

***MAYER, BROWN, ROWE & MAW LLP'S
SUPREME COURT DOCKET REPORT
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Today the Supreme Court granted certiorari in three cases of potential interest to the business community, including one case in which Mayer, Brown, Rowe & Maw LLP represents the respondents. Amicus briefs in support of the petitioners are due on Thursday, January 15, 2004, and amicus briefs in support of the respondents are due on Thursday, February 19, 2004.

1. *Alien Tort Statute — Private Right of Action for Violation of International Law.*
The Alien Tort Statute (ATS) (also known as the Alien Tort Claims Act), which was enacted as part of the Judiciary Act of 1789, provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The Supreme Court granted certiorari in *Sosa v. Alvarez-Machain*, No. 03-339, to determine whether the ATS is simply a grant of jurisdiction, or whether it also creates a private cause of action that allows aliens to sue for violations of international law. If the Court decides that the ATS does create a private right of action, it also may decide whether it authorizes actions only for violations of fundamental international norms, or whether violations of lesser categories of international law also are actionable under the statute.

In 1990, the U.S. Drug Enforcement Agency arranged for the abduction in Mexico and transportation to the United States of Humberto Alvarez-Machain, who was suspected of involvement in the 1985 kidnapping and murder of a DEA agent. Jose Sosa, a private citizen, participated in Alvarez-Machain’s capture at the request of the DEA. After the Supreme Court ruled that the trial could proceed (see *United States v. Alvarez-Machain*, 504 U.S. 665 (1992)), Alvarez-Machain was tried in the U.S. and acquitted. Subsequently, Alvarez-Machain sued Sosa under the ATS in federal district court in California. The district court granted summary judgment for Alvarez-Machain, holding that Sosa’s conduct violated international law.

A panel of the Ninth Circuit affirmed the judgment against Sosa. 266 F.3d 1045 (2001). The Ninth Circuit granted rehearing *en banc*, and, by a 6-5 vote, again affirmed the judgment. 331 F.3d 604 (2003). The court of appeals first noted its view that the ATS “not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations.” *Id.* at 612 (citing *Hilao v. Estate of Marcos (In re Estate of Marcos, Human Rights Litig.)*, 25 F.3d 1467, 1475 (9th Cir. 1994)). It then explained that it would not restrict ATS suits to those alleging violations of *jus cogens* norms — *i.e.*, norms that are “derived from values taken to be fundamental by the international community” and that hence “enjoy the highest status within international law” (*id.* at 613 (internal quotation marks omitted)) — but also would recognize claims for violation of “customary international law,” which “rests on the consent of states” (*id.*). The court of appeals then held that, although the transborder abduction of Alvarez-Machain did not violate international law, his arbitrary arrest

and detention did violate a “clear and universally recognized norm” and hence was actionable under the ATS. *Id.* at 620.

Like the Ninth Circuit, the Second and Eleventh Circuits have held that the ATS creates a cause of action for certain violations of international law. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir.), cert. denied, 519 U.S. 830 (1996). By contrast, judges of the D.C. Circuit have opined that the ATS merely provides federal district courts with subject matter jurisdiction over claims that are otherwise actionable. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801-11 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985); *Al Odah v. United States*, 321 F.3d 1134, 1145-49 (D.C. Cir. 2003) (Randolph, J., concurring), cert. granted sub nom. *Rasul v. Bush*, ___ S. Ct. ___, 72 U.S.L.W. 3171, 3323, 3327 (U.S. Nov. 10, 2003) (Nos. 03-334 & 03-343).

This case is of great importance to all corporations that engage in business activities abroad. Although the ATS was rarely invoked during the first two centuries of its existence, more recently many plaintiffs have used the statute as a vehicle for suits alleging that U.S. and multinational corporations that have invested or conducted operations abroad are complicit in human rights or other international law violations by foreign governments. The Supreme Court’s decision in this case may determine the future viability of such lawsuits.

Any questions about this case should be directed to Miriam Nemetz (202-263-3253) in our Washington, D.C. office.

2. Title VII of the Civil Rights Act of 1964 — Hostile Work Environment — Vicarious Liability. In *Burlington Industries, Inc v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court determined that, in a sexual harassment suit under Title VII of the Civil Rights Act of 1964, an employer will be vicariously liable “for an actionable hostile [work] environment created by a supervisor with immediate (or successively higher) authority over the employee.” *Ellerth*, 524 U.S. at 765; accord *Faragher*, 524 U.S. at 807. If the harassment resulted in a “tangible employment action,” the employer is strictly liable for the harassment or discrimination by its supervisors. *Id.* at 808. Examples of tangible employment actions identified by the Supreme Court are “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Ellerth*, 524 U.S. at 761. If the harassment did not result in a tangible employment action, a defending employer may raise an affirmative defense by which it can avoid liability or damages by showing (1) that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and (2) “that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher*, 524 U.S. at 807. The Court granted certiorari in *Pennsylvania State Police v. Suders*, No. 03-95, to address whether a constructive discharge — *i.e.*, an employee’s resignation due to a work environment so intolerable that the employee had no choice but to resign — constitutes a tangible employment action for which an employer will be strictly liable.

Nancy Drew Suders filed a complaint against the Pennsylvania State Police (“State Police”) alleging, *inter alia*, that she had been subjected to a hostile work environment while employed by the State Police as a communications operator, and had been constructively discharged as a result. Specifically, Suders alleged that her supervisors — all State Police officers — had made disparaging remarks about her age, had engaged in offensive sexual conversations, had repeated obscene sexual gestures, and had accused her of theft, culminating in an episode during which Suders was handcuffed, photographed, and interrogated in the police barracks in which she worked. Suders resigned immediately after this last incident.

Following discovery, the district court granted the defendants’ motion for summary judgment on Suders’ hostile environment claim. Although the district court concluded that Suders had raised genuine issues of material fact as to each element of her claim, the district court also found that the State Police had met its burden of establishing the affirmative defense to vicarious liability. The district court did not address Suders’ claim of constructive discharge and its effect on the availability to the State Police of the affirmative defense.

The Third Circuit reversed. *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003). As an initial matter, the court of appeals held that the district court erred in ruling that the State Police had established their affirmative defense, concluding that, at a minimum, there were disputed issues of material fact as to whether the State Police had implemented an effective remedial program to address sexual harassment claims and whether Suders had failed to avail herself of that program. *Id.* at 443. The Third Circuit also held that the district court erred in failing to consider whether a constructive discharge, if proven, constitutes a tangible employment action that would bar the State Police from raising the affirmative defense in the first instance. *Ibid.* Adding to an established split among the circuits, the Third Circuit answered that question affirmatively, holding that Suders had raised genuine issues of material fact on the issue of whether she had been constructively discharged, thus leaving for trial the question of whether the State Police would be barred from raising the affirmative defense. *Id.* at 462. The Eighth Circuit, in *Jaros v. Lodgenet Entertainment Corp.*, 294 F.3d 960, 966 (8th Cir. 2002), also found that a constructive discharge constitutes a tangible employment action.

In reaching its holding, the Third Circuit disagreed with the reasoning of the Second Circuit in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999). In *Caridad*, the Second Circuit distinguished constructive discharge from the tangible employment actions expressly identified by the Supreme Court in *Ellerth* and *Faragher* on the grounds that, “unlike demotion, discharge, or similar economic sanctions, an employee’s constructive discharge is not ratified or approved by the employer,” and “co-workers, as well as supervisors, can cause the constructive discharge of an employee.” *Id.* at 294; accord *Turner v. Dowbrands, Inc.*, 2000 WL 924599, at *1 (6th Cir. June 26, 2000).

The Third Circuit rejected the ratification rationale of *Caridad*, observing that federal courts “have explicitly recognized that some of the most pernicious forms of workplace harassment, clearly amounting to tangible employment actions” — for example, a supervisor’s demand of sexual favors as a condition of job retention or promotion — “are often not accompanied by official company acts.” 325 F.3d at 458. The Third Circuit also concluded that,

“as a practical matter, a constructive discharge is often ratified by an employer,” because the termination gives the employer notice and the opportunity to investigate the cause of the separation from employment. *Id.* at 459-460. As for the contention in *Caridad* that co-workers, as well as supervisors, can cause a constructive discharge, the Third Circuit held that this was “beside the point,” because a court’s inquiry in a hostile environment case focuses solely on the actions of supervisors. *Id.* at 457.

This case is of significant importance to every employer. Unlike other employment actions, such as firing, failure to promote or reassignment, the question of whether an employee was constructively discharged — and therefore whether a defendant employer will be held strictly liable for harassment by its supervisory employees — turns upon subjective factors unique to that employee, and often known only to him or her. If adopted, the Third Circuit’s approach will encourage plaintiffs to raise claims of constructive discharge, and will make it extremely difficult for employers to defeat such claims at the summary judgment stage.

Any questions about this case should be directed to Craig Canetti (202-263-3276) in our Washington, D.C. office.

3. ERISA — Anti-Cutback Rule — Change In Rules Governing Suspension Of Early Retirement Benefits. Under the “anti-cutback” rule contained in section 204(g)(1) of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1054(g)(1), with limited exceptions “[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan.” ERISA section 204(g)(2)(A), added by the Retirement Equity Act of 1984, clarifies that “[f]or purposes of” this anti-cutback rule, “a plan amendment which has the effect of * * * eliminating or reducing an early retirement benefit or a retirement-type subsidy * * * with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits,” and thus is also prohibited. The Supreme Court granted certiorari in *Central Laborers’ Pension Fund v. Heinz & Schmitt*, No. 02-891, to address whether when an ERISA pension plan is amended to expand the categories of “disqualifying” post-retirement employment that “suspend” early retirement benefits under the plan, it violates ERISA’s anti-cutback rule to apply that amendment to plan participants who had already retired, were already receiving benefits, and were already working in forms of post-retirement employment that were non-disqualifying under the prior version of the plan but were disqualifying under the amendment.

Respondents Thomas E. Heinz and Richard J. Schmitt, Jr. are participants in the Central Laborers’ Pension Fund (“the Fund”), a multiemployer pension fund whose participants are mainly construction workers in central Illinois. The Fund is a “qualified” pension plan governed by ERISA, and offers participants both a traditional retirement pension (available to participants aged 65 or older) and an early-retirement pension. Respondents each became eligible to receive the early-retirement pension in 1996, and retired.

Under ERISA, early-retirement pensions may specify that pension benefits will be suspended if, after retiring, a participant engages in delineated “disqualifying employment.” At the time respondents retired, the Fund’s plan specified that working as a union or non-union

construction worker would cause a retiree’s benefits to be suspended, but that other jobs — including working as a supervisor in the construction industry — were not “disqualifying employment.” Thus, after retiring as construction workers, both respondents began working as supervisors in the construction industry, while, as the plan allowed, collecting their early-retirement pensions.

Two years after respondents retired, the Fund amended the terms of the plan to expand the definition of disqualifying employment for purposes of early-retirement benefits to include employment in *any* capacity in the construction industry. The plan applied this amended definition to participants such as Messrs. Heinz and Schmitt who were already receiving early-retirement benefits prior to the amendment, and thus suspended respondents’ pension benefits. After exhausting intra-Fund avenues for review of the decision to suspend their benefits, respondents brought suit in the Central District of Illinois, asserting that the retroactive application of the 1998 Amendment to suspend their benefits violated ERISA’s anti-cutback rule.

The district court ruled in favor of the Plan, but the Seventh Circuit reversed. See *Heinz & Schmitt v. Central Laborers’ Pension Fund*, 303 F.3d 802 (2002). The court of appeals explained that “[a] participant’s benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit ‘reduces’ the benefit just as surely as a decrease in the size of the monthly benefit payment.” *Id.* at 805. In so ruling, the Seventh Circuit expressly considered and rejected the Fifth Circuit’s decision in *Spacek v. Maritime Association, I L A Pension Plan*, 134 F.3d 283 (5th Cir. 1998), which had found that a similar change in suspension rules for early-retirement benefits did not violate the anti-cutback rule.

This case is important to all businesses that have created qualifying ERISA pension plans. The anti-cutback rule is one of the foundational principles of ERISA, on which both employers and employees rely to create the predictability necessary for pension funds to be useful. Although the Supreme Court’s decision in this case will directly affect only multi-employer pension funds, the Court’s analysis of the anti-cutback rule may have broader implications for other ERISA plans.

Mayer, Brown, Rowe & Maw LLP represents the respondents in this matter. Any questions about this case should be directed to David Gossett (202-263-3384) in our Washington, D.C. office.

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