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### **Ellerth/Faragher Affirmative Defense Extended To Claims For Hostile Work Environment Constructive Terminations**

Employers have an affirmative defense against constructive termination claims resulting from sexual harassment committed by a supervisor brought under Title VII of the Civil Rights Act of 1964. On June 14, 2004, in Pennsylvania State Police v. Suders, the United States Supreme Court extended the Ellerth/Faragher affirmative defense to constructive termination claims. Recognizing that claims of constructive termination based on supervisory sexual harassment are essentially hostile work environment claims "ratcheted up to the breaking point," the Supreme Court held that the employers should have an affirmative defense to avoid vicarious liability in cases that do not involve an "official act of enterprise."

#### **1. Overview of Facts**

In March 1998, the plaintiff, Nancy Drew Suders ("Suders"), was hired by the Pennsylvania State Police ("PSP") as a police communications operator. She alleged that during her employment, her supervisors subjected her to a barrage of sexual harassment. Examples of the alleged sexual harassment included a variety of sexual comments, gestures, and conduct and other instances of intimidating or threatening behavior.

In June 1998, Suders visited PSP's Equal Employment Opportunity Officer and said that she "might need some help" after she was accused of taking a missing file home. She was given the officer's telephone number, but neither Suders nor the officer followed up on the conversation. On August 18, 1998, Suders again visited the Equal Employment Opportunity Officer and this time said that she was being harassed and that she was afraid. Suders was instructed to file a complaint, but was not told how to obtain the necessary paper work.

Two days later, Suders was arrested for stealing the results of her own computer-skills exams, and subsequently resigned. Suders had taken the exam several times, but was told each time that she had failed. Upon discovering her exams in the women's locker room, she concluded that they had never been graded and removed them. Upon learning that the exams were missing, Suders' supervisors arrested and interrogated her. They released her when she repeatedly stated that she wished to resign. No charges of theft were filed.

## 2. Legal Analysis

In September 2000, Suders sued PSP alleging sexual harassment and constructive termination in violation of Title VII of the Civil Rights Act of 1964. The U.S. Supreme Court cases, Burlington Industries, Inc. v. Ellerth and Faragher v. Boca Raton, held that an employer is strictly liable for supervisor harassment that results in a tangible employment action. However, if no tangible employment action is taken, an employer may raise an affirmative defense to vicarious liability. The Ellerth/Faragher affirmative defense requires that two elements be satisfied: 1) the employer exercised reasonable care to prevent and promptly correct sexually harassing conduct; and 2) the plaintiff employee unreasonably failed to utilize the employer-defendant's established preventative and corrective procedures.

Following the holdings of Ellerth and Faragher, the district court concluded that Suders' claim for hostile work environment was untenable because Suders resigned only two days after she mentioned harassment to the Equal Employment Opportunity Officer. As a result, she never gave PSP the opportunity to respond to her complaints. The district court did not address her constructive termination claim.

The Court of Appeals for the Third Circuit reversed and remanded, holding that there were genuine questions of material fact regarding the ability of PSP's program to effectively address claims of sexual harassment. It also held that a constructive termination constitutes a tangible employment action that imparts the same "direct economic harm" as a termination. As a result, the court held that PSP was precluded from asserting the Ellerth/Faragher affirmative defense to Suders' constructive termination claim.

The Supreme Court granted certiorari to resolve the narrow issue of whether a constructive termination is a tangible employment action which precludes the Ellerth/Faragher defense. The Court only considered claims of constructive termination resulting from "sexual harassment or hostile work environment attributable to a supervisor." On June 14, 2002, the Court held that a constructive termination is functionally equivalent to an actual termination; however, it noted that "absent an official act of the enterprise" an employer may have no reason to suspect that an employee's resignation was due to a supervisor's conduct. As a result, it held that an employer is entitled to assert the Ellerth/Faragher defense to establish that it should not be held vicariously liable for claims that do not include a tangible employment action.

In light of this expansion of the Ellerth/Faragher defense in Title VII cases, it is increasingly important that employers diligently create and enforce procedures to report and correct sexually harassing conduct. Preventative policies and prompt investigation of sexual harassment complaints can effectively defeat hostile work environment and hostile work environment constructive termination claims by an employee who unreasonably failed to utilize existing reporting procedures.

For more information on this issue, please contact a member of the Labor and Employment Practice Group in one of our offices.

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