

Casenote

Pennsylvania State Police v. Suders

In *Pennsylvania State Police v. Suders*,¹ the United States Supreme Court reached two conclusions. First, the Court wrote that an employee who resigns as a result of sexual harassment may assert a Title VII² constructive discharge claim where the employee can show that the “working conditions became so intolerable that a reasonable person in the employee’s position would have felt compelled to resign.”³ Second, the Court held that an employer may assert the affirmative defense established in *Burlington Industries, Inc. v. Ellerth*⁴ and *Faragher v. City of Boca Raton*,⁵ (“*Ellerth/Faragher*”) in a situation where an employee resigns due to a sexually hostile work environment, alleging constructive discharge, when a supervisor does not impose a tangible employment detriment, such as discharge, demotion, or undesirable reassignment.⁶ *Suders* is the Court’s first decision approving a Title VII constructive discharge claim, but it also allows the employer an affirmative defense to constructive discharges brought about by the most

-
1. 542 U.S. 129 (2004).
 2. 42 U.S.C. § 2000(e) (2005).
 3. *Suders*, 542 U.S. at 141.
 4. 524 U.S. 742, 765 (1998).
 5. 524 U.S. 775, 807 (1998).
 6. *Suders*, 542 U.S. at 140-41.

common type of actionable workplace harassment, “hostile environment” discrimination.

I. FACTUAL BACKGROUND

Nancy Suders began working at the Office of the Pennsylvania State Police (“PSP”) in March 1998 as a police communications operator. Shortly thereafter, Suders alleged that her three supervisors sexually harassed her by making repeated obscene gestures and lewd sexual comments. In June 1998 one of the supervisors accused Suders of taking an accident file home. This incident prompted Suders to contact the PSP’s Equal Employment Opportunity Officer, Virginia Smith-Elliott. Although Suders did not file a complaint at that time, she indicated to Smith-Elliott that “she was being harassed and was afraid.”⁷ Smith-Elliott advised Suders to file a complaint. However, Smith-Elliott did not tell Suders how to obtain the necessary form. Two days following her conversation with Smith-Elliott, the supervisors arrested Suders for theft.⁸ Shortly after her arrest and interrogation, Suders expressed a desire to resign.⁹

In September 2000 Suders filed suit in federal district court against the three supervisors and the PSP, alleging that she had been sexually harassed and constructively discharged in violation of Title VII of the Civil Rights Act of 1964.¹⁰ During the course of the proceedings, the defendant, PSP, filed a motion for summary judgment asserting the *Ellerth/Faragher* defense. That defense enables an employer to defeat liability for a supervisor’s creation of a hostile work environment—but not for “tangible terms” harassment—by showing (1) that “[it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and (2) that the plaintiff employee unreasonably failed to take advantage of any of the employer’s adequate preventive or corrective opportunities, or that the employee unreasonably failed to avoid harm otherwise.¹¹ The district court granted the defendant’s motion. Although Suders presented sufficient evidence to show that the supervisors had created a hostile work environment, the evidence showed beyond any genuine issue of fact that she failed to utilize the employer’s adequate internal procedures for reporting sexual harass-

7. *Id.* at 135.

8. Apparently, Suders took her old exams, which she found in a set of drawers in the women’s locker room. Though Suders was told that she had failed the exams, she determined that they were never forwarded for grading. *Id.* at 136.

9. *Id.*

10. 42 U.S.C. § 2000(e).

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

ment. On Suders' appeal, the Third Circuit reversed and remanded, reasoning that any constructive discharge resulting from a supervisor's harassment constitutes a tangible employment action that accordingly renders the *Ellerth/Faragher* affirmative defense unavailable and the employer, therefore, strictly liable.¹² On the defendant's petition, the United States Supreme Court granted certiorari.¹³

II. LEGAL BACKGROUND

A. *Constructive Discharge*

1. The Development of the Constructive Discharge Doctrine. The National Labor Review Board ("Board") developed the constructive discharge doctrine under the National Labor Relations Act ("NLRA").¹⁴ The NLRA serves to protect employees' right to organize and to engage in collective bargaining activities.¹⁵ The doctrine addresses situations where employers sought to compel their employees, who were exercising their right to organize and engage in collective bargaining activities, to resign.¹⁶ If the employee shows that she resigned due to unbearable working conditions, the constructive discharge doctrine treats the resignation as a formal discharge, which, in turn, allows the employee to seek back-pay and other equitable remedies.¹⁷

The constructive discharge doctrine was first recognized by the Board in the *Matter of Sterling Corset Co.*¹⁸ Initially, the courts were reluctant to acknowledge the doctrine; however, it eventually gained wide acceptance. The First Circuit was the first to uphold a Board's finding of constructive discharge in 1953 in *NLRB v. Saxe-Glassman*

12. *Suders*, 542 U.S. at 138, 140.

13. *Id.* at 134-40.

14. 29 U.S.C. §§ 151 to 169 (2005); Cathy Shuck, Comment: *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401, 406 (2002).

15. Shuck, *supra* note 14, at 406.

16. *Id.*

17. *Id.* at 403; *Penn State Police v. Suders*, 542 U.S. 129, 141-42 (2004).

18. 9 N.L.R.B. 858 (1938). In *Sterling Corset*, the employer subjected employees who attended union meetings to continual threats and surveillance. *Id.* at 867. The Board held that the employees were constructively discharged. *Id.* at 870.

Shoe.¹⁹ The U.S. Supreme Court officially recognized the constructive discharge doctrine in 1984 in *Sure-Tan, Inc. v. NLRB*.²⁰

2. Application of the Constructive Discharge Doctrine to Title VII Cases. Title VII, enacted in 1964, prohibits discrimination in the workplace based on race, national origin, sex, or religion.²¹ Allegations of constructive discharge began to appear in Title VII cases during the mid-1970s,²² and the doctrine eventually gained acceptance in a wide variety of Title VII cases. In *Robinson v. Sappington*,²³ the Seventh Circuit held that, viewed in a light most favorable to the plaintiff, a jury could find that the plaintiff had been subjected to sexually offensive behavior and that the supervisor's proposed transfer would subject the plaintiff to an equally cruel working situation.²⁴ Therefore, a jury could conclude that the plaintiff was constructively discharged.²⁵

Similarly, the Sixth Circuit, in *Moore v. Kuka Welding Systems & Robot Corp.*,²⁶ held that a jury could find that the plaintiff-employee, a black man, had been constructively discharged after he was subjected to racial slurs and after he spent over a year in complete isolation due to having filed a charge with the Equal Employment Opportunity Commission ("EEOC").²⁷ Reversing the district court, the Fifth Circuit concluded that the plaintiff in *Young v. Southwestern Savings & Loan Ass'n*²⁸ was constructively discharged when her employer required her to attend business meetings that began with a short religious talk and a prayer.²⁹ Finally, in *Amirmokri v. Baltimore Gas & Electric Co.*,³⁰ the Fourth Circuit reversed the district court's grant of summary

19. 201 F.2d 238, 244 (1st Cir. 1953).

20. 467 U.S. 883 (1984). In *Sure-Tan*, the employer sent a letter to Immigration and Naturalization Service ("INS") requesting the agency to investigate eight of its Mexican national employees' immigration status. *Id.* at 887. Finding that the employer sent the letter to the INS in retaliation for the employees' statutorily protected collective bargaining activities, the Court upheld the Board's ruling for the plaintiffs. *Id.* at 894, 906. Thus, the Court's holding legitimized the constructive discharge doctrine and provided a platform for its use in future Title VII cases.

21. 42 U.S.C. § 2000e-2(a)(1) (2005).

22. See, e.g., *Padilla v. Stringer*, 395 F. Supp. 495, 499 (1974); *Olson v. Rembrandt Printing Co.*, 375 F. Supp. 413, 415 (E.D. Mo. 1974); *EEOC v. General Electric Co.*, 376 F. Supp. 757, 758 (W.D. Va. 1974).

23. 351 F.3d 317 (7th Cir. 2003).

24. *Id.* at 337.

25. *Id.*

26. 171 F.3d 1073 (6th Cir. 1999).

27. *Id.* at 1077-78, 1080-81.

28. 509 F.2d 140 (5th Cir. 1975).

29. *Id.* at 141-42.

30. 60 F.3d 1126 (4th Cir. 1995).

judgment on the plaintiff's constructive discharge claim,³¹ determining that the plaintiff's supervisor exhibited discriminatory behavior by making derogatory references to the employee's Iranian national origin and by withholding company benefits.³² However, although courts have unanimously acknowledged the validity of constructive discharge and its applicability to Title VII cases, the circuits have split over the elements that plaintiffs were required to prove to sustain a constructive discharge claim.

3. The Circuit Split over the Subjective Specific Intent Element. The basic, invariable, and objective element of the constructive discharge claim is that "if the employer makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has [in effect chosen] a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee."³³ Whether the plaintiff must also prove that the employer created the intolerable work environment with the specific intent of causing the employee to quit is an issue that divided the circuits. The First,³⁴ Third,³⁵ Seventh,³⁶ Ninth,³⁷ Tenth,³⁸ and Eleventh³⁹ Circuits applied the objective standard alone, which requires the plaintiff to prove that "a reasonable person in the employee's shoes would have felt compelled to resign."⁴⁰ The First Circuit reasons that an additional requirement of specific employer intent to create intolerable conditions that would cause a reasonable person to resign would defeat the purpose of the doctrine, which is to deter employers from creating or tolerating such a work environment regardless of their motive.⁴¹ "The doctrine

31. *Id.* at 1134.

32. *Id.* at 1129.

33. *Young*, 509 F.2d at 144; *accord* *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980).

34. *See Ramos v. Davis & Geck, Inc.*, 167 F.3d 727, 732 (1st Cir. 1999).

35. *See Schafer v. Bd. of Pub. Educ. of Sch. Dist.*, 903 F.2d 243, 249 (3d Cir. 1990); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 888 (3d Cir. 1984).

36. *See Lindale v. Tokheim Corp.*, 145 F.3d 953, 955 (7th Cir. 1998).

37. *See Woods v. Champion Chevrolet*, 35 F. App'x 453, 459 (9th Cir. 2002).

38. *See Turnwall v. Trust Co. of Am.*, 2005 U.S. App. LEXIS 22249, at **9-10 (10th Cir. 2005); *Douglas v. Orkin Exterminating Co.*, 2000 U.S. App. LEXIS 11563, at *11 (10th Cir. 2000).

39. *See Fitz v. Pugmire Lincoln-Mercury, Inc.*, 348 F.3d 974, 977 (11th Cir. 2003); *Mitchell v. Overbey*, 2005 U.S. Dist. LEXIS 17489, at **28-29 (D. Ga. 2005).

40. *Ramos*, 167 F.3d at 732 (quoting *Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559, 561 (1st Cir. 1986)).

41. *Id.*

reflects the sensible judgment that employers charged with employment discrimination ought to be accountable for creating working conditions that are so intolerable to a reasonable employee as to compel that person to resign.⁴²

In contrast, the Second,⁴³ Fourth,⁴⁴ Fifth,⁴⁵ Sixth,⁴⁶ Eighth,⁴⁷ and D.C.⁴⁸ Circuits require that the plaintiff prove that an employer had the specific intent to sexually harass an employee. In other words, they interpret the constructive doctrine to require a two-part inquiry: 1) were the working conditions created by the employer so intolerable that a reasonable person would resign (objective standard), and 2) did the employer act with the intention of forcing the employee to resign (subjective standard).⁴⁹ However, it is important to note that the nature of the intent element is unsettled within these circuits.⁵⁰

42. *Id.*; accord *Flores-Suarez v. Turabo Med. Ctr. P'ship*, 165 F. Supp. 2d 79, 92 (D.P.R. 2001).

43. *Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000); *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 74 (2d Cir. 2000).

44. *Johnson v. K-Mart Corp.*, 1997 U.S. App. LEXIS 34000, at **3-4 (4th Cir. 1997).

45. *Jurgens v. EEOC*, 903 F.2d 386, 390-391 (5th Cir. 1990).

46. *Nickell v. Memphis Light, Gas & Water Div.*, 76 F. App'x 87, 94 (6th Cir. 2003).

47. *Tatom v. Georgia-Pac. Corp.*, 228 F.3d 926, 932 (8th Cir. 2000).

48. *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Cir. 1997); *Dashnaw v. Pena*, 12 F.3d 1112, 1115 (D.C. Cir. 1994).

49. *E.g.*, *Moore*, 171 F.3d at 1080; *Amirmorkri*, 60 F.3d at 1132.

50. For instance, in *Whidbee*, the Second Circuit noted that while constructive discharge requires deliberate action by the employer, there is disagreement in the Second Circuit between cases requiring intent to force an employee into quitting and cases requiring no such specific intent. 223 F.3d at 73-74. Continuing, the court in *Whidbee* asserted that "our case law indicates that something beyond mere negligence or ineffectiveness is required." *Id.* at 74. This leaves the issue of what constitutes intent or deliberateness wholly unresolved. *Id.*

The same uncertainty exists in the Fifth Circuit. Although the Fifth Circuit claims to endorse an objective standard, in practice, this circuit often requires plaintiffs to show a deliberate action by the employer or the existence of aggravating factors. *Haley v. Alliance Compressor LLC*, 391 F.3d 644, 651 (5th Cir. 2004). "The general rule is that if the employer *deliberately* makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has [caused] a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee." *Jurgens*, 903 F.2d at 390 (emphasis added) (quoting *Bourque*, 617 F.2d at 65). Further, the D.C. Circuit provides that constructive discharge requires a finding of "aggravating factors," which are "those things that would force an employee to leave." *Mungin*, 116 F.3d at 1558 (citing *Clark*, 665 F.2d at 1174). The clearest definition of intent seems to come from the Sixth and Eighth Circuits, which have held that intent may be demonstrated by showing that the plaintiff's resignation was a foreseeable consequence of the employer's actions. *Tatom*, 228 F.3d at 932; *Moore*, 171 F.3d at 1080; *Amirmorkri*, 60 F.3d at 1132-33. However, even this articulation of the intent prong is vague.

Although no circuit has explicitly stated its policy rationale for adopting the specific intent required, it can be inferred that these courts are attempting to encourage employees to remain on the job while protesting alleged harassment or, possibly, to discourage frivolous lawsuits.⁵¹ One could also argue that the specific intent requirement also advances the underlying policy of Title VII, which is to encourage the implementation and use of grievance procedures and prevent litigation.⁵² These policy concerns were reflected earlier in the Supreme Court's implementation of the *Ellerth/Faragher* affirmative defense.⁵³

B. *The Creation of the Ellerth/Faragher Affirmative Defense*

Title VII of the Civil Rights Act of 1964 provides that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."⁵⁴ The Supreme Court in *Faragher* and *Ellerth* explained that sexual harassment claims have been categorized as follows: 1) "tangible terms" cases, where an employer's agent, with authority over those terms and conditions, has responded to resistance to requested or demanded sexual favors by implementing a tangible employment action, such as discharge, demotion, promotion denial, or undesirable reassignment; and 2) "hostile work environment" cases resulting from sexual harassment by superiors, co-workers, or other third parties who create a hostile or offensive working environment for the plaintiff but without affecting her tangible terms of employment.⁵⁵ With respect to the former category, the circuits unanimously hold employers strictly liable, with no affirmative defense, because the harasser is utilizing the authority given by the employer to alter the terms and conditions of plaintiff's employment.⁵⁶

However, courts have had more difficulty determining employer liability regarding claims of "hostile work environment" harassment. In

51. See Martin W. O'Toole, Note: *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 CORNELL L. REV. 587, 597-98 (1986).

52. *Suders*, 542 U.S. at 145.

53. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998).

54. 42 U.S.C. § 2000e-2(a)(1) (2005).

55. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751-53 (1998); *Faragher*, 524 U.S. at 786; see also *Meritor*, 477 U.S. at 62.

56. See e.g., *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994); *Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1363 n.9 (11th Cir. 1994); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443 (10th Cir. 1997).

Meritor Savings Bank, FSB v. Vinson,⁵⁷ the Supreme Court officially recognized that a hostile work environment claim is actionable under Title VII.⁵⁸ Further, with respect to imputing employer liability for a supervisor's conduct, the Court held that employers are not automatically liable for environmental sexual harassment by their supervisors; instead, the courts must look to agency principles to determine liability.⁵⁹ The Court rejected the notion that "the mere existence of a grievance procedure and a policy against discrimination, coupled with [the employee's] failure to invoke that procedure, must insulate [that employer] from liability."⁶⁰

Because the Court in *Meritor* failed to establish a specific employer liability standard for hostile work environment claims, the federal courts of appeals continued to struggle to define and apply standards for determining employer liability in those cases.⁶¹ The standards that the circuits adopted ranged from strict liability to, at the other extreme, a "knew or should have known" standard that in effect required a showing of employer negligence.⁶² As a result of the uncertainty in the lower courts, the Supreme Court revisited the issue in *Faragher*⁶³ and *Ellerth*,⁶⁴ companion cases the Court decided in 1998.

In *Faragher*, the plaintiff resigned from her position as a lifeguard and brought suit against her immediate supervisors and the City of Boca Raton ("City"), asserting a claim for hostile work environment sexual harassment.⁶⁵ Faragher alleged that the supervisors repeatedly touched the bodies of the female employees without invitation and made demeaning references about the bodies of the female lifeguards.⁶⁶ Although Faragher never reported the supervisors to higher management, another female lifeguard wrote the City's Personnel Director regarding the supervisors' behavior. Upon completing its investigation, the City reprimanded the supervisors by requiring them to choose

57. 477 U.S. 57 (1986).

58. *Id.* at 65.

59. *Id.* at 72.

60. *Id.*

61. *Faragher*, 524 U.S. at 785.

62. Tara Kaesebier, Comment, *Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth: Employer Liability in Supervisor Sexual Harassment Cases: The Supreme Court Finally Speaks*, 31 ARIZ. ST. L.J. 203, 207 n.38 (1999).

63. 524 U.S. at 785-86.

64. 524 U.S. at 754.

65. 524 U.S. at 780.

66. *Id.* at 782.

between a suspension without pay or a forfeiture of their annual leave.⁶⁷

The plaintiff in *Ellerth* resigned from her position with Burlington Industries and alleged that she was sexually harassed.⁶⁸ Ellerth claimed that during her tenure with the company, the vice president of her division consistently made comments about her body and encouraged her to “loosen up” to make her life at Burlington Industries easier.⁶⁹ Ellerth did not report any of the incidents to her immediate supervisor because he would have been obligated to report the incident to his superiors.⁷⁰

In both cases, the Supreme Court held as follows:

An employer is subject to vicarious [but not always strict] 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 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 No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.⁷¹

Accordingly, the Court officially extended vicarious employer liability to both categories of sexual harassment claims. However, the Court recognized strict liability only for “tangible terms” claims (involving harassment that by definition could be perpetrated only by a supervisor or manager), while formulating a two-pronged affirmative defense for

67. *Id.* at 782-83.

68. 524 U.S. at 747, 748.

69. *Id.* at 748.

70. *Id.* at 748-49.

71. *Id.* at 765; accord *Faragher*, 524 U.S. at 807. In *Ellerth*, the Court concluded that Burlington was vicariously liable for the conduct of the supervisor. 524 U.S. at 766. However, because Burlington is able to use the affirmative defense as Ellerth suffered no tangible employment action, the Court remanded the case to the district court. *Id.* at 766. Similarly, in *Faragher*, the court reinstated the district court’s finding that the City was liable for the supervisor. 524 U.S. at 810. Although the City was entitled to raise the affirmative defense, the Court also noted that the City failed to use reasonable care to prevent the harassment. *Id.* at 809. Therefore, the City would be unable to successfully assert the defense. *Id.*

employers charged with liability for hostile environment harassment.⁷² Consistent with its general suggestion in *Meritor*, the Court predicated its ruling on the “aided by the agency relation” standard articulated in Restatement (Second) of Agency (2)(d).⁷³ The Court reasoned that “a supervisor’s power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relationship.”⁷⁴

However, the Court also noted that there may be circumstances where the supervisor’s status is irrelevant in the sexual harassment claims and the supervisor’s acts could be viewed as tantamount to the acts of a co-worker.⁷⁵ In crafting the details of the affirmative defense to hostile environment harassment, the Court also relied on Title VII’s underlying policy “to encourage the creation of anti-harassment policies and effective grievance mechanisms.”⁷⁶ In short, although the Court specified that employers would be strictly liable for tangible terms claims and provided an affirmative defense for hostile environment harassment claims, certain issues remained open.

C. The Circuits Continue to Struggle after the Ellerth / Faragher Decision

Despite the Court’s valiant efforts to clarify the standard for employer liability in *Ellerth/Faragher*, the lower courts continued to struggle with its application. Specifically, the courts split over whether environmental harassment culminating in a constructive discharge should be treated as a type of “tangible terms” violation that the employer accordingly could not avoid via the *Ellerth/Faragher* affirmative defense.⁷⁷

Before *Suders*, the First,⁷⁸ Ninth,⁷⁹ and Eleventh⁸⁰ Circuits had not decided whether a constructive discharge constitutes a tangible employment action to which the employer would therefore have no affirmative defense. However, the Second,⁸¹ Sixth,⁸² Seventh,⁸³

72. *Id.* at 807.

73. *Ellerth*, 524 U.S. at 763; RESTATEMENT (SECOND) OF AGENCY 2d § 219(d) (1958).

74. *Ellerth*, 524 U.S. at 763.

75. *Id.*

76. *Id.* at 764.

77. *Id.* at 765.

78. *See Reed v. MBNA Mktg. Sys.*, 333 F.3d 27, 33 (1st Cir. 2003).

79. *See Wallace v. San Joaquin County*, 58 F. App’x 289, 290 (9th Cir. 2003).

80. *See Walton v. Johnson & Johnson Servs.*, 347 F.3d 1272, 1283 (11th Cir. 2003).

81. *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294-295 (2d Cir. 1999).

82. *See Turner v. DowBrands, Inc.*, 2000 U.S. App. LEXIS 15733, at *4 (6th Cir. 2000).

83. *See Robinson*, 351 F.3d at 334.

Tenth,⁸⁴ D.C. Circuits,⁸⁵ and district courts within the Fourth Circuit,⁸⁶ had held that a constructive discharge resulting from environmental harassment does not constitute a tangible employment action for *Ellerth/Faragher* purposes, and therefore, employers in such cases could assert the affirmative defense. Relying on agency principles, some courts have reasoned that when a plaintiff quits, for whatever reason, there is no official act by the employer.⁸⁷ Further, a plaintiff who resigns has probably failed to avail herself of the employer's internal grievance procedures, thereby undercutting the Title VII policy favoring voluntary, extrajudicial resolutions of disputes.⁸⁸ In *Caridad v. Metro-North Commuter Railroad*,⁸⁹ the Second Circuit provided three reasons for construing constructive discharge as a non-tangible employment action: (1) co-workers, who do not possess special powers or authority from the employer, can cause the constructive discharge; (2) an employee's constructive discharge is not "approved by the employer"; and (3) the Supreme Court noted that Ellerth, who resigned, did not suffer a tangible employment action.⁹⁰

Contrary to the Second Circuit's holding, courts within the Third,⁹¹ Fifth,⁹² and Eighth⁹³ Circuits denied employers the *Ellerth/Faragher* affirmative defense reasoning that a constructive discharge resulting from hostile environment harassment is a legal characterization which equates a forced resignation to the formal firing of an employee. In *Cherry v. Menard*,⁹⁴ for example, a district court within the Eighth Circuit, rejected the reasoning of *Caridad* by pointing out that "under the Supreme Court's definition, it is the 'nature of the harm' inflicted by a supervisor—that is, 'a significant change in employment status' or 'infliction of a direct economic harm'—that determines whether the supervisor's action is a 'tangible employment action,' not whether a co-worker could also inflict such harm."⁹⁵ Therefore, the better test to

84. See *Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1231-32 (10th Cir. 2000).

85. See *EEOC v. Barton Protective Servs., Inc.*, 47 F. Supp. 2d 57, 59-60 (D.D.C. 1999).

86. See *Scott v. Ameritex Yarn*, 72 F. Supp. 2d 587, 594 (D.S.C. 1999); *Thomas v. BET Soundstage Restaurant*, 104 F. Supp. 2d 558, 563 (D. Md. 2000).

87. *Scott*, 72 F. Supp. 2d at 594-95; *Caridad*, 191 F.3d at 294.

88. See *Scott*, 72 F. Supp. 2d at 595.

89. 191 F.3d 283 (2d Cir. 1999).

90. *Id.* at 294-95; see also Shuck, *supra* note 14, at 440.

91. See *Suders v. Easton*, 325 F.3d 432, 454 (3d Cir. 2003).

92. See *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 410 n.15 (5th Cir. 2002); *Duhe v. U.S. Postal Serv.*, 2004 U.S. Dist. LEXIS 3737 at **29-30 (D. La. 2004).

93. See *Jackson v. Arkansas Dep't of Educ.*, 272 F.3d 1020, 1026 (8th Cir. 2001).

94. 101 F. Supp. 2d 1160 (D. Iowa 2000).

95. *Id.* at 1173 (quoting excerpts from *Ellerth*, 524 U.S. 761-62).

determine whether a constructive discharge is a tangible employment action is whether the discharge inflicts economic harm on the employee or causes a significant change in employment status.⁹⁶ According to the court in *Cherry*, a constructive discharge occurs when a supervisor deliberately renders an employee's working conditions intolerable and specifically intends to force the employee to resign.⁹⁷ Therefore, the very nature of a constructive discharge, so defined, is that the supervisor's conduct is imputed to the employer and ". . . a supervisor's conduct is, legally, the employer's own 'deliberate act.'"⁹⁸ The *Cherry* court's reasoning for disallowing the *Ellerth/Faragher* defense hinges on the Eighth Circuit's position that, to prove constructive discharge, an employee must show that the employer had a specific intent to force the employee to resign.⁹⁹

Prior to *Suders*, the Fifth, Seventh, Eighth, and Tenth Circuits, balanced the playing field between plaintiffs and defendants, although they struck two different balances. The Fifth and Eighth Circuit held that 1) to sustain a claim of constructive discharge, a plaintiff is required to prove both objectively intolerable working conditions and a subjective intent on the part of the employer to force the plaintiff-employee to resign,¹⁰⁰ and 2) if a plaintiff can make that two-fold showing of a hostile work environment constructive discharge, the employer is strictly liable for a tangible employment action.¹⁰¹ The Seventh and Tenth Circuits held that 1) a constructive discharge claim requires proof of the objective standard alone,¹⁰² and 2) a constructive discharge is not a tangible employment action and therefore, the employer may assert the *Ellerth/Faragher* affirmative defense.¹⁰³ However, there were other circuits that did not recognize a trade off between the difficulty of establishing the claim and the availability of the defense. Specifically, the Third Circuit took a pro-employee stance by establishing an objective standard for the claim, "a reasonable person in the employee's shoes would have felt compelled to resign,"¹⁰⁴ yet simultaneously holding that a constructive discharge based on hostile

96. *Id.* at 1172.

97. *Id.* at 1173.

98. *Id.* at 1174.

99. *Id.* at 1173; *see also Jackson*, 272 F.3d at 1026.

100. *Jurgens*, 903 F.2d at 390-391; *Tatom*, 228 F.3d at 932.

101. *Wyatt*, 297 F.3d at 410 n.15; *Duhe*, 2004 U.S. Dist. LEXIS 3737 at **29-30; *Jackson*, 272 F.3d at 1026.

102. *Lindale*, 145 F.3d at 955; *Turnwall*, 2005 U.S. App. LEXIS 22249 at *9; *Douglas*, 2000 U.S. App. LEXIS 11563 at *11.

103. *Robinson*, 351 F.3d at 334; *Mallinson-Montague*, 224 F.3d at 1232.

104. *Ramos*, 167 F.3d at 732 (quoting *Calhoun*, 798 F.2d at 561).

work environment is a tangible employment action for which the employer is strictly liable.¹⁰⁵ Conversely, the Second, Sixth, and DC Circuits, and district courts within the Fourth Circuit, took a pro-employer position by allowing the employer to assert the *Ellerth/Faragher* affirmative defense, apparently even if the plaintiff was able to demonstrate the subjective element that employer's agent (supervisor) had intentionally sought to cause the employee's resignation.¹⁰⁶

III. THE COURT'S RATIONALE

Due to the conflict among the circuits, the U.S. Supreme Court granted certiorari in *Pennsylvania State Police v. Suders*¹⁰⁷ to consider whether a constructive discharge brought about by supervisor harassment can ever constitute, or always constitutes, a tangible employment action that would accordingly preclude the employer's assertion of the *Ellerth/Faragher* affirmative defense.¹⁰⁸ Writing for the majority, Justice Ginsburg first examined the history of the constructive discharge doctrine and confirmed the circuit courts' consensus that Title VII does assign employer liability for a constructive discharge.¹⁰⁹ In the second part of the Court's discussion, Justice Ginsburg revisited the *Ellerth/Fa-*

105. *Suders*, 325 F.3d at 454.

106. Because the intentional element of constructive discharge is such a difficult prong for plaintiffs to meet, in most cases courts do not reach an analysis of the affirmative defense because the plaintiff's claim is dismissed based on failure to show that the employer's actions were deliberate or intentional. *See, e.g.*, *Mack v. Otis Elevator Co.*, 326 F.3d 116, 128 (2d Cir. 2003) (concluding that the plaintiff failed to provide evidence of intent or deliberate action on the part of the employer because the employer sought to correct the harm, which is the first prong of the *Ellerth/Faragher* affirmative defense). However, a few such courts state, although in dictum, that even though the plaintiff is required to prove objectively intolerable working conditions and a subjective intent on the part of the employer, the employer will not be strictly liable. *See, e.g.*, *Le Prevost v. New York State*, 2004 U.S. Dist. LEXIS 58, 11-12 (D.N.Y. 2004) ("An employee is constructively discharged when her employer, rather than discharging her directly, *intentionally* creates a work atmosphere so intolerable that she is forced to quit Constructive discharge is not a tangible employment action depriving the employer of the availability of the affirmative defense to Title VII liability.") *Id.* (emphasis added). This implies, although only in dictum, that even if the plaintiff shows that the supervisor intentionally sought to make her resign, the employer would still be able to assert *Ellerth/Faragher* affirmative defense. *See also Thomas*, 104 F. Supp. 2d at 560, 564-569 (a district court in the Fourth Circuit, which requires proof of a subjective intent or deliberate action as well as objective proof of a hostile environment constructive discharge, denies summary judgment on plaintiff's claim and also finds *Ellerth/Faragher* affirmative defense not conclusively proven).

107. 542 U.S. 129, 140 (2004).

108. *Id.*

109. *Id.* at 142-43.

ragher framework and concluded that an employer may assert the two-pronged affirmative defense to a constructive discharge resulting from a supervisor's (or presumably a co-worker's) creation of a hostile work environment, but not where the constructive discharge follows a tangible employment action.¹¹⁰

A. *Part I: Constructive Discharge Analysis*

Justice Ginsburg noted that the National Labor Relations Board ("NLRB") created the constructive discharge doctrine to address situations in which employers sought to coerce employees who engage in collective activities to resign by creating intolerable working conditions.¹¹¹ Over the next two decades, the doctrine gained wide acceptance by the federal courts of appeals.¹¹² Further, in addition to sustaining the NLRB rulings, the courts of appeals also recognized the constructive discharge doctrine in a wide range of Title VII cases.¹¹³ While the Supreme Court had not previously addressed the constructive discharge claim in the context of a Title VII case directly, it recognized the claim in the labor law context in *Sure-Tan, Inc. v. NLRB*.¹¹⁴ Accordingly, because the lower courts' unanimously accepted the constructive discharge doctrine and because it has recognized the claim in the labor law context, the Court officially held that Title VII encompasses employer liability for constructive discharge.¹¹⁵

Significantly, in describing the applicable constructive discharge standard, the Court outlined a test using only the objective element identified in the circuit courts' opinions. The Court articulated the inquiry as follows: "Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?"¹¹⁶ In other words, the Court described an objective inquiry without any discussion of the circuit split over whether an employee is required to show that an employer created an intolerable work environment and possessed the specific intent of forcing the employee to quit.¹¹⁷ After recognizing a Title VII constructive discharge claim, the Court addressed whether and when the *Ellerth / Faragher* defense would

110. *Id.* at 144-46, 152.

111. *Id.* at 141.

112. *Id.*

113. *Id.* at 142.

114. 467 U.S. 883, 894 (1984); *Suders*, 542 U.S. at 142.

115. *Suders*, 542 U.S. at 143.

116. *Id.* at 141.

117. *Id.*

be available to employers facing liability for supervisory environmental harassment that triggered a constructive discharge.¹¹⁸

B. Part II: The Ellerth/Faragher Line of Analysis

Relying on the *Ellerth/Faragher* structure, Justice Ginsburg identified two categories of sexual harassment: 1) “harassment that ‘culminates in a tangible employment action,’ for which the employer is held strictly liable,” and 2) hostile environment harassment where the supervisor’s harassment is unaccompanied and unprompted by a tangible employment action, to which employers can assert the affirmative defense.¹¹⁹ Justice Ginsburg revisited the agency principles¹²⁰ discussed at length in *Ellerth* and *Faragher*.¹²¹ The Court explained that when the supervisor’s conduct is not an official action of the employer, the extent to which the agency relationship between the supervisor and the employer aided the supervisor’s misconduct is less certain than when the employer imposes a tangible detriment on or withholds a tangible benefit from the harassment target.¹²² This uncertainty justifies allowing the employer to assert the *Ellerth/Faragher* affirmative defense to claims of constructive discharge resulting from hostile environment, as distinct from tangible terms, harassment.¹²³

Further, Title VII is designed “to encourage the creation of anti-harassment polices and effective grievance mechanisms,” thereby promoting conciliation, as opposed to litigation.¹²⁴ In essence,

[w]hile it is important to discourage sexual harassment and to protect the employees from sexual harassment, neither goal will be served by holding an employer liable for the harassment committed by a supervisor if the employer has taken substantial measures to ensure such harassment does not take place and if the employer has no way of knowing that such harassment is taking place.¹²⁵

Accordingly, when an employee resigns due to a sexually hostile work environment created by a supervisor and alleges constructive discharge,

118. *Id.* at 143.

119. *Id.*

120. *Suders*, 542 U.S. at 144. The Restatement (Second) of Agency 2d § 219(d) (1958) states that an employer is liable for the acts of its agent when the agent “was aided in accomplishing the tort by the existence of the agency relationship.”

121. *Suders*, 542 U.S. at 144-45.

122. *Id.*

123. *Id.* at 149.

124. *Id.* at 145 (quoting *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998)).

125. Michael Lestino, Note, *Penn. State Police v. Suders: Supreme Court of the United States: Penn. State Police v. Suders*, 11 WASH. & LEE R.E.A.L. J. 235, 239 (2004).

and the supervisor does not actually implement harassment in the form of a tangible employment action such as discharge, demotion, promotion denial, or undesirable reassignment, the employer may assert the *Ellerth/Faragher* affirmative defense.¹²⁶ Presumably, this interpretation means that the employer will have the defense in response to all actionable harassment by co-workers, third parties, and other non-supervising, non-managerial employees, as well as in response to a very substantial subset of hostile environment harassment perpetrated by supervisors and other managerial employees.

Upon concluding that the defendant is entitled to the *Ellerth/Faragher* affirmative defense in hostile work environment constructive discharge cases, the Court determined that Suders had presented genuine issues of material fact on her constructive discharge claim.¹²⁷ Accordingly, the Court vacated the Third Circuit's judgment and remanded the case for further proceedings in light of the Court's holding.¹²⁸

C. Justice Thomas Dissents

Justice Thomas, the lone dissenter, argued that employers defending constructive discharge “suits should be liable if, and only if, the plaintiff proves that the employer was negligent.”¹²⁹ Justice Thomas supports his position by reasoning that a constructive discharge does not require an official company act that can be performed only by the exercise of specific authority granted by the employer.¹³⁰ Moreover, he asserted that the majority of the federal courts of appeals do not require a specific intent on the part of the employer to prove a constructive discharge.¹³¹ Thus, according to Justice Thomas, the Court of Appeals' judgment should have been reversed because the employee had not adduced (a) sufficient evidence of a tangible adverse employment action taken because of her sex or (b) any evidence of employer negligence showing that the state police knew or should have known of the alleged harassment.¹³²

126. *Suders*, 542 U.S. at 148-49.

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

128. *Id.*

129. *Id.* at 154 (Thomas, J., dissenting) (quoting *Ellerth*, 524 U.S. at 767).

130. *Id.*

131. *Id.* at 153 (Thomas, J., dissenting).

132. *Id.* at 154 (Thomas, J., dissenting).

IV. IMPLICATIONS

A. *Constructive Discharge*

As mentioned previously, the Supreme Court appeared to adopt an objective test for the constructive discharge inquiry. However, the Court did not directly address the contours of that standard, as the granted certiorari did not encompass that issue, and therefore, the Court's description of a purely objective test is dictum. Indeed, the Second Circuit and district courts within the Second Circuit persist, after *Pennsylvania State Police v. Suders*,¹³³ in requiring plaintiffs to show subjective employer intent or proof of "deliberate actions."¹³⁴ In *Petrosino v. Bell Atlantic*,¹³⁵ the Second Circuit stated that a constructive discharge occurs when an employer, "intentionally creates a work atmosphere so intolerable that [the employee] is forced to quit involuntarily."¹³⁶ The court further explained that the employee must prove two elements: the employer's intentional conduct and the intolerable level of the work conditions.¹³⁷ If the employee is unable to establish specific intent to "prompt employees' resignations,"¹³⁸ then the employee must be able to show that the employer's actions were "deliberate" and not merely "negligent or ineffective."¹³⁹ Citing *Suders*, the Second Circuit then turned to the second element the employee must prove: "[W]hether the employer's deliberate actions rendered the employee's work conditions so intolerable as to compel resignation."¹⁴⁰

The Sixth Circuit,¹⁴¹ Eighth Circuit,¹⁴² and the district courts within the Fourth Circuit¹⁴³ have also continued, despite the *Suders* dictum, to require a showing of intent or "deliberate actions." The Sixth Circuit,¹⁴⁴ like the Second, observed that the "constructive discharge

133. 542 U.S. 129 (2004).

134. *E.g.*, *Petrosino v. Bell Atl.*, 385 F.3d 210, 229-30 (2d Cir. 2004); *Palomo v. Trustees of Columbia Univ. in the City of New York*, 2005 U.S. Dist. LEXIS 14428, *50 (S.D.N.Y. 2005); *Stroud v. New York City*, 374 F. Supp. 2d 341, 350 (S.D.N.Y. 2005).

135. 385 F.3d 210 (2d Cir. 2004).

136. *Id.* at 229 (quoting *Terry v. Ashcroft*, 336 F.3d 128, 151-52 (2003)).

137. *Id.*

138. *Id.*

139. *Id.* at 229-30.

140. *Id.* at 230.

141. *See Collette v. Stein-Mart, Inc.*, 126 F. App'x 678, 681-82 (6th Cir. 2005).

142. *See Meyers v. Neb. HHS*, 324 F.3d 655, 660 (8th Cir. 2003).

143. *See, e.g. Morse v. Giant Food, Inc.*, 2005 U.S. Dist. LEXIS 567 at *29 (D. Md. 2005).

144. *Collette*, 126 F. App'x at 682.

standard requires an objective assessment of the employee's feelings, and an inquiry into the employer's intent and the foreseeability of the impact its conduct had on the employee."¹⁴⁵ Citing *Suders*, the Sixth Circuit then proceeded to discuss the objective inquiry portion of the test.¹⁴⁶ Similarly, in *Morse v. Giant Food, Inc.*,¹⁴⁷ a district court within the Fourth Circuit dismissed the plaintiff's constructive discharge for her failure to show "any evidence that Giant in any way sanctioned the conduct or deliberately made her working conditions intolerable in an effort to force her to quit."¹⁴⁸ Moreover, the Fifth and D.C. Circuits¹⁴⁹ continue to describe an objective inquiry with more bite than the objective test described in *Suders*. In *Haley v. Alliance Compressor LLC*,¹⁵⁰ the Fifth Circuit explained that, "[d]etermining whether supporting aggravating factors exist is not a separate analysis from the reasonable employee test; it is part and parcel of the same inquiry."¹⁵¹

In brief, the lower courts that, before *Suders*, required proof that an employer intended to force the plaintiff out of work, continue to require plaintiffs to make that showing or at least a deliberate action or aggravating factor. Thus, the question whether constructive discharge is a two-part inquiry requiring a showing of an employer's specific intent to induce resignation or merely a showing of objectively intolerable conditions has not been definitively resolved. In practice, this issue is critical for plaintiffs because of the difficulty of proving a subjective intent or "deliberate action" on the part of the employer.

B. *The Ellerth/Faragher Affirmative Defense*

In contrast to the constructive discharge intent requirement, the issue of whether a constructive discharge brought about by a supervisor's harassment constitutes a tangible employment action, and therefore precludes assertion of the Ellerth/Faragher affirmative defense, was directly before the Court. Accordingly, the courts which held, prior to *Suders*, that a hostile work environment constructive discharge constitutes a tangible employment action for which the employer is held strictly liable, now allow employers to assert the *Ellerth/Faragher*

145. *Id.*

146. *Id.*

147. 2005 U.S. Dist. LEXIS 567 (D. Md. 2005).

148. *Id.* at 29.

149. "Constructive discharge thus requires a finding of discrimination and the existence of certain 'aggravating factors.'" *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Cir. 1997) (quoting *Clark v. Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981)); *accord Hussain v. Principi*, 344 F. Supp. 2d 86, 107 (D.D.C. 2004).

150. 391 F.3d 644 (5th Cir. 2004).

151. *Id.* at 651.

affirmative defense in those cases.¹⁵² In *Wade v. Minyards Food Stores*,¹⁵³ a district court within the Fifth Circuit, citing *Suders*,¹⁵⁴ wrote that “when an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis . . . calls for extension of the affirmative defense to the employer.”¹⁵⁵ Thus, only if the court finds that there is an official act, or tangible term, which underlies the constructive discharge will the discharge itself constitute a tangible employment action and will the affirmative defense accordingly be ruled unavailable.¹⁵⁶

There are practical concerns created by the Court’s holding that constructive discharges resulting from other kinds of harassment—discharges produced purely by hostile environment discrimination—are not tangible employment actions and, therefore, the *Ellerth/Faragher* affirmative defense is available. The most pressing concern is that as a result of the *Suders* decision, there are now two additional circuits (Fifth and Eighth) which (1) require plaintiffs, who are asserting a constructive discharge based on hostile work environment conditions, to show that the employer possessed a specific intent to force the employee to resign or a deliberate action on the part of the employer and (2) allow the employer to assert the *Ellerth/Faragher* defense where there is no underlying tangible employment action, even if the plaintiff-employee is able to prove the specific intent prong of the two-part inquiry. Thus, it will be even more difficult for plaintiffs within those six circuits (Fifth, Eighth, Second, Fourth, Sixth and D.C.) to successfully assert a constructive discharge claim based on hostile work environment harassment,¹⁵⁷ which is the most common type of actionable

152. *Fornicoia v. Haemonetics Corp.*, 131 F. App’x 867, 870-71 (3d Cir. 2005); *Wells v. Happy Tymes Family Fun Ctr., Inc.*, 2005 U.S. Dist. LEXIS 28846, 4-5 (D. Pa. 2005); *Brenneman v. Famous Dave’s of Am., Inc.*, 2006 U.S. Dist. LEXIS 2593, 28-29 (D. Iowa 2006); *Wade v. Minyards Food Stores*, 2005 U.S. Dist. LEXIS 4973, 25-26 (N.D. Tex. 2003).

153. 2005 U.S. Dist. LEXIS 4973 (N.D. Tex. 2003).

154. *Id.* at *24.

155. *Id.* at *25 (quoting *Suders*, 124 S. Ct. at 2355).

156. *See* *Donnell v. Kohler Co.*, 2005 U.S. Dist. LEXIS 29816, 9-11 (D. Tenn. 2005) (denying defendant’s motion to dismiss because the amended complaint stated a valid claim that the defendant employer was strictly liable for the supervisor’s acts of sexual harassment); *see also* *Fornicoia v. Haemonetics Corp.*, 2006 U.S. Dist. LEXIS 2780, 6-7 (D. Pa. 2006) (denying defendant’s motion for a partial new trial to separate the sexual harassment and constructive discharge claim because the underlying facts which support plaintiff’s constructive discharge claim may prove to be a tangible employment action).

157. *See, e.g., Collette*, 126 F. App’x at 682-83 (asserting that because the defendant employer could successfully assert the *Ellerth/Faragher* defense, it was unnecessary to even review the district court’s finding that the plaintiff failed to make a prima facie case for constructive discharge).

workplace harassment. For this reason, arguably, the Court was advertent in describing the constructive discharge claim as solely an objective inquiry, realizing that its holding preserved for employers the *Ellerth/Faragher* affirmative defense to most constructive discharges resulting from harassment.

Nevertheless, it is perhaps doubtful that a reconstituted Supreme Court including Justices Roberts and Alito, would relieve the plaintiff of the subjective element of the claim when the issue comes squarely before it. If that is true, employers would be able to defeat harassment-based constructive discharge claims either when plaintiffs fail to prove both objective and subjective elements of that claim or, in most cases, by establishing the two-prong *Ellerth/Faragher* affirmative defense.

LETOYIA C. BROOKS