Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management July 2004

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In this issue …

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

Supreme Court Preserves Employer Defenses to Workplace Harassment Claims

The U.S. Supreme Court held recently that employers have affirmative defenses to certain claims of workplace harassment that involve the harassment victim's resignation. *Pennsylvania State Police v. Suders*, ___ U.S. ___ (6/14/04). This decision finally settles a sharp division among federal courts concerning a major principle of workplace harassment and discrimination law.

Prior to this decision, some federal courts held that when an employee resigns due to ***severe*** harassment on the job (based on sex, religion, race, etc.), the law should treat that resignation ***as if the employer terminated the employee***. This is referred to as the principle of "constructive discharge." Other federal courts, however, held that constructive discharge should not apply in the context of workplace harassment and discrimination. ***Had the Supreme Court agreed with the former viewpoint, employers would have had fewer defenses to claims of harassment and discrimination in the workplace.***

In 1998, the U.S. Supreme Court (in the landmark *Ellerth* and *Faragher* decisions) held that employers are automatically liable – or "strictly liable" – for discriminatory "tangible employment actions" by a supervisor against an employee. "Tangible employment actions" are supervisory decisions which cause significant changes to an individual's employment status, like firing, refusing to hire, demotion, failure to promote, etc.

The bottom line is ...

Unless an employee's resignation was precipitated by a discriminatory "tangible employment action," the employer will still have an affirmative defense to avoid liability for the harassment of the resigning employee.

In *Ellerth* and *Faragher*, the Supreme Court ruled that if a supervisor takes any such action against an employee, and that action is motivated by the fact that the employee is of a particular race, gender, religion, etc., then the employer will be financially responsible for any harm suffered by that employee. It does not matter whether the employer was actually aware of the supervisor's conduct or not. These Supreme Court decisions solidified the principle that ***for purposes of workplace harassment and discrimination law, the supervisor <u>is</u> the employer***.

For example, if a male supervisor terminated a female employee because she refused his sexual advances, the supervisor's employer would be held strictly liable for any harm she suffered, regardless of whether the president of the company knew about the supervisor's actions or not. ***The law, in essence, would treat this case as though the president engaged in the discriminatory tangible employment action him/herself.***

However, the *Ellerth* and *Faragher* decisions also did away with strict liability for a different kind of discriminatory act by supervisors. They created an "affirmative defense" for employers where the supervisor engages in "hostile environment harassment" of an employee. "Hostile environment harassment" is another form of discrimination where an employee's work atmosphere has become so permeated with hostility based on sex, race, religion, etc. that the employee is harmed even without being discharged, demoted, etc.

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Supreme Court Preserves Employer Defenses to Workplace Harassment Claims (continued)

When confronted with harassment of this sort, employees will sometimes resign and sue the employer.

Unlike tangible employment action discrimination suits, however, an employer in New York has been able to avoid — not only strict liability but — liability entirely by raising the *Ellerth*/*Faragher* affirmative defense. The defense requires that: (a) the employer exercise reasonable care to prevent and correct any harassing behavior, and (b) the employee unreasonably fails to take advantage of any preventive and corrective opportunities provided by the employer.

In the *Suders* case, the federal Third Circuit Court of Appeals held that "constructive discharge" constitutes a "tangible employment action." In this case, Nancy Drew Suders alleged that while working for the Pennsylvania State Police she suffered mistreatment and sexual harassment so severe that she ultimately felt compelled to resign. The Third Circuit's holding was as follows:

> On the basis of the record presented to the trial court, we hold that Suders raised genuine issues of material fact as to her claim of constructive discharge. [Also], we hold that a constructive discharge, when proved ... constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher*. This precludes the PA State Police's assertion of the affirmative defense ....

In other words, according to the lower court's ruling, an employee could resign because of hostile environment harassment by a supervisor – of which the employer is unaware – and the employer could still be held strictly liable for those harassing actions.

The U.S. Supreme Court rejected this ruling stating:

> … to establish "constructive discharge," the plaintiff ... must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. ***This affirmative defense will not be available to the employer, however, 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***. (Emphasis added.)

While this appears to say that an employee's resignation may be treated as a tangible employment action, "a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions" would have all been considered tangible employment actions under the *Ellerth* and *Faragher* decisions. Thus, unless the constructive discharge comes as a result of a discriminatory tangible employment action, the employer will still have the affirmative defense spelled out in *Ellerth* and *Faragher.*

If you have any questions regarding this very important Supreme Court decision, please contact Mike Dodd at 315-437-7600.

OSHA Tips for Employees Working Outside in the Summer Weather

Hot summer months pose special hazards for outdoor workers who must protect themselves against sun and heat exposure. Employers and employees should know the potential hazards in their workplaces and how to manage them.

Sun Exposure — Sunlight contains ultraviolet (UV) radiation, which causes premature aging of the skin, wrinkles, cataracts, and skin cancer. There are no safe UV rays or safe suntans. Be especially careful in the sun if you burn easily, spend a lot of time outdoors, or have any of the following physical features: numerous, irregular, or large moles; freckles; fair skin; or blond, red, or light brown hair. Here's how to block those harmful rays:

Cover up. Wear tightly woven clothing that you can't see through.

Use sunscreen. A sun protection factor (SPF) of at least 15 blocks 93 percent of UV rays. Be sure to follow application directions on the bottle or tube.

W**ear a hat.** A wide brim hat, not a baseball cap, works best because it protects the neck, ears, eyes, forehead, nose, and scalp.

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OSHA Tips for Employees Working Outside in the Summer Weather
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Wear UV-absorbent shades. Sunglasses don't have to be expensive, but they should block 99 to 100 percent of UVA and UVB radiation. Before you buy, read the product tag or label.

Limit exposure. UV rays are most intense between 10 a.m. and 4 p.m.

Heat Exposure —The combination of heat and humidity can be a serious health threat during the summer months. If you work at a beach resort, on a farm, or in a kitchen, laundry, or bakery, for example, you may be at risk for heat-related illness. So, take precautions. Here's how:

- Drink plenty of water before you get thirsty.
- Wear light, loose-fitting, breathable clothing — cotton is good.
- Take frequent short breaks in cool shade.
- Eat smaller meals before work activity.
- Avoid caffeine and alcohol or large amounts of sugar.
- Find out from your health-care provider if your medications and heat don't mix.
- Know that equipment such as respirators or work suits can increase heat stress.

If you have any questions on these tips or other OSHA standards, please feel free to contact our office at 315-437-7600.

Non-Union Employee Not Entitled to Coworker Presence at Investigation

The National Labor Relations Board has ruled by a 3-2 vote that employees who work in a nonunionized workplace are not entitled under Section 7 of the National Labor Relations Act (NLRA) to have a coworker accompany them to an interview with their employer, even if the affected employee reasonably believes that the interview might result in discipline. *IBM Corp*., 341 NLRB No. 148 (6/9/04).

This decision overrules the NLRB's earlier ruling in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), which had extended to unrepresented employees a right to have a coworker present during such interviews. And, in effect, it returns to pre-*Epilepsy* Board precedent holding that so-called "*Weingarten* rights" apply only to unionized employees. Under *NLRB v J. Weingarten*, 420 U.S. 251 (1975), employees represented by a union have the right to have a representative accompany them to a disciplinary interview.

In this case, IBM, whose employees are not represented by a union, denied three employees' requests to have a coworker present during investigatory interviews about a former employee's allegations that they had engaged in harassment. An NLRB administrative law judge, applying *Epilepsy Foundation*, found that IBM violated Section 8(a)(1) of the Act by denying the employees' requests for the presence of a co-worker. Upon review, a Board majority reversed *Epilepsy* and therefore reversed the judge.

The Board stated that:

> Our reexamination of *Epilepsy Foundation* leads us to conclude that the policy considerations supporting that decision do not warrant … adherence …. In recent years, there have been many changes in the workplace environment, including ever-increasing requirements to conduct workplace investigations, as well as new security concerns raised by incidents of national and workplace violence. ... [This leads] us to conclude that an employer must be allowed to conduct its required investigations in a thorough, sensitive, and confidential manner. This can best be accomplished by permitting an employer in a nonunion setting to investigate an employee without the presence of a coworker.

If you have any questions regarding this decision or other NLRB decisions, please contact us at 315-437-7600.

EMPLOYMENT LAW MATTERS is published monthly by **Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com.**

Ferrara-Fiorenza Law Firm's Breakfast Briefing Schedule

The following workshops, presented to the public at no charge, will be held from 7:45 AM to 9 AM at the Wyndham Hotel, 6301 Route 298, East Syracuse, New York (location subject to change). Call 315-437-7600 to make reservations today!

DATE	TOPIC
July 8, 2004	Doctor's Notes, Work Restrictions and the Absent Employee: Know the Rules
September 9, 2004	"Red Flag Audit": Common Employment Law Mistakes. Are You Making Them?
October 14, 2004	What You Don't Know About Employee Documentation
December 9, 2004	Employment Law: The Year in Review

HR ADMINISTRATION AND TRAINING SERVICES

The Ferrara-Fiorenza Law Firm provides a full range of HR administration consulting services, including, in part:

- ❑ A comprehensive audit of your HR policies, practices and procedures.
- ❑ Advice for complying with employment laws.
- ❑ More effective, more efficient HR policies, practices and procedures, along with implementation strategies and assistance.

The Firm also works with employers to tailor training on a variety of personnel issues for managers/ supervisors, including:

- ❑ Minimizing the Risk of Employment Litigation
- ❑ Preventing Workplace Harassment
- ❑ Leadership and Influence
- ❑ Managing Non-Performing Employees

For more information on the services Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. can provide to you, contact us at 315-437-7600.

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