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Sexual Harassment, Constructive Discharge, and Employers' Affirmative Defenses: The U.S. Supreme Court Decision in Pennsylvania State Police v. Suders

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Summary

On June 14, 2004 the Supreme Court resolved a conflict among the federal circuits concerning the defenses, if any, that may be available to an employer against an employee's claim that she was forced to resign because of "intolerable" sexual harassment at the hands of a supervisor. An employer may generally assert an affirmative defense to supervisory harassment under the Court's 1998 rulings in *Farager v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*. The defense is not available, however, if the harassment includes a "tangible employment action," such as discharge or demotion. In *Pennsylvania State Police v. Suders*, the plaintiff claimed the tangible adverse action was supervisory harassment so severe that it drove the employee to quit, a constructive discharge in effect. The Court, in an opinion by Justice Ginsburg, with only Justice Thomas dissenting, accepted the theory of a constructive discharge as a tangible employment action, but it also set conditions under which the employer could assert an affirmative defense and avoid strict liability. The issue is of key importance for determining the scope of employers' vicarious liability in "supervisory" sexual harassment cases alleging a hostile work environment.

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[1] 524 U.S. 775 (1998).

[2] 524 U.S. 742 (1998).

Pennsylvania State Police v. Suders,[3] the plaintiff claimed the tangible adverse action was supervisory harassment so severe that it drove the employee to quit, a constructive discharge in effect. The Court, in an opinion by Justice Ginsburg, with only Justice Thomas dissenting, accepted the theory of a constructive discharge as a tangible employment action, but it also set conditions under which the employer could assert an affirmative defense and avoid strict liability under Title VII of the 1964 Civil Rights Act.[4] The issue is of key importance for determining the scope of employers' vicarious liability in "supervisory" sexual harassment cases alleging a hostile work environment.

Legal Background – Employer Liability for Sexual Harassment by Supervisors

Originally, courts drew a distinction for purposes of employer liability between so-called "*quid pro quo*" and "hostile environment" claims of sexual harassment. The former consist of cases where a supervisor threatens to grant or withhold tangible job benefits – or to inflict detrimental job consequences – based on a subordinate's response to unwelcome sexual advances by the supervisor. Employers were uniformly held liable – whether or not they knew of the harassment or had any policy against it – for any retaliation suffered by employees who resisted this form of sexual extortion. But the *quid pro quo* theory failed to address the plight of employees who refused the supervisor's advances, without adverse consequence, or who submitted to save their jobs.

In *Meritor Savings Bank v. Vinson*,[5] the Court recognized hostile environment sexual harassment, which dispensed with the need for any tangible harm – psychological or economic – to pursue a Title VII claim. In a hostile environment action, the plaintiff must demonstrate unwelcome sexual conduct – of verbal, physical, or visual nature – that is so "severe and pervasive" as to alter employment terms and conditions by creating a subjectively and objectively "hostile, abusive, or offensive working environment." *Meritor*, however, did not define a standard for holding employers liable for harassing conduct by their supervisors, which led to varying lower court approaches. One approach held the employer strictly liable for the acts of its supervisors. Other courts applied a negligence standard, holding employers liable only for harassment of which they were both aware and failed to prevent. A middle course emphasized as factors whether the employer had reason to know of the harassment or had a formal anti-harassment policy in place.

The Supreme Court in *Farager* and *Ellerth* sought to allay some of this judicial confusion as to the nature and scope of an employer's legal liability for the discriminatory and harassing conduct of its supervisors in Title VII cases. It held employers strictly liable for a sexually hostile work environment created by a supervisor, when the challenged discrimination or harassment results in a "tangible employment action."[6] But in the absence of such a "company act" the employer may raise an affirmative defense based on its having in place a reasonable remedial process and on the employee's failure

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[3] 542 U.S. ____ (2004).

[4] 42 U.S.C. § 2000e et seq.

[5] 477 U.S. 57 (1986).

[6] Ellerth, 524 U.S. at 765; Farager, 524 U.S. at 807.

to take advantage of it. Thus, the *Ellerth/Farager* defense has two components: "(a) that the employer exercise reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."

The Supreme Court defined a "tangible employment action" categorically to mean any "significant change in employment status," that may – but not always – result in economic harm. Specifically, the term includes "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"[7] However, a "constructive discharge," where the employee quits, claiming that conditions are so intolerable that he or she was effectively "fired," presented an unresolved issue. Could an employer, faced with a claim of constructive discharge, still assert the *Ellerth/Farager* defense?

The *Suders* Case

Nancy Suders was hired by the Pennsylvania State Police as a police communications officer in March 1998. She claimed that she was forced to resign her job in August 1998, because of a sexually hostile work environment created by three male supervisors, and harassment due to her age and political affiliation. The conduct alleged included repeated episodes of name-calling, explicit sexual gesturing, obscene and offensive sexual conversation, and the posting of vulgar images in the workplace. Suders complained to the employer's equal employment opportunity officer, but received no assistance in resolving her problem. Near the end of her tenure, Suders was accused of theft of records from the barracks and, as a result, was handcuffed, photographed, and held for questioning. Immediately after this incident, she resigned.

Suders filed a federal district court lawsuit, alleging that the State Police and the individual defendants had subjected her to a hostile work environment based on her sex, age, and political affiliation and had constructively discharged her, in violation of Title VII, the Age Discrimination in Employment Act, and the Pennsylvania Human Relations Act. At the close of discovery, the defendants successfully moved for summary judgment. Suders' claims raised genuine hostile environment issues, but the district court found the State Police were shielded from strict Title VII liability by the *Farager/Ellerth* affirmative defense. A three-judge panel of the Third Circuit agreed that Suders' claim of a hostile work environment stated a genuine issue for the trier-of-fact. The district court's analysis regarding the *Farager/Ellerth* affirmative defense, however, was flawed for two reasons. First, whether the state police exercised reasonable care to prevent the harassment remained in dispute. "[M]ore importantly," the district court failed to consider the merits of Suders' constructive discharge claim and whether a valid claim of this nature would affect the availability of the affirmative defense.

The constructive discharge doctrine originated in federal labor law and was later transposed by judicial interpretation to employment discrimination cases. Basically, the courts have held that an employee alleging a constructive discharge must demonstrate the concurrence of two factors: 1) (s)he suffered harassment or discrimination so intolerable

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[7] Ellerth, 524 U.S. at 761.

that a reasonable person in the same position would have felt compelled to resign and 2) the employee's reaction to the workplace situation was reasonable given the totality of circumstances. Because of its direct economic harm to employees, the Third Circuit joined the Eighth Circuit [8] in concluding that constructive discharge, if proven, is the functional equivalent of an actual dismissal and amounts to a tangible employment action. Taking the opposite position, the Second[9] and Sixth[10] Circuits had decided that a voluntary resignation, as opposed to a dismissal, was never the kind of official action that deprived the employer of its legal defenses. Otherwise, constructive discharge would have been included in the recital of tangible employment actions listed by the Supreme Court in the *Faragher/Ellerth* opinions. Moreover, constructive discharge could result from actions of co-workers, for which employers have never been held vicariously liable, as well as supervisory harassment. Finally, the opposing circuits refused to view constructive discharge as a tangible employment action because it is a "unilateral" act of the employee that is neither instigated nor ratified by the employer.

Writing for the Third Circuit in *Suders*, however, Judge Fuentes was convinced that to permit the affirmative defense in constructive discharge cases would discourage active intervention by employers to prevent harassment at its earliest stages and could even promote its continuation.[11] Conversely, he did not believe that its decision would encourage precipitate or irresponsible action by victimized employees. "Because of the stringent test for proving constructive discharge . . .it is highly unlikely that the employee will walk off of the job at the first sign of harassment and expect to prevail under Title VII."[12] Consequently, whenever an employee shows that working conditions have become so unendurable as to lead a reasonable employee to resign without formally being dismissed, the employer would be strictly liable for compensatory and punitive damages or other Title VII relief. Or, in Suders' case, "when an employee has raised a genuine issue of material fact as to a claim of constructive discharge, an employer may not assert, or otherwise rely on, the affirmative defense in support of its motion for summary judgment."

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[8] Jaros v. Lodge Net Enter. Corp., 294 F.3d 960 (8th Cir. 2002).

[9] Caridad v. Metro-North Commuter Railroad, 191 F.3d 283 (2d Cir. 1999)(concluding that constructive discharge does not constitute a tangible employment action), cert. denied, 529 U.S. 1107 (2000).

[10] Turner v. Dowbrands, Inc., 221 F.3d 1336 (6th Cir. 2000).

[11] According to the opinion:

> With these realities in mind, if we were to hold that a constructive discharge does not constitute a tangible employment action, employers would undoubtedly catch on to the availability of the affirmative defense even if the victimized employee resigns from objectively intolerable conditions at work. Under such a rule, the temptation of employers to preserve their affirmative defense would be overwhelming in many situations. Some employers might wish for an employee to quit voluntarily; others might even tacitly approve of increased harassment to achieve that result. In any event, the benefits of stepping in to remedy the hostile work environment are measurably cloudier. 325 F.3d at 461.

[12] *Id.*

The Supreme Court Ruling

Justice Ginsburg's opinion in *Suders* applied the framework of the Court's 1998 rulings to stake out a middle ground between the conflicting approaches to constructive discharge taken by the courts of appeals. The only real difference between the harassment in *Ellerth/Farager* and this case was one of degree; that is, *Suders* presented a "worst case" scenario, or harassment "racheted up to the breaking point." But a constructive discharge claim requires more than a pattern of severe or pervasive workplace abuse as would satisfy the legal standard for ordinary harassment. Employees advancing "compound" claims must also prove that the abusive working environment became so intolerable that a reasonable person would have felt compelled to resign. Such objectively intolerable conditions could result from co-worker conduct, unofficial supervisory act, or "official" company acts. The Court's earlier decisions applied agency principles to define employer vicarious liability for a supervisor's harassment of subordinates. Only when supervisory misconduct is "aided by the agency relation," as evidenced by a tangible or "official act of the enterprise," is the employer's responsibility so obvious as to warrant strict liability. When no tangible employment action is taken, the basis for imputing blame on the employer is less evident, and the focus shifts to the Title VII policy of prevention. The employer may then defeat vicarious liability by showing that it had reasonable anti-harassment procedures in place that the employee unreasonably failed to utilize.

The Supreme Court affirmed that Title VII encompasses employer liability for constructive discharge claims attributable to a supervisor. It disagreed, however, with the Third Circuit's conclusion that the affirmative defense from *Ellerth* and *Faragher* was never available in such cases. The Third Circuit equated constructive discharge with a tangible employment action, in effect conflating what the Court viewed to be two separate inquiries. Thus, while actual termination always involves an official company act, Justice Ginsburg reasoned, a constructive discharge may or may not. Consequently, when an "official act" (e.g. a demotion, pay-cut, job transfer, or other "official directions or directions" likely known to the employer) "does not underlie the constructive discharge," the role of the agency relationship in the supervisor's misconduct is uncertain, and the employer is entitled to the benefit of the affirmative defense. The Third Circuit erred in drawing the line differently. Justice Ginsburg elaborated:

> Under its formulation, the affirmative defense would be eliminated in all hostile-environment constructive discharge cases, but retained, as *Ellerth* and *Faragher* require, in 'ordinary' hostile environment cases, i.e., cases involving no tangible employment action. That placement of the line, anomalously, would make the *graver* claim of hostile-environment constructive discharge *easier* to prove than its lesser included component, hostile work environment. Moreover, the Third Circuit's formulation, that court itself recognized, would make matters complex, indeed, more than a little confusing to jurors. Creation of a hostile work environment is a necessary predication to a hostile environment constructive discharge case. Juries would be so informed. Under the Third Circuit's decision, a jury, presumably, would be cautioned to consider the affirmative-defense evidence only in reaching a decision on the hostile environment claim, and to ignore or at least downplay the same evidence in deciding the closely associated constructive discharge claim. It makes scant sense thus to alter

> the decisive instructions from one claim to the next when the only variation between the two claims is the severity of the hostile working conditions.[13]

The Court was critical of one other aspect of the Third Circuit decision. While rejecting the availability of the affirmative defense in any constructive discharge case, the appeals court suggested that the existence of an effective anti-harassment policy may nonetheless be relevant to the threshold question of whether the harassment was intolerable and the employee's decision to quit a reasonable one. In response, Justice Ginsburg sought to clarify that the employer, rather the employee, has the ultimate burden of proving the unreasonableness of the employee's actions in this regard. In his dissenting opinion, Justice Thomas faulted the Court for adopting an overly broad definition of constructive discharge, which improperly failed to demand proof by the employee that supervisory harassment was intended to force a resignation.

Conclusion

In recognizing hostile environment constructive discharge claims, *Suders* enhanced Title VII protection for employees who quit their jobs over intense sexual harassment by a supervisor. But the decision also makes it easier for an employer to defend against such claims by showing that it has reasonable procedures for reporting and correcting harassment of which the employee failed to avail herself. Only "if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working condition," is the employer made strictly liable for monetary damages or other Title VII relief. Moreover, even where there has been a tangible employment action, coupled with a constructive discharge or resignation, the employer may have defenses available. First, the employer may argue that the harassing conduct did not occur as alleged, or was not sufficiently severe, pervasive, or unwelcome to meet standards for a Title VII violation. Second, if the tangible employment action is shown to be unrelated to the alleged harassment, or is taken for legitimate non-discriminatory reasons – particularly, if by persons other than the alleged harasser – the employer might escape liability. Finally, the employer might be able to demonstrate that, whatever form the underlying supervisory harassment may take, it did not meet the standard for constructive discharge: "so intolerable that a reasonable person would have felt compelled to resign." But *Suders* also makes it more difficult to obtain summary judgment and avoid jury trials in sexual harassment cases involving constructive discharge claims. Under the decision, if there is any real dispute about whether the employee suffered a tangible employment action, the employer may not rely on the affirmative defense to obtain summary judgment.

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[13] Suders (slip opinion) at p. 18.