

The U.S. Supreme Court Clarifies Constructive Discharge under Title VII – Responsibilities and Opportunities for Human Resources Practitioners

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Abstract

In 1998, the U.S. Supreme Court established a defense for employers to minimize liability against a Title VII claim of hostile work environment due to a supervisor's harassment unless the employee suffered a tangible employment action, such as termination, demotion, or an undesirable reassignment. At that time, the Supreme Court did not address whether a tangible employment action includes constructive discharge. Since then, Circuit Courts of Appeals have reached conflicting conclusions, resulting in possible inconsistencies in Human Resources advice and guidance. On June 14, 2004, the Supreme Court resolved the split among the circuits in *Pennsylvania State Police v. Suders*. This Article revisits the current employer liability defense, the effect of the *Suders* decision on that defense, and the responsibilities and opportunities that *Suders* imputes to Human Resources practitioners to minimize employer liability in constructive discharge cases.

Keywords

Constructive Discharge, Employer Liability, Sexual Harassment, Sexual Discrimination, Tangible Employment Action, Title VII

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Introduction

According to a recent poll, more than one in five Americans claim to have experienced employment discrimination.¹ Whether in the private or public sector, workplace harassment and discrimination based on sex are frequent complaints of employees, male and female.² In addressing such complaints, the Human Resources department (HR) occupies a unique position within an organization because of its dual role in serving employees' interests and in protecting and promoting employers' interests. With respect to the various employment laws governing harassment and discrimination, particularly Title VII of the Civil Rights Act of 1964, HR promulgates and implements policies and procedures to ensure that all employees, supervisory and non-supervisory, understand their rights and responsibilities and that, should the need arise, employees know how to avail themselves of appropriate internal reporting procedures, without fear of reprisal. Through such activities, HR contributes to the compatible goals of fostering an informed workforce, eliminating inappropriate workplace conduct, and reducing organizational liability.

In 1998, the U.S. Supreme Court provided important direction to HR through its rulings in two landmark employment cases, *Burlington Industries v. Ellerth*³ (*Ellerth*) and *Faragher v. City of Boca Raton*⁴ (*Faragher*). In *Ellerth* and *Faragher*, the Supreme Court established the conditions under which an employer may be held strictly liable and when an employer may use a defense against liability in claims of supervisory sexual harassment or discrimination. The Supreme Court also established reporting responsibilities for employees in these cases. In both *Ellerth* and *Faragher*, however, the Court stopped short of addressing an employer's ability to defend against claims of constructive discharge in situations where an employee resigns because

of alleged intolerable work conditions due to supervisory harassment or discrimination. The Supreme Court's failure to address employer liability in constructive discharge claims under Title VII has produced different rulings among the Circuit Courts of Appeals since 1998. These differences, in turn, have increased the possibility of HR practitioners providing inconsistent advice and guidance to employees and employers.

On June 14, 2004, the U.S. Supreme Court resolved the split among the circuits in *Pennsylvania State Police v. Suders*⁵ (*Suders*) when the Court held that constructive discharge due to a hostile work environment attributable to a supervisor is a recognizable claim under Title VII.⁶ The Supreme Court also held that an employer may minimize its liability in such a case using the defense established in *Ellerth* and *Faragher* (*Ellerth-Faragher* defense), unless the former employee resigned "in reasonable response to an employer-sanctioned adverse action"⁷ that changed the employee's "employment status or situation."⁸ Thus, through *Suders*, the Supreme Court refined its 1998 *Ellerth* and *Faragher* cases to provide employers a defense against liability in hostile environment constructive discharge cases brought under Title VII.

In this Article, we revisit the *Ellerth-Faragher* defense for employer liability and discuss the significance of the *Suders* case on that defense, including its significance for HR practitioners. Part I briefly reviews employer responsibility in sexual harassment and discrimination cases from a statutory, administrative, and judicial perspective. Part I also outlines the *Ellerth-Faragher* defense. Part II summarizes the two major opposing views within the Courts of Appeals that produced a split among the circuits in relation to availability of the *Ellerth-Faragher* defense in constructive discharge cases. Part III examines the *Suders* case and the effect of the Supreme Court's ruling in *Suders* on the *Ellerth-Faragher* defense. Part IV discusses the implications of the *Suders* decision for HR practitioners. This Article concludes

that HR practitioners must establish and continuously promote certain best practices throughout the organization in order to minimize employer liability in potential constructive discharge claims under Title VII. These best practices involve the following: producing and circulating an appropriate anti-harassment and anti-discrimination policy; reporting and internal-complaint processing procedures; training employees and supervisors; reviewing proposed supervisor-initiated adverse actions; assessing workplace climate and culture; and communicating and consulting.

I. Employer Responsibility: Statutory, Administrative, and Judicial Interpretations

1. Statutory Interpretation

The primary Federal law governing sexual harassment and discrimination in the workplace is Title VII of the Civil Rights Act of 1964 (Title VII).⁹ Under Title VII, an employer is prohibited from discriminating against any individual “with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex or national origin.”¹⁰ Title VII established the Equal Employment Opportunity Commission (EEOC), an independent Federal agency, to administer and enforce Title VII in private and public sector workplaces.¹¹ In 1972, Congress extended Title VII to include state and local governments.¹² Congress further extended Title VII through the Government Employees Rights Act of 1991 to all but elected officials.¹³

2. Administrative Interpretation

According to the EEOC, an employer who treats an employee adversely or disparately because of the employee’s sex and without a legitimate reason violates Title VII.¹⁴ The EEOC seeks to reduce and eliminate workplace harassment and discrimination by investigating

complaints of alleged discrimination; providing training to employees and employers; and issuing guidance to employees and employers on ways in which they may avoid being subjected to sexually harassing or discriminatory conduct or being viewed as condoning such conduct, respectively.¹⁵

Employee assertions of constructive discharge as part of a Title VII claim are not new to the EEOC. Since at least 1990, the EEOC has set forth guidance addressing requirements for an employee to be able to bring a successful Title VII claim after resigning due to harassment or discrimination.¹⁶ The employee must be able to establish not only that s/he is a member of a group protected by Title VII, and that the alleged harassment or discrimination did occur, but also that the employee resigned because the conditions were so intolerable s/he had no other reasonable alternative.¹⁷

Through its administrative regulations, the EEOC has long advised employers to “take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise [the issue of harassment] and how to raise the issue of harassment.”¹⁸ The EEOC has further advised employers of the need to establish complaint procedures within the workplace “to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor.”¹⁹ Concurrently, the EEOC has encouraged employees to be aware of and use the employer’s internal complaint system, before resigning and filing a claim of constructive discharge.²⁰

3. Judicial Interpretation

The U.S. Supreme Court has interpreted Title VII as seeking “to make persons whole for injuries suffered on account of unlawful employment discrimination.”²¹ The Court has further interpreted Title VII to be similar to other statutes directed to influence conduct, to have as its

“primary objective,” avoidance of harm rather than redress for harm.²² In 1998, through the two cases of *Burlington Industries v. Ellerth*²³ (*Ellerth*) and *Faragher v. City of Boca Raton*²⁴ (*Faragher*), the U.S. Supreme Court established a standard for determining whether and when an employer may defend against liability in situations involving supervisory sexual harassment or discrimination of an employee.

The general facts in both *Ellerth* and *Faragher* were similar in that each case involved one or more male supervisors who subjected a subordinate female employee to a work environment each woman perceived as hostile, characterized by frequent or continual offensive sexual comments, lewd gestures, threatening sexual advances, and other harassing behavior. In each case, the employee claimed no alternative but to resign from her job and file a lawsuit in Federal District Court asserting that her former employer violated Title VII.

In *Ellerth*, the employee, Kimberly Ellerth, was aware of a company policy addressing sexual harassment and the procedures for reporting complaints.²⁵ Ellerth did not formally file a complaint against the offending supervisor, but on at least one occasion did comment to that supervisor that she considered his behavior towards her to be inappropriate and unwelcome.²⁶ The district court initially ruled against Ellerth.²⁷ The court reasoned that the employee knew about but failed to follow the employer’s harassment policy procedures by not reporting the supervisor’s inappropriate conduct.²⁸ As a result, the district court found that the employer was neither aware of nor had any reason to be aware of the supervisor’s actions.²⁹ The Court of Appeals for the Seventh Circuit reversed the district court’s ruling and found that the employer had subjected Ellerth to a hostile work environment.³⁰ The Seventh Circuit, however, did not reach agreement on the controlling rationale for its reversal. Instead, each Circuit judge issued a separate opinion.³¹ The employer appealed to the Supreme Court.³²

In *Faragher*, although the employer had a policy against sexual harassment, the employer failed to circulate the policy throughout its workforce.³³ The employee, Beth Ann Faragher, expressed her concerns about two offending male supervisors to a third supervisor, as had other female employees.³⁴ That particular supervisor, however, simply told Faragher that the employer did not care.³⁵ The supervisor never reported any of Faragher's or other female employees' complaints through his own management chain-of-command.³⁶ The Federal District Court initially ruled in favor of Faragher, reasoning that the employer had actual or constructive knowledge of the harassment, but took no action to stop it.³⁷ The Court of Appeals for the 11th Circuit reversed the district court's ruling on the rationale that the supervisory bad acts were not considered within the scope of the supervisor's employment.³⁸ Faragher appealed to the Supreme Court.³⁹

The U.S. Supreme Court accepted the *Ellerth* and *Faragher* cases to address the issue of when an employer should be liable, under Title VII, for supervisory acts that create a sexually hostile work environment for an employee. In decisions issued the same day, the Supreme Court stated that the key factor in determining if an employer should face liability for a sexually hostile work environment attributable to a supervisor depended upon whether there was a "tangible employment action" taken within the context of the supervisor's conduct.⁴⁰ The Supreme Court defined a tangible employment action as one that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."⁴¹

The Supreme Court stated, "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer."⁴² According to the Court, "when the supervisor's harassment culminates in a tangible employment action, . . . [n]o affirmative

defense is available.”⁴³ Therefore, if the former employee establishes that the supervisor fired, failed to promote, or significantly reduced that employee’s benefits as part of the supervisor’s overall conduct, the employer would not be able to present a defense from liability for the supervisor’s actions. In *Ellerth* and *Faragher*, the Supreme Court also considered whether an employer should be held liable for supervisory harassment if there was no tangible employment action involved. In such instances, the Supreme Court found that the employer should be able to present a defense to reduce or avoid liability.

4. The *Ellerth-Faragher* Defense

The Supreme Court established the conditions under which an employer may minimize liability for supervisory harassment or discrimination in what has since become widely recognized as simply the *Ellerth-Faragher* defense. When an employer is faced with a claim of harassment or discrimination due to supervisory conduct, the employer may defend itself from liability for the supervisory harassment or discrimination if the employer has not taken a tangible employment action against the employee. In that instance, the employer may offer evidence to show that it is more likely than not that:

- (1) the employer 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 the employer may have provided or to avoid harm otherwise.⁴⁴

In announcing these conditions for assessing employer liability in sexual harassment and discrimination cases, the Supreme Court stopped short of definitively addressing whether constructive discharge would be considered a tangible employment action.

II. The Split in the Circuits --Constructive Discharge as a Tangible Employment Action

Whether a former employee can establish a constructive discharge claim against a supervisor is important to both employees and employers, because succeeding on a constructive discharge claim increases the potential scope of damages the employee may recover, and thus, the potential scope of liability against the employer. If the former employee proves a hostile work environment claim, the employee may recover compensatory damages (out-of-pocket expenses and “pain-and-suffering” due to the discrimination) and punitive damages that are directly attributable to the workplace abuse the former employee suffered.⁴⁵ If the former employee also proves a constructive discharge claim, additional damages of backpay and frontpay are generally available.⁴⁶

In applying *Ellerth* and *Faragher* to cases involving claims of constructive discharge, the Circuit Courts of Appeals (which are responsible for deciding appeals of decisions from various lower Federal District Courts among the states), have consistently required a former employee to show that the supervisor’s harassment or discrimination created conditions that were so intolerable that a reasonable person would have felt compelled to resign.⁴⁷ The Circuit Courts have been less consistent in their rulings regarding whether a former employee must show that the employer, by its supervisor’s actions, actually intended to force the employee to resign.⁴⁸

Since the *Ellerth* and *Faragher* cases, a split among the Circuit Courts has developed around the question of whether an employee who resigns because of an allegedly sexually hostile work environment has actually suffered a tangible employment action. Courts that have found that constructive discharge cannot be a tangible employment action have allowed the employer to use the *Ellerth-Faragher* defense to minimize its liability against supervisory harassment or discrimination. Conversely, courts that have found that constructive discharge may be a tangible

employment action have not allowed the employer to use the *Ellerth-Faragher* defense in order to minimize its liability for such supervisory acts. Opposite rulings between the Courts of Appeals for the Second Circuit and the Eighth Circuit illustrate the differing judicial conclusions depending upon how the holdings of *Ellerth* and *Faragher* are interpreted and applied.

The Second Circuit Court of Appeals (which decides appeals from the Federal district courts of Connecticut, New York, and Vermont) interpreted *Ellerth* and *Faragher* to mean that constructive discharge could never qualify as a tangible employment action for purposes of a Title VII hostile environment claim.⁴⁹ The Second Circuit reasoned that “[c]o-workers, as well as supervisors can cause the constructive discharge of an employee,”⁵⁰ and that “unlike demotion, discharge, or similar economic sanctions, an employee’s constructive discharge is not ratified or approved by the employer.”⁵¹ The Sixth Circuit Court of Appeals (which decides appeals from the Federal district courts of Kentucky, Michigan, Ohio, and Tennessee) also adopted the rationale of the Second Circuit.⁵²

The Eighth Circuit Court of Appeals (which decides appeals from the Federal district courts of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota) took a view opposite that of the Second and Sixth Circuits. The Eighth Circuit interpreted *Ellerth* and *Faragher* such that, if proven, a constructive discharge would be a tangible employment action for purposes of a Title VII hostile environment claim.⁵³ The Eighth Circuit looked to the specific conduct of both the employee and the employer. For example, in a case in which the employee either failed to report the harassment or discrimination, or, after reporting, refused to cooperate with the employer’s corrective steps, the Eighth Circuit did not find the employee’s constructive discharge to be a tangible employment action.⁵⁴ In another case, however, in which the employer did nothing after an employee complained of supervisory

harassment or discrimination, the Eighth Circuit upheld the Federal district court's jury finding that the employee's resignation was a constructive discharge.⁵⁵

The Second and Eighth Circuit Courts of Appeals illustrate the split among the circuits with respect to hostile environment constructive discharge claims. When the Third Circuit Court of Appeals (which decides appeals from the Federal district courts of Delaware, New Jersey, Pennsylvania, Virgin Islands) adopted the holding of the Eighth Circuit, the U.S. Supreme Court agreed to review the issue.⁵⁶

III. *Pennsylvania State Police v. Suders* and its Impact on the *Ellerth-Faragher* Defense

1. Facts

In March 1998, Nancy Suders began work as a communications operator for the Pennsylvania State Police (PA State Police) under the supervision of a sergeant, who was the Station Commander, and two corporals who shared supervisory authority for Suders.⁵⁷ Suders alleged that for nearly five months, the three male supervisors continually subjected her to repeated sexual or vulgar gesturing; obscene sexual conversations about oral sex and bestiality; continual name-calling; and the posting of vulgar images at the worksite.⁵⁸ In June, after Suders' sergeant accused her of stealing a work file, Suders contacted the PA State Police Equal Employment Opportunity (EEO) Officer claiming she "might need some help."⁵⁹ The EEO Officer gave Suders her telephone number, but neither Suders nor the EEO officer followed-up with one another.⁶⁰

On at least one occasion during the next two months, Suders confronted one of the corporals and expressed to him that she considered his actions towards her to be inappropriate.⁶¹ The supervisory sexual harassment continued, however, and, on August 18, 1998, Suders again contacted the EEO Officer to report the harassment and to express that she was afraid.⁶²

According to Suders, the EEO Officer was “insensitive and unhelpful,” and, although the EEO Officer did instruct Suders to file a complaint, Suders alleged that the EEO Officer would not help Suders locate the proper form.⁶³ Suders claimed that because she was never able to obtain a reporting form, she could not file a complaint.⁶⁴

On August 20, 1998, two days after contacting the EEO Officer, Suders’ supervisors arrested her for theft when Suders attempted to return an ungraded exam that she had previously come across in a drawer and, believing it belonged to her, took it home.⁶⁵ Upon finding the exam, Suders had concluded that rather than forwarding her exam to be graded, her sergeant had simply hidden it in a drawer and told Suders that she had failed the exam.⁶⁶ When Suders attempted to return the exam, the supervisors detained, hand-cuffed, and questioned her, including reading *Miranda* rights and placing her under arrest.⁶⁷ Suders then tendered her resignation, which her sergeant accepted. Her supervisors released Suders later that day. Suders was never charged with a crime.⁶⁸

2. Procedural History

In September 2000, Suders sued the three supervisors and the PA State Police in Federal District Court alleging, among other things, hostile work environment and constructive discharge in violation of Title VII.⁶⁹ The district court ruled in favor of Suders’ former employer, PA State Police, and dismissed all of Suders’ claims.⁷⁰ In explaining why it dismissed Suders’ hostile work environment claim, the district court noted its reliance on the *Ellerth* and *Faragher* cases. The district court concluded that although Suders had presented enough evidence to take a hostile work environment claim to a jury, the court dismissed her claim because Suders did not follow internal complaint processing procedures to report her concerns and give her employer a chance to correct any problem(s), especially since Suders had been in contact with the EEO

Officer more than once.⁷¹ The court neither ruled on nor explained why it dismissed Suders' constructive discharge claim.⁷² Suders appealed.⁷³

The Court of Appeals for the Third Circuit reversed the district court and ordered the case returned for a trial.⁷⁴ The Third Circuit found that "genuine issues of material fact existed concerning the effectiveness of the [PA State Police's] 'program . . . to address sexual harassment claims.'"⁷⁵ Consistent with the Eighth Circuit Court of Appeals, the Third Circuit found that, if proven, Suders' constructive discharge would constitute a tangible employment action that would preclude her former employer from using the *Ellerth-Faragher* defense.⁷⁶ The PA State Police appealed the Third Circuit's ruling and the U.S. Supreme Court accepted the case in order to resolve the split among the circuits.⁷⁷

3. U.S. Supreme Court Decision

On June 14, 2004, in *Pennsylvania State Police v. Suders*,⁷⁸ the U.S. Supreme Court agreed with the Third Circuit's decision that Suders could pursue her claim of constructive discharge under Title VII, but disagreed on the issue of when the *Ellerth-Faragher* defense is available to employers in such cases. The Supreme Court stated, for the first time, that a claim of constructive discharge is available in a Title VII sexual harassment or hostile environment action attributable to supervisors.⁷⁹ The Court clarified, however, that to succeed on such a claim, the former employee must show that the employer's adverse official act prompted the employee's resignation, rather than the constructive discharge alone. Therefore, to establish constructive discharge as part of a hostile environment claim under Title VII, the former employee must prove that s/he was the victim of a hostile work environment such that "the abusive working environment became so intolerable that [the employee's] resignation qualified as a fitting response."⁸⁰

The Supreme Court held that the Third Circuit erred in concluding that a constructive discharge, if proven, automatically constitutes a tangible employment action that prevents the employer from using the *Ellerth-Faragher* defense.⁸¹ The Supreme Court, instead, held that the employer will not be able to use the *Ellerth-Faragher* defense if the former employee can establish that s/he resigned “in reasonable response to an employer-sanctioned adverse action officially changing [his/her] employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which [s/he] would face unbearable working conditions.”⁸² Otherwise, the employer may use the *Ellerth-Faragher* defense to minimize its potential liability.

Writing for an 8-1 majority, Justice Ruth Bader Ginsburg observed “a constructive discharge is functionally the same as an actual termination in damages-enhancing respects.”⁸³ Ginsburg further observed “[a] constructive discharge involves both an employee’s decision to leave and precipitating conduct,”⁸⁴ but is not always effected by an official act of the employer. Specifically, “[t]he former involves no official action; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action.”⁸⁵ Therefore, “when an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, . . . calls for extension of the affirmative defense to the employer.”⁸⁶

In so ruling, the Supreme Court reasoned that there are circumstances in which an employee may resign that are unrelated to the supervisor or the employer.⁸⁷ Moreover, a sexual harassment claim does not always involve constructive discharge.⁸⁸ Even when a sexual harassment claim does include an assertion of constructive discharge, while a jury may find that an individual suffered sexual harassment, that finding, alone, does not prove the work conditions were so intolerable that a reasonable person would be forced to resign.⁸⁹ As a result, in *Suders*,

the Supreme Court held that, “the plaintiff [employee] who alleges no tangible employment action has the duty to mitigate harm, but the defendant [employer] bears the burden to allege and prove that the plaintiff failed in that regard.”⁹⁰ The Supreme Court vacated and remanded the Third Circuit case for further proceedings in the Federal District Court, presumably a jury trial.⁹¹

The Supreme Court, in *Suders*, validated long-standing EEOC guidance and refined when an employer may use the *Ellerth-Faragher* defense to minimize liability for a constructive discharge claim. The Court, however, left unanswered the question of whether a former employee must show employer intent in order to establish a claim of constructive discharge. The Court also did not clearly define what type of employer action, if any, beyond a tangible employment action, might be considered an official action. Given these unanswered questions, although the Supreme Court provides some clarity on how both the employee and the employer should approach constructive discharge claims under Title VII, future litigation from both employees and employers is likely.⁹²

IV. Impact of *Suders* on HR Practitioners

In *Suders*, the Supreme Court imputes to the employer a number of responsibilities the employer must address in order to make use of the *Ellerth-Faragher* defense in cases involving a constructive discharge claim due to supervisory harassment or discrimination. The impact of *Suders* on HR is that these responsibilities fall squarely within the purview of HR. Many of the responsibilities considered in *Suders*, such as producing and publicizing an organizational anti-harassment and anti-discrimination policy and promoting the organization’s internal complaint-processing procedures, are familiar to HR practitioners who have dealt with *Ellerth-Faragher* since 1998 and with similar EEOC administrative guidance since 1990. In light of the Supreme Court’s ruling in *Suders*, however, and given the costs to the employer in terms of lost

productivity, personnel replacement, and possible legal damages involved when an employee resigns and later sues, careful attention to these seemingly common-sense responsibilities remain as important today as when the U.S. Supreme Court initially established the *Ellerth-Faragher* defense.⁹³

The availability of the *Ellerth-Faragher* defense for the employer's use in a constructive discharge case depends upon whether the employer subjected the employee to an adverse action as part of the alleged supervisory created hostile work environment. The Supreme Court, in *Suders*, has thus imputed a presumption of additional responsibilities for HR, specifically, the role of organizational adverse action gatekeeper for supervisory-initiated actions against employees that may negatively impact the employee's employment condition or status. The heightened responsibilities for HR that *Suders* adds, in addition to those from *Ellerth-Faragher* that *Suders* reaffirmed, presents an opportunity for HR practitioners to enhance their role as strategic partners within their organization's leadership structure. HR practitioners, in both the private and public sectors, can add significant value to the organization of which they are a part, particularly in connection with potential constructive discharge claims, by implementing and continuously promoting the following best practices:

1. Anti-Harassment/Anti-Discrimination Policy

Since the early 1990s, the EEOC has recommended that organizations establish and circulate an anti-harassment and discrimination policy throughout the workplace.⁹⁴ Even so, employee complaints continue to be filed each year alleging the employer either had no policy or failed to make that policy available to the employee.⁹⁵ Therefore, to minimize the employer's liability for hostile environment and constructive discharge claims, HR must ensure that the organization establish and publish a no tolerance anti-harassment and anti-discrimination policy.

This policy must remain current and be circulated throughout the workplace, providing opportunity for all employees and supervisors to access and familiarize themselves with the policy; and, thus the organization's expectations. HR should work with the organization's Chief Executive Officer or Agency Head and coordinate, as needed, with others, such as the organization's legal and EEO points-of-contact, to produce and publicize a written "no tolerance" policy prohibiting sexual harassment and discrimination in the workplace.⁹⁶ HR should review and update this policy as necessary, but at least annually, to ensure any EEOC or court generated changes are properly reflected in the policy.⁹⁷ HR should then identify and use the organizational vehicles of communication that are the most conveniently accessible to employees to widely circulate the policy to all employees and supervisors.⁹⁸ Circulating a memorandum addressed to all employees is a common means of communication as is posting the policy at various locations throughout the worksite, such as on worker bulletin boards.⁹⁹ Other means of publicizing the policy include presentations at company-wide meetings, publication in employee newsletters, employee handbook(s), and on the organization's website, both Internet and Intranet sites.¹⁰⁰

2. Internal Reporting and Complaint-Processing Procedures

Although Title VII requires no explicit reporting requirement for employees,¹⁰¹ the Supreme Court in *Suders* makes clear that an employee who believes his or her supervisor is trying to force that employee to resign must first follow internal complaint procedures before resigning and asserting a subsequent constructive discharge claim against the employer. Reporting allegations of harassment and discrimination provides the employer notice and the opportunity to correct and eliminate any inappropriate supervisory conduct consistent with the objective of Title VII to avoid future harm.¹⁰² Giving the employer an opportunity to take

corrective action benefits the employee by enabling him or her to retain his or her employment status. As HR practitioners are aware, however, employees do not always express their concerns about inappropriate supervisory misconduct directly to their supervisor. Nor do employees always report inappropriate supervisory conduct to others, including HR, for various reasons, such as lack of awareness of the process to be followed, fear of retaliation, and general mistrust of management.¹⁰³

Thus, HR must ensure that independent, internal complaint-processing procedures are readily accessible and that employees are aware of the process to be followed or how to obtain assistance. In order for employees to consider the process fair, HR must ensure that complaint-processing procedures, including investigations conducted upon the filing of a complaint, are implemented with confidentiality, independence, and promptness.¹⁰⁴ Additionally, such procedures and any subsequent investigations must apply to all employees equally, regardless of the level of authority that a particular supervisor or manager might hold. Finally, HR must have an awareness of potential conflicts arising from the internal investigation process and who should conduct the investigation in order that employees and supervisors have confidence that such investigations and resulting findings and recommendations are credible.

Upon receipt of a complaint, HR must ensure that a thorough investigation is conducted promptly and impartially, keeping the employee apprised of the status of the investigation and any procedural rights the employee may have. As with the circulation of the organization's anti-harassment and anti-discrimination policy, HR should ensure that employees are aware of how they may gain ready and independent access to the complaint-processing procedures.

3. Employee and Supervisory Training

In terms of both policy and internal complaint-processing procedures, training for

employees and for supervisors is critical in promoting a workplace environment reflecting fairness, dignity, and respect for one another. Effective training should include components that address and make each group aware of its respective protections under Title VII, including its responsibilities.¹⁰⁵ Additionally, particular attention is needed to ensure that supervisors are aware of and responsive to societal and cultural shifts and their impact within a workplace.¹⁰⁶ For instance, what once may have been considered mere banter or joking takes on a completely different interpretation as society's expectations shift. Supervisors who work with the same group of employees over an extended period of time with an established behavioral routine may find themselves the subject of a complaint if a new employee of a different generation, race, or culture joins the workgroup and considers the supervisor's conduct inappropriate.¹⁰⁷ Therefore, effective training programs should communicate to all employees and supervisors up-to-date legal and regulatory requirements; organizational policies, expectations, and standards; and the various protections and reporting procedures available, including how such procedures may be accessed.

HR should ensure that supervisory personnel receive specific training relating to their role as supervisors and how, as supervisors, their actions may impute liability upon the employer. For this reason, not only should supervisors receive training that addresses their specific duties in preventing a hostile work environment, but they should also receive training on implementing and documenting progressive discipline. Finally, HR should ensure that supervisors understand that their behavior serves as a reflection of the employer's policy.¹⁰⁸ Supervisors who do not adhere to the employer's policy for appropriate workplace conduct and interaction with employees should be subject to discipline or removal.

4. Review of Adverse Actions

Under *Suders*, the employer is precluded from using the *Ellerth-Faragher* defense if the employee shows s/he resigned “in reasonable response to an employer-sanctioned adverse action.”¹⁰⁹ Although the *Suders* Court did not specifically delineate the parameters of official action, tangible employment acts (such as termination, demotion, etc.) that change an employee’s employment status, if not legitimate, can result in an employer losing its ability to assert the *Ellerth-Faragher* defense during any subsequent legal proceeding. Thus, with the potential for liability and the associated costs of losing an employee and possibly losing a subsequent lawsuit, HR has the opportunity and responsibility to minimize the employer’s liability by serving in a gatekeeper role with respect to proposed adverse actions against employees.

Requiring that a supervisor’s proposed adverse action(s) undergo HR review before the supervisor presents such action(s) to the employee provides HR the opportunity to ensure that supervisors follow internal requirements and that supervisors do not use an adverse action or the threat of such an action as a means of asserting power or fear over the employee, for personal reasons, or to harass or discriminate against the employee for non-legitimate, non-business reasons.¹¹⁰ This review role enables HR to identify existing or potential conduct issues within the supervisory ranks that the employer can promptly correct through follow-up training, counseling, or other appropriate action. In addition, independent review of proposed adverse actions requires HR to ensure that paperwork is not simply being rubber-stamped and sent through to the next step of processing.¹¹¹ In this regard, HR plays a crucial role in reviewing whether required documentation is complete. Standardizing an adverse action review process within the organization, through HR, may prove invaluable in protecting the employer’s ability

to assert the *Ellerth-Faragher* defense should an employee subsequently file a constructive discharge claim against the employer.

5. Workplace Climate and Culture Assessment

Another area in which HR can provide leadership is through the collection and assessment of workplace, climate, and culture information, absent another organization component having this responsibility (in which case, HR should coordinate information-sharing). One important assessment tool is the employee exit interview.¹¹² When an employee resigns, HR should seek to learn as much as possible about the circumstances leading to the employee's decision, particularly as it relates to the work environment. Using such tools helps HR keep its finger on the pulse of the workforce and often permits HR to uncover and identify potential problems before they escalate.

HR may also obtain information through other assessment and evaluation tools, such as human capital surveys and organizational climate surveys, the results of which may or may not be publicized to the general workforce.¹¹³ The information available through climate surveys can enable HR to provide the employer with important insights regarding employee and management perception of workplace conditions, culture, and environment. Survey results, however, often put management on the spot to act, and, for that reason, the employer may not be receptive, initially, to the idea. With the employer's support, however, including a commitment to act on negative results, HR can use climate surveys both to improve, continuously, the general work environment and provide a rebuttal to subsequent assertions that the employer's efforts towards eliminating harassment or discrimination are not sincere. Thus, HR's involvement in assessing workforce climate is clearly important in protecting the employer's ability to use the *Ellerth-Faragher* defense, if necessary, in defending a constructive discharge claim.

6. Communication and Consultation

Communication and consultation have long been, and will continue to be important roles for HR practitioners.¹¹⁴ Both employees and supervisors generally rely upon HR to communicate workplace policies, and changes or updates to these policies, and to be available for consultation on myriad workplace-related matters. Communication occurs in more than one manner--oral, written, and non-verbal. Whether communication has the intended effect depends upon how the message is transmitted and whether there are any actual or perceived barriers to the receiver.

Continuously striving to ensure all communications with employees and supervisors are neutral, professional, and credible, enables HR practitioners to model desired behavior to employees and supervisors throughout the organization, particularly as the workplace continues to change to include multiple generations, differing cultures, and other indicia of increased diversity. HR's ability to provide quality communicative and consultative services also promotes trust among HR, employees, and management, which enhances the credibility of the HR profession. The manner in which HR fosters and maintains this role can strengthen HR's ultimate value as a professional and strategic partner within the organization, including during any investigation of a Title VII violation.

Conclusion

For more than five years, courts have applied the *Ellerth-Faragher* defense, with conflicting results, to cases involving employer liability in connection with claims of constructive discharge attributable to supervisory sexual harassment or discrimination. In *Pennsylvania State Police v. Suders*, the U.S. Supreme Court clarified whether and when an employer may use the *Ellerth-Faragher* defense. The *Suders* decision imputes a number of responsibilities to HR involving establishing and maintaining a workplace free of harassment and

discrimination. Such responsibilities concurrently present opportunities for HR practitioners to enhance themselves as strategic partners within the organization's leadership structure. By promoting best practices relating to producing and publicizing an anti-harassment, anti-discrimination policy; internal complaint reporting and investigation procedures; review of proposed adverse actions; training; and communication and consultation in a consistent manner, HR adds significant tangible and intangible value through its contributions to the compatible goals of fostering an informed workforce, eliminating inappropriate workplace conduct, and minimizing employer liability.

NOTES

¹ Press Release. FindLaw®. (2004, July 20). "One in Five Americans Has Experienced Employment Discrimination, Says New FindLaw Survey." [Online]. Available: <http://company.findlaw.com/pr/2004/072004.employmentdiscrim.html>.

² U.S. Equal Employment Opportunity Commission. "Sexual Harassment Charges." [Online]. Available: 07/21/2004 from <http://www.eeoc.gov/stats/harass.html>.

³ 524 U.S. 742 (1998), 118 S.Ct. 2257 (1998).

⁴ 524 U.S. 775 (1998), 118 S.Ct. 2275 (1998).

⁵ 124 S.Ct. 2342 (June 14, 2004).

⁶ *Id.*, at 2352

⁷ *Id.*, at 2347.

⁸ *Ibid.*

⁹ 42 U.S.C. § 2000e-2(a).

¹⁰ *Ibid.*

¹¹ *See generally*, *Ibid.*

¹² *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666 (1976)(holding the extension of Title VII constitutional).

¹³ 2 U.S.C.A. § 1202 (1991).

¹⁴ *See McDonald v. Department of the Interior*, 1999 WL 722908 (E.E.O.C.), EEOC No. 01975,031 (Aug. 27, 1999).

¹⁵ *Ibid.*

¹⁶ U.S. Equal Employment Opportunity Commission, "Policy Guidance on Current Issues of Sexual Harassment," (Mar. 19, 1990) [Online]. Available: <http://www.eeoc.gov/policy/docx/currentissues.html>.

¹⁷ *Id.*, at para. 5, "Constructive Discharge."

¹⁸ *See* 29 CFR § 1604.11(f) (1997).

¹⁹ *See supra*, Note 16.

²⁰ *Ibid.*

²¹ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

²² *Id.*, at 417.

²³ *See supra*, Note 3.

²⁴ *See supra*, Note 4.

²⁵ 524 U.S. 749.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Id., at 749-750.

³⁰ Id., at 750-751.

³¹ Ibid.

³² Ibid (citing Burlington Industries, Inc. v. Ellerth, 522 U.S. 1086, 118 S.Ct. 876 (Jan. 23, 1998)).

³³ 524 U.S. at 782-783.

³⁴ Id., at 783.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid at 783-784.

³⁸ Ibid.

³⁹ Ibid (citing Faragher v. City of Boca Raton, 522 U.S. 987, 118 S.Ct. 438 (Nov. 14, 1997)).

⁴⁰ See 524 U.S. at 751. See also, 524 U.S. at 786.

⁴¹ 524 U.S. at 790.

⁴² Ibid.

⁴³ Id., at 807.

⁴⁴ Ibid.

⁴⁵ See generally, 42 U.S.C. § 1981a(a)(i). Compensatory damages represent money awards covering out-of-pocket expenses due to the discrimination and for such intangible losses as pain and suffering. An employer with fewer than 101 employees may be liable for compensatory damages of up to \$50,000 if an employee-plaintiff prevails; if the employer has more than 500 employees, the employer may be liable for compensatory damages of up to \$300,000. See also, Pollard v. E.I. duPont de Nemours & Co., 532 U.S. 843, 848-54 (2001).

⁴⁶ Ibid.

⁴⁷ See, e.g., Landrau-Romero v. Banco Popular De Puerto Rico, 212 F.3d 607, 613 (1st Cir. 2000); Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1188 (2nd Cir. 1987); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 887 (3d Cir. 1984); Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 272-73 (4th Cir. 2001); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975); Ford v. General Motors Corp., 305 F.3d 545, 554 (6th Cir. 2002); Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 886 (7th Cir. 1998); Jaros v. Lodgenet Entm't Corp., 294 F.3d 960, 965 (8th Cir. 2002); Bergene v. Salt River Project Agric. Improvement & Power Dist., 272 F.3d 1136,

1143-44 (9th Cir. 2001); Sanchez v. Denver Pub. Sch., 164 F.3d 527, 534 (10th Cir. 1998); Fitz v. Pugmire Lincoln-Mercury, Inc., 348 F.3d 974, 977 (11th Cir. 2003); Mungin v. Katten Muchin & Zavis, 116 F.3d 1549, 1558 (D.C. Cir. 1997).

⁴⁸ See, e.g. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980)(employee-plaintiff not required to show intent); compare Whidbee v. Garzarelli Food Specialities, Inc., 223 F.3d 62, 74 (2d Cir. 2000)(employee-plaintiff required to show intent).

⁴⁹ Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294 (2nd Cir. 1999), cert. denied, 529 U.S. 1107 (2000).

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Turner v. Dowbrands, Inc., No. 99-3984, 2000 WL 924599, at *1 (6th Cir. June 26, 2000). In addition to the 6th Circuit Court of Appeals, a number of district courts also subscribed to the general holding of *Caridad*, including: Alberter v. McDonald's Corp., 70 F.Supp. 2d 1138, 1147 (D.Nev. 1999); Desmarteau v. City of Wichita, Kansas, 64 F.Supp. 2d 1067, 1079 (D.Kan. 1999); Keaton v. State of Ohio, No. C2-00-1248, 2002 WL 1580567, at *9 (S.D. Ohio June 3, 2002); Scott v. Ameritex Yarn, 72 F.Supp. 2d 587, 594 (D.S.C. 1999).

⁵³ Jaros v. Lodge Net Entertainment Corp., 294 F.3d 960, 966 (8th Cir. 2002).

⁵⁴ See, e.g., Jackson v. Arkansas Department of Education, 272 F.3d 1020 (2001), cert. denied, 536 U.S. 908 (2002).

⁵⁵ See *supra*, Note 52.

⁵⁶ 124 S.Ct. at 2347.

⁵⁷ Ibid.

⁵⁸ Id., at 2348.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ 124 S.Ct. at 2349.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Id., at 2348.

⁷³ *Suders v. Easton*, 325 F.3d 432 (3rd Cir. (Pa.) Apr. 16, 2003).

⁷⁴ 325 F.3d at 443.

⁷⁵ Ibid.

⁷⁶ 540 U.S. 1046, 124 S.Ct. 803 (2003).

⁷⁷ *Pennsylvania State Police v. Suders*, 124 S.Ct. 803 (Dec. 1, 2003).

⁷⁸ 124 S.Ct. at 2352.

⁷⁹ Ibid. (“We agree with the lower courts and the EEOC that Title VII encompasses employer liability for a constructive discharge.”).

⁸⁰ Id., at 2347.

⁸¹ Id., at 2358.

⁸² Id. at 2351.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Id., at 2356.

⁸⁸ Ibid.

⁸⁹ Id., at 2357.

⁹⁰ Ibid.

⁹¹ Id., at 2358.

⁹² Hoffman, Mark A. (2004). “Court Upholds Employer Defense; Supreme Court Rejects Strict Liability for Sexual Harassment Claim.” *Business Insurance*, Crane Communications, Inc. [News Brief].

⁹³ Ivancevich, John M. (1992). *Human Resource Management Foundations of Personnel* (5th Ed.). Boston, MA: Irwin, p. 104.

⁹⁴ *See supra*, Note 16.

⁹⁵ *See supra*, Note 2.

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- ⁹⁶ Robinson, Robert K., Mero, Neal P., Nichols, Dave L. (2001). More Than Just Semantics: Court Rulings Clarify Effective Anti-Harassment Policies, *Human Resource Planning*, 24:4
- ⁹⁷ Ibid.
- ⁹⁸ ---- (2004). Plaintiff's Sexual Harassment Suit Fails Because She Failed to Use Policy. *Fair Employment Practices Guidelines*, 588 (1)(3).
- ⁹⁹ Id., discussing Conatzer v. Medical Professional Building Services Corp., 2004 WL 789801 (10th Cir. (Okla.))(unpublished).
- ¹⁰⁰ Ibid.
- ¹⁰¹ See *supra*, Note 9.
- ¹⁰² Faragher v. City of Boca Raton, 524 U.S. 775, 777-778 (1998).
- ¹⁰³ See *supra*, Note 96, citing EEOC v. R&R Ventures, 244 F.3d 334 (4th Cir. 2001).
- ¹⁰⁴ Robinson, Robert K., Fink, Ross L., Lane, Peggy L. (1994) Developing an Expert System as Sexual Harassment Investigative Tool, *Human Resource Planning*, 17:3, p. 75.
- ¹⁰⁵ Sherwyn, David, Wagner, Paul, Gilman, Gregg. (2004). Trying to Make Sense of Sexual Harassment Law After Oncale, Holman, and Rene. *Cornell Hotel & Restaurant Administration Quarterly*, 45:2, p. 172.
- ¹⁰⁶ See, e.g., Oreskovic, Alexei (2003). The Young and Vulnerable (EEOC Tackles Teenage Worker Sexual Harassment Cases), *Corporate Counsel*, 10:9.
- ¹⁰⁷ Jackson, S.E., ed. (1993) *Diversity in the Workplace: Human Resource Initiatives* (New York: Guilford Press); Kessler, L.I. (1990), *Managing Diversity in an Equal Opportunity Workplace* (Washington, DC; National Foundation for the Study of Employment Policy, Cox, T., Jr. (1993), *Cultural Diversity in Organizations: Theory, Research, and Practice* (San Francisco: Berrett-Koehler Publishers), pp. 216-218.
- ¹⁰⁸ See, e.g., Davis v. City of Sioux City, 115 F.3d 1365 (8th Cir. 1997).
- ¹⁰⁹ 124 S.Ct. at 2347.
- ¹¹⁰ Burns, James A., Jr. (2001). The Top Ten Ways to Guarantee Employee Lawsuits, *Employee Relations Law Journal*, 27:3.
- ¹¹¹ Mesritz, George D. (1996) Constructive Discharge and Employer Intent: Are the Courts Split Over a Distinction Without a Difference? *Employee Relations Law Journal*, 21:4, pp. 91-107.
- ¹¹² Caudron, Shari. (1996). Staying Out of Court, *Personnel Journal*, 75:11, p. S1(4).
- ¹¹³ Merrick, Neil. (1996). Masterstrokes for a Brighter Canvass, *People Management*, 2:17, p. 41.
- ¹¹⁴ Meyer, John. (2002). Strategic Communication Enhances Organizational Performance, *Human Resource Planning*, 25:2, p. 7.