

Supreme Court Rules that the Ellerth/Faragher Affirmative Defense is Available in Constructive Discharge Cases

Several days ago, the Supreme Court issued its decision in Pennsylvania State Police v. Suders, No. 03-95, 2004 WL 1300153 (June 14, 2004). At issue in this case was whether the Ellerth/Faragher affirmative defense is available to employers defending against a claim of constructive discharge based upon a supervisor's sexual harassment.

Nancy Drew Suders was hired as a police communications operator by the Pennsylvania State Police in March of 1998. Suders alleged that her male supervisors subjected her to a continuous barrage of sexual harassment. In June 1998, Suders contacted her employer's Equal Employment Opportunity Officer, Virginia Smith-Elliott, and informed Smith-Elliott that she might need assistance. Smith-Elliott gave Suders her telephone number, but neither Suders nor Smith-Elliott followed up on their initial conversation. On August 18, 1998, Suders contacted Smith-Elliott to report that she was being harassed and that she was afraid. Although Smith-Elliott told Suders to file a complaint, she did not explain to Suders how to obtain the necessary form. Two days later, Suders resigned from her employment.

Suders then brought suit against her former employer, alleging that she had been subjected to sexual harassment and constructively discharged in violation of Title VII of the Civil Rights Act of 1964. The District Court found that the employer was not vicariously liable for the supervisors' harassing conduct because Suders did not avail herself of the employer's internal procedures for reporting harassment. The Court of Appeals for the Third Circuit reversed, finding that the Ellerth/Faragher affirmative defense is not available for claims of constructive discharge. The Supreme Court granted certiorari to resolve the question of "whether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and therefore precludes the assertion of the affirmative defense articulated in Ellerth and Faragher." 2004 WL 1300153, at *7.

The Supreme Court held that an employer may assert the Ellerth/Faragher affirmative defense to a claim of constructive discharge based upon supervisor harassment, unless the supervisor's "official act" precipitated the constructive discharge. The Court held that the "plaintiff must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response" to it. The Court defined an "official act" as any "means by which the supervisor brings the official power of the enterprise to bear on the subordinates," such as a humiliating demotion, an extreme pay cut, or a transfer to a position involving unbearable working conditions.

The Supreme Court's decision in Suders resolves the conflict in the Circuits concerning whether a constructive discharge rises to the level of a "tangible employment action" that precludes the application of the Faragher/Ellerth affirmative defense. However, in order to rely on the affirmative defense in harassment cases involving a constructive discharge, an employer must prove that there was no "official act," such as a humiliating demotion or substantial reduction in pay, that justified the employee's decision to resign.

If you would like a copy of the decision or have any questions concerning it, please do not hesitate to contact Connie Bertram at 202-344-4835 or cnbertram@venable.com.

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