K&L ALERT

Pennsylvania Employment Law

DECEMBER 2004

Affirmative Defenses to Harassment and Discrimination Claims: The Cautionary Tales Told in 2004

BACKGROUND

The defense of harassment and discrimination claims is an important issue for all employers, private or public. There are two basic types of harassment and discrimination claims: (1) one in which a tangible employment action, such as discharge, demotion or undesirable reassignment, is taken against an employee with a discriminatory motive; and (2) one in which the employee claims a hostile work environment and, sometimes, a constructive discharge.[1] In two often-cited 1998 cases, *Faragher v. Boca Raton* and *Burlington Industries, Inc. v. Ellerth,* the U.S. Supreme Court held that an employer is strictly liable for harassment where there is a tangible employment action but, where there is no tangible employment action, an employer may assert an affirmative defense to liability. To successfully claim the affirmative defense, an employer must prove that it "exercised reasonable care to prevent and correct promptly any [unlawful] harassing behavior" and that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

In response to these decisions, many employers have adopted and disseminated policies banning unlawful harassment, which include clear directions for the reporting and investigation of prohibited conduct. In addition, many employers have provided training to both supervisors and employees in the handling of workplace harassment.

THE CAUTIONARY TALES

On June 14, 2004, the United States Supreme Court decided the case of *Pennsylvania State Police v. Suders* in which it held for the first time that a tangible employment action includes a constructive discharge if the supervisor's official action resulted in the constructive discharge.

In *Suders*, a female police officer charged that she experienced a hostile work environment so severe that she was forced to quit her job rather than continue to be subject to harassing conduct from her peers and her supervisor. In response to her complaint, the Pennsylvania State Police asserted the *Faragher/Ellerth* affirmative defenses and moved for summary judgment. The trial court agreed with the employer and found that, although there may have been a hostile work environment, the employer was not responsible for the supervisor's conduct because the employee did not make use of the remedial measures set forth in the harassment policy.

The Third Circuit Court of Appeals reversed and held that a constructive discharge is a tangible employment action and, therefore, the *Faragher/Ellerth* affirmative defenses were not available to the employer. The Supreme Court reversed the Third Circuit and held that a constructive discharge does not, in all instances, rise to the level of a tangible employment action. Rather, an employee must demonstrate that the constructive discharge was a reasonable response to an "official act" of a supervisor. Unfortunately, the Supreme Court's decision does not unequivocally resolve the issue. The difficulty lies in the fact that the Supreme Court did not define the term "official act."[2]

In *Barra v. Rose Tree Media School District*, the first case decided by the Pennsylvania state appellate courts after the opinion in *Suders*, the Pennsylvania Commonwealth Court attempted to clarify what, under Pennsylvania law, might equate to an "official act." Barra, a computer network specialist employed by a school district, claimed that she was not promoted due to her color and that she was subjected to discriminatory treatment in that, among other things, she was asked to perform additional tasks not performed by her white co-workers and she was excluded from meetings which impacted her job. As a result of this treatment, she resigned from her position with the school district and claimed that she was constructively discharged.

1 A constructive discharge arises where an employee experiences a working environment that becomes so intolerable that the employee's resignation qualifies as a reasonable response.

2 In addition, of course, the question of whether a particular employee's response is a "reasonable response" is always arguable.

After the Pennsylvania Human Relations Commission and the Equal Employment Opportunity Commission found that there was no probable cause to support her claim, Barra filed a complaint in the local county court. In response, the school district asserted the *Faragher/Ellerth* affirmative defenses. The trial court entered summary judgment in favor of the school district finding that, on the facts presented, the school district was not responsible for the actions of its employees. Barra appealed.

On appeal, Barra argued that her constructive discharge resulted from official acts of her supervisor and, therefore, the school district should be held strictly liable for the actions of its employees. The Commonwealth Court disagreed and held that she had not alleged an official act. According to the court, the following actions taken against an employee by the supervisor do not constitute "official acts" of a supervisor:

- Assignment of a heavier workload than that assigned to other similarly-situated employees;
- A requirement that the employee maintain a daily log of work and location;
- The failure to include the employee in meetings with vendors;
- The taking of office keys from the employee;
- The failure to give a performance evaluation; and,
- Critical, insulting emails from the employee's supervisor.

Although the Pennsylvania Commonwealth Court found that these actions were not "official acts" of the supervisor and, therefore, the *Faragher/Ellerth* affirmative defenses were available to the school district, the court also found that the school district did not satisfy its burden of proving the affirmative defenses. The court held that the school district's unlawful harassment policy was too narrow. The policy addressed only "hate-based conduct" and failed to expressly address discrimination and discriminatory conduct. According to the court, those omissions rendered the policy fatally deficient.

CONCLUSION

These decisions are cautionary tales for employers, especially those doing business in Pennsylvania. The U.S. Supreme Court's decision in *Suders* placed employers on notice that they may be held liable for the constructive discharge of an employee *if* the constructive discharge comes about because of an "official act" of a supervisor. However, according to the Commonwealth Court's decision in *Barra,* an employee bears a high burden in demonstrating that a supervisor's conduct amounts to an "official act." It appears that, to allege an "official act," an employee must allege more than harassing conduct by the supervisor.

Further, the Commonwealth Court's decision in *Barra* has told us that an employer should examine its unlawful harassment policy to ensure that it expressly addresses all types of discrimination and harassment. Based upon the close scrutiny by the court of the school district's policy in *Barra,* a failure to include express language that specifically identifies each type of harassment, *i.e.,* gender, racial or national origin, and the types of conduct prohibited, could result in the court finding that the employer cannot avail itself of the affirmative defenses.

Finally, these decisions tell the cautionary tale that, until the term "official act" is more clearly defined, it could be difficult for an employer to obtain summary judgment on the basis of the *Faragher/Ellerth* affirmative defenses.

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