

# H.R. ALERT\*

JUNE 2004

RECENTLY, THE COURTS ISSUED KEY DECISIONS AFFECTING EMPLOYERS. TAKE NOTE:

## United States Supreme Court Holds Constructive Discharge an Actionable Adverse Job Action

In *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004) the United States Supreme Court held that a constructive discharge can be deemed an adverse employment action. An employee is constructively discharged if the employee resigns because of extreme conditions that allegedly force him or her to leave, rather than seek corrective action through the employer's established anti-discrimination harassment policies and procedures.

In *Suders*, the plaintiff alleged that she was subjected to a hostile work environment, which included allegations of sexual harassment. The Supreme Court identified two categories of hostile work environment: 1) harassment that culminated in a tangible employment action, for which employers are liable and (2) harassment that takes place in the absence of a tangible employment action. Employers may still avail themselves of the so-called *Faragher* and *Ellerth* defense, which allows employers to argue that they should not be held liable for the actions of supervisors, unless the employee can show that some "official" act changed his or her employment status. In addition, the employee must have failed to properly follow the employer's complaint procedures outlined in the harassment/discrimination policy.

In sum, a plaintiff alleging constructive discharge because

of sexual harassment must first establish that the abusive working environment was so intolerable, due to the severe or pervasive nature of the harassment, that the employee's resignation qualified as a fitting response. An employer may assert the *Faragher* and *Ellerth* defense mentioned above, unless the plaintiff's response was the reasonable result of an adverse action that officially changed the employee's status. Accordingly, where an employee has not been the subject of an "official" act changing his or her employment status, and the employee has failed to properly utilize the employer's grievance procedures to report the purported harassment, it is likely that a claim of hostile work environment will fail.

**Practice Tip:** One of the most important components of an employer's harassment/discrimination policy is an effective complaint procedure and of course, dissemination of the policy and procedures. Your policy should allow the employee to lodge complaints with more than just their supervisor. Ideally, there should be two or more people that can receive complaints so that the employee cannot raise the issue that they were uncomfortable reporting a complaint to management. In addition, supervisors should be trained on what procedures to follow once an employee lodges a complaint — no matter how informal or insignificant the complaint seems at the time.

## NLRB Overrules *Epilepsy Foundation* – Employers Take Note

On June 15, 2004, the National Labor Relations Board ("NLRB") overruled *Epilepsy Foundation of Northeast Ohio* and limited the right of non-unionized employees to have another person present during investigations that could possibly lead to disciplinary action. 341 N.L.R.B. 148 (2004). Accordingly, the Board has clearly established that only employees who are represented by a union are entitled to have a representative present during an interview that might result in discipline. In the NLRB decision, the Board stated that "the right of an employee to a co-worker's presence

in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough, and confidential workplace investigations." The Board further stated that "limiting this right to employees in unionized workplaces strikes the proper balance between the competing interest of the employer and the employees."

**Practice Tip:** The NLRB's decision is a major victory for employers. The Board's decision, however can still be appealed. Stay tuned!

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## Standard of Liability for Sexual Harassment – Person Who is Proxy of Company Can Impose Strict Liability on Employer in Harassment Cases

In *Ackel v. National Communications, Inc.*, 339 F.3d 376 (5<sup>th</sup> Cir. 2003) the Fifth Circuit held that an employee accused of sexual harassment can be deemed the proxy of the employer if the alleged harasser was in charge of all or major aspects of the corporation's business. The Court further stated

that it was irrelevant that the person accused of sexual harassment only owned two percent of the stock, and had to consult the corporation's outside CPA before giving raises to employees.

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### MARK YOUR CALENDARS

#### Breakfast Briefings

“Fair Labor Standards Act Final Regulations”

Thursday, July 15, 2004

Phelps Dunbar New Orleans Office

“New Fair Labor Standards Act Regulations”

Thursday, July 22, 2004

Marriott Baton Rouge

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