

## HOSTILE WORK ENVIRONMENT CONSTRUCTIVE DISCHARGE

By: Gregory P. Kult\*

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It is well-settled that, to establish an unlawful hostile work environment, an employee must prove harassing behavior so severe or pervasive that it alters conditions of employment. In *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004), the United States Supreme Court ruled that, to establish "constructive discharge" in a harassment case, an employee must also show that the work environment was so intolerable a reasonable person would have felt compelled to resign. The Court held that an employer may defend a constructive discharge hostile work environment claim by showing (1) it had a readily accessible and effective policy for reporting and resolving complaints of harassment and (2) the employee unreasonably failed to take advantage of the employer's preventive and remedial measures. However, this affirmative defense is not available (i.e., the employer will be liable) if the employee's resignation is a reasonable response to unlawful harassment by a supervisor that involves an official change in the employee's employment status or situation (e.g., humiliating demotion, extreme cut in pay, transfer to a position with unbearable working conditions).

Suders was employed as a police communications operator for the Pennsylvania State Police. She alleged that one or more of her supervisors engaged in the following types of conduct during her employment:

- Discussing the subject of people having sex with animals;
- Stating young girls should be given instruction in how to gratify men with oral sex;
- Spreading legs apart while wearing spandex shorts;
- Grabbing own genitals and shouting out vulgar comments inviting oral sex;
- Rubbing own rear end and stating: "I have a nice ass, don't I?"

Suders once told one of her supervisors that she did not think he should be engaging in this type of conduct. She called the State Police's Equal Employment Opportunity Officer to report the conduct, but did not follow up. Suders complained one final time to the Equal Employment Opportunity Officer but quit two days later when her supervisors arrested her for theft. The circumstances of the alleged theft were as follows: Suders had to take a computer skills exam to satisfy one of her job requirements. Each time she took the test, she was told by her supervisors that she had failed. One day she found her exams in a set of drawers in the women's locker room. She concluded that the exams were never submitted for grading. She took the exams, believing them to be her property. Her supervisors set her up so that when she returned the exams her hands would turn blue. Once this happened, they arrested her. Suders decided to resign, and was not charged with a crime. Suders sued, alleging that she was the victim of unlawful sexual harassment and was constructively discharged from her position.

In *Suders*, the Court officially recognized that Title VII encompasses employer liability for a constructive discharge. To prove constructive discharge in a harassment case, an employee must show that the work environment was so intolerable that a reasonable person would have felt compelled to resign. The big question for the Court was under what circumstances an employer would be liable for a hostile work environment that results in a constructive discharge.

The Court turned to its 1998 cases *Faragher v. Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, both of which hold that an employer is strictly liable (in other words, there is no defense) for supervisor harassment that results in a tangible employment action such as discharge, demotion or undesirable reassignment. When no tangible employment action is taken, however, an employer may raise an affirmative defense to liability if it can prove that it exercised reasonable care to prevent and correct promptly any harassing behavior and that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

In *Faragher* and *Burlington Industries*, the Court determined that an employer's liability for workplace harassment should be based on agency principles. In the workplace harassment context, an

employer is liable for the unlawful acts of its supervisor when the supervisor is aided in accomplishing those acts by the existence of the agency relationship. Tangible employment actions such as hiring, firing, failing to promote, reassignment, or decisions causing a significant change in benefits are dependent upon the employer providing the supervisor with power to make economic decisions affecting other employees. Therefore, they can be viewed as an official company act, and the employer cannot escape liability. However, when a supervisor's harassment of a subordinate does not result in a tangible employment action, it is less obvious that the agency relationship is the driving force. For example, if a supervisor continually propositions or fondles a subordinate (the type of harassment in which a co-worker might engage), but does not terminate, reassign or otherwise take tangible employment action against the subordinate, it is less clear whether the supervisor is acting as an agent of the employer in committing the harassment. In such a case, the affirmative defensive, outlined above, is available to the employer. The Court's major holdings can be broken down as follows:

- Following well-established precedent, to establish an unlawful hostile work environment, an employee must prove harassing behavior so severe or pervasive that it alters conditions of employment.
- If an employee resigns in response to harassment, the employee can prove constructive discharge only if the employee can demonstrate that the work environment was so intolerable a reasonable person would have felt compelled to resign.
- If an employee successfully proves that he or she was the victim of unlawful workplace harassment and was constructively discharged, the employer will be liable (in other words, there will be no defense) if unlawful supervisor harassment involved an official change in the employee's employment status or situation (e.g., humiliating demotion, extreme cut in pay, transfer to a position with unbearable working conditions).
- If an employee is able to prove that he or she was constructively discharged as a result of unlawful workplace harassment but cannot prove that the harassment involved an official change in the employee's status or situation, the employer may escape liability by showing both (1) it had a readily accessible and effective policy for reporting and resolving complaints of harassment and (2) the employee unreasonably failed to take advantage of the employer's preventive and remedial measures.

*Suders*, like Supreme Court cases before it, underscores the importance of developing a clear, well-publicized protocol for reporting and resolving workplace harassment and providing regular harassment training for officers, managers, supervisors, and others with authority to change employees' terms and conditions of employment. Such training should include all forms of unlawful harassment, not just sexual harassment, and address the employer's commitment to prohibit retaliation.

\*Current contact information:

Wooden & McLaughlin, LLP  
One Indiana Square, Suite 1800  
Indianapolis, IN 26204  
(317) 639-6151 ext. 341  
gkult@woodmclaw.com

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