attention, sexual remarks or other sexually offensive behavior in the work place.

In "quid pro quo" harassment claims an employer is strictly liable for its employees' sexually harassing conduct. See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 724, 752-753 (1998). Contrastingly, in hostile work environment claims, the United States Supreme Court has determined an employer's vicarious liability for sexual harassment based on the actual consequences of the harassment on the employee's employment. Employers are strictly liable for their supervisors' sexual harassment where the harassment culminates in a tangible employment action, i.e. demotion, termination, etc. However, where the sexual harassment occurs in the absence of a tangible employment action an employer may avoid vicarious liability for its supervisors' conduct by asserting a defense that the employee failed to utilize the internal reporting procedures and allow the employer an opportunity to rectify the situation.

In *Faragher v. Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 724 (1998), the Supreme Court recognized an affirmative defense to sexual harassment ("*Faragher/Ellerth* affirmative defense"), which may be asserted by an employer to defend against liability in a sexual harassment claim¹ by showing both (1) that it had a readily accessible and effective policy for reporting and resolving complaints of sexual harassment available to its employees, and (2) that the plaintiff unreasonably failed to avail him or herself of the employer's preventive or remedial resolution policy or process.² The burden of establishing the affirmative defense falls on the employer to demonstrate the existence of an adequate anti-sexual harassment policy and internal sexual harassment reporting procedure, and an employee's failure to avail himself or herself of the employer's internal procedure.

An employer is strictly vicariously liable for a hostile work environment claim that results in an adverse tangible employment action against the employee. The *Faragher/Ellerth* affirmative defense will not be available to an employer where there is a tangible adverse employment action against an employee, such as an employer officially changing an employee's employment status or situation, for example, a demotion, cut in pay, a transfer to a position in which he or she would face unbearable working conditions, or where an employee quits in reasonable response to a formal employer-sanctioned adverse employment action. While a constructive discharge is considered to be an involuntary termination of employment for remedial purposes, until recently it has been unclear if such a resignation that is unprompted by an employer's formal action would constitute a tangible employment action in evaluating a hostile work environment claim.³

The issue of whether a constructive discharge constitutes a tangible adverse employment action was addressed by the United States Supreme Court, on appeal from the Third Circuit Court of Appeals, in *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342 (2004). In *Suders*, the Supreme Court held that an employer may assert the *Faragher/Ellerth*

affirmative defense in cases involving constructive discharge as a constructive discharge does not alone constitute a tangible employment action.

The underlying facts in *Suders* are as follows. In 1998, the Pennsylvania State Police ("State Police") hired Nancy Drew Suders ("Suders") to work as a police communications operator. Suders claims that her male supervisors allegedly sexually harassed her by making continued explicit sexual comments directed toward her. Suders unofficially reported the harassment to State Police's Equal Employment Opportunity Officer. Suders subsequently officially reported the harassment to the EEOC Officer and also reported her hesitancy in making an internal complaint against her supervisors. Suders was advised by the EEOC Officer to file a formal written complaint, but never was instructed on the procedure or provided with any forms, information, etc. concerning the internal procedure for reporting sexual harassment. Two days after making the oral complaint to the EEOC Officer, Suders' supervisors arrested her for theft of her own computer skills exam paper. Suders had taken a computer skills exam necessary to satisfy a State Police job requirement and had been advised that she had failed. Prior to her arrest, Suders discovered the exam papers that had never been graded, in a drawer in the women's locker room. Suders removed the exam papers in an attempt to investigate her purported failure of the computer skills exam. No formal charges were filed against Suders. Following this incident, Suders resigned from the force and sued the State Police for sexual harassment and constructive discharge in violation of Title VII.

Procedurally, the United States District Court for the Middle District of Pennsylvania granted the State Police's motion for summary judgment finding that the State Police could not be vicariously liable for the supervisors' harassment of Suders because there was no tangible adverse employment action and she had failed to avail herself of the employer's internal reporting procedures under the *Faragher/Ellerth* standard. The matter was appealed to the Third Circuit Court of Appeals, which reversed and remanded the case for trial, holding that the State Police were strictly liable for the sexual harassment because constructive discharge constitutes a tangible employment action. The Supreme Court⁴ affirmed the Third Circuit's reversal of summary judgment finding the existence of material issues of fact relative to the sexual harassment claims. Yet, the Supreme Court reversed the Circuit Court's holding that an employer is vicariously liable for its supervisors' sexual harassment of an employee because constructive discharge does not constitute a tangible employment action, and remanded the case for further proceedings. The State Police would therefore be able to assert the *Faragher/Ellerth* affirmative defense to avoid vicarious liability for Suder's sexual harassment claim by introducing evidence of its anti-sexual harassment policy and internal reporting and remediation procedures, and Plaintiff's failure to use such procedures before resigning.

In *Suders*, the Supreme Court held that a constructive discharge is not in and of itself considered a tangible adverse employment action. In the absence of such a tangible adverse employment action, a plaintiff who resigns as a result of a hostile work environment caused by her supervisors' sexual harassment must exhaust the employer's internal procedures for reporting said harassment. The Courts have continued to recognize a plaintiff's duty to mitigate her harm by notifying her employer of any alleged

sexual harassment under the internal reporting procedures thereby allowing the employer an opportunity to rectify the situation even in the event of a constructive discharge. Accordingly, an employer remains able to assert a defense to an employee's alleged sexual harassment claims that the employee failed to report his or her harassment or exhaust the internal reporting procedures even if the employee claims that the harassment was so severe as to constitute a constructive discharge. An employee's resignation does not excuse his or her failure to utilize the formal internal harassment reporting procedure or an employer's anti-harassment policy prior to leaving his or her employment. An employee must follow these reporting procedures before resigning and filing a viable hostile work environment sexual harassment charge.

Does your company have an adequate anti-sexual harassment policy and reporting procedures for sexual harassment? Are the employees adequately informed of the policy and procedures to report sexual harassment? To avoid potential liability for sexual harassment, an employer should have an adequate, accessible and publicized anti-sexual harassment policy and procedure for employees to report sexual harassment in the work place. The policy and procedure should be reduced to writing and contained in an employee manual, periodically distributed, and posted to avoid potential vicarious liability for hostile work environment sexual harassment claims.

About the Author

Nicole L. Mangino is an associate attorney with the firm and is a member of the firm's Litigation Services Group. Her practice is concentrated in the areas of commercial litigation, employment and civil rights, insurance coverage, and family law. Ms. Mangino is a 1999 graduate of the University of Pennsylvania and a 2002 graduate of the University of Pittsburgh School of Law.

Endnotes

¹ The recognized affirmative defense carved out by the United States Supreme Court addresses vicarious liability for a supervisor's sexual harassment of an employee, and does not address a co-worker's sexual harassment conduct.

² The *Faragher/Ellerth* affirmative defense considerations of whether an employer had remedial internal reporting procedures for harassment, plaintiff's use of the procedures or anti-harassment policy, etc. may also be considered in determining if the employee's resignation under the circumstances constitutes a constructive discharge.

³ In comparison to the objective standard of a tangible adverse employment action, like a transfer, demotion, termination, etc., the subjective nature of constructive discharge creates a difficult determination of whether an employer should be held strictly liable for sexual harassment claims in the absence of an employer's formal employment action.

⁴ The Supreme Court's decision in *Suders* was a recent rarity in being almost a relatively unanimous eight to one decision. Justice Thomas cast the only dissenting vote.

E-MAIL PRIVACY IN THE WORKPLACE

Richard was an independent insurance agent who sold policies for a major insurer on an exclusive basis. After a period in which there was some dissatisfaction and acrimony on both sides of the relationship, the company terminated its agreement with Richard. In subsequent litigation brought by Richard, the parties disagreed as to the reason for the termination. The company's position was that it had fired Richard for disloyalty. How the company came by its evidence of disloyalty led to a separate element of the ensuing lawsuit.

When other events raised suspicions about Richard, an attorney for the company and a systems expert searched the company's main file server for any e-mail to or from Richard that caught their attention because of the e-mail headers. There, they claimed to find two messages from Richard to a competing insurance company that essentially asked if the competitor might be interested in acquiring some clients who supposedly were unhappy with Richard's company.

Richard argued to no avail that his former company violated his rights under the federal Electronic Communications Privacy Act (ECPA). First, he asserted that there was a violation of that part of the law that prohibits "intercepts" of electronic communications such as e-mails. However, courts, including the one hearing his case, have reasoned that an intercept can only occur contemporaneously with the electronic transmission. The company did not access Richard's e-mails *as he was sending them*, but read them later, so it did not "intercept" them.

The second claim was brought under a different part of the ECPA, which creates liability for intentionally accessing without authorization a facility through which an electronic communication service is provided, and thereby obtaining access to a communication while it is in electronic storage. "Storage" in this context means temporary, intermediate storage, or backup storage. A related part of the law makes an exception from liability for the person or entity providing the communications service. Since Richard's e-mails were stored on a system controlled and administered by his company, the company could not be liable for accessing the e-mails.

FIRM ANNOUNCEMENTS

Peter Y. Herchenroether, a shareholder and director of the firm and Chair of its Estates and Trusts Section, was recently elected to a three-year term as a member of the Allegheny County Bar Association Probate and Trust Section Council.

Joseph L. Robinson, a shareholder and director of the firm, was a speaker at the Appalachian Producers Marketing Seminar held in Lexington, Kentucky on November 17, 2004. The Seminar is an annual mineral law conference which is sponsored by the various Independent Oil and Gas Associations of several states, including Ohio, Pennsylvania, West Virginia, and Kentucky. The panel of speakers, of which Mr. Robinson was a member, addressed the topic of the conflicting claims to ownership of coalbed methane gas, which is contained within coal seams, between the coal owners and the owners or lessees of the conventional oil and gas deposits found at depths below the coal seams. Mr. Robinson spoke on the topic of the Coalbed Methane Law of Pennsylvania.

The firm was the Presenting Sponsor of the Financial Industries Network Event which took place on November 18, 2004 at the Duquesne Club in downtown Pittsburgh. The featured speaker was William S. Demchak, Vice Chairman and Chief Financial Officer of PNC Financial Services Group. The topic of the event was "Managing Financial Risk in a Post 9/11 World". Mr. Demchak spoke about economic uncertainty and financial risk in light of terrorism, election results, oil prices, and how those issues impact interest rates, equities, the economy in general and the Pittsburgh market in particular. The presentation was an overwhelming success with over 125 attendees registered for the event. The firm has been involved with the Financial Industries Network and its predecessor, the Bankers Exchange, for many years and Eric Springer has served on its Board for the past 5 years.

The firm is pleased to announce that Jennifer R. Applegate has joined the firm as an associate in the Corporate Services Group. She comes to the firm from a Pittsburgh firm providing counsel in the areas of business and corporate law, real estate, estate planning and probate, commercial lending and general litigation. Her practice focuses on legal issues related to various types of business entities, including sole proprietorships, corporations, partnerships, limited partnerships and limited liability companies. Her practice includes entity formation, dissolution, reorganization, mergers and acquisitions, real estate issues, and representing sellers and buyers in real estate transactions. Ms. Applegate received her undergraduate degree in 1993 from Carnegie Mellon University and her law degree in 2000 from the University of Pittsburgh School of Law.