

Louisiana Employment Law Letter

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Highlights

- Take this job and shove it!

CONSTRUCTIVE DISCHARGE

Take this job and shove it!

When country music star Johnny Paycheck sang those famous words, he wasn't singing about an employee who quit her job after being sexually harassed at work, but they fit that scenario nevertheless. According to the U.S. Supreme Court, an employee who tells her employer to "take this job and shove it" because of alleged sexual harassment can recover for a claim of "constructive discharge" (i.e., things were so bad at work, I was forced to quit), but only if she can prove a supervisor's "official" act is the final straw that caused her to quit. Although neither management nor employee rights advocates see this case as a victory, the Supreme Court's decision helps clarify whether and how constructive discharge claims factor into supervisor harassment cases.

How it all started

Nancy Drew Suders worked as a police communications operator and reported to three male supervisors. She claimed her supervisors subjected her to "a continuing barrage of sexual harassment" until she was forced to quit her job. Specifically, she alleged, one of them would bring up the subject of sex with animals every time she walked into his office. She also claimed he told one of the other supervisors in front of her that young girls should be given instruction in how to gratify men with oral sex. In addition, he supposedly would sit near her while wearing spandex shorts and spread his legs apart.

Another supervisor allegedly made obscene gestures in Suders' presence by grabbing his genitals and shouting out a vulgar comment inviting oral sex. She claimed he made that gesture as many as five to 10 times a night, and when she told him to stop, he jumped on a chair and did it again. She also alleged he rubbed his rear end in front of her and said, "I have a nice ass, don't I?"

According to Suders, the third supervisor told her the village idiot could do her job. He allegedly would wear black gloves and pound on the furniture to intimidate her. Three months after she was hired, he accused her of taking a missing accident file home with her. After that incident, she told the police department's equal employment opportunity (EEO) officer that she "might need some help." The EEO officer gave Suders her telephone number, but she never called, and the officer never followed up.

Two months later, Suders called the EEO officer and told her she was being harassed and she was afraid. The officer told her how to file a complaint, but didn't tell her how to obtain the necessary paperwork. Suders said the officer's response and the manner in which it was conveyed were "insensitive" and "unhelpful."

Two days after her conversation with the EEO officer, Suders' supervisors accused her of theft. According to Suders, she had taken a required computer-skills exam several times. Each time her supervisors told her she'd failed the test. One day, she found her exams in a set of drawers in the women's locker room. She concluded that her supervisors had never forwarded the tests for grading and their claims that she had failed were false.

Suders considered the tests her property and removed them from the locker room. Her supervisors realized they were missing and guessed that she would try to return them to the drawer. They dusted it with a theft-detection powder that turns blue when it comes into contact with skin. When Suders returned the tests to the drawer, her hands turned blue, and her supervisors arrested her for theft, handcuffed her, and photographed her blue hands. They took her into an interrogation room, read her her rights, and questioned her. Suders, who previously had prepared a written resignation, was eventually allowed to leave after she told her supervisors she wanted to resign. Theft charges were never filed against her.

Suders sues for sexual harassment

Suders sued the police department, claiming she had been sexually harassed and forced to quit her job (constructively discharged). The trial court granted the employer's motion to dismiss the case before trial, reasoning that Suders unreasonably failed to take advantage of the department's internal procedures for reporting harassment because she resigned just two days after she first mentioned anything about sexual harassment to the EEO officer. In other words, the police department successfully defended itself against liability and avoided a trial by showing it had preventive and remedial measures in place but Suders failed to avail herself of them.

Although you may not know that defense by name (it's named after the two 1998 Supreme Court decisions in which it was first announced), you know what it is. In the *Faragher* and *Ellerth* decisions, the Supreme Court distinguished between, on one hand, harassment by a supervisor that's *unaccompanied* by an official act and, on the other hand, supervisor harassment accompanied by an adverse employment action. An employer is "strictly liable" if a supervisor harasses an employee and that harassment results in an adverse employment action. But when no employment action is taken, the employer may raise an "affirmative defense" to liability if it can prove two things: (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities it provided or otherwise avoid harm.

Suders appealed the case, and a federal appellate court reversed the trial court's decision. The court ruled that if Suders was able to prove constructive discharge (*i.e.*, she suffered harassment so intolerable that a reasonable person in the same position would've felt compelled to resign and her decision to quit was reasonable under the circumstances), then the police department wouldn't be able to raise the *Faragher/Ellerth* affirmative defense because a constructive discharge is an adverse employment action.

The police department asked the Supreme Court to review the appellate court's decision. The Court agreed to hear the case because so many courts have disagreed about whether a constructive discharge brought about by supervisor harassment is an adverse employment action that prevents the employer from using the affirmative defense. Ultimately, the Court split the baby, ruling that an employer can't use the defense when a supervisor's "official act" (*e.g.*, a demotion or reduction in pay) causes the constructive discharge. If an official act doesn't underlie the constructive discharge, however, the employer can use the defense.

What does that mean? Well, if a supervisor harasses an employee but hasn't used the power of his position to take an official act against her, the employer won't be strictly liable for his actions. It can defend itself by showing that it had policies in place to prevent harassment and the employee unreasonably failed to take advantage of those policies or otherwise avoid the harassment. If, on the other hand, the supervisor takes an official act against the employee, like demoting her or reassigning her to another shift with less pay, and she quits as a result, the employer may be liable for his conduct without a chance to explain or defend it, according to the Supreme Court.

What does that mean for Suders and the state police department? They go back to court, and a jury gets to decide if she was actually harassed and if her work conditions were so intolerable that a reasonable person would have felt compelled to resign under the same circumstances. *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342; 2004 U.S. LEXIS 4176 (6/14/04).

Prevent your employees from singing 'Take this job and shove it'

You know the best way to prevent claims like this one. Establish a sound antiharassment policy and reporting procedure, and train your supervisors to behave appropriately and respond quickly to any complaints of harassment. Training should occur annually and focus on recognizing, preventing, and responding to sexual harassment.

Another suggestion: Require approval from human resources or upper management for employment decisions like demotions, reductions in pay, or discharges. That way, your supervisors aren't taking any adverse employment actions against employees without some oversight by the folks in charge of keeping supervisors on the up and up. If you do all those things and an employee still quits her job, she will probably be singing a different tune in court.

You can research employer liability for sexual harassment by supervisors or any other employment law topic in the subscribers' area of www.HRhero.com, the website for Louisiana Employment Law Letter. Access to this online library is included in your newsletter subscription at no additional charge.

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