

CONSTRUCTIVE DISCHARGE POST SUDERS¹

Adele Rapport
Law Office of Richard T. Seymour PLLC
1150 Connecticut Ave. N.W.
Washington D.C. 20008
202-862-4325
adele@rickseymourlaw.net

I. The Suders Decision

On June 14, 2004 the United States Supreme Court decided *Suders v. Pennsylvania State Police*, 542 U.S. 129, 124 S. Ct. 2342, 159 L.Ed. 2d 204 (2004). In that decision, the court dealt with the constructive discharge issue as well as the definition of a tangible employment action. The facts in the *Suders* case were quite compelling. Plaintiff suffered egregious sex harassment, including “name calling, repeated episodes of explicit sexual gesturing, obscene and offensive sexual conversation and the posting of vulgar images.” *Id.* at 2347.² For example, the station manager repeatedly discussed people having sex with animals. One of her co-workers would frequently (5-10 times a night) grab his private parts and yell obscenities involving oral sex, apparently in imitation of a professional wrestler. She did tell her co-worker harasser that she did not think he should be engaging in such conduct, but did not complain about it to anyone else. She explained that the station commander was talking about bestiality and abusing children so she did not feel she could complain to him about it. She did approach the EEO officer and said she might need some help, but did not mention the details. She contacted the EEO officer later and said he was being harassed and was afraid, but felt the EEO officer was insensitive and unhelpful. The EEO Officer simply told Suders to fill out a complaint on a standard form. Suders could not find the form and was afraid that her supervisor was watching her every move.

¹ This article is an updated version of an article written in 2006 with research assistance from EEOC Trial Attorney Omar Weaver.

² *Suders* was a good case to take to the Supreme Court on the constructive discharge issue as it involved egregious harassment and conduct so severe that it should easily meet the stringent burden required for proof of constructive discharge in most jurisdictions.

The other officers set Suders up and falsely accused her of theft two days after she complained about the harassment. She was interrogated, handcuffed, photographed. When she tried to leave, she was told she could not do so because she was a suspect and was given Miranda rights. When she confirmed her intent to resign, she was allowed to leave.

The District Court granted the defendant's motion for summary judgment holding that while she had established a hostile environment, she could not prevail because no tangible job detriment had been proven and she had not used the internal grievance mechanism procedure. The district court did not address Suders' constructive discharge claim.

The Third Circuit ruled that there was an issue of fact as to the effectiveness of the grievance mechanism and found that she was constructively discharged. It noted that false charges of misconduct are tantamount to a discharge and commented on the excessive and humiliating treatment she received when she was handcuffed and photographed.

The appellate court then discussed the tangible employment action issue. It observed that the language used by the Supreme Court in *Faragher* when listing examples of such action was not exclusive and was not dispositive, as a claim of constructive discharge was not then before the Court. The Third Circuit reasoned that the constructive discharge standard is a difficult proof standard and, once met, it is the equivalent of an intentional discharge by an employer. Accordingly, the employer should be strictly liable for harassment when it results in constructive discharge. The court reasoned that this was fair because the supervisor has created an environment so severe that an employee felt compelled to resign, thereby abusing the official powers of the enterprise. The Supreme Court in *Faragher* noted that most tangible employment actions result in official paperwork so that the employer's authority is used to accomplish it. The Third Circuit noted that official paperwork is also generated in a resignation, implying that an employer has some duty to assure that when an individual resigns it is not because of a hostile work environment. The Third Circuit felt that this approach was most in line with the spirit of the *Faragher* ruling. In that regard, it noted that its holding would not discourage responsible behavior by the victim. The constructive discharge standard is so stringent employees will not be able to "walk off the job" at the first sign of harassment and expect to prevail under Title VII.

Prior to *Suders*, some circuits had held that a constructive discharge is **not** a tangible job detriment. See, *Turner v. Dowbrands, Inc.*, 2000 WL 924599 (6th Cir. June 26, 2000) (unpublished); *Caridad v. Metro North Commuter Railroad*, 191 F.3d 283 (2d Cir. 1999), *cert. denied* 529 U.S. 1107, 120 S.Ct. 1959, 146 L.Ed.2d 791(2000); *Powell v. Morris*, 37 F. Supp. 2d 1011 (S.D. Ohio 1999). Other Circuits had held that a constructive discharge **is** a tangible job detriment. See, *Reed v. BNA Marketing Systems, Inc.*, 333 F.3d 27 (1st Cir. 2003); *Robinson v. Sappington*, 351 F.3d 317, 336 (7th Cir. 2003); *Jaros v. Lodgenet Entertainment Corp.* 294 F.3d 960, 966 (8th Cir. 2002); *Jackson v. Ark. Department of Education* 272 F. 3d 1020, 1026 (8th Cir. 2001), *cert. denied*, 536 U.S. 908, 122 S. Ct. 2366, 153 L. Ed.2d 186 (2002). See also, the well reasoned and highly instructive opinion by Judge Mark Bennett in *Cherry v. Menard*, 101 F. Supp.2d 1160 (N. D. Iowa 2000).

In *Suders*, the Supreme Court first discussed the constructive discharge theory and held that Title VII covers constructive discharge claims. It explained that these claims are in essence aggravated sexual harassment claims. In order to establish such a claim the plaintiff must demonstrate that “her working conditions were so intolerable that her resignation qualified as a fitting response.” *Id.* at 2347. The Court noted that a constructive discharge involves two elements, an employee’s decision to leave and the precipitating conduct. The precipitating conduct may or may not involve official action by the employer. The Court preferred the approaches by the courts in *Reed* and *Robinson*, *supra*. In *Reed*, the court held that the plaintiff had not established a tangible job detriment based upon a supervisor’s assault as that was not an official act. In *Robinson*, the court found a tangible job detriment where the plaintiff was transferred and threatened following a complaint of harassment. The Court observed that the transfer was an official act that would support a tangible job action. The Court ultimately held that *Suders* did present a genuine issue of fact on the hostile environment and constructive discharge claims. It reversed the Third Circuit’s holding that the *Faragher* defense is never available in a constructive discharge case. In a footnote, the Court observed that some of the conduct may have been an official act, if so *Faragher* would not apply. *Id.* at 2347. Fn.11. Justice Thomas dissented. He objected to the constructive discharge definition he would have reversed the Third Circuit’s decision in this entirety.

II. The Status of Constructive Discharge Law Post *Suders*

A. The Constructive Discharge Standard-A Two Tiered Analysis

Courts have been citing the *Suders* language or using similar language to describe the type of evidence necessary to support a constructive discharge claim and have added some nuances. For example, in *Smith v. Henderson*, 376 F.3d 529 (6th Cir. 2004), the Sixth Circuit described the evidentiary burden as “working conditions would have been so difficult or unpleasant that a reasonable person would have felt compelled to resign. *Id.* at 533-34, citing *Held v. Gulf Oil Co.* 684 F. 2d 427, 432 (6th Cir. 1982). In a lower court decision, the Sixth Circuit standard was also described as evidence showing that “a reasonable woman in the plaintiff’s shoes would find the working conditions objectively intolerable”. *Myers v. Todd’s Hydroseeding & Landscape, L.L.C.*, 368 F. Supp. 808 (E.D. Mich. 2005). The *Myers* court also stated that the plaintiff must establish aggravating factors beyond proof of discrimination and that the employer reasonably foresaw the impact of its conduct on the employee expected. There, the plaintiff claimed seven instances of harassment including references to “big boobs”, panty lines, G-strings and genitalia size in her presence, the harasser touching her on the shoulder, comments about her appearance, and figure and a few other less offensive acts directed at other females in her presence. The above court held that the above described evidence did not meet the constructive discharge standard or even support a hostile environment claim.

The Eighth Circuit used similar language in describing the constructive discharge standard in *Tatum v. Arkansas Dept of Health*, 2005 WL1421689 (8th Cir. 2005). There, the plaintiff claimed that the defendant tolerated an environment that included sexual jokes, cartoon and gags that were circulated to employees once every 3-6 months. She was physically harassed

by a co-worker. He placed her hand on his penis, made comments about his condition and asked her if it felt good. He also asked her to come over to his house for the weekend because his wife was away. She complained about the conduct to management and the defendant took its time responding to her complaints. During the investigation, another female employee stated that the same co-worker made inappropriate sexual remarks to her as well. The District Court let the hostile work environment claim go to the jury and it awarded the plaintiff \$300,000 in compensatory damages. However, the District Court found that she had not established a constructive discharge and the Eighth Circuit agreed. It noted that Tatum had not experienced further harassment after she reported the incidents, and her fear of working in the same office with the harasser was not objectively reasonable because he had not done anything overtly threatening. The Eighth Circuit described the constructive discharge standard as follows; “‘Constructive discharge occurs when an employer deliberately renders the employees working condition intolerable thereby forcing her to quit.’ *Baker v. John Morrell & Co.*, 382 F.3d 816, 829 (8th Cir. 2004). To prove a case of constructive discharge a plaintiff must show that: (1) ‘a reasonable person in her situation would find the working conditions intolerable’ and (2) ‘the employer intended to force the employee to quit’. *Gartman v. Gencorp. Inc.*, 120 F.3d 127, 130 (8th Cir. 1997).” It should be noted that the *Suders* Court did not require that the plaintiff prove that the employer intended to force the employee to resign.

B. A Real Choice to Stay or Go

Courts have also focused on whether the plaintiff had a real choice to stay without fear of continuing discrimination. If so, they cannot claim constructive discharge. For example in *Baca v. Sklar*, 398 F.3d 1210 (10th Cir. 2005), the Tenth Circuit found that the employer had offered the plaintiff viable continuing employment options, but he chose to leave. The plaintiff claimed his position had been undermined by his supervisor. He had received a letter of reprimand, his supervisory duties were given to another employee, his supervisor dealt directly with this staff, filed a charge against him, requested his resignation on several occasions and threatened to move his office and continue to take away supervisory responsibilities. The parties attempted an internal mediation where Baca essentially insisted on his proposed solution, that he work at home until they found him a new job. He was ultimately offered continued employment, which he rejected in favor of a deal where he would be paid six months severance while he looked for a new job. The court indicated that resignation with severance may have been his best option under the circumstances, but he was not in a situation where he had no choice but to quit and accordingly could not establish a constructive discharge claim. *Id* at 1218.

In contrast, in *Saroli v. Automation & Modulab Components, Inc.*, 405 F. 3d 446 (6th Cir. 2005), the court found that the plaintiff was forced to resign. There the plaintiff was a high level manager reporting directly to the owners. She advised them she was pregnant and wanted to take maternity leave. The Defendant was not responsive to her verbal requests to discuss her maternity leave so she sent a written proposal. The next day, she was advised that the defendant had hired the son of one of the owners who was to take over some of her responsibilities and that she would be reporting to him. The owners refused to discuss the terms of her maternity leave, other than to distinguish her voluntary condition from the medical leaves taken by male employees for conditions that (unlike her pregnancy) could not be controlled or planned.

When Saroli returned to work, she was advised for the first time that she needed a doctors' note and she was told there was no position for her at that time. The owners said she could remain employed if she wanted to do. They would decide her new job duties that would likely be decreased from her former responsibilities or, she could leave and get severance or stay for 60-90 days while looking for another job. The court found that the evidence was sufficient to support a finding that "a reasonable person in Saroli's position would have felt that Shore created an intolerable working environment with the intent of forcing Saroli to resign" *Id.* at 452.

See also, *Jorge v. Rumsfeld*, 404 F. 3d 556 (1st Cir. 2005) (court rejected ADEA claim but noted that constructive discharge can be established in ADEA claim based on offer of early retirement where refusal of offer would result in working conditions that would be so onerous that a reasonable person would feel compelled to resign). *Id.* at 562.

In *Mainor v. Chicago Transit Authority*, 2005 WL 30050604 (N. D. Ill. Nov. 15, 2004), the court refused to extend *Suders* to a failure to transfer (a so-called constructive suspension). There, the plaintiff repeatedly complained about sexual harassment including sexual contact (the harasser pulled the plaintiff's head back and forced his tongue in her mouth, put his hand between her thighs and grabbed her breast). He also leered at her and stared at her in an intimidating fashion. As a result of her initial complaints, the harasser was suspended for 21 days and was given EEO training. The harassment continued and nothing was done about the last two incidents. The plaintiff requested a transfer but was forced to continue to work with the harasser. She argued that the failure to transfer her was a constructive suspension. She did not quit so she could not assert a constructive discharge. The court noted that *Suders* involved a discharge and the holding could not be extended to a suspension. Her retaliation claim failed because the constructive suspension did not constitute an adverse action

C. Failure to Accommodate

Failure to provide necessary accommodation can constitute a constructive discharge. The Court so held in *Smith v. Henderson, supra*. There, Plaintiff had severe rheumatoid arthritis, which required certain hour and lifting restrictions. Her supervisor unilaterally altered her subordinates' work schedule and refused to authorize overtime or allow her to delegate certain duties as was permitted for others in her position. She was also instructed by her manager to under report the hours she worked. She complained about the treatment and requested a necessary accommodation, but was told she was in a man's world now and should stop her whining. She was also ordered to come in to work on her day off. Smith was exhausted and in constant pain due to the work requirements and felt she had no choice but to resign.

The Sixth Circuit held that the above described evidence was sufficient to establish a constructive discharge claim. The court observed that merely denying a requested accommodation may not be sufficient to support a constructive discharge claim in every case, but evidence that the employee worked to exhaustion and poor health due to an employer's refusal to accommodate a known disability on her request was sufficient. *Id.* at 538. The

Henderson Court distinguished *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432 (7th Cir. 2000), where the Seventh Circuit held that failure to offer an employee the access accommodation she requested did not constitute a constructive discharge because she could have discussed the need for an accommodation with her supervisor rather than quit her job prematurely. *Henderson*, *supra*, at 538.

D. Prompt Remedial Action

In the Post *Suders* era, courts have continued to emphasize the importance of prompt remedial action by the employer in determining whether the plaintiff should have felt compelled to resign. If complaints are ignored, the courts are more likely to find a constructive discharge. For example in *Baker v. John Morrell & Co.*, 382 F. 3d 816 (8th Cir. 2004), the plaintiff and other female employees were subjected to egregious sex harassment including sexual gestures and offensive epithets. One female was called a “wine tit”, “fucking scab bitch” and a female manager was called a “Mexican low life fucking c-t”. The harasser made fun of the Plaintiff when her friend died and mocked her in front a supervisor when she asked to use the restroom. He also called her a “fucking idiot” and a “dumb bitch” and told her “blow me bitch” when she asked him to turn on the line. He also told other employees he was in Baker’s bedroom and he also made sexual gestures in her presence. The harasser also engaged in threatening and intimidating behavior, almost hitting her with his truck.

Baker complained frequently to management to no avail. She finally had an emotional breakdown, walked off the line and immediately sought medical treatment. Baker prevailed at trial and the Eighth Circuit affirmed the constructive discharge claim on appeal. The court specifically observed that the constant harassment over a period of years combined with her numerous unsuccessful efforts to force management to address the problem left her no choice but to resign. *Id.* at 829.

Similarly, in *Corrales v. Chase Bankcard Service, Inc.*, 128 Fed Appx. 598 (9th Cir. 2005), the court found a constructive discharge where the plaintiff experienced an egregious incident of sex harassment followed by an abject refusal by management to address the issue. There, the plaintiff claimed that a male diversity officer in the human resource department forced her to discuss personal, humiliating information about her sex life during an hour long interview. She complained separately to two supervisors who both told her nothing could be done. Corrales then complained to a higher level manager who was too busy to talk to her and one of her supervisors ordered her to report back to the diversity officer for more questioning.

In contrast, where the employer has engaged in prompt remedial action it can defeat a constructive discharge claim (as well as the underlying harassment claim). In *Hockman v. Westward Communications, LLC*. 407 F. 3d 317 (5th Cir. 2004), the court noted that constructive discharge requires proof of aggravating factors beyond the actual discrimination that would compel departure. It cited a list of such factors including demotion, reduction in salary or job responsibilities, reassignment to menial or degrading work, reassignment to work under a younger supervisor, badgering, harassment or humiliation designed to encourage the employee

to leave, or offers of retirement or continued employment on less desirable terms. *Id.* at 331-32. The court found insufficient evidence to support a constructive discharge claim by Hockman for a variety of reasons. Initially, she did not establish any aggravating circumstances and “Westward’s prompt remedial measures are fatal to Hockman’s constructive discharge claim.” *Id.* at 332. The Court found that Hockman’s immediate transfer away from the harasser and the absence of any harassment thereafter constitutes remedial action.

Similarly, in *Collette v. Stein-Matt, Inc.*, 126 Fed Appx 678 (6th Circuit 2005) (unpublished), the Sixth Circuit held that the plaintiff could not establish a constructive discharge where the defendant immediately investigated the complaints of harassment, terminated the harasser and repeatedly invited the plaintiff to return to work advising her that the harasser was no longer employed there. The court stated that no reasonable person could have felt compelled to quit when management had fired the harasser after her complaint. Importantly this case involved a single, albeit egregious, incident. It did not, as this author frequently observes, involve a pattern of harassment, complaints and prompt remedial action only after criminal sexual conduct has occurred.

III. CONCLUSION

The case law developing post *Suders* is very similar to the standards prior to the Supreme Court’s decision. Employees must establish proof that a reasonable person would have felt compelled to resign and this must include some aggravating factors beyond the actual harassment. Employees must also prove that the employer did or should have foreseen that the conduct in question would result in resignation. Additionally, the courts are still holding that employees who are given a real choice to stay have no constructive discharge claim, but if they are advised that they will have to endure further discrimination, or if they are denied a reasonable accommodation they may be able to establish a constructive discharge claim. Finally, the courts are still emphasizing the importance of prompt remedial action. It can be fatal to a constructive discharge claim. Arguably if the employer’s response to a harassment claim was a little slow or did not fully address the discrimination, it may be insufficient to defeat a harassment claim, but may be enough to establish that a reasonable person would have stayed and tried to work things out.