

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KERI WELLS	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	NO. 04-5354
HAPPY TYMES FAMILY FUN CENTER, INC.	:	
Defendant	:	

**MEMORANDUM AND ORDER**

**Baylson, J.**

**November 21, 2005**

This case presents claims of sexual harassment based on an allegation that the Plaintiff Keri Wells was constructively discharged by the Defendant Happy Tymes Family Fun Center (“Happy Tymes”), because sexual harassment by an employee allegedly part of the management made her conditions of employment intolerable. Presently before this Court is the Defendant’s motion for summary judgment (Doc. No. 11), filed on October 14, 2005. Briefing on this matter was completed on November 10, 2005. This memorandum will explain the reasons for the Court’s prior order (Doc. No. 19) denying Defendant’s motion for summary judgment on November 17, 2005.

Plaintiff, who was fifteen years old at the time of the events in question, asserts that she was employed by the Defendant children’s amusement center from March until August, 2001. Starting in approximately May 2001, and continuing until she departed on August 26, 2001, Plaintiff avers that assistant manager Dan Rutledge made inappropriate remarks and/or subjected her to inappropriate body contact at least once a week, totaling roughly fifty incidents. Plaintiff

admits that while she was employed at Happy Tymes, she did not complain about these incidents to any manager at Happy Tymes, apart from a report made to general manager Colleen Garomon on the date that she left her employment.

The Defendant has moved for summary judgment, relying solely on its assertion of the defense articulated in the companion cases of Faragher v. Boca Raton, 524 U.S. 775, 118 S.Ct. 2275 (1998) and Burlington Industries v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257 (1998) (“Ellerth-Faragher defense”). These cases hold that in sexual harassment cases when no tangible employment action is taken, a defending 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 harm otherwise.” Ellerth, 524 U.S. at 765, 118 S.Ct. at 2270; Farragher, 524 U.S. at 778, 118 S.Ct. at 2279. Under this doctrine, alleged victims of sexual harassment have a duty to mitigate harm, but the employer defendant has the burden to prove that the employee unreasonably failed to avoid or reduce harm. Faragher, 524 U.S. at 806, 118 S.Ct. at 2292.

Defendant asserts that both prongs apply in the “classic” Ellerth-Faragher case at hand, and therefore Happy Tymes is entitled to summary judgment. (Def.’s Mot. Summ. J. at 9-15). Plaintiff responds that the Court cannot grant summary judgment in favor of Defendant based solely on an assertion of the Ellerth-Faragher affirmative defense. First, Plaintiff contends that Ellerth and Faragher limited the defense to cases involving no tangible employment action, and did not specifically address whether this includes constructive discharge, as is asserted in this

case. Therefore, she argues the case should properly be analyzed under Pa. State Police v. Suders, 542 U.S. 129 (U.S. 2004), in which the Supreme Court specifically articulated the standard to apply when constructive discharged is alleged.<sup>1</sup> Second, with regard to the two prongs, she asserts there are several disputed issues of fact. She asserts Happy Tymes never even had a viable harassment policy in place. Further, even if they did, she urges she was never informed of or given an employee handbook stating Happy Tymes' employee harassment policy,<sup>2</sup> and did not see the state-required sexual harassment posted allegedly posted by Defendant. Moreover, Plaintiff urges that she *did* try to complain to management on August 26, 2001, but that she was not taken seriously by Ms. Garomon. (Pl.'s Br. at 4-11, 21-22, 26).

The Court finds that summary judgment in this case is not appropriate. Although Defendant advances its Ellerth-Faragher defense based on numerous "undisputed facts" regarding the circumstances of the Plaintiff's departure and the existence of a well-developed sexual harassment policy that was made known to Plaintiff, many of these facts are in dispute.<sup>3</sup>

These include:

1. Whether Plaintiff was constructively discharged or left Defendant's employ for other reasons.

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<sup>1</sup>In Suders, the Court addressed the impact of an alleged constructive discharge within the Ellerth-Faragher affirmative defense: "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." Suders, 542 U.S. at 134.

<sup>2</sup>Plaintiff also avers the handbook did not contain a policy for dealing with sexual harassment. (Pl.'s Br. at 8-9)

<sup>3</sup>Compare Defendant's Stipulation of Proposed Undisputed Facts with Plaintiff's Response to Defendant's Statement of Undisputed Facts at ¶¶ 3, 10, 13-14, 17-19, 21-26, 28, 30-31, 33-37.

2. Whether the actions taken by Defendant constitute an adverse employment decision.
3. Whether the Defendant had in place an effective anti-harassment policy.
4. Assuming Happy Tymes had a sexual harassment policy, whether Defendant made reasonable efforts to make Plaintiff aware of it by, for example, explaining the policy, providing Plaintiff with an employee handbook and/or otherwise notifying Plaintiff.
5. Assuming Happy Tymes had a sexual harassment policy, whether Plaintiff was actually aware of such policy.

The Court also has to interpret the recent Supreme Court decision in Suders and believes that doing so on a summary judgment record, as opposed to a full trial record, would be unfair to one or both parties and an inappropriate abrogation of the Plaintiff's right to a trial by jury.

Accordingly, Defendant's Motion for Summary Judgment (Doc. No. 11) is DENIED.

**BY THE COURT:**

**s/Michael M. Baylson**

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**MICHAEL M. BAYLSON, U.S.D.J.**