Constructive Discharge as a Tangible Employment Action in Harassment Cases: The Supreme Court Speaks
June 25, 2004

On June 14, 2004, the U. S. Supreme Court resolved a disagreement among the lower federal courts and ruled that a constructive discharge resulting from harassment by a supervisor does not constitute a "tangible employment action," at least when the harassment is not accompanied by some employer-sanctioned adverse personnel action. Pennsylvania State Police v. Suders, No. 03-95, 2004 WL 1300153 (U.S. June 14, 2004). This decision will make it easier for employers to defend against many hostile environment sexual harassment claims.

I. Hostile Work Environment Harassment - the Affirmative Defense

In its landmark 1998 decisions in Faragher v. Boca Raton, 524 U.S. 775 (1998) and Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998), the Supreme Court set forth the standard under which employers may be held liable for workplace harassment by supervisors. The Court ruled that employers are strictly liable for a supervisor's harassment of a subordinate when the harassment results in a "tangible employment action." Ellerth, 524 U.S. at 765. The Court explained that a tangible employment action is a "significant change in employment status" that inflicts direct economic harm (including failure to hire, firing, failure to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits). The Court further noted that a tangible employment action is the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. The supervisor often must obtain the imprimatur of the enterprise and use its internal processes.

Ellerth, 524 U.S. at 762 (internal citations omitted).

On the other hand, if the employee is not subjected to a tangible employment action (such as where the employee alleges only the existence of a hostile work environment), then the employer is not strictly liable for the supervisor's conduct. Rather, the employer can avoid liability if it proves an affirmative defense that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to
avoid harm otherwise." Ellerth, 524 U.S. at 765.

Thus, the availability of the Faragher/Ellerth defense turns on whether the plaintiff can show that a tangible employment action occurred. In some cases, such as where a plaintiff claims that he or she was discharged for resisting a supervisor's sexual advances (a so-called quid pro quo harassment claim), it is clear that a tangible employment action is involved. On the other hand, plaintiffs in hostile work environment harassment cases frequently do not allege that they were fired or demoted by the employer; instead, they quit their jobs and claim that they were constructively discharged. That is, they claim that the harassment made the workplace so intolerable that a reasonable person would resign. The issue in Suders was whether such a constructive discharge constitutes a tangible employment action, making the Faragher/Ellerth affirmative defense unavailable.

The Faragher and Ellerth decisions did not directly address this question. And in the ensuing 6 years, the federal appeals courts have come to different conclusions. The Second and Sixth Circuits, for example, concluded that constructive discharge is not a tangible employment action because it is not an official company act and was not among the examples of tangible employment actions cited by the Supreme Court in Ellerth. See e.g., Turner v. Dowbrands, Inc., No. 99-3984, 2000 WL 924599, at * 1 (6th Cir. June 26, 2000); Caridad v. Metro North R.R., 191 F.3d 283, 294 (2d Cir. 1999). Adopting the opposite view, the Eighth Circuit ruled that constructive discharge is a tangible employment action, reasoning that a constructive discharge is the functional equivalent of an actual discharge and results in a "significant change" in employment status. Jackson v. Arkansas Dep't of Educ., 272 F.3d 1020 (8th Cir. 2001). A third opinion, expressed by the First Circuit, was that a constructive discharge may be a tangible employment action in "rare" cases, depending on the particular circumstances. Reed v. MBNA Marketing Sys., 333 F. 3d 27, 33 (1st Cir. 2003). It was against this backdrop that the Suders case made its way to the Supreme Court.

II. The Facts and Procedural History of Suders

Nancy Drew Suders spent five months as a Pennsylvania State Police dispatcher before quitting over what she claimed was a continual stream of lewd and offensive comments by her supervisors. Two months after her hire, she told a human resources representative during a sexual harassment training session that she may need to speak with her. But Suders failed to follow up until two months later, when she called to complain about sexual harassment that she was allegedly suffering; she was told to file a complaint but was not instructed as to how to do so. Two days after her call, Suders's supervisors arrested her for theft of computer skills exams that she took because she believed they were being
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improperly not graded and hidden. She resigned after she was detained for questioning about the theft.

Thereafter, Suders filed suit for sexual harassment and constructive discharge under Title VII, but the district court dismissed the claims on summary judgment. The court ruled that Suders’s supervisors had created a hostile work environment but that she had not suffered a tangible employment action and that the employer successfully established the Faragher/Ellerth affirmative defense.

On appeal, the U.S. Court of Appeals for the Third Circuit disagreed and reinstated the case. The court ruled Suders had created a genuine issue of fact with regard to her claim of constructive discharge and that constructive discharge itself is a tangible employment action precluding application of the Faragher/Ellerth affirmative defense.

Pennsylvania State Police v. Suders, 325 F.3d 432, 447 (3d Cir. 2003). The Third Circuit explained that constructive discharge is the functional equivalent of an actual termination and constitutes a significant change in employment and, as such, falls within the class of acts that are tangible employment actions. Id. The employer appealed to the Supreme Court.

III. The Supreme Court's Decision

In deciding that a constructive discharge is sometimes, but not always, a tangible employment action, the Supreme Court first restated the standard a plaintiff must meet to establish that hostile work environment harassment has led to constructive discharge. The Court stated that "for an atmosphere of sexual harassment or hostility to be actionable, the offending behavior 'must be sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment.'" Suders, 2004 WL 1300153, at * 4 (citing Meritor Sav’gs Bank v. Vinson, 477 U.S. 57, 67 (1986)). And to establish that such an environment resulted in constructive discharge "entails something more" - the plaintiff must also show that "the abusive working environment was so intolerable that her resignation qualified as a fitting response." Id.

On the issue of whether a constructive discharge constitutes a tangible employment action, precluding application of the Faragher/Ellerth defense, the Court ruled that a constructive discharge is a tangible employment action where it is accompanied by some "official act" attributable to the employer that has negative consequences to the employee (like "a humiliating demotion," "extreme cut in pay," or transfer to a position in which she could face unbearable working conditions). The Court reasoned that employers should be held strictly liable where such acts have occurred because a
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harassing supervisor is able to take these actions against an employee only as a result of the supervisor’s agency relationship with the employer. Id. at * 10 ("when a supervisor takes a tangible employment action against a subordinate . . . it would be implausible to interpret agency principles to allow an employer to escape liability."). Conversely, where the claimed constructive discharge is unaccompanied by an act that could constitute an "official act," such as where the employee experiences no change in employment, has only a small cut in pay, or is laterally transferred, no tangible employment action has occurred and the employer is entitled to defend against the hostile environment claim by proving the Faragher/Ellerth affirmative defense.

The Suders decision will permit employers to assert the Faragher/Ellerth defense in all cases in which a plaintiff alleges constructive discharge based solely on the existence of a hostile work environment, unaccompanied by an "official act" by the offending supervisor. Accordingly, this decision is yet another reminder to employers of the importance of maintaining a comprehensive harassment-free workplace policy and conducting periodic harassment training, especially for supervisory employees, as well as the importance of acting promptly and effectively on employee complaints of inappropriate conduct. The Supreme Court has given employers the opportunity to reduce their liability in a broad range of hostile environment/constructive discharge cases; it is up to employers to ensure that they put in place the measures that will allow them to establish the affirmative defense and thereby to take advantage of this opportunity.