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4-22-2003

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Recommended Citation

Joanna Grossman, *When an Employee Is Not Formally Fired, but Effectively Forced to Leave, Is Her Employer Automatically Liable for Sexual Harassment?* Findlaw's Writ (2003)

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When an Employee is Not Formally Fired, But Effectively Forced to Leave, Is Her Employer Automatically Liable for Sexual Harassment?

By **JOANNA GROSSMAN**

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Tuesday, Apr. 22, 2003

In the public imagination, the typical sex harassment case may be one in the victim is fired by a harassing supervisor for refusing to submit to sexual advances. But what if the victim, instead of being fired, quits her job because the harassing environment has become intolerable? (In legal terms, this situation is referred to as a "constructive discharge.") Is her employer still automatically liable for sexual harassment?

Recently, in [Suders v. Easton](#), the U.S. Court of Appeals for the Third Circuit said yes. Earlier, the U.S. Court for the Eighth Circuit also said yes, in [Jaros v. LodgeNet Entertainment Corp.](#). But two other federal courts of appeals, for the Second and Sixth Circuits, have said no.

As a result, the Supreme Court may eventually take this case--or the next one like it--to resolve this Circuit split.

Which view is correct? To answer that question, it's necessary to go into some of the history of the law governing employer liability for sexual harassment, before and after the Supreme Court clarified the area in 1998.

Pre-1998 Quid Pro Quo Harassment Liability

Originally, courts and commentators divided sexual harassment claims into two categories - quid pro quo and hostile environment - though they disagreed about the dividing line between the two.

Quid pro quo harassment clearly occurred, for instance, when a supervisor threatened a subordinate employee with an adverse employment action unless she agreed to submit to his sexual advances: "Sleep with me or you're fired."

Clearly, the employee in this example can sue under a quid pro quo harassment theory. But what about the employee who refuses her supervisor's advances, and doesn't get fired after all? Or the employee who submits in order to save her job?

The characterization of harassment claims became important because the standard for employer liability turned on it. Courts almost universally agreed that an employer would be automatically liable for anything denominated "quid pro quo harassment" - regardless of whether it knew of the harassment or not, had punished the harasser or not, or had a strong anti-harassment policy or not.

Pre-1998 Hostile Environment Harassment Liability

Hostile environment harassment, by contrast, was understood to include any unwelcome sexual conduct (verbal, physical, or visual) that was severe or pervasive and had the effect of creating a subjectively and objectively hostile, abusive, or offensive working environment.

The Supreme Court first recognized hostile environment harassment as an actionable violation of Title VII in 1986, in [Meritor Savings Bank v. Vinson](#). Later, the Court made clear that a victim need not suffer any tangible harm--psychological or economic--in order to pursue a hostile environment claim.

What about the question of when the employer is liable for the supervisor's harassment? The standard varied

greatly from court to court.

Some courts held that the employer was automatically liable. Others applied a negligence standard that held employers liable only for harassment they both knew about and failed to stop. Still others did something in between--considering, as factors in assessing liability, whether there was an anti-harassment policy and whether the employer had notice of the harassment.

Employer Liability for Sexual Harassment After the 1998 Decisions

Then, in 1998, the Supreme Court reformulated the rules of liability for supervisory sexual harassment in two important decisions - [*Burlington Industries v. Ellerth*](#) and [*Faragher v. City of Boca Raton*](#).

Under the prior law, the proper classification of the harassing behavior was clearly key to the success of many claims of vicarious liability. Quid pro quo harassment called for a stricter standard of liability in most jurisdictions, and did not require a showing that the conduct was severe or pervasive. By comparison, a hostile environment harassment case was harder to win.

In the 1998 decisions, the Supreme Court rejected these traditional categories. It stated that courts should look instead to whether the harassment resulted in a "tangible employment action" such as a firing.

If so, the Court held, the employer is automatically liable regardless of whether it knew about the harassment, ratified it, or even tried to prevent it. But for harassment that does not result in a tangible employment action, an employer can escape liability by raising an affirmative defense based on its "efforts to prevent and correct harassment and the employee's unreasonable failure to take advantage of opportunities to avoid or mitigate harm."

Looking back to the gray areas under the old regime--unfulfilled threats and submission cases--which kinds of harassment claims should now be subject to the affirmative defense?

When a supervisor makes a threat but does not carry it out, a resulting claim of harassment is clearly subject to the affirmative defense. In *Ellerth* itself, the plaintiff's supervisor, who had the clear authority to fire her, subjected her to repeated unwelcome sexual advances as well as comments indicating that her success at the company was contingent on her submission to his advances. Although she refused his advances, the supervisor never carried through with his threats.

The post-*Faragher* and *Ellerth* treatment of submission cases has been uneven. As I discussed in an earlier column, the EEOC has taken the position that an employee who submits to a supervisor's advances should be able to hold her employer automatically liable. Some, but not all courts have agreed.

But *Faragher* and *Ellerth* engendered an additional gray area: what standard of liability should apply when an employee voluntarily quits because she cannot endure the harassing environment? Has she suffered a tangible employment action sufficient to preclude invocation of the affirmative defense?

This question is provoked by *Faragher* and *Ellerth*, which moved away from the threat-refusal-retaliation paradigm into the harassment-with-a-tangible-result paradigm. Without the requirement of a threat, this new paradigm is more susceptible to the claim that constructive discharge should be treated within the category that generates automatic liability.

What Constitutes a Tangible Employment Action?

Once the Court had made clear that only a tangible employment action triggers automatic employer liability, that led to an important question: What does "tangible employment action" mean, exactly?

In *Ellerth*, the Court defined it as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." (Emphasis added.) This change, the Court explained will often - but not necessarily - inflict direct economic harm.

Plainly, a firing, a demotion, a pay cut, and a reduction in benefits all count as "tangible employment actions." But the "such as" language suggests other actions can also qualify.

What about "constructive discharge" due to harassment? Should it be treated like firing - thus making the employer automatically liable?

The Third Circuit's decision in the *Suders* case sheds light on the issue.

The Third Circuit Properly Counts Constructive Discharge As A Firing

Suders, a Pennsylvania State Police communications operator, alleged that she suffering escalating harassment from supervisors from June 1998, to August 1998, when she felt compelled to resign.

One supervisor, she alleged, made repeated sexual comments about topics ranging from sex with animals, to fathers teaching their daughters to perform oral sex, to the size of his wife's breasts. Another, she alleged, would - as many as five to ten times a night - in imitation of television wrestling, "cross his hands, grab hold of his private parts and yell, suck it." (Many of these statements were either admitted or corroborated by the defendants.)

Suders's claim against the Pennsylvania State Police was certainly a hostile environment sexual harassment claim. However, it was arguably also a claim stating a tangible employment action - a "constructive discharge."

After all, Suders not only claimed that all of these comments and gestures created a hostile environment, she also said they'd made her feel compelled to leave her job rather than suffer further harassment.

The trial court found, with respect to Suders's claim against the State Police, that the defendant was entitled, as a matter of law, to invoke the affirmative defense because it maintained adequate internal procedures for resolving problems of harassment that she had failed to use.

The Third Circuit reversed the grant of summary judgment, accepting the argument that "constructive discharge" is tantamount to firing - and thus can make an employer automatically liable (by depriving it of the opportunity to prove the affirmative defense) under the *Faragher* and *Ellerth* framework.

Contrary Holdings Are Not Persuasive

Why have other Circuits - such as the Sixth Circuit, and the Second Circuit, in *Caridad v. Metro-North Commuter R.R.*--then held to the contrary?

There are two basic reasons. First, these courts have noted that not only supervisors, but coworkers and others can contribute to a "constructive discharge."

But so what? True, others might also drive an employee from her workplace. This is true of almost all forms of harassing behavior--co-workers can make threats, sexually suggestive comments, lewd gestures, and so on; but the behaviors mean something different than they do coming from a supervisor. The potential overlap does not answer the question of how to treat it when a supervisor makes it happen. When that occurs, the action is tantamount to firing.

Second, courts have noted that a constructive discharge is not "ratified by the employer." When a supervisor formally fires an employee, the argument goes, the employer can be held vicariously liable because the supervisor acted on the employer's behalf, and because afterwards, the employer "ratified" the agent's action by declining to reverse it. But when an employee quits, the employer can't be held liable for that action. When she quit, she wasn't acting on behalf of the employer. To the contrary, she was leaving the employer all together, renouncing her position there.

This argument would work if the employee truly quit voluntarily - after all, a quitting employee isn't acting on behalf of her employer. But again, the whole point of the constructive discharge doctrine is that the employee is forced out.

So the correct action to focus on is the supervisor's harassment-tantamount-to-firing, not the employee's quitting, which is a foregone conclusion. And just as it's appropriate to hold an employer automatically liable for an illegal firing, so too is it appropriate to hold an employer automatically liable for a supervisor's illegal actions that are tantamount to firing.

A jury can judge if conditions were so intolerable that the plaintiff was forced out by her supervisor's actions; if so, she was as good as fired, and she should be treated as such. Being harassed out of the office is no better than being pink-slipped out.

Joanna Grossman, a FindLaw columnist, is an associate professor of law at Hofstra University. Her other columns on sexual harassment law may be found in the archive of her columns on this site.

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