

# Client Alert

A report  
for clients  
and friends  
of the firm     June 2004

## Supreme Court Rules That An Employee's "Constructive Discharge" Does Not Necessarily Either Eviscerate Or Alter The Employer's Affirmative Defense Established By Its Earlier Pronouncements In The *Faragher* and *Ellerth* Opinions:

The Third Circuit's Effort To Sanction The Exploitation Of A Legal Fiction By Employees And Permit Them To Gain A Tactical Advantage Over Their Employers In Title VII Lawsuits Is Rejected.

Deciding an important issue under federal hostile work environment law, the United States Supreme Court ruled, in an 8-1 majority opinion, that while an employee may suffer a "constructive discharge" by showing that the abusive working environment became so intolerable that the employee's resignation is an appropriate response, an employee's constructive discharge does not necessarily constitute a "tangible employment action" of the employer that deprives the employer of an important defense in a Title VII lawsuit. In *Pennsylvania State Police v. Suders*, the United States Supreme Court embraced the opportunity to continue to offer a legally sanctioned

incentive to employers to disseminate and enforce strong anti-harassment policies while requiring employees to exhaust their employers' internal procedures before seeking judicial redress by affording employers an affirmative defense to vicarious liability for workplace harassment created by their supervisors. By its June 14, 2004, holding, however, the Supreme Court also sent a resounding message to employers and their human resources professionals to examine carefully employees' decisions to terminate their own employment when that "resignation" follows a supervisor's "official act" taken against an employee that resulted in a "tangible employment action", such as a demotion, a reduction in compensation or a transfer.

The Supreme Court reviewed the case of Nancy Suders, a Pennsylvania state employee who filed an action against her employer and her supervisors alleging, among other things, that she suffered mistreatment and sexual harassment so severe that she ultimately felt compelled to resign. The Pennsylvania State Police moved for summary judgment on Suders' Title VII claims and invoked the employer's affirmative defense to vicarious liability. The basis of the PA State Police's defense was that it was not vicariously liable for the alleged harassment by Suders' supervisors because she failed to avail herself of the PA State Police's internal procedures for reporting workplace harassment. A federal district court in Pennsylvania found that the PA State Police was entitled to invoke the employer's affirmative defense; and, further found that because Suders failed to utilize the PA State Police's internal grievance procedures, the PA State Police was entitled to summary judgment on Suders' Title VII claims. The Third U.S. Circuit Court of Appeals overturned the decision and ordered that the case go to trial. The basis for the reversal was a determination that Suders' alleged constructive discharge was a "tangible employment action" of the employer that precluded the PA State Police from raising the affirmative defense to vicarious liability for workplace harassment by supervisors. In so ruling, the Third Circuit aligned

itself with the Eighth Circuit, deviating from holdings to the contrary by the First, Second, Sixth and Seventh Circuits. Although the Supreme Court agreed with the Third Circuit that the case presented genuine issues of material fact concerning Suders' hostile work environment claim, it vacated the Third Circuit's opinion because it erred in declaring *Ellerth/Faragher* affirmative defense was never available in constructive discharge cases.

As a threshold matter, the Supreme Court agreed with the holdings of the lower courts and the EEOC by determining, for the first time, that Title VII encompasses employer liability for a constructive discharge. The Supreme Court held that to establish a constructive discharge, an employee must establish that the abusive working environment became so intolerable that the employee's resignation qualified as an appropriate response. Further, "under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes." Thus, an employee who prevails on a claim of constructive discharge is entitled to all damages available for formal discharge, and may recover post-resignation damages, including both backpay and, in warranted circumstances, frontpay, as well as compensatory and punitive damages.

Next, based on its earlier pronouncements in *Ellerth* and *Faragher* that acknowledged that Title VII was designed to encourage employers to create anti-harassment policies and install effective grievance procedures, the Supreme Court concluded that, in "extreme cases," a constructive discharge that is precipitated by a supervisor's "official act" will constitute a tangible employment action that precludes an employer from asserting the *Ellerth/Faragher* affirmative defense; however, absent an official act by a supervisor, an employer whose supervisors are charged with harassment can assert the affirmative defense to avoid liability for an employee's constructive discharge. The basis for this holding was the Supreme Court's acknowledgement of the reality behind the legal fiction: "unlike an actual termination, which is *always* effected through an official act of the company, a constructive discharge need not be." The Supreme Court further elaborated on its reasoning: a constructive discharge involves both an employee's decision to leave, which is an entirely unofficial act, and precipitating conduct, which may or may not involve official action. When no official act underlies the constructive discharge, the employer is permitted to assert the affirmative defense because the employer would have no reason to suspect that the resignation is not an ordinary voluntary quit. However, when the employee "quits in reasonable response to an employer-sanctioned adverse action officially changing [the employee's] employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which [the employee] would face unbearable working conditions," the affirmative defense is not available

to the employer because the employer had a basis for learning that the supervisor used his or her managerial or controlling position to the employee's disadvantage.

Proskauer Rose (Allan H. Weitzman and Sarah A. Mindes) authored the Amicus Brief in this case on behalf of the Society for Human Resource Management ("SHRM"), which is the world's largest association devoted to human resource management. The Amicus Brief was submitted to persuade the Supreme Court to hold that a constructive discharge, in and of itself, cannot qualify as a tangible employment action because, except in "extreme cases", it is not an "official act" of the employer. Rather, according to the Amicus Brief, the Third Circuit's decision: (i) controverted the Supreme Court's pronouncements (in *Ellerth* and *Faragher*); (ii) greatly diminished, if not entirely eliminated, the incentive the Supreme Court offered to employers to disseminate and enforce strong anti-harassment policies; (iii) eliminated the employee's duty to exhaust internal grievance procedures; and (iv) opened the judicial floodgates to employment litigation by employee manipulation. The Supreme Court's opinion reflects its adoption of many of the arguments raised in the Amicus Brief.

By vacating the holding of the Third Circuit, the Supreme Court, following the urging of the key points made in the Amicus Brief, has:

- Upheld its earlier holdings that agency principles preclude holding an employer strictly liable for the workplace harassment of its supervisors who act outside the scope of their employment.
- Furthered the purpose of Title VII and its own previously voiced message of promoting management policies that aim to eradicate unlawful workplace harassment and discrimination through efficient internal resolution channels by recognizing the employer's affirmative obligation to prevent Title VII violations and give credit to employers who make reasonable efforts to discharge their duty.
- Rejected providing employees with a legally-sanctioned end-run around the judicially approved internal human resources mechanisms designed to prevent and correct unlawful workplace harassment and discrimination by replacing the required independent, official act of the employer with the independent, unreviewable act of the employee to impose strict vicarious liability on the employer for the unlawful, unreported, unauthorized acts of a rogue supervisor.
- Rejected encouraging employees to resign their employment to achieve an advantage in litigating their allegations of unlawful workplace harassment, and

simultaneously rejected discouraging them from invoking and utilizing their employers' internal grievance system before seeking judicial redress.

- Rejected sending the message to employees that they are better off not complaining to their employers initially because if their work environment deteriorates, they can quit and prevail in court.
- Rejected allowing employees to simply quit, allege constructive discharge, and file a claim under Title VII, to ensure that employees do not gain a tactical advantage of holding their employers strictly liable for alleged unlawful harassment, depriving employers of the ability to assert a defense that should be available to companies who "do the right thing" but their employees do not.
- Instructed employers and their human resources professionals to examine carefully employees' decisions to terminate their own employment that follow official action taken by a supervisor to determine whether the supervisor had an improper motive for such official action.

### Editors' Comment

Based on the Supreme Court's holding, in the event of a demotion, reduction in pay or transfer, an employer would be wise to conduct an investigation to determine whether the underlying decision was the result of an improper motive to harass the employee and induce the employee's resignation. Moreover, employers can no longer turn a blind eye to employee-initiated terminations and still hope to assert the *Ellerth/Faragher* affirmative defense in an attempt to escape liability from supervisory harassment. Indeed, employers would be wise to implement a system of interviewing employees who voluntarily terminate their own employment following a supervisor's official act. The purpose of this follow-up interview in these limited instances serves two important purposes that could ultimately shield an employer from liability for illegal supervisory harassment, ensuring that an employer could satisfy the requirements of the *Faragher/Ellerth* affirmative defense: (1) it precludes an employer from blindly and unknowingly "rubber-stamping" a rogue supervisor's official act taken against an employee in the furtherance of illegal workplace harassment; and (2) it provides employees both an arena and a final opportunity to voice complaints of inappropriate, illegal supervisor harassment that may have caused the employee to terminate his or her own employment.

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