

***First Wednesday — A Monthly Discussion of Employment Law
Issues and Other Hot Topics for Management***



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**New Sexual Harassment Ruling
From The United States Supreme Court**

The United States Supreme Court has decided a very important issue – whether a constructive discharge is a “tangible employment action” for purposes of federal sexual harassment law. If a constructive discharge is considered a “tangible employment action,” then the employer will not be able to raise an important defense described below. If, however, the constructive discharge is not considered a “tangible employment action,” then the employer will be allowed to raise the defense.

The case reviewed by the court was *Pennsylvania State Police v. Suders*, No. 03-95, decided June 14, 2004. Before getting to the court’s decision, a few definitions and some history will put the decision in context. A constructive discharge occurs when the employee is not actually discharged, but resigns because the work environment has become so abusive and intolerable that the resignation qualifies as a fitting response. To establish constructive discharge under federal law, the employee must prove that (1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign; and (2) the employee’s reaction to the workplace situation – that is, his or her decision to resign – was reasonable given the totality of circumstances. Tangible employment actions include

hiring, firing, failing to promote, reassigning the employee with significant different responsibilities, or making a decision resulting in a significant change in benefits. The High Court had never before determined whether or not a constructive discharge constitutes a “tangible employment action.”

Now back to the case at hand. Ms. Suders was a police communications officer with the Pennsylvania State Police. The court characterized her facts as a “worse case harassment scenario ratcheted up to the breaking point.” Her supervisors subjected her to sexual harassment on many occasions, including crude gestures, jokes and sexual invitations. She resigned after being arrested for theft of her own exam papers. She had previously taken computer skills exams, and a supervisor said that she failed each one. When she later discovered her exams in a set of drawers in the women’s locker room, she took them believing them to be her property. It appeared the supervisors had not forwarded the tests for grading and their reports of her failures were false. The supervisors, anticipating that Suders would grab the exams, had dusted the drawer with a theft-detection powder that turns skin blue. When the supervisors saw her blue hands, she was arrested and held for questioning. She then resigned, without having brought a formal complaint of harassment against the employer.

The issue for the Supreme Court was whether the employer could raise the affirmative defense, known as the *Ellerth/Faragher* defense, based on Ms. Suders’ failure to use the internal complaint procedure. This defense was established by the Supreme Court in a pair of decisions in 1998, which held that, in some sexual harassment cases, the employer may show that (1) it had a readily accessible and effective policy for reporting and resolving complaints of sexual harassment; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. The Supreme Court’s announcement of this defense in 1998 is what led many employers to establish or strengthen their workplace policies against sexual harassment.

In the 1998 *Ellerth/Faragher* cases, the court did not address whether a constructive discharge is a tangible employment action. In one sense, a constructive discharge is functionally the same as an actual termination because a constructive

discharge requires that the conduct be so intolerable that any reasonable person would be forced to quit. Therefore, the employee has lost his or her job as a result of the supervisor's conduct. The court recognized, however, that some constructive discharge situations are not precipitated by official actions of the company. Absent an official act of the company, the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind occurring daily in the workforce. In those cases, therefore, where official actions do not precipitate the employee's resignation, the employer will be able to raise the affirmative defense.

The court is recognizing that, in "garden-variety" harassment and discrimination cases, the employee should promptly report the situation to the employer's attention to allow it the opportunity to investigate and remedy the situation. Assuming the employer has an effective reporting policy in place, then the employee has a duty to follow it and not delay until the situation becomes worse.

Based on the recent Supreme Court ruling, here is how the "official act" and "tangible employment action" issues should play out when constructive discharge is alleged. In one case, the employee quits without reporting the harassment and claims a constructive discharge based on her supervisor's repeated sexual comments. The affirmative defense can be asserted in that case because the supervisor's behavior, while inappropriate, involved no official act of the company. Compare this to a case in which the supervisor, to retaliate for spurning his advances, relocates the employee to a third-world country. She then quits. In this case, the affirmative defense will not be available because the constructive discharge was precipitated by official action of the company, that is, the job reassignment. In another case, after the employee reports that she was sexually harassed by her supervisor, she was transferred elsewhere within the company but told that her "first six months probably would be hell" and it was in her "best interest to resign." In that case, the affirmative defense cannot be asserted since the official action of the company in transferring her precipitated the constructive discharge claim.

What eventually happened to Ms. Suders? The Supreme Court sent the case back to the trial court for a decision on whether she unreasonably failed to report the

conduct and follow the procedures of the police agency's anti-harassment policy. The court noted that most of the harassing conduct was "unofficial," though the events surrounding her computer skills exams were "less obviously unofficial." Thus, the police agency will be able to raise the affirmative defense at trial. While the Supreme Court ruling permits the employer to try to prove the affirmative defense, if the jury finds that Ms. Suders was constructively discharged, she will likely win the case.

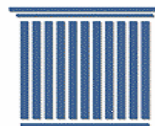
By comparison, under California sexual harassment law, the facts would be analyzed under the "avoidable consequences" doctrine, discussed in Issue No. 17 of *First Wednesday* (December 3, 2003). The California Supreme Court ruled that the *Ellerth/Faragher* defense is unavailable under FEHA, but the employer can try to prove that the employee's claimed damages should be reduced if he or she failed to promptly report the misconduct under the employer's policies against sexual harassment. Under both California and federal law, to get the benefit of these defenses, the employer must have in place an effective anti-harassment reporting and investigation procedure that is communicated to all employees.

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