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Client Alert

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Third Circuit And New Jersey Appellate Division Decisions Expand Employers' Potential Vicarious Liability For Workplace Harassment By Supervisors

One of the key issues in harassment cases alleging a hostile work environment is whether or not the company is liable for the misbehavior of its employees. Earlier this month, the U.S. Court of Appeals for the Third Circuit and the Superior Court of New Jersey, Appellate Division issued separate decisions that will likely expose companies doing business within New Jersey and the Third Circuit to greater potential vicarious liability for workplace harassment.

First, in *Suders v. Easton*, 2003 WL 1879011 (3d Cir. Apr. 16, 2003), and *Entrot v. BASF Corp.*, 2003 WL 1792115 (N.J. Super. App. Div. Apr. 7, 2003), the courts held that a constructive discharge, if proved, constitutes a "tangible employment action" within the meaning of the U.S. Supreme Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Thus, if an employee proves that he/she was constructively discharged, the employer is precluded from asserting the so-called *Faragher/Ellerth* affirmative defense to avoid liability for the supervisor's harassment.

Moreover, when assessing whether an employer is vicariously liable for harassment, courts must determine whether the harassing employee is a supervisor or co-worker, since the legal standard for imputing liability to the company differs depending on the status of the alleged harasser. Courts have taken various positions in determining whether the alleged harasser is a "supervisor." In *Entrot v. BASF Corp.*, the Appellative Division adopted a broad definition of "supervisor" which focuses on "whether the power the offending employee possessed was reasonably perceived by the victim, accurately or not, as giving that employee the power to adversely affect the victim's working life."

A Summary Of *Faragher* And *Ellerth*

In *Faragher* and *Ellerth*, the U.S. Supreme Court addressed the scope of an employer's vicarious liability for harassing conduct of its supervisors in the context of Title VII of the Civil Rights Act of 1964. The Supreme Court held that an employer will be strictly liable to a victimized employee for a hostile work environment created by a supervisor when the harassment at issue results in a "tangible employment action." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The Supreme Court defined a tangible employment action as "a significant change in employment status," often resulting in economic injury, and set forth a non-exclusive list of the following actions: "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761.

If the harassment does *not* result in a tangible employment action, the employer still may be liable, but can raise an affirmative defense to liability or damages. To do so, the employer has to show that "(a) [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765; *Faragher*, 524 U.S. at 807.

The Third Circuit's Decision In *Suders v. Easton*

Background Facts

The plaintiff, Nancy Drew Suders, was hired as a police communications operator with the Pennsylvania State Police in March 1998. She claimed that she was forced to resign from her job in August 1998, because of a sexually hostile work environment created by her male supervisors, Sergeant Eric Easton, Patrol Corporal William Baker, and Corporal Eric Prendergast, as well as their daily harassment because of her age and political affiliation.

Some of the alleged conduct included name-calling, repeated sexual gesturing, offensive and obscene sexual conversation, and the posting of vulgar images. For instance, Easton allegedly discussed bestiality in front of Suders, as well as made disparaging remarks about her age. Suders alleged that Baker would repeatedly imitate a move by a popular televised wrestler – "cross his hands, grab hold of his private parts and yell, suck it" – in front of her. Suders also asserted that she was accused of stealing papers in the barracks and, as a result, was handcuffed, photographed, and held for questioning. After that incident, Suders resigned from her job.

The District Court Proceeding

Suders filed suit in the Middle District of Pennsylvania, alleging that the PA State Police and the individual defendants had subjected her to a hostile work environment based on her sex, age, and political affiliation and had constructively discharged her, in violation of Title VII, the Age Discrimination in Employment Act, and the Pennsylvania Human Relations Act. At the close of discovery, the PA State Police and individual defendants successfully moved for summary judgment. In particular, the district court concluded that, while Suders had established that she endured a hostile work environment, the PA State Police had met its burden of establishing a *Faragher/Ellerth* affirmative defense, and thus could not be held vicariously liable for the alleged harassment. Suders then appealed to the Third Circuit.

Third Circuit Rules That Constructive Discharge Is A "Tangible Employment Action"

Writing for the panel, Circuit Judge Fuentes, who was joined by Circuit Judge McKee and visiting Judge Pogue of the U.S. Court of International Trade, agreed with the district court's conclusion that Suders had presented evidence showing that her workplace was a hostile work environment. *Id.* at *8. The Court, however, found the district court's analysis regarding the availability of the *Faragher/Ellerth* affirmative defense flawed for two separate reasons: there were disputed issues of fact as to whether the PA State Police exercised reasonable care to prevent the harassment and, "more importantly," the district court failed to consider the merits of Suders' constructive discharge claim and whether a valid constructive discharge claim would affect the availability of the affirmative defense. *Id.* at *9-10.

In addressing the merits of Suders' constructive discharge claim, the Third Circuit reiterated the "stringent" and "heavily fact-driven" test for proving such claim, namely: whether a "reasonable person" in the employee's position would have had no choice but to resign because of the "intolerable" working conditions. *Id.* at *12. The Court stated:

> we reiterate that a plaintiff-employee alleging a constructive discharge in violation of Title VII must establish the convergence of two factors: (1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign; in that regard, although we cannot say as a matter of law that a single incident of discrimination is insufficient to show a constructive discharge, the employee has the burden of establishing that the discrimination surpassed a threshold of intolerability; and (2) the employee's reaction to the workplace situation – that is, his or her decision to resign – was reasonable given the totality of the circumstances; as to this factor, although it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning, a failure to do so will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign.

Id.

After concluding that Suders raised genuine issues of material fact relating to her constructive discharge claim, the Third Circuit addressed the following issue: "whether a constructive discharge constitutes a tangible employment action, such that the affirmative defense to the liability of an employer for the discriminatory conduct of its supervisors would not be available to the employer." *Id.* at *4. The Court answered that question in the affirmative, stating:

> we hold that a constructive discharge, when proved, constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher*. Consequently, when an employee has raised a genuine issue of material fact as to a claim of constructive discharge, an employer may not assert, or otherwise rely on, the affirmative defense in support of its motion for summary judgment.

Id. at *27. This means that, whenever an employee shows that he/she was constructively discharged because of the harassment, the employer is strictly liable for any actionable harass-

ment without regard to the *Faragher/Ellerth* affirmative defense. *Id.*

In reaching this decision, the Third Circuit joined the split in the Circuits. *Compare Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999) (concluding that constructive discharge does not constitute a tangible employment action), *cert. denied*, 529 U.S. 1107 (2000), and *Turner v. Dowbrands, Inc.*, No. 99-3984, 2000 U.S. App. LEXIS 15733 (6th Cir. June 26, 2000) (same), *with Jaros v. LodgeNet Enter. Corp.*, 294 F.3d 960 (8th Cir. 2002) (concluding that constructive discharge does constitute a tangible employment action). Rejecting the Second and Sixth Circuit's decisions, the Third Circuit concluded that there was no reason to treat a constructive discharge differently than an actual termination. *Suders*, 2003 WL 1879001, at *25. Indeed, the Court believed that "removing constructive discharge from the category of tangible employment actions could have the perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment." *Id.* at *26.

According to Judge Fuentes, employers confronted with allegations of harassment "have a wide range of options, including terminating the offending supervisor or stepping in and removing the victim from the hostile work environment by, for example, a transfer." *Id.* (*EDITOR'S NOTE*: Despite that statement, employers should be cautious about transferring the purported victim, since that decision could be viewed as a tangible employment action and/or retaliatory.) Nonetheless, he emphasized that, "as our ever expanding Title VII caseload shows, there are instances when employers ignore these two alternatives and opt instead to either turn a blind eye or let their internal procedures run their course while the hostile environment remains unchanged." *Id.* Judge Fuentes went on to state that:

> With these realities in mind, if we were to hold that a constructive discharge does not constitute a tangible employment action, employers would undoubtedly catch on to the availability of the affirmative defense even if the victimized employee resigns from objectively intolerable conditions at work. Under such a rule, the temptation of employers to preserve their affirmative defense would be overwhelming in many situations. Some employers might wish for an employee to quit voluntarily; others might even tacitly approve of increased harassment to achieve that result. In any event, the benefits of stepping in to remedy the hostile work environment are measurably cloudier.

Id.

In the end, the Court opined that, "[b]y holding that a constructive discharge constitutes a tangible employment action, we effectively encourage employers to be watchful of sexual harassment in their workplaces and to remedy complaints at the earliest possible moment; otherwise, they risk losing the benefit of the affirmative defense should victimized employees feel compelled to resign." *Id.* at *27. On the other hand, the Court stated that it did not believe that its holding "discourages responsible behavior on the part of victimized employees." *Id.* In this respect, the Court stated that "[b]ecause of the stringent test for proving constructive discharge . . . it is highly unlikely that employees will walk off of the job at the first sign of harassment and expect to prevail under Title VII." *Id.*

The Appellate Division's Decision In *Entrot v. BASF Corp.*

Background Facts

The plaintiff, Cindylu Entrot, was hired in 1988 as a Group Information Systems manager in BASF's Polymer Division. In 1996, she asked to be assigned to a temporary project involving the implementation of new business software. Entrot was one of five team leaders under a designated "project leader." The project leader's duties included setting priorities for the team, scheduling implementation dates, and helping make strategic decisions. Entrot claimed that the project leader was responsible for directing and evaluating her job performance.

In 1997, while on business trips together, Entrot and the project leader developed a sexual relationship, spending time in each other's hotel rooms. Entrot claimed that she was afraid of the consequences if she turned down the project leader's advances, and so did not resist his attempt to engage in varied sexual acts. Entrot also asserted that the project leader insisted on giving her a birthday present, wrote love poems to her, and had psychological power over her. Entrot's husband eventually learned of the affair and warned the project leader to stay away from his wife. Thereafter, Entrot's husband called her supervisor to complain that she was being stalked by the project leader, but Entrot never mentioned to her supervisor that any sexual conduct took place. She later denied allegations of any sexual misconduct by the project leader in a conversation with a corporate security officer. In April 1997, Entrot was diagnosed with bipolar disorder, and left work on a disability leave in late July 1997. She never returned to work.

The Trial Court Proceeding

In April 1999, Entrot filed suit in Morris County Superior Court against BASF and the project leader, asserting claims for sexual harassment and constructive discharge in violation of New Jersey's Law Against Discrimination ("LAD") and various

tort claims. In July 2001, after extensive discovery, BASF and the project leader each made a motion for summary judgment. The trial court granted BASF's motion. The court concluded that, although Entrot had sufficiently raised issues of fact concerning her claim of a hostile work environment, she failed to show that the project leader was a supervisor and, even if the project leader were a supervisor, she failed to show that BASF should be held vicariously liable for the sexual harassment of a supervisor. The trial court also rejected Entrot's constructive discharge claim. The trial court cited a number of factors supporting its conclusion that the project leader was not Entrot's supervisor, including the following: the project leader was not from Entrot's department; the project leader had no authority to hire, fire, or promote Entrot; the project leader had not selected Entrot for the project; the project leader had no significant input into personnel decisions concerning Entrot; the project leader did not control Entrot's day-to-day working environment; Entrot did not report to the project leader on a daily basis or seek redress from him on workplace issues; and the project was temporary.

The trial judge denied the project leader's motion regarding the tort claims against him. Thereafter, Entrot and the project leader entered into a settlement.

Appellate Division Broadens Scope Of "Supervisor," Concludes That Constructive Discharge Is A "Tangible Employment Action," And Remands Case For Trial

Writing for the panel, Judge Weissbard, who was joined by Judges Kestin and Fall, reversed the trial court's grant of summary judgment in favor of BASF on the hostile environment and constructive discharge claims, and remanded the case for trial.

Who Is A "Supervisor" Under The LAD?

In considering an employer's liability for sexual harassment, the Appellate Division turned to *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587 (1993), the seminal case outlining the standards of employer liability. The Appellate Division noted that "when a court is asked to assess compensatory and punitive damages as a result of the harassing conduct, an employer's liability for a supervisor's conduct must be gauged under common-law principles of agency." 2003 WL 1792115, at *5. According to *Lehmann*, an employer is vicariously liable for a harassing supervisor's conduct if the employer "contributed to the harm through its negligence, intent, or *apparent authorization of the harassing conduct, or if the supervisor was aided in the commission of the harassment by the agency relationship.*" 132 N.J. at 624 (emphasis added). In other words, the harassing employee must receive some degree of "supervisory" authority from the employer. *Id.* at 620.

Based on *Lehmann*, the Appellate Division emphasized that, in determining an employer's liability, a court must first ascertain whether the harassing employee is a "supervisor." *Entrot*, 2003 WL 1792115, at *5. In fashioning its definition of a "supervisor," the Court reviewed a number of New Jersey cases decided since *Lehmann*, including *Heitzman v. Monmouth County*, 321 N.J. Super. 133, 145 (App. Div. 1999), and *Cavuoti v. New Jersey Transit Corp.*, 161 N.J. 107, 129 (1999). 2003 WL 1792115, at *6. Based on that review, the Court in *Entrot* stated that "supervisory status depends on the nature of the employer's delegation of authority to the harassing co-worker. If the co-worker had the authority to control the work environment, any harassing behavior by him or her will cause the employer to be liable." *Id.*

The Appellate Division also looked at federal court decisions that have defined the term "supervisor" for purposes of assessing vicarious liability under Title VII. *Id.* at *8. In so doing, the Court acknowledged that the federal courts are "split into two camps": one camp focusing on the "power to make key personnel decisions" such as the power to hire, fire, demote, promote, transfer, or discipline an employee, *e.g.*, *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998), and the other camp focusing on the "power to direct on-the-job activities," *e.g.*, *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001). *Entrot*, 2003 WL 1792115, at *8-9.

In the end, the Appellate Division concluded that the *Dinkins* approach represented "'a more indulgent line of case authority.'" *Id.* at *9. In *Dinkins*, the court held that an employee is a "supervisor" if he is empowered "to recommend tangible employment actions if his recommendations are given substantial weight by the final decisionmaker or to direct another employee's day-to-day work activities in a manner that may increase the employee's workload or assign additional or undesirable tasks." 133 F. Supp. 2d at 1266. *Dinkins* also acknowledged another basis for qualifying as a "supervisor": when the harasser, while not really a supervisor, has "apparent authority" that causes the victim to reasonably believe that the harasser possesses supervisory powers. *Id.* The *Dinkins* court's definition of a "supervisor" was consistent with EEOC's enforcement guidance, which provides that "[a]n individual qualifies as an employee's 'supervisor' if: . . . the individual has authority to direct the employee's daily work activities." EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment By Supervisors, 8 FEP Manual (BNA) 405:7654 (1999).

In following *Dinkins* and the EEOC's view, the Appellate Division in *Entrot* stated:

> To date our Supreme Court has not been called on to choose between these two competing views. . . . Our

> reading of *Lehmann* and its progeny . . . suggests that the Court, instead of requiring a litmus test depending on specific factors (*e.g.*, power to fire or power to control daily tasks), would make the decision turn on *whether the power the offending employee possessed was reasonably perceived by the victim, accurately or not, as giving that employee the power to adversely affect the victim's working life.* Thus, such indicia as the power to fire and demote, to influence compensation, and to direct all job functions would be probative of supervisory status, but would not exclude other indicia. Also relevant would be any evidence that the alleged harasser controlled the workplace in subtler and indirect ways, as long as the effect was to restrict the victim-employee's freedom to ignore sexually harassing conduct.

Entrot, 2003 WL 1792115, at *11 (emphasis added).

Applying this new test to the evidence in the record, the Appellate Division concluded that there was a disputed issue of fact as to the project leader's "supervisor" status, and thus summary judgment should not have been granted in favor of BASF on the harassment claim. *Id.* at *11-14. In particular, the Court highlighted the following facts: As "overall team leader," the project leader assigned Entrot projects and tasks, and told Entrot "what to do and how to do it. When to do it. Where to do it." *Id.* at *12. When Entrot first joined the new project, her supervisor told her that she would be reporting to the project leader and that he would be doing her performance review. *Id.* Entrot also testified that the project leader would remind her that he was her boss, and threatened that if she did not follow his instructions, he could "ruin" her career. *Id.* Entrot believed the project leader had the authority to remove her from the team leader position because he was the "coordinator, leader of the project." *Id.* One of the project leader's duties was to gather information for other project members, like Entrot, and submit periodic reports to his own supervisor on the progress of the project. *Id.* at *13. The project leader recommended to Entrot's boss that she be promoted to a position that she did start in 1997. *Id.* The project leader also chose members to work on the project. *Id.* According to the Appellate Division, "[m]ost important was [Entrot's] claim that the project leader directly invoked his job authority over [her] as a way to coerce her to submit to his sexual advances." *Id.* at *14.

Entrot Holds That Constructive Discharge Is A "Tangible Employment Action"

The Appellate Division also ruled that the trial court erred in granting summary judgment to BASF on the ground that it had a valid *Faragher/Ellerth* affirmative defense to vicarious liability for the project leader's conduct. *Id.* In reaching that decision, the Court concluded that the trial court improperly rejected Entrot's constructive discharge claim. *Id.* at *15. That error was significant because the Appellate Division went on to hold that a constructive discharge resulting from sexually harassing conduct of a supervisor constitutes a "tangible employment action" within the meaning of the *Faragher/Ellerth* standard, and therefore would deprive an employer of the *Faragher/Ellerth* affirmative defense to vicarious liability. *Id.* at *19. The Appellate Division's rationale for this ruling is substantially similar to the reasons articulated by the Third Circuit in *Suders*, as discussed above. There is, however, some good news for employers from this ruling: the Appellate Division stated that, while no New Jersey court has expressly adopted the *Faragher/Ellerth* affirmative defense to a claim under the LAD, "there is no barrier to the application of a Title VII defense to an LAD action." *Id.* at *15-16.

In remanding the case back to the trial court, the Appellate Division provided the following road map for the trial of such cases:

> At the trial on remand, plaintiff must first prove that the project leader was her 'supervisor,' as discussed above. Then she must prove that defendant was vicariously liable for the project leader's harassment. As we have held, if plaintiff was constructively discharged based upon the project leader's actions for which defendant was responsible, the *Ellerth/Faragher* [affirmative defense] is not available and defendant would be liable.

Id. at *20.

Implications for Employers

The implications of *Suders* and *Entrot* are significant for employers doing business in New Jersey and within the Third Circuit. Indeed, the Appellate Division's adoption of a broad definition of the term "supervisor" will likely expose companies to vicarious liability under the LAD for harassment by employees who exercise the authority to make and oversee work assignments, including those employees who have no power to, and do not, make decisions that affect others economically. This is particularly true if there is no other person at the work site or even on a specific project with higher supervisory authority. An employer, however, can avoid such liability by proving its *Faragher/Ellerth* affirmative defense (assuming, of course, that the defense is available).

Given the ruling in *Entrot*, employers should examine employees' job descriptions and reporting relationships, to avoid the situation in *Entrot*. Employers also should consider revising their existing anti-harassment policies and complaint procedures to ensure that employees have several avenues of complaint beyond their immediate "supervisor."

In addition, because a viable constructive discharge claim constitutes a tangible employment action, employers should heed the advice of the Third Circuit in *Suders*: "we effectively encourage employers to be watchful of sexual harassment in their workplaces and to remedy complaints at the earliest possible moment; otherwise, they risk losing the benefit of the affirmative defense should victimized employees feel compelled to resign." Thus, companies have to put a premium on prompt and effective internal investigations and remedial measures, and should take reasonable steps to ensure that the alleged victim does not feel compelled to resign.

Finally, both *Entrot* and *Suders* make clear – now more than ever – that employers should provide non-harassment training to all levels of supervision, including even low-level supervisors and "team leaders." By doing so, an employer will at least be able to argue that it should not be held vicariously liable for punitive damages for harassment by a supervisor because it made good-faith efforts to comply with the anti-discrimination laws.

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