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Employment Law Update

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NON-UNION EMPLOYEES NOT ENTITLED TO CO-WORKER REPRESENTATION, SAYS NLRB

Reversing its prior position on this issue, the National Labor Relations Board ("NLRB") ruled that non-union employees do not have the right to be represented by a co-worker at an investigatory interview that could result in disciplinary action. *IBM Corp.* (June 9, 2004).

Background

This is not the first time that the NLRB has changed course on this issue. It all started in 1975 when the Supreme Court in *NLRB v. Weingarten, Inc.* held that union employees have the right to have a co-worker present during an investigatory meeting that could lead to disciplinary action.

As applied to non-union employees, *Weingarten* rights have a muddled history. In 1982 the NLRB in *Materials Research Corp.* decided that the rights enjoyed in the union setting should also apply to non-union employees. In 1985 the NLRB overruled *Materials Research* when, in *Sears Roebuck & Co.*, newly appointed NLRB members found that *Weingarten* rights should be limited to unionized employees. That policy remained the law until 2000, when the NLRB in *Epilepsy Foundation of Northeast Ohio* reinstated a non-union employee's right to co-worker representation.

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SUPREME COURT RECOGNIZES AFFIRMATIVE DEFENSE IN SEX HARASSMENT CONSTRUCTIVE DISCHARGE CASES

The Supreme Court recently held that an employee's failure to seek recourse under her employer's non-discrimination/non-harassment policy may bar a claim that she was forced to resign because of intolerable sexual harassment. In effect, the Supreme Court extended its 1998 rulings in *Burlington Indus., Inc. v Ellerth* and *Faragher v. Boca Raton* that, in cases where there is no tangible adverse employment action, an employee's failure to invoke her employer's non-discrimination policy can defeat a sex harassment claim.

In *Pennsylvania State Police v. Suders* (June 14, 2004), the Supreme Court made the following rulings:

- An employer may be liable under Title VII for constructive discharge, a concept that was universally accepted by the lower courts.

- Not all sex harassment gives rise to a constructive discharge. To show constructive discharge, an employee must prove that the sexually hostile working environment became so intolerable that her resignation was a fit response.

- Sex-based harassment accomplished through "official employer acts" that

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NON-UNION EMPLOYEES...*continued*

IBM Corp.

The NLRB rationalized its latest flip-flop on changes to the workplace that during recent years have led to an increased need for more discrete and sensitive employer-conducted investigations, including those concerning harassment, discrimination, corporate abuse, violence, fiduciary lapses and terrorist attacks. Additionally, the Board discussed the dissimilarities between unionized and non-unionized workforces, stating for example, that the presence of a union representative may protect the interests of the bargaining unit as a whole, and non-union representatives may not have the same efficacy in representing their co-workers as union employees who have more experience in a representative role. In restricting *Weingarten* rights to union employees, the Board reiterated a longstanding distinction between a union workforce and a non-union workforce force: the employer of a non-union workforce is permitted to engage its employees on an individual basis. The employer in a union setting is not.

Going Forward

With this decision, employers are no longer required by law to accede to a non-union employee's request that a co-worker attend an investigatory interview that could lead to discipline. However, employers cannot discipline non-union employees for making such a request.

Employers with a non-unionized workforce should review their investigatory and disciplinary procedures and policies to determine if they want to implement any change consistent with this new decision.

AFFIRMATIVE DEFENSE...*continued*

reasonably force an employee to resign results in automatic employer liability.

- However, an employer may defeat a claim of constructive discharge if the harassment by a co-worker or even a supervisor was not an official employer act and the employer has an effective sex harassment complaint policy which the employee unreasonably failed to utilize before quitting.

Facts

Employed by the Pennsylvania State Police, Suders filed a Title VII action alleging that she was subjected to a sexually hostile work environment and constructively discharged. Suders accused her supervisors as the primary harassers and sought to hold their employer, the Pennsylvania State Police, vicariously liable for the actions of its agents. The Third Circuit Court of Appeals held that a constructive discharge always was a "tangible employment action" within the meaning of Supreme Court precedent, and thus the employer could not raise an affirmative defense to vicarious liability for sexual harassment by its supervisors.

The Supreme Court was asked to decide whether an employer may raise the *Ellerth/Faragher* affirmative defense to a constructive discharge claim resulting from supervisory harassment.

The Supreme Court's Ruling

Initially, the Supreme Court not unexpectedly decided that Title VII embraces constructive discharge claims. However, the Court made clear that although sex harassment must be so pervasive or severe to be actionable under Title VII, that standard does not necessarily rise to the level of a constructive discharge. There must be more. According to the Court, the abusive working environment must be so intolerable

AFFIRMATIVE DEFENSE...*continued*

that resignation is a "fitting response" for a reasonable person. Rejecting Justice Thomas' view in dissent, the Court majority did not require that the employer intend for the employee to resign.

Next, the Court drew a distinction between constructive discharge claims based upon "official employment actions" such as demotions, unfavorable transfers and significant reductions in salary, and constructive discharge claims that do not arise from official employment actions. The Court reasoned that the employer undoubtedly has knowledge of and control of "official acts" and the offending supervisor is using his management authority to the employee's disadvantage. In those cases, the employer has strict liability if the employee reasonably quit in response to the supervisor's sex-based harassing actions or conduct. However, when the conduct is not an "official act," the affirmative defense established in *Ellerth* and *Faragher* can be used. "Absent an official act [such as a demotion, change in pay, etc.]… , the employer ordinarily would have no particular reason to suspect that a resignation is not a typical kind daily occurring in the work force." In other words, the employer would not necessarily know of the supervisor's inappropriate conduct nor is the supervisor using the mantle of authority vested in him by his employer to violate the employee's Title VII rights. In these situations, the employer is not strictly liable. It can defeat a constructive discharge claim by proving that the employee should have, but did not, use the employer's effective harassment prevention policy and procedure before she quit.

Going Forward

Suders is generally a good decision for proactive employers. It enables employers who adopt, disseminate and enforce non-harassment policies to defend some claims of constructive discharge when the claimant fails to avail herself of the policy before resigning. *Suders* suggests that employers should be even more wary of illogical or unexplained "official" employment actions (*i.e.*, demotion, unfavorable reassignment), particularly those that occur close in time to a resignation. Those are the cases where strict liability can attach. Monitoring such actions, possibly in conjunction with a thorough exit interview, may enable some employers to identify potential problems and work to reverse or otherwise resolve them before litigation ensues.

Further, the Supreme Court has reemphasized the importance of these staple employer initiatives:

- Ensure that the company has a policy against unlawful harassment and an effective procedure for investigating complaints.

- Educate and train employees, supervisors and managers on the employer's policies and procedures as well as the consequences of not following them.

- Create and promote a known complaint process to encourage employees to protest questionable official actions.

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