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The Supreme Court Gets Constructive: A Case Note on Pennsylvania State Police v. Suders

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THE SUPREME COURT GETS CONSTRUCTIVE: A CASE NOTE ON *PENNSYLVANIA STATE POLICE v. SUDERS*

I. INTRODUCTION

What if an employee, after quitting her job, alleges that her workplace was so pervasively offensive and discriminatory that she had no choice but to quit? Not only that, but she wants to be compensated for her resignation. Does the employee have this ability? Does the employer have any recourse?

According to the United States Supreme Court the answer is: it depends.

These were the issues faced by the Supreme Court when it decided *Pennsylvania State Police v. Suders*,[1] in which the Court analyzed the concepts of sexually hostile work environment and constructive discharge, and the liability of the employer for such occurrences.[2] The Court granted certiorari to expound upon its twin 1998 decisions of *Burlington Industries, Inc. v. Ellerth*[3] and *Faragher v. City of Boca Raton*.[4] The Court needed to provide guidance as to when an employer may utilize the affirmative defense articulated in *Ellerth* and *Faragher* in constructive discharge situations.[5] The Court examined the *Ellerth–Faragher* framework to determine whether constructive discharge hostile environment claims allow the employer to raise an affirmative defense or require the employer to be held strictly liable.[6] The Court's answer to whether employers will be strictly liable or will be able to affirmatively defend is dependent upon whether or not an "official act" by the supervisor induced the employee's resignation.[7] The official act requirement necessarily begs the question of what constitutes an official act by a supervisor? Unfortunately, even after *Suders*, the answer remains unclear.

In *Suders*, the Court analyzed a subset of cases in which a Title VII constructive discharge is the result of a supervisor-induced hostile work environment.[8] While the *Suders* decision may appear limited in scope, the

1. 542 U.S. 129 (2004). Throughout this Note, the Supreme Court decision will be referred to as "*Suders*" and the circuit court decision will be referred to as "*Easton*."

2. *Id.* at 133.

3. 524 U.S. 742 (1998).

4. 524 U.S. 775 (1998).

5. *Suders*, 542 U.S. at 139–40.

6. *Id.*

7. *Id*. at 140–41.

8. *Id*. at 142.

potential impact of the decision was such that the Supreme Court's grant of certiorari resulted in amicus filings from businesses, government, women's rights organizations, and many other entities.[9] To decide the question presented in *Suders*, the Court examined the existing hostile work environment jurisprudence developed in *Ellerth* and *Faragher*.[10] The Court explained that the *Ellerth–Faragher* framework established that an employer is vicariously liable to an employee who is subjected to an actionable hostile work environment created by a supervisor with immediate or higher authority over the employee.[11] Under the *Ellerth–Faragher* framework, the plaintiff must prove that the supervisor-induced hostile work environment culminated in a tangible employment action in order for the employer to be strictly liable for the actions of its supervisors.[12] If the plaintiff is unable to prove the supervisor-induced hostile work environment culminated in a tangible employment action, the employer may affirmatively defend against the imposition of vicarious liability by asserting the *Ellerth–Faragher* defense.[13]

In *Suders*, the plaintiff claimed she was constructively discharged due to the hostile work environment created by the actions of her supervisors, and as such, her employer should be liable under Title VII.[14] A "constructive discharge" is defined as a situation where pervasive harassment causes the

9. The following briefs were filed as amici curiae for the respondent: Brief for the Lawyers' Committee for Civil Rights Under Law et al. as Amici Curiae in Support of Respondent, Pennsylvania State Police v. Suders, 524 U.S. 129 (2004) (No. 03–95), 2004 WL 419432; Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Respondent, Pennsylvania State Police v. Suders, 524 U.S. 129 (2004) (No. 03–95), 2004 WL 363887. The following briefs were filed as amici curiae for the petitioner: Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner, Pennsylvania State Police v. Suders, 524 U.S. 129 (2004) (No. 03–95), 2004 WL 110582; Brief Amicus Curiae of the Society for Human Resource Management in Support of the Petitioner, Pennsylvania State Police v. Suders, 524 U.S. 129 (2004) (No. 03–95), 2004 WL 110583; Brief of Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioner, Pennsylvania State Police v. Suders, 524 U.S. 129 (2004) (No. 03–95), 2004 WL 110584. Finally the United States also filed a brief: Brief for the United States as Amicus Curiae, Pennsylvania State Police v. Suders, 524 U.S. 129 (2004) (No. 03–95), 2004 WL 121589. Additionally, the Supreme Court granted the Solicitor General's motion for leave to participate in oral argument as amicus curiae and for divided argument. Pennsylvania State Police v. Suders, 541 U.S. 929 (2004). A transcript of the oral argument is available at 2004 WL 772081.

10. *Suders*, 542 U.S. at 143–46.

11. *Id*. at 144–45.

12. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

13. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

14. *Suders*, 542 U.S. at 133. It should be noted that supervisory participation is not a requirement for a cognizable hostile environment constructive discharge claim. Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294 (2d Cir. 1999) ("Co-workers, as well as supervisors, can cause the constructive discharge of an employee."). This is a distinction which is important to the holding of *Suders*.

work environment to be so unbearable that resignation from the job is a reasonable response.[15] In constructive discharge claims, the plaintiff tries to establish that resignation was caused by the hostile environment created by the employer and, as such, that the resultant constructive discharge should be regarded as an involuntary termination.[16] The *Suders* Court was faced with determining whether a supervisor-induced constructive discharge is the equivalent of a tangible employment action for *Ellerth–Faragher* analysis purposes.[17]

In *Suders*, the Supreme Court recognized for the first time that a constructive discharge is a cognizable claim under Title VII.[18] As to the possible imposition of strict liability against the employer for a constructive discharge claim, the Court held that a constructive discharge is not automatically equivalent to a tangible employment action for *Ellerth–Faragher* analysis purposes.[19] Rather, only when a constructive discharge is initiated by "an official act of the enterprise" as the "last straw" before the plaintiff's resignation will the employer be held strictly liable.[20] The employer will be precluded from raising the *Ellerth–Faragher* affirmative defense when a tangible employment action precipitates the constructive discharge.[21] The employer is strictly liable when an official action has been taken by the supervisor because an "aided-by-the-agency-relation" is evident.[22] In other words, liability is imputed to the employer for the harassing acts of its

15. *Suders*, 542 U.S. at 141 (stating that the inquiry of whether a constructive discharge has occurred is objective: "Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?"). *Black's Law Dictionary* defines constructive discharge as: "A termination of employment brought about by making the employee's working conditions so intolerable that the employee feels compelled to leave." BLACK'S LAW DICTIONARY 495 (8th ed. 2004).

16. Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 315 (2004).

17. *Suders*, 542 U.S. at 140 (stating that the Court granted certiorari to resolve the circuit split as to whether a supervisor-induced constructive discharge is a tangible employment action that precludes the employer from asserting the *Ellerth–Faragher* affirmative defense). Circuit interpretations varied regarding language in *Ellerth*, which stated essentially stated: "[W]hen a supervisor takes a tangible employment action against a subordinate[,] . . . it would be implausible to interpret agency principles to allow an employer to escape liability." *Id.* at 145 (quoting *Ellerth*, 524 U.S. at 762–63).

18. While the circuits had long since recognized constructive discharge claims under many types of Title VII claims, the Supreme Court had never formally recognized that such claims were correct. *See infra* notes 189–94 and accompanying text.

19. *Suders*, 542 U.S. at 140–41.

20. *See id.* at 148.

21. *Id.* at 140–41.

22. *See id.* at 145, 148–49.

supervisors because those harassing acts could not have occurred absent the agency relationship.[23]

Although the Court held that for strict liability to attach to the employer the supervisor must have effected an official act causing the resignation, the court failed to establish exactly what constitutes an "official act."[24] The lack of clarity regarding what constitutes an "official act" is likely to lead to great confusion and inconsistent applications of the *Suders* holding by the circuits.

This Note analyzes the *Suders* Court's reasoning and argues that while the Court's requirement of an "official act" precipitating the resignation was well founded in light of Title VII objectives, agency principles, and hostile work environment jurisprudence, the Court has left significant room for future circuit splits due to its failure to ground the *Suders* decision with a definitive explanation of what constitutes an "official act."

Part II of this Note introduces the background of the *Suders* case and summarizes the findings of the lower courts. Part III explains employer liability for sexual harassment under Title VII of the Civil Rights Act of 1964 and discusses the development of the constructive discharge doctrine. Part IV examines the pre-*Suders* circuit split in which circuits made inconsistent determinations as to whether constructive discharge constituted a tangible employment action for *Ellerth–Faragher* analysis purposes. Part V analyzes the *Suders* decision in light of agency principles and Title VII policy considerations and then explains how the Court resolved the circuit split. Part VI evaluates the *Suders* Court's requirement of an official act, offers suggestions as to what the parameters of an official act should be, analyzes whether the *Suders* decision comports with agency principles, and explains the burdens of persuasion set out in the decision. Part VII discusses future recommendations regarding sexual harassment training, supervisory responsibilities, and plaintiff duties in light of the *Suders* decision.

II. HARASSMENT BY THE PENNSYLVANIA STATE POLICE

The Pennsylvania State Police (PSP) hired Nancy Drew Suders in March 1998 as a police communications operator.[25] Suders filed a discrimination claim stating she was subjected to harassing behavior by her supervisors:

23. *See id.*

24. *Suders*, 542 U.S. at 140–41.

25. *Id.* at 134. Throughout the discussion of the facts it should be noted that the PSP "'vigorously dispute[s]' the truth of Suders' allegations, contending that some of the incidents she describes 'never happened at all,' while 'others took place in a context quite different from that suggested by [Suders].'" *Suders*, 542 U.S. at 134, n.1. The recitation of facts is drawn from the Supreme Court's *Suders* decision and augmented with additional information included in the Third Circuit's *Suders v. Easton* decision. 325 F.3d 432, 436 (3d Cir. 2003). As the Supreme Court noted, the recitation of facts is in the light most favorable to the plaintiff as PSP's motion for summary judgment was granted. *Suders*, 542 U.S. at 134.

Sergeant Easton, Station Commander at the McConnellsburg barracks, Patrol Corporal Baker, and Corporal Prendergast.[26] Suders claimed various harassing behaviors by the supervisors. For example, Suders claimed that many inappropriate statements were made in the work environment. Suders stated that Sergeant Easton would bring up bestiality whenever Suders entered his office.[27] Easton discussed with Prendergast, in front of Suders, how young girls should be taught early how to properly give oral sex to men.[28] Corporal Baker would grab his crotch and yell, "Suck it," in Suders' presence as much as five to ten times per night.[29] When Suders once suggested that he should not behave in such a manner at work, Baker responded by getting up on a chair and repeating the process.[30] Baker would also rub his behind in front of Suders and ask her if she agreed that he had a "nice ass."[31] Corporal Prendergrast would question Suders' intelligence and abilities and would act forcefully with her.[32]

The barrage of alleged harassment supposedly escalated after Prendergast accused Suders of taking a missing file home with her.[33] After Prendergast's accusation, Suders contacted the department's Equal Employment Opportunity (EEO) officer and informed her that she might need help.[34] The EEO officer

26. *Suders*, 542 U.S. at 134–35. According to the background of the case, as reported in the district court decision, Suders claimed that Easton told her before she started the job that he had concerns about her. *Easton*, 325 F.3d at 436. Suders stated that Easton warned her that any later allegations on her part would be her words against his. *Id*. *See generally* Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, *available at* www.eeoc.gov/policy/docs/harassment.html (last visited Feb. 21, 2005) [hereinafter EEOC Enforcement Guidance] (providing the requirements for who qualifies as an advisor in Section III).

27. *Suders*, 542 U.S. at 135. Suders said that every time she went into Easton's office "he would bring up [the subject of] people having sex with animals. . . . [T]hat's all the man wanted to talk about." *Easton*, 325 F.3d at 436.

28. *Suders*, 542 U.S. at 135. Easton said that "if someone had a daughter, they should teach her how to give a good blow job!" *Easton*, 325 F.3d at 436. Easton claimed that the statements regarding bestiality and oral sex pertained to investigations. *Id.* at 437. Sergeant Easton would also sit down near Suders, while wearing spandex shorts, and spread his legs far apart. *Id.* at 436.

29. *Easton*, 325 F.3d at 437. Suders said that the obscene gestures always followed the same pattern. *Id*. Evidently Baker was trying to imitate a television professional wrestling move. *Id*. According to Suders, Baker would "cross his hands, grab hold of his private parts and yell, suck it." *Id*. Suders said that he would also beat on his crotch while yelling "suck it." *Id*. Suders stated that all Baker wanted to do was "play with his crotch." *Id*. Suders said that Baker would also "ask me to do this garbage." *Id*.

30. *Suders*, 542 U.S. at 135.

31. *Id*. at 135. Suders alleged that on one occasion Baker, without invitation, told Suders that his wife intended to pierce her nipple and he intended to pierce his genitals. *Easton*, 325 F.3d at 437.

32. *Suders*, 542 U.S. at 135 (telling Suders that "the village idiot could do her job").

33. *Id*.

34. *Id.*

gave Suders her telephone number but neither person contacted the other.[35] Two months later, Suders approached the EEO officer again, this time stating that she was being harassed and was afraid.[36] The EEO officer instructed Suders to file a complaint, but did not tell her where or how to do so.[37] Two days after Suders last approached the EEO officer, she was arrested by her supervisors for theft of PSP property.[38]

The PSP property Suders was arrested for stealing was computer examinations.[39] Suders had taken a computer-skills examination several times trying to satisfy a requirement for her job.[40] Suders was told that she failed the exam every time she took the test.[41] One day Suders happened upon her computer-skills exams in a drawer in the women's locker room, concluded that her tests were never graded, and took the tests from the drawer.[42] Suders' supervisors discovered that the exams were missing, covered the drawer with a theft-detection powder and waited for Suders to return the tests.[43] When Suders tried to put the tests back in the drawer, the powder turned her hands a "telltale blue."[44] The supervisors arrested Suders upon viewing her blue hands.[45] Suders was handcuffed, photographed, and detained as a suspect.[46] Prior to the day of her arrest, Suders had prepared a resignation letter that she ultimately tendered on that day.[47] Suders was not immediately released upon tendering her resignation, although after she repeatedly stated that she quit, she was released and no charges were pressed against her.[48]

35. *Id*.

36. *Id.*

37. *Suders*, 542 U.S. at 135–36. In fact, to Suders the EEO officer's response and demeanor were "insensitive and unhelpful." *Id*. at 136. "[T]he record in this case makes clear that an important factor was the EEO officer's failure to take any meaningful action when the plaintiff complained, thereby making her feel helpless and hopeless and precipitating her resignation." *Supreme Court Extends Sexual Harassment Defense to Constructive Discharge Claims*, FAIR EMPLOYMENT PRACTICES GUIDELINES, Number 590, July 2004, at 1, 3 [hereinafter FAIR EMPLOYMENT PRACTICES GUIDELINES]. It is also notable that the Pennsylvania State Police was under investigation generally for the "lax way it handles sexual-misconduct complaints against its troopers." Nicole Weisensee Egan, *Court Rules Workers Forced to Leave Due to Sexual Harassment Can Sue*, KNIGHT RIDDER TRIBUNE BUSINESS NEWS, Jun. 15, 2004, at 1.

38. *Suders*, 542 U.S. at 136.

39. *Id.*

40. *Id*.

41. *Id*.

42. *Id.*

43. *Suders*, 542 U.S. at 136.

44. *Id*.

45. *Id.*

46. *Id*.

47. *Id*.

48. *Suders*, 542 U.S. at 136.

Suders sued PSP in federal district court in September of 2000.[49] Suders claimed a violation of Title VII of the Civil Rights Act of 1964[50] alleging she was sexually harassed and constructively discharged.[51] Essentially, Suders claimed that the workplace sexual harassment she experienced was so severe that she had no other choice but to quit.[52] Suders substantiated this "no choice but to resign" position by claiming that in a five-month timeframe she was continually harassed by her supervisors.[53] Suders alleged that the harassment ceased only upon her resignation.[54]

PSP filed a motion for summary judgment at the close of discovery and the motion was granted by the district court.[55] Although the district court determined that Suders' testimony was such that a trier of fact could conclude that the supervisors had created a sexually hostile environment,[56] the court held PSP was not vicariously liable for the conduct of its employees.[57] In so holding, the district court relied on the 1998 twin Supreme Court decisions of *Ellerth* and *Faragher*.[58] In *Ellerth* and *Faragher* the Court distinguished between supervisor harassment accompanied by an official act, and supervisor harassment unaccompanied by an official act.[59] The import of this distinction is that supervisory harassment accompanied by an official act imputes strict liability to the employer for the acts of the supervisors.[60] It is important to note that the district court found Suders' hostile work environment claim untenable as a matter of law.[61] The district court found that Suders "unreasonably failed to avail herself to the PSP's internal procedures for reporting any harassment."[62] Suders appealed the decision.[63]

49. *Id*.

50. 42 U.S.C. § 2000e–2000e-17 (2000).

51. *Suders*, 542 U.S. at 136–37.

52. *Id.*

53. *Id*. at 135–37.

54. *Id.* at 135.

55. *Id*. at 137.

56. *Suders*, 542 U.S. at 137. "The essence of a 'hostile environment' claim is a 'pattern or practice' of offensive behavior by the employer, a supervisor, co-workers, or non-employees so 'severe or pervasive' as to interfere with the employee's job performance or create an abusive work environment." CHARLES V. DALE, SEXUAL HARASSMENT AND VIOLENCE AGAINST WOMEN: DEVELOPMENTS IN FEDERAL LAW 4 (2004).

57. *Suders*, 542 U.S. at 137.

58. *Id.*

59. *Id*.

60. *Id*.

61. *Id.* at 138.

62. *Suders*, 542 U.S. at 137–38.

63. *See id*. at 138. The district court reasoned that Suders had never given the PSP an opportunity to address her complaints, as she resigned only two days after discussing actual harassment with the Equal Employment Opportunity Officer. *Id*. Suders' constructive discharge claim was not addressed by the district court. *Id*.

The Court of Appeals for the Third Circuit reversed and remanded the case.[64] The Court of Appeals determined that the district court erred when it failed to address Suders' claim of supervisor-induced hostile environment constructive discharge.[65] The court decided that per its precedent, constructive discharge was the functional equivalent of an actual termination.[66] The Third Circuit held that when a constructive discharge is proven, it amounts to a tangible employment action for which the employer is strictly liable under the *Ellerth–Faragher* framework, precluding the employer's use of the affirmative defense.[67] The court opined that making the *Ellerth–Faragher* defense available in constructive discharge cases might lead to undesired effects that would be inconsistent with Title VII goals.[68]

PSP filed a petition for certiorari to the United States Supreme Court.[69] The Court granted certiorari to resolve the circuit split regarding whether a supervisor-induced hostile environment constructive discharge is a tangible employment action that imposes strict liability on the employer.[70] The Supreme Court agreed with the Third Circuit's decision that a claim of constructive discharge was cognizable under Title VII.[71] As to the imposition of liability, the Court determined that the Third Circuit incorrectly held that an employer is automatically liable when the employee claims constructive discharge.[72]

The Court's opinion, written by Justice Ginsburg, explained that it was disinclined to hold that a claim of constructive discharge would always bar the employer from asserting the *Ellerth–Faragher* affirmative defense.[73] Rather, the Court determined that employers should only be held strictly liable for harassing acts of supervisors that would not be possible without the

64. *Id*. at 138.

65. *Id*. at 139. Suders' complaint did not expressly allege constructive discharge, but based upon allusions to being "forced to suffer a termination" in her complaint, the Third Circuit found "[t]he allegations of constructive discharge . . . apparent on the face of Suders's [pleading]." *Id*. at 139 n.5.

66. *Id*. at 139.

67. *Suders*, 542 U.S. at 139. Note that this decision was consistent with the Third Circuit's prior rulings. *See infra* notes 158–62.

68. *Easton*, 325 F.3d at 461 (stating that disallowing constructive discharge as a tangible employment action could have the "perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment").

69. Suders v. Easton, 325 F.3d 432 (3d Cir. 2003), *petition for cert. filed, available at* 2003 WL 22428573 (U.S. July 14, 2003) (No. 03-95).

70. *Suders*, 542 U.S. at 140; *see also* Chamallas, *supra* note 16, at 310 (noting that lower courts had difficulty deciding constructive discharge cases and that as such, a circuit split had occurred).

71. *Suders*, 542 U.S. at 140.

72. *Id.* at 141.

73. *Id.* at 140–41.

supervisor's agency relationship with the employer.[74] The Court's distinction was driven by the concern that constructive discharges may be induced by acts of employees, unofficial acts of supervisors, or official acts of supervisors.[75] As such, the Court did not believe that a finding of strict liability was warranted without greater certainty that the harasser was "aided by" his position as a supervisor.[76] The Court also stated that allowing an employer to utilize the *Ellerth–Faragher* defense promotes deterrence, an underlying policy of Title VII.[77]

III. EMPLOYER LIABILITY FOR SUPERVISORY HARRASSMENT UNDER TITLE VII

A brief discussion of Title VII and its sexual harassment progeny is enlightening for understanding the holding of *Suders*. Title VII of the Civil Rights Act of 1964 is the law that initially made discrimination based upon sex or gender illegal.[78] Title VII makes it unlawful for an employer to discriminate in the terms or conditions of hiring or employment based upon an individual's sex.[79] Congress's intent regarding gender as a protected class under Title VII was to prevent occurrences that dissuaded women from employment opportunities.[80] Later courts recognized that the goals of equality for women

74. *Id.* at 148–49 (stating that "absent . . . an official act, the extent to which the supervisor's misconduct has been aided by the agency relation . . . is less certain").

75. *Id.* at 148 (explaining that "harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts. Unlike an actual termination, which is *always* effected through an official act of the company, a constructive discharge need not be.").

76. *Suders*, 542 U.S. at 148 (stating that "[a]bsent 'an official act of the enterprise,' as the last straw, the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force").

77. This is reflected in the affirmative defense requirement of a showing that the employee unreasonably failed to take advantage of the employer's internal grievance procedure. *Id.* at 137–38. As such the Court suggests that this requirement will encourage employers to have effective procedures in place and encourage employees to report harassment. The reporting requirement would then allow the employer to take appropriate corrective action before it escalates to severity. *See also* Shari M. Goldsmith, *The Supreme Court's* Suders *Problem: Wrong Question, Wrong Facts Determining Whether Constructive Discharge is a Tangible Employment Action*, 6 U. PA. J. LAB. & EMP. L. 817, 836 (2004).

> Chief Judge Posner intimated that the mitigation standard embodies the same principle underlying the Court's tangible employment action. Judge Posner explained in his concurring opinion that Ellerth's "action in quitting rather than complaining underscores the importance of agency principles that place appropriate pressure on victims of sexual harassment to protect themselves . . . by complaining."

Id. (quoting Ellerth v. Burlington Indus., Inc., 123 F.3d 490, 516 (7th Cir. 1997) (Posner, C.J., concurring)).

78. 42 U.S.C. § 2000e-2(a)(1).

79. *Id.*

80. Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990). "The point of the laws against sex discrimination is that women have a right to be in the workplace on the same

in the workplace could only be achieved if women could work without fear of harassment.[81] When considering sexual harassment claims, courts are still heedful of the fact that the primary purpose of Title VII is to avoid harm rather than to provide redress.[82]

The concept of constructive discharge was originally developed by the National Labor Relations Board to characterize situations where employers essentially forced employees who were associated with unions to leave their employ.[83] Employers would create a constructive discharge by causing employees to quit due to unbearable working conditions.[84] The doctrine of constructive discharge was recognized by, and firmly established in, the federal courts by the enactment of Title VII.[85] The constructive discharge doctrine was utilized in Title VII cases beginning in the early 1970s.[86] Since that time, a wide range of constructive discharge cases under Title VII have been recognized by the courts of appeal.[87] The concept of constructive discharge has been amended somewhat from the original National Labor Relations Act when imported into employment discrimination suits. Whereas the National Labor Relations Board decisions initially focused on the illegality of the employer's conduct when determining whether the employee was constructively discharged, two additional requirements have been engrafted into proof of a constructive discharge.[88] One requirement utilized by some of the circuits is a showing of intent on the part of the employer to cause the employee to resign.[89] Second, plaintiffs in all circuits must prove that their

terms as men." GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 134 (2001).

81. *Andrews*, 895 F.2d at 1483.

82. Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998) (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

83. *Suders*, 542 U.S. at 141. The first case to use the term "constructive discharge" was *In re Sterling Corset Co.*, 9 NLRB 858, 865 (1938). Chamallas, *supra* note 16, at 357 n.196.

84. *Suders*, 542 U.S. at 141. *See* NLRB v. East Texas Motor Freight Lines, 140 F.2d 404, 405 (5th Cir. 1944) (first court of appeals case to hold that a supervisor-induced resignation is an unfair labor practice); *see also* NLRB v. Saxe-Glassman Shoe Corp., 201 F.2d 238, 243–44 (1st Cir. 1953) (first court of appeals case to give backpay award for constructive discharge).

85. *Suders*, 542 U.S. at 142; *see also* Cathy Shuck, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 402, 410 (2002).

86. Shuck, *supra* note 85, at 404 (referring to Young v. Southwestern Sav. & Loan Ass'n., 509 F.2d 140 (5th Cir. 1975) and Andres v. Southwestern Pipe, Inc., 321 F. Supp. 895 (D. La. 1971)).

87. *Suders*, 542 U.S. at 142. "[A]pplication of the constructive discharge doctrine to Title VII cases has received apparently universal recognition among the courts of appeals which have addressed that issue." *Id.* at 142 (quoting Goss v. Exxon Office Systems Co., 747 F.2d 885, 887 (3d Cir. 1984)).

88. Shuck, *supra* note 85, at 404.

89. *Id.*

resignation was a reasonable response to the harassment.[90] Note that the second requirement serves to shift the focus of the "constructive discharge inquiry" from the employer to the employee.[91]

A. Constructive Discharge and Damages

The remedies originally available under Title VII to victims of sexual harassment were expanded by the Civil Rights Act of 1991, codified at 42 U.S.C. 1981(a)(2000).[92] The 1991 Act allowed for the award of damages for intentional discrimination.[93] The structure of the Civil Rights Act of 1991 utilizes compensatory damages as deterrence.[94] By including monetary damages as part of Title VII's remedial scheme, Congress accentuated the fact that monetary damages increase the employer's potential costs for engaging in intentional discrimination.[95] The concept is that increased potential liability will provide encouragement for extinguishing sexual harassment before problems occur.[96] Under the Act, damage caps are placed on the employer's future pecuniary losses, non-pecuniary losses, and punitive damages based on the number of employees.[97]

90. *Id*.

91. *Id*. "The reasonableness of the employee's response is generally evaluated by asking whether the discrimination was more egregious than 'ordinary' actionable harassment, and whether or not the employee, prior to quitting, gave the employer an opportunity to remedy the harassment." *Id*.

92. RUTHERGLEN, *supra* note 80, at 178.

93. *Id.* at 179 (referring to section 1981(a) of the United States Code). As such, the damages available for sex discrimination are now more on par with the damages already available for discrimination based on race and national origin. *Id.* at 178–79.

94. Nancy R. Mansfield and Joan T. A. Gabel, *An Analysis of the* Burlington *and* Faragher *Affirmative Defense: When Are Employers Liable?*, 19 LAB. LAW. 107, 108 (2003).

> Among the stated motivations driving the Act's passage was "the need to overturn *Price Waterhouse* [*v. Hopkins*]," 490 U.S. 228 (1989), which Congress believed had severely undercut Title VII's effectiveness. *See* H.R. Rep. No. 102-40(I) at 45 (1991). In *Price Waterhouse*, the Supreme Court held that an employer who made an employment decision that was based on discrimination could escape liability if it could prove that it would have made the same decision in the absence of discrimination. *See Price Waterhouse*, 490 U.S. at 258. This holding undermined Title VII's intent to completely eliminate intentional discrimination.

Id. at n.13.

95. *Id*. at 109 (citing H.R. REP. NO. 102-40(I) at § XI (1991)).

96. *Id*.

97. RUTHERGLEN, *supra* note 80, at 179. The amounts vary depending on the size of the employer, from $50,000 for employers with 15 to 100 employees, to $300,000 for employers with more than 500 employees. *Id.* Punitive damages are also used as a deterrent but are only applicable to private employers. *Id*. As such, punitive damages will not be available to Suders. Additionally, the applicability of punitive damages is based upon a showing that the employer acted "with malice or with reckless indifference" to the rights of the plaintiff. *Id*.

The significance of successfully proving a claim of constructive discharge lies in the remedies available to the plaintiff.[98] A plaintiff who can prove constructive discharge may be able to recover backpay and frontpay, which are damages that result from the job loss.[99] Frontpay and backpay are of particular importance because they do not have damage caps.[100] The focus in constructive discharge is whether a plaintiff was justified in resigning based upon the circumstances. Thus, if the plaintiff is unable to prove constructive discharge, that is, that she was justified in quitting, courts generally will not allow her to recover the economic losses connected with her job loss.[101] A plaintiff will usually not be able to recover such economic losses even if the plaintiff successfully demonstrates a hostile environment violative of Title VII because her resignation would be viewed as an unreasonable response to the situation.[102] If the requirement were otherwise, employees would likely quit under adverse situations rather than trying to correct the problem. Title VII's remedial scheme, that is, to prevent harm rather than to provide redress, would not be advanced if employees were able to quit without having to mitigate the situation.

B. Progeny of Title VII Emphasizes Deterrence

Since the passage of Title VII, sexual harassment cases interpreting the Act have continued to emphasize Title VII's focus on motivating employers to constrain discriminatory acts.[103] As such, sexual harassment has evolved from

98. Chamallas, *supra* note 16, at 315.

> [I]f the plaintiff is successful in proving [a] constructive discharge, she will be entitled to recover two sets of damages: not only those damages flowing from the hostility of supervisors and co-workers while on the job, . . . but also damages flowing from the loss of her job—most notably, backpay and frontpay.

Id.

99. *See* Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 848 (2001). Courts usually do not grant recovery for backpay and frontpay to plaintiffs who quit, unless they successfully prove constructive discharge. Chamallas, *supra* note 16, at 315.

100. *See Pollard*, 532 U.S. at 848–54; Chamallas, *supra* note 16, at 317.

101. Chamallas, *supra* note 16, at 315.

102. *Id*.

103. Mansfield & Gabel, *supra* note 94, at 109; *see, e.g.*, City of Riverside v. Rivera, 477 U.S. 561 (1986); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998). The power theory presented by Catharine MacKinnon in 1979 has assisted the Court in recognizing sexual harassment as Title VII discrimination. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 57–99 (1979); Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982) (utilizing the terms quid pro quo sexual harassment and "hostile work environment" which were developed by MacKinnon). The idea of MacKinnon's "power theory" is that women generally lack power equal to men in the workplace and as such sexual harassment is a vehicle for men to retain greater power. *See* MACKINNON, *supra*, at 59.

recognizing basically only "quid pro quo" sexual harassment[104] to recognizing that Title VII's purview includes "hostile work environment" harassment.[105] Throughout the development of sexual harassment law, the Court has steadfastly focused on the deterrent intent of Title VII to prevent harm.

An employee must first have experienced a hostile work environment before a hostile work environment constructive discharge case can be claimed.[106] As such, it is important to review briefly the case that established the concept of a sexually hostile work environment.

1. Hostile Work Environment—*Meritor Savings Bank, FSB v. Vinson*

The concept of a sexually hostile work environment was first recognized by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*.[107] In *Meritor*, the Court determined that sexually harassed employees have a cause of action under Title VII when the harassment is so pervasive as to create a hostile work environment that alters the condition of employment.[108] In so holding, the Court specified that Title VII serves to prohibit discrimination committed by employers, not to regulate the behavior of employees.[109] The Court discerned

104. *Black's Law Dictionary* defines quid pro quo sexual harassment as: "Sexual harassment in which the satisfaction of a sexual demand is used as the basis of an employment decision." BLACK'S LAW DICTIONARY 1407 (8th ed. 2004). This type of harassment might occur, for example, if a boss fired or demoted an employee who refused to go on a date with the boss. *See id*.

105. Mansfield & Gabel, *supra* note 94, at 109; *see also* Ellen Frankel Paul, *Sexual Harassment as Per Se Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333–36 (1990). *Black's Law Dictionary* defines "hostile-environment sexual harassment" as:

> Sexual harassment in which a work environment is created where an employee is subject to unwelcome verbal or physical sexual behavior that is either severe or pervasive. This type of harassment might occur, for example, if a group of coworkers repeatedly e-mailed pornographic pictures to a colleague who found the pictures offensive.

BLACK'S LAW DICTIONARY 1407 (8th ed. 2004).

106. Pennsylvania State Police v. Suders, 542 U.S. 129, 151 (2004).

107. 477 U.S. 57 (1986). It is interesting to note that Catharine A. MacKinnon, who first coined the phrase "hostile work environment," *see supra* note 103, assisted Vinson's attorney on the brief filed with the Supreme Court in *Meritor*. Linda Kelly Hill, *The Feminist Misspeak of Sexual Harrassment*, 57 FLA. L. REV. 133, 147 n.74 (2005). In *Meritor*, a bank employee alleged that her supervisor made demands for sexual favors, fondled her in front of other employees, exposed himself to her, and forcibly raped her more than once. *Meritor*, 477 U.S. at 60.

108. *Meritor*, 477 U.S. at 66–67; *see also* Suders v. Easton, 325 F.3d 432, 443 (3d Cir. 2003). The Supreme Court's opinion in *Meritor* brought sexual harassment mainstream attention and influenced the highly controversial issues of the Anita Hill–Clarence Thomas hearings, the Tailhook scandal, and President Clinton's impeachment. *See generally* AUGUST B. COCHRAN III, SEXUAL HARASSMENT AND THE LAW: THE MECHELLE VINSON CASE 166, 173–80 (2004).

109. *Meritor*, 477 U.S. at 71–72; RUTHERGLEN, *supra* note 80, at 129. The definition of employer includes anyone who is acting as an "agent," and as such, if an employee is harassing and is acting as an agent of the employer, the employer is liable. RUTHERGLEN, *supra* note 80, at 129. It is also important to note though that liability under state law may render different results.

that employers are not automatically responsible for all acts committed by their employees.[110] The Court utilized common law agency principles, specifically *Restatement (Second) of Agency* § 219,[111] to determine when employers will be liable for the acts of their employees.[112] The *Meritor* Court tempered strict application of agency principles with the remedial goals of Title VII in limiting the liability of employers for the acts of their employees.[113] Thus, *Meritor* formulated a new analysis for whether the employer is vicariously liable for supervisor harassment.[114]

One way in which an employer may be held vicariously liable for the actions of its employees is where a supervisor creates a hostile work environment. *Meritor* held that Title VII encompassed actions for hostile work environments caused by supervisors.[115] *Meritor* established that the "creation or toleration of a hostile . . . working environment" due to a victim's sex is discriminatory harassment.[116] The *Meritor* Court stated that the allegedly hostile environment must satisfy two prongs. First, the environment must be such that a reasonable person would objectively find it hostile.[117] Second, the victim must also have perceived the environment as hostile.[118] Once this

See Misty L. Gill, *The Changed Face of Liability for Hostile Work Environment Sexual Harassment: The Supreme Court Imposes Strict Liability in* Faragher v. City of Boca Raton *and* Burlington Industries, Inc. v. Ellerth, 32 CREIGHTON L. REV. 1651, 1690 n.414 (1999) (citing Jansen v. Packaging Corp. of Am., 123 F.3d 490, 566 (7th Cir. 1997)).

110. *Meritor*, 477 U.S. at 72 (stating that "Congress' decision to define 'employer' to include any 'agent' of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible") (internal citation omitted).

111. *See* RESTATEMENT (SECOND) OF AGENCY §§ 219–37 (1958).

112. *Meritor*, 477 U.S. at 72.

113. *Id*. at 71–72. *Meritor* held that "agency principles constrain the imposition of vicarious liability in cases of supervisory harassment." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 763 (1998).

114. *Meritor*, 477 U.S. at 70–72 (relying upon RESTATEMENT (SECOND) OF AGENCY § 219); *see also* Mansfield & Gabel, *supra* note 94, at 109.

115. *Meritor*, 477 U.S. at 73.

116. *Id.* at 66–67.

117. *See id.* at 65.

118. *See id.* at 67–68. The victim is not required to establish economic or psychological harm. Harris v. Forklift Systems, Inc., 510 U.S. 17, 22–23 (1993). The victim must in fact find the conduct offensive or unwelcome. MACK A. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL 157 (4th ed. 1999). Whether the conduct was subjectively unwelcome is an issue of fact. *Id*. This means that a reasonable person in the plaintiff's position would have found that the conduct created a hostile work environment. *Id*. at 158. Note, though, that the Court has recognized that Title VII is not a "general civility code," and that "ordinary tribulations of the workplace, such as sporadic use of abusive language, gender related jokes, and occasional teasing" are not actionable. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). "Discourtesy or rudeness should not be confused with . . . harassment" and "a lack of . . . sensitivity does not, alone, amount to actionable harassment." *Id*. at 787. But note that the

standard was announced, lower courts soon developed differing standards as to applicability of vicarious liability based upon varying interpretations of agency principles.[119] The *Meritor* decision was an important beginning, but not a long-term fix.

2. Court Announces Affirmative Defense for Employers

The next major development in hostile environment jurisprudence that is important to a discussion of the *Suders* decision came in 1998 from the twin decisions of *Ellerth* and *Faragher*. *Ellerth* and *Faragher* made clear that under some circumstances an employer may be held strictly liable for sexual harassment committed by a supervisor.[120]

In *Ellerth*, Kimberly Ellerth was threatened with various adverse decisions, including denial of a raise or promotion or even termination if she failed to give her supervisor, Ted Slowik, sexual favors.[121] The supervisor never followed through with his threats, though, and Ellerth remained employed until she ultimately quit.[122] While the Seventh Circuit saw the situation as quid pro quo harassment, resulting in strict liability, the Supreme Court ruled that

conduct itself need not be sexual in nature, sexually explicit, or motivated by sexual desire. PLAYER, *supra*, at 159.

119. Burlington Industries Inc. v. Ellerth, 524 U.S. 742, 752–53 (1998); *see also* Mansfield & Gabel, *supra* note 94, at 109. When lower courts applied *Meritor*, they began to use the terms quid pro quo and hostile work environment as a standard for determining vicarious liability of the employer. *Id.* at 111 (citing Davis v. Sioux City, 115 F.3d 1365, 1367 (8th Cir. 1997); Nichols v. Frank, 42 F.3d 503, 513–14 (9th Cir. 1994); Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 106–07 (3d Cir. 1994); Sauers v. Salt Lake County, 1 F.3d 1122, 1127 (10th Cir. 1993); Kauffman v. Allied Signal, Inc., 970 F.2d 178, 185–86 (6th Cir. 1992), *cert. denied*, 506 U.S. 1041 (1992); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989)).

120. RUTHERGLEN, *supra* note 80, at 131.

121. *Ellerth*, 524 U.S. at 747–48. Ellerth claimed that Slowik made many offensive remarks and gestures to her, but she placed emphasis on three particular situations where she took Slowik's comments to be threats to deny her certain job benefits. *Id.* Once when Ellerth did not respond to comments Slowik made regarding her breasts, he said that she should "loosen up" and told her, "[Y]ou know, Kim, I could make your life very hard or very easy at Burlington." *Id.* at 748. Slowik later commented in a promotion meeting that Ellerth was not "loose enough" and then reached over and rubbed her knee. *Id.* Ellerth received the promotion, but when Slowik called to inform her of the promotion he told Ellerth, "[Y]ou're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs." *Id.* After Ellerth was promoted, she contacted Slowik to ask a question to which he responded, "I don't have time for you right now, Kim . . .—unless you want to tell me what you're wearing." *Id.* Ellerth ended the call and when she tried to discuss the matter with Slowik a few days later he responded by asking, "[A]re you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." *Id.*

122. *Id.* at 748. At the time Ellerth quit, she fashioned a resignation letter which gave reasons for her departure that were unrelated to the harassment by her supervisor. *Id.* However, Ellerth did submit a second letter, approximately three weeks after her resignation, stating that she quit due to her supervisor's behavior. *Id.*

Ellerth's situation was a hostile work environment.[123] The Court ruled in Ellerth's favor and utilized the ruling to clarify how to determine the extent of an employer's liability when a supervisor is the harasser.[124]

The facts of *Faragher* are very similar to *Ellerth* except that Burlington Industries was a private employer whereas the City of Boca Raton was a public employer.[125] Beth Ann Faragher was a lifeguard who experienced severe and pervasive abuse from two of her supervisors.[126] The City had a harassment policy, but Faragher was never informed of or exposed to it.[127] Justice Souter authored the opinion for the same 7–2 majority that existed in *Ellerth* and repeated Justice Kennedy's *Ellerth* holding verbatim.[128]

Under the *Ellerth–Faragher* framework, if the harassment is accompanied by a "tangible employment action"[129] the employer is strictly liable for the hostile work environment created.[130] If the hostile environment is not accompanied by a tangible employment action, the employer may assert the affirmative defense and, if successful, avoid liability.[131] To succeed on the affirmative defense, the employer must establish that: (1) it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," such as having an effective, well-publicized harassment prevention program and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[132]

123. *Id.* at 754 (stating that "[b]ecause Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct").

124. *Id*. at 754–66.

125. Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998).

126. *Id.* at 780. The acts Faragher complained of included abuses to herself and other female lifeguards. For example, one of the supervisors would put his arm around Faragher and his hand on her buttocks. *Id*. at 782. Another supervisor informed Faragher that if it were not for a physical characteristic that he found unattractive, he would have wanted to have sex with her. *Id*. On a different occasion this same supervisor pantomimed the act of oral sex. *Id.*

127. *Id.* at 781–82. The City's harassment policy was never disseminated among employees of Faragher's department. *Id*.

128. *Id*. at 807.

129. In *Ellerth*, the Court stated that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761.

130. *Id*.; *Faragher*, 524 U.S. at 807.

131. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

132. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807; *see also* Edward Felsenthal, *Justices' Ruling Further Defines Sex Harassment*, WALL ST. J., Mar. 5, 1998, at A1 (recommending four steps an employer can take to aid in utilization of the affirmative defense: 1) "Tailor a sexual-harassment policy" appropriate to your business and include "real-life examples" to illustrate situations the policy covers; 2) "Require every employee," including *all* top

The Court developed the *Ellerth–Faragher* defense in light of Title VII's goals of encouraging anti-harassment policies and grievance mechanisms.[133] The Court determined that relating the liability to the employer's efforts to utilize effective grievance procedures would further Congress's intent to "promote conciliation rather than litigation" of Title VII controversies.[134] Additionally, tying liability limitation to incorporation of effective preventive and corrective measures serves Title VII's deterrent purpose.[135] The defense encourages employees to report harassing behaviors before the environment becomes "severe or pervasive."[136]

3. Founded in Agency Principles, Focused on Tangible Employment Action

The Court's analysis in *Ellerth* and *Faragher* was founded upon principles of agency law.[137] In *Ellerth*, the Court specifically discussed and quoted

executives, to take "customized training on sexual-harassment awareness"; 3) Explain the internal procedures for victims to follow to file complaints, and promise to employ an external investigator if required; 4) Regularly evaluate how familiar employees are with "corporate sexual-harassment policies and complaint procedures").

133. *Ellerth*, 524 U.S. at 764. Additionally, the creation of the affirmative defense supports the primary purpose of Title VII, in that it is not to provide redress, but rather to avoid harm. Suders v. Easton, 325 F.3d 432, 461 n.18 (3d Cir. 2003) (citing *Faragher*, 524 U.S. at 805–06).

134. *Ellerth*, 524 U.S. at 764.

135. *Id.*

136. *Id*. The moral of these cases is included in the EEOC Enforcement Guidance, which was written in June 1999 to interpret *Ellerth* and *Faragher*. The EEOC Enforcement Guidance states that "at a minimum," a policy to prevent and protect should contain the following six elements:

1) A clear explanation of prohibited conduct;
2) Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
3) A clearly described complaint process that provides accessible avenues of complaint;
4) Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
5) A complaint process that provides a prompt, thorough, and impartial investigation; and
6) Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

EEOC Enforcement Guidance, *supra* note 26. This document's precursor, Equal Employment Opportunity Commission, Policy Guidance on Current Issues of Sexual Harrassment, N915.002, (1990), written in March 1990 to interpret *Meritor*, is available at http://www.eeoc.gov/policy/docs/currentissues.html.

137. *Ellerth*, 524 U.S. at 756–65; *Faragher*, 524 U.S. at 793–94.

1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
    a) the master intended the conduct or the consequences, or
    b) the master was negligent or reckless, or
    c) the conduct violated a non-delegable duty of the master, or

section 219(2) of the *Restatement (Second) of Agency*.[138] Section 219(2) defines when a master is liable for the actions of his servant when the servant is not acting within the scope of his duties; the Court discussed three standards for imputing liability to the employer for the acts of the supervisor under § 219(2):

1) the intent standard ("the master intended the conduct or the consequences"),[139]

2) the negligence standard ("the master was negligent or reckless"),[140] and

3) the "aided in the agency relation" standard ("the servant . . . was aided in accomplishing the tort by the existence of the agency relation").[141]

The basis for the resulting tangible employment action rule in *Ellerth* and *Faragher* is based upon the third standard ("aided in the agency relation" standard). The Court recognized though that were this "aided in the agency relation" standard to be strictly applied to employment cases, an employer would potentially be liable for harassment committed by any persons within its employ.[142] The Court acknowledged that in some ways all workplace tortfeasors are aided in the accomplishment of torts by the existence of the agency relation. In other words, "[p]roximity and regular contact may afford a captive pool of potential victims."[143] The Court considered that neither the EEOC nor any of the courts of appeals to have considered the issue thought vicarious liability was always the required result.[144] Thus the Court determined that when the "aided in the agency relation" standard is applied to Title VII causes of action, "the existence of something more than the employment relation itself" is required.[145]

The *Ellerth* Court found the "aided in the agency relation" standard to be appropriate for determining when the employer should be liable for an act of a supervisor. The requirement of something more than the employment

d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

138. *Ellerth*, 524 U.S. at 758.

139. RESTATEMENT (SECOND) OF AGENCY § 219(2)(a) (1958).

140. *Id*.

141. *Id*.

142. *Ellerth*, 524 U.S. at 760.

143. *Id*.

144. *Id*.

145. *Id*.; *see* FRANCIS ACHAMPONG, WORKPLACE SEXUAL HARASSMENT LAW: PRINCIPALS, LANDMARK DEVELOPMENTS, AND FRAMEWORK FOR EFFECTIVE RISK MANAGEMENT 50–51 (1999) (discussing RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) and its application to hostile environment harassment).

relationship is found in what the Court terms as a "tangible employment action."[146] As such, the Court determined that when a supervisor causes a tangible employment action to occur, the discriminatory or harassing action could not have occurred without the agency relationship.[147] That is to say that the particular "tortious" harassment which was manifested through the tangible employment action could not have occurred without the supervisor's position of power. Once a tangible employment action is established, the "aided in the agency relation" standard for strict liability is also automatically established.[148] Thus, for Title VII purposes, a tangible employment action by a supervisor constitutes a tangible employment action taken by the employer.[149]

What then constitutes a tangible employment action? The *Ellerth* Court stated that a tangible employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[150] The Equal Employment Opportunity Commission (EEOC) offers further guidance by providing examples of tangible employment actions: hiring and firing, promotion and failure to promote, demotion, undesirable reassignment, a decision causing a significant change in benefits, compensation decisions, and work assignment.[151]

146. *Ellerth*, 524 U.S. at 760–61.

147. *Id.* at 761–62. Only a person acting with the authority of the company can cause this sort of injury. *Id.*

148. *Id*. at 762. One should note though that even without a tangible employment action, the employer will still face vicarious liability (although not strict liability) unless it can prove the two elements of the affirmative defense. *Id*. at 766.

149. *Id.* at 762.

150. *Id.* at 761. This definition has been easily applied to the facts of many cases. Mansfield & Gabel, *supra* note 94, at 115; *see* Durham Life Ins. Co. v. Evans, 166 F.3d 139, 153–54 (3d Cir. 1999) (holding that taking away an employee's office, dismissal of employee's secretary, and stealing an employee's files is unequivocally a tangible employment action).

151. *See* EEOC Enforcement Guidance § IV(B). The Guidance defines tangible employment action as "a significant change in employment status" and provides characteristics of a tangible employment action:

1) A tangible employment action is the means by which the supervisor brings the official power of the enterprise to bear on subordinates, as demonstrated by the following:
   - it requires an official act of the enterprise;
   - it usually is documented in official company records;
   - it may be subject to review by higher level supervisors; and
   - it often requires the formal approval of the enterprise and use of its internal processes.
2) A tangible employment action usually inflicts direct economic harm.
3) A tangible employment action, in most instances, can only be caused by a supervisor or other person acting with the authority of the company.

Id.

The difficulty arose from the fact that constructive discharge was not listed in the above examples from either the *Ellerth* case or the EEOC Guidelines. Should constructive discharge be considered a tangible employment action? This question was not easily answered and as such resulted in a split among the circuits.

IV. THE CIRCUIT SPLIT—IS A CONSTRUCTIVE DISCHARGE A TANGIBLE EMPLOYMENT ACTION?

As discussed above in Part III, the *Ellerth* and *Faragher* Courts held that an employer is strictly liable for supervisor harassment that culminates in a tangible employment action. As such, determining whether a constructive discharge equates to a tangible employment action became very important subsequent to the *Ellerth* and *Faragher* decisions. Whether a constructive discharge was the equivalent of a tangible employment action was determinative of whether or not the employer would be held strictly liable or could present the *Ellerth–Faragher* affirmative defense in hostile environment constructive discharge claims.

Unfortunately, after the *Ellerth* and *Faragher* decisions, lower courts were still unclear as to whether or not constructive discharge was a tangible employment action.[152] Some courts treated constructive discharge as an actual discharge. In other words, these courts equated a constructive discharge to a tangible employment action.[153] Other courts said that constructive discharge did not rise to the level of a tangible employment action for which the employer is held strictly liable.[154] Some parties argued that the fact that the *Ellerth* Court did not list constructive discharge as an example of a tangible employment action[155] was in itself telling.[156] The circuits thus split when faced

152. Mansfield & Gabel, *supra* note 94, at 117.

153. Jackson v. Ark. Dep't of Educ., Vocational and Technical Educ. Div., 272 F.3d 1020, 1026–27 (8th Cir. 2001) (finding that constructive discharge constitutes a tangible employment action); Cherry v. Menard, Inc., 101 F. Supp. 2d 1160, 1171–74 (N.D. Iowa 2000); *Durham*, 166 F.3d at 153 (finding that when sexually hostile work environment was so pervasive as to leave the employee no choice but to resign, it is a constructive discharge that is tantamount to a tangible employment action).

154. Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294–95 (2d Cir. 1999).

155. *Ellerth*, 524 U.S. at 761.

156. *See* Brief of Chamber of Commerce of the U.S. as Amicus Curiae Supporting Petitioner 8, Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) (No. 03-95), 2004 WL 110584 ("[T]his Court's omission of constructive discharge in its discussion of tangible employment actions was widely regarded as a purposeful one."). Actually, the *Suders* Court indicated that "[t]ellingly, we stated that Ellerth 'ha[d] not alleged she suffered a tangible employment action,' despite the fact that her complaint alleged constructive discharge." *Suders*, 542 U.S. at 147 n.9. *But see* Mansfield & Gabel, *supra* note 94, at 117 (stating that "[t]he *Burlington* court explicitly stated that constructive discharge is a tangible employment action" when it listed that "[a] tangible employment action constitutes a significant change in employment status, such as hiring,

with deciding the issue. Put another way, the split amongst the circuits regarded whether employers should be held strictly liable when acts of supervisors cause employees to quit their jobs.[157]

A. Constructive Discharge Is a Tangible Employment Action

The Third Circuit held in *Suders* that constructive discharge is a tangible employment action.[158] The court noted that in so holding, the Third Circuit was simply following its own precedent.[159] Prior to the *Suders* decision, the Third Circuit had already held that constructive discharge was a tangible employment action in *Durham Life Insurance Co. v. Evans*.[160] In *Durham*, the Third Circuit did not look to whether a tangible employment action precipitated the constructive discharge, but rather just to the circumstances of the hostile environment.[161] The Third Circuit reasoned that if the situation was pervasive enough for the employee to resign, the constructive discharge was the equivalent of a tangible employment action.[162]

The Eighth Circuit first had occasion to review the issue of whether a constructive discharge constitutes a tangible employment action in *Jackson v. Arkansas Department of Education.*[163] The Eighth Circuit determined in *Jackson* that the plaintiff had not been constructively discharged and as such no tangible employment action had occurred.[164] The *Jackson* opinion, in

firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"); Marc A. Hearron, *Employment Discrimination—Sexual Harassment—First Circuit Holds That Constructive Discharge Is Generally Not a Tangible Employment Action, Thereby Not Precluding the* Ellerth/Faragher *Affirmative Defense*—Reed v. MBNA Marketing Systems, Inc., 57 SMU L. REV. 481, 485 (2004). Although the *Ellerth* listing of examples of tangible employment actions does not specifically name constructive discharge, it defines tangible employment action as "a significant change in employment status." *Id*. Constructive discharge falls within this definition due to the fact that the employer–employee relationship ends. *Id.* "Moreover, Ellerth did list discharge as an example of a tangible employment action, and constructive discharge is a type of discharge; it is treated under the law as if the employer terminated the employee." *Id*.

157. Chamallas, *supra* note 16, at 310.

158. See *supra* notes 66–68 and accompanying text.

159. *See* Durham Life Ins. Co. v. Evans, 166 F.3d 139, 153–54 (3d Cir. 1999) (finding that where plaintiff dealt with humiliating and sexist remarks, removal of her office and the disappearance of her files, the hostile working environment was so pervasive as to leave the plaintiff no choice but to resign, and as such, constructive discharge is equivalent to a tangible employment action).

160. *Id*. at 153.

161. *Id*.

162. *Id*.

163. Jackson v. Ark. Dep't of Educ., Vocational and Technical Educ. Div., 272 F.3d 1020 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002).

164. *Jackson*, 272 F.3d at 1027; *see also* Campos v. City of Blue Springs, Mo., 289 F.3d 546, 551 (8th Cir. 2002) (saying that one who is harassed "must take affirmative steps short of

holding that the plaintiff did not suffer a constructive discharge, noted that the plaintiff had not given the employer a chance to rectify the problem.[165] The Eighth Circuit required a mitigation element for a plaintiff to succeed on a claim of constructive discharge. In dicta, the Eighth Circuit intimated that had Jackson proven the constructive discharge it would have constituted a tangible employment action.[166]

The Eighth Circuit was faced with a similar decision in *Jaros v. LodgeNet Entertainment Corp.*[167] In *Jaros*, the jury concluded that the plaintiff was constructively discharged.[168] The Eighth Circuit held in *Jaros*, relying on the above referenced dicta in *Jackson*, that constructive discharge was a tangible employment action and therefore precluded the *Ellerth–Faragher* defense.[169] This resulted in a finding of strict liability against LodgeNet.[170] Essentially the Eighth Circuit integrated a portion of the *Ellerth–Faragher* defense into the plaintiff's burden to establish the occurrence of a constructive discharge. The plaintiff could not prove constructive discharge if she unreasonably failed to take advantage of the employer's internal grievance procedure.

B. Constructive Discharge Is Not a Tangible Employment Action

At the opposite end of the spectrum from the rulings of the Third and Eighth Circuits, the Second Circuit held that constructive discharge was not a tangible employment action.[171] Even though the Second Circuit found that the employer had constructively discharged the employee, it still allowed the employer to assert the *Ellerth–Faragher* defense in *Caridad v. Metro-North*

resigning that a reasonable employee would take to make her conditions of employment more tolerable" before her resignation can be termed a constructive discharge).

165. *Jackson*, 272 F.3d at 1027 (stating that for a constructive discharge to be reasonable, "an employee must give her employer a reasonable opportunity to correct the problem").

166. *Id.* at 1026 (stating that "[i]f Jackson was in fact constructively discharged, then the constructive discharge would constitute a tangible employment action and prevent the Department from utilizing the affirmative defense").

167. 294 F.3d 960 (8th Cir. 2002).

168. *Id.* at 964.

169. *Id.* at 966 (stating that "constructive discharge constitutes a tangible employment action which prevents an employer from utilizing the affirmative defense").

170. *Id.* The jury awarded Jaros $500,000 in damages, reduced by the court to $300,000, the maximum allowable under Title VII. *See* John A. Gray, *Is a Constructive Discharge Resulting from a Supervisor's Environmental Harassment a Tangible Employment Action?*, 55 LAB. L.J. 179, 195 n.88 (2004).

171. Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294 (2d Cir. 1999). The Second Circuit was the first federal court of appeals to address whether constructive discharge is a tangible employment action. *See* Goldsmith, *supra* note 77, at 825; *see also* Turner v. DowBrands, Inc., 221 F.3d 1336 (6th Cir. 2000) (unpublished) (citing *Caridad* for the proposition that "constructive discharge is not a tangible employment action for purposes of *Faragher* and *Burlington*").

Commuter Railorad.[172] In so holding, the court relied on the Supreme Court's analysis of agency principles in *Faragher* and *Ellerth*.[173] The Second Circuit, as did the Supreme Court in *Ellerth* and *Faragher*, focused on the "aided in the agency relation" standard[174] and reasoned that a constructive discharge could be instigated by acts of co-workers as well as supervisors.[175] The Second Circuit also differentiated situations such as demotion or discharge as being ratified or approved by the employer from a constructive discharge where an employer would have no similar ratification.[176]

The Second Circuit also utilized *Ellerth*'s definition of a tangible employment action.[177] In *Ellerth*, the Supreme Court defined tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[178] The Second Circuit took this list to be exclusive and thus lent particular credence to the absence of constructive discharge as a behavior that constitutes a tangible employment action.[179] The *Caridad* court found this to have particular

172. 191 F.3d at 295. In so holding, the court noted it had previously stated that "[w]hen a constructive discharge is found, an employee's resignation is treated . . . as if the employer had actually discharged the employee," but stated that this holding was "in another context." *Id.* (citing Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1188 (2d Cir. 1987)). *Lopez* involved a claim of discrimination based upon national origin. 831 F.2d at 1185.

173. The language reads, "A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . (d) the servant . . . was aided in accomplishing the tort by the existence of the agency relation." *Caridad*, 191 F.3d at 294 (citing RESTATEMENT (SECOND) OF AGENCY § 219(2)(a) (1957)). The *Caridad* court also found significance in the fact that Ellerth essentially alleged that she had been constructively discharged and that in remanding the case the Supreme Court stated that "Ellerth ha[d] not alleged she suffered a tangible employment action at the hands of [her supervisor]." *Id.* at 295 (second alteration in original) (citing Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 766 (1998)).

174. Hearron, *supra* note 156, at 483–84 (stating that the "aided in the agency relation standard was the primary basis for the new tangible employment action rule").

175. *Caridad*, 191 F.3d at 294.

176. *Id.*

177. *Id.* at 294–95.

178. *Ellerth*, 524 U.S. at 761. The Court further explained that in most cases, a tangible employment action causes economic harm. *Id.* at 762. The Court then differentiated such "official" supervisory acts from acts of co-workers. "But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor." *Id.*

179. *Caridad*, 191 F.3d at 294. Later, when filing an amicus curiae brief in *Suders*, the U.S. Chamber of Commerce relied upon the omission as well. "[T]his Court's omission of constructive discharge in its discussion of tangible employment actions was widely regarded as a purposeful one." Brief of Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner 8, Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) (No. 03-95), 2004 WL 110584.

relevance because the plaintiff in *Ellerth* herself had claimed, *inter alia*, constructive discharge.[180]

C. Sometimes a Tangible Employment Action

The First and Seventh Circuits rejected the extremes of the Second Circuit (constructive discharge is not a tangible employment action) and the Third and Eighth Circuits (constructive discharge is a tangible employment action). The First and Seventh Circuits did not see the question as an all or nothing consideration. Instead the First and Seventh Circuits held that the employer could claim the affirmative defense, unless the cause of the constructive discharge claim was "an official supervisory act."[181] As such, a constructive discharge finding did not automatically preclude use of the *Ellerth–Faragher* defense.

The First Circuit in *Reed v. MBNA Marketing Systems, Inc.*,[182] stated that "the constructive discharge label cannot be used to preclude the affirmative defense; but possibly, on rare facts, it might be appropriate for that purpose."[183] The First Circuit did not indicate what those "rare facts" might be. The facts of *Reed* dealt with a supervisor who made sexual comments to the plaintiff and pressed her to perform oral sex on him after babysitting for him in his home.[184] Reed left her employment, returned a year later, and when the comments began again, she reported her supervisor's behavior.[185] The court held that the supervisor's actions were "exceedingly unofficial and involved no direct

180. *Caridad*, 191 F.3d at 295; *see supra* notes 121–22 and accompanying text.

181. Reed v. MBNA Mktg. Sys., Inc., 333 F.3d 27, 33 (1st Cir. 2003) (stating that if "the supervisor . . . is exercising official authority even if doing so for improper purposes . . . the courts treat the act as that of the employer"). The *Reed* court did further add that different than the Third, Eighth, Second, and Sixth Circuits, it saw "no reason to adopt a blanket rule one way or the other." *Id.* "Specifically, in circumstances where '*official* actions by the supervisor . . . make employment intolerable,' . . . a constructive discharge may be considered a tangible employment action." Robinson v. Sappington, 351 F.3d 317, 336 (7th Cir. 2003) (citation omitted).

182. *Reed*, 333 F.3d at 27.

183. *Id.* at 33; *see also* Hearron, *supra* note 156, at 485.

> The court's refusal to declare a bright-line rule, and its failure to give examples of what "rare facts" may preclude the affirmative defense serve only to add confusion to an already confusing issue. Following the court's reasoning, it is difficult to conceive of a constructive discharge context in which the court would disallow the assertion of the defense.

Hearron, supra note 156, at 484 n.39.

184. *Reed*, 333 F.3d at 30. After Reed performed oral sex on her supervisor, the supervisor told Reed that she should not tell anyone or they that would both be fired and that his family was politically connected to the head of the company. *Id.* While the supervisor did not approach Reed for a short while, he soon started making comments to her again and left green M&M's on her desk, requesting that she come to his house and babysit. *Id.* at 30–31.

185. *Id.* at 31.

exercise of company authority."[186] In other words, the court determined that the supervisor's actions neither were, nor resulted in, a tangible employment action. As such, strict liability was not imputed to the employer.[187]

Similarly, the Seventh Circuit, in *Robinson v. Sappington*,[188] held that the employer could not assert the affirmative defense where official conduct had caused the constructive discharge.[189] In *Robinson*, the plaintiff was a judicial clerk who complained of harassment by the judge she worked for.[190] The judge told the plaintiff that he would transfer her, but that her new position would not be pleasant.[191] The judge then advised the plaintiff that it would be in her best interest to resign.[192] The court found that the plaintiff's resignation "resulted, at least in part, from [the judge's] official action in transferring" her to another judge who would intentionally make her job difficult.[193] Thus, the "official actions" discussed in *Robinson* seem to be the "rare facts" where *Reed* suggested that a finding of constructive discharge would be warranted. The Seventh Circuit took the position that a finding of supervisory official action causing the constructive discharge would preclude utilization of the *Ellerth–Faragher* defense.[194]

As such, the wide divergence amongst the circuits regarding whether or not a constructive discharge does in fact constitute a tangible employment action led the Supreme Court to grant certiorari to resolve the inconsistency.[195]

186. *Id.* at 33.

187. *Id.* (stating that this supervisor's "behavior is exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed").

188. 351 F.3d 317 (7th Cir. 2003).

189. *Id*. at 337.

190. *Id*. at 320–24.

191. *Id*. at 324. Plaintiff alleged that the judge said her "first six months [in her new position] probably would be 'hell.'" *Id*.

192. *Id*.

193. *Robinson*, 351 F.3d at 337.

194. *Id*. (stating "because a jury could determine that Ms. Robinson's decision to resign resulted, at least in part, from . . . official actions in transferring [her] . . . and in suggesting that she resign, we believe that it would be appropriate to hold the State of Illinois liable for Ms. Robinson's resulting resignation").

195. Pennsylvania State Police v. Suders, 542 U.S. 129, 140 (2004). "This Court granted certiorari . . . to resolve the disagreement among the Circuits on the question whether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and therefore precludes assertion of the affirmative defense articulated in *Ellerth* and *Faragher*." *Id*. The Court particularly noted the *Jaros*, *Caridad*, *Turner*, *Reed*, and *Robinson* decisions. *Id*.

V. THE *SUDERS* DECISION

The issue that the U.S. Supreme Court faced in *Suders* was determining whether or not a supervisor-induced constructive discharge amounts to a tangible employment action for purposes of the *Ellerth–Faragher* framework.[196] The difficulty approached by the Court is the overarching concept that a hostile work environment may be created without any actual tangible employment action on the part of the employer.[197] As such, the *Suders* Court had to determine how the application of agency principles would be weighted along with competing Title VII policy concerns of deterring discrimination. The question facing the Court was whether a tangible employment action occurred when the hostile work environment causes a constructive discharge.[198]

In *Suders*, the Court concluded that when a supervisor's official act is the condition precedent to the constructive discharge, the employer will not be able to utilize the *Ellerth–Faragher* affirmative defense.[199] The Court also stated that when no official act of the supervisor precipitates the constructive discharge, the *Ellerth–Faragher* defense is available to the employer whose supervisor is accused of sexual harassment.[200]

A. Court Recognizes Constructive Discharge Under Title VII

The *Suders* opinion reiterated that Title VII is violated by "either explicit or constructive alterations in the terms or conditions of employment."[201] Writing for the majority, Justice Ruth Bader Ginsburg noted that the concept of constructive discharge was first recognized in the labor law context in the 1930s.[202] The Court noted that the courts of appeals had long since recognized constructive discharge claims in many different Title VII cases.[203] The Court

196. Once again, the significance is that if constructive discharge is a tangible employment action, the employer will be held strictly liable with no opportunity to raise the affirmative defense. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (stating that "no affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment").

197. Examples of such would be hostile environments created by co-workers or, and most significantly for this discussion, hostile environments created by supervisors through unofficial acts, that is, acts essentially no different than those of other co-workers.

198. *Suders*, 542 U.S. at 140.

199. *Id.* at 140–41.

200. *Id*. at 145–46.

201. *Id*. at 143. "A constructive discharge occurs when an employee quits her job in response to intolerable working conditions, often a sexually hostile environment." Chamallas, *supra* note 16, at 309–10.

202. *Suders*, 542 U.S. at 141.

203. *Id*. at 142 (citing Moore v. KUKA Welding Sys. & Robot Corp., 171 F.3d 1073, 1080 (6th Cir. 1999) (recognizing constructive discharge in a case of race discrimination); Bergstrom-Ek v. Best Oil Co., 153 F.3d 851, 858–59 (8th Cir. 1998) (recognizing constructive discharge in a

then referenced that the EEOC, as the federal entity that enforces Title VII, has stated that "[a]n employer 'is responsible for a constructive discharge in the same manner that it is responsible for the outright discriminatory discharge of a charging party.'"[204] Based upon these considerations, the Court formally recognized that employers may be liable for constructive discharge under Title VII.[205]

B. Reiterating Meritor

The Court next sought to determine whether the employer was liable for a constructive discharge that resulted from a hostile work environment created by a supervisor. The Court first looked to *Meritor*'s focus on limiting the liability of employers for the acts of their employees through principles of agency.[206] The *Suders* Court recognized, as the *Meritor* Court had, that Title VII serves to prohibit discrimination committed by employers, not discrimination committed by employees in their individual capacities.[207] That is to say that for Title VII to have effect, the plaintiff's claim must be against the employer. The definition of employer includes anyone who is acting as an "agent," and as such if an employee is harassing and is acting as an agent of the employer, then the employer is liable.[208] Conversely, if the harassing employee is not acting as an agent for the employer, then the employer is not liable under Title VII.[209] The significant step in the *Suders* decision is in determining when an employer will be held strictly liable for an act of its supervisors who are often regarded as extensions of the employer.

C. Court Resolves the Split, Focuses on "Official Act"

In *Suders*, the Supreme Court held that a constructive discharge constitutes a "tangible employment action" when a supervisor's "official act of the enterprise" is the "last straw" which leads to the employee's resignation.[210]

case of pregnancy discrimination); Young v. Southwestern Sav. & Loan Assoc., 509 F.3d 140, 143–44 (5th Cir. 1975) (recognizing constructive discharge in a case of religious discrimination)).

204. *Suders*, 542 U.S at 142 (citing the EEOC Compliance Manual 612:0006 (2002)).

205. *Id.* at 143.

206. *Id*. at 143–45. See *supra* note 111 and accompanying text for a discussion of *Meritor*'s utilization of RESTATEMENT (SECOND) OF AGENCY § 219 (1958). The Court discussed the import of the fact that Title VII's definition of "employer" includes the employer's "agent[s]." *Suders*, 542 U.S. at 144 (referring to 42 U.S.C. § 2000e(b) (2000)). "We viewed that definition as a direction to 'interpret Title VII based on agency principles.'" *Id.*

207. RUTHERGLEN, *supra* note 80, at 129 (citing to §§ 701(b), 703(a) of Title VII).

208. *Id.*

209. *Suders*, 542 U.S. at 145–46 (discussing the Court's utilization of the "aided by the agency relation" standard in developing the *Ellerth–Faragher* framework).

210. *Id*. at 147. "Absent 'an official act of the enterprise' as the last straw, the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force." *Id*. at 148. The Court was concerned with the Third Circuit's

The Court gave two examples of how this official act as the last straw is to apply based upon the *Reed* and *Robinson* decisions.[211] The *Reed* court determined that the supervisor's activities involved no official actions and essentially were no different than harassing acts of other employees.[212] Where a plaintiff claims constructive discharge based on a supervisor's repeated sexual comments and sexual assault, assertion of the *Ellerth–Faragher* defense is not precluded.[213] Conversely, where the plaintiff in *Robinson*, after complaining of harassment by her supervisor, was advised by her supervisor to resign in light of her transfer option, the Court found that an official act occurred.[214] The employer may not assert the defense to such an official act where the supervisor has brought the power of the organization to bear on the plaintiff, thus qualifying the constructive discharge as a tangible employment action.[215] Essentially, the Court ratified the rationales advanced by the First and Seventh Circuits in *Reed* and *Robinson*.

D. Ms. Suders, Your Harassment Is a "Worse Case" Scenario, but . . .

The Court found that Suders' claim was of the same type as those in *Ellerth* and *Faragher*.[216] The Court actually termed Suders' case as "a 'worse case' harassment scenario, harassment ratcheted up to the breaking point."[217] Even with such a description of the *Suders* case, the Court still found that the severity of the harassment was not determinative regarding preclusion of the affirmative defense. Rather, the Court determined that employers should be afforded the opportunity to establish the affirmative defense, in the absence of

ruling in that it essentially made a claim of hostile environment constructive discharge easier to prove than its "lesser included component," hostile work environment. *Id*. at 149.

211. *Id.* at 149–50. "We note . . . two recent Court of Appeals decisions that indicate how the 'official act' (or 'tangible employment action') criterion should play out when constructive discharge is alleged. Both decisions advance the untangled approach we approve in this opinion." *Id.* at 149. "The courts in *Reed* and *Robinson* properly recognized that *Ellerth* and *Faragher*, which divided the universe of supervisor-harassment claims according to the presence or absence of an official act, mark the path constructive discharge claims based on harassing conduct must follow." *Id.* at 150. These examples demonstrate the significant role the "aided in the relation" agency doctrine serves when the Court is determining whether to impute strict liability to an employer. See *supra* notes 182–95 and accompanying text for facts of the *Reed* and *Robinson* cases.

212. *Suders*, 542 U.S. at 150. Rather, the *Reed* court termed the supervisor's actions as "exceedingly unofficial and involv[ing] no direct exercise of company authority." *Id.* (citing Reed v. MBNA Mktg. Sys., Inc., 333 F.3d 27, 33 (1st Cir. 2003)).

213. *Id.* at 149–50.

214. *Id.* (citing Robinson v. Sappington, 351 F.3d 317, 337 (7th Cir. 2003) (stating that the plaintiff's resignation was at least partially due to the supervisor's official authority regarding her transfer).

215. *Suders*, 542 U.S. at 150.

216. *Id.* at 147.

217. *Id.* at 147–48; *see supra* Part II explaining the facts of the case as alleged by Suders.

an "official act" by the harassing supervisor.[218] In Suders' case, the Court agreed with the Third Circuit that genuine issues of material fact did exist regarding Suders' claims of hostile work environment and constructive discharge.[219] The Court indicated in a footnote that while it found most of the activities surrounding Suders' complaint to be unofficial, the Court did find the conduct surrounding her computer exam to be "less obviously unofficial."[220] The Court disagreed with the Third Circuit holding that the *Ellerth–Faragher* defense was never available in constructive discharge cases.[221] Although the Justices reversed the Third Circuit on the central question, they upheld the appellate court's decision to revive Suders' case so that the constructive discharge claim could be reviewed on remand.[222] The case was remanded for further proceedings.[223]

In the second portion of the opinion, the Court clarified the burdens of the parties.[224] The Court wanted to provide guidance for the district courts when determining pleading and persuasion burdens under the *Ellerth–Faragher* framework.[225] The Court stated that when a plaintiff makes a claim of hostile environment constructive discharge and does not allege a tangible employment

218. *Id.* at 148–49.

219. *Id.* at 152.

220. *Suders*, 542 U.S. at 152 n.11.

221. *Id.* at 152.

222. *Id.*

223. *Id.*

224. *Id.* at 150–52. The Court noted that the Third Circuit had "imported" the *Ellerth–Faragher* affirmative defense elements into the "anterior issue whether 'the employee's decision to resign was reasonable under the circumstances.'" *Id.* at 150–51. The Third Circuit had stated that "it may be relevant to a claim of constructive discharge whether an employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff's complaints, and whether plaintiff took advantage of alternatives offered by antiharassment programs." *Id*. at 151 (alteration in original). The Court noted similar opinions in other circuits at footnote 10.

> For similar expressions, see, *e.g.*, *Jaros v. LodgeNet Entertainment Corp.*, 294 F.3d 960, 965 ([8th Cir.] 2002) (though not entitled to the *Ellerth/Faragher* affirmative defense, employer facing constructive discharge complaint may assert that plaintiff "did not give it a chance to respond to her [grievance]" in rebutting plaintiff's contention that conditions were so intolerable as to force her resignation); *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 28 ([1st Cir.] 2002) ("the jury reasonably can take into account how the employer responded to the plaintiff's complaints, if any" in deciding whether conditions were intolerable); *Hartman v. Sterling, Inc.*, No. Civ. A. 01-CV-2630, 2003 WL 22358548, *13 (ED Pa., Sept. 10, 2003) (noting "it is relevant," but not dispositive, whether plaintiff complained); Brief for Lawyers' Committee for Civil Rights Under Law et al. as *Amici Curiae* 19 (affirmative defense unnecessary because of the "overlap between elements of constructive discharge and of the *Faragher/Ellerth* [affirmative] defense").

Id. at 151 n.10.

225. *Suders*, 542 U.S. at 152.

action, the plaintiff has the duty to mitigate harm.[226] If the plaintiff fails to allege a tangible employment action, the defendant then bears the burden to allege and prove that the plaintiff failed to mitigate.[227]

E. Justice Thomas Dissents

The lone dissenting opinion, authored by Justice Thomas, focused on his disagreement with the majority's definition of a constructive discharge.[228] Justice Thomas thought that the majority deviated from principles established in the original conception of a constructive discharge as promulgated by the National Labor Relations Board.[229] The dissent noted that the conception of constructive discharge arose from the particular situation where an employee was coerced into resigning due to involvement in union activities.[230] As such, Justice Thomas explained that an employee must establish two elements to prove a constructive discharge claim to the National Labor Relations Board.[231] One, the employer must take actions against the employee that cause, and are intended to cause, a severely unpleasant working environment, which results in the employee's resignation.[232] Two, it must be shown that the employer's actions were in response to the employee's union activities.[233]

From this historical perspective, Justice Thomas took issue with how the majority construed a constructive discharge under Title VII.[234] Justice Thomas's concern was that under the majority's formulation, a person does not have to suffer an adverse employment action to allege a constructive discharge.[235] Thomas disagreed with the majority's divergence from the intent

226. *Id.*

227. *Id.*

228. *Id.* at 153 (Thomas, J., dissenting) (taking opposition to the Court's parameters for a plaintiff to establish constructive discharge, that a plaintiff must "show that the abusive working environment became so intolerable that [the employee's] resignation qualified as a fitting response") (alteration in original).

229. *Id.* at 152–53.

230. *Suders*, 542 U.S. at 152.

231. *Id.*

232. *Id.* at 152–53 (citing to Crystal Princeton Refining Co., 222 N.L.R.B. 1068, 1069 (1976)).

233. *Id.* at 153 (citing to *Crystal*, 222 N.L.R.B. at 1069).

234. Justice Thomas referred to the fact that when constructive discharge was initially used in the Title VII area, similar elements were required. *Id.* (citing Muller v. U. S. Steel Corp., 509 F.2d 923, 939 (10th Cir. 1975) (stating that a showing was required that "an employer deliberately render[ed] the employee's working conditions intolerable and thus forced[d] him to quit his job") (alterations in original)).

235. *Id.* Justice Thomas also noted and was concerned that "a majority of Courts of Appeals ha[d] declined to impose a specific intent or reasonable foreseeability requirement." *Id.* ("[C]onstructive discharge occurs when the working conditions deteriorate, as a result of discrimination, to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on

requirement under the original formulation of constructive discharge within the labor law context.[236] As such, Thomas was concerned that the majority's definition did not limit recognition of constructive discharge claims to occurrences where the actions were taken purposefully to instigate actual discharge.[237]

Justice Thomas suggested that under the parameters of constructive discharge announced by the Court, it would not make sense to attach the same legal consequence to a Title VII constructive discharge as would be attached to an actual discharge.[238] Essentially Thomas suggested that to have a valid claim of constructive discharge, an employee must prove that his employer subjected him to an adverse employment action with the specific intent of forcing the employee to quit. Otherwise, Justice Thomas advocated that where the alleged constructive discharge results only from a hostile work environment, an employer should be liable only if negligent.[239] Under Thomas's definition of constructive discharge, he would have reversed the judgment of the Third Circuit due to Suders' failure to prove negligence on the part of the employer.[240]

VI. EVALUATION OF THE *SUDERS* DECISION

The Equal Employment Opportunity Commission states that approximately 14,000 sexual harassment cases are brought to the commission each year.[241] The ability of plaintiffs to recover for constructive discharge has

the job to earn a livelihood and to serve his or her employer.") (alteration in original) (citing Brooks v. City of San Mateo, 229 F.3d 917, 930 (9th Cir. 2000)).

236. *Suders*, 542 U.S. at 153.

237. *Id.* at 154.

238. *Id*. at 154. Rather, Justice Thomas agreed with the Court's description of the constructive discharge as being "more akin to 'an aggravated case of . . . sexual harassment or hostile work environment.'" *Id*.

239. *See* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 768 (1998) (explaining that the employer is negligent only if the employer knew, or in the exercise of reasonable care should have known, about the harassment and failed to take remedial action) (citing Dennis v. City of Fairfax, 55 F.3d 151, 153 (4th Cir. 1995); Davis v. Monsanto Chemical Co., 858 F.2d 345, 349 (6th Cir. 1988)). Justice Kennedy advocated a negligence standard based upon § 219(2)(b) of the *Restatement (Second) of Agency*. "An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it." *Ellerth*, 524 U.S. at 759.

240. *Suders*, 542 U.S. at 154 (Thomas, J., dissenting) (stating that "[b]ecause respondent has not adduced sufficient evidence of an adverse employment action taken because of her sex, nor has she proffered any evidence that petitioner knew or should have known of the alleged harassment, I would reverse the judgment of the Court of Appeals").

241. *See* U.S. Equal Employment Opportunity Commission, Sexual Harassment Charges: EEOC & FEPAs Combined: FY 1992–FY 2004, http://www.eeoc.gov.stats/harass.html (last visited Nov. 12, 2004). Since 1991, though, this demonstrates approximately a 127% increase. *See* New Light Shed on Sexual Harassment in the Workforce, http://mentalhealth.about.com/library/sci/0202/blharass0202.htm (last visited Jan. 25, 2006).

opened new opportunities for damage awards.[242] The Supreme Court is careful to consider the balancing of incentives and consequences of giving such incentives when formulating rules in the Title VII context. While the Court did recognize an employer's ability to still utilize the *Ellerth–Faragher* defense, the Court also opened the door for plaintiffs to get around it. As such, the Court did not adequately discuss what constitutes an official act that imposes strict liability.[243] Thus, the previous circuit split is likely to take a new form—a split over what constitutes an official act on the part of the supervisor. The courts will continue to struggle with when a constructive discharge does and does not constitute a tangible employment action. A consistent standard would provide all courts with a useful framework upon which to try the facts before them. Title VII cases should not have drastically different results dependent upon the circuit in which the case is tried.

A. Formulation of Constructive Discharge and the "Last Straw" Requirement

The Court's formal recognition of constructive discharge under Title VII was well-founded. Congressional intent with respect to women and Title VII was to put an end to behaviors that kept women from accepting employment opportunities.[244] *Suders* continues the line of Title VII cases that seek to achieve equality for women in the workplace by allowing them to work without fear of harassment.[245] The Court's decision will also evolve with changing trends of employment discrimination while still serving Title VII purposes. For example, while the vast majority of sexual harassment victims are women, men claiming sexual harassment is a trend that is increasing significantly.[246] The Court's formal adoption of constructive discharge serves to advance the *Meritor* rationale of allowing severely sexually harassed employees a Title VII cause of action when harassment alters their conditions of employment.[247] As such, the Court's recognition of the constructive discharge concept in Title VII cases was justified and warranted.

242. *See supra* notes 93–102 and accompanying text.

243. *See Suders*, 542 U.S. at 152 n.11 (utilizing the phrase "less obviously unofficial" conduct).

244. *See supra* notes 81–82 and accompanying text.

245. *See supra* notes 81–82 and accompanying text.

246. *See* U.S. Equal Employment Opportunity Commission, *supra* note 241 (noting that in 2002, 85.1% of sexual harassment charges were filed by women); *Sexual Harassment of Men Doubles in Decade*, PERSONNEL TODAY, Sept. 28, 2004, at 10 (stating that of the sexual harassment claims filed with the Equal Employment Opportunity Commission in 2003, men made up 15% of all charges). Almost 2,000 of the 13,566 charges were filed by men as compared to only 958 in 1992. *Id.* Many of the claims filed by men involve males harassing other males. *Id*. A car retailer paid $500,000 to former salesmen who claimed that they were harassed and molested by male managers. *Id*.

247. *See supra* notes 108–09 and accompanying text.

The Court's definition of constructive discharge, while not identical to the formulation under labor cases, is reflective of Title VII's goals and policy.[248] Justice Ginsburg stated that to prove constructive discharge, a plaintiff must show that the offensive behavior was "sufficiently severe or pervasive" so as to alter conditions of employment.[249] If the working conditions would become such that a reasonable person would be compelled to resign, the resignation was a fitting response. Although this formulation of constructive discharge means that one may allege a constructive discharge caused by "non-official" conduct, such a situation is addressed through the employer's application of the *Ellerth–Faragher* defense.[250] If the employer has attempted to have an effective remedial scheme in place, the employer may be able to avoid liability.[251]

Requiring that an official act of a supervisor precipitate the employee's resignation before strict liability will be imposed on an employer is consistent with the Court's previous rulings in *Ellerth* and *Faragher*.[252] The "last straw" requirement advances the idea that employers should not be held strictly liable for all acts of their supervisors.[253] Thus, although the Court did not impute a direct intent requirement, the last straw requirement is consistent with the established ideals of employer liability for hostile work environment as set out in *Meritor*.[254]

248. See *supra* Part V.E regarding Justice Thomas's concerns of the definition constructed by the majority.

249. *Suders*, 542 U.S. at 146–47 (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

250. *See* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. 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. The defense comprises two necessary elements: (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.

Id.

251. *Id.*

252. "No affirmative defense is available . . . when the supervisor's harassment culminates in a tangible employment action . . . ." *Id.*; Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

253. *See Faragher*, 524 U.S. at 804 (stating that "an employer is not 'automatically' liable for [all] harassment by a supervisor"); *see also* Goldsmith, *supra* note 77, at 821.

254. *See Ellerth*, 524 U.S. at 763–64 (noting that the Court is bound by *Meritor*'s utilization of agency principles to "constrain the imposition of vicarious liability in cases of supervisory harassment"; also noting that "Congress has not altered *Meritor*'s rule even though it has made significant amendments to Title VII in the interim").

The application and availability of damages that apply to a constructive discharge claim comports with the statutory intent of Title VII to avoid harm, rather than to seek redress. The "last straw" requirement supports the idea that an employee should stay working and seek redress unless conditions are so pervasive as to extend beyond "ordinary" discrimination.[255] As such, the "last straw" requirement coincides with the employee's duty to mitigate damages.[256] Thus, the Court's "last straw" requirement serves the deterrent intent of damages set forth under the Civil Rights Act of 1991.[257]

While the Court's definition of constructive discharge comports with the ideals of Title VII, a definition that allows constructive discharge to be alleged when no official act precipitated the resignation does not strictly adhere to agency principles.[258] In the context of sexual harassment claims, this issue is adequately addressed by the employer's ability to prove the *Ellerth–Faragher* defense. The same result may not be assured where constructive discharge claims arise in Title VII cases other than those involving sexual harassment. If the *Ellerth–Faragher* defense is not applied by analogy to constructive discharge cases covered under the purview of Title VII, the necessary limiting factor of an official act as the last straw may not be required.[259] Based upon the "aided in the relation" agency concept, an official act as the "last straw" should be mandatory in all Title VII constructive discharge cases.[260]

255. Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1015 (7th Cir. 1997). "In other words, the plaintiff's resignation is not truly voluntary if quitting was the only way she could extricate herself from the intolerable conditions." *Id.* "But unless conditions are beyond ordinary discrimination, a complaining employee is expected to remain on the job while seeking redress." *Id.*

256. This is important because where a constructive discharge is proven, it is the functional equivalent of termination with regard to damages. Pennsylvania State Police v. Suders, 542 U.S. 129, 146 (2004).

257. *See supra* notes 92–102 and accompanying text.

258. *But see* Goldsmith, *supra* note 77, at 185 (explaining that the Court in setting out the *Ellerth–Faragher* defense also had to make adjustments to the application of agency law as otherwise "a blanket application of the aided in agency relation principle might thus impose the exact de facto rule of strict liability that *Meritor* rejected" as "there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisor relationship").

259. *Cf.* Williams v. Admin. Review Bd., 376 F.3d 471, 478–79 (5th Cir. 2004) (applying the *Ellerth–Faragher* defense to whistleblower case); Mason v. S. Ill. Univ. at Carbondale, 233 F.3d 1036, 1043 (7th Cir. 2000) (applying *Ellerth–Faragher* defense to race discrimination case); Hampton v. Gannett Co., Inc., 296 F. Supp. 2d 716, 720–21 (S.D. Miss. 2003) (applying *Ellerth–Faragher* defense to religious discrimination case).

260. *See supra* notes 210–15 and accompanying text. Without the presence of the limiting factor of an official act, such potential decisions would seem to support Justice Thomas's concern in the dissent, regarding the definition of constructive discharge promulgated by the Court not resembling an actual discharge.

B. Agency Principles

The inconsistent application of agency principles in *Suders* and the cases leading up to it are of interesting note. While the Circuits seemingly recognized the importance of the "aided in the agency relation," as recognized in *Meritor*, the interpretations of that requirement varied from circuit to circuit. The Second Circuit interpreted the agency language to mean that a constructive discharge was not a tangible employment action because it was "not ratified . . . by the employer."[261] Whereas the Seventh Circuit interpreted the "aided in the agency relation" requirement to mean a situation that could not happen without official action on the part of the supervisor.[262]

The Supreme Court took the approach of recognizing that a constructive discharge may occur due to a pervasive environment caused by co-workers or by supervisors.[263] In doing so, the Court acknowledged that not all conduct committed by a supervisor is "supervisory" in nature.[264] Conversely, the Court correctly recognized that supervisors would be unable to effect certain conditions on employees were they not aided by their relationship with the employer.[265] As such, the requirement of an official act is logical in that it follows precedent of requiring something more than the existence of the employment relationship itself for the employer to be liable.[266]

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261. See Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294 (2nd Cir. 1999).

262. See *supra* notes 188–95 and accompanying text (discussing the significance of the judge's power in the Seventh Circuit's finding of a tangible employment action in the *Robinson* case).

263. Pennsylvania State Police v. Suders, 542 U.S. 129, 148 (2004).

> Unlike an actual termination, which is *always* effected through an official act of the company, a constructive discharge need not be. A constructive discharge involves both an employee's decision to leave and precipitating conduct: The former involves no official action; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action.

Id.

264. *Id.* at 145 (noting that "there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status [would] mak[e] little difference").

265. *Id.* at 148; *see also* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 762 (1998) (noting that "the supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control").

266. *Suders*, 542 U.S. at 144 (explaining that when a supervisor takes a tangible employment action against the employee, more than the "mere existence of the employment relation aids in commission of the harassment"). In *Suders*, the Court reiterated its concern from *Ellerth*, that without an official act on the part of the supervisor, there is no certainty of knowing to what extent the supervisor's harassment was aided by the agency relation. *Id.* at 148; *see also Ellerth*, 524 U.S. at 760 (stating that an official act "shows 'beyond question' that the supervisor has used his managerial or controlling position to the employee's disadvantage"). The *Suders* Court explained that uncertainty as to the supervisor being aided in his harassment by the agency

The difficulty in applying the *Suders* decision lies in the fact that the Court offers no clear definition of "official action."

C. What Does "Less Obviously Unofficial Conduct" Mean?

The portion of the *Suders* decision that is most likely to be argued in the future is located in the last footnote of the case. This is where the Court explains that while most of the discriminatory conduct alleged by Suders is clearly unofficial, the events surrounding her computer-skills exams and her last day of employment were "less obviously unofficial" conduct.[267] As the Court did not clearly define the parameters of what can and cannot be considered official conduct, it is likely that the Court's open-ended qualification of "less obviously unofficial" is likely to lead to further litigation. It is easy to see where a new split may evolve based upon the wide divergence of views among the circuits as to what qualified as a tangible employment action.[268] The varied interpretations as to whether or not constructive discharge was a tangible employment action in the post-*Ellerth–Faragher* era are a prime example of how this can occur.

While the Court did not define the parameters of what is an official act, the Court did note some examples of where a constructive discharge has an underlying official act. The Court said that official directions and declarations, such as an extremely dangerous job assignment to retaliate for unreciprocated advances, would qualify as an underlying official act.[269] Another example the Court offered was where a supervisor transfers the claimant to a department knowing that the employee would be unwelcome there.[270] Such occurrences seem to be relatively limited in scope. Thus it is unlikely that the courts will interpret the meaning of official act as restrictively as these examples might suggest it should be.

1. New Split Likely to Occur Over What Constitutes an Official Act

As was observed in the post *Ellerth–Faragher* era, even when the Court strives to set out a clear definition of a term, subsequent interpretations can lead to varied judicial results.[271] Due to the ambiguity of the Court's "less obviously unofficial" language, varied judicial interpretations are likely to

relationship affords the employer the opportunity to affirmatively defend vicarious liability. 542 U.S. at 148.

267. *Id.* at 152 n.11.

268. *See generally* Susan Grover, *After Ellerth: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J.L. REFORM 809, 809 (2002) (arguing that courts ascribe various meanings to the tangible employment action concept).

269. *Suders*, 542 U.S. at 150 (referencing the facts of the *Reed* case).

270. *Id.* (referencing the facts of the *Robinson* case).

271. See *supra* Part IV's discussion of the circuit split precipitating the grant of certiorari in *Suders*.

occur again. Such ambiguity will likely result in a new circuit split in which the circuits differ on what does and does not constitute an "official act." As the "official act" term has significant consequences upon the path of a case and because there have been varied interpretations in this area previously, the Court should have offered clearer guidance regarding what makes an act "official."

An example of where such conflict may arise is the *Suders* case itself when decided on remand. For example, the original determinations of the Middle District of Pennsylvania Court would suggest that the district court would not find the occurrence of official actions.[272] Whereas the Third Circuit might similarly find, as it originally did, that the acts of the police supervisors were official based upon the Court's direction to consider the circumstances of Suders' final day of employment.[273] The Third Circuit previously concluded that it could be found that the officers were trying to set Suders up on a "false charge of theft."[274] The court even intimated that a false charge of theft would be an effective way to get someone to resign under threat of being fired otherwise.[275]

The Court has now clearly stated that a constructive discharge is not automatically a tangible employment action. However, the employer's ability to assert the affirmative defense is still based upon whether or not a tangible

272. *See* Suders v. Easton, et al., No. 1: CV-00-1655, 2003 WL 22428573, 77a (discussing defendants' argument that the PSP had no actual notice of discrimination) (as found within Suders v. Easton, 325 F.3d 432 (3d Cir. 2003) *petition for cert. filed*, 2003 WL 22428573 (July 14, 2003) (No. 03-95); *see also id*. at 79a (discussing the plaintiff failing to contact the Affirmative Action Office).

273. *Suders*, 325 F.3d at 446–47.

> Any shred of doubt . . . is removed when considering the events of Suders's final day on the job. Drawing all reasonable inferences in her favor, Suders presented evidence sufficient to enable a reasonable finder of fact to conclude that the officers attempted to set her up on a false charge of theft. The concealment of her test results in a set of drawers in the women's locker room, the use of theft detection powder to catch one of their own inside the station, and the excessive and humiliating treatment that Suders suffered when she was handcuffed and photographed all point to a pattern of conduct designed to find some way to terminate Suders. . . . In other words, false charges of misconduct are tantamount to threats or suggestions of discharge. Attacking someone with a false charge of theft seems a most effective way of suggesting that an employee will be fired or should leave voluntarily.

Id.

274. *Id.* at 446 (finding that the seeming set-up of Suders points to a grand plan to terminate Suders).

275. *Id.* at 447–48. Conversely though, it is important to note that based upon *Ellerth*, the Court seemed to indicate that an unfulfilled threat will not constitute a tangible employment action. RUTHERGLEN, *supra* note 80, at 131. In *Suders* though, it could be argued that the threat was fulfilled in that once the individuals believed that Suders was actually quitting, she was released and no charges were filed.

employment action occurred. Additionally, a constructive discharge is a tangible employment action when precipitated by an official act. Because no definite parameters of what constitutes official action have been drawn, the *Suders* dispute is only partially resolved.

2. Recommended Parameters of Official Act

In light of prior sexual harassment cases, there does seem to be some indication as to what should and should not qualify as an official act. The fact that the Court seemed to derive the basis for the meaning of official conduct from the same basis as tangible employment action is partly due to the differing meanings that lower courts have ascribed to the tangible employment action term since the *Ellerth* and *Faragher* decisions in 1998.[276]

If courts are going to apply tangible employment action concepts to the definition of official act, the courts may need to adopt a broader conception in light of the constructive discharge claim. For example, the Court has previously determined that economic decisions are tangible employment actions.[277] As such, where a supervisor takes official action that negatively impacts the employee's job-related economics, it would seem that a finding of official conduct should be made. An example of an economic loss could include a failure to promote that resulted in loss of future benefits.[278] Thus, an official act seemingly could actually be a form of failure to act so long as the "imprimatur of the enterprise" was somehow obtained, in this example by continually denying a promotion.[279] Additionally, a situation where inaction could qualify as an official act on the part of the supervisor could arise where a transfer is repeatedly denied by the supervisor. Consider a case in which an employee repeatedly asked for a transfer after having been hospitalized for depression due to harassment from a co-worker.[280] The supervisor refused to consider the transfer requests.[281] The employee ultimately resigned, sued and was awarded $45,000 in compensatory damages and $25,000 in punitive

276. *See* Grover, *supra* note 268, at 809. Grover argues that courts have often defined the term "tangible employment action" too narrowly or have simply engaged in outcome-based analysis. *Id.*

277. *See* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 762 (1998) (referring to economic decisions as tangible employment actions).

278. *Suders*, 542 U.S. at 144 (explaining that a tangible employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits").

279. *See Ellerth*, 524 U.S. at 762 (discussing tangible employment actions being achieved via the company's internal processes and often obtaining the "imprimatur of the enterprise").

280. DONALD H. WEISS, FAIR, SQUARE & LEGAL 204–05 (2004).

281. *Id.*

damages.[282] As such, it would seem that on specific facts, inaction might be considered an official act based on the *Suders* decision.

Future parameters of what constitutes "official conduct" should also include a situation where the supervisor creates a hostile work environment with the specific intent of forcing a person to resign. A supervisor who unintentionally creates a pervasive environment, which may or may not impute vicarious liability to the employer, is very different from a situation where a supervisor intentionally sets out to force an employee to quit.[283] If the developing definition of "official conduct" does not encompass such examples in the future, the concept of constructive discharge in the employment context will have digressed.[284]

As the parameters of "official conduct" become more defined through case law, courts should be mindful that for an official act to occur, the supervisor must be enabled by his agency relationship with the employer.[285] Courts must recognize that no matter what parameters are developed for an official act, a fact-intensive inquiry will be required.[286] Additionally, courts must be sure to separate the proof required for a constructive discharge, regardless of whether it was caused by official supervisory conduct, from the proof required to determine whether an official act was taken. This required distinction was made clear by the Court's explanation of the burdens of persuasion.

D. Burdens of Persuasion

Prior to the *Suders* decision, the district courts were unclear at what point in the case that consideration should be given to the employee's duty to mitigate and the employer's duty to have an effective remedial scheme in place.[287] The Court clarified these requirements in the second part of the

282. *Id*.

283. Gray, *supra* note 170, at 191–92.

284. *Cf*. Sarah H. Perry, *Enough is Enough: Per Se Constructive Discharge for Victims of Sexually Hostile Work Environments Under Title VII*, 70 WASH. L. REV. 541, 542 (1995) (arguing pre-*Suders* that a per se rule should exist that would require finding a constructive discharge when a sexually hostile work environment is found).

285. *See* Anne Lawton, *Operating in an Empirical Vacuum: The* Ellerth *and* Faragher *Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 198 (2004) (suggesting that "lower federal courts have interpreted the elements of the affirmative defense so as to reward employers for engaging in behaviors that have little effect on the incidence of workplace harassment").

286. *See* Suders v. Easton, 325 F.3d 432, 446–47 (3d Cir. 2005) (discussing the sufficiency of allegations Suders made in claiming a supervisor-induced constructive discharge).

287. As to this issue, the Third Circuit had previously stated that

> it may be relevant to a claim of constructive discharge whether an employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff's complaints, and whether plaintiff took advantage of alternatives offered by antiharassment programs.

Suders opinion. The Court established that following *Ellerth* and *Faragher*, if there is no tangible employment action, the plaintiff has a duty to mitigate.[288] The defendant has the burden to "allege and prove that the plaintiff failed" to mitigate.[289] These requirements effectuate Title VII's deterrent purposes of encouraging employers to have anti-harassment programs and effective grievance mechanisms which in turn advance Title VII's goal of eradicating discrimination in the workplace.[290]

The establishment of the burdens on the parties serves to clarify at what point in the case each of these issues should be taken into consideration. Whereas before the burdens were laid out, some courts would try to import the issue of mitigation to a finding of whether the plaintiff's resignation was reasonable under the circumstances.[291] Under *Suders* it is now clear that a plaintiff may allege a constructive discharge in the absence of official conduct on the part of the employer. If the plaintiff alleges constructive discharge unaccompanied by an official act, then there is no tangible employment action and the employer may assert the *Ellerth–Faragher* affirmative defense. Under the affirmative defense, it is the duty of the employer to prove that the plaintiff failed to mitigate. As such, the elements of the affirmative defense should not be considered until the burden has shifted to the defendant. Therefore, the elements of the affirmative defense should not be used to determine whether

Pennsylvania State Police v. Suders, 542 U.S. 129, 151 (2004). The confusion regarding how the elements of the defense were to be utilized may have been partly derived from the following language in *Faragher*:

> While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided y the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (2004).

288. *Suders*, 542 U.S. at 152. The Court went on to explain that the "plaintiff might elect to allege facts relevant to mitigation in her pleading or to present those facts in her case in chief, but she would do so in anticipation of the employer's affirmative defense, not as a legal requirement." *Id*.

289. *Id*.; *see also Easton*, 325 F.3d at 438 (regarding Suders interactions with EEO Officer).

290. *See Faragher*, 524 U.S. at 806 (discussing that the EEOC seeks to recognize employers who make reasonable efforts to prevent violations and noting that the employee as a victim has a duty "to use such means as are reasonable under the circumstances to avoid or minimize damages") (citation omitted).

291. *See Suders*, 542 U.S. at 151 ("[I]t may be relevant to a claim of constructive discharge whether an employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff's complaints, and whether plaintiff took advantage of alternatives offered by anti-harassment programs.") (quoting *Easton*, 325 F.3d at 462).

the employee's decision to resign was reasonable under the circumstances.[292] Rather, reasonableness of the resignation for constructive discharge purposes should focus on the pervasiveness of the allegedly hostile environment. In this way, courts should approach the decision as to whether a constructive discharge exists in a consistent manner.

VII. RECOMMENDATIONS IN LIGHT OF *SUDERS*

A. Legislated Sexual Harassment Prevention Training

As evidenced by the statistics from the Equal Employment Opportunity Commission, sexual harassment is a problem which continues to plague the workforce of this nation.[293] As such, it would be appropriate to statutorily mandate training on harassment issues.[294] Some states have already enacted laws that require the general workforce to receive sexual harassment prevention training and separate sexual harassment training for supervisors.[295]

292. *See id.* at 150–51.

293. During fiscal year 2004, the EEOC received 13,136 sexual harassment charges. The U.S. Equal Employment Opportunity Commission, *Sexual Harassment*, http:www.eeoc.gov/types/sexual_harassment.html (last visited Apr. 26, 2006) [hereinafter *Sexual Harassment*]. Approximately fifteen percent of the charges were filed by males. *Id.* The EEOC resolved 13,786 sexual harassment charges in fiscal year 2004 and recovered $37.1 million in monetary benefits for charging parties and other aggrieved individuals. *Id.* Additionally, "[s]tudies suggest anywhere between 40-70% of women and 10-20% of men have experienced sexual harassment in the workplace." Sexual Harassment in the Workplace and in Education, http://womensissues.about.com/cs/sexdiscrimination/a/sexharassstats.htm (last visited Feb. 7, 2005). One academic argues that the disparity suggests a clear "gap between the intent of sexual harassment policies and the enactment of those policies." Debbie Dougherty, *Sexual Harassment as [Dys]Functional Process: A Feminist Standpoint Analysis*, 29 J. APPLIED COMM. RES. 372, 373 (2001). Her suggestion is that all employees be trained regarding sexual harassment especially in light of the fact that most harassment is peer to peer rather than from managers. *Id*. Note that while ninety-seven percent of organizations report having sexual harassment policies, overall sexual harassment charges filed with the EEOC have increased over 125% since 1991. *Id.* at 373.

294. Such a requirement would not appear to be overly burdensome based on a 1999 survey conducted by the Society for Human Resource Management, which stated that sixty-two percent of companies surveyed offered harassment prevention training programs. Sexual Harassment in the Workplace and in Education, *supra* note 293; *see also* Michael W. Johnson, *Harassment and Discrimination Prevention Training: What the Law Requires*, 55 LAB. L.J. 119, 119 (2004) (advising that after three United States Supreme Court cases, *Burlington v. Ellerth*, 524 U.S. 742 (1998), *Faragher v. City of Boca Raton*, 542 U.S. 775 (1998), and *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), employers may no longer use harassment and discrimination prevention training as a luxury).

295. Judy Greenwald, *California Law Mandates Periodic Manager Training on Harassment Issues*, BUS. INS., Oct. 25, 2004, at 4. Of the states with existing sexual harassment training laws, Connecticut's is the most similar to the new California law. *Id.* Connecticut's law has been in effect since 1993 and "calls for an initial two hours of training, but does not require that it be

For example, California Gov. Arnold Schwarzenegger recently signed into law a bill requiring employers to provide two hours of sexual harassment training to supervisors bi-annually.[296] Currently, this is the "most rigorous" legislation of its type in the nation.[297] The intent of the California legislation is that the required training will ultimately reward employers in terms of decreased litigation costs.[298] Although providing the training will not automatically insulate employers from suit, some California attorneys believe that conducting sexual harassment prevention training may help employers avoid punitive damages.[299]

While comparable federal legislation would likely be met with some resistance,[300] the ultimate goals of both Title VII and judicial opinions would

repeated, although employers are encouraged by the Connecticut Human Rights Commission to provide updates every three years." *Id*.; *see* R.I. GEN. LAWS § 28–51–3 (2003) (encouraging employers to conduct training on sexual harassment, "including, but not limited to supervisory or managerial personnel"); CONN. GEN. STAT. § 46a-54(15) (2004) (authorizing the Human Rights and Opportunities Commission to require an employer having fifty or more employees to provide two hours of sexual harassment training and requiring supervisory employees to be trained on sexual harassment within six months of assuming a supervisory position); MASS. GEN. LAWS ANN. ch. 151B, § 3A(e) (1999) (encouraging employers to conduct training programs which address "the specific responsibilities of supervisory and managerial employees and the methods that such employees should take to ensure immediate and appropriate corrective action in addressing sexual harassment complaints"); VT. STAT. ANN. tit. 21, § 495h(f) (2003) (encouraging employers to conduct a training program regarding sexual harassment, which includes "the specific responsibilities of supervisory and managerial employees and the methods that these employees must take to ensure immediate and appropriate corrective action in addressing sexual harassment complaints"). Note also that even states that do not statutorily require training may interpret training as essential. *See* Gaines v. Bellino, 801 A.2d 322, 330 (N.J. 2002) (stating that state courts should consider whether the employer provided harassment training as to whether the employer was negligent in preventing harassment); *see also* Carol M. Merchasin, et al., *Case Dismissed! Taking Your Harassment Prevention Training to Trial*, NEW JERSEY LAW., Oct. 2005, at 42.

296. Greenwald, *supra* note 295. The requirement is limited to employers with 50 or more employees and the "training must include information and practical guidance on federal and state statutory provisions concerning sexual harassment, and practical examples aimed at preventing harassment." *Id*.; *see* CAL. GOV'T CODE § 12950.1(a) (2005).

297. Greenwald, *supra* note 295.

298. *Id*. While some employers opposed the legislation as adding additional cost to their total production costs, Joe Gibbons of FutureWork Institute suggests that the California lawyers consider it in terms of payoff. "One lawsuit can really bring a company down, especially a smaller company." *Id*.; *see also* Felsenthal, *supra* note 132 (suggesting that thorough and continued sexual harassment training will be helpful when asserting the *Ellerth–Faragher* affirmative defense).

299. Greenwald, *supra* note 295.

300. *Id.* (noting that one California employer opposed the legislation because it means two hours of lost productivity per year per employee).

be served by enacting such a law.[301] As stated by the EEOC, "[p]revention is the best tool to eliminate sexual harassment in the workplace."[302] The EEOC suggests that this can be accomplished via effective communication to employees of the employer's intolerance of sexual harassment.[303] The EEOC suggests that communication of anti-harassment policies is most effectively achieved through sexual harassment training.[304] The costs that employers would incur to conduct sexual harassment training would be justified by the employer's cost savings resulting from decreased negative effects of sexual harassment.[305] In light of the legislature's actions in other discrimination areas, as well as federally mandated Occupational Safety and Health Administration and Environmental Protection Agency training, such actions would not seem disproportionate to the problem.

B. Supervisors

As noted by the *Faragher* court, "When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose 'power to supervise'—to hire and fire, and to set work schedules and pay rates—does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion."[306]

301. While Title VII and related legislation purports to remedy discrimination, "their primary purpose is to prevent violations." EEOC Enforcement Guidance, *supra* note 26.

302. *Sexual Harassment*, *supra* note 293. *Suders* is an example of a need for content of the training to be addressed, as PSP's own equal employment opportunity officer evidently was unclear on the proper avenues to effect prevention, demonstrated by her hesitance to follow up with Suders regarding her concerns. *See supra* notes 34–38 (discussing Suders' attempts to seek assistance from PSP's equal employment opportunity officer).

303. *Sexual Harassment*, *supra* note 293.

304. *Id.* "Policies have little value unless training informs managers about the policies and how to administer them." WEISS, *supra* note 280, at 194.

305. This seems especially true in light of costs of lawsuits. In fiscal year 2003 the EEOC "recovered $37.1 million in monetary benefits for charging parties and other aggrieved individuals (not including benefits obtained through litigation). *Id.* Additionally important to consider in terms of constructive discharge, is that as of December 2000 in "38% of constructive discharge cases, the median award for punitive damages was $300,000." *Is It Time to Try EPLI?*, HRFOCUS, Dec. 2000, at 7.

306. Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998) (citing Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 854 (1991)). In the portion of Estrich's work which the *Faragher* Court cited, Estrich was actually criticizing the holding of *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982). The *Henson* court stated that the capacity of a supervisor to create a hostile work environment was not enhanced through the authority granted the supervisor by the employer. 682 F.2d at 910.

In light of the *Suders* ruling, employers must be cognizant of the precarious legal situations in which their supervisors may place them.[307] Organizations must be sure to keep legal implications in mind when recruiting, selecting, hiring, and training supervisors.[308] As demonstrated by the Court's holding in *Suders*, official conduct of supervisors will now be imputed to the employer and as such the employer must respond appropriately or face the consequences for failure to do so. Thus, even if no legislative initiative is advanced nation-wide or in an employer's particular state, the employer should voluntarily train its workforce regarding sexual harassment prevention. This is especially important in light of the evolving concept of what sexual harassment includes: sexual attraction or motivation need not be involved,[309] the increase in men being harassed,[310] and same-sex harassment.[311] Employment attorneys advising employers will be well-served by counseling their clients as to the importance of the role that supervisors play within their organizations.

As such, it is important for employers to recognize that minor job assignments to undesirable positions may not, in and of themselves, constitute a tangible employment action.[312] However, many lesser job changes occurring over a span of time could create a hostile working environment.[313] This is because the minor job actions could not have occurred absent the official

307. *See Sexual Harassment*, *supra* note 293 (stating that a telephone poll of 782 workers conducted by Louis Harris and Associates showed that of the thirty-one percent of female employees who claim to have been harassed at work, forty-three percent of those claimed to be harassed by supervisors and another twenty-seven percent claimed to be harassed by an employee senior to them; additionally "approximately 11% of claims involve men filing against female supervisors").

308. The *Faragher* Court noted that

> recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.

Faragher, 524 U.S. at 803. Labor Law scholar Charles Craver, of George Washington University Law School, interpreted the Court as sending a message to employers with the *Suders* ruling that employers should be careful in the way supervisors are hired and in the way that they themselves are supervised. Marcia Coyle, *Mixed Outcome: Workplace Ruling Has Something for Each Side*, N.Y. L.J., June 24, 2004, at 8.

309. See Sandra M. Tomkowicz, *Hostile Work Environments: It's About the Discrimination, Not "The Sex,"* 55 LAB. L.J. 99–100 (2004).

310. *See supra* note 246 (discussing that the amount of men claiming harassment is increasing steadily).

311. *See* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 75 (1998) (holding that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII).

312. PLAYER, *supra* note 118, at 155–56.

313. *Id.*

power conveyed to the supervisor by the employer.[314] As such, a finding of such a series of acts amounting to a tangible employment action would preclude the employer from raising the *Ellerth–Faragher* affirmative defense.

All supervisors should be trained to immediately report any and all allegations of harassment, discrimination or any other unlawful conduct that an employee might raise with regard to their resignation.[315] Supervisors should take all complaints seriously, and then should act immediately to take whatever corrective action is needed.[316] Additionally, supervisors should closely monitor the behavior of those within their charge and ensure that unlawful harassment is not a part of any subordinate's working conditions.[317]

VIII. CONCLUSION

"Ever since the passage of Title VII of the Civil Rights Act, courts have been struggling to articulate a coherent framework for conceptualizing and recognizing claims of sex discrimination."[318] The evolution of Title VII's progeny with respect to sexual harassment continues with the *Suders* decision. The *Suders* decision furthers the objectives and policy considerations promoted in the pathmarking opinions of *Meritor*, *Ellerth*, and *Faragher*. The Court's requirement of an official act by the supervisor as the last straw for strict liability to be imputed to the employer is consistent with the rationale of *Ellerth* and *Faragher*. Title VII policy considerations and agency principles are served by requiring something more than the existence of the employment relationship itself. Additionally, the Court's utilization of the employer's efforts to install effective remedial programs furthers Congress's intent to promote conciliation rather than litigation of Title VII controversies.

The restriction of the *Suders* decision remains in its lack of defined parameters as to what constitutes an official act. As the employer will be held strictly liable for constructive discharge only where an official act precipitated the resignation, the meaning ascribed to the "official act" concept will be pivotal. Additionally, the parameters of an official act for constructive discharge purposes should encompass such issues as specific intent of encouraging the resignation and inaction on the part of the supervisor. As courts interpret the meaning of official act, they should be mindful of the concept that for an employer to be held strictly liable the supervisor must have been enabled by the agency relationship to engage in the harassing behavior.

314. For example, employers will be well-advised to scrutinize "requests for demotions, significant cuts in pay and transfers to intolerable-type jobs." Margaret M. Clark, *Ruling Allows Defense in Harassment Cases*, HRMAGAZINE, Aug. 2004, at 30.

315. *See generally* Jonathan A. Segal, *I Quit! Now Pay Me*, HRMAGAZINE, Oct. 2004, at 129.

316. FAIR EMPLOYMENT PRACTICES GUIDELINES, *supra* note 37, at 3.

317. *Id.*

318. Tomkowicz, *supra* note 309, at 99.

Federal legislation mandating routine training of supervisors would advance the goals and policies of Title VII. Even in the absence of such a requirement existing in a particular state, employers would be well-served to offer sexual harassment prevention training, if not to the entire workforce, then at least to the supervisors. Employers should also approach hiring and promoting supervisors with caution. On a final note for those who are harassed and contemplate resignation, a plaintiff's case still seems to be best served by trying to mitigate. Even if it is not always an absolute requirement, don't just quit, complain.[319]

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319. Kelly Collins Woodford & Harry A. Rissetto, *The Best Advice for Sexual Harassment Victims: Don't Complain, Just Quit and Sue—Take Two*, 55 LAB. L.J. 213, 219 (2004).

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