



Labor and Employment Law Information Memo

June 2004

Bond, Schoeneck & King, PLLC

New York

Albany ■ 518-533-3000
Buffalo ■ 716-566-2800
Garden City ■ 516-267-6300
Ithaca ■ 607-330-4000
New York ■ 646-253-2300
Oswego ■ 315-343-9116
Syracuse ■ 315-218-8000
Utica ■ 315-738-1223

Kansas

Overland Park ■ 913-234-4400

Bond, Schoeneck & King, P.A.

Florida

Bonita Springs ■ 239-390-5000
Naples ■ 239-659-3800

THE SUPREME COURT HOLDS THAT EMPLOYERS MAY ASSERT AN AFFIRMATIVE DEFENSE TO SEXUAL HARASSMENT CLAIMS INVOLVING CONSTRUCTIVE DISCHARGE: *PENNSYLVANIA STATE POLICE V. SUDERS*

On June 14, 2004, the Supreme Court held, in *Pennsylvania State Police v. Suders*, that an employer may defend itself against a sexual harassment claim involving constructive discharge by showing: (1) that it had an accessible and effective policy for reporting and resolving complaints of sexual harassment; and (2) that the employee unreasonably failed to take advantage of the employer's complaint procedures. In so holding, the Supreme Court reversed a lower appellate court ruling that constructive discharge resulting from alleged sexual harassment by an employee's supervisor is a tangible adverse employment action that renders an employer strictly liable for the alleged harassment.

This information memo sets forth the legal framework utilized by the courts in analyzing claims of sexual harassment by a supervisor, describes the factual background and holding of the *Suders* case, and discusses the significance of the *Suders* case to employers.

The Legal Framework: *Faragher* and *Ellerth*

In 1998, the Supreme Court issued two decisions (*Faragher v. Boca Raton* and *Burlington Industries v. Ellerth*) that establish the legal framework that courts continue to utilize in determining whether an employer should be liable for sexual harassment committed by a supervisor. In those cases, the Supreme Court held that when an employee is harassed by her supervisor, the relevant determination is whether the employee suffered a tangible job detriment, such as discharge, demotion, denial of a promotion, undesirable reassignment, or a marked change in benefits. If the employee has suffered a tangible job detriment, the employer is strictly liable for the supervisor's harassing conduct, even if the employer had an anti-harassment policy, the employee did not complain about the harassment, and the employer had no notice of the

BS&K publications are for clients and friends of the firm and are not intended to substitute for professional counseling or advice.

For information about our firm, our practice areas and our attorneys, please visit our interactive web site, www.bsk.com.

© 2004 Bond, Schoeneck & King, PLLC
All Rights Reserved

Printed on recycled paper

BOND, SCHOENECK & KING, PLLC
ATTORNEYS AT LAW ■ NEW YORK FLORIDA KANSAS



harassment. In contrast, if the employee has not suffered a tangible job detriment, the employer may avoid liability by showing: (1) that it exercised reasonable care to prevent or correct promptly any harassment (for example, by establishing an anti-harassment policy and effective complaint mechanism); and (2) that the employee unreasonably failed to take advantage of the employer's complaint procedures.

The *Suders* Case

In March 1998, the plaintiff, Nancy Drew Suders, was hired by the Pennsylvania State Police ("PSP") as a police communications officer. Suders alleged that, throughout her employment with the PSP, three male supervisors made unwelcome sexual comments and gestures. In June 1998, Suders was accused by one of her supervisors of taking a missing accident file home with her. After this incident, Suders alleged that she contacted the PSP's Equal Employment Opportunity ("EEO") Officer and reported that she "might need help." The PSP's EEO Officer gave Suders her telephone number, but neither Suders nor the EEO Officer followed up on this initial conversation.

Suders alleged that she contacted the EEO Officer again in August 1998 and reported that she felt harassed and was afraid. The EEO Officer told her to file a complaint, but did not tell her how to obtain a complaint form. Two days later, Suders was arrested by her supervisors for stealing computer skills tests. After being apprehended and questioned regarding the alleged theft, Suders resigned. Suders was never charged with the theft of the computer skills tests.

After her resignation, Suders filed a sexual harassment claim against the PSP, alleging that her supervisors created a hostile work environment, and that she was constructively discharged as a result of the hostile work environment. In order to state a claim for constructive discharge, a plaintiff must show that his or her working conditions became so intolerable that a reasonable person in his or her position would have felt compelled to resign. A plaintiff who states a valid claim for constructive discharge based on intolerable discriminatory working

conditions can recover back pay and other forms of compensatory damages available to a plaintiff who is actually discharged from employment.

The District Court granted the PSP's motion for summary judgment. The District Court found that, although Suders had demonstrated a question of fact regarding whether she was subjected to a hostile work environment created by her supervisors, the PSP was not liable for the supervisors' harassing conduct because it had policies and procedures in place to prevent and correct harassment, and Suders had unreasonably failed to take advantage of those procedures.

The Third Circuit Court of Appeals reversed the District Court's decision. The Third Circuit held that constructive discharge constitutes a tangible adverse employment action that renders an employer strictly liable for supervisory harassment under the *Faragher* and *Ellerth* framework. The Third Circuit found that if Suders were able to prove her constructive discharge claim, the *Faragher/Ellerth* affirmative defense would not be available to shield the PSP from liability. The Third Circuit also held that even if the *Faragher/Ellerth* affirmative defense were available to the PSP, there were genuine issues of material fact regarding the effectiveness of the PSP's harassment policy and procedures.

The Supreme Court vacated the Third Circuit's decision, holding that the Third Circuit erred in declaring that the *Faragher/Ellerth* affirmative defense is never available to an employer in constructive discharge cases. The Supreme Court found that Suders' constructive discharge claim was based on an alleged hostile work environment created by her supervisors rather than an "official act" of the PSP, and that the *Faragher/Ellerth* affirmative defense was therefore available to the PSP under these circumstances. Essentially, the Supreme Court held that a constructive discharge, by itself, does not constitute a "tangible adverse employment action" that renders an employer strictly liable for supervisory harassment. However, the Supreme Court agreed with the Third Circuit that summary judgment should be denied because there were genuine issues of material fact regarding Suders' hostile work environment and constructive discharge claims.

The Supreme Court left open the possibility that an employee's constructive discharge could render an employer strictly liable if it is caused by an "official act" of the employer. The examples cited by the Supreme Court regarding what constitutes an "official act" of the employer suggest that a tangible adverse employment action is necessary to fall within the strict liability standard. For example, if the employee is demoted or transferred to a less desirable job assignment due to her failure to accept a supervisor's advances, and the employee is able to show that the new job or new assignment was so intolerable that a reasonable person would have felt compelled to resign, the employee's constructive discharge claim would likely fall within the strict liability standard.

The Significance of the *Suders* Decision

Had the Supreme Court held that constructive discharge, by itself, constitutes a tangible adverse employment action, employers would have had an extremely difficult time defending themselves against claims brought by employees who allege that they were forced to resign as a result of supervisory sexual harassment. In addition, employees would have had more of an incentive to resign and file a lawsuit against their employers in response to supervisory harassment rather than give their employers the opportunity to investigate and stop the harassment from occurring. The Supreme Court's decision re-affirms the general principle that an employee must make an internal complaint and give the employer an opportunity to take corrective action before filing a claim with an outside agency or in court.

The Supreme Court's decision highlights the importance of having an anti-harassment policy and effective procedures to address complaints of harassment. Employers should also conduct periodic anti-harassment training to ensure that these policies and procedures are communicated to their employees.

If you have any questions regarding the *Suders* case, or need any advice or assistance with respect to anti-harassment policies, procedures, or training, please contact:

In the Capital District, call 518-533-3000 or e-mail:

John M. Bagyi	jbagyi@bsk.com
Nicholas J. D'Ambrosio	ndambrosio@bsk.com

In Central New York, call 315-218-8000 or e-mail:

R. Daniel Bordoni	dbordoni@bsk.com
Robert A. LaBerge	rlaberge@bsk.com

On Long Island, call 516-267-6300 or e-mail:

Terry O'Neil	toneil@bsk.com
--------------	----------------------------------------------------

In New York City, call 646-253-2300 or e-mail:

Michael I. Bernstein	mbernstein@bsk.com
Louis P. DiLorenzo	ldilorenzo@bsk.com
Stanley Schair	sschair@bsk.com

In Western New York, call 716-566-2800 or e-mail:

Robert A. Doren	rdoren@bsk.com
Daniel P. Forsyth	dforsyth@bsk.com
Richard C. Heffern	rheffern@bsk.com

IMPORTANT NOTICE

The New York State Division of Human Rights has issued a supplemental non-discrimination poster to reflect the recent amendments to the New York Human Rights Law prohibiting discrimination based on sexual orientation and military status. A copy of the supplemental poster is enclosed with this information memo. It should be posted along with the non-discrimination poster previously issued by the Division of Human Rights.

BS&K HR Training Services

More and more often, courts are finding that employers who have sexual, and other, harassment policies, but who have not provided actual supervisory and management training in those areas as a supplement to those policies, simply have not done enough to avoid costly liability.

Here are some of the things courts have been saying about the need for formal training:

- The failure of an employer to provide manager and supervisory training regarding the requirements of discrimination laws is an “**extraordinary mistake.**” (United States Court of Appeals for the Seventh Circuit)
- Only those employers which adopt anti-discrimination policies **and** take affirmative steps to educate their employees (especially their supervisory and management employees) about workplace anti-discrimination laws fall within the protection from punitive damages offered by Supreme Court decisions. (United States Court of Appeals for the Tenth Circuit)
- Employers must not only provide anti-discrimination training for supervisors and managers, but that training must be **mandatory.** (New Jersey Supreme Court)
- Even the EEOC’s published Guidelines provide that “reasonable care” to prevent harassment **must** include training, and that the promulgation of workplace policies standing alone are not enough.

BS&K can help you avoid these same mistakes. With almost 70 years in the Labor and Employment Law field, we have the knowledge and experience to provide cost-effective EEO training for your supervisors and managers. You can choose from one of our existing programs or we can design one specifically with you in mind. Either way you will find this to be a prudent approach to risk management.

Call us for details concerning any of our Supervisory and Management Training Programs:

- ADA and FMLA
- Avoiding Discrimination
- Conducting Workplace Investigations
- Discipline and Discharge
- Diversity
- Documentation and Recordkeeping
- Employee Evaluations and Appraisals
- Fostering Positive Employee Relations
- Interviewing and Hiring
- Layoffs Without Lawsuits
- Problem Resolution (Procedures)
- Sexual and Other Harassment
- Supervising Sick, Injured or Disabled Employees
- Working With and Without Unions

Albany ▪ **Capital District** ▪ Nicholas J. D’Ambrosio, ndambrosio@bsk.com, 518-533-3000

Buffalo ▪ **Western New York** ▪ Richard C. Heffern, rheffern@bsk.com, 716-566-2800

Long Island ▪ **Garden City** ▪ Terry O’Neil, toneil@bsk.com, 516-267-6300

New York City ▪ **Metro Area** ▪ Louis P. DiLorenzo, ldilorenzo@bsk.com, 646-253-2300

Syracuse ▪ **Central New York** ▪ R. Daniel Bordoni, dbordoni@bsk.com, 315-218-8000