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PENN. STATE POLICE V. SUDERS, 124 S. Ct. 2342 (2004)

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FACTS

Nancy Drew Suders worked as a police communications operator for the McConnellsburg barracks of the Pennsylvania State Police (PSP) beginning in March 1998.[1] While working at PSP, her three supervisors constantly sexually harassed her.[2] In June 1998, one of the supervisors accused her of taking a missing accident file home with her.[3] As a result of this incident, Suders told PSP's Equal Employment Opportunity Officer, Virginia Smith-Eliott, that she "might need some help," but "neither woman followed up on the conversation."[4] Suders again contacted Smith-Eliott on August 18, 1998, and informed her that she was being harassed and was afraid.[5] Smith-Eliott told Suders to file a complaint but did not indicate where she could acquire the forms to do so.[6] Suders felt that Smith-Eliott seemed insensitive and unhelpful.[7]

Two days later, Suders's supervisors arrested her for theft, and Suders resigned from the force.[8] Suders took tests she had completed to satisfy a PSP job requirement from the PSP office.[9] She said she believed that the tests were her property.[10] She concluded that while her employers told her that she continually failed the test, they never forwarded the tests for grading.[11] When Suders returned the tests to the PSP drawer, her hands turned blue as a result of the theft-detection powder that her employers had dusted the drawer with to catch her.[12] Her employers handcuffed and questioned her.[13] PSP never charged her with theft.[14]

In September 2000, Suders sued PSP in federal district court alleging, *inter alia*, that while employed at PSP, her employers sexually harassed her and she was constructively discharged in violation of Title VII of the Civil Rights Act of 1964.[15] Although the district court found that Suders presented sufficient evidence to permit a trier of fact to conclude that

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1 Pennsylvania State Police v. Suders, 124 S. Ct. 2342 (2004).
2 *Id.* at 2347.
3 *Id.* at 2348.
4 *Id.* at 2348.
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 Civil Rights Act of 1964 42 U.S.C. § 2000e *et seq.* (1991).

the supervisors had created a hostile work environment, the district court held that PSP was not vicariously liable for the supervisors' conduct, and thus, granted PSP's motion for summary judgment.[16] To reach its decision, the court relied on the principles enunciated in *Faragher v. Boca Raton*[17] and *Burlington Industries Inc. v. Ellerth.*[18] In both cases, the Supreme Court of the United States held that in the absence of a tangible employment action,[19] the employer could argue that "it exercised reasonable care to prevent or promptly correct any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[20] The district court concluded that Suders did not avail herself of PSP's internal procedures for reporting harassment as she resigned just two days after first reporting the harassment.[21] The Court of Appeals for the Third Circuit reversed, holding that there was sufficient evidence of a constructive discharge.[22] The court concluded that a constructive discharge should always be treated as a "tangible employment action," thereby rendering the *Ellerth/Faragher* defenses inapplicable.[23] On appeal, the issue was whether the Court of Appeals had correctly held that a constructive discharge is always a tangible employment action which would eliminate the *Faragher/Ellerth* affirmative defenses.[24]

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[16] *Suders*, 124 S. Ct. at 2349.

[17] Faragher v. Boca Raton, 524 U.S. 775 (1998) (establishing an affirmative defense to sexual harassment charges for employers). The plaintiff, a lifeguard, brought an action against her employer and two supervisors claiming a violation of Title VII of the Civil Rights Act of 1964. *Id.* at 780. The plaintiff alleged that the two supervisors created a sexually hostile environment by subjecting female lifeguards to uninvited touching and lewd comments. *Id.* On appeal, the Supreme Court held that an employer may be vicariously liable for the discriminatory behavior of one of its employees, subject to an affirmative defense which assesses the reasonableness of the employer's attempts to prevent and correct any sexual harassment and determines whether the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. *Id.*

[18] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) (creating an affirmative defense to sexual harassment charges for employers in the absence of a tangible employment action). Plaintiff quit her job as a salesperson after refusing sexual advances from a supervisor. *Id.* at 748. The plaintiff sued her employer alleging a violation of Title VII of the 1964 Civil Rights Act. *Id.* at 749. On appeal, the Supreme Court held that an employer can be responsible for an employee's sexual harassment of another employee if the employer knew of the conduct or reasonably should have known, but failed to stop it. *Id.* at 759. In the absence of a tangible employment action, the employer has available the affirmative defense that it had reasonable mechanisms to prevent harassment and the employee failed to take advantage of these mechanisms. *Id.* at 765.

[19] The Supreme Court indicated that a "tangible employment action" would include a discharge, demotion, or undesirable reassignment. *Id.* at 765.

[20] *Suders*, 124 S. Ct. at 2349.

[21] *Id.*

[22] *Id.* at 2350.

[23] *Id.*

[24] *Id.*

HOLDING

The Supreme Court held that constructive discharge is not always a tangible employment action and, thus, an employer is not necessarily denied the *Ellerth/Faragher* defenses.[25]

ANALYSIS

The Court began its analysis with the general assertion that an employer may be liable for the actions of its supervisors.[26] This concept is based on agency principles.[27] The employer is liable when the agent was aided in performing the misconduct by the existence of its relationship with the employer.[28] Such liability was the basis for the Court's decisions in *Ellerth* and *Faragher*, in which it held that in the absence of a tangible employment action, an employer has certain affirmative defenses.[29] The Court found that the absence of a tangible employment action is important because it is not then obvious that the agency relationship is the driving force in the commission of the misconduct.[30] Unlike an actual termination, a constructive discharge[31] is not necessarily affected through an official act of the employer company.[32] Considering this, the Court concluded that in the absence of an official act by an employer, the employer has available the *Ellerth/Faragher* affirmative defense that the employee failed to take advantage of reasonable employer-provided mechanisms to prevent and rectify sexual harassment in the workplace.[33] The Court reasoned that if an official act does not underlie the constructive discharge, the employer has no reason to suspect that the resignation is due to a hostile work environment.[34] This uncertainty, both in terms of the role the agency relationship played and whether the employer had knowledge of the misconduct, justifies allowing the employer to avail itself of the *Ellerth/Faragher* affirmative defenses.[35]

The Court held that the Third Circuit's decision should be overruled in order to avoid jury confusion.[36] By treating a constructive discharge as an

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25 *Id.*

26 *Id.* at 2352.

27 *Id.*

28 *Id.*

29 *Id.* at 2353.

30 *Id.*

31 A constructive discharge denotes a situation in which "working conditions become so intolerable that a reasonable person would have felt compelled to resign." *Id.* at 2354.

32 *Id.* at 2355.

33 *Id.*

34 *Id.*

35 *Id.* at 2357.

36 *Id.* at 2356.

actual discharge and thus an official employer act under all circumstances, the Third Circuit held that a defendant could never assert the *Ellerth/Faragher* affirmative defenses in a constructive discharge claim.[37] However, the Third Circuit would allow the *Ellerth/Faragher* defenses to be asserted in an "ordinary" hostile work environment claim that involves no tangible employment action.[38] This holding would lead to confusion as the creation of a hostile work environment is a necessary predicate to a hostile environment constructive discharge case.[39] Additionally, the Court noted that the Third Circuit qualified its holding that a constructive discharge itself constitutes a tangible employment action when it indicated that it an employer's remedial program and an employee's use of it may be relevant to a claim of constructive discharge.[40] Ironically, these considerations are the same considerations relevant to the affirmative defense in *Ellerth* and *Faragher*, which the Third Circuit claimed were not applicable.[41]

DISSENTING OPINION

In his dissent, Justice Thomas argued the majority defined "constructive discharge" in a way that does not resemble the definition of an actual discharge.[42] He argued that the majority rule allows a plaintiff to allege a constructive discharge absent any adverse employment action.[43] Thus, the majority's definition closely resembles an aggravated case of sexual harassment or hostile discharge, cases in which an employer is only liable if found to be negligent.[44] Thomas argued that Suders did not adduce sufficient evidence of an adverse action taken because of her sex, nor did she allege that PSP was negligent in monitoring the sexual harassment.[45] Thus, Justice Thomas held that the judgment of the Court of Appeals should be reversed, but on different grounds than the majority articulated.[46]

CONCLUSION

The Court was concerned with holding strictly liable under Title VII of the Civil Rights Act of 1964 only those employers whose supervisors

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37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.* at 2356-2357.
41 *Id.* at 2357.
42 *Id.* at 2358.
43 *Id.*
44 *Id* at 2359.
45 *Id.*
46 *Id.*

engaged in sexual harassment via an official act. The presence of an official act is important because it indicates that the supervisor acted as the employer's agent in the misconduct and thus the employer is presumed to be on notice of the possibility of supervisor misconduct.[47] A constructive discharge does not necessarily give the employer notice of any supervisor misconduct; thus, the Court held that if an official act does not underlie the constructive discharge, the employer can avail itself of the *Ellerth/Faragher* affirmative defenses.[48]

On its face, this Court's holding sets good public policy by allowing employers who may conceivably have no knowledge of their supervisors' wrongdoing an opportunity to present evidence to that effect in their defense. It should be relevant that an employer had in place mechanisms to prevent and rectify sexual harassment and whether the employee took advantage of these mechanisms. No matter what measures an employer takes, there always exists the risk that one employee or a supervisor will sexually harass another employee, but, when an employer is put on notice that such harassment might be taking place but does not act to remedy it, the employer should be strictly liable for its employee's actions. While it is important to discourage sexual harassment and to protect employees from sexual harassment, neither goal will be served by holding an employer liable for the harassment committed by a supervisor if the employer has taken substantial measures to ensure such harassment does not take place and if the employer has no way of knowing that such harassment is taking place.

However, it should not be accepted dogmatically that an employer is less blameworthy because he has established a mechanism to deal with sexual harassment. The Supreme Court created the *Ellerth/Faragher* defenses to encourage employers to create anti-harassment mechanisms to effectuate the goal of Title VII—the prevention of workplace discrimination.[49] Unless the Supreme Court and lower courts demand more than a nominal remedial harassment mechanism, the employer or a harassing supervisor may have available affirmative defenses to which they ought not to be entitled.[50]

Summary and Analysis Prepared By:
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[47] *Id.* at 2353, 2355.

[48] *Id.* at 2355.

[49] Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197 (2004).

[50] Lawton, *supra* note 49.