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The U.S. Supreme Court rules that an employer may defend a hostile environment claim where the plaintiff has resigned by proving the *Ellerth/Faragher* affirmative defense, as long as the plaintiff's resignation was not precipitated by an official act of the employer.

Hostile Environment and Constructive Discharge: When the Employer is Strictly Liable

By Kristine Grady Derewicz

In a clarification of the application of the affirmative defense first made available in the Court's *Ellerth* and *Faragher* decisions, the U.S. Supreme Court has ruled that the affirmative defense is available to employers in some, but not all, cases of constructive discharge. The critical question is whether the "quit" was precipitated by any official act of a supervisor such that the employer should be strictly liable for the consequences or, alternatively, whether the employer played no role in the "quit" and, therefore, can defend itself by proving the affirmative defense. When an employee quits without an official act, an employer may defend a subsequent hostile environment lawsuit by proving that it had a readily accessible and effective policy for reporting and resolving claims of unlawful harassment **and** that the plaintiff unreasonably failed to avail herself of the reporting/resolution mechanism made available by the employer. The Supreme Court issued this ruling in *Pennsylvania State Police v. Suders* on June 14, 2004.

Suders' Allegations of Sexual Harassment

In *Suders*, a woman was hired by the Pennsylvania State Police as a police communications operator in one of the police barracks. She was supervised by three members of the state police, including the station commander. According to Ms. Suders, these supervisors began to sexually harass her almost at the inception of her employment. Specifically, she alleged that the station commander would "bring up [the subject of] people having sex with animals" each time Suders entered his office, and he and another supervisor often discussed oral sex in front of Suders. Another supervisor repeatedly made obscene gestures imitative of television wrestling, accompanied by vulgarities, in front of Suders.

Approximately three months after her hire, Ms. Suders commented to the state police's EEO officer that she "might need some help." The EEO officer gave Suders her telephone number but neither woman followed up. Two months later, Suders again contacted the EEO officer and stated that she was being harassed and was afraid. The EEO officer responded by telling Suders to file a complaint, but she did not provide further instruction or assistance.

Two days after her second report to the EEO officer, Ms. Suders' supervisors arrested and interrogated her on the job based upon their suspicion that she had removed police property from the barracks. In fact, Ms. Suders had removed certain computer proficiency tests that she had taken over the course of her employment because her supervisors had lied to her in telling her that she had failed the tests. Upon her arrest, Suders tendered her resignation.

The Supreme Court's Analysis

In analyzing the case before it, the Supreme Court reviewed its theory behind the *Faragher/Ellerth* holdings, i.e., that an employer should not be strictly liable for a hostile environment that is not aided by the "imprimatur of the enterprise." Thus, when a supervisor creates a hostile work environment that is unaided by the agency relationship, the employer is permitted to avoid liability by proving the two elements of the *Faragher/Ellerth* affirmative defense. In Suders' case, and other cases of constructive discharge, therefore, the question becomes whether the constructive discharge was

caused by an official act. The Court held, "when an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis . . . calls for extension of the affirmative defense to the employer." The Court further explained, "[a]bsent 'an official act of the enterprise,' as the last straw, the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force." On the other hand, "[t]his affirmative defense will not be available to the employer . . . if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions."

In terms of proof, the Court held, "to establish 'constructive discharge,' the plaintiff must make a . . . showing [beyond severe or pervasive conduct]: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response."

In a solitary dissent, Justice Thomas opined that the majority's opinion adopted a definition of "constructive discharge" that is at odds with relevant precedent and, more importantly, is too broad. According to Justice Thomas, the standard of an abusive work environment that is so intolerable that the employee's resignation "qualified as a fitting response" leaves the door wide open for claims of constructive discharge absent any adverse employment action. Coining the phrase "hostile environment plus," Justice Thomas writes that these cases require application of the affirmative defense in all instances.

Practical Implication of the Supreme Court's Decision

Employers rarely worry about an employee's resignation that is not preceded by some formal complaint or other obvious concern. After all, employees resign every day for a variety of legitimate reasons. With this new decision, however, the legal landscape around resignations is better-defined. If an employee is able to tie her resignation to any conduct of a supervisor that stems from the supervisor's official authority, the employer will be strictly liable for the hostile environment created by the supervisor. On the other hand, if the employee's resignation was the result of a hostile environment that was completely separate from the supervisor's official authority, the employer will be permitted to defend the claim by proving the *Faragher/Ellerth* affirmative defense. This decision drives home once again the importance of instituting and effectively communicating procedures for reporting and resolving complaints of harassment. Without those procedures, the affirmative defense is rendered worthless, and liability may follow.

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