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LABOR AND EMPLOYMENT NOTES
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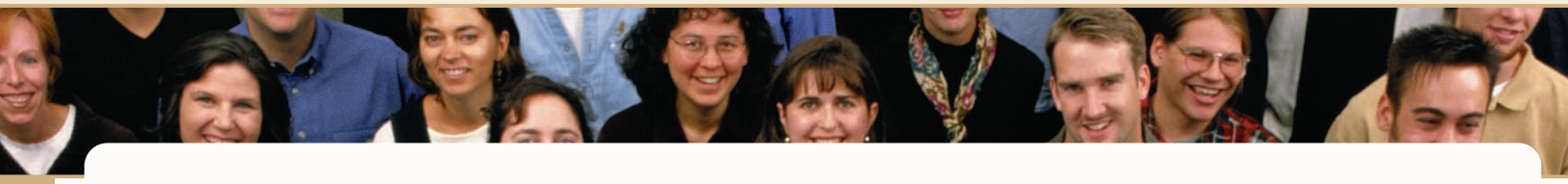

CONSTRUCTIVE DISCHARGE MAY BE CONSIDERED "TANGIBLE EMPLOYMENT ACTION" IN SUPERVISOR-HARASSMENT CASES

A plaintiff's decision to quit her job is within her discretion. But the Supreme Court, in *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004), determined that a plaintiff who quits her job after being sexually harassed by her supervisor may be able to benefit in her lawsuit from her unilateral decision.

By way of background, in supervisor harassment cases, whether there is a "tangible employment action" from the supervisor's harassment is important. If the harassment culminates in a tangible employment action, then an employer will be vicariously liable for the sexually harassing conduct. If there is no tangible employment action, then the employer can avoid liability by showing an affirmative defense: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) and *Faragher v City of Boca Raton*, 524 U.S. 742, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). A "tangible employment action" is generally defined as one making a significant change in employment status, such as hiring and firing, failing to promote, and reassignment with significant changes in responsibilities. *Burlington* 118 S.Ct. at 2268-2269.

Before *Suders*, the circuit courts were split regarding whether a plaintiff, who quit her job because her working conditions were intolerable as a result of supervisor harassment, had suffered a "tangible employment action." Under *Suders*, whether this is a tangible employment action depends on the circumstances and the following analysis. First, is there a constructive discharge? This requires a plaintiff to show her working conditions were so intolerable that a reasonable person would have felt compelled to resign. Second, if there was a constructive discharge, did the employee quit in response to some "official act" by the harassing supervisor brought about by the harasser's supervisory position (such as a demotion or reduction in pay)? If so, the constructive discharge will be considered a "tangible employment action" and the employer will be liable for the harassment. If not, the employer will be able to introduce evidence to try to show the affirmative defense.

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RECOGNIZING A DUTY TO PREVENT WORKPLACE VIOLENCE

In Jefferson City, Missouri, three people were killed by a plant worker at a manufacturing plant in 2003. In March 1998, four state lottery executives were killed by a Connecticut lottery accountant. In 1986, a part-time letter carrier facing dismissal walked into the post office where he worked and shot 14 people to death before killing himself.

What are these events examples of? Although all of the above events represent examples of terrible crimes, these occurrences also illustrate a recent increase in workplace violence – a specific criminal category now recognized by most law enforcement agencies. Workplace violence is defined by the FBI as any action that may threaten the safety of an employee, impact an employee's physical or psychological well being, or cause damage to company property. Homicide is the most extreme form of workplace violence. Most incidents of workplace violence occur in the form of assault, battery, stalking, threats, harassment (including sexual harassment), and emotional abuse.

Do employers have a legal responsibility regarding workplace violence? Although the law has not been fully developed in this area, most legal counsel do see employers as having some degree of employer liability. For example, Louisiana courts have found that an employer is liable if it negligently hires (or retains) someone who it knows (or should have known) is capable of workplace violence. Also, the Occupational Safety and Health Act ("OSHA") contains a broad general duty clause. In addition to complying with the specific standards enumerated by OSHA, the Act also requires employers to provide its employees a place of employment which is free from "recognized hazards." In recent years, OSHA experts have said that workplace violence is a recognized hazard under the general duty clause. Employers who fail to take precautions to prevent workplace violence could be sanctioned by OSHA, in addition to being subject to legal liability.

How can employers prevent workplace violence and protect themselves from liability? Although there are several preventative measures that should be taken, the best place for any employer to start is to have a written workplace violence policy. The policy should at a minimum (1) state that the employer is committed to preventing workplace violence; (2) list examples of what the employer considers to be workplace violence; and (3) state that employees who partake in workplace violence are subject to discipline, up to and including termination. In addition, the policy should set forth mechanisms for reporting workplace violence and the procedures under which such reports will be investigated. Although a comprehensive and enforced policy will not be the only way that an employer can prevent workplace violence, it surely is a good place for the employer to start.

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