Editorial Note: The issue of sexual harassment in the workplace in other countries will be forthcoming in the January 2005 column.

The Supreme Court’s Ruling in Suders—They Missed the Boat

The Supreme Court ruled in Pennsylvania State Police v. Suders on June 14, 2004. This case was previewed in this column in the July 2004 issue of TIP (in press before the ruling was handed down). At that time, I used the impending ruling as an occasion to summarize 25 to 30 years of case law on sexual harassment. I didn’t expect the ruling itself to be earth shattering. Nor did I not expect it to raise more questions than it answered—it did. The ruling was 8 to 1 with a dissent from Justice Thomas. A dissent from Justice Thomas on a sexual harassment ruling is ordinarily no big deal. However, in this case, I agree with him. I will explain.

Overview of the Majority Opinion

Even unreasonable people (and the Pennsylvania State Police [PSP]) know that Nancy Suders was a victim of hostile environment sexual harassment. Furthermore, under standards established in Burlington v. Ellerth (1998) and Faragher v. Boca Raton (1998), the PSP was a likely loser on the affirmative defense that it (a) had a policy to prevent and quickly prevent such abuses and (b) Nancy Suders unreasonably failed to use that policy. Suders notified an appropriate authority (Virginia Smith-Elliot, the EEO officer for PSP). Although her first contact was informal (that she might need help), 2 months later, Suders informed Smith-Elliot she was being sexually harassed and feared for her safety. Smith-Elliot told her to file a complaint but failed to inform her how to obtain a complaint form. In general, Smith-Elliot gave no indication of prompt investigation of the claim. Therefore, as in other cases cited in the July 2004 column (i.e., Coates v. Sundor Brands, 1998 & Shaw v. AutoZone, 1999), Nancy Suders was a likely winner under either prong of the Ellerth-Faragher standard. So, if not for the issue of constructive discharge, this case would probably not have made it to the Supreme Court.

1 The ruling can be found on the Supreme Court’s official Web site, http://www.supremecourtus.gov/.
2 The relevant background issues in Suders are discussed in detail in the July 2004 issue of this column. The author recommends reading that article prior to reading this one.
The Supreme Court reviewed *Suders* because of a conflict among several circuit courts on whether constructive discharge is a **tangible employment action**. *Ellerth-Faragher* rules dictate that harassment resulting in negative tangible employment actions mandates **strict liability** (with no affirmative defense). Examples of tangible employment actions cited in *Ellerth* include “discharge, demotion, or undesirable reassignment.” In *Suders v. Easton* (2003), the 3rd Circuit ruled that constructive discharge is a tangible employment action, thereby agreeing with the 8th Circuit (see *Jaros v. LodgeNet*, 2002) but disagreeing with the 2nd and 6th Circuits (see *Caridad v. Metro-North*, 1999 & *Turner v. Dowbrands*, 2000). So, the Supreme Court had no choice. It had to review one of these cases and provide a definitive ruling on whether constructive discharge is a tangible employment action implying strict employer liability. The problem is the ruling in *Suders* is hardly definitive.

The 3rd Circuit issued a two-prong definition of constructive discharge, ruling the plaintiff must prove:

(1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign...and (2) the employee’s reaction to the workplace situation—that is, his or her decision to resign—was reasonable given the totality of circumstances.

The Supreme Court had no problem with the definition, per se, but rather with the conclusion that if this proof is successful, the constructive discharge is tantamount to a tangible employment action, thereby implying strict employer liability. It would have been fine if the Supreme Court ruled that constructive discharge is or is not a tangible employment action, with nothing in between. The problem is that the actual ruling was tantamount to sometimes yes, sometimes no.

Speaking for seven other justices, Justice Ginsburg called constructive discharge a “worse case harassment scenario” in which the abuse is “ratcheted up to the breaking point.” This is consistent with the 3rd Circuit’s characterization of constructive discharge as “an aggravated case of...[a]...hostile work environment.” Justice Ginsburg also agreed with the 3rd Circuit that constructive discharge should be inferred from the perspective of a reasonable person. However, where it gets obtuse is when Justice Ginsburg states:

We conclude that an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor’s official act precipitates the constructive discharge; absent such a “tangible employment action,” however, the defense is available to the employer whose supervisors are charged with harassment. We therefore vacate the Third Circuit’s judgment and remand the case for further proceedings.

Strange as it sounds, that means a constructive discharge is an official company act if it is preceded by an official company act.
More specifically, Ginsburg ruled that constructive discharge qualifies as a tangible employment action if, prior to quitting, the reasonably acting employee suffers “a demotion or a reduction in compensation.” So what’s new here? Based on Ellerth alone, the employee who is demoted or suffers a pay reduction for not consenting to sexual relations with a supervisor already has a strict liability claim, even if that employee does not resign. After all, “discharge, demotion, or undesirable reassignment” are examples used by the Supreme Court for defining tangible employment actions in Ellerth. So nothing is added by the Suders ruling, in this author’s opinion, but confusion.

**Historical Definitions of Constructive Discharge**

All nine Supreme Court justices agreed that constructive discharge is a time-honored concept in the National Labor Relations Act (NLRA). Justice Thomas dissented, however, because he believed the definition of constructive discharge used by the majority is not faithful to the NLRA definition. He was correct.

As noted in Ginsburg’s majority ruling, the NLRA definition of constructive discharge involves a motive to force the employee to quit. Accordingly:

> [T]he National Labor Relations Board (NLRB) developed the concept of constructive discharge to address situations in which employers coerced employees into resigning because of the employees’ involvement in union activities….the NLRB requires employees to establish two elements to prove a constructive discharge. First, the employer must impose burdens upon the employee that “cause, and [are] intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee’s union activities.”

Thus, in the NLRA, constructive discharge requires a conscious effort to make life so miserable for employees involved in union activities so as to coerce them into quitting. It’s like a department head that coerces a tenured professor into quitting by raising the teaching load and, in other ways, making his or her life miserable (fictitious, of course). The point is, under NLRA rules, the intention to force resignation in retaliation for legal union activities is the essence of the constructive discharge claim.

Thomas correctly states that in early Title VII cases, courts used a definition of constructive discharge consistent with the NLRA definition. Thomas cited Muller v. United States Steel (1975), which featured a charge of discriminatory failure to promote. In that case, the 9th Circuit ruled:

> Constructive discharge exists when the employer deliberately makes an employee’s working conditions so intolerable that the employee is forced into an involuntary resignation….to find constructive discharge the fact...
finder must conclude that working conditions would have been so difficult or unpleasant that a reasonable person in the employee’s position would be compelled to resign.

Thomas also cited *Derr v. Gulf Oil* (1986), which featured a charge of discriminatory demotion. Here, the 10th Circuit, echoing *Muller*, ruled that constructive discharge occurs if “the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee’s position would feel compelled to resign.” Therefore, Thomas concluded:

If, in order to establish a constructive discharge, an employee must prove that his employer subjected him to an adverse employment action with the specific intent of forcing the employee to quit, it makes sense to attach the same legal consequences to a constructive discharge as to an actual discharge. [Emphasis added by author]

Thus, the key difference between Thomas and the *Suders* majority is that as in NLRA, there must be a motive to terminate over and above conditions that compel a reasonable person to resign. Ginsburg’s ruling requires only conditions that compel the resignation.

**The EEOC’s Definition of Constructive Discharge**

The Equal Employment Opportunity Commission (EEOC) rarely errs when it interprets case law. However, in this author’s opinion, the EEOC incorporated a disjointed definition of construct discharge in its *Policy Guidance on Current Issues of Sexual Harassment*, issued in March 1990 (EEOC N-915-050).³ Interpreting rulings such as *Derr v. Gulf Oil* (1986; the same case subsequently cited by Thomas in *Suders*), the EEOC stated the following in its 1990 guidance:

Claims of ‘hostile environment’ sexual harassment often are coupled with claims of constructive discharge. If constructive discharge due to a hostile environment is proven, the claim will also become one of ‘quid pro quo harassment’.²⁶ It is the position of the Commission and a majority of courts that an employer is liable for constructive discharge when it imposes intolerable working conditions in violation of Title VII when those conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim’s resignation. [Emphasis added by author]

There are two obvious points to note. First, constructive discharge is defined as a form of quid pro quo harassment, which the Supreme Court later defined as implying tangible employment actions and strict employer liability in *Ellerth* and *Faragher*. Second, the EEOC interprets cases like *Derr* to imply that constructive discharge occurs when (a) it is foreseeable by the employer

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due to intolerable working conditions and that (b) the reasonable person feels compelled to quit—even if there is no intention to force the resignation.

There is a third point to note, but it is more subtle. Nested in the above quote is Footnote #26, which states:

However, while an employee’s failure to utilize effective grievance procedures will not shield an employer from liability for “quid pro quo” harassment, such failure may defeat a claim of constructive discharge. Therefore, ultimately, what we have here is an oxymoron. A cannot equal B if B equals C and A does not. Translated, that means constructive discharge cannot possibly be tantamount to quid pro quo if quid pro quo implies strict liability and constructive discharge leaves room for an affirmative defense. That said, this should not be open season for criticizing the EEOC. Far from it. The major purpose of the 1990 guidance was to interpret Meritor v. Vinson (1986), the Supreme Court’s first ruling on sexual harassment. As noted in the July 2004 column, Meritor was clear in its definition of hostile environment harassment but unclear on the issue of employer liability when hostile harassment is proven. The 1990 guidance correctly anticipated the affirmative defense for hostile environment claims later clarified by the Supreme Court in 1998 in Ellerth and Faragher. The 1990 guidance also correctly anticipated what ultimately amounted to the conditions an employer must satisfy to prove it acted to prevent and quickly correct sexual harassment, the main component in the affirmative defense. Thus, on the issues of greatest importance, the 1990 guidance was as good as it gets. Constructive discharge was a minor issue at the time. Indeed, the EEOC has not had occasion to further discuss constructive discharge in any of its subsequent releases. Unfortunately, its passing reference to constructive discharge possibly misdirected some district and circuit court judges, particularly if they failed to process Footnote #26.

**Implications of the Suders Ruling**

To reiterate, Justice Ginsburg’s ruling implies strict liability if “a supervisor’s official act precipitates the constructive discharge,” but permits the Faragher-Ellerth affirmative defense “absent such a tangible employment action.” Ginsburg cited Robinson v. Sappington (2003) as an example of a strict liability case and Reed v. MBNA (2003) as an example of an affirmative defense case.

In Robinson v. Sappington (2003), Melissa Robinson was a judicial secretary to Warren Sappington, a county judge. The judge harassed Robinson on a daily basis. Although he often suggested it, Sappington never assaulted Robinson physically. Ultimately, Robinson asked for a transfer and was obliged. However, the judge who authorized the transfer (Judge Greanias) told Robinson that the new judge (Judge Francis) would not be happy with
the transfer and the first 6 months working for him would be “hell.” Judge Greanias also advised Robinson it would be in her best interest to resign. Judge Sappington continued to harass Robinson even after she left his supervision. As summarized by Ginsburg in *Suders*, the 7th Circuit concluded:

The *Robinson* plaintiff’s decision to resign, the court explained, “resulted, at least in part, from [the presiding judge’s] official actio[n] in transferring” her to a judge who resisted placing her on his staff.

The 7th Circuit ruled for Robinson, denying the option of the affirmative defense (i.e., favoring strict liability), and Ginsburg agreed.

In *Reed v. MBNA* (2003), Bobbi-Lyn Reed was a 17-year-old telemarketer and William Appel was her 34-year-old supervisor. Appel harassed Reed on a daily basis, and physically assaulted her one evening when Reed was caring for Appel’s child in Appel’s home. Appel then threatened Reed, telling her they would both be fired if she complained to management. As summarized by Ginsburg in *Suders*, the 1st Circuit concluded:

[T]he supervisor’s conduct in *Reed* “was exceedingly unofficial and involved no direct exercise of company authority”; indeed, it was “exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed.

The 1st Circuit ruled that the “alleged wrongdoing did not preclude the employer from asserting the *Ellerth/Faragher* affirmative defense,” and Ginsburg agreed.

I have two observations. First, both perpetrators acted egregiously, but I think a reasonable person would find Appel’s behavior more egregious because he was guilty of sexual assault (in the criminal sense) and Sappington was not. Nevertheless, the 7th Circuit explained that “Appel’s conduct was exceedingly unofficial because it involved no direct exercise of company authority.” That seems unjust.

Second, although both plaintiffs were threatened with tangible consequences, the basis for strict liability in *Robinson v. Sappington* (2003) was the transfer authorized by Judge Greanias, which was considered an official act, not the threatening recommendation that Robinson resign. In *Reed v. MBNA* (2003), the 1st Circuit dismissed Appel’s threat to Reed (that both would be terminated if she complained), stating:

Reed claims—and this is the possible qualification—that even if official action is needed for a tangible employment action, here Appel told her that they would both be fired if she reported the assault. However, we think that this issue is controlled by the Supreme Court’s treatment in *Ellerth* that “unfulfilled threats” are not tangible employment actions. The Court also stated that the concept of a tangible employment action is based on the distinction between “cases in which threats are carried out and those where they are not or are absent altogether.”
In fact, that ruling does follow from *Burlington v. Ellerth* (1998). Kimberly Ellerth was threatened with termination by Ted Slowik. Her supervisor, if she did not submit to his sexual advances, made threats that were never carried out. Ellerth’s lawyers argued for quid pro quo (and strict liability). The Supreme Court answered with what is now known as the *Ellerth-Faragher* affirmative defense and made the above distinction cited by the 1st Circuit between threats that are carried out (tangible) and threats that are not carried out (not tangible).

There are two ways to view this. First, it is arguable that a threat by a supervisor is an official act because the supervisor is in an official position to carry it out. But second, one can argue that the *Ellerth-Faragher* incorporates that consideration because it mitigates against the second prong of the affirmative defense (that the victim unreasonably failed to take advantage of the employer’s policy to prevent and promptly correct sexual harassment). Obviously, it’s not very reasonable to expect an employee to use a policy under the threat of retaliation.

**Conclusions**

In the July 2004 column, I confessed to being confused on the definition of constructive discharge. After the July 2004 issue of *TIP* hit the streets, I received several e-mails offering to enlighten me, even one from my own PhD student. (who is very sharp). However, despite these efforts, I remain confused. I see three possible definitions of constructive discharge, and I don’t believe I’m hallucinating. First, there is the 3rd Circuit definition, endorsed by Ginsburg, that asks if a reasonable person was compelled to resigned regardless of what the employer intended or could have foreseen. Second, there is the EEOC definition, which adds to the 3rd Circuit definition the foreseeability by the employer that the working conditions were intolerable, regardless of what the employer intended. Finally, there is the NLRA definition, which requires proof that the employer intended to force a resignation by creating conditions so intolerable as to coerce the reasonable person to feel compelled to quit.

A second thought that occurred to me follows from something I once learned in a philosophy course I took in college (long ago and far away). Thomas Aquinas, the theologian, proposed the ontological argument on the existence of God. He said think of the most perfect thing you can imagine and call it God. The thing must exist or else it is not perfect. I can apply that to Ginsburg’s statement that constructive discharge is a “worse case harassment scenario.” So, imagine the worst case of sexual harassment you can think of. It must be indefensible, or else it cannot be the “worst case harassment scenario.”

Confusion and philosophy aside, there are two things I perceive clearly and distinctly (learned that one from Descartes). First, it makes no sense to
talk about constructive discharge if, to qualify for strict liability, it must involve a preceding official act that also qualifies for strict liability. Second, it makes no sense to have three definitions of constructive discharge floating around. Pick one, for perfect thing’s sake.

**Case Law Citations**

Derr v. Gulf Oil Corp (CA10 1986) 796 F. 2d 340.
Faragher v. City of Boca Raton (1998) 524 U.S. 775
Jaros v. LodgeNet Entertainment Corp. (CA8 2002) 294 F.3d 960.
Muller v. United States Steel Corp (CA10 1975) 509 F. 2d 923.
Reed v. MBNA Marketing Systems, Inc (CA1 2003) 333 F. 3d 27.
Shaw v. AutoZone, Inc. (CA7 1999) 180 F.3d 806.
Suders v. Easton (CA3 2003) 325 F.3d 432.

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