

# **Constructive Discharge Under Title VII**

**What Human Resources Practitioners Need to Know**

**The Effect of *Pennsylvania State Police v. Suders*  
on the Employer Liability Defense  
in Constructive Discharge Cases**

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# Workplace Discrimination

According to a July 2004 poll,

More than **one in five Americans** claim to have experienced **employment discrimination**.

Such complaints frequently involve claims of sexual harassment.



## Sexual Harassment in the Workplace

Governed by ***Title VII*** - - employers are prohibited from discriminating with respect to an individual's "compensation, terms, conditions, or privileges of employment because of the individual's race, color, religion, sex or national origin."

**Equal Employment Opportunity Commission (EEOC)** administers the law - -investigates complaints, provides training to employees and employers, and issues guidance addressing:

- for employers: how to prevent workplace harassment
- for employees: how to bring a claim

*Employers are to have internal complaint procedures.  
Employees are to use those complaint procedures before resigning and filing a claim of constructive discharge.*

## Judicial Interpretation



U.S. Supreme Court has interpreted Title VII as seeking *“to make persons whole for injuries suffered on account of unlawful employment discrimination.”*

In 1998, the Supreme Court established a standard for when an employer may defend against liability in cases involving claims of supervisory sexual harassment or discrimination against an employee.

**Ellerth-Faragher Defense**

## Ellerth-Faragher Defense

If the employer has not taken a tangible employment action against an employee (demotion, firing, extreme cut in pay, transfer to an undesirable position), the employer may offer evidence to show that it is more likely than not that:

1. The *employer* exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and
2. The *employee* unreasonably failed to take advantage of any preventive or corrective opportunities the employer may have provided . . . Or to avoid harm otherwise.

# The Question of Constructive Discharge



If an employee resigns because of an allegedly sexually hostile work environment, was there a tangible employment action?

# Split in the Circuits

- Courts have been *consistent* in requiring a former employee to show the supervisor's harassment or discrimination created conditions that were so intolerable that a reasonable person would have felt compelled to resign.



- Courts have been *inconsistent* in their rulings regarding whether a former employee must show that the employer, by its supervisor's actions, actually intended to force the employee to resign.

# Court Rulings . . .

Courts holding constructive discharge to be a tangible employment action have not permitted the employer to use the *Ellerth-Faragher* defense to minimize liability for the supervisory acts.

Example:

Eighth Circuit (looked to specific acts of both the employer and the employee)

(Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota)

# Court Rulings . . .

Courts holding that constructive discharge is not a tangible employment action have permitted the employer to use the *Ellerth-Faragher* defense to minimize liability for the supervisory acts.

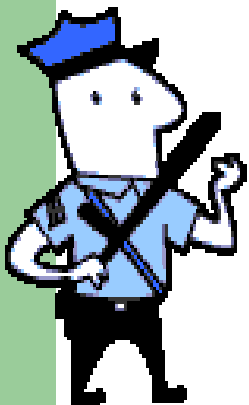
Example:

*Second Circuit* (co-workers as well as supervisors can cause an employee to resign. . . The employer does not ratify or approve constructive discharge . . .) (Connecticut, New York, Vermont)

*Sixth Circuit* agreed (Kentucky, Michigan, Ohio, Tennessee)

# The Case of Nancy Suders

- began work as a communications operator for the *Pennsylvania State Police* in March 1998
- worked for the Station Commander (male) and two corporals (male)
- alleged that for nearly 5 months, she was subjected to repeated sexual or vulgar gesturing; obscene sexual conversations about oral sex and bestiality; continual name-calling; and the posting of vulgar images at the worksite.



## Facts of *Suders*

- Confronted her supervisor expressing she considered these acts inappropriate
- The harassment continued
- Suders contacted the EEO Officer (found EEO non-responsive)
- In August 1998, her supervisor accused Suders of stealing an exam
- Suders had taken an ungraded exam of hers home after she discovered her supervisor never sent the exam to be graded

## Facts of *Suders*

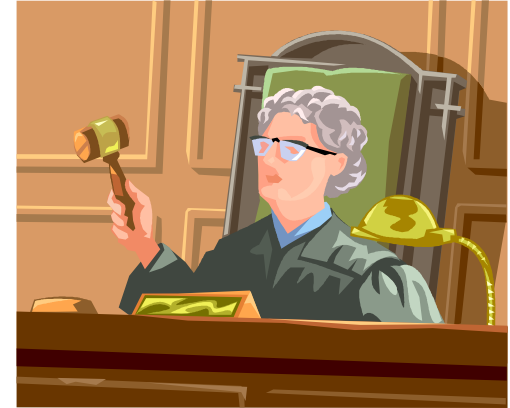
- When Suders attempted to return the exam, her supervisors detained, hand-cuffed, and questioned her, reading her the *Miranda rights* and placing her under arrest.
- Suders tendered her resignation.
- Her supervisors released Suders later that day.
- She was never charged with a crime.



## Procedural History

- In September 2000, Suders sued the three supervisors for *hostile work environment and constructive discharge under Title VII*
- District Court dismissed Suders' *hostile work environment claim*, reasoning Suders failed to follow internal complaint procedures and give her employer an opportunity to correct any problems. The court gave no reason for dismissing the *constructive discharge claim*.
- Court of Appeals reversed. Court found that, if proven, Suders' constructive discharge would constitute a tangible employment Action that would preclude the employer from invoking a defense.

# Supreme Court



For the first time, stated that a claim of *constructive discharge* is available in a Title VII sexual harassment or hostile environment action attributable to supervisors

Clarified that to succeed on this claim, the former employee must show that the employer's adverse official act prompted the employee's resignation, rather than the constructive discharge alone.

# Supreme Court

Justice Ruth Bader Ginsburg . . .

A “constructive discharge involves both an employee’s decision to leave and precipitating conduct, but is not always effected by an official act of the employer.”

“When an official act [of the employer] does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, . . . calls for extension of the affirmative defense to the employer.”

# Supreme Court

“the plaintiff [employee] who alleges no tangible employment action has the duty to mitigate harm, but the defendant [employer] bears the burden to allege and prove that the plaintiff failed in that regard.”

Thus the Supreme Court validated EEOC guidance and refined when an employer may use *Ellerth-faragher* to minimize liability in cases involving constructive discharge.

# Supreme Court

Left Unanswered:

1. The question of whether a former employee must show employer intent in order to establish a claim of constructive discharge; and
2. What type of employer action, if any, beyond a tangible employment action, might be considered an official action.

# Impact of *Suders* on HR Practitioners

HR has a multi-faceted role - -

Ensure employees know their rights & responsibilities

Ensure employer (and supervisors) know their responsibilities

Promote employer's interests and help employer reduce liability

# Some Best Practices for HR . . .

## Anti-Harassment / Anti-Discrimination Policy

- work with EEO and Legal departments to ensure organization has a clear anti-harassment and anti-discrimination policy

- ensure the policy is widely circulated and conveniently accessible to all employees and supervisors (newsletters, employee handbook, company website, Intranet, e-mails, etc.)

# Some Best Practices for HR . . .

## Internal Reporting / Complaint-Processing Procedures

Under *Suders*, an employee must first follow internal complaint procedures before resigning and asserting a constructive discharge claim.

- employers have right to correct existing problem and avoid future harm

but,

- many employees often fail to report, due to fear, lack of awareness, general mistrust of management

# Some Best Practices for HR . . .

## Internal Reporting and Complaint-Processing Procedures

HR must ensure:

independent, internal complaint-processing procedures are readily accessible

employees are aware of the process

investigations are conducted confidentially, independently, and promptly

rules apply up and down the organization

conflict of interest issues (when assigning the investigation to outside or another internal department is needed)

# Some Best Practices for HR . . .

## Employee and Supervisory Training

Effective training should address

protections under Title VII, including responsibilities

responsive to societal and cultural shifts and their impact within a workplace

up-to-date legal and regulatory requirements;  
organizational policies; expectations and standards;  
reporting procedures; how to access reporting procedures

# Some Best Practices for HR . .

## Review of Adverse Actions (gatekeeper)

HR's review of proposed adverse actions . . .

Ensures supervisor has followed internal requirements and not using adverse action as a means to assert power or fear over employees.

Enables HR to identify existing or potential supervisory conduct that the employer can promptly correct through follow-up training, counseling, or other appropriate action.

# Some Best Practices for HR . .

## Workplace Climate and Culture Assessment

when an employee does resign, HR should follow-up with an exit interview to learn as much as possible, including potential for subsequent complaint being filed

climate surveys provide insights into employee and management perceptions of workplace conditions, culture, and environment

assessments may be used to continuously improve the work environment and provide a rebuttal to assertions that employer's efforts to eliminate harassment or discrimination are not sincere

# Some Best Practices for HR . .

## Communication and Consultation

HR's ability to provide quality communicative and consultative services promotes trust among HR, employees, and management, which enhances the credibility of the HR profession.

# Conclusion

For more than 5 years, courts have applied the *Ellerth-Faragher* defense, with conflicting results to cases involving employer liability in connection with claims of constructive discharge attributable to alleged supervisory sexual harassment or discrimination.

In *Pennsylvania State Police v. Suders*, the Supreme Court clarified whether and when an employer may use the *Ellerth-Faragher* defense.

# Conclusion

*Suders* imputes a number of responsibilities to HR:

- *Anti-harassment, anti-discrimination policy*
- *Internal complaint reporting & investigation*
- *Review of proposed adverse actions*
- *Training*
- *Communication & consultation*

Promoting best practices in fostering an informed workforce and eliminating inappropriate behavior enables HR practitioners to enhance themselves as strategic partners within the organization's leadership structure and minimize employer liability.