Unanswered Questions After 'Suders'

by Jeffrey M. Schlossberg and Kimberly Mandel Malerba

As counsel to an employer, you receive a call from the vice president of Human Resources, who reports the following: An employee who was the subject of a three-month pattern of hostile work environment sexual harassment involving her supervisor's lewd comments, sexual gestures, and the posting of vulgar images, quit within 24 hours following a humiliating demotion. Can the company be held strictly liable? Will the company be entitled to assert an affirmative defense should the employee bring a claim? What if this employee quit one week after the demotion? Or one month later?

While the first two questions seem to have been answered by the U.S. Supreme Court's June decision in Pennsylvania State Police v. Suders, WL 1300153, the ruling left the other questions unresolved.

In Suders, the Court held that a constructive discharge would result in strict liability for employers when the employee is forced to quit following a "tangible employment action" despite the fact that the employee was not actually fired. A constructive discharge takes place when an employee quits because the conditions are so intolerable that a reasonable person would have felt compelled to resign. Where a tangible employment action (such as a humiliating demotion, extreme cut in pay, or transfer to a position where the employee would face unbearable conditions) gives rise to the resignation, the employer will not be permitted to rely on the affirmative defense established by the Supreme Court's 1998 decisions in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

On the other hand, if the constructive discharge results from a hostile work environment that does not result in a tangible employment action, the employer will be permitted to assert the affirmative defense.

In Ellerth and Faragher, the Court created an affirmative defense to an employer's strict liability where a hostile environment had not resulted in a tangible employment action "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision

causing a significant change in benefits." Where a tangible employment action did result, the employer could not avail itself of that affirmative defense. Over the years, the lower courts struggled with the issue of whether a constructive discharge constituted a "tangible employment action" thereby depriving the employer of the valued affirmative defense.

In Suders, the U.S. Court of Appeals for the Third Circuit held that " 'a constructive discharge, if proved, constitutes a tangible employment action.' " The Second and Sixth circuits had ruled that a constructive discharge could not constitute a tangible employment action depriving an employer of the Ellerth and Faragher affirmative defense.[i]

The Supreme Court granted certiorari to resolve the disagreement as to whether a constructive discharge brought about by supervisor harassment qualifies as a tangible employment action and therefore precludes assertion of the Ellerth and Faragher affirmative defense.

Employers had hoped for a ruling that would never have imposed strict liability when an employee quits because the employer does not take the final action. Plaintiffs, on the other hand, hoped the Supreme Court would affirm the Third Circuit and hold that a constructive discharge is by definition a tangible employment action resulting in strict liability to the employer.

News accounts of the Suders decision simplistically and superficially reported that a constructive discharge involving a tangible employment action deprives the employer of the affirmative defense and a constructive discharge without a tangible employment action permits an employer to rely upon the affirmative defense. However, in the real world, the analysis is not quite that cut and dry.

Strict Liability

To appreciate the significance of Suders, it is important to review the development of employer strict liability for hostile work environment harassment.

In Ellerth and Faragher, the Court held that an employer is subject to strict liability to an employee for a hostile work environment created by a supervisor with immediate (or successively higher) authority over the

employee when the harassment results in a "tangible employment action.

As the Supreme Court explained in Ellerth, when a supervisor takes a tangible employment action such action will be deemed for liability purposes, to be the action of the employer. This rule of vicarious liability for an employer is sensible, the Court said, because "[w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . . As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury."

A tangible employment action is "the means by which the supervisor brings the official power of the enterprise to bear on subordinates." Further, a tangible employment action "requires the official act of the enterprise, a company act."

Moreover, tangible employment actions are usually "documented in official company records, and may be subject to review by higher level supervisors" and the supervisor "often must obtain the imprimatur of the enterprise and use its internal processes."

When a supervisor's harassment does not result in a tangible employment action, the Supreme Court stated that it is "less obvious" that the agency relationship is the driving force. Thus, where no tangible employment action has taken place, the employer is not strictly liable. In such a situation, the Court created an affirmative defense to be available to an employer in order to ensure that automatic liability is not imposed.

The Supreme Court in Ellerth and Faragher believed that linking a liability limitation to effective preventive measures could serve Title VII's deterrent purpose by " 'encourag[ing] employees to report harassing conduct before it becomes severe or pervasive.' "

Affirmative Defense
The affirmative defense fashioned in Ellerth and Faragher requires that the employer establish it: "(a) exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the employee unreasonably failed to take advantage of any preventive or corrective

opportunities provided by the employer or to avoid harm otherwise."

Because the affirmative defense can be asserted only when there is no tangible employment action involved, the determination of whether an employee's quitting legally qualified as a tangible employment action (thereby depriving the employer of the affirmative defense) naturally was critical.

In Suders, the Supreme Court acknowledged long-standing precedent that equates a constructive discharge claim under Title VII to a formal discharge. Thus, the notion that an employer may be liable in some fashion where an employee quits was not new. Under the constructive discharge doctrine, an employee's decision to resign because of unendurable working conditions is equivalent to a formal discharge. But should the employer be strictly liable?

The lower courts struggled with the idea of imposing strict liability where an employee quit. The Supreme Court succinctly explained the difficulty in resolving this issue as follows:

[U]nlike an actual termination, which is always effected through an official act of the company, a constructive discharge need not be. A constructive discharge involves both an employee's decision to leave and precipitating conduct: The former involves no official action; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action.

Before the Court's Suders ruling, the Third Circuit maintained that a constructive discharge should always be considered a tangible action because supervisors could make an employee's life so intolerable that the employee quits thereby permitting the employer to escape liability; the same direct economic harm is imposed when an employee is fired or quits as a result of an intolerable working environment; and, not all tangible employment actions are documented in official records of the employer.

Those courts that held a constructive discharge should never be a tangible employment action stated that a constructive discharge lacks the official action or other documentation that most often accompanies an actual discharge or other tangible employment action and, thus, there is no "official

act of the enterprise."

Also, a disgruntled employee could quit and seek to hold the employer responsible for action about which the employer had no way of knowing. Further, unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer.

The Supreme Court did not engage in lengthy analysis of either side's arguments and simply ruled that "when an official act does not underlie the constructive discharge, the Ellerth and Faragher analysis . . . calls for extension of the affirmative defense to the employer."

Absent an official act, the Court explained, an employer would not ordinarily have reason to suspect that a resignation is expected. Further, the Court stated, absent an official act by a supervisor, the extent to which the supervisor's misconduct has been aided by the agency relation is uncertain thereby justifying affording the employer the chance to establish through the affirmative defense that it should not be held vicariously liable.

The Supreme Court was clear in rejecting the Third Circuit's opinion that the affirmative defense can never be available in constructive discharge cases. However, the Supreme Court also expressly stated that the "affirmative defense will not be available to the employer . . . if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions."

Thus, the ultimate question of whether the facts underlying a constructive discharge can make an employer strictly liable and deprive it of the affirmative defense was answered with a resounding "it depends."

The Road Ahead

An analysis of Suders helps answer the initial inquiry — an employee's resignation within 24 hours of a humiliating demotion is the type of tangible employment action that likely would result in strict liability and deprive the employer of the affirmative defense. But, is a resignation one week or one

month after the demotion a "reasonable response" to an employer-sanctioned adverse action? Should the employer faced with these scenarios be barred from relying upon the affirmative defense?

It was hoped by many that Suders would have definitively resolved the deep division on the issue of whether an employer can rely upon the affirmative defense in the face of a constructive discharge. The Court's holding appears to be an attempt to "split the baby." Setting a black line rule perhaps would have tipped the scales too far in favor of either plaintiff or the employer.

One thing is clear, however: The Court's decision leaves the issue open for further analysis and will create additional litigation. Where will courts draw the line in defining an employee's "reasonable response"? How long after an "employer-sanctioned adverse action" does an employee have to quit for the employer to be deprived of the affirmative defense? Is the employee going to be able to control an employer's ability to use the affirmative defense depending on when she quits in response to the tangible employment action?

Clearly, the Supreme Court wanted to hold employers strictly liable when the adverse action immediately resulted in the employee's departure. But when a lapse of time occurs, the "strictness" of the employer's liability similarly should diminish. However, without a black line rule, there likely will be inconsistent rulings and unclear guidance. One court will find that a two-week gap made the employee's resignation unreasonable; another court will find that a 10-day gap was reasonable.

Practitioners will have to follow closely further developments and be guided accordingly. In the mean time, employers are well advised to hold refresher training courses and remind supervisors of the effect that their creation of a hostile work environment can have on employer liability.

Suders provides additional incentive for employers to ensure that they have effective complaint procedures in place and that they intervene as soon as they become aware of supervisors' actions that appear to be improper. Further, employers must make employees aware of the complaint mechanisms that they have in place so that the type of intolerable working conditions that result in a constructive discharge never develop.

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