The Ellerth/Faragher Affirmative Defense to Harassment

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THE UNIVERSITY OF TEXAS SCHOOL OF LAW

ESSENTIAL EMPLOYMENT LAW
Fall 2016

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This paper focuses on the creation of an affirmative defense to harassment by the Supreme Court, where they dramatically changed the harassment law in an effort to encourage employers and employees to take actions which would eliminate harassment in the workplace by encouraging employers to have anti-harassment policies which provided means for employees to report incidents and encouraging employees to report incidents of harassment so that such claims can be promptly investigated.

Although this paper focuses on sexual harassment, it is important to remember that harassment on the basis of any protected category is illegal and the same principles will apply. It is also important that any anti-harassment policy be drafted to include not only sex or gender, but all protected categories.

I. THE ELLERTH/FARAGHER AFFIRMATIVE DEFENSE

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the U.S. Supreme Court held that an employer is strictly liable for actionable sexual harassment by a supervisor if a tangible employment action resulted from the harassment. The Court further held that when there is no tangible employment action resulting from the harassment, the employer may assert an affirmative defense if the employer can prove the following elements: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

II. DEFINITION OF "TANGIBLE EMPLOYMENT ACTION"

In the *Ellerth/Faragher* decisions, the U.S. Supreme Court held that if the employee suffered any "tangible employment action" as a result of sexual harassment, the employer would be held strictly liable. The Court defined "tangible employment actions" as "significant changes in employment status" which included employment actions such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Recent cases discussed below demonstrate that courts continue to struggle with the meaning of "tangible employment action."

Pennsylvania State Police v. Suders, 542 U.S. 129 (2004). The 3rd Circuit had addressed one of the many questions that arose after *Ellerth/Faragher* -- whether or not constructive discharge of an employee is a "tangible employment action," that would completely foreclose the employer's opportunity to assert the affirmative defense. Finding that the literal language of the Supreme Court decisions required an affirmative answer, the appeals court held that where an

* The bulk of this paper was prepared by my fellow shareholders at Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Lori Bowman and Peter Hughes for the firm's 2004 Client Seminar.

employee established constructive discharge, an employer was never entitled to the *Ellerth/Faragher* defense. Fortunately, the Supreme Court saw more flexibility.

The plaintiff, Nancy Suders was a police communication operator with the Pennsylvania State Police. She alleged that she suffered mistreatment and severe sexual harassment at the hands of various supervisors. For example, Suders alleged that the station commander would continuously make comments to her about people having sex with animals, while others made sexually suggestive gestures and comments to her. Despite Suders asking the alleged harassers to stop, the comments and gestures continued. Suders claims that the final straw came when she was set up to look as though she had stolen test exam results, which led to her being handcuffed, photographed, and questioned as a criminal suspect. Suders then resigned, claiming she had no alternative as a result of the pervasive sexual harassment.

Suders filed suit against the Pennsylvania State Police for sexual harassment. The district court granted summary judgment for the employer based upon the *Ellerth/Faragher* affirmative defense, although the court did not address Suders' claim of constructive discharge. On appeal, the Third Circuit Court of Appeals addressed whether the constructive discharge was a "tangible employment action." The court first discussed the split decisions between the circuits which have ruled on the issue. The Second and Sixth Circuit Courts of Appeals have ruled that a constructive discharge is not a "tangible employment action," while the Eighth Circuit Court of Appeals and a few other district courts have held that a constructive discharge is a "tangible employment action."

After discussing these rulings, the Third Circuit held that a constructive discharge is a "tangible employment action." The appellate court noted first the recent decisions from the Third Circuit which have suggested that a constructive discharge is a "tangible employment action." Second, the court determined that none of the reasons advanced by the Second Circuit (which held a constructive discharge is not a "tangible employment action") were persuasive. Specifically, the court rejected the following arguments: that the Supreme Court's exclusion of constructive discharge from the list of representative tangible employment actions in the *Ellerth/Faragher* decisions compels holding that a constructive discharge does not constitute a tangible employment action; that the Supreme Court in *Ellerth* implicitly addressed and rejected constructive discharge as a tangible employment action; that co-workers as well as supervisors can cause a constructive discharge; and that, unlike a discharge or demotion, constructive discharge is not ratified by the employer.

Lastly, the Third Circuit stated that "holding an employer strictly liable for a constructive discharge resulting from the actionable harassment of its supervisors more faithfully adheres to the policy objectives set forth in *Ellerth* and *Faragher*." On this last rationale, the court viewed a constructive discharge, as the functional equivalent of an actual termination finding that it constituted a significant change in employment status. The court concluded by stating that if it were "to hold that a constructive discharge does not constitute a tangible employment action, employers would undoubtedly catch on to the availability of the [*Ellerth/Faragher*] affirmative defense even if the victimized employee resigns from objectively intolerable conditions at work. Under such a rule, the temptation of employers to preserve their affirmative defense would be

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