

HARASSMENT DEFENSE IN 'CONSTRUCTIVE DISCHARGE' CASES PRESERVED

By Edward "Bud" F. O'Donnell, Jr., Esq.

The U.S. Supreme Court recently reaffirmed that employers may still assert a defense against a former employee's claim of sexual harassment in circumstances where the employee claimed to have quit because the working conditions were unbearable due to a supervisor's sexual harassment. The decision confirmed earlier Supreme Court rulings that where tangible employment action such as an official discharge, demotion, transfer, cut in wages or benefits, etc., did not precipitate the discharge, employers can assert a defense against a claim of sexual harassment if they can demonstrate that they had policies and procedures to prevent and correct any sexually harassing behavior, and that the employee failed to properly follow those procedures. If employers can prove that they met these two elements, they may escape liability for their supervisor(s)'s inappropriate behavior. *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004).

In this case, Nancy Suders claimed that she resigned as a communications officer with the Pennsylvania State Police ("PSP") after her supervisors continually sexually harassed her at work. She had not filed an official complaint, but claimed that the abuse made her work environment so intolerable that quitting was all she could do to escape it. At trial, the district court dismissed her claim because PSP asserted the affirmative defense in that she had failed to follow the established complaint procedure. On appeal, the Third Circuit Court of Appeals held that the affirmative defense is never available to employers when sexual harassment results in a constructive discharge. The Supreme Court vacated the Circuit Court's improper decision and remanded the case back for further proceedings.

To meet the elements of the affirmative defense, we recommend that employers consider the following:

- Hold sexual harassment training for supervisors, which may include frequent conversations or seminars;
- Establish a clear harassment policy, then distribute and review the policy with all employees;
- Establish a standard complaint procedure;
- Periodically remind employees of the harassment policy and the respective complaint procedures
- Conduct prompt, thorough, and impartial investigations of any complaints;
- Take swift corrective action if necessary.

This article is intended to provide information on a noteworthy legal development. It should not be regarded as a substitute for legal advice concerning any specific situation in your workplace. If you have any questions or require additional information, please contact Edward "Bud" O'Donnell, Jr., Esq., at (860) 727-8900.