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# What is an Employer's Liability for Constructive Discharge Under Title VII? An Analysis of Pennsylvania State Police v. Suders

Barbara J. Fick

*Notre Dame Law School*, [barbara.j.fick.1@nd.edu](mailto:barbara.j.fick.1@nd.edu)

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## What Is an Employer's Liability for Constructive Discharge Under Title VII?

by Barbara J. Fick

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Barbara J. Fick is an associate professor of law at Notre Dame Law School in Notre Dame, Indiana; fick.1@nd.edu or (574) 631-5864.

**Editor's Note:** The respondent's brief in this case was not available by *PREVIEW's* deadline.

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Supreme Court discussed the basis for an employer's liability when a supervisor engages in sexual harassment. The Court began its analysis by looking for guidance to general principles of agency law, which addresses the liability of employers for the tortious acts of their agents. Under agency principles employers can be liable for their agent's acts if, among other things, the agent was aided in accomplishing the tort by the existence of the agency relationship.

Applying this concept to supervisory harassment, the Court held that when the supervisor takes a "tangible employment action" against the employee, the injury that results from that action could not have occurred were it not for the fact that the agent had been given authority by the employer to take

the action. The supervisor has been empowered by the employer to make decisions that affect the employees under his control. The supervisor uses this official power to make the decision and thus the decision becomes the act of the employer. For example, when the supervisor fires an employee because she refused his sexual advances, the supervisor's act is, in effect, the act of the employer for which the employer is liable.

The Court noted that even when the supervisor's harassing conduct does not result in a tangible employment action, he is still aided by the agency relation because his power and authority, given to him by the company, "invests his harassing conduct with a particular threatening character." But, the Court cautioned, often a supervisor's harassing conduct will be similar in kind to the type of harassment engaged in by co-workers (e.g., sexual com-

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PENNSYLVANIA STATE POLICE  
v. SUDERS  
DOCKET NO. 03-95

ARGUMENT DATE:  
MARCH 31, 2004  
FROM: THE THIRD CIRCUIT

# Case at a Glance

Title VII holds an employer strictly liable for a supervisor's sexually harassing conduct that culminates in a tangible employment action. In this case the Court must decide whether a constructive discharge caused by supervisory harassment is a tangible employment action for purposes of imposing strict liability.





ments and inappropriate touching), and the fact of his supervisory status will make little difference. This tension between the supervisor's status and the similarity of certain harassing conduct with that engaged in by co-workers led the Court to conclude that some limits need to be placed on the employer's liability for the supervisor's harassing conduct. The Court found that Title VII provided certain policy considerations to take into account when fashioning the limitations on employer liability.

According to the Court, Title VII "is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." Limiting employer liability where such policies and mechanisms exist would encourage employers to create such policies and encourage employees to report harassment, thereby serving the deterrent purposes of Title VII. Based on these factors, the Court developed the following rule for imposing liability on the employer when the supervisor's harassing conduct does not include a tangible employment action: an employer is liable for the hostile environment created by the supervisor's conduct unless the employer can prove that it exercised reasonable care to prevent and correct harassing conduct (such as by the promulgation of a policy with a complaint procedure) and that the employee unreasonably failed to take advantage of any preventive or corrective measures available (such as by not using a complaint procedure).

The Court concluded by emphasizing that this affirmative defense is not available when the supervisor's harassment results in a tangible employment action for which the employer remains strictly liable.

## ISSUE

Is a constructive discharge caused by a supervisor's harassing conduct a tangible employment action for which the employer is strictly liable, or can the employer assert the affirmative defense to avoid liability?

## FACTS

Nancy Drew Suders was employed by the Pennsylvania State Police from March 23 to August 20, 1998. During her employment she was continuously subjected to name-calling, explicit sexual gestures, obscene and offensive conversation and the posting of vulgar images. Those responsible for the harassing conduct included her supervisors.

Twice during her tenure she spoke with the Equal Employment Opportunity officer for the Pennsylvania State Police. The first time she vaguely alluded to the fact that she might need some help, but neither Suders nor the officer pursued the matter. The second time, she specifically mentioned that she was being harassed and that she was afraid, but the officer was singularly unhelpful, telling her to file a complaint on a standard form without telling Suders where to obtain the form.

For Suders, the straw that broke the camel's back occurred on August 20, when her supervisors allegedly set her up for a false accusation of theft. She was arrested, handcuffed, photographed, and interrogated, whereupon she resigned.

Suders filed a lawsuit in federal district court alleging, among other things, a violation of Title VII. Specifically, she claimed that the supervisors' harassing conduct was so severe and pervasive as to create a hostile work environment and that, as a result, she had no alternative but to resign. This forced resign-

nation constituted a constructive discharge for which the employer was strictly liable.

The district court granted the motion for summary judgment filed by the Pennsylvania State Police and dismissed the case. The court found that even if the supervisors had created a sexually hostile work environment, Suders had unreasonably failed to take advantage of the employer's complaint procedure for reporting harassment. Therefore, under *Ellerth*, the employer could not be liable for the supervisors' harassing conduct. The district court did not address Suders's claim of constructive discharge.

On appeal, the Third Circuit reversed the grant of summary judgment. *Suders v. Easton*, 325 F.3d 432 (3rd Cir. 2003). The court of appeals found the district court's analysis flawed for two reasons. First, even if the employer could assert the *Ellerth* affirmative defense, there were genuine issues of material fact that could not be resolved on a motion for summary judgment. Specifically, there was a factual dispute as to whether Suders had failed to use the employer's complaint procedures given the evidence concerning the lack of effective responsiveness from the Equal Employment Opportunity officer.

Secondly, the district court erred by failing to consider whether a claim of constructive discharge precludes the availability of the *Ellerth* defense. On this point the court of appeals held that when a supervisor's harassing conduct culminates in a constructive discharge, a tangible employment action has been taken and thus, under *Ellerth*, the employer is strictly liable.

A constructive discharge occurs when "acts of discrimination in violation of Title VII ... make working



conditions so intolerable that a reasonable employee would be forced to resign." Under such circumstances, a constructive discharge is the "functional equivalent of an actual termination." In this case, Suders raised genuine issues of material fact as to whether the supervisors' harassing conduct was so intolerable that, given the totality of the circumstances, a reasonable person would have felt that she had no other choice than to resign.

Therefore, these factual issues concerning the constructive discharge claim precluded the grant of summary judgment.

The Third Circuit remanded the case to the district court, finding that a trial on the merits was required to resolve these factual issues. The court of appeals concluded that if Suders proves that she was constructively discharged, the employer is precluded from relying on the *Ellerth* affirmative defense and will be held strictly liable for the supervisors' harassing conduct. If Suders is unable to prove the elements of a constructive discharge claim, the employer will have the opportunity to prove the elements of the *Ellerth* affirmative defense.

The Pennsylvania State Police filed a petition for writ of certiorari with the Supreme Court, which the Court granted. *Pennsylvania State Police v. Suders*, 124 S.Ct. 803, 157 L.Ed.2d 692 (2003).

## CASE ANALYSIS

The employer begins its argument by reminding the Court that it has previously rejected the concept that employers should always be held strictly liable for the harassing conduct of supervisors. In *Meritor Savings Bank v. Vinson*, 47 U.S. 57 (1986) (the first case in which the Court addressed the issue of sexual

harassment under Title VII), the Court noted that Title VII places some limits on the extent of employer liability for the acts of its employees, and that in determining those limits, the courts should be guided by general principles of agency law.

In *Ellerth*, the Court used those agency principles in drawing a distinction between those types of supervisory acts for which an employer would be held strictly liable and those actions for which the employer would have available an affirmative defense. That line was drawn "when a supervisor takes a tangible employment action against the subordinate." The *Ellerth* Court defined a tangible employment action as one that causes a significant change in employment status and inflicts direct economic harm. The employer is strictly liable for such actions because they are the type that can only be imposed by a person acting with the authority of the employer. When taking such actions the supervisor brings the official power of the employer to bear upon the employees. Thus, it is very clear that, pursuant to agency principles, the supervisor is able to take such actions because it is aided by the existence of the agency relationship it holds vis-a-vis the employing entity.

Where the supervisor's harassing conduct does not result in a tangible employment action, it is less clear that it is aided by the existence of the agency relationship. Sexually crude comments and gestures can be inflicted by anyone—co-workers, customers, or supervisors. This type of conduct lacks the indicia of "official" action that can be traced back solely to the employer.

Whether a supervisor's actions are "aided by the agency relationship" (as required by *Ellerth*) depends on

what the supervisor does, not on the employee's reaction. The focus for agency principle purposes is on the supervisor's conduct, (i.e., was his action aided by the agency relationship?). To focus on the employee's reaction would lead to the nonsensical result that if the employee resigns in response to supervisory harassment then the employer is strictly liable, but if the employee toughs it out and does not resign, the exact same supervisory conduct is subject to an affirmative defense to employer liability.

Moreover, unlike tangible employment actions, supervisory harassment that leads an employee to resign is not the kind of conduct that only a supervisor can inflict. There are numerous examples of employee resignations in the face of co-worker harassment.

While it is true that a constructive discharge effects a significant change in employment status that causes direct financial harm, this change is the result of the employee's own decision rather than the actions of the supervisor. Secondly, this same change in status and economic harm results when the constructive discharge is in response to co-worker harassment. Thus, this aspect of constructive discharge is not dispositive of whether the employer should be held strictly liable. The employee decision to resign has nothing to do with whether or not the supervisor was aided by the agency relationship; therefore the employee act of resignation should not affect the availability of the *Ellerth* affirmative defense.

In determining principles for employer liability, the Court in *Ellerth* did not focus on the nature of the harm to the employer but rather on whether the supervisor

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was aided by the agency relationship in inflicting the harm. Thus, the availability of the affirmative defense should depend on the nature of the supervisor's conduct. If a constructive discharge results from a supervisor's tangible employment action, such as occurs when a supervisor demotes the employee because she rejected his sexual advance and the employee resigns in response, the affirmative defense would not be available. If, however, the constructive discharge is a response to a hostile work environment created by the supervisor, the affirmative defense would apply.

The United States, in its *amicus* brief, takes a similar, but perhaps more nuanced view of the issue. The United States focuses on whether the constructive discharge is the result of a supervisor's "official" act, regardless of whether the act could be defined as a "tangible employment action."

Title VII does not explicitly refer to the concept of constructive discharge. The statute prohibits employers from failing or refusing to hire, from discharging individuals, or from discriminating with respect to terms and conditions of employment. The courts are in uniform agreement that the prohibition against discharge and discrimination in terms of employment is broad enough to hold an employer liable when it creates discriminatory working conditions so intolerable that a reasonable employee has no alternative but to resign.

In determining whether a reasonable person would find no alternative but to resign, the employer's efforts to correct the problems, as well as the employee's efforts to alert the employer to the situation, are relevant considerations. A failure to complain may indicate that the employee did not find the condi-

tions intolerable, or that resignation was not the only alternative (i.e., the employee could have complained). When an employee does complain, the employer's failure to correct the problem would be relevant to whether resignation became the only alternative.

In determining whether a resignation constitutes a constructive discharge, there may often be an overlap between the factors for proving constructive discharge and the factors for proving the *Ellerth* affirmative defense, such that attempting to separate the two issues is impossible. (For example, if corrective opportunities are available—one of the elements of the *Ellerth* affirmative defense—it would be difficult for the employee to prove there was no reasonable alternative but to resign—one of the elements for proving constructive discharge.)

In the absence of definitive guidance from the Supreme Court as to the contours for proving a constructive discharge case, there may be cases in which a plaintiff could prove constructive discharge even if she has unreasonably failed to take advantage of corrective measures. In such cases the issue will remain whether the employer may assert the *Ellerth* affirmative defense.

*Ellerth* provides the basis for answering the latter question. Strict liability applies when the supervisor takes a tangible employment action that, the Court said, "requires an official act of the enterprise." Ordinary workplace harassment engaged in by a supervisor does not require an official act of the enterprise. This type of conduct does not depend on a grant of authority from the employer nor is it conduct that only a supervisor can commit. However, when the supervisor engages in an official act it estab-

lishes that he has been aided by the agency relationship, thereby precluding the affirmative defense. Official acts, in most cases, are documented and subject to review by other corporate actors. These are acts over which the employer maintains control and supervision. It is this ability to control that provides the justification for strict liability. When there is no official act, there is no ability for the employer to control the conduct.

Although a constructive discharge is functionally the same as a termination in some respects, it is different in others. Both a constructive discharge and termination constitute a change in employment status imposing direct economic harm. But with a termination, the employer ultimately decides, whereas in a constructive discharge, the decision is the employee's. A company will have a reason to review a termination decision (thereby affording the opportunity to control the decision) whereas it will not have a reason to review a resignation. A termination is always the result of an official act of the employer, whereas a constructive discharge may be the result of co-worker acts, unofficial supervisory conduct, or official company acts. Thus, the issue to focus on is whether the constructive discharge was caused by a supervisor's official act. Thus, a supervisor who demotes an employee has engaged in an official act, and if the consequence of that act is the employee's constructive discharge, the employer is strictly liable.

Applying this standard to the present case requires a determination of whether any of the actions that caused Suders's resignation were official acts. Name-calling, gestures, and obscene conversation are unofficial and unauthorized supervisory acts for which the affirmative defense would be available. It is not



as clear, however, whether the supervisor's acts in allegedly falsely accusing her of theft and arresting her depended upon a grant of authority from the employer and whether it was the kind of activity likely to be documented and subject to review. If those supervisory acts were official acts and Suders's resignation resulted in significant part from those acts, then the affirmative defense should not be available to the employer.

Suders's argument will likely focus on the parameters of the concept of "tangible employment action." In *Ellerth*, the Supreme Court defined a tangible employment action as one that "constitutes a significant change in employment status" and usually "inflicts direct economic harm." There is universal agreement that a constructive discharge is the functional equivalent of a termination. As such, it clearly results in a significant change in employment status and definitely inflicts direct economic harm. Although the *Ellerth* Court did not specifically list a constructive discharge as a type of tangible employment action, the list provided in the decision ("such as hiring, firing, failure to promote ...") was not intended to be exhaustive or nonexclusive but rather was illustrative of representative actions.

The fact that a co-worker may engage in sexually harassing conduct leading to the constructive discharge of the victim is not dispositive of the question regarding the employer's liability when it is the supervisor's conduct that causes the constructive discharge. As the Court noted in *Ellerth*, even "merely" harassing conduct, without a tangible employment action, is of a different character and degree from a co-worker's harassment, since the power and authority given to the supervisor by the company "invests his harassing conduct with a partic-

ular threatening character." The issue is not whether co-workers and supervisors are capable of engaging in the same type of conduct, but whether the supervisor's conduct causes a "significant change in employment status" of the victim.

On this view, the assertion that a constructive discharge does not constitute an official act of the employer misconceives the legal effect of a constructive discharge. As noted previously, a constructive discharge is, in effect, a termination. It imposes direct economic harm identical to that of a terminated employee. When the work environment is so intolerable that the employee has no choice but to resign, the constructive discharge becomes the act of the employer. The employer's conduct has left the employee no feasible alternative but to resign. The resignation has been forced on the employee by the employer's conduct; it is not a voluntary choice of the employee.

Moreover, a constructive discharge is often ratified by the employer. There is always some paperwork involved even when an employee resigns, thus providing the company with an opportunity to monitor the circumstances. The employer is on notice that the employment relationship has been severed, providing an opportunity to question the cause of the separation.

Lastly, holding the employer strictly liable for a constructive discharge caused by supervisory harassment serves Title VII's policy objective of preventing sexual harassment from occurring by encouraging employers to be watchful for harassment in their workplaces, lest they be held accountable when their supervisors' harassing conduct forces employees to resign.

## SIGNIFICANCE

The issue of employer liability for supervisory harassment that causes a constructive discharge is one that has divided the courts of appeals since the *Ellerth* decision was handed down. Thus, a resolution of this issue will provide needed clarity and guidance for both the lower courts and employers.

But, as the United States noted in its *amicus* brief in this case, the overlap between the factors to consider in determining whether an employee's resignation in response to intolerable conditions is a reasonable response, and the elements of the employer's affirmative defense, may mean that the Supreme Court's decision will actually affect the outcome in only a small category of supervisory sexual harassment cases.

Finally, it is possible that the Court will take this opportunity to directly address the issue of constructive discharge and provide definite guidelines for the lower courts to apply in deciding what facts an employee has to prove in order to claim that a resignation meets the requirements for a constructive discharge.

## ATTORNEYS FOR THE PARTIES

**For Pennsylvania State Police**  
(Gerald J. Pappert (717) 787-1144)

**For Nancy Drew Suders** (Donald A. Bailey (717) 221-9500)

## AMICUS BRIEFS

**In Support of Pennsylvania State Police**

Chamber of Commerce of the United States (Peter Buscemi (202) 739-5190)

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Equal Employment Advisory  
Council (Ann Elizabeth Reesman  
(202) 789-8600)

Society for Human Resource  
Management (Allan H. Weitzman  
(561) 241-7400)

United States (Theodore B.  
Olson, Solicitor General (202) 514-  
2217)

**In Support of Nancy Drew Suders**

American Federation of Labor  
and Congress of Industrial  
Organizations (Laurence Gold (202)  
842-2600)