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Supreme Court Defines Defenses in Constructive Discharge Cases

The Supreme Court has issued a very interesting decision clarifying the defenses that are available to employers in constructive discharge cases stemming from hostile work environment claims.

Pennsylvania State Police v. Suders, 124 S. Ct. 2342 (June 15, 2004). In that case, the plaintiff, Suders, claimed that she was sexually harassed by her superiors and that she was “constructively discharged,” *i.e.*, the severity of the harassment forced her to resign. Her case raises the question of what defenses employers can assert where alleged workplace harassment is claimed to cause a constructive discharge.

The starting point in the Court’s analysis was its discussion of the term “constructive discharge.” Although lower courts have recognized constructive discharge claims under Title VII, the Supreme court had never decided that issue. In *Suders*, it held, consistently with lower court decisions, that a claim for constructive discharge can be filed under Title VII. It further held that the test for determining whether an employee was constructively

discharged is an objective one: “Did working conditions become so intolerable that a reasonable person in the employee’s position would have felt compelled to resign?”

The Court then summarized its prior decisions delineating the defenses available in hostile environment cases. As the Court had found in its landmark decisions in the *Ellerth* and *Faragher* cases, there are two categories of hostile environment claims: (1) supervisory harassment that results in a “tangible employment action” (such as a pay cut or a demotion) for which employers are “vicariously” (automatically) liable; and (2) supervisory harassment that does not involve a “tangible employment action,” in which case the employer may assert an affirmative defense to the plaintiff’s claim. The defense is that the employer had exercised reasonable care both to prevent the harassment and correct it when it became known. The specific issue posed in the *Suders* case was whether that affirmative defense could be asserted when the plaintiff establishes a hostile environment that leads to a constructive discharge. The circuit court of appeals held that a constructive discharge constitutes a tangible

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employment action and, therefore, that the employer could not assert the affirmative defense.

The Supreme Court disagreed. It noted that *Suders*'s claim was an aggravated form of harassment -- harassment ratcheted up to the point of causing a constructive discharge. But unlike a termination or demotion, where the employment action is taken by the employer, the constructive discharge results both from supervisory action and a decision of the employee to quit. The Court ultimately held that "when an official act does not underlie the constructive discharge" (for example, the employee quits after being demoted), the *Faragher/Ellerth* affirmative defense is available to the employer.

Constructive discharge cases are always difficult to prove because the employee must show not only that s/he was being harassed to the point of creating a hostile environment but also that the harassment was so intolerable that a reasonable employee would have resigned. The *Suders* case adds an additional burden to the plaintiff's case: if the resignation was not triggered by a tangible employment action, the employer may defend by raising the *Faragher/Ellerth* affirmative defense.

Changes at the NLRB

As expected, almost four years after President Bush took office, the Bush appointees to the Labor Board are issuing decisions that significantly impact federal labor policy. Several of these decisions are discussed below.

In *New York University*, 332 N.L.R.B. 1205 (2000), the new Board overruled a Clinton-Board decision, which extended collective bargaining rights to graduate students working as teaching and research assistants. The new decision, *Brown University*, 342 N.L.R.B. No. 42 (July 13, 2004), returns the law to what it was before *NYU* -- namely, that graduate students are primarily students who have a primarily educational, not economic, relationship with their university. As such, they are not considered to be "employees" under the National Labor Relations Act ("NLRA"). The Board emphasized that graduate students, although paid, are still students; that they spend only a limited amount of time working as teaching assistants; that their compensation is not typical wages but financial aid; and that serving as teaching assistants is a core part of their Ph.D. program. "Because they are first and foremost students," the Board held that they are not "employees" and, therefore, they do not have a statutory right to organize a union.

As the two dissenting members noted, the consequence of the Board's ruling is "not only that universities can avoid dealing with graduate student unions," but because graduate students are not covered by the NLRA, the university is "also free to retaliate against graduate students who act together to address their working conditions."

In another case where a Democratic member dissented, the Board held that where the union inadvertently fails to provide a statutory notice of contract modification, employees who strike lose their protection as employees and can legally be fired. *Boghossian Raisin Packing Co.*, 342 N.L.R.B. No. 32 (June 30, 2004). While this result is certainly harsh, the Board majority found that it was compelled by the language of the statute. Under the NLRA, there can be no strikes or lockouts until 60 days after one of the parties provides notice to the other of its intent to terminate or modify the collective bargaining agreement and notifies the appropriate federal and state mediation agencies. Unions routinely provide such notices at least 60 days before the labor agreement expires. In this case, the union inadvertently failed to provide the requisite notice. The statute also says, however, that any employee who strikes before the 60-day period has elapsed "shall lose his status as an employee of the

employer.” The Board accurately described this provision as a “severe penalty” but concluded that because the penalty was prescribed by the statute, it “was a clear mandate that we are obligated to respect and enforce.” The dissent argued that because the employer knew that the notice had not been provided, it violated its duty of good faith bargaining by not disclosing the union’s error to the employees before firing them. This argument, which was not supported by any close legal precedent, was rejected by the majority which considered itself bound by the explicit language of the statute.

A third illustration of the new Board’s views relates to voluntary recognition agreements. The Board has always held that a voluntary recognition -- meaning an employer recognition of a union without an NLRB election -- is lawful if properly implemented. It has also long held that such a recognition, if valid, bars a union election for a reasonable period of time

In *Dana Corp.*, 341 NLRB No. 150 (June 7, 2004), the Board reviewed the question of whether a voluntary recognition bars a decertification petition. In that decision, all Board members agreed that voluntary recognitions were lawful. The majority, however, questioned whether a voluntary recognition precludes disgruntled employees from filing a decertification petition. The

Democratic Board members felt that that issue was “settled forty years ago.” A majority of the Board, however, agreed to reconsider the question. It noted that voluntary recognition had become more common in recent years (one must wonder what statistical evidence supports this conclusion) and that an NLRB election “remains the best method for determining whether employees desire union representation.” The Board did not make any final decision; it simply agreed to review the issue of whether a voluntary recognition bars a union election. The decision to review, while not a determination on the merits, confirms that the new Board is willing to review long-established doctrines. It will come as no surprise if the Board changes the law on this issue.

In 1997, the Board held that an employer violates the NLRA when it unilaterally installs surveillance cameras in the workplace. *Colgate Palmolive Co.*, 323 NLRB 515 (1997). The Board ruled that surveillance cameras were a condition of employment which the employer had to bargain about before implementation. We have always had questions about this decision because negotiation about the location of hidden cameras in the workplace undermines the purpose of the cameras -- to catch unsuspecting employees unawares. But our reservations

notwithstanding, the *Colgate* decision was enforced in court.

The new NLRB recently issued a decision which undercuts much of the *Colgate* rationale. *Anheuser-Busch, Inc.*, 342 NLRB No. 49 (July 29, 2004). In that case, the Board affirmed that employers must offer the union the opportunity to negotiate about surveillance cameras before they are installed. However, the Board held that if the employer unlawfully implements surveillance cameras without bargaining, the remedy for that violation does not include reinstatement and back pay for employees who were disciplined because of conduct revealed by the hidden cameras. The General Counsel argued that such a remedy was necessary because the discharge of the employees was a “fruit of the poisoned tree.” The majority, however, disagreed. It relied on section 10(c) of the NLRA which provides that the Board has no power to require reinstatement or back pay for an employee discharged for cause. Of course, one might question whether an employee who was fired based on improperly obtained evidence was discharged for just cause, but the Board thought otherwise. As a result of this decision, the *Colgate* rule still stands but the remedy leaves the employer’s discipline intact.

New Union Reporting Rules to Go into Effect

Months ago, the Department of Labor issued new rules requiring all unions with income in excess of \$250,000 to file electronically more detailed LM2 reports than had previously been required. A motion to stay enforcement of these rules was denied by a federal district court. The new rules require unions to itemize their expenses by category and to specifically disclose any expense over \$5,000. This will require unions to disclose the salaries of all union employees and officers as well as other large expenses. Proponents of the rule argue that it will provide useful information to union members and promote union democracy. Opponents argued that the rule requires unions to incur considerable expense inputting data into Department of Labor forms that provide an incomplete picture of the union's finances. Unions also argue that the information provided will be used more by employers during union organizing campaigns than by union members, and that the easy access provided by electronic filing will make the union's internal business all the more accessible to anti-union employers. Time will tell how the new rules work in practice.

Reductions in Force: Can They Be Based on Subjective Criteria?

A decision by the Second Circuit in New York clarifies the criteria that companies can use when implementing reductions in force. *Meacham v. Knolls Atomic Power Laboratory*, 2004 U.S. App. LEXIS 17873 (2nd Cir. August 23, 2004). That case involved a reduction in force in which the plaintiffs argued that the company had designed the reduction process to eliminate older workers or, alternatively, that even if discrimination against older workers had not been intended, the reduction process had a disparate adverse impact on older employees. The court of appeals agreed.

In discussing the disparate impact issue, the court noted that the plaintiffs had the burden of identifying a specific employment practice that created a disparate impact. The court found that plaintiffs had satisfied this burden when they showed that one step in the reduction process allowed district managers a significant degree of subjective discretion to determine whether individual employees had "flexibility" to perform more than one job and whether their skills were "critical." The court found that the company's policy to reduce its workforce while still retaining employees with skills critical to the company's functions was a facially neutral policy that, standing alone, would have

provided a defense to a discrimination claim. However, it also ruled that if the plaintiffs can show that the reduction plan is based on subjective criteria like "flexibility" and "criticality," and the result disproportionately affects older workers in an obvious way, unlawful discrimination can be found if suitable alternative means were available to safeguard against subjectivity. Finding that such means were available, the court found that the reduction in force was discriminatory.

Reductions in force must always be undertaken with care. This case illustrates the risks that a company assumes when it adopts a reduction plan with subjective criteria that adversely impact older workers.

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