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***Ellerth/Faragher* Defense Available to Defeat Most Constructive Discharge Claims**

On June 14, 2004, the United States Supreme Court decided *Pennsylvania State Police v. Suders*, a sexual harassment case alleging constructive discharge. Nancy Drew Suders quit her job as a police communications operator, allegedly because her male supervisors had barraged her with vulgar sexual commentary and obscene sexual gestures over a period of five months. But Suders never reported harassment through the available channels.

When she sued her former employer under Title VII, for constructive discharge, the district court granted summary judgment against her because the employer had proved that Suders unreasonably failed to use available anti-harassment measures — the affirmative defense recognized by the Supreme Court in its 1998 *Ellerth* and *Faragher* decisions. The Third Circuit reversed, holding that if Suders could prove constructive discharge, then she suffered a tangible employment action that made the employer liable without recourse to any affirmative defense.

At issue before the Supreme Court in *Suders* was whether constructive discharge is a tangible employment action, precluding an employer's use of the two-part *Ellerth/Faragher* affirmative defense. That affirmative defense enables an employer to reduce or avoid liability for harassment if the employer can prove both that it took reasonable care to prevent and correct harassment and that the employee unreasonably failed to avoid harm. That affirmative defense is not available, however, when harassment has culminated in a tangible employment action, the most obvious examples of which would include a formal termination of employment or an official demotion.

Reversing the Third Circuit, the Supreme Court held that the *Ellerth/Faragher* affirmative defense is available with respect to a constructive discharge claim, in the absence of an official company act precipitating the constructive discharge. The Court made these significant rulings:

- A sexual harassment victim may quit and sue under Title VII, as if she had been fired, if she quit in reasonable response to an abusive working environment, even though the employer did not intend for her to quit. (Only Justice Thomas dissented here; he argued that a constructive discharge finding should require proof that the employer specifically intended the employee to quit.)
- Where a constructive discharge has resulted from co-worker harassment or unofficial supervisory harassment, the employer can avoid or reduce liability by establishing the *Ellerth/Faragher* defense. This defense is not available, however, when the constructive discharge results from an official company act, such as a humiliating demotion or job transfer. (There was no dissent from this ruling.)

Suders, which is the tenth Supreme Court case to address issues of employer liability in cases of workplace harassment, reinforces how critical it is for employers to create and distribute bullet-proof anti-harassment policies, while maintaining effective complaint procedures that encourage harassed employees to come forward without fear of retaliation or futility.



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