

## EMPLOYMENT LAW UPDATE

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### Federal Law

#### ***An Employee's Claims For "Constructive" Discharge May Be Barred If The Employee Fails To Take Advantage Of The Employer's Internal Preventative Procedures.***

***Pennsylvania State Police v. Suders*** (June 14, 2004) 124 S.Ct. 2342, 4 C.D.O.S. 5110

By Jason A. Geller and David P. Borovsky

Plaintiff Nancy Drew Suders quit her job as a police communications operator with the Pennsylvania State Police ("PSP"), allegedly as a result of a continuous barrage of sexual harassment by her supervisors. Although she reported some of the alleged harassment, she failed to follow up on the initial reports by filing a formal complaint. Suders then sued the PSP under Title VII for sexual harassment and "constructive" discharge.

In response, PSP asserted the ***Ellerth/Faragher*** defense, which applies where the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise". The Federal District Court granted summary judgment in favor of PSP, holding that Suders' claims failed because she did not avail herself of the procedures under PSP's internal anti-harassment program. The Third Circuit Court of Appeal reversed, holding that while the ***Ellerth/Faragher*** defense applies to claims for sexual

harassment, it did not apply to Suders' claim for "constructive" discharge. The Third Circuit held that a constructive discharge involves a tangible employment action, thereby making the defense inapplicable.

The Supreme Court granted review to address the question of whether the ***Ellerth/Faragher*** defense applied to claims for constructive discharge. In reversing the Third Circuit's decision, the U. S. Supreme Court found the defense applicable "unless the plaintiff quit ***in reasonable response*** to an "adverse action" officially changing her employment status or situation, e.g., a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions". As a result, unless a constructive discharge is precipitated by such an adverse employment action, the employer may rely on the ***Ellerth/Faragher*** defense to reduce or avoid liability. This decision is a victory for employers, and reinforces the importance of creating and

implementing workplace anti-harassment policies.

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