FENWICK & WEST LLP

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Trey Wichmann Contributor 415.875.2418
John Fox Co-Editor 650.335.7144

U.S. Supreme Court Recognizes Concept of Constructive Discharge in Title VII Cases

The U.S. Supreme Court has officially recognized a cause of action for constructive discharge under Title VII when an employee experiences severe sexual harassment that reasonably forces the employee to resign. In *Pennsylvania State Police v. Suders*, Plaintiff Nancy Suders claimed she suffered a "continuous barrage" of sexual harassment from her supervisors, including numerous lewd comments and gestures. Suders talked to the department's Equal Employment Opportunity Officer, who told her to file a complaint but did not tell her how to obtain the necessary form. Two days later, Suders' supervisors arrested her for theft, and she resigned. The theft arrest arose from the fact that Suders had taken a computer skills exam on several occasions to satisfy a job requirement, but had been told repeatedly that she had failed. However, Suders later found her exam papers in a set of drawers in the women's locker room, which led her to the conclusion that her supervisors had never submitted her exams for grading. Considering the exams her property, Suders removed them from the drawers. She was arrested when she subsequently tried to return the exams. She was never formally charged with the theft.

Suders sued the department for hostile work environment and constructive discharge. A constructive discharge occurs where an employee faces harassment or discrimination so intolerable that a reasonable person would feel compelled to resign. The trial court dismissed her claims based on the so-called "Faragher/Ellerth" affirmative defense. Under Title VII, if an employee suffers a "tangible employment action," such as a termination or a demotion, the employer is strictly liable. Otherwise, the employer can avoid liability by proving it took "reasonable care" to prevent and promptly correct any sexually harassing behavior, and that the employee unreasonably failed to take advantage of the preventive or corrective opportunities provided. The trial court here did not address Suders' constructive discharge claim as a tangible employment action, and determined Suders unreasonably failed to take advantage of the department's internal procedures to report harassment. The appellate court reversed, questioning the effectiveness of the department's program to address harassment claims, but also finding that when an employee faces harassment that is so severe that a reasonable person would feel forced to resign, such constructive discharge is a tangible employment action that results in strict liability where the affirmative defense is not available.

On appeal to the Supreme Court, the Court held that the concept of constructive discharge applies to Title VII cases (something it had never had the opportunity to address previously). However, the Court determined that a constructive discharge is not a tangible employment action (which would preclude the possibility of the Faragher/Ellerth affirmative defense) unless a supervisor's "official act" precipitates the resignation. In most cases, hostile environment harassment by a supervisor is not accomplished through use of the supervisor's official authority. However, a demotion or a failure to promote based on spurned advances would constitute such an official

act. In this case, the Court sent the case back to the trial court to make that determination.

Although significant in federal law, this decision has less of an impact in California, where employers are strictly liable for all sexual harassment by supervisors. Nonetheless, this decision further underscores the importance of having in place effective anti-harassment policies and procedures.

NLRB Reverses Itself: Non-Union Employees Now Not Entitled to Have Coworker Present at Disciplinary Interview

In a dramatic reversal of its previous position, the National Labor Relations Board ("the Board") recently held that non-unionized workers are not entitled to have a coworker present during investigatory interviews that might result in disciplinary action. The case of *IBM Corporation*, involved IBM's investigation into harassment allegations brought by a former employee. As part of that process, IBM sought to interview three of its employees, but denied each of their requests to have a coworker and/or an attorney present for the interviews. All three employees were terminated within a month of the interviews, and filed a charge claiming IBM's refusal of their requests violated the National Labor Relations Act (NLRA). In 2000, the Board had held in *Epilepsy Foundation of Northeast Ohio* that non-unionized workers had the right to have a coworker present for interviews with potential disciplinary consequences. The administrative judge in this case, applying *Epilepsy Foundation*, concluded IBM violated the NLRA. On appeal, IBM asked the Board to overturn Epilepsy Foundation. The Board agreed, finding recent societal and workplace changes justified a departure from the prior rule. Specifically, the Board cited the recent sharp rise in the need for workplace investigations caused by new federal and state whistleblower laws, the rise in workplace violence and corporate financial scandals, and the aftermath of 9/11. The Board determined employers needed the ability to conduct investigations in a "thorough, sensitive and confidential manner," which could best be accomplished without permitting an employee to have a coworker present in interviews. The Board also found that the rationale underlying the rule allowing unionized employees to have the official union representative present for interviews did not apply in the non-union context. Unlike the union representative, coworkers do not necessarily represent the interests of the entire workforce, do not have the same skills as the union representative, and do not have a fiduciary obligation to maintain confidentiality. Moreover, the presence of a coworker may inhibit the employee from candidly responding to the company's questions, depending on the circumstances.

This decision should have a substantial impact on how companies conduct investigations. While companies are free to permit employees to have a coworker present during investigatory interviews, they no longer are required to do so, assuming their handbooks or policy manuals do not state otherwise. However, companies should be careful to apply any such rule consistently to all employees.

$5 Million Verdict for Employee Terminated for Jokes at Off-Site Retirement Roast

A Los Angeles County Superior Court jury recently awarded over $5 million in damages to an employee terminated for jokes made at a retirement roast for his supervisor. In *Tobiassen v. Mail-Well Commercial Printing, Inc. d/b/a/ Anderson Lithograph Co.*, Michael Tobiassen worked as a superintendent in Anderson Lithograph's press department. In November 2001, Tobiassen participate in an off-site roast to celebrate the retirement of his long-time supervisor. At the roast, Tobiassen joked about horse-play that had occurred at Anderson over the years. However, for most of the horse-play incidents, Tobiassen claimed he was the victim. The next business day, Anderson suspended Tobiassen pending an investigation into whether his comments violated company policy. Two days later, Anderson terminated his employment, claiming he violated company policy regarding "abusive treatment of fellow employees" and had engaged in "grossly inappropriate behavior."

Tobiassen sued Anderson for wrongful termination, claim that even though he technically violated company policy, the policy violation was simply a pretext to justify his termination. Tobiassen claimed the company's investigation into the roast was inadequate and that other employees admitted engaging in similar horseplay but were not terminated or even disciplined. Tobiassen claimed he was really terminated because of a disability, which restricted his ability to work long hours or to work on machinery. Tobiassen asserted that several employees, including management, had made derogatory remarks about his disability prior to his termination, and that he was required to work on machinery despite his medical restrictions and even though it was outside his job description and was a violation of his union contract. Tobiassen claimed he suffered severe depression and post-traumatic stress syndrome following his termination, which required admission into a psychiatric hospital on three occasions.

The jury found for Tobiassen and awarded him almost $5.3 million, including $3.2 million in back and front wages and over $2 million in past and future emotion distress. The parties subsequently settled the case for just over $4.9 million. Although companies should justifiably be concerned about jokes that may give rise to harassment or discrimination liability, this case demonstrates the need to be consistent with disciplinary decisions as they affect employees who have committed similar violations of company policy.