SEXUAL HARASSMENT IN THE WORKPLACE

Critical Concepts and Procedures

I. INTRODUCTION

A. Sexual harassment is a form of sexual discrimination that violates Title VII of the Federal Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq., and the New Jersey Law Against Discrimination (N.J.S. 10:5-1 to -42). Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405-06 (1986); Erickson v. Marsh & McLennan Co., 117 N.J. 539, 555-56 (1990); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2283 (1998).

B. Title VII specifically provides that it is an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1)

C. The New Jersey Law Against Discrimination "was enacted to protect not only the civil rights of individual aggrieved employees but also to protect the public's strong interest in a discrimination-free workplace." Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 600 (1993). In this respect, N.J.S. 10:5-12 provides that it is an unlawful employment practice, or unlawful discrimination for any employer because of the race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, sex * * * of any individual, * * * to refuse to hire or employ or to bar or to discharge * * * from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment * * *.

II. SEXUAL HARASSMENT—Defined

A. "Sexual harassment" consists of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, or based on gender, when:

1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment
2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

B. Sexual harassment includes, but is not limited to, the following prohibited behavior:

1. Sexual assault; gross sexual imposition:

    a. Physical assaults of a sexual nature, including sexual assault or criminal sexual contact, or the attempt to commit these offenses; or
    b. Intentional physical conduct which is sexual in nature, such as touching, pinching, patting, grabbing, brushing against another employee's body, or poking another employee's body.

2. Seductive behavior: Inappropriate, unwanted, offensive physical or verbal sexual advances, propositions or other sexual comments, including:

    a. sexually oriented gestures, noises, remarks, jokes, or comments about a person's sexuality or sexual experience directed at or made in the presence of any employee who indicates or has indicated in any way that such conduct in his or her presence is unwelcome; or
    b. subjecting, or threatening to subject, an employee to unwelcome sexual attention or conduct.

3. Sexual bribery: Preferential treatment or promise of preferential treatment to an employee for submitting to sexual conduct, including soliciting or attempting to solicit any employee to engage in sexual activity or other sex-linked behavior for compensation or promise of reward.

4. Sexual coercion: Coercion of sexual activity by threat of punishment.

5. Gender harassment: Generalized gender-based remarks and behavior. Includes intentionally making performance of the employee's job more difficult because of the employee's gender.

6. Visual harassment: Sexual or discriminatory displays or publications posted or stored in the workplace, such as

    a. pictures, posters, calendars, graffiti, objects, promotional materials, reading materials, or other materials that are sexually revealing, sexually suggestive, sexually demeaning, or pornographic; or

b. the display of signs or other materials purporting to segregate an employee by sex in any area of the workplace, other than restrooms and similar semi-private locker/changing rooms.

7. Retaliation for sexual harassment complaints, such as

a. disciplining, changing work assignments of, providing inaccurate work information to, or refusing to cooperate or discuss work-related matters with any employee because that employee has complained about or resisted harassment, discrimination or retaliation; or
b. intentionally pressuring another person to give false information about an alleged incident of sexual harassment for the purpose of covering up such incident.

III. THE CATEGORIES OF SEXUAL HARASSMENT

A. State and federal case law generally recognize two broad categories of sexual harassment. See e.g., Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257 (1998); Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 601 (1993). These two categories are:

1. Quid pro quo sexual harassment (threats which are carried out):

a. Where the submission to, or rejection of, unwelcome sexual conduct or sexual demands is made a condition of employment.
b. This is where the employee is forced to grant sexual favors in order to obtain, maintain, or improve employment status.
c. It involves an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive unfavorable performance reviews, be passed over for promotion, or suffer other adverse employment consequences.

2. Hostile work environment sexual harassment (offensive conduct in general):

a. Contains the following four elements. The conduct:
(1) is unwelcome
(2) is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment;
(3) is perceived by the victim as hostile or abusive; and
(4) creates an environment that a reasonable woman/man would find intimidating, hostile or abusive.

b. The New Jersey Supreme Court has held that a victim of actionable hostile workplace sexual harassment states a cause of action in court when the complained of conduct:
(1) would not have occurred but for the employee's gender; and it was
(2) severe or pervasive enough to make a
(3) reasonable person of the same gender to believe that
(4) the conditions of employment are altered and the working environment is hostile or abusive.

Note: The complainant need not personally have been the target of each or any instance of offensive or harassing conduct. Evidence of sexual harassment directed at others in the workplace is relevant to both the character of the work environment and its effect on the complainant. Lehmann v. Toys 'R' Us, Inc., 132 N.J. at 603-04, 611, 614). Thus, a victim may present such "other harassment" evidence, even if the victim was not a witness to it, to show an employer's "motives, attitudes, and intentions." Mancini v. Township of Teaneck, 179 N.J. 425, 434 (2004) (Mancini IV).

The "gender specific" standard (rather than the "reasonable person" standard) is used to respect the difference between male and female perspectives on sexual harassment. Lehmann at 614.

Where "a hostile work environment claim involves allegations of harassment based on religious faith or ancestry, the inquiry is whether a reasonable person of plaintiff's religion or ancestry would consider the workplace acts and comments made to, or in the presence of, plaintiff to be sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment." Cutler v. Dorn, 196 N.J. 419, 430 (2008)

c. A hostile work environment is created when individual employees are subjected to suggestive comments, photographs, jokes, obscene gestures, or unwanted physical contacts. It includes visual harassment, such as graffiti written on men's bathroom walls about a female employee, or pervasive displays of nude or pornographic pictures.
d. There is no requirement that the harassing conduct be motivated by the harasser's sexual desires in order to support a claim of discrimination on the basis of sex. Thus, a case for sexual harassment in the workplace may also be made where the harasser and the harassed employee are of the same sex. See Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82, 118

S.Ct. 998, 1003 (1998) ("sexual discrimination consisting of same-sex sexual harassment is actionable under Title VII).

e. In this area, it is important to recognize that personality conflicts, even severe ones, do not equate to a hostile work environment "simply because the conflict is between a male and female employee." The aggrieved party must demonstrate that the hostility directed toward him or her was "gender motivated." Herman v. Coastal Corp., 348 N.J.Super. 1, 20-21 (App.Div.2002).

B. Other Forms of Sexual Harassment

1. Sexual favoritism. This type of sexual harassment occurs when an agency allows intimate relationships to continue to exist between supervisors and direct subordinates. In a similar vein, an employer may be liable when employees who submit to sexual favors are rewarded while others who refuse are denied promotions or benefits. It has been held that a female employee who wasn't asked for sexual favors while others were was a victim of sexual harassment.

2. "Indirect" or "third party" sexual harassment occurs when one employee witnesses the sexual harassment of another on a repetitive basis, or when an employee is not directly harassed, but the harassment has the effect of adversely altering the terms and conditions of employment.

   a. For example, an employee may be able to claim that he or she was denied job benefits due to the unlawful quid pro quo sexual harassment or sexual coercion of a favored employee.
   b. See also Vinson v. Taylor, 753 F.2d 141, 146 (D.C.Cir. 1985) ("Even a woman who was never herself the object of harassment [may state a claim] if she were forced to work in an atmosphere where such harassment was pervasive."); Hall v. Gus Constr., 842 F.2d 1010, 1015 (8th Cir. 1988) (although plaintiff "was not subjected to sexual propositions and offensive touching, evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile work environment.") (both cases quoted with approval by the New Jersey Supreme Court in Lehmann).

IV. RESPONSIBILITIES

A. Employees

1. Employees subjected to sexual harassment are encouraged, whether directly or through a third party, to notify the alleged harasser that the behavior in question is offensive and unwelcome. However, failure to do so does not preclude filing a complaint.

2. Employees subjected to sexual harassment should promptly report all such incidents.

3. Employees who observe any behavior by another employee which constitutes sexual harassment must promptly report the incident.

B. Supervisors and Managers should make proactive efforts to maintain a work environment that is free from any form of prohibited harassment or discrimination.

Supervisors and managers are required to ensure adherence to and compliance with the department's/agency's policy governing the prohibition of sexual harassment in the workplace.

1. Upon becoming aware of possible sexual harassment, supervisors must:

   a. Take appropriate immediate action to stop the harassing behavior;
   b. Inform the employee of his or her right to bring a discrimination complaint; and
   c. Refer the matter to the individual or unit (e.g., Internal Affairs) responsible for receiving and investigating such complaints.

2. Supervisors are the key facilitators in the ongoing battle against sexual harassment in the law enforcement workplace.

   a. As representatives of management, first-line supervisors are expected to be proactive in their effort to ensure a harassment-free work environment.
   b. As observed by the courts, and echoed by the International Association of Chiefs of Police:
      (1) Supervisors have "a unique role in shaping the work environment." Herman v. Coastal Corp., 348 N.J. Super. 1, 25 (App.Div.2002). Through their own actions and words, supervisors function as role models for their subordinates. They help set the moral tone. Consequently, they must never

initiate or participate in sexual harassment. On the contrary, supervisors must be prepared to stop the behavior of others that can be perceived as harassment and to take immediate steps to stop further occurrences. As stated by the court in Herman, "[p]art of a supervisor's responsibilities is the duty to prevent, avoid, and rectify invidious harassment in the workplace." Id. at 25. Even the tacit acceptance of sexually inappropriate behavior sends the message that sexual harassment will be tolerated regardless of formal departmental policy.

(2) Supervisors have an affirmative duty to deal effectively with and to report all known or reported cases of sexual harassment to the unit responsible for investigating employee misconduct. Failure to take appropriate action or failure to report incidents of harassment as required by department policy is normally grounds for disciplinary action. This is essential if management wants to ensure the integrity of the anti-harassment effort of all levels of the process.

(3) Each supervisor has a responsibility to reinforce the department's anti-harassment training and behavior modification efforts by actively counseling subordinates on the topic of sexual harassment in the workplace.

(4) Supervisors must make themselves accessible to victims and ensure that their complaints will be handled in a proactive yet discreet and confidential manner. In situations in which allegations of sexual harassment have been lodged, confirmed, and resolved, the supervisor should continue to interact with the parties in order to ensure that the offensive behavior does not resume. The supervisor should also work with the victim to find ways of making the workplace more comfortable for all of the parties concerned.

C. The Department/Agency

1. Establish and disseminate an anti-harassment policy. To prevent liability from charges of sexual harassment, police departments/law enforcement agencies must establish and disseminate "a well-publicized and enforced anti-harassment" policy.

   See Payton v. N.J. Turnpike Auth., 148 N.J. 524, 535-38 (1997) (stressing the importance of an effective anti-sexual harassment policy); Cavuoti v. N.J. Transit Corp., 161 N.J. 107, 121 (1999) ("employers who promulgate and support an active, anti-harassment policy" may be "afforded a form of safe haven" from vicarious liability). See also Gaines v. Bellino, 173 N.J. 301, 319, 320 (employer may "assert the existence of an effective anti-sexual harassment policy as an

affirmative defense," but the policy must be more than "mere words"; it must be "backed up by consistent practice").

a. The anti-harassment policy should include, at a minimum, the following ten elements:

(1) A strong policy statement declaring that discrimination or sexual harassment will not be tolerated, and encouraging employees to treat each other with professionalism, dignity and respect.
(2) A definition of sexual harassment and an identification of the types of conduct that may constitute harassment in general, sexual harassment in particular, and unlawful discrimination.
(3) A statement that non-compliance with the policy will result in appropriate disciplinary action.
(4) An explanation of the procedures and identification of the forums for instituting a discrimination or sexual harassment complaint.
(5) An effective formal and informal complaint structure.
(6) A requirement that all incidents of discrimination or sexual harassment be reported through appropriate channels.
(7) Assurance that all complaints or other evidence of discrimination or sexual harassment will be promptly and thoroughly investigated, and to the extent possible, maintained confidential. (The employer can face severe adverse consequences by failing to conduct thorough investigations into complaints of sexual harassment.)
(8) A clear prohibition against retaliation.
(9) Mandatory training for all managers and supervisors.
(10) An effective sensing or monitoring mechanism to ensure that the policy is properly disseminated and enforced, and to determine if the policy and procedures are adequate and trusted.

b. Department/Agency liability

A. The department/agency will be directly and strictly liable for all equitable damages and relief in cases where supervisors engage in the sexual harassment of employees.
B. In addition, the department/agency may be vicariously liable to the victimized employee for damages when a supervisor with authority to control the work environment creates a hostile work environment. Gaines v. Bellino, 173 N.J. 301, 312 (2002). Whether an offending employee is, in fact, a "supervisor" of the victimized employee depends on a variety of

factors, including whether the individual has authority to undertake or recommend tangible employment decisions affecting the victim, such as the power to fire, promote, demote, reassign, influence compensation, and/or direct job functions or daily work activities. Entrot v. BASF Corp., 359 N.J.Super. 162, 180-81 (App.Div. 2003). In this regard, the definition of "supervisor" also turns on whether the individual was "authorized to direct another employee's day-to-day work activities" as a supervisor, "even if that individual does not have the authority to undertake or recommend tangible job decisions." Aguas v. State, 220 N.J. 494, 527-28 (2015).

C. Liability may also be imposed where "upper management knew or should have known of the harassment" and "failed to take effective, remedial measures to stop it." Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 623 (1993); Mancini v. Township of Teaneck, 349 N.J.Super. 527, 561 (App.Div.2002). Constructive knowledge—the "should have known" aspect of the existence of sexual harassment in the workplace—will be found in two types of circumstances: (1) "where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer," and (2) "where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it." Kunin v. Sears Roebuck & Co., 175 F.3d 289, 294-95 (3rd Cir. 1999). See also Mancini at 561 (citing examples of sexual harassment so open and pervasive that if management was unaware of it, "one has to wonder how well management is doing their job"); Hurley v. Atlantic City Police Department, 174 F.3d 95, 111 (3rd Cir. 1999) (evidence of "other acts of harassment," directed at other employees "is extremely probative" as to whether the police department "knew or should have known that sexual harassment was occurring despite the formal existence of an anti-harassment policy").

D. Department administrators may also be liable for punitive damages if the victim can establish, by clear and convincing evidence, that the employer's conduct was "egregious," in that upper management either participated directly in the sexual harassment, or showed "willful indifference." Aguas v. State, supra at 531.

E. An employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid the harm otherwise." Aguas v. State, 220 N.J.

494, 499 (2015) (adopting the standard set forth by the United States Supreme Court in Burlington Industries v. Ellerth, 524 U.S. 742, 765, 118 S.Ct. 2257, 2270 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 807-08, 118 S.Ct. 2275, 2292-93 (1998)). "No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." Id.

F. Clearly, "an employer's implementation and enforcement of an effective anti-harassment policy, or its failure to maintain such a policy, is a critical factor in determining" the agency's liability. See Aguas v. State, supra at 499. See also Herman v. Coastal Corp., 348 N.J.Super. 1, 29 (App.Div.2002), where a company successfully defended a sexual harassment complaint with, among other things, a policy against sexual harassment which "was publicized and distributed to every employee, and reaffirmed every year by Employee Relations through memos and workshops."

V. REPORTING SEXUAL HARASSMENT

A. There are various ways in which employees may file sexual harassment or discrimination complaints within or outside the department/agency, either concurrently or sequentially. Complaints may be filed with:-

1. The Internal Affairs Unit/Officer
2. The employee's direct supervisor
3. Other supervisors/managers in the employee's chain of command
4. Officials outside the employee's chain of command
    a. The complainant should be permitted to initiate a sexual harassment/discrimination complaint outside his or her direct chain of command, up to the chief executive officer, if filing the complaint using the normal chain of command or the Internal Affairs Unit would pose a conflict of interest by virtue of the alleged harasser having any involvement in the intake, investigative or decision-making process.
    b. The complainant may also initiate a sexual harassment or other discrimination complaint directly with the Division of Equal Employment Opportunity and Affirmative Action, Department of Personnel, if filing the complaint with a member of the Department would pose a conflict of interest by virtue of the alleged harasser having any involvement in the intake, investigative or decision-making process.

B. Other Forums include filing the complaint directly with the NJ Superior Court (claims of violations of the NJ Law Against Discrimination) the Federal District Court (claims of violations of Title VII or 42 U.S.C. §1983); the Division on Civil Rights in the NJ Department of Law & Public Safety; the United States Equal Employment Opportunity Commission (EEOC); and the Department of Personnel, Merit System Board (if applicable).

C. Time limitations. A sexual harassment complaint brought under the New Jersey Law Against Discrimination, N.J.S. 10:5-1 to -49 (LAD) must be filed within 2 years after the cause of action has accrued. N.J.S. 2A:14-2; Montells v. Haynes, 133 N.J. 282, 294-95 (1993). See also Shepherd v. Hunterdon Center, 174 N.J. 1, 17 (2002) ("The statute of limitations for claims arising under the LAD is two years."). A victim of sexual harassment or discrimination may also file a complaint directly with an external agency that investigates such complaints. In this regard, a complaint alleging a violation of State law must be filed with the New Jersey Division on Civil Rights within 180 days of the alleged violation. Under federal law, a complaint under Title VII of the federal Civil Rights Act must be filed with the United States Equal Employment Opportunity Commission (EEOC) within 300 days of the alleged violation. See 42 U.S.C. §2000e-5(e)(1). See also National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 2070 (2002)).

1. The "continuing violation" doctrine. Both the United States and New Jersey Supreme Courts recognize an exception to the statute of limitations known as the "continuing violation" doctrine. Under that doctrine, a plaintiff may pursue a claim for harassment or other discriminatory conduct "if he or she can demonstrate that each asserted act by a defendant is a part of a pattern and at least one of those acts occurred within the statutory limitations period." Shepherd at 6-7. As stated in Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999), when an individual is subjected to a continual, cumulative pattern of harassment or discrimination, "the statute of limitations does not begin to run until the wrongful action ceases." See also Morgan, 122 S.Ct. at 2074; Mancini v. Township of Teaneck, 349 N.J.Super. 527, 556 (App.Div.2002) (the "continuing violation" doctrine is "an equitable exception to the statute of limitations"). Thus, by definition, "the continuing violation doctrine exposes a defendant to liability for acts that, standing alone, might have occurred outside the limitations period." Mancini v. Township of Teaneck, 179 N.J. 425, 431 (2004) (Mancini IV).

2. In analyzing questions regarding the statute of limitations, courts have differentiated between "discrete" discriminatory acts and "hostile work environment" claims.

    a. "Discrete acts," such as termination, failure to promote, denial of transfer, refusal to hire, and the like, are easy to identify and, as such, the act "occurs" on the day that it happens. Shepherd at 19; Morgan at 2073.
    b. On the other hand, "hostile work environment" claims " 'are different in kind from discrete acts. Their very nature involves repeated conduct. The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative effect of individual acts.' " Shepherd at 19 (quoting Morgan at 2073) (internal citations omitted).
        (1) Accordingly, it does not matter " 'that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.' " Shepherd at 20, 21 (quoting Morgan at 2074, 2077).
        (2) See also Caggiano v. Fontoura, 354 N.J.Super. 111, 115 (App.Div. 2002) (A "complaint alleging a hostile work environment created by a series of acts and incidents, all but the last of which occurred more than two years before plaintiff filed her complaint, should be deemed timely as a continuing violation."). In Fontoura, the last act alleged to have been committed against the plaintiff, a sheriff's officer, was the following comment made in the plaintiff's presence by the Sheriff at a sexual harassment training seminar: "[R]emember, guys, harass is one word, ha, ha, ha." Id. at 121, 133.
        (3) In Mancini v. Township of Teaneck, 349 N.J.Super. 527, 559 (App.Div. 2002), the court rejected the Township's argument that the plaintiff failed to assert a viable continuing violation because "she linked together different types of acts by different persons with different subject matters." According to the court, Mancini clearly established a continuing violation for she "was subjected to a continuing escalating pattern of gender-based harassment by multiple individuals in the Department. The subject matter, sexually explicit cartoons or photographs, suggestions of sexual acts, or sexually harassing behavior by other officers, all constituted sexual harassment." Id. Thus, the

harassment need not involve the same actor or the same exact form of conduct. Rather, "the focus is the work atmosphere as a whole," and it does not matter "that the collection of incidents comprising the claim were committed by a variety of individuals." West v. Philadelphia Electric Co., 45 F.3d 744, 756-57 (3rd Cir. 1995).

c. A victim with knowledge of his or her claim should not, however, unreasonably delay in filing a complaint. Particularly in cases involving continuing violations, which may involve claims extending over long periods of time, an employer may raise a "laches" defense, which bars a victim from maintaining a lawsuit if he or she "unreasonably delays in filing a suit and as a result harms the defendant." Morgan at 121-22, 122 S.Ct. at 2076-77.
   (1) The defense of laches requires "proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." Id. See also Shepherd at 23 (an employer may have a "laches" defense when "an aggrieved party, with knowledge of a claim based on non-discrete acts, waits a considerable period of time before filing suit"). The defense of laches requires more than a showing of mere delay or mere lapse of time. "There must be delay for a length of time which, unexplained and unexcused, is unreasonable under the circumstances and has been prejudicial to the other party." Mancini v. Township of Teaneck, 179 N.J. 425, 437 (2004) (Mancini IV).
   (2) "Procedurally, to maintain a laches defense against a plaintiff's delayed claim, a defendant must assert the defense in a diligent fashion. In other words, diligence is a two-way street." Mancini IV at 433.
   (3) Accordingly, the availability of a laches defense encourages victims to pursue their claims diligently, which creates a fairer process for all. "Left unchallenged, sexual harassment not only injures individual victims but also denigrates the entire workplace. From that perspective, all innocent employees benefit when a timely complaint is brought to eradicate discriminatory employment practices." Id. at 435.

D. The "constructive discharge" doctrine. The "constructive discharge" doctrine was originally developed to address situations in which employers coerced employees to resign, often by creating intolerable working conditions. Under this doctrine, an employee's reasonable decision to resign because of "unendurable working conditions" is equated "to a formal discharge for remedial purposes." Pennsylvania State Police v. Suders, 542 U.S. 129, 124 S.Ct. 2342 (2004). The relevant inquiry is objective: "Did working conditions become so intolerable that a

reasonable person in the employee's position would have felt compelled to resign?" Id., 124 S.Ct. at 2351. As stated by the Equal Employment Opportunity Commission (EEOC), an employer is "responsible for a constructive discharge in the same manner that it is responsible for the outright discriminatory discharge of a charging party." EEOC Compliance Manual, 612:0006 (2002).

1. In Suders, the Court held that an employer may be liable for "constructive discharge" resulting from severe sexual harassment or "hostile work environment" attributable to either a co-worker's conduct, unofficial supervisory conduct, or official employer acts.

2. Generally, for an atmosphere of sexual harassment or hostile work environment to be actionable, the offending behavior must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. "A hostile-environment constructive discharge claim entails something more: A plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign." Id., 124 S.Ct. at 2354. In other words, to establish a case for "constructive discharge," a victim of severe sexual harassment "must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." Id. at 2347.

3. "An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions." Id.

VI. PROTECTION OF ALL PARTIES

A. All complaints must be addressed promptly and investigated thoroughly, and all parties to the complaint shall be afforded all of the protection as in any internal affairs investigation. . To the extent possible, the sexual harassment investigative proceedings should be conducted in a manner which protects the confidentiality of the complainant, the alleged harasser and all witnesses.

1. All parties involved in the proceedings will be advised to maintain strict confidentiality, from the initial meeting to the final decision of the organization, to safeguard the privacy and reputation of all involved.
2. The official investigating the complaint of sexual harassment should explain to the complainant that while the information being reported is sensitive, the department/agency will need to know all the relevant facts to ensure a proper and complete investigation.
3. The official investigating the complaint should also refrain from promising absolute confidentiality, for that will not be possible.