

DRIVING THEM AWAY – THE EMPLOYEE WHO QUILTS IN RESPONSE TO HARASSMENT

THE SUPREME COURT *SUDERS* DECISION—  
CONSTRUCTIVE DISCHARGE AND THE AFFIRMATIVE DEFENSE

*REVIEWING HISTORY TO FIND A PREDICTABLE CONTINUATION OF SEXUAL HARASSMENT JURISPRUDENCE AND EMPLOYER LIABILITY UNDER TITLE VII*

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I. INTRODUCTION

Somewhere deep in the darkest corners of their souls, employers would love to believe that their liability for treatment of employees only signals a red flag when they take some overt, clear action. In fact, a premature solace emerges when a difficult employee simply quits and leaves the organization on his or her own volition. The employer gets away without having to take the strong stance to terminate and certainly that should come with some reassurance. But perhaps that consolation is misplaced, especially if the employee was subjected to any type of harassing environment while employed. For the first time, the Supreme Court addressed a very practical issue for employers—for liability purposes, is a constructive discharge, where an employee quits in response to supposedly intolerable, harassing conditions, equivalent to an actual firing, demotion, or other tangible employment action?<sup>1</sup> A decision in the affirmative would have imposed vicarious liability for the activity that allegedly led to the employee's departure.<sup>2</sup> An answer in the negative, that a constructive discharge was *not* automatically a tangible employment action, meant the employer still had access to the

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1. Pa. State Police v. Suders, 542 U.S. 129, 140 (2004); *see also* Ogletree, Deakins, Nash, Smoak, Steward, P.C., *Federal Employment Law Insider—Sexual Harassment*, FED. L. INSIDER, Jan. 2004, at 7 (discussing the impact of the Supreme Court's grant of certiorari to decide this issue).

2. Ogletree, *supra* note 1, at 7.

affirmative defense.<sup>3</sup> The Court's answer fell slightly towards the latter—it was unwilling to call every constructive discharge a tangible employment action, but also unwilling to say that constructive discharge was never a tangible employment action—its answer rested again on the “official” nature of the action leading to the discharge.<sup>4</sup>

The general industry response to the *Suders* decision has been positive.<sup>5</sup> The Court essentially affirmed for employers that constructive discharge was not automatically a tangible employment action in the absence of other supervisory action.<sup>6</sup> Some labor and employment attorneys seemed to be relieved by the decision, even though they felt it followed logically from prior case law.<sup>7</sup>

The ruling in *Suders* is ‘certainly a victory for employers in that employees are now required to utilize the employer's in-house complaint mechanism to air their charge that they are being forced out of the company’ . . . as a result of the decision, ‘employers and the HR profession will have a chance to police their own workforce.’<sup>8</sup>

Couching this optimism with a bit of caution, however, Weitzman reiterates that employers still have a burden to ensure decisions are free from bias and that complaints are handled when made.<sup>9</sup>

“Somebody in the company—and we know it's the HR professional—is the gatekeeper to make sure that official decisions are fair and free from illegal harassment . . . [o]therwise the employer is going

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3. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 780–81 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (establishing an affirmative defense for employers against liability in discrimination litigation so long as the employee did not suffer a tangible employment action). The affirmative defense, fully detailed in Section IV of this paper, gives employers an opportunity to limit their liability for sexual harassment when they have effective controls in place and employees do not take full advantage of them.

4. See *Suders*, 542 U.S. at 133–34.

5. See, e.g., Margaret M. Clark, *Supreme Court allows employer defense in constructive discharge harassment cases*, [http://www.shrm.org/hrnews\\_published/archives/CMS\\_008738.asp](http://www.shrm.org/hrnews_published/archives/CMS_008738.asp) (discussing industry responses shortly after the *Suders* decision, quoting, among others, Allan H. Weitzman of Proskauer Rose LLP in Boca Raton, Florida, who drafted an amicus brief on behalf of the Society for Human Resources Management (SHRM) in the *Suders* case).

6. See *Suders*, 542 U.S. at 134.

7. Clark, *supra* note 5.

8. Clark, *supra* note 5, at 2 (quoting Attorney Alan Weitzman on his view of the Human Resources profession's view of the outcome).

9. *Id.* at 2.

to be responsible . . . [the ruling is] a feather in the cap of the HR professional because of the responsibility the Supreme Court has placed on your shoulders . . . [but] [w]hen requests for demotions, significant cuts in pay and transfers to intolerable-type jobs come across your desk, they'd better get extra scrutiny . . . [b]ecause if those kinds of actions are merely rubber-stamped and it turns out that the supervisor has put in the paper work for them as part and parcel of a scheme to make the employee quit by making the working conditions intolerable, the company is going to lose the affirmative defense."<sup>10</sup>

## II. THE HISTORY BEHIND *SUDER*—AN INTRODUCTION TO TITLE VII AND THE BEGINNINGS OF NON-DISCRIMINATION

### A. *Civil Rights Legislation and the Impacts on American Business*

#### 1. Early Attempts to Correct Employment Discrimination

Title VII of the Civil Rights Act of 1964, in spite of its fame and recognition in the world of employment litigation, was not Congress' first attempt at resolving employment discrimination in our country.<sup>11</sup> No prior attempts, however, seemed to provide the answer to truly begin correcting discrimination in employment. The laws seemed to lack enforcement power, failed to be specific enough for employers to truly utilize and understand, and contained no mandatory provisions—employers could decide not to comply without fear of penalty.<sup>12</sup> In their text on human resources management, authors Bohlander, Snell and Sherman argue that although earlier attempts were unsuccessful, they were critical in building a foundation for later

10. *Id.*

11. GEORGE BOHLANDER ET AL., *MANAGING HUMAN RESOURCES* 44 (South-Western College Publishing 12th ed. 2001) (chronologically laying out Congressional attempts at Civil Rights legislation in employment, such as the Civil Rights Act in 1866, extending "to all persons the right to enjoy full and equal benefits of all laws, regardless of race"; the Unemployment Relief Act of 1933, preventing discrimination in employment on the basis of race, color, or creed; and Executive Order 8802, issued by Franklin Delano Roosevelt in 1941, attempting to relieve employment discrimination in government defense contracts during World War II).

12. *Id.*

federal anti-discrimination laws.<sup>13</sup>

2. Title VII—Adding Enforcement and Increasing the Stakes

In 1964, Congress made another attempt at legislation, finally backing it up with enforcement power. Title VII of the Civil Rights Act of 1964 finally announced to employers that they could no longer:

fail or refuse to hire or to discharge any individual, or otherwise 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; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>14</sup>

In addition, Title VII created the Equal Employment Opportunity Commission (EEOC), giving the enforcement authority that was previously missing from earlier acts.

There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years . . . (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title [section 703 or 704]. . . Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining,

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13. *Id.*

14. 42 U.S.C. § 2000e-2 (2000).

including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days, and shall make an investigation thereof. . .<sup>15</sup>

Title VII also gave the EEOC power to draft regulations and interpretations, giving guidance to employers and employees on the Act's intent and purpose.<sup>16</sup> In doing so, the EEOC revisited the original language and intent of Title VII and determined that in its description of "terms, conditions, or privileges of employment," Congress meant to include such employer actions as "hiring, and firing; compensation, assignment or classification of employees; transfer, promotion, layoff, or recall; job advertisements; recruitment; testing; use of company facilities; training and apprenticeship programs; fringe benefits; pay, retirement plans, and disability leave; or other terms and conditions of employment."<sup>17</sup>

This interpretation provided absolute clarity to employers that the generalities and loopholes of the earlier acts were gone.<sup>18</sup> Title VII therefore dramatically changed the nature of the employer-employee *relationship* by imposing new burdens on employers to justify their everyday practices as non-discriminatory.<sup>19</sup> The emphasis was not solely on obvious discriminatory hiring and firing, but on the daily treatment of and decisions relating to employees.<sup>20</sup>

In its famous 1971 holding in *Griggs v. Duke Power Co.*, the Supreme Court demonstrated this when it addressed early on that even posted job requirements could violate Title VII if they adversely impacted a particular protected group.<sup>21</sup> This class action suit, brought by a group of African-American employees, argued the practice of requiring high school education and/or standardized placement tests was a violation of Title VII because

15. 42 U.S.C. §§ 2000e-4, 2000e-5 (2000).

16. 42 U.S.C. § 2000e-12 (2000).

17. EEOC GUIDANCE ON DISCRIMINATORY PRACTICES, [http://www.eeoc.gov/abouteeo/overview\\_practices.html](http://www.eeoc.gov/abouteeo/overview_practices.html) (last visited Jan. 29, 2005).

18. *See generally id.*

19. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971) (demonstrating a somewhat "new" requirement for employers to validate job selection procedures).

20. *See id.*

21. *Id.*

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it rejected minority applicants at much higher rates than other candidates.<sup>22</sup> Interestingly, on the very day that Title VII became effective, Duke Power added a new requirement for employees to pass two professional, standardized exams and to have completed high school.<sup>23</sup>

The District Court dismissed the complaint, finding although Duke Power had overtly practiced discriminatory employment practices in the past, these practices had now stopped and were therefore not at issue.<sup>24</sup> The Supreme Court disagreed because it had concerns about the validity of these apparently neutral policies that discriminated against certain candidates.<sup>25</sup> The decision led to a precedent-setting rule—anything listed as a job requirement that might otherwise weed out a group of protected applicants must be job related in order to avoid a Title VII violation.<sup>26</sup> The Court provided a concrete example of how Title VII was to go far beyond a blatant refusal to hire—even the most subtle discriminatory measures would not be tolerated.

### 3. Damages Under Title VII—Then and Now

Originally, Title VII provided successful plaintiffs with only equitable remedies under the law. Specifically, 42 U.S.C. § 2000e-5 provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay...or any other equitable relief as the court deems appropriate.<sup>27</sup>

While even this much was novel and incited employers to make changes in discriminatory practices, it would not be until

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22. *Id.* at 426-27.

23. *Id.* at 427-28.

24. *Id.* at 428.

25. *Griggs*, 401 U.S. at 431-32 (discussing the possible invalidity of these tests related to job performance where employees who had not passed these exams and met the criteria were already performing successfully).

26. *Id.* at 436.

27. 42 U.S.C. § 2000e-5 (2000).



nearly thirty years later that the remedies for a violation of Title VII would truly hit the organization's bottom line.<sup>28</sup> In 1991, Congress passed dramatic amendments to Title VII, providing among other things, compensatory and punitive damages and the right for a plaintiff to request a jury trial.<sup>29</sup> Compensatory damages added under the Civil Rights Act of 1991 were new and included things not previously authorized under Title VII.<sup>30</sup> To provide some control over damage recoveries and to "[strike] a balance between the interests of business and labor,"<sup>31</sup> Congress imposed statutory limits on the total allowable award of compensatory and punitive damages for each complainant based on the size of the employer.<sup>32</sup>

This change to a plaintiff's ability to claim damages in Title VII cases provided a range of possible relief—from back pay and reinstatement (as provided originally) to damages for non-monetary forms of harm (such as claims for emotional distress) as well as attorney fees and potential punitive damages.<sup>33</sup> But perhaps some of the most frightening news for employers came with the notion that plaintiffs alleging discrimination could have their causes of action settled by a jury of their peers—likely a group of fellow American workers—rather than the judges who previously decided such claims.<sup>34</sup>

#### 4. Employees Seeking Relief —The Trends in Claims Since 1991

Since the passage of the Civil Rights Act of 1991, the EEOC posts increasing numbers of claims against employers for alleged violations of Title VII.<sup>35</sup> While employee charges filed with the

28. Civil Rights Act of 1991 § 2, 42 U.S.C. § 1981a (2000).

29. See Stephanie Schaeffer, *Sexual Harassment Damages and Remedies*, 73 AM. JUR. TRIALS 1, § 2 (2004) (describing in detail the evolution of Title VII damages, focusing specifically on sexual harassment violations, which are decided in accordance with the general Title VII damage provisions).

30. 42 U.S.C. §§ 1981(a)(1), (b)(3) (2000) (allowing recovery for things such as "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses . . .").

31. Schaeffer, *supra* note 29, at 13.

32. 42 U.S.C. § 1981(b)(3) (laying out damage caps for recoveries against employers for intentional discrimination in violation of Title VII, specifically providing for a \$50,000 maximum for employers with 15-100 employees, \$100,000 for employers with 101-200 employees, \$200,000 for employers with 201-500 employees, and \$300,000 for employers with more than 500 employees).

33. 42 U.S.C. § 2000e-5; see also Schaeffer, *supra* note 29, at 13.

34. See generally 42 U.S.C. § 1981a (c) (providing access to a jury trial, on demand, by any party making a claim of intentional discrimination).

35. *EEOC Charge Statistics FY 1992 Through FY 2005*, [www.eeoc.gov/stats/charges.html](http://www.eeoc.gov/stats/charges.html) (last visited January 16, 2006) (showing charge

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EEOC show claims against racial discrimination have actually declined 6.2% since 1992, all other areas have increased.<sup>36</sup> National origin claims have increased by 12.4%, religion claims by an astounding 77.7%, and sex discrimination claims by 11.2%.<sup>37</sup> Perhaps the most troubling news for employers, however, is that damages awarded in EEOC settlements related to sex discrimination are up 228%, a number which does not even begin to consider those damages awarded via litigation.<sup>38</sup> While claims for discrimination are not a new phenomenon, damages carry a much more powerful blow to businesses than they did just over a decade earlier.

#### 5. The Rules Have Been Established, But Liability for Sexual Harassment Continues to Impact Businesses

Although some other categories of harassment under Title VII show sharper increases in volume, businesses see no shortage of claims for sexual harassment violations.<sup>39</sup> Despite continuous lawsuits for sexual harassment, employers are still making some of the same, basic mistakes and the EEOC continues to punish accordingly. In some cases, the EEOC and the courts have responded with heavy damages against the organizations.<sup>40</sup> In addition, businesses who have previously considered themselves somewhat exempt or immune from these lawsuits are getting a wakeup call.<sup>41</sup> Most interestingly, the EEOC, after prosecuting

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statistics in the decade following the Civil Rights Act of 1991).

36. *Id.* (providing statistics through the end of 2004 only and showing since 1992 increases and decreases in claims made to the EEOC involving sex, race, religion, and national origin discrimination in employment).

37. *Id.*

38. *EEOC Sex-Based Charges FY 1992–FY 2005*, <http://www.eeoc.gov/stats/sex.html> (last visited January 16, 2006) (displaying national data in sex discrimination cases regarding the number of claims received, settlements made, and monetary benefits awarded. Numbers show an increase in sex discrimination claims from 21,796 to 24,249, but with damages awarded increasing from \$30.7 million to an astonishing \$100.8 million. These statistics refer only to EEOC settlements and conciliations, and do not begin to uncover the damages awarded in actual litigation over sex discrimination and other violations of Title VII.).

39. *See id.* (citing sexual harassment charge statistics for the last ten years).

40. *See, e.g.*, Charles Hobson et al., *Updating Company Sexual Harassment Programs Using Recent Behavioral Science Research*, (March 2003), [http://www.shrm.org/hrresources/whitepapers\\_published/CMS\\_003968.asp](http://www.shrm.org/hrresources/whitepapers_published/CMS_003968.asp) (citing the “average cost of sexual harassment for large U.S. companies [at] \$6.7 million annually”); *see also* Editorial, *Hands Off the Employees*, ST. LOUIS POST-DISPATCH, Jan. 13, 2005, at C6 (demonstrating that large settlements are often preferred to the more negative, public litigation involved with sexual harassment claims. Burger King settled a lawsuit for \$400,000 for a single franchise violation in St. Louis County.).

41. *See* Lisa Wangsness, *House Settles Sexual Harassment Lawsuit; Ex-Secretary*

sexual harassment claims for over twenty years, is still getting creative with its responses.<sup>42</sup>

### III. FROM “SEX” TO “SEXUAL”—A POTENTIAL LEAP IN LEGISLATIVE INTENT

Some scholars argue that the protection against sex discrimination, at least in 1964, was a strategic move gone wrong.<sup>43</sup> The protection from sex discrimination was added to Title VII by the House of Representatives at the last moment, supposedly by legislators who hoped to kill the legislation.<sup>44</sup> Opponents of amending Title VII as it was to include sex discrimination argued such action was inappropriate because sex discrimination was so different from other types of discrimination and demanded its own legislation.<sup>45</sup> Congress overlooked this idea and the bill passed quickly, leaving little legislative history about the drafting legislator’s intent.<sup>46</sup>

Therefore, although sex was one of the major categories protected in the original verbiage of Title VII, the development of the case law related to employer violations for sex discrimination, and later what was to be called “sexual harassment,” took much

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*Says Top Staffers Punished Her; ‘A Balanced Result,’* CONCORD MONITOR, Jan. 17, 2005, at A01 Again, (detailing an unprecedented sexual harassment suit by the “first legislative aide in New Hampshire history to publicly accuse either a lawmaker or a legislative body of sexual harassment”); *see also* Miriam Jordan, *Farmworker Gets Rare Win Against Grower*, WALL ST. J., Jan. 24, 2005, at B1 (discussing a federal court in California who rendered a \$1 million verdict to a single employee against one of the state’s largest growers who was found liable for sexual harassment. This “marks the first time that the U.S. Equal Employment Opportunity Commission has taken a sexual-harassment case involving the agriculture industry to trial.”); *see also* Virginia Young, *Prison Guards Harass Co-workers, Suits Claim*, ST. LOUIS POST-DISPATCH, Dec. 19, 2004, at A1 (citing four significant sexual harassment lawsuits against the Missouri Department of Corrections in the last year and a half).

42. *See, e.g.*, See Jaxson Van Derbeken, *Reprimand Issued In Sex-Harass Case*, SAN FRANCISCO CHRONICLE, Jan. 14, 2005, at B4, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/01/14/BAG94AQDFP1.DTL> (detailing unusual punishments for a firefighter who failed to respond after learning about sexual harassment of another employee, including mandatory training and decrease in pay potential until at least 2006); *see also* Editorial, *supra* note 40 (discussing the EEOC’s response of issuing a consent decree requiring mandatory training for managers, the creation of a new sexual harassment policy, and the posting of a 1-800 number for employees to notify management of harassing behavior).

43. *See, e.g.*, Schaeffer, *supra* note 29, at § 6 (referencing the Congressional Record, 110 Cong. Rec. 2577-2584 (1964)).

44. *See id.*

45. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986) (recreating the development of sex discrimination jurisprudence to determine whether the intent of Title VII would allow sex harassment claims as a viable cause of action).

46. *Meritor*, 477 U.S. at 64.

longer to evolve.<sup>47</sup> In fact, earlier cases held that the primary type of sex discrimination Title VII intended to address were those where a woman's gender (sex) was the basis of why she was denied a promotion, job opportunity or benefit.<sup>48</sup> In *Sprogis*, the 7th Circuit Court cited to earlier EEOC guidance, stating if sex was a factor in determining how to apply a rule or policy of employment, then the application of that rule or policy was discriminatory.<sup>49</sup>

### A. *Sexual Harassment Enters the Scene as Actionable Under Title VII*

Later, however, the courts and the EEOC showed employers that sex discrimination also included sexual harassment in the workplace, which was seen as a derivation of discrimination, or different treatment, based on sex as indicated under Title VII.<sup>50</sup>

#### 1. Forging Ahead to Allow Sexual Harassment as a Sex Discrimination Claim in Violation of Title VII

The United States District Court for the District of Columbia stood alone in its initial philosophy that sex discrimination, as described under Title VII, also included harassment of a sexual nature.<sup>51</sup> In *Williams v. Saxbe*, the District of Columbia Circuit held retaliation taken by a supervisor against his subordinate due to her refusal to submit to sexual requests was a violation of

47. See generally Beverly Johnson, *Sexual Harassment on the Job*, 33 AM. JUR. TRIALS 257, § 1 (discussing the nature of the development of sexual harassment jurisprudence); see also Sara Kagay, *Applying the Ellerth Defense to Constructive Discharge: An Affirmative Answer*, 85 IOWA L. REV. 1035, 1038 (March 2000) (citing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) for the proposition that even racial harassment was not a viable Title VII action until 1971). Kagay goes on to fully develop *Faragher* and *Ellerth* and argues, four years before the holding in *Suders*, that the courts should allow the affirmative defense in constructive discharge claims. *Id.* at 1062.

48. See, e.g., *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 723 (1978) (finding that an employer's policy of requiring females to contribute more to pension funds than males because women tend to live longer and would collect more funds than men was a violation of Title VII); see also, *Sprogis v. United Air Lines*, 444 F.2d 1194, 1196, 1202 (7th Cir. 1971) (holding in favor of a married female plaintiff who was employed by United as a stewardess and was then terminated for violating a "no-marriage" policy that applied only to female stewardesses); see also Johnson, *supra* note 47, § 1 n.3 (citing several cases, including *Barnes v. Train*, 561 F.2d 983 (D.C. Cir. 1977), where a male supervisor was held not to have violated Title VII for professional repercussions against a female subordinate who refused to engage in a relationship with him outside of work).

49. *Sprogis*, 444 F.2d at 1197-98.

50. See Johnson, *supra* note 47, at § 1 n.3.

51. See Kagay, *supra* note 47, at 1039 (discussing the transition between sex discrimination and sexual harassment in the development of Title VII and its application to sex/gender).

the sex discrimination provision of Title VII.<sup>52</sup> The court went to great lengths to describe its reasoning for placing pressure by a supervisor for sexual conduct within the meaning of Title VII:

“. . .the conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated. . .on its face, the statute clearly does not limit discrimination to sex stereotypes. And while there is language in the legislative history of the amendment that indicates that Congress did want to eliminate impediments to employment erected by sex stereotypes, these expressions do not provide a basis for limiting the scope of the statute, particularly since there is ample evidence that Congress' intent was not to limit the scope and effect of Title VII, but rather, to have it broadly construed. . .Furthermore, the plain meaning of the term 'sex discrimination' as used in the statute encompasses discrimination between genders whether the discrimination is the result of a well-recognized sex stereotype or for any other reason.”<sup>53</sup>

The same court forged a new course again just five years later when it dealt with the same question as applied to hostile working environments.<sup>54</sup> In *Bundy v. Jackson*, the D.C. Circuit held that hostile work environment harassment was actionable under Title VII.<sup>55</sup> The debate in this case was whether or not the sex-based discrimination involved actually affected a “term, condition, or privilege of employment” as required under Title VII.<sup>56</sup> In the earlier *Saxbe* holding, this was a simple conclusion—the plaintiff had been fired directly as a result of not submitting to her supervisor's advances.<sup>57</sup> Here, the plaintiff was alleging a damaging work environment which harmed her emotionally and psychologically, presenting a case of first impression.<sup>58</sup> The angle taken by the plaintiff alleged her conditions of employment were altered because the work

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52. *Williams v. Saxbe*, 413 F. Supp. 654, 661–62 (D.D.C. 1976).

53. *Saxbe*, 413 F. Supp. at 657-58.

54. Kagay, *supra* note 47, at 1039 (giving credit again to the D.C. Circuit for its progressive look at sexual harassment development under Title VII).

55. *Bundy v. Jackson*, 641 F.2d 934, 946 (D.C. Cir. 1981).

56. *Id.* at 943.

57. *Saxbe*, 413 F. Supp. at 662.

58. *Bundy*, 641 F.2d at 943–44.

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environment is comprised of the emotional and psychological state created while at work.<sup>59</sup> She additionally alleged that the environment included constant “sexually stereotyped insults and demeaning propositions to which she was indisputably subjected and which caused her anxiety and debilitation.”<sup>60</sup>

While more traditional courts viewed Title VII as a mechanism to protect purely financial and tangible job benefits, the more progressive court had to consider, as the D.C. Circuit eloquently stated, that “the modern employee makes ever-increasing demands in the nature of intangible fringe benefits . . . [r]ecognizing the importance of these benefits, we should neither ignore their need for protection nor blind ourselves to their potential misuse.”<sup>61</sup> Perhaps due to the severity of the facts of this case, the court held this not to be an abuse, but a perfect exercise of Title VII’s original protective intent.<sup>62</sup> The court also concluded by stating that if this type of relief were completely denied, plaintiffs such as Bundy would have no other remedy.<sup>63</sup> In other words, as long as supervisors avoided changing tangible job benefits, then the employer would be free from liability to its employees—clearly not a result intended by Title VII.<sup>64</sup>

Although the D.C. Circuit was the first to apply this idea to sex discrimination, its holding was directly supported by the Fifth Circuit’s race discrimination holding ten years prior in *Rogers v. EEOC*, where it opined:

“. . .the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection. . .we must be acutely aware of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination.”<sup>65</sup>

59. *Bundy*, 641 F.2d at 944.

60. *Id.*

61. *Id.*

62. *Id.* at 939–40 (laying out the facts of this case and citing testimony that Bundy continuously received sexual propositions, was called into her supervisors’ offices repeatedly and asked to spend the afternoon and evenings at hotels in lieu of work, and was asked openly to engage in sexual intercourse on a frequent basis. When Bundy appealed to the next level of management for help from her employer, according to testimony, he told her that “any man in his right mind would want to rape you” and then propositioned her himself).

63. *Id.* at 945.

64. *See id.*

65. *Rogers v. EEOC*, 454 F.2d 234, 237-38 (5th Cir. 1971).

The Eleventh Circuit agreed, also using race as a parallel, stating “[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.”<sup>66</sup>

## 2. The Supreme Court Finally Agrees

While these D.C. Circuit cases were never overturned, the Supreme Court did not finally put its full weight and authority behind the proposition that sexual harassment in the workplace was a viable Title VII action until 1986 in its historic *Meritor Savings Bank v. Vinson* holding.<sup>67</sup> By that time, the EEOC had already chimed in and affirmed the D.C. Circuit’s argument, stating that sexual harassment was a form of sex discrimination prohibited by Title VII.<sup>68</sup> This was codified in Title 29 of the Code of Federal Regulations:

Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.<sup>69</sup>

The Court restated that Title VII allows employees the right to “work in an environment free from discriminatory intimidation, ridicule, and insult.”<sup>70</sup> The Court was finally providing the highest authority for the proposition that sexual harassment was actionable under Title VII which would deal with some of the more egregious violations previously

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66. *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (affirming the existence of a cause of action for hostile work environment under Title VII).

67. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

68. *Id.* at 65 (relying on an earlier EEOC guidance that, while not binding on it, remained persuasive and instructive).

69. 29 CFR § 1604.11(a) (1985).

70. *Meritor*, 477 U.S. at 66.

unrecognized under Title VII.<sup>71</sup>

However, the *Meritor* court also spoke to restrict the nature of sexual harassment claims by reinforcing the idea that not all behavior that employees classify as harassment automatically affects a “term, condition, or privilege of employment.”<sup>72</sup> It also gave a rope to employers, in its disagreement with the Court of Appeals below, stating employers were not always vicariously liable for the sexually harassing conduct of their supervisors.<sup>73</sup> This specific issue of vicarious liability would not be resolved for more than ten years, when the Court would be asked to grant certiorari in the *Faragher*<sup>74</sup> and *Ellerth* cases.<sup>75</sup>

### 3. Defining the Types of Sexual Harassment

Although much of the *Meritor* holding was simply reinforcing what the EEOC and some lower courts had already held, the Court confirmed that both types of sexual harassment previously articulated by the EEOC were actionable under Title VII.<sup>76</sup>

Neither the lower court nor the Supreme Court questioned that Title VII was intended to cover “tangible loss” in its “terms, conditions, or privileges of employment” wording.<sup>77</sup> However, the Court used the Latin phrase “quid pro quo,” meaning “this for that,” to refer to the situation where a condition of employment is directly contingent upon allowance of or submission to sexual requests and favors.<sup>78</sup> It then distinguished this type of harassment from the type that does not result in any tangible loss, using the words from the Code, “hostile, or offensive

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71. See, e.g., *Robinson v. Sappington*, 351 F.3d 317, 340 (7th Cir. 2003) (reversing summary judgment originally granted to defendants where plaintiff had been continuously subjected to a barrage of strong sexual comments, offers, propositions, and stalking by a supervisor, yet no traditional quid pro quo had existed in terms of the conditions of her employment. The court found that those conditions were sufficiently severe to allow a trier of fact to determine the outcome by relying on *Meritor's* definition, cited in other cases, of how to determine whether or not a hostile work environment existed.).

72. *Meritor*, 477 U.S. at 67.

73. *Id.* at 72.

74. *Faragher v. City of Boca Raton*, 524 U.S. 775, 809–10 (1998) (deciding that in some cases, employers may assert a defense against liability for sexual harassment by supervisors, negating the idea that employers were always vicariously liable for harassing supervisory conduct).

75. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 766 (1998) (concluding, on the same day as it did the *Faragher* case, that supervisory conduct may not always lead to liability).

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

77. *Id.* at 64.

78. *Id.* at 65.



working environment.”<sup>79</sup>

The EEOC, in its policy guidance on sexual harassment, defines the two types of sexual harassment, using terms that are now part of the everyday employment law vernacular.

The EEOC Guidelines define two types of sexual harassment: “quid pro quo” and “hostile environment.” The Guidelines provide that “unwelcome” sexual conduct constitutes sexual harassment when “submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment. . . .” “Quid pro quo harassment” occurs when “submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.”<sup>80</sup>

#### 4. Clarity on What Really Constitutes Sexual Harassment—and What Does Not

The *Meritor* court left some confusion among the circuits about what exactly constituted a hostile work environment. The prevailing argument seemed to be over whether or not the harassment had to do serious psychological damage to be severe enough to warrant a cause of action under Title VII.<sup>81</sup> The Supreme Court, in resolving this debate, affirmed it wanted to take a “middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.”<sup>82</sup> While attempting to reinforce the idea that not every bad judgment would land an employer in court, Justice O’Connor, speaking for the majority, also snapped back at the circuits who wanted to require demonstration of the most severe psychological damage in order to pursue:

“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond

79. 29 CFR § 1604.11(a) (2005).

80. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT, N-915-050 (1990), [www.eeoc.gov/policy/docs/currentissues.html](http://www.eeoc.gov/policy/docs/currentissues.html) (labeling the two types of sexual harassment laid out in the Code of Federal Regulations, 29 C.F.R. § 1604.11, as “quid pro quo” and “hostile work environment” harassment).

81. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993) (granting certiorari to resolve a circuit split over this issue and citing to decisions arising out of the Ninth and Eleventh Circuits).

82. *Id.* at 21.

Title VII's purview. Likewise, if the victim does not perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation. But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers . . . The appalling conduct alleged in *Meritor*, and the reference in that case to environments . . . merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable."<sup>83</sup>

Lower courts then spent some significant time and energy working through what the Supreme Court did intend to include under its *Harris* decision. The arena of quid pro quo harassment was quickly being replaced by less tangible activities, statements, and behavior.<sup>84</sup> Supervisory activities such as touching employees in a close, personal way (even when non-sexual), comments about strong emotions and feelings, and references to stereotypes about men and women all began to come under the purview of hostile work environment.<sup>85</sup>

However, the courts have shown some restraint by not automatically determining all sex-related comments and conduct as creating a hostile work environment.<sup>86</sup> Existence of prior relationships, invites to dinner, and isolated incidents of activity that a single employee finds offensive do not necessarily destroy the protection the Supreme Court demanded employers to provide for their employees.<sup>87</sup>

Even activities that appear on the surface to be sexually offensive may not rise to the level of proof needed to sustain a Title VII claim for hostile work environment. In *Temple v. Auto Banc of Kansas, Inc.*, the court granted summary judgment to the

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83. *Id.* at 21–22.

84. *See* EEOC v. Domino's Pizza, Inc., 909 F. Supp. 1529, 1534–35 (finding for male plaintiff for comments and conduct he found objectionable and sexually harassing).

85. *Id.* at 1533.

86. *See* Schaeffer, *supra* note 29, at § 9 (discussing the limits of hostile work environment harassment and giving various examples of what the courts have found do and do not substantiate such claims).

87. *Id.*

employer despite plaintiff's pleas of what she considered severe sexual harassment.<sup>88</sup> The plaintiff, a former female employee of a car dealership, brought an action against her employer for hostile work environment after being subjected to what she described as the most "horrifying" experience of her career.<sup>89</sup> A car sales event at the dealership was being supplemented with models in thong bikinis who were hired to interact with and entertain the customers.<sup>90</sup> To the plaintiff's horror, one of the scantily-clad models came over to her area, dripping wet from a hot tub, and sat on the desk she was working at to talk to the customer.<sup>91</sup> She complained repeatedly to her supervisor and was told she could return home—but returned the next morning to find the conduct ongoing.<sup>92</sup> She was sent home again after similar complaints to her boss, and was later terminated for poor sales performance.<sup>93</sup> The district court held for the employer, stating for a hostile work environment claim to survive summary judgment, the workplace had to be "permeated" with discrimination.<sup>94</sup> The court said in its opinion:

"Even assuming the activities at the sales event offended plaintiff, the atmosphere in the showroom was simply not severe or pervasive enough to create an objectively hostile work environment. Significantly, the sales event was an isolated incident—the models were in the showroom for a few hours over a two-day period . . . [m]oreover, the circumstances surrounding the sales event were not "because of plaintiff's sex" and, thus, cannot alone support a finding of liability for sexual harassment."<sup>95</sup>

This holding, and the Supreme Court's articulation in *Harris*, indicate that there is a critical balancing that must occur before determination of liability is certain. This balance shows up again in the *Suders* decision.

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88. *Temple v. Auto Banc of Kansas, Inc.*, 76 F. Supp. 2d 1124, 1129 (D. Kan. 1999).

89. *Id.* at 1127.

90. *Id.* at 1126.

91. *Id.* at 1127.

92. *Id.*

93. *Id.*

94. *Temple*, 76 F. Supp.2d at 1129 (citing *O'Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1097 (10th Cir. 1999)).

95. *Id.* at 1130.

IV. GOOD NEWS FOR EMPLOYERS—THE SUPREME COURT  
ARTICULATES THE AFFIRMATIVE DEFENSE

Formal classification of sexually harassing and discriminatory behavior became critical in 1998, when the Supreme Court decided the *Faragher* and *Ellerth* cases, establishing an affirmative defense for employers where there was no tangible employment action.<sup>96</sup> The necessity of determining the details of this defense for employers came from a case decided twelve years earlier where the Court determined that Title VII does not imply automatic liability for employers when their supervisors engage in sexual harassment.<sup>97</sup> While an employer has an obvious responsibility to respond, the Court ruled that the intent of Title VII included some sort of limitation on the responsibilities of the employer.<sup>98</sup> When the Court granted certiorari to hear *Faragher* and *Ellerth*, it finally articulated those limitations.<sup>99</sup>

In both cases, the Court dealt with the issue of harassing supervisory conduct towards subordinate employees where no tangible employment action existed.<sup>100</sup> Twelve years earlier, the Court determined that hostile work environments could violate the statute, even in the absence of a traditional tangible employment action.<sup>101</sup> Tangible employment actions require 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.”<sup>102</sup>

In *Faragher*, the Court was called upon specifically to identify the circumstances under which an employer can be held liable for a sexually hostile work environment in violation of Title VII of the Civil Rights Act of 1964.<sup>103</sup> The ruling held employers vicariously liable for a supervisor’s discriminatory behavior, but it subjected such liability to an affirmative defense that would reasonably consider the actions of the employer and the alleged victim.<sup>104</sup>

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96. *Faragher*, 524 U.S. at 780; *Ellerth*, 524 U.S. at 766.

97. *Faragher*, 524 U.S. at 792 (referencing its own holding in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

98. *Id.*

99. *See id.* at 780; *see also Ellerth*, 524 U.S. at 746–47.

100. *See generally Faragher*, 524 U.S. at 785; *see also Ellerth*, 524 U.S. at 746–47.

101. *Meritor*, 477 U.S. at 66–67.

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

103. *Faragher*, 524 U.S. at 780.

104. *Id.*

In its ultimately infamous holding, the *Faragher* court held an employer could assert a two-prong affirmative defense to liability by demonstrating: (1) it had “exercised reasonable care to prevent and correct promptly any sexually harassing behavior”;<sup>105</sup> and (2) “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>106</sup>

The Court grounded its decision on the legislative intent behind Title VII, which was not to provide remedy, but to avoid the discriminatory conduct in the first place.<sup>107</sup> By giving employers the ability to assert this affirmative defense when they acted properly, the Court provided an incentive for them to act in a preventive rather than reactive manner.

A. *Faragher v. City of Boca Raton, Employer -0, Employee -1*

A female lifeguard for the City of Boca Raton, Faragher, was subject to repeated sexual gestures, comments, and propositions by her supervisors.<sup>108</sup> Faragher never informed the City of the harassment by filing a complaint,<sup>109</sup> which would ordinarily put the power of the affirmative defense behind the City. However, the official sexual harassment policy had never been made available to the supervisors or employees at her location.<sup>110</sup> The Court ruled, therefore, that the City did not exercise reasonable care and did not fulfill the first prong of the defense, finding for Faragher and reversing the lower court.<sup>111</sup>

Justice Thomas dissented, as he would again in *Suders*, stating that an employer should not be held vicariously liable where the supervisors took no tangible employment action against the employee.<sup>112</sup> He also argued the requirement that the City have a complaint procedure was premature, because the harassment had ended the same year the EEOC issued an official policy statement articulating this requirement.<sup>113</sup> In effect, he felt the Court was requiring the employer to comply with a requirement it knew nothing about.<sup>114</sup>

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105. *Id.* at 807

106. *Id.*

107. *Id.* at 805–06.

108. *Id.* at 780–82.

109. *Faragher*, 524 U.S. at 782.

110. *Id.*

111. *Id.* at 808, 810.

112. *Id.* at 810 (Thomas, J., dissenting).

113. *Id.* at 810–11 (Thomas, J., dissenting).

114. *See id.* n.1.

B. *Burlington Industries v. Ellerth, Employer -1, Employee -1?*

In *Ellerth*, the Court faced a similar question with an emphasis on employer awareness—when there is no negligence or knowledge on the part of the employer about the alleged harassment, can the employee recover under Title VII?<sup>115</sup> The nature of most of the harassment in this case fell under the traditional “quid pro quo” category articulated by the Supreme Court in *Meritor*.<sup>116</sup> When courts have found situations of quid pro quo harassment, they have held employers vicariously liable for the actions of their supervisors.<sup>117</sup> Alternatively, when the harassment simply creates an unpleasant or hostile work environment as it did in *Faragher*, vicarious liability does not automatically attach and the court looks to whether the employer knew or should have known about the harassment.<sup>118</sup>

The facts in *Ellerth* bridged both types of harassment and left the Court to answer the ultimate question—can an employer be held vicariously liable “where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?”<sup>119</sup>

*Ellerth* contended that she had been subjected to repeated inappropriate behavior and crude remarks, but her case focused primarily on three incidents, all of which she alleged threatened to harm her employment with Burlington.<sup>120</sup> Her supervisor, who had the ability to recommend hiring and promotion decisions, made comments regarding her body, sexual activities, and his ability to make her life “very hard or very easy at Burlington.”<sup>121</sup> *Ellerth* did not report this activity to anyone, even though she was aware of Burlington’s anti-harassment policy.<sup>122</sup> She ended up leaving her job after receiving a mild reprimand from another supervisor and faxed a letter to Burlington giving reasons other than the harassment for her

115. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 746–47 (1998).

116. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

117. *Ellerth*, 524 U.S. at 749, 753.

118. *Meritor*, 477 U.S. at 71–73.

119. *Ellerth*, 524 U.S. at 753.

120. *Id.* at 747–48.

121. *Id.* (citing the lower court’s decision in *Ellerth v. Burlington Indus., Inc.*, 912 F. Supp. 1101, 1199, n.14 (N.D. Ill. 1996) in favor of Burlington).

122. *Id.* at 748.

departure.<sup>123</sup> Three weeks later, she informed Burlington that her resignation was due to her supervisor's harassing behavior.<sup>124</sup>

The District Court granted summary judgment for the employer, employing logic later used to develop the affirmative defense.<sup>125</sup> It held that because Burlington did not know and therefore could not have responded reasonably (prong 1), and because Ellerth had not used the internal complaint procedures (prong 2), she could not prevail.<sup>126</sup> The appellate court reversed the district court's summary judgment for Burlington, disagreeing on rationale.<sup>127</sup> The Supreme Court then affirmed, stating that even though it would hold the employer vicariously liable for the supervisor's conduct, because there was no tangible employment action, Burlington should have an opportunity to raise the affirmative defense.<sup>128</sup>

Justice Thomas again dissented, re-illustrated his philosophy from *Faragher*, and added that the Court had drawn an unacceptable line between racial and sexual harassment, both violations of Title VII.<sup>129</sup> Not requiring knowledge by the employer for this cause of action, the Court essentially required hostile environment race discrimination to meet a higher standard for liability—in those cases, the employer had to have some blameworthiness for liability to attach.<sup>130</sup> He articulated again that an employer should be liable only if it was negligent in allowing the conduct to continue because “sexual harassment is simply not something that employers can wholly prevent without taking extraordinary measures—constant video and audio surveillance, for example—that would revolutionize the workplace in a manner incompatible with a free society.”<sup>131</sup>

*C. In Summary—Clarifying the Affirmative Defense Prongs  
Laid Out By the Faragher/Ellerth Court*

Since the *Faragher/Ellerth* holdings, the EEOC has advised employers that for an employer to exercise reasonable care, it should have a clearly articulated policy distributed to employees,

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123. *Id.*

124. *Id.*

125. *See Ellerth*, 524 U.S. at 749, 765.

126. *Id.* at 749.

127. *Id.*

128. *Id.* at 766.

129. *See id.* at 766–67 (Thomas, J., dissenting).

130. *Id.* at 766–71 (Thomas, J., dissenting).

131. *See Ellerth*, 524 U.S. at 770 (Thomas, J., dissenting).

and providing training on those policies is critical.<sup>132</sup> For prong two, employees who allege harassment are expected to utilize the formal complaint procedure followed by the organization and seek redress through those channels first.<sup>133</sup>

## V. TWO AREAS OF THE LAW MERGE—SEXUAL HARASSMENT AND THE DEVELOPMENT OF THE CONSTRUCTIVE DISCHARGE DOCTRINE

### A. *The Beginnings of Constructive Discharge*

The cause of action for constructive discharge has been around much longer than our sexual harassment jurisprudence.<sup>134</sup> The doctrine originated in the 1930's under the purview of the National Labor Relations Board (NLRB), believing it was necessary to handle situations whereby an employer made working conditions so intolerable for employees that they were forced to resign.<sup>135</sup> Even though the employee in this situation technically initiates the termination of employment, the NLRB viewed this termination as a discharge and held the employer liable for the employee's departure.<sup>136</sup> According to the NLRB, the employer did not innocently stand by while the employee quit—instead, the employer actually created or allowed the conditions which precipitated the termination of employment, and therefore, the employer essentially fired the employee.<sup>137</sup> Therefore, the NLRB made no significant distinction between a constructive discharge and an actual discharge.<sup>138</sup>

The earliest cases involving constructive discharge trace back to 1936, when the NLRB began to realize violations of the Wagner Act where employers outwardly agreed to collective bargaining agreements, but then proceeded to alter the working

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132. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS N-915-002 (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>.

133. *Id.*

134. *Suders*, 542 U.S. at 141-42.

135. *Id.*; Roslyn Corenzwit Lieb, *Constructive Discharge Under Section 8(a)(3) of the National Labor Relations Act: A Study in Undue Concern Over Motives*, 7 INDUS. REL. L.J. 143, 144 (1985) (discussing the erosion of common law freedom to terminate employment using the National Labor Relations Act (or the "Wagner Act") as an example of legislative restrictions on employer behavior when employees exercised their rights to unionize).

136. *See Lieb*, *supra* note 135, at 144.

137. *Id.*

138. *See id.*



conditions of their employees.<sup>139</sup> The term “constructive discharge” was truly coined in 1938, when the NLRB found an employer liable for deliberately coercing employees to resign by engaging in activities such as stationing police officers to watch over those who had shown interest in the union.<sup>140</sup>

Over the years, the National Labor Relations Board developed the constructive discharge doctrine to include higher standards for employer motive as well as a close nexus between that motive, its actual manifestations, and the employee’s response in quitting.<sup>141</sup> As a violation of the Wagner Act, constructive discharge was aimed at eliminating discriminatory treatment of employees by their employers.<sup>142</sup> As it has developed, however, the doctrine seems to require an even higher level of blameworthiness than just discriminatory conduct.<sup>143</sup> Justice Thomas would have liked to see this higher motive requirement carried through in the doctrine’s application to Title VII cases like *Suders*.<sup>144</sup>

### B. *Applying Constructive Discharge to Title VII*

Early constructive discharge cases involved employer attempts to defeat unionization activities, but the doctrine applied in Title VII employment cases not long after the statute was enacted.<sup>145</sup> Although Title VII doesn’t specifically prohibit or provide a cause of action for constructive discharge, it does make it illegal for employers “to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any

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139. See, e.g., *Canvas Globe Mfg. Works, Inc.*, 1 N.L.R.B. 519, 523 (1936) (holding the employer had violated the Wagner Act by changing the working conditions of the employee and pressuring her to withdraw from a union, using such subtleties as assigning them unfamiliar work without assistance they had previously been accustomed to).

140. *Sterling Corset Co., Inc.*, 9 N.L.R.B. 858, 865–66 (1938) (holding constructive discharge had occurred based on the evidence presented, including the employer stating that she would not fire union members, but that she would “make it so hot” that they would be forced to quit on their own).

141. See *Lieb*, *supra* note 135, at 156, 168–69.

142. *Id.* at 144.

143. *Id.* at 176.

144. See *Suders*, 542 U.S. at 154.

145. See, e.g., *Maney v. Brinkley Mun. Waterworks & Sewer Dep’t*, 802 F.2d 1073, 1074–75 (8th Cir. 1986) (finding against plaintiffs on an allegation of constructive discharge in violation of Title VII, but including discussion of the doctrine as a valid Title VII action); *Muller v. U.S. Steel Corp.*, 509 F.2d 923, 929 (10th Cir. 1975) (stating in dicta that the constructive discharge doctrine did have application in civil rights cases, although it did not find a constructive discharge on the facts presented); *Young v. S.W. Sav. & Loan Ass’n*, 509 F.2d 140, 143 (5th Cir. 1975) (equating a discriminatory constructive discharge with a discriminatory actual discharge).

individual. . .because of such individual's race, color, religion, sex, or national origin."<sup>146</sup> Allowing employers to abuse employees to the point of their own resignation would certainly violate the intent of Title VII, essentially allowing employers to accomplish what they could not do directly by more passively aggressive means.<sup>147</sup> Simply stated, an employer who makes conditions so intolerable that an employee quits is no less guilty than the employer who outright terminates her for discriminatory reasons.<sup>148</sup> The Fifth Circuit has clearly articulated this philosophy, equating a constructive discharge with an actual discharge:

“[An] employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.”<sup>149</sup>

The various circumstances involved in these cases often leave courts in disagreement about what exactly constitutes a constructive discharge.<sup>150</sup> The first debate arises over what exactly makes these working conditions so intolerable.<sup>151</sup> The courts will also look closely at the reasons behind any changed working conditions.<sup>152</sup> Intent of the employer, however, has been the true focal point of constructive discharge cases.<sup>153</sup> In some pro-employer decisions, the courts of appeals have held the conduct leading to a constructive discharge had to be an

146. 42 U.S.C. § 2000e-2(a) (2000).

147. See 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, 846 n.73 (2004).

148. See *id.*

149. *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980) (quoting its own wording from *Young*, 509 F.2d at 143, for the proposition that constructive and actual discharge are equivalent, although here in *Bourque*, it did not find that the employee's decision to resign in that case was reasonable).

150. *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 887 (1984).

151. See, e.g., *id.* at 888-89 (finding constructive discharge where employer was hostile and intimidating and took away plaintiff's sales territory, thereby hurting her confidence level, a critical element for success in her job); but see *Bourque*, 617 F.2d at 65 (holding that unequal or unfavorable pay alone did not constitute justification for an employee to quit); *Grube v. Lau Indus., Inc.*, 257 F.3d 723, 728 (7th Cir. 2001) (holding that an unfavorable change to the second shift was not enough to constitute a constructive discharge).

152. See, e.g., *Muller v. U.S. Steel Corp.*, 509 F.2d 923, 929 (10th Cir. 1975) (holding that although there was a downgrade in position, it was a result of a temporary site closing and therefore was not “designed to coerce” the employee's resignation).

153. See Goldsmith, *supra* note 147, at 832-33.

“intentional course of conduct calculated to force the victim’s resignation.”<sup>154</sup> More pro-employee decisions have articulated a lower standard, requiring only that a resignation be the foreseeable consequence of the working conditions.<sup>155</sup> At a minimum, however, a plaintiff typically must show that the employer knew about the conduct that led to her resignation and must have either acted to allow it or refused to act to remedy it.<sup>156</sup>

### C. *Employer Responsibilities in Constructive Discharge Situations*

For employers, the most significant news from the *Ellerth/Faragher* decisions was the assurance that they were entitled to an affirmative defense when they exercised reasonable care in responding to claims of discrimination.<sup>157</sup> Although the constructive discharge cases have produced a mixture in terms of consistency with prior rulings, the importance of employer response has not changed.<sup>158</sup> Employers who take “prompt and appropriate remedial action to prevent further harassment,” satisfying the first prong of the *Ellerth/Faragher* defense, have made a great deal of headway in disproving allegations of constructive discharge.<sup>159</sup> The Court’s ruling in *Suders* affirmed access to this defense when an employer’s official action does not initiate the discharge.<sup>160</sup>

### D. *Employee Responsibilities in Constructive Discharge Situations*

In addition to weighing factors on the employer side of a constructive discharge equation, many courts will look to the employee’s actions to determine whether or not constructive discharge has actually been shown.<sup>161</sup> An employee who does not alert the employer or attempt to seek some other sort of assistance may send a signal that the decision to leave was not

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154. *Goss*, 747 F.2d at 887.

155. *Id.* at 887–88.

156. *See* Goldsmith, *supra* note 147, at 836.

157. *Faragher*, 524 U.S. at 807.

158. *See, e.g.,* Tutman v. WBBM-TV, Inc., 209 F.3d 1044, 1046 (7th Cir. 2000) (affirming summary judgment for the employer when it took action to protect the employee from further racial harassment by a coworker).

159. *Id.* at 1046–47 (citing immediate employer responses, including sending the perpetrator to appropriate training, writing him up formally in his personnel record, and re-circulating its antidiscrimination policies to the entire organization).

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

161. *See* Goldsmith, *supra* note 147, at 830.

reasonable.<sup>162</sup> Under almost all circumstances, this reasonableness is the crux of the constructive discharge analysis from the employee standpoint.<sup>163</sup>

First, a court will expect more than simple assertions of an unpleasant work environment on the part of the employee—there have to be conditions so intolerable that an employee would have to resign.<sup>164</sup> Courts have signaled that factors such as frequency and severity will play a part in determining whether a person responds reasonably by resigning or failing to return to work.<sup>165</sup> Because the standard for constructive discharge is higher than that of hostile work environment harassment, a plaintiff will have to show conditions more egregious than one-time, offensive, or even possibly discriminatory behavior might create.<sup>166</sup>

In determining the reasonableness of a constructive discharge resignation, courts also place a great deal of emphasis on whether the employee continued working during attempts to remedy the intolerable conditions.<sup>167</sup> Employees who do not give the employer an appropriate chance to respond may have trouble showing they responded reasonably.<sup>168</sup> Courts will presume that employees will not expect the worst possible outcome, will not jump to conclusions, and will complain of the situation and give

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162. *Id.* at 830-31; *Lindale v. Tokheim Corp.*, 145 F.3d 953, 955 (7th Cir. 1998) (citing that an employee must attempt to do something before walking off the job—that “passivity in the face of working conditions alleged to be intolerable is often inconsistent with the allegation”).

163. *Lindale*, 145 F.3d at 955 (positing dryly that “[U]nless the employer is proved to be deliberately taking advantage of a known idiosyncratic vulnerability of the employee (like Winston’s fear of rats in Orwell’s Nineteen Eighty-Four) by altering the employee’s working conditions in order to make the employee’s life at work intolerable, the test for intolerable working conditions is whether a reasonable employee would have concluded that the conditions made remaining in the job unbearable.”).

164. *See Tutman*, 209 F.3d at 1049-50 (finding Tutman did not respond reasonably by refusing to return to work when the employer had taken every action possible to make a recurrence improbable).

165. *Id.* at 1050 (citing other examples where constructive discharge had been successful due to the repetitiveness of racist comments, instances of grossly offensive behavior and conversation, and threats to life or safety that would make a reasonable person afraid to be in that environment).

166. *Id.* at 1050; *see also Tidwell v. Meyer’s Bakeries, Inc.*, 93 F.3d 490, 495 (8th Cir. 1996) (implying a higher standard for the plaintiff to prove by its finding of no constructive discharge, in spite of clear evidence of racial discrimination. The court stated that although discrimination existed, it wasn’t intolerable enough to lead a reasonable person to quit and succeed under an action for constructive discharge.).

167. *See Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 886 (7th Cir. 1998) (stating that in an ordinary case, the employee should stay working for the employer while seeking assistance).

168. *See e.g., Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1538-39 (11th Cir. 1987).

the employer an appropriate chance to respond.<sup>169</sup> Essentially, it creates a duty to mitigate on the part of the employee before bringing a claim of constructive discharge.<sup>170</sup> In a sense, this philosophy rings of the same logic in *Ellerth/Faragher's* second prong, requiring an employee to take advantage of the processes put in place by the organization to deal with discriminatory behavior.<sup>171</sup>

E. *Constructive Discharge—The Continuum Between Hostile Work Environment and Tangible Employment Action*

Interestingly, most of the findings in constructive discharge cases actually preceded the Supreme Court's later ruling that hostile work environment was a valid claim under Title VII. Not until 1986 in its *Meritor* decision did the Supreme Court put its authority behind the proposition that a hostile work environment could create a valid cause of action under Title VII.<sup>172</sup>

The confusion of the constructive discharge doctrine and where it fell was a source of confusion from *Meritor* onward, until the Court finally answered the question in *Suders*.<sup>173</sup> The area between hostile work environment and those claims involving quid pro quo tangible employment actions had been grayed for quite some time, and constructive discharge hung in the balance between the two.<sup>174</sup> Because constructive discharge was essentially predicated on the idea that the work environment became so hostile as to force an employee to resign, the question was whether or not circumstances that made an employee want to quit were "official" enough to preclude the employer's use of the affirmative defense. The Court's answer in *Suders*, perhaps much to the dismay of plaintiff-employees, held a constructive discharge was not necessarily a tangible employment action—that it only reached such a level if the discharge was preceded by an official act on the part of the employer.<sup>175</sup>

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169. See *id.* at 1539 (finding no constructive discharge where employee resigned one day after being assigned a disappointing position); see also *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 308-09 (5th Cir. 1987) (finding no constructive discharge where employee worked for the employer for a period of four days and the employer attempted to resolve the conduct within twelve hours).

170. See Goldsmith, *supra* note 147, at 830.

171. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); see *supra* text accompanying note 104.

172. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (holding for the first time that a claim of hostile work environment sexual harassment was possible, even absent an official employment action).

173. *Suders*, 542 U.S. at 140-41.

174. See *id.* at 139-40.

175. *Id.* at 134.

VI. COMBINING ALL THE DOCTRINES IN ANSWERING THE  
*SUDERS* QUESTIONA. *The Circuit Split on the Issue of Constructive Discharge  
and its Application to Title VII Sexual Harassment Cases*1. The Second Circuit Says Constructive Discharge is  
Not a Tangible Employment Action

The lower courts were split, disagreeing over the inherent nature of a constructive discharge and how it should be classified.<sup>176</sup> The Second Circuit, ruling that constructive discharges were *not* equivalent to tangible employment actions, held to the philosophy that because these discharges could occur as a result of conduct that was not necessarily attributable to supervisors, having the same level of liability for employers was inappropriate.<sup>177</sup> This view is directly in line with Thomas' *Suders* dissent.<sup>178</sup> The *Caridad* court argued taking the affirmative defense away from employers in constructive discharge situations was a mistake, and that

[i]n creating the affirmative defense to vicarious liability for the acts of supervisors, the Supreme Court sought to 'accommodate the principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving by objecting employees.'<sup>179</sup>

The court felt the very nature of the affirmative defense was to help employers deal with these types of situations.<sup>180</sup>

The Second Circuit was predictable in its *Caridad* holding, having consistently linked the existence of employer liability to the status of the alleged perpetrator—"from the perspective of

176. Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 327–36 (2004) (discussing at length the doctrine of constructive discharge and the impact of the Court's grant of certiorari in *Suders*).

177. *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 294–95 (2d Cir. 1999) (holding for the employer and allowing the establishment of the affirmative defense to avoid liability when the employee did not properly report the incidents); *see also* Chamallas, *supra* note 176, at 328–29.

178. *See Suders*, 542 U.S. at 154.

179. *Caridad*, 191 F.3d at 296 (quoting language from *Faragher* to support the idea that the affirmative defense should still be available to employers in constructive discharge situations).

180. *See id.*

the employee, the supervisor and the employer merge into a single entity.”<sup>181</sup> In other words, when a supervisor acts, he represents the employer as a whole.<sup>182</sup> But when the actions are taken by a co-worker who has no such assumption of representation, employer liability is not as clear.<sup>183</sup> Because constructive discharge can occur by either means, precluding the affirmative defense was error.<sup>184</sup>

In addition to the source of the behavior, the court believed that constructive discharge was also unlike a tangible employment action because it was in no way sanctioned or approved by the employer, and robbing the employer of the affirmative defense to which it was entitled was a misunderstanding of the requirements for the defense.<sup>185</sup>

## 2. Third Circuit Says Constructive Discharge is a Tangible Employment Action

Alternatively, the Third Circuit concluded constructive discharges were tangible employment actions because even co-workers outside the supervisory relationship were capable of changing the working conditions of an employee, and that to do so, one need not have the power to hire, fire, demote, etc.<sup>186</sup> The court was strongly persuaded by both legal and policy arguments of the plaintiff, ultimately determining that an employer who was not held vicariously liable for constructive discharges would have no incentive to mitigate such behavior when it did occur.<sup>187</sup> If liability was only tied to official actions (firing, hiring, etc.), then employers could effectively allow abusive work environments to drive employees away without the normal accountability that accompanies harassing behavior.<sup>188</sup>

### B. Fifth Circuit Predicts the Real Suders Question

Although the circuits seemed fairly evenly split on the issue of whether constructive discharge amounted to a tangible

181. See, e.g., *Faragher*, 524 U.S. at 790 (quoting *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992)).

182. See *id.*

183. See *Caridad*, 191 F.3d at 294.

184. *Id.* at 295.

185. See *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 762 (1998); see also *Chamallas*, *supra* note 176, at 328–29.

186. *Suders v. Easton*, 325 F.3d 432 (3rd Cir. 2003), *vacated by* 542 U.S. 129 (2004) (finding for the employee on a constructive discharge claim when she quit without a “traditional” tangible employment action such as firing, demotion, etc.).

187. *Id.* at 461.

188. *Id.*; see also *Chamallas*, *supra* note 176, at 332–33.

employment action, the Fifth Circuit correctly predicted the Court's *Suders* response by allowing the affirmative defense in *Reed v. MBNA*.<sup>189</sup> In fact, the *Reed* court did exactly what the *Suders* court would do the following year—it held that whether or not the constructive discharge was caused by a supervisor in his official capacity was the fact on which access to the affirmative defense turned.<sup>190</sup> The court addressed the circuit split in its opinion, but disagreed that it needed to adopt a “blanket rule one way or the other” about whether or not a constructive discharge was a tangible employment action.<sup>191</sup> Instead, it argued:

“All of [supervisor’s] conduct was exceedingly unofficial and involved no direct exercise of company authority . . . [t]hus [supervisor’s] behavior is exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed. Yes, [supervisor’s] supervisory status may have *facilitated* his harassment, but that is a reason for vicarious liability, not for bypassing the affirmative defense.”<sup>192</sup>

So as the Supreme Court would do in the *Suders* holding, the Fifth Circuit predicted that an umbrella rule regarding constructive discharge and tangible employment actions did not solve the problem of the affirmative defense.<sup>193</sup> Their holding, while a year prior to the Court’s grant of certiorari in *Suders*, was directly on target with the philosophy of the Supreme Court.<sup>194</sup>

### C. *The Supreme Court Finally Tackles the Question*

#### 1. Case Background and History

Nancy Drew Suders was a police communications operator for the Pennsylvania State Police Department from March of 1998 until her alleged constructive discharge in August of that same year.<sup>195</sup> Suders alleged she was subject to the repeated

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189. See *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27, 33 (articulating constructive discharge, unless caused by official conduct of a supervisor, would not preclude the affirmative defense).

190. See *id.* at 33.

191. *Id.*

192. *Id.* (citing *Ellerth*, 524 U.S. at 763-64) (emphasis added).

193. *Id.*

194. Cf. *Pa. State Police v. Suders*, 542 U.S. 129 (2004).

195. *Suders v. Easton*, 325 F.3d 432, 435–39 (3rd Cir. 2003), *vacated by* 542 U.S. 129



harassment of three male supervisors at her barracks almost immediately upon her arrival.<sup>196</sup> The harassment was continuous and included offensive gestures, inappropriate sexual conversations, and the presence of crude images.<sup>197</sup> Suders attempted to seek assistance from the EEOC officer of the Pennsylvania State Police, but neither the officer nor Suders followed up on the issue.<sup>198</sup> Upon contacting the officer again, Suders never received the form required to file a complaint with the organization.<sup>199</sup> Although the harassing behavior continued, Suders stayed with the organization for five months, until August 20th, when she finally submitted her resignation after being accused of stealing.<sup>200</sup>

Suders had taken an exam to demonstrate computer skills on several occasions, each time being told that the results were sent off and that she had failed the exam.<sup>201</sup> Believing perhaps this was more harassment, she located and found all of her exams in a drawer in the women's locker room, with signs indicating they had never been sent off.<sup>202</sup> She took the exams with her at that time.<sup>203</sup> When her superiors realized the exams were missing, they dusted the drawers with a powder that immediately identified Suders by dyeing her hands blue when she attempted to return the papers to the drawers.<sup>204</sup> The officers then restrained her and questioned her as a suspect.<sup>205</sup> After this confinement, Suders repeatedly told them that she wanted to resign and they released her.<sup>206</sup>

Suders initiated an action for sexual harassment and constructive discharge in violation of Title VII.<sup>207</sup> The federal district court, relying on the Supreme Court rulings in *Faragher* and *Ellerth*, granted the Pennsylvania State Police Department's motion for summary judgment because Suders did not take advantage of the internal complaint procedures available to her.<sup>208</sup> The court also felt because she resigned so quickly after

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(2004).

196. *Id.* at 436.

197. *Id.* at 436–37.

198. *Id.* at 438.

199. *Id.* at 438.

200. *Id.* at 438–39.

201. *Easton*, 325 F.3d at 438–39.

202. *Id.* at 439.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Suders*, 542 U.S. at 136–37.

208. *Id.* at 137–38.

notifying the internal EEOC officer, she had not given the employer an opportunity to appropriately mitigate the situation.<sup>209</sup>

The Third Circuit reversed and remanded the ruling of the district court, holding that even if the *Faragher/Ellerth* affirmative defense was available, there were some concerns about whether or not the employer would survive the first prong of the test regarding the reasonableness of its efforts to deal with claims.<sup>210</sup> Even if the employer would have had reasonable processes, however, the court held this case was about a constructive discharge, which it considered to be a tangible employment action, precluding the employer from asserting the defense at all.<sup>211</sup> In other words, because there had been a tangible employment action, the police department was strictly liable for the actions of its supervisors.<sup>212</sup> In so holding, the court opposed the ruling of other circuits that constructive discharge did not amount to a tangible employment action.<sup>213</sup>

To resolve this circuit dispute, the Supreme Court granted certiorari to answer the question of whether or not a constructive discharge compelled by supervisory behavior qualifies as a tangible employment action for the purposes of denying the employer's right to the affirmative defense.<sup>214</sup>

## 2. Holding and Rationale

Finding the appellate court had erred in refusing to allow employers to assert the affirmative defense in all cases involving a constructive discharge, the Court vacated the judgment of the Third Circuit and remanded the case for consideration in light of its opinion.<sup>215</sup> The Court held that if a supervisor's official act causes the constructive discharge, the employer may not assert the affirmative defense.<sup>216</sup> However, if no such tangible employment action was taken, the employer may still assert the *Faragher/Ellerth* defense to defend itself against the harassing behavior of its supervisors.<sup>217</sup>

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209. *Id.* at 138.

210. *Id.* at 138–39.

211. *Id.* at 139.

212. *Id.* at 140.

213. *Suders*, 542 U.S. at 139–40; *see also* *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 294 (1999) (Second Circuit ruling that constructive discharge was not a tangible employment action).

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

215. *Id.* at 152.

216. *Id.* at 140–41.

217. *Id.* at 141.

To answer the question of employer liability, the Court had to decide, in a case of first impression, how to categorize claims of constructive discharge.<sup>218</sup> It determined that Suders' claim was that of a hostile work environment, ultimately leading her to a breaking point—a breaking point that could have been brought on by a supervisor or her co-workers.<sup>219</sup> The situation was complicated by the fact that the activity was brought on by supervisors, yet there was no tangible employment action to make the liability standard clear.<sup>220</sup> Although the Court reaffirmed that a constructive discharge was the functional equivalent of an actual firing, if there is no official act that causes the discharge, the employer must be entitled to assert the affirmative defense.<sup>221</sup>

The Court felt that its earlier decisions in *Ellerth* and *Faragher* depended on the policy argument that only official acts of an employer (such as hiring, firing, demotion, etc.) were under the complete control of the organization and therefore only then could an employer be robbed of the opportunity to assert the defense.<sup>222</sup> Without some official act or notice, the employer would have no reason to know or be concerned about an employee's departure, and therefore a standard of strict liability appears unreasonable.<sup>223</sup> Additionally, without an official act, it is less obvious that the supervisor acted with the force of the organization behind him to alter the working conditions of the employee.<sup>224</sup>

The Supreme Court criticized the Third Circuit's decision to refuse the affirmative defense in all constructive discharge claims.<sup>225</sup> Preventing an employer from asserting the affirmative defense in any case of constructive discharge actually made it easier for a complaining employee to prevail against her employer.<sup>226</sup> To clarify the Third Circuit's philosophy, an employer would then be defenseless against an employee who decided to quit as a result of a hostile work environment. This claim of constructive discharge, entitling a prevailing employee to all the damages of a formal firing,<sup>227</sup> seems like it would be a

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218. *Id.* at 143.

219. *Id.* at 147–48.

220. *See Suders*, 542 U.S. at 149–50.

221. *Id.* at 148–49.

222. *Id.* at 148.

223. *Id.*

224. *Id.* at 148–49.

225. *Id.* at 149.

226. *Suders*, 542 U.S. at 149.

227. *Id.* at 147 n.8.

responsibility-free route for the employee and even easier for her to prove.<sup>228</sup>

The Court also felt that the Third Circuit's decision left it to the trial courts to determine whether all the other factors in a claim of sexual harassment should be considered—such as the employer's anti-harassment policies and the employee's attempt to seek help or avoid harm.<sup>229</sup> The lower court indicated that issues such as these would be relevant in determining whether the employee was reasonable in her decision to leave,<sup>230</sup> yet it said that the affirmative defense (which included those elements) played no role in a constructive discharge.<sup>231</sup> The Court insisted on giving the district courts more direction in its holding here and it laid down the principle, in line with *Faragher/Ellerth*, that an employee who suffers no official action at the hands of a supervisor has a duty to mitigate harm, and that the employer has the burden of proof to establish that she did not do so.<sup>232</sup> Other facts might come into play about the reasonableness of procedures, etc. but the ability to discuss such factors was on the table because of the employer's right to discuss the same in its assertion of the affirmative defense.<sup>233</sup>

### 3. Thomas Again Criticizes the Court for its Fundamental Flaw Related to Employer Liability for Sexual Harassment Under Title VII

#### (a) The Court is Misapplying the Intent of the Constructive Discharge Doctrine

Justice Thomas, in line with his earlier dissents in *Faragher*<sup>234</sup> and *Ellerth*,<sup>235</sup> came down again on the side of employer defense against liability for actions over which it had no control.<sup>236</sup> Thomas relied on the history of the constructive discharge doctrine, tracing it back to its NLRB roots, to remind that the intent of the doctrine was to attach the same legal consequences to a constructive discharge as to an actual

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228. See *id.* at 149.

229. *Id.* at 151.

230. *Easton*, 325 F.3d at 462.

231. *Id.* at 447.

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

233. See *id.* at 152.

234. *Faragher*, 524 U.S. at 810–11.

235. *Ellerth*, 524 U.S. at 766–74.

236. See *Suders*, 542 U.S. at 152–54.

discharge for discriminatory reasons.<sup>237</sup> His dissent expresses concern that the Court made a very powerful statement, allowing a claim of constructive discharge even in the absence of an official employment action.<sup>238</sup> He argues that this changes the very nature of constructive discharge and it separates it from its original goals and purpose.<sup>239</sup>

(b) Changing the Standard of Employer Liability?

To equalize a constructive discharge claim with a hostile work environment claim, which he argues the Court has done here, we must return to that standard of liability—that if the employer knows or should have known, then it is vicariously liable.<sup>240</sup> If, however, there is no negligence on the part of the employer, there should be no liability.<sup>241</sup> Thomas' fear seems to be that the Court expanded employer liability by diluting the negligence requirement yet again, and stating that even if an employer, in the most extreme sense, could not have stopped the activity and knew nothing about it, an employee still has a cause of action.<sup>242</sup> He wanted a reversal of the Third Circuit ruling, and felt that the Court's decision to vacate and remand was a dangerous one.<sup>243</sup>

VII. GUIDANCE FOR EMPLOYERS—THE AFFIRMATIVE DEFENSE  
CLEARLY SURVIVES *SUDERS*: FACTORS THAT WILL  
ULTIMATELY DETERMINE YOUR LIABILITY FOR SEXUAL  
HARASSMENT AND CONSTRUCTIVE DISCHARGE

While the Court's purpose in granting certiorari in the *Suders* case was to answer a very specific question regarding the nature of constructive discharge,<sup>244</sup> its return to the principles surrounding the affirmative defense<sup>245</sup> should provide employers with continued insight into how they can guard against liability for sexual harassment, whether or not those incidents end in a constructive discharge. *Suders* did not change the affirmative defense from *Faragher*<sup>246</sup> and *Ellerth*.<sup>247</sup> It simply clarified one

237. *Id.* at 152–53.

238. *Id.* at 153.

239. *See id.* at 152–53.

240. *Id.* at 154.

241. *See id.* at 154; *Ellerth*, 524 U.S. at 767.

242. *See Suders*, 542 U.S. at 154.

243. *See id.* at 152–54.

244. *See id.* at 139.

245. *See id.* at 134.

246. *Id.*; *See Faragher*, 524 U.S. at 780.

of its applications.<sup>248</sup>

The key for employers emerging from the *Suders* decision is that the constructive discharge of an employee must not flow from an official act of the employer in order to preserve its right to the affirmative defense.<sup>249</sup> Specifically, the “affirmative defense will not be available to the employer. . .if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.”<sup>250</sup> Therefore, any actions employers take to eliminate supervisory action leading to these discharges should reduce their liability for harassment. These actions are not unlike the factors that strengthened an employer’s argument under the affirmative defense before *Suders*.<sup>251</sup> Therefore, the only negative factor one can glean from *Suders* seems to be that an employer still has to exercise a good amount of diligence in order to take advantage of the protection the Court has provided.<sup>252</sup>

#### A. *The Power of Employer Response*

Courts find a poor response by an employer who knows harassment is occurring almost as punishable as if the supervisor had been the perpetrator of the harassment himself.<sup>253</sup> The importance of the employer’s response articulated in *Faragher/Ellerth* and lower courts survives the *Suders* holding.<sup>254</sup>

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247. *Ellerth*, 524 U.S. at 766.

248. *Suders*, 542 U.S. at 134.

249. *See id.*

250. *Id.*

251. ENFORCEMENT GUIDANCE, *supra* note 132 (clarifying employer success under the first prong of the affirmative defense requires, among other things, a strong policy and training).

252. *See Suders*, 542 U.S. at 151-52 (leaving the burden on employers to prove their own compliance and the plaintiff’s failure under the affirmative defense).

253. *See, e.g., Van Derbeken, supra* note 42 (mandating sexual harassment prevention training and a pay cut for the supervisor who failed to act appropriately, even though he was not the perpetrator of the harassment).

254. *See Suders*, 542 U.S. at 134 (holding the affirmative defense, which emphasizes employer response to complaints, is still available if the constructive discharge does not occur as the result of a tangible employment action); *Ellerth*, 524 U.S. at 765 (citing the first prong of the affirmative defense as “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior . . .”); *see, e.g., Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1133 (4th Cir. 1995) (stating harassment claims turn on the employer’s response and whether or not it took “prompt and adequate” action to handle the situation).

Prior to *Suders*, in 2000, the Seventh Circuit articulated this clearly, leaning heavily on the employer's response to alleged discrimination to find in favor of the employer.<sup>255</sup> While the court dealt separately in its analysis with the issues of hostile work environment and constructive discharge, it stated:

In hostile environment cases, the employer can avoid liability for its employees' harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring. . . the question is not whether the punishment was proportionate to [defendant's] offense, but whether CBS responded with appropriate remedial action reasonably likely under the circumstances to prevent the conduct from recurring.<sup>256</sup>

After *Suders*, courts continue to emphasize employer response.<sup>257</sup> In January of 2005, the Sixth Circuit decided a case against an employer based purely on its poor response to employee complaints of harassment.<sup>258</sup> In *McCombs v. Meijer*, the employee filed three formal complaints of harassment before her employer responded by suspending the alleged harasser.<sup>259</sup> Citing its own wording from an earlier case, the court restated "[t]he act of discrimination by the employer in such a case is not the harassment, but rather the inappropriate response to the charges of harassment."<sup>260</sup> The employer in the *McCombs* case actually transferred the alleged harasser to the department of the victim after getting a complaint.<sup>261</sup> The court concluded that the jury could have reasonably found that the employer acted without regard for the employee's well being by not responding quickly enough and by allowing the alleged harasser to stay in the work environment.<sup>262</sup> The court seems to attach liability for the employer's response rather than the harassment itself.

Using this philosophy to extend to the situation of a potential constructive discharge, an employer who responds

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255. See *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1046 (7th Cir. 2000) (finding for the employer because of its immediate response, despite atrocious racial comments made repeatedly to the plaintiff).

256. *Id.* at 1048-49 (citing *Saxton v. American Tel. & Telegraph Co.*, 10 F.3d 526, 535 (7th Cir. 1993)).

257. *McCombs v. Meijer*, 395 F.3d 346, 357 (6th Cir. 2005).

258. *Id.* at 356.

259. *Id.* at 351.

260. *Id.* at 353 (citing *Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868, 873 (6th Cir. 1997)).

261. *Id.* at 355.

262. *Id.* at 356.

appropriately should create one of two desired results. First, because of its good faith response, an employer will be able to dilute the employee's argument that she had no other option but to resign, resulting in a failed claim for constructive discharge.<sup>263</sup> Logically speaking, intolerable working conditions and reasonability seem to turn on whether or not the employer is doing anything to assist the employee. In *Dornhecker v. Malibu Grand Prix Corp.*, the Fifth Circuit overturned a lower court finding of constructive discharge on the basis of employer response alone.<sup>264</sup> After a complaint of harassment, the president of the corporation responded to the alleged victim within twelve hours of the reporting of the incident.<sup>265</sup> In its holding, the court eloquently stated "[b]ecause Malibu's prompt response was the antithesis of 'inaction,' Mrs. Dornhecker was not constructively discharged."<sup>266</sup>

Secondly, should the activity result in a constructive discharge, a good employer response is likely to make it appear much less clear that a constructive discharge stemmed from an "employer-sanctioned adverse action"<sup>267</sup>—which would preserve the right to assert the affirmative defense.<sup>268</sup>

Regardless of whether or not the employee actually leaves, employers who respond quickly and appropriately to complaints, as the first prong of the affirmative defense requires,<sup>269</sup> should find that simply knowing how to respond provides a great deal of insulation from liability.

### B. *Necessary But Not Sufficient—The Importance of an Effective Policy*

Employers with inadequate policies on harassment prevention and handling are still learning the painful lessons of liability.<sup>270</sup> Even the Pentagon, as recently as January of 2005, was forced to review and completely change and update its policies on sexual harassment.<sup>271</sup> Officials at the Pentagon, after acknowledging a failure to respond and address sexual

263. See *Suders*, 542 U.S. at 141 (discussing the constructive discharge claim as one where an employee felt "compelled to resign" due to conditions being "intolerable").

264. *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 310 (5th Cir. 1987).

265. *Id.* at 309.

266. *Id.* at 310.

267. *Suders*, 542 U.S. at 134.

268. See *id.*

269. *Faragher*, 524 U.S. at 807.

270. See, e.g., David Stout, *Pentagon Toughens Policy on Sexual Assault*, N.Y. TIMES, Jan. 5, 2005, at A21.

271. *Id.*



harassment there for over a decade, have issued new investigative procedures, stronger and more concrete policy definitions of what constitutes harassment, and uniform procedures to handle complaints.<sup>272</sup>

*Suders* again reinforced this idea in its discussion of what constitutes a successful claim for constructive discharge.<sup>273</sup> To show working conditions are intolerable enough to necessitate quitting (i.e., constructive discharge), courts look to the procedural options made available to employees needing to report unlawful harassment.<sup>274</sup> This makes the existence of a sound written policy a key to avoiding liability in asserting the first prong of the affirmative defense.<sup>275</sup>

But having a policy on the books is not enough—it has to fit the environment and employees.<sup>276</sup> The *Ellerth* court stated:

“[w]hile proof that an employer had promulgated an antiharassment 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.”<sup>277</sup> (emphasis added)

“The policy should be written in plain English, so that all employees regardless of their educational level or background can understand it . . . [a] policy should include a clear and precise definition of unlawful harassment so that employees know what type of conduct is prohibited by the policy and will be able to recognize that conduct should it occur . . .”<sup>278</sup>

Industry recommendations concur and suggest an effective

272. *Id.*

273. *See Suders*, 542 U.S. at 151 (quoting an amicus brief on the relevance of an “effective remedial scheme” in determining constructive discharge cases).

274. *See, e.g., Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1247 (8th Cir. 1998) (finding no constructive discharge and giving as part of its reasoning that the plaintiff was “not an employee who felt she had no place to turn when faced with unlawful discrimination . . . [s]he knew she could report any allegations of retaliatory action directly to McNew and up the chain of responsibility . . .”).

275. *Ellerth*, 524 U.S. at 765.

276. *See id.*

277. *Id.* (emphasis added).

278. Gilbert F. Casellas & Irene L. Hill, *Sexual Harassment: Prevention and Avoiding Liability*, SHRM Legal Report 3, [http://www.shrm.org/hrresources/lrpt\\_published/CMS\\_000955.asp](http://www.shrm.org/hrresources/lrpt_published/CMS_000955.asp) (last reviewed Aug. 2002) (discussing prevention strategies for employers as a result of the *Faragher/Ellerth* decisions of 1998).

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policy must include a “clear definition of sexual harassment,”<sup>279</sup> the organization’s “zero-tolerance” philosophy related to sexual harassment,<sup>280</sup> a list of actual prohibited behaviors,<sup>281</sup> a “clear chain of communication,” allowing employees to step outside of the normal hierarchy in the event the supervisor is the harasser,<sup>282</sup> and a promise of protection for employees who report.<sup>283</sup>

Unfortunately for employers, the Supreme Court has been clear that even if the policy is sound, its simple existence is not enough. In *Faragher*, a key issue against the City was its complete failure to disseminate the anti-harassment policy to the lower level beach employees, of which the plaintiff was one.<sup>284</sup>

But the courts do not require perfection. The Second Circuit eloquently laid down a “good faith” type argument regarding employer attempts at prevention, stating “[a]n employer need not prove success in preventing harassing behavior in order to demonstrate that it exercised reasonable care in preventing and correcting sexually harassing conduct . . . [a]lthough not necessarily dispositive, the existence of an anti-harassment policy with complaint procedures is an important consideration . . .”<sup>285</sup>

Therefore, while a written policy alone may be inadequate to shield an employer from sexual harassment liability, it is an important first step in asserting the affirmative defense. In addition, having an effective policy tears down an employee’s ability to assert that she was constructively discharged in violation of Title VII because with a strong policy the employee can follow, quitting might not be the only alternative.

### C. *Training as Prevention*

As *Suders* reinforced, an employer may not assert the affirmative defense when official acts of the employer, carried out

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279. Samuel J. Bresler, *Minimizing Workplace Sexual Harassment: A Preventive Strategy*, p. 1, [http://www.shrm.org/hrresources/whitpapers\\_published/CMS\\_000126.asp](http://www.shrm.org/hrresources/whitpapers_published/CMS_000126.asp) (last reviewed October 2002).

280. Hobson, *supra* note 40, at 5.

281. Bresler, *supra* note 279, at 2.

282. *Id.*; see also *Faragher*, 524 U.S. at 807–09 (criticizing the City’s policy for not including a way for Faragher to bypass her supervisors, the alleged harassers, in the complaint procedure).

283. Hobson, *supra* note 40, at 5.

284. *Faragher*, 524 U.S. at 808 (denying the option of asserting the affirmative defense to the employer because it failed to handle its burden of proof under the first prong appropriately due to a complete lack of policy effectiveness and availability).

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

by supervisors, lead to the constructive discharge of an employee.<sup>286</sup> However, even though the affirmative defense will not always be available, employers' primary ammunition against even supervisory acts of discrimination has been and will continue to be an effective, comprehensive training program.<sup>287</sup> The EEOC's Policy Guidance on Sexual Harassment states:

An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedure. Periodic training of those individuals can help achieve that result. Such training should explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation.<sup>288</sup>

In fact, as part of its settlements against employers, the EEOC has chosen mandatory training as one of its primary responses through the use of consent decrees requiring organizations to conduct training and ensure policy compliance.<sup>289</sup> At least one state is pre-empting these future punishments by going above and beyond federal requirements related to sexual harassment.<sup>290</sup> In 2004, the California Legislature passed Assembly Bill 1825, requiring all employers with fifty or more employees to conduct compulsory sexual harassment training for all of its supervisory employees by January of 2006.<sup>291</sup> The training must re-occur every two years, and all new supervisors brought in after the original round of training must go through the program within six months of their

286. *Suders*, 542 U.S. at 134-35.

287. *See, e.g.*, *Duhe v. U.S. Postal Serv.*, No. Civ. A. 03-746, slip op., at 9 (E.D. La. Mar. 9, 2004) (stating that plaintiff's claim of constructive discharge—which was actually just a continued medical leave—failed because of a comprehensive plan including a remedial response by the employer which included sexual harassment training).

288. ENFORCEMENT GUIDANCE, *supra* note 132 (providing lengthy guidance to employers on how to minimize liability through effective policies, training, and preparation of supervisors whose behavior the employer is otherwise vicariously liable for).

289. *See, e.g.*, Editorial, *supra* note 40 (requiring Burger King, as a result of a sexual harassment settlement, to "conduct sexual harassment training for managers, distribute a new sexual harassment policy to all workers and prominently display an 800- number that workers can use to report harassment.").

290. Michael W. Johnson, *California Requires Sexual Harassment Training*, (last visited Mar. 4, 2005).

291. *Id.*

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arrival.<sup>292</sup> California relies on “court decisions and Equal Employment Opportunity Commission (EEOC) guidelines indicating that training on sexual harassment and other forms of workplace harassment must be provided ‘periodically’.”<sup>293</sup>

Human resources experts in the field agree with making training an integral part of the sound policies described in part B of this section.<sup>294</sup> They see the entire effort against harassment of employees as a prevention program that includes mandatory training, “delivered by a qualified professional.”<sup>295</sup>

Solid training of managers assists employers in light of the *Suders* holding.<sup>296</sup> Managers who are aware of the implications of sexual harassment may be less likely to take official action they realize will create vicarious liability for the organization<sup>297</sup>—this may preserve the employer’s right to the affirmative defense in a case of constructive discharge.<sup>298</sup> Secondly, managers who are aware of how to proceed with complaints from employees about harassment are more likely to intervene with an appropriate employer response as detailed in part A of this section—thus making a stronger showing under the first prong of the affirmative defense.<sup>299</sup>

#### VIII. SOME GOOD NEWS FOR EMPLOYERS—THE EMPLOYEE STILL CARRIES A BURDEN OF NOTIFICATION

The District Court in *Suders*’ original case against the Pennsylvania Police Department used her decision to resign only two days after notification as major ammunition against her claim for constructive discharge.<sup>300</sup> Other courts agreed with this concept, refusing to find constructive discharge in cases where employees failed to properly notify their employers.<sup>301</sup>

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292. *Id.*

293. *Id.*

294. Bresler, *supra* note 279 (recommending employers commit to “periodic management education and employee awareness programs” and that “managers at all levels should receive periodic training on the organization’s policy and on their roles in investigating and resolving sexual harassment complaints,” seemingly strengthening the employer’s response as detailed in Part A of this Section.).

295. Hobson, *supra* note 40.

296. *Suders*, 542 U.S. at 133–34.

297. *Ellerth*, 524 U.S. at 765 (discussing the vicarious liability standard).

298. *Suders*, 542 U.S. at 134.

299. *Faragher*, 524 U.S. at 807.

300. *Suders*, 542 U.S. at 137 (citing to the District Court’s refusal to address her claim and their grant of summary judgment for the police department when she did not properly take advantage of what recourse might have been available to her).

301. *See, e.g.*, *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1011 (7th Cir. 1997) (finding for the employer when the plaintiff employee quit before complaining about the

Employees who give their employers no chance to respond weaken their cases tremendously.<sup>302</sup> The Eleventh Circuit, in a decision against an employee who claimed constructive discharge when she quit after only a day of employment, stated “[p]art of an employee’s obligation to be reasonable is an obligation not to assume the worst, and not to jump to conclusions too fast” and “it is not reasonable for an employee to resign after one day’s disappointment . . . .”<sup>303</sup> But even in the absence of such extreme circumstances, employers seem to have some room to maneuver.<sup>304</sup> In *Coffman v. Tracker Marine, L.P.*, the Eighth Circuit implied there was a burden of reasonability on employees when it stated, just prior to the *Faragher/Ellerth* decisions, that the plaintiff former employee “had an obligation to not jump to the conclusion that the attempt would not work and that her only reasonable option was to quit.”<sup>305</sup>

Although the Supreme Court did not reach *Suders*’ choice not to give her employer more time to respond in the present case, it had already articulated its philosophy on that issue clearly in its *Faragher/Ellerth* decisions.<sup>306</sup> In fact, the affirmative defense requires employees to report the harassment to their employers unless doing so is unreasonable.<sup>307</sup> While the employer has little control over an employee’s decision to go forward, in cases where an employer can demonstrate a lack of notification, the second prong of the affirmative defense is satisfied.<sup>308</sup> Because *Suders* preserved this defense in cases where no tangible employment action exists, the Court left many employers with the powerful ammunition originally provided to

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alleged harassment, providing the employer no notification or opportunity to respond); *see also* *White v. Midwest Office Tech., Inc.*, 5 F.Supp.2d 936, 950 (D. Kan. 1998) (finding no constructive discharge when plaintiff failed to complain about a discriminatory or hostile work environment, even up to and including her words in her own resignation letter about reasons for her decision to quit).

302. *See* *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536 (11th Cir. 1987).

303. *Id.* at 1539.

304. *See* *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1247 (8th Cir. 1998).

305. *See id.*

306. *See* *Faragher*, 524 U.S. at 782 (addressing the female lifeguard’s failure to report the incident to higher management and while the court ultimately found in favor of the lifeguard, its establishment of the affirmative defense reinforced that employees had a duty to take advantage of processes made available to them); *Ellerth*, 524 U.S. at 765 (stating in its description of the affirmative defense:

“[w]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense.”).

307. *See* *Casellas*, *supra* note 278.

308. *See id.*

them in *Faragher/Ellerth*.<sup>309</sup>

#### IX. *SUDERS* LEAVES THE POLICY OF VICARIOUS LIABILITY FOR SUPERVISORY ACTIONS UNCHANGED

For employers, the most traumatic element of the *Suders* holding is the remaining fear of their responsibility for the official acts of their supervisors.<sup>310</sup> As Thomas' dissent clearly articulates, this means an employer cannot assert the affirmative defense when supervisors choose to act discriminatorily in their official capacities.<sup>311</sup> The *Suders* ruling simply extended this truth to situations where the employee terminates her own employment<sup>312</sup>—a situation that perhaps employers feel they have much less control over. This result was predictable, reinforcing the Court's view on vicarious liability from six years earlier in *Faragher*<sup>313</sup> and *Ellerth*.<sup>314</sup> Employers hoping to get relief from the element of vicarious liability will remain disappointed at this result.

#### X. CONCLUDING THOUGHTS AND THE UNANSWERED QUESTION OF *SUDERS*—ARE OFFICIAL ACTIONS AND INTENT DISTINGUISHABLE?

##### A. *Was Suders a Misapplication of Constructive Discharge to Title VII?*

The *Suders* court held to the mantra that official employer action was a required element to prohibit use of the affirmative defense.<sup>315</sup> Thomas struggled with this in his dissent, believing the *Suders* court drew a blurry line between official action and intent.<sup>316</sup>

Proof of employer intent has always remained a critical

309. *Suders*, 542 U.S. at 134; *Ellerth*, 524 U.S. at 765.

310. *Suders*, 542 U.S. at 134 (holding no affirmative defense availability to employers when the constructive discharge occurs “if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation . . .”).

311. *Id.* at 154.

312. *See id.* at 134.

313. *Faragher*, 524 U.S. at 802 (agreeing with plaintiff that “in implementing Title VII it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority . . .”).

314. *Ellerth*, 524 U.S. at 765 (stating “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.”).

315. *See Suders*, 542 U.S. at 148.

316. *Id.* at 153.

element to the constructive discharge actions brought under the NLRB.<sup>317</sup> Thomas' *Suders* dissent sharply restates this historical truth, arguing that allowing a cause of action without such proof violates the origins of constructive discharge.<sup>318</sup> In requiring a plaintiff to show only that the abusive environment was severe enough that quitting was the only option, Thomas argues that the Court allows plaintiffs to establish a constructive discharge claim without any official act of the employer—and therefore possibly devoid of true employer intent.<sup>319</sup> He further argues that the Court has changed the nature of the constructive discharge claim, equating it more closely with a hostile work environment action than an actual discharge.<sup>320</sup> He returns to his dissent in *Ellerth*, where he argued strongly that such situations should require plaintiffs to show employer negligence (some sort of awareness and neglect) in order to prevail.<sup>321</sup> Thomas seems to believe that the Court has used constructive discharge to impose an even higher standard of liability on employers than the *Faragher/Ellerth* decisions posed.<sup>322</sup>

At least one circuit, agreeing (prior to *Suders*) with Thomas' philosophy, reinforced that simple discrimination and intent to cause constructive discharge were not the same thing.<sup>323</sup> In *Howard v. Burns Bros., Inc.*, the Eighth Circuit earlier declared, in order to “constitute a constructive discharge, the employer must deliberately create intolerable working conditions with the intention of forcing the employee to quit . . .”<sup>324</sup> The intent issue in constructive discharge cases is still debated among the

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317. Lieb, *supra* note 135, at 156.

318. See *Suders*, 542 U.S. at 153 (reminding the Court of the original NLRB concept of constructive discharge, requiring employer intent and a direct relationship between the harassment and the employee's assertion of protected rights for the employee to prevail—neither of which, in his opinion, was present here).

319. *Id.* at 153.

320. *Id.*

321. *Id.*

322. See *id.*

323. See *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 840 (8th Cir. 1998).

324. See *id.* at 841 (holding no constructive discharge existed, even though her supervisor treated her differently, the court specifically said that while things like this make work “less enjoyable,” they do not rise to the level that would force a reasonable person to quit, and therefore such conditions could not give rise to a claim of constructive discharge under Title VII); but see *Moore v. KUKA Welding Sys.*, 171 F.3d 1073, 1080-81 (6th Cir. 1999) (agreeing with the intent requirement articulated by the Eighth Circuit, but finding constructive discharge did exist where supervisor's repeated treatment of employee plaintiff, even absent official action, demonstrated intent and led to his quitting because “day after day, week after week of isolation on the job and lack of communication would lead him to believe that he was no longer wanted and would continue to receive the cold shoulder as long as he worked there”).

circuits,<sup>325</sup> and in one opinion, the Third Circuit stated that employer intent and the employer's knowledge of the harassment were not the same thing, again muddying the waters between intent and official action.<sup>326</sup> Unfortunately, *Suders* did nothing to settle this question.

### B. *Delivering a Mixed Message*

One scholar suggests the Court further complicated things by not "answering yes or no" to what should have been a fairly fundamental question in *Suders* and that the only remedy will be for Congress to intervene and finally close the chapter on constructive discharge and official employer actions.<sup>327</sup>

To be certain, the news for employers in light of *Suders* and those cases leading up to it seems to be mixed. Simple changes in behavior between managers and supervisors, even if driven by animosity or dislike for reasons otherwise disallowed under Title VII, are not alone enough to constitute a finding of constructive discharge caused by an official action which would rob the employer of its ability to assert the affirmative defense.<sup>328</sup> However, the door appears to be open for a constructive discharge cause of action to proceed, with or without intent on the part of the employer.<sup>329</sup>

This appears to leave a question unanswered in the arena of harassment in the workplace—when an employee chooses to leave as a response to working conditions, can her cause of action proceed even without an intentional act of the employer? Thomas, with much regret, believes the Court has answered this in the affirmative.<sup>330</sup>

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325. *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 887-88 (3rd Cir. 1984) (discussing the "divergence of opinion as to the findings necessary for [constructive discharge in violation of Title VII]" and holding "no finding of a specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine").

326. *See id.* at 888.

327. James M. Weiss, *If He Makes You Quit, We're Not Liable: How Pennsylvania State Police v. Suders Unnecessarily Complicates Title VII Lawsuits*, 82 WASH. U. L.Q. 1621, 1621-22 (2004) (discussing the loophole provided for employers who simply act so abhorrently as to cause employees to quit rather than firing them, presumably allowing them to avoid liability in the wake of *Suders*. Weiss argues that the *Suders* court complicated a simple question and that Congress should intervene and call a constructive discharge a tangible employment action, thus "rendering the Ellerth defense inapplicable.").

328. *See Howard*, 149 F.3d at 842.

329. *Suders*, 542 U.S. at 150-51.

330. *Id.*



### C. *Final Thoughts*

When sexual harassment emerged as actionable, the main fear seemed to surround quid pro quo actions creating automatic liability.<sup>331</sup> Today, the actual work environment the employee functions in seems to garner much more attention.<sup>332</sup> *Suders* addressed the constructive discharge problem and may have created concern for employers who felt their hands were tied.<sup>333</sup> For years, employers knew they could be robbed of the affirmative defense if employees were fired or demoted, but now they could be in the same situation if the employee chooses to quit.<sup>334</sup>

But the lesson from *Suders* was predictable, and simply provided a logical extension to *Faragher*<sup>335</sup> and *Ellerth*.<sup>336</sup> Those famous cases taught employers that the existence of a policy, appropriate training, and intelligent, expedient response could prevent the excessive liability they so feared.<sup>337</sup> Constructive discharge arises when an employee feels he has no other recourse.<sup>338</sup> Employers with solid training programs, sound and distributed policies, and effective responses will ward off constructive discharge situations in general.<sup>339</sup> It is reasonable to assume employees often quit because they feel they have no recourse, because their managers treat them badly due to lack of training and understanding, and because their employers do not respond when they cry out for help. Mitigating these factors will ultimately reduce the number of constructive discharges and preserve the affirmative defense in as many cases as possible.

Following the rules from *Faragher* and *Ellerth* leaves employers squarely in line with the Court's holding in *Suders*—ultimately, the rules have not been changed, they have just been once more applied.

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331. *Meritor*, 477 U.S. at 73 (holding for the first time that harassment outside of the quid pro quo category, in this case, hostile work environment harassment, was actionable under Title VII).

332. *See generally Ellerth*, 524 U.S. at 754; *Faragher*, 524 U.S. at 780; *Suders*, 542 U.S. at 133–34 (all three cases reaching the United States Supreme Court regarding sexual harassment since *Meritor* involved incidences of hostile work environment rather than traditional quid pro quo harassment).

333. *Suders*, 542 U.S. at 134 (informing employers they had no access to the affirmative defense if a constructive discharge occurred as a result of an official action).

334. *Id.*

335. *Faragher*, 524 U.S. at 805.

336. *Ellerth*, 524 U.S. at 765–66.

337. *See id.* at 765; *Faragher*, 524 U.S. at 807.

338. *See Suders*, 542 U.S. at 141.

339. *See supra* text, Sections and on the effectiveness of policies and training towards reducing claims for constructive discharge.

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